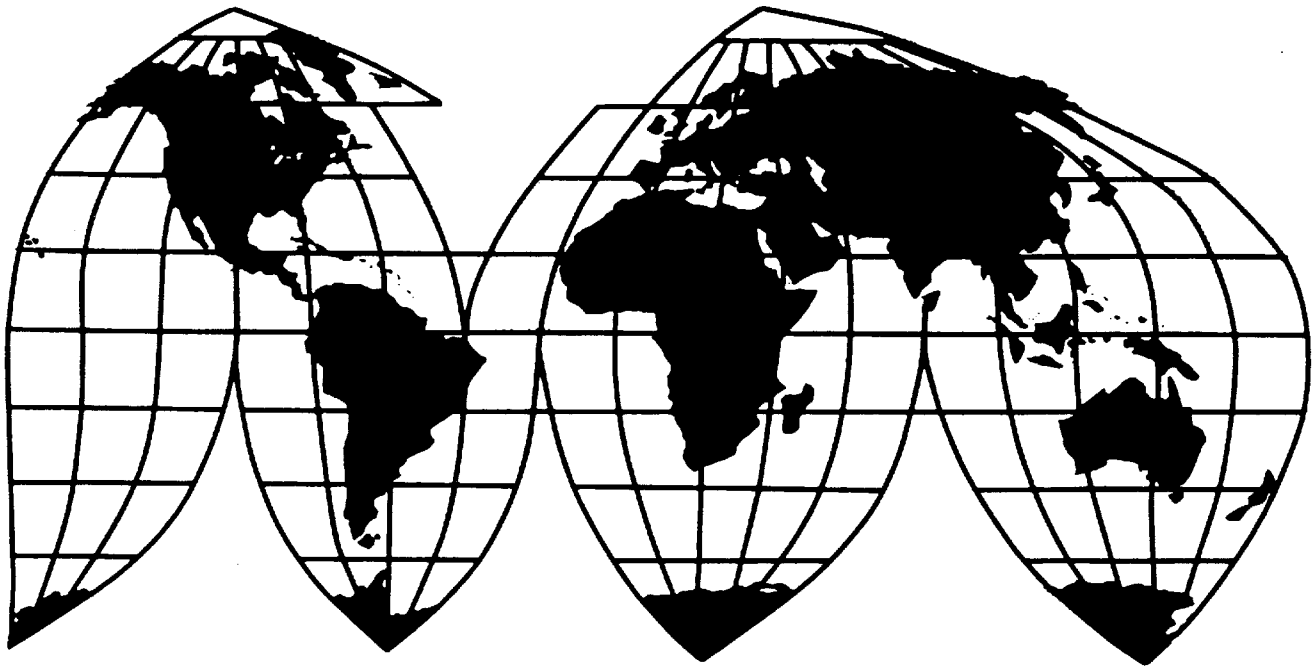
Softwood Lumber From Canada (Views on Remand)

Investigation Nos. 701-TA-414 and 731-TA-928 (Final)
(Second Remand)

Publication 3715 **June 2004**

U.S. International Trade Commission



Washington, DC 20436

U.S. International Trade Commission

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Address all communications to
Secretary to the Commission
United States International Trade Commission
Washington, DC 20436

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VIEWS OF THE COMMISSION

By decision released April 29, 2004, a United States-Canada Binational Panel remanded, in part, the Commission's determinations on remand in Softwood Lumber from Canada, Inv. Nos. 701-TA-414 and 731-TA-928 (Remand), USITC Pub. 3658 (December 2003). Upon consideration of the remand instructions and evidence in the record of these investigations, we determine that an industry in the United States is threatened with material injury by reason of imports of softwood lumber from Canada found to be subsidized and sold in the United States at less than fair value ("LTFV").[1]

We note at the outset that the Panel has violated U.S. law and basic tenets of fairness in setting the procedural deadlines in this proceeding, which have prevented the Commission from reopening the record. Under well-settled U.S. law, it is solely within the Commission's authority to decide whether to reopen the record in response to a remand from U.S. courts or North American Free Trade Agreement ("NAFTA") panels.[2] We did not reopen the record in the first remand from this Panel, specifically because the Panel directed us not to do so[3] and we believed

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[1]Commissioner Pearson did not participate in either the original determinations or the first remand determinations. In light of the brevity of the remand period allowed by the Panel, and the complexity of the record and the issues involved, he has opted not to participate in this remand. However, he joins with the views of the other Commissioners regarding the Panel's failure to follow U.S. law in setting the procedural parameters of this remand.

[2]In vacating a Court of International Trade (CIT) decision on the basis that the CIT had exceeded its authority in directing a negative Commission determination, the Court of Appeals for the Federal Circuit in Nippon Steel stated: "[w]hether on remand the Commission reopens the evidentiary record, while clearly within its authority, is of course solely for the Commission itself to determine." Nippon Steel Corp. v. International Trade Commission, 345 F.3d 1379, 1382 (Fed. Cir. 2003).

[3]In the Panel's first decision, the Panel stated that the Commission's remand "shall be conducted based on the evidence in the administrative record." Certain Softwood Lumber Products from Canada, USA-CDA-2002-1904-07, Decision of the Panel at 112 (September 5,

at that time we could adequately respond based on the original record.[4] The Panel's second remand, however, discounted, ignored, or otherwise criticized probative information relied upon by the Commission in making our remand determination. While we respond to the Panel's instructions without reopening the record, in a number of instances additional information would likely have been relevant and helpful in addressing the concerns that the Panel raised for the first time in its second remand decision. While we have the authority to reopen the investigative record, it is not feasible in the time frame granted by the Panel.

The Panel has also overstepped its authority as established by the NAFTA by failing to apply the correct standard of review and by substituting its own judgment for that of the Commission. Under well-established U.S. law, NAFTA panels, like U.S. courts, review Commission decisions for reasonableness and to assess whether they are supported by substantial evidence. The Panel's role is not to substitute its view of the record for the Commission's judgment. In this case, the Panel has rejected the substantial evidence set forth by the Commission in both its original and remand determinations, choosing instead to find its views of the facts as the only reasonable interpretation.

We continue to provide the Panel with substantial evidence and a thorough analysis of that evidence, which demonstrate that the volume of subject imports from Canada is significant, comprising over one-third of the U.S. market and likely to increase substantially from those

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2003) ("Panel Decision I").

[4]In its June 2, 2004 order, the Panel stated that we cannot at this point reopen the record because we did not do so in our first remand investigation. In other words, the Commission's good faith efforts to comply with the Panel's explicit instructions in the first remand are now being used against the Commission to confine its scope of action. Panel's Decision and Order at 3 (June 2, 2004).

significant levels; that this significant volume of imports is likely to enter at prices that suppress or depress prices in the U.S. market, with prices in 2001 at the end of the period of investigation at levels as low as they were in 2000; and that, largely as a result of this large volume of imports and these low prices, the U.S. industry was in poor financial condition and therefore threatened with material injury by reason of imports of softwood lumber from Canada.

I. Background

On May 16, 2002, the Commission determined that an industry in the United States is threatened with material injury by reason of imports of softwood lumber from Canada found to be subsidized and sold in the United States at LTFV.[5] Respondent parties subsequently challenged the Commission's final determinations before the United States-Canada Binational Panel, pursuant to Article 1904 of the North American Free Trade Agreement (NAFTA).[6] The parties briefed and argued the case before the Panel, and on September 5, 2003, the Panel issued

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[5]Softwood Lumber from Canada, Inv. Nos. 701-TA-414 and 731-TA-928 (Final), USITC Pub. 3509 (May 2002); 67 Fed. Reg. 36068-36077 (May 22, 2002).

[6]Eight parties to the original investigations filed complainants with the NAFTA Secretariat, including: Canadian Lumber Trade Alliance and constituent associations, Alberta Forest Products Association, British Columbia Lumber Trade Council, Free Trade Lumber Council, Ontario Forest Industries Association, Ontario Lumber Manufacturers Association, and Quebec Lumber Manufacturers Association (collectively "CLTA"); Government of Canada, Governments of the Provinces of Alberta, British Columbia, Manitoba, Ontario, and Saskatchewan, and Gouvernement du Quebec, and Governments of the Northwest Territories and the Yukon Territory (collectively " Govt. of Canada"); Governments of Provinces of New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland and Labrador, and the Maritime Lumber Bureau of Canada (collectively "Maritime Complainants"); Abitibi-Consolidated Inc. ("Abitibi"); Doman Industries Ltd. and Enyeart Cedar Products, LLC ("Doman/Enyeart"); Ontario Forest Industries Association and the Ontario Lumber Manufacturers Association ("OFIA/OLMA"); Tembec Inc. ("Tembec"); and Weyerhaeuser Company ("Weyerhaeuser") (hereinafter collectively referred to as Complainants).

its decision.[7] The Panel affirmed in part and remanded in part the Commission's determinations. On December 15, 2003, the Commission again determined that an industry was threatened with material injury by reason of dumped and subsidized subject imports.[8] By decision circulated on April 29, 2004, the Panel affirmed in part and remanded in part the Commission's determinations on remand.[9] With respect to the second remand, the Panel stated that "the Commission is directed to conduct its threat of injury analysis consistent with the following conclusions of this Panel:

1. The Commission's finding of Canadian producers' excess production and projected increases in capacity, capacity utilization and production, indicating the likelihood of substantially increased imports of the subject merchandise into the United States, is not supported by substantial evidence.

2. The Commission's finding that the domestic industry is threatened with material injury by reason of a significant rate of increase of the volume or market penetration of imports of the subject merchandise, indicating the likelihood of substantially increased imports into the United States, is not supported by substantial evidence.

3. The Commission's finding that the domestic industry is threatened with material injury by reason of the fact that imports of the subject merchandise are entering at

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[7]Certain Softwood Lumber Products from Canada, USA-CDA-2002-1904-07, Decision of the Panel (September 5, 2003) ("Panel Decision I").

[8]The public or non-proprietary version of the first remand determinations is contained in USITC Pub. 3658 (Dec. 2003). References throughout this submission are to the proprietary version of the remand determinations, which the Commission submitted to the Panel on December 15, 2003 (referred to herein as "Remand Determination"). The Commission's original determinations and a public version of the Views of the Commission and staff report are found in Softwood Lumber from Canada, Inv. Nos. 701-TA-414 and 731-TA- 928 (Final), USITC Pub. 3509 (May 2002). PD 423. The confidential version of the original Views of the Commission are found in CD 213, and the confidential version of the staff report is found in CD 210. This staff report contains the factual information upon which the Commission relied in both its Original Determinations and its first and second Remand Determinations.

[9]Certain Softwood Lumber Products from Canada, USA-CDA-2002-1904-07, Remand Decision of the Panel (circulated April 29, 2004) ("Panel Decision II").

prices that are likely to have a significant depressing or suppressing effect on domestic prices, and are likely to increase demand for further imports is not supported by substantial evidence.

4 The Commission's finding that the domestic industry has curbed its overproduction of softwood lumber is not supported by substantial evidence."[10]

We have considered the record as a whole in light of the instructions in the Panel's second decision. Having considered the Panel's instructions and having examined the record consistently with those instructions, we again find that there is substantial evidence in the existing record to support our determination that an industry in the United States is threatened with material injury by reason of imports of softwood lumber from Canada found to be subsidized and sold in the United States at LTFV.[11] Because the Panel affirmed the Commission's domestic like product findings, as well as its findings regarding Maritime Provinces, effects of subsidies or dumping, and consideration of the nature of the subsidy and its likely trade effects,[12] the Commission does not reconsider those issues and adopts its prior views on those issues in their entirety.[13] We also incorporate in full our discussion of issues, including domestic industry and related parties, use of publicly available information, conditions of competition, and material injury analysis of volume, price effects and impact of subject imports, which were not subject to the appeal.[14]

With respect to our threat of material injury analysis and determinations, we incorporate

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[10]Panel Decision II at 51-52.

[11]We incorporate in full our Remand Determinations of December 15, 2003.

[12]Panel Decision II at 5-6 and 51; Panel Decision I at 114-115.

[13]See Remand Determination at 5-34 ; USITC Pub. 3509 at 3-13, 27-29, 30-31, and 39.

[14]See USITC Pub. 3509 at 16-27, and 31-37.

in full our prior findings, analysis and conclusions on conditions of competition, cross-cumulation,[15] alleged potential other factors, material injury analysis of volume, price effects and impact of subject imports, and threat of material injury by reason of subject imports,[16] as supplemented and further explained below in response to the Panel's instructions.

In the ensuing pages of these Views of the Commission, we articulate reasoned and detailed explanations for issues material to our determinations so that our decisional path "may reasonably be discerned" by the Panel.[17]

II. The Panel's Role and Authority Under the Substantial Evidence Standard

The NAFTA carefully delineates the role and authority of a Panel reviewing a Commission determination. The NAFTA requires the Panel to apply the *exact same* standard of review and general legal principles that a U.S. court would apply in reviewing a Commission determination.[18] Under well-established U.S. law, the Panel is required to uphold the Commission's determination in an antidumping or countervailing duty investigation unless it is

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[15]We note that while the Panel's Decision of September 5, 2003 remanded the issue of cross-cumulation to the Commission and the Commission responded to those instructions with a detailed analysis in its Remand Determination, the Panel's Decision circulated on April 29, 2004 is silent on the issue of cross-cumulation.

[16]See Remand Determination at 34-115; USITC Pub. 3509 at 13-15, 21-27, 29-44.

[17]Statement of Administrative Action to the Uruguay Round Agreements Act of 1994, H.R. Rep. No. 103-316, Vol. 1 ("SAA") at 892 ("Existing law . . . requires that issues material to the agency's determination be discussed so that the "'path of the agency may reasonably be discerned'" by a reviewing court. See, e.g., Ceramica Regiomontana, S.A. v. United States, 810 F.2d 1137, 1139 (Fed. Cir. 1987)(quoting Bowman Transportation v. Arkansas-Best Freight Sys., 419 U.S. 281, 286 (1974))." See also Wheatland Tube Co. v. United States, 161 F.3d 1365, 1369-70 (Fed. Cir. 1998); Nippon Steel Corp. v. United States, 19 CIT 450, 469 (1995).

[18]NAFTA Article 1904.3; NAFTA Annex 1911, which specifies that the "standard of review" for the United States is "the standard set out in section 516A(b)(1)(B) of the Tariff Act of 1930, as amended . . . ." See 19 U.S.C. § 1516a(b)(1)(B).

"unsupported by substantial evidence on the record, or otherwise not in accordance with law."[19] [20]

A basic tenet of the substantial evidence standard is that "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."[21] Thus, the Panel must uphold the Commission's determination as long as it is supported by substantial evidence, even if Complainants can hypothesize and point to evidence that could support a reasonable basis for a contrary determination, and the Panel agrees.[22]

Under U.S. law, reviewing courts/panels must afford deference to the agency tasked with

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[19]19 U.S.C. § 1516a(b)(1)(B)(i); 19 U.S.C. § 1516a(a)(2)(B)(i).

[20]The Supreme Court has defined "substantial evidence" as "more than a mere scintilla. . . . [and] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," taking into account the record as a whole. Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951), quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

[21]Consolo v. Federal Maritime Commission, 383 U.S. at 620 (1966), quoted in Matsushita Elec. Indus. Co. v. United States, 750 F.2d 927, 933 (Fed. Cir. 1984); accord Committee for Fairly Traded Venezuelan Cement v. United States, 279 F. Supp.2d 1314, 1323 (CIT 2003).

[22]Asociacion de Productores de Salmon y Trucha de Chile AG v. United States, 180 F. Supp. 2d 1360, 1364 (CIT 2002) ("Chilean Salmon"); see also Titanium Metals Corp. v. United States, 155 F. Supp.2d 750, 755 (CIT 2001) ("the court affirms [the agency's] factual determinations so long as they are reasonable and supported by the record as a whole, even if there is some evidence that detracts from the agency's conclusions."); Atlantic Sugar Ltd. v. United States, 744 F.2d 1556, 1563 (Fed. Cir. 1984). As the Federal Circuit has further opined "[e]ither of such inconsistent conclusions would, therefore, have to be upheld on appeal. An appellate court is not the initial decision maker, and thus cannot substitute its judgment for that of the fact finder if [the conclusion] is supported by substantial evidence." Grupo Industrial Camesa v. United States, 85 F.3d 1577, 1582 (Fed. Cir. 1996); see also Certain Flat-Rolled Carbon Steel Products from Canada, USA-93-1904-05, at 12 (Nov. 4, 1994) ("The reviewing Panel must not reweigh the evidence, or substitute its judgment for that of the Commission").

making the complex determinations required under the antidumping/countervailing duty law.[23]

The Court of Appeals for the Federal Circuit has stated that the question for the reviewing Court:

> is not whether we agree with the Commission's decision, nor whether we would have reached the same result as the Commission had the matter come before us for decision in the first instance. By statute, Congress has allocated to the Commission the task of making these complex determinations. Ours is only to review those decisions for reasonableness.[24]

Thus, the task of the Panel as established by NAFTA and set forth in U.S. law is only to review those decisions for reasonableness; that is, the question for the Panel is "does the administrative record contain substantial evidence to support it and was it a rational decision?"[25]

The principles discussed above are, beyond debate, the foundation for any review of Commission decisions. In its most recent statements reaffirming these principles, the Federal Circuit, whose decisions are binding upon the Panel, set forth yet again the well-established role and authority of the Commission and those of reviewing courts in rejecting a decision by the Court of International Trade that overstepped that lower court's authority.[26]

In sum, the Panel is *not* permitted to substitute its judgment for that of the Commission.[27]

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[23]The statute provides that "the decision of . . . the International Trade Commission is presumed to be correct. The burden of proving otherwise shall rest upon the party challenging such decision." 28 U.S.C. § 2639(a)(1).

[24]U.S. Steel Group v. United States, 96 F.3d 1352, 1357 (Fed. Cir. 1996).

[25]Matsushita, 750 F.2d at 933 (Fed. Cir. 1984).

[26]Nippon Steel, 345 F.3d at 1381 (Fed. Cir. 2003) ("the Court of International Trade abused its discretion by not returning the case to the Commission for further consideration."). Accord Altx, Inc. v. United States, Ct. No. 03-1320 at 4, n.2 (Fed. Cir., June 2, 2004).

[27]The Supreme Court has clearly proscribed such substitution, holding that under the substantial evidence standard the court, or as in this case the reviewing panel, may not, "even as to matters not requiring expertise . . . displace the [agency's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the

Rather, its well-defined role is limited to determining whether the Commission's judgment is supported by substantial evidence on the record. However, the Panel has repeatedly substituted its own view of the evidence for that of the Commission. This is clearly not permitted under U.S. law, which is binding on the Panel.

III. Threat of Material Injury by Reason of Subject Imports

The Panel's decision directs the Commission to conduct its threat of injury analysis consistent with four specific conclusions of the Panel. Two of those conclusions focus on the likelihood of increased subject imports[28] and two conclusions focus on the likely price effects of subject imports.[29] In reaching these findings, as discussed above, the Panel clearly exceeded its authority and substituted its conclusions of what is significant or substantial for the findings properly made by the Commission.

We have considered the existing record as a whole in light of the instructions in the Panel's opinion. In several instances additional information would likely have been relevant and

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matter been before it de novo." Universal Camera, 340 U.S. at 488. Accordingly, the Panel "cannot substitute its judgment for that of the agency, nor may it reweigh the evidence." Acciai Speciali Terni v. United States, 19 CIT 1051, 1054 (1995); Metallverken Nederland B.V. v. United States, 728 F. Supp. 730, 734 (CIT 1989).

[28]Specifically, the Panel concluded that the Commission's findings regarding Canadian producers' excess production and projected increases in capacity, capacity utilization and production related to increases in subject imports were not supported by substantial evidence, and that the Commission's finding regarding the volume of subject imports, and in particular the rate of increase in the volume or market penetration of subject imports, was not supported by substantial evidence. Panel Decision II at 51.

[29]Specifically, the Panel concluded that the Commission's finding that Canadian softwood lumber was entering the U.S. market at prices that are likely to have a significant depressing or suppressing effect on domestic prices was not supported by substantial evidence and that the Commission's finding that the domestic industry has curbed its overproduction of softwood lumber is not supported by substantial evidence. Panel Decision II at 52.

helpful in more fully assessing the concerns raised by the Panel.[30] However, while we have the authority to reopen the investigative record,[31] it is not feasible in the time frame granted by the Panel. Thus, after reconsideration of all of the existing record evidence in these investigations, subject to the time restraints imposed by the Panel, we again determine that the domestic softwood lumber industry is threatened with material injury by reason of subject imports of softwood lumber from Canada that are subsidized and sold at less than fair value.

By statute, Congress directed the Commission to consider specific factors, among other relevant economic factors, and provided the Commission discretion to determine the weight to be accorded each factor.[32] Or as the Federal Circuit has explained, "[t]he Commission's decision

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[30]The Panel stated in its June 2, 2004 decision and order that "[t]he Commission could have structured the original investigation to obtain all of the information that might be deemed relevant. It did not do so." Panel's Decision and Order at 3 (June 2, 2004). We believe that the original investigative record fully supports the Commission's affirmative threat of material injury determination. It is important to note that it is the Commission, not the Panel, which has the authority to determine the relevance of information collected in any investigation. The Commission has "broad discretion to fashion its own rules of administrative procedure . . . [and] 'to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." Avesta AB v. United States, 689 F. Supp. 1173, 1188 (CIT 1988) quoting Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 543 (1978). The Panel's actions in setting forth the procedures and deadlines for this remand investigation appear to be an attempt to limit the Commission's discretion to discharge its duties under the antidumping and countervailing duty statutes. As other Panels have noted, "[t]he substantial evidence standard generally requires the reviewing authority to accord deference to an agency's factual findings and the methodologies selected and applied by the agency." Certain Flat-Rolled Carbon Steel Products from Canada, USA-93-1904-05, at 13 (Nov. 4, 1994); Fresh, Chilled or Frozen Pork from Canada, USA 89-1904-11, at 8 (Aug. 24, 1990), citing, Red Raspberries from Canada, USA-89-1904-01, at 18-19 (Dec. 15, 1989).

[31]Nippon Steel, 345 F.3d at 1382 (Fed. Cir. 2003) ("Whether on remand the Commission reopens the evidentiary record, while clearly within its authority, is of course solely for the Commission itself to determine.").

[32]S. Rep. No. 96-249, at 87-88 (1979) ("[n]either the presence nor the absence of any [particular] factor listed . . . can necessarily give decisive guidance with respect to whether an industry is materially injured, and the significance to be assigned to a particular factor is for the

does not depend on the 'weight' of the evidence, but rather on the expert judgment of the Commission based on the evidence of record."[33] Congress also has explicitly stated that: "A threat of material injury determination is subject to the same evidentiary requirements and judicial standard of review as a *present* material injury determination."[34]

We note at the outset that the Panel ignores the U.S. statute's explicit direction that the Commission must consider the factors "as a whole in making a [threat] determination."[35] The Panel disregards the record evidence, and fails to recognize that the likely effects being assessed are interrelated and should not be considered and analyzed as isolated fragments. Rather, the

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ITC to decide."); U.S. Steel Group, 96 F.3d at 1362 (Fed. Cir. 1996). The Commission's reviewing courts have repeatedly affirmed that "[t]he Commission has the discretion to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor in its analysis." Chilean Salmon, 180 F. Supp. 2d at 1370 (CIT 2002), quoting Goss Graphics System, Inc. v. United States, 33 F. Supp. 2d 1082, 1100 (CIT 1998), aff'd, 216 F.3d 1357 (Fed. Cir. 2000).

[33]Matsushita, 750 F.2d at 933.

[34]SAA at 855. The Commission's reviewing courts have rejected arguments proposing that separate rules or standards must be devised for threat determinations, Dastech Int'l, Inc. v. USITC, 963 F. Supp. 1220, 1227 (CIT 1997), and reaffirmed that "[i]n reaching a threat determination, the Commission is afforded discretion in interpreting the data, and the court does not weigh the evidence." U.S. Steel Group, 873 F. Supp. at 703 (CIT 1994), aff'd, 96 F.3d 1352 (Fed. Cir. 1996); Bando Chemical Industries, Ltd. and Bando American Inc. v. United States, 17 CIT 798, 802 (1993) (the court has recognized that "[t]his is particularly appropriate when threat, which Congress has seen fit to require the ITC to consider, is the issue."), aff'd, 26 F.3d 139 (Fed. Cir. 1994).

[35]19 U.S.C. § 1677(7)(F)(ii). This provision of the statute states in relevant part:

> The Commission shall consider the factors set forth in clause (i) as a whole in making a determination of whether further dumped or subsidized imports are imminent and whether material injury by reason of imports would occur unless an order is issued or a suspension agreement is accepted under this subtitle. The presence or absence of any factor which the Commission is required to consider under clause (i) shall not necessarily give decisive guidance with respect to the determination.

Panel has viewed the threat analysis as distinctly separate from the present injury analysis and inappropriately undertaken its review in a piece-meal approach.[36]

Threat of material injury is material injury that has not yet occurred, but remains a future event whose actual materialization cannot, in fact, be assured with absolute certainty, although the determination must be based on evidence that is real and not mere conjecture or supposition.[37] The inclusion of the threat provision in the statute is a recognition that injury to a domestic industry may not yet have occurred, or not yet be "material," but rather there can be a progression or accretion of adverse effects by reason of subject imports that in the imminent future would ascend from a threat of material injury to actual present material injury if an order is not issued. Thus, the threat of material injury and present material injury analyses necessarily are intertwined rather than entirely separate, and many of the same factors weigh into our

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[36]Accord NEC Corp. v. United States, 83 F. Supp.2d 1339, 1346 (CIT 1999). The statute directs the Commission to consider, in addition to the relevant statutory factors, other economic factors the Commission deems relevant. 19 U.S.C. § 1677(7)(F)(i).

[37]SAA at 854. Congress, as well as the reviewing courts, have recognized that "[b]ecause of the predictive nature of a threat determination, and to avoid speculation and conjecture, the Commission will continue using special care in making such [threat] determinations." SAA at 855. See also Suramerica de Aleaciones Laminadas, C.A. v. United States, 818 F. Supp. 348, 353 (CIT 1993). The reviewing courts, however, have acknowledged that "[a]s it deals with the projection of future events . . . [the Commission's threat] analysis is inherently less amenable to quantification . . . ." NEC Corp. v. United States, 36 F. Supp.2d 380, 391(CIT 1998); see also Hannibal Indus., Inc. v. United States, 710 F. Supp. 332, 338 (CIT 1989); Rhone Poulenc. S.A. v. United States, 592 F. Supp. 1318, 1329 (CIT 1984). According to the Federal Circuit, predictive determinations by the Commission are by nature not "verifiable," but rather are "based on currently available evidence and on logical assumptions and extrapolations flowing from that evidence." Matsushita, 750 F.2d at 933 (Fed. Cir. 1984). Projections involve extrapolations from existing data. Thus, special care, far from establishing a special review standard, simply is the recognition that these are projections about future events, and such projections must be based on past and present facts. See BIC Corp. v. United States, 964 F. Supp. 391, 405 (CIT 1997); Metallverken Nederland B.V. v. United States, 744 F. Supp. 281, 287 (CIT 1990).

analysis for both. Moreover, the Commission's original and remand Views must be viewed as a whole, and analysis conducted in any particular section (whether in the present or in the threat analysis) can, and often does, have a bearing on analysis in other sections.[38]

The Commission made several findings in its present injury analysis that foreshadow injury and clearly support the existence of a threat of material injury; these include the findings that the volume of subject imports already was significant; subject imports had increased during the period of investigation even with the restraining effect of the Softwood Lumber Agreement (SLA); imports had some adverse price effects on domestic prices; and the condition of the domestic industry had deteriorated, primarily as a result of substantial declines in prices, and thus was in a vulnerable state. The threat analysis must be read in the context of these findings.

A. Likelihood of Substantially Increased Imports

Two of the statutory factors considered in a threat of material injury analysis focus on the likelihood of substantially increased subject imports.[39] We continue to find that there is an

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[38]Accord Angus Chemical Co. v. United States, 140 F.3d 1478, 1486 (Fed. Cir. 1998) (Court held that "sufficient analysis and findings with regard to the three factors to satisfy the statute" were in portions of opinion joined by two Commissioners even though they had not joined portions of opinion that explicitly discussed those three factors.).

[39]These factors are as follows:

> (II) any existing unused production capacity or imminent, substantial increase in production capacity in the exporting country indicating the likelihood of substantially increased imports of the subject merchandise into the United States, taking into account the availability of other export markets to absorb any additional exports,
>
> (III) a significant rate of increase of the volume or market penetration of imports of the subject merchandise indicating the likelihood of substantially increased imports.

19 U.S.C. § 1677(7)(F)(i)(II) and (III).

interrelationship between factors subsidiary to these two statutory factors (i.e., likely import volume and production capacity factors) that warrants considering them together rather than in a piece-meal approach, and that both factors must be considered in the context of the already substantial volume of imports.[40] Each of the subsidiary factors considered relate directly to whether there is a significant rate of increase in imports and to whether there is existing unused production capacity.

As discussed below, our analysis of likely substantial increases in subject imports first takes into account the fact that subject import volumes were already at significant levels, i.e., accounting for about 34 percent of the U.S. market. The evidence shows volume increases even with the restraining effect of the SLA in place,[41] and substantial increases during periods when such imports were not subject to import restraints.[42] Moreover, Canadian producers had increasing excess capacity during the period of investigation.

A threat analysis looks at whether these imports, which in this case already were at significant levels and would be indicative of material injury when combined with significant price effects and adverse impact, are likely to be injurious in the imminent future. The evidence

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[40]Accord NEC Corp., 83 F. Supp.2d at 1346 (CIT 1999) ("here, for example, that unused capacity and volume increases 'indicat[e] the likelihood of substantially increased imports.'"); Mitsubishi Materials Corp. v. United States, 820 F. Supp. 608, 627 (CIT 1993) ("the court determines that the record viewed *in toto* [specifically capacity utilization and increases in imports during the period of investigation] demonstrates that substantial evidence supports Commissioner Rohr's findings that the regional industry was threatened with material injury.").

[41]The volume of subject imports from Canada increased by 2.8 percent from 1999 to 2001. USITC Pub. 3509 at Tables IV-1, IV-2, and C-1.

[42]For example, during the April-August 2001 period subject imports increased by 11.3 percent compared with the same period in 2000 when subject imports were subject to the import restraining effect of the SLA. Official monthly import statistics.

demonstrates that subject imports will not only continue to enter the U.S. market at this already significant level, but are projected to increase.

Volume of Imports is Significant and Likely to Increase Further in the Imminent Future. Fundamentally, the Panel has reached its own determination that the increase in the volume of imports would not be substantial and therefore could not be the basis for a determination that imports of softwood lumber from Canada threatened to cause material injury to the U.S. industry producing softwood lumber. However, the evidence on the record clearly indicates that imports of softwood lumber from Canada accounted for 33.2 percent to 34.3 percent of the U.S. market for softwood lumber in the 1999-2001 period of investigation, totaling between 17,983 and 18,483 mmbf.[43] Simply stated, one-third of the U.S. market, or one out of every three boards of softwood lumber purchased in the United States, is an import from Canada. We reasonably found, and continue to find, that the large volume and market share of imports from Canada were significant[44] and were likely to increase further in the future.[45]

Nevertheless, the Panel has consistently ignored the magnitude of subject imports in the U.S. market, and the Commission's findings of their significance. Instead, the Panel repeatedly has focused only on additional future volumes of subject imports over the already significant

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[43]USITC Pub. 3509 at Table IV-2 and C-1.

[44]USITC Pub. 3509 at 32 and Remand Determination at 50-55. A finding that the volume and market share of subject imports is significant is a legal finding, pursuant to 19 U.S.C. § 1677(7)(C)(i).

[45]Mitsubishi Materials, 820 F. Supp. at 627 (CIT 1993) ("Plaintiffs were also unable to discredit Commissioner Rohr's findings that imports increased from 1986 until Commerce's suspension of liquidation in 1990, as did import penetration. Plaintiffs did not undermine Commissioner Rohr's conclusion that even in the absence of any further increases, present levels were likely to be injurious in the future.").

level of such imports, even improperly considering the statutory negligibility provision in connection with such increases,[46] and made findings regarding the significance of further imports; findings which, as discussed above, Congress has tasked the Commission, and not the Panel, to make.[47]

Neither the Panel, nor any party, disputes that subject imports will continue to enter the U.S. market at a significant level, and that they are projected to increase from that large and significant level.[48] If imports are already significant and projected by everyone to increase, then

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[46]We find it surprising that the Panel would even attempt to use the negligibility provision of the statute as a surrogate test for considering what constitutes a significant rate of increase in the volume of imports. The negligibility provision involves a static measure of subject imports as a share of total imports, and does not speak at all to an analysis of increases in the volume of imports, as the Panel has applied it. Imports from Canada account for 93 percent of all imports of softwood lumber into the U.S. market – 31 times the three percent negligibility threshold. The Panel, however, applied this static three percent level to the change in subject imports relative to prior subject import volumes. This is a totally impermissible and unsupportable use of the provision.

Ironically, while individual country non-subject imports could have properly been deemed negligible, with no individual country accounting for more than 1.3 percent of total imports, the Panel in its first Decision made a finding, exceeding its authority, that non-subject imports increased substantially, while simultaneously discounting imports from Canada that accounted for 93 percent of total imports. Panel Decision I at 103.

[47]U.S. Steel Group, 96 F.3d at 1357 (Fed. Cir. 1996) ("Congress has allocated to the Commission the task of making these complex determinations. Ours is only to review those decisions for reasonableness."); Grupo Industrial Camesa, 85 F.3d at 1582 (Fed. Cir. 1996)("An appellate court is not the initial decision maker, and thus cannot substitute its judgment for that of the fact finder if [the conclusion] is supported by substantial evidence."); Acciai Speciali Terni, 19 CIT at 1054 (1995) (the Panel "cannot substitute its judgment for that of the agency, nor may it reweigh the evidence."); see also Certain Flat-Rolled Carbon Steel Products from Canada, USA-93-1904-05, at 12 (Nov. 4, 1994) ("The reviewing Panel must not reweigh the evidence, or substitute its judgment for that of the Commission").

[48]We also note that even substantial increases in absolute volume over a large baseline will not result in large percentage increases. Increases of the same absolute volume over a small baseline will result in substantially higher percentage rates of increase than those same volume increases over a large baseline. For example, if the baseline is five units and over three years it increases by five more units for a total of 10 units, the rate of increase is 100 percent. If the

the Panel cannot reasonably conclude that substantial evidence does not support the Commission's findings that the volume of imports and its projected increase are significant.

The Panel has apparently taken the view that the only imports that the Commission can look at are those that come in over and above the already existing level of subject imports; that somehow the only imports that should be considered a threat to the U.S. market are the additional subject imports on top of the more than 18,000 mmbf that entered each year during the period of investigation. However, the statute, in defining "material injury" in the first instance and in defining it for purposes of determining whether an industry is either materially injured or threatened with material injury, requires the Commission to consider whether the volume of imports, or any increase in the that volume, is significant.[49] While the additional factors the Commission takes into account in making a threat of material injury determination include examining the rate of increase of the volume or market penetration of imports,[50] nothing in the

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baseline, on the other hand, is 100 units and it increases also by 5 units over the three year period for a total of 105 units, the rate of increase is only 5 percent.

[49]19 U.S.C. §§1671d(b) and 1673d(b); 19 U.S.C. § 1677(7)(B).

[50]19 U.S.C. § 1677(7)(F). Congress has indicated that the Commission has "the authority to weigh each factor in light of the circumstances: *The significance of the various factors affecting an industry will depend upon the facts of each particular case. . . .and the significance to be assigned to a particular factor is for the ITC to decide."* Iwatsu Elec. v. United States, 758 F. Supp. 1506, 1510-1511 (CIT 1991) (emphasis in original), quoting, S. Rep. No. 96-249, at 88 (1979); see also Ranchers-Cattlemen Action Legal Foundation, et al. v. United States, 74 F. Supp.2d 1353, 1375-76 (CIT 1999), citing, S. Rep. No. 96-249, at 86 (1979) ("Congress has vested the ITC with considerable discretion as to the weight it will assign a given factor in making its injury determination" and "discretion in interpreting the data. . . ."); U.S. Steel Group, 873 F. Supp. at 703 (CIT 1994), aff'd, 96 F.3d 1352 (Fed. Cir. 1996). Moreover, the Commission's reviewing court has recognized that affording discretion in interpreting the data to the Commission "is particularly appropriate when threat, which Congress has seen fit to require the ITC to consider, is the issue." Bando, 17 CIT at 802 (1993), aff'd, 26 F.3d 139 (Fed. Cir. 1994). See also Dastech Int'l, 963 F. Supp. at 1227 (CIT 1997).

statute suggests that the Commission must ignore the already existing volume of imports or that in applying these provisions, the Commission should not consider what the total volume of imports would likely be, examining both the current level of imports and any projections that are supported by substantial evidence for further increased imports in the future.[51]

In this case, we determined that both the current level of subject imports and the future level of such imports were significant, and further determined that the rate of increase of the volume of imports indicated the likelihood of substantially increased imports of softwood lumber from Canada.

The SLA had a Restraining Effect on Subject Imports. In focusing on incremental increases and our characterization of the import volume as "relatively stable," the Panel overlooks our finding that the actual volume of imports from Canada, both in absolute terms and relative to consumption, was already at significant levels, i.e., accounting for approximately 34 percent of the U.S. market. More importantly, the Panel fails to recognize the implications of our findings that the volume increased even with the restraining effect of the SLA in place, and that substantial increases occurred during periods when such imports were not subject to import

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[51]The Panel should be aware that the Commission's reviewing courts have repeatedly recognized that Congress intended that the Commission "be given broad discretion to analyze import volume in the context of the industry concerned." USX Corp. v. United States, 698 F. Supp. 234, 238 (CIT 1988), quoting, Copperweld Corp. v. United States, 682 F. Supp. 552, 570 (CIT 1988). Congress acknowledged that:

> For one industry, an apparently small volume of imports may have a significant impact on the market; for another, the same volume might not be significant.

H.R. Rep. No. 96-317, at 46 (1979); S. Rep. No. 96-249, at 88 (1979).

restraints.[52] Subject imports' relatively stable share of the U.S. market during the SLA period does not negate the finding that the market share was already significant. Rather, the Commission reasonably found it to be an indicator of the SLA's restraining effect, supporting a finding of likely substantial increases in subject imports after the SLA expired.

Despite the restraining effect of the SLA, which imposed $50-100 fees per thousand board feet on imports over specified levels,[53] the volume of subject imports from Canada increased above the already significant level by 2.8 percent from 1999 to 2001.[54] While imports of softwood lumber from Canada held a substantial share of the domestic market, at the significant 34 percent level during the period of investigation,[55] it had been higher (35.7 percent)

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[52]These investigations, in contrast to most original antidumping or countervailing duty investigations, involved imports that during the period of investigation were subject to a trade restraining agreement, and immediately thereafter, these investigations. Thus, to place them in the appropriate context, we considered the restraining effects of the SLA on imports and trends in subject imports during periods when such imports were not subject to some type of restraint, in making our findings.

[53]The SLA set a limit for imports on a fee-free basis and two levels of quotas for imports above the fee-free level. Each year during the pendency of the SLA, Canadian producers used their fee-free quota, substantially all of their $50 fee quota in every year except 2000-2001, and in each year, including 2000-2001, exported significant quantities of softwood lumber with $100 fees. Canadian producers also shipped significant quantities of bonus exports each year. (Bonus exports are Canadian exports of softwood lumber that enter the U.S. market without fees and are not subject to the quota limitations pursuant to Article III of the SLA.) See, e.g., USITC Pub. 3509 at Table IV-3 and Petitioners' Prehearing Brief at Exh. 62.

[54]The volume of imports of softwood lumber from Canada increased from 17,983 mmbf in 1999 to 18,483 mmbf in 2001. USITC Pub. 3509 at Tables IV-1 and C-1. Conversely, the value of subject imports declined by 16 percent, from $7.1 billion in 1999 to $6.0 billion in 2001, a decline of 16 percent. Id.

[55]As a share of apparent domestic consumption, subject imports from Canada increased from 33.2 percent in 1999 to 34.3 percent in 2001. USITC Pub. 3509 at Table IV-2 and C-1.

prior to the imposition of the restraining effect of the SLA.[56] Thus, the Commission reasonably found that the SLA had constrained the volume and market share of subject imports, and substantial evidence supported this finding.

The Panel acknowledges that "it can be fairly concluded that the SLA had *some* restraining effect" but finds that because "it is not possible to appraise the magnitude or impact of that effect" the Commission's observations "fail significantly to advance its finding."[57] As discussed above, it is the Commission, not the Panel, that is tasked with weighing the evidence and making assessments.[58] Moreover, there is additional evidence in the existing record demonstrating the impact of the effects of the SLA on the domestic market,[59] including evidence that the constraints on the volume of imports resulted in higher prices for such imports than in the absence of the SLA and higher costs for construction. For example, we note that respondents

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[56]Subject imports held a U.S. market share of 35.7 percent in 1995, the year prior to the SLA, and 35.9 percent in 1996, the year the SLA was imposed (on May 29, 1996). During the first full year under the SLA (1997), subject imports declined to a U.S. market share of 34.3 percent, the same market share held in 2001, with a range from 33.2 percent to 34.6 percent during the SLA period. USITC Pub. 3509 at Table IV-2.

[57]Panel Decision II at 26.

[58]See e.g., U.S. Steel Group, 96 F.3d at 1357 (Fed. Cir. 1996); Goss Graphics System, 33 F. Supp. 2d at 1100 (CIT 1998), aff'd, 216 F.3d 1357 (Fed. Cir. 2000).

[59]We note that studies (conducted outside the context of these proceedings) in the existing record, that appraise or quantify the magnitude or impact of the SLA, are consistent with our findings that the SLA had constrained subject imports. See, e.g., Zhang, Daowei, "Welfare Impacts of the 1996 United States - Canada Softwood Lumber (trade) Agreement," *Canadian Journal of Forest Research*, Vol. 31 at 1958-1967 (2001), in Petitioners' Prehearing Brief, Vol. II at Exh. 16; R&S Rogers Consulting, "West Central B.C. Mountain Pine Beetle Strategic Business Recommendations Report," prepared for the Province of British Columbia Ministry of Forests, at 18 (September 2001) in Petitioners' Prehearing Brief, Vol. II at Exh. 72. Moreover, if the Commission had been provided reasonable time to conduct a thorough remand investigation, we could have sought specific comments from the parties regarding such studies already in the existing record, but not addressed by respondents.

estimated that increases in prices caused by the SLA added about $50/mbf to the average price of framing lumber which translated into increasing the cost of a typical new home by $1,000.[60] Moreover, a comparison of prices for Eastern SPF lumber in Toronto prior to the SLA was about $20 less (in U.S. dollars) than the price for delivery in the Great Lakes area of the United States. The average difference in 1999 was $91.[61] The SLA restrained U.S. imports and increased Canadian supply, resulting in a widening gap between U.S. and Canadian prices.

During Periods with No Import Restraints, There Were Substantial Increases in Subject Imports. We reasonably examine evidence regarding subject imports during restraint-free periods (i.e., prior to the adoption of the SLA between 1994 and 1996, and the period immediately after the SLA expired but before suspension of liquidation in these investigations) as highly probative evidence of how subject imports have entered the U.S. market, and would enter the U.S. market in the imminent future, when not subject to trade restraints. In both periods without trade restraints, subject imports increased substantially.

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[60]Letter of National Association of Home Builders ("NAHB") to the U.S. Trade Representative ("USTR") at 2-3 and 6 (April 14, 2000) ("The Softwood Lumber Agreement adversely affects the U.S. trade balance. . . . Even though imports from Canada are somewhat lower in terms of physical volume than they would be without trade barriers, the higher prices paid for those imports increases the total cost paid for imported lumber.") in Petitioners' Posthearing Brief, Vol. II, Exh. 54 at 2-3 and 6; National Lumber and Building Materials Dealers Association ("NLBMDA")/NAHB's Posthearing Brief at 5 ("'. . . simple common sense suffices to show that when the supply of something is restricted, its price will be higher than if no restriction existed. The supply of lumber from Canada is presently restricted under the SLA; consequently, the price of lumber, and therefore of housing is higher than it otherwise would be.'").

[61]Letter of NAHB to USTR at 6 and Figure 1 (comparison is based on Random Lengths pricing data) in Petitioners' Posthearing Brief, Vol. II, Exh. 54 at 6.

During the period immediately after the SLA expired (April 2001)[62] and before suspension of liquidation (August 2001), subject import volumes were substantially higher, by a range of 9.2 percent to 12.3 percent, than the comparable April-August period in each of the preceding three years (1998-2000).[63] While the rate of increase in imports slowed when bonding requirements associated with the preliminary countervailing duties were imposed in August 2001, they continued to enter the U.S. market in the April-December 2001 period at a rate 4.9 percent higher than the comparable 2000 period.[64]

The Panel recognizes that substantial evidence supports the "Commission's reliance on import data during the April 2001 to August 2001 period to draw inferences about the likely future import trends after the period of investigation."[65] Yet, the Panel concludes that "[b]y its nature, this finding is of little significance in supporting the Commission's ultimate

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[62]The SLA expired on March 31, 2001; thus, the SLA was in effect for 1999, 2000, and only the first quarter of 2001.

[63]Official monthly import statistics. Total subject imports of softwood lumber by volume for the period of April to August 2001 were 11.3 percent higher than the comparable April-August period in 2000, 9.2 percent higher than April-August 1999, and 12.3 percent higher than April-August 1998. The evidence also shows that the subject imports by volume for the period between April and August 2001 was higher in each month than the comparable month in 2000, with the exception of June, by a range of 7.5 percent to 25.6 percent. Id.

[64]Subject imports increased by 2.4 percent from 2000 to 2001, and by only 0.4 percent from 1999 to 2000. During the April-August 2001 period, which was subject to the pending investigation but free of trade restraints, subject imports increased by 11.3 percent compared with the same period in 2000. Moreover, for the April-December 2001 period, during part of which imports were subject to the August CVD preliminary finding, subject imports still increased, although at a lower rate of 4.9 percent, compared with the same period in 2000. USITC Pub. 3509 at Table C-1 and Official import statistics.

[65]Panel Decision II at 29.

conclusions."[66] However, the Commission acted appropriately in determining the significance of this evidence.[67] In contrast, the Panel has provided no reason why import trends during the most recent period in which there were no trade restraints – a period that ended shortly before the end of the period of investigation – would be of "little significance"[68] in determining whether imports are likely to substantially increase in the imminent future. To the contrary, this evidence is a clear indicator of likely future import trends and is highly significant to the Commission's ultimate conclusion that subject imports would threaten material injury to the domestic industry. The fact that subject imports increased substantially after expiration of the SLA and have continued to increase is clearly of relevance to a threat analysis. Moreover, as discussed below, had the Commission been given a reasonable time to conduct a remand investigation, it intended to collect, in order to further assess the Panel's concerns, import data for the first quarter of 2002 to consider whether the substantial increases after the SLA expired in 2001 continued into 2002.

The Panel also has refused to consider the similar pattern of increases in subject imports during the 1994-1996 period prior to the adoption of the SLA, increases which stopped when the SLA was imposed.[69] The Panel makes the general claim that the Commission did not consider

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[66]Panel Decision II at 29.

[67]See e.g., U.S. Steel Group, 96 F.3d at 1357 (Fed. Cir. 1996)("By statute, Congress has allocated to the Commission the task of making these complex determinations."); Goss Graphics, 33 F. Supp. 2d at 1100 (CIT 1998) ("The Commission has the discretion to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor in its analysis."), aff'd, 216 F.3d 1357 (Fed. Cir. 2000); Iwatsu Elec., 758 F. Supp. at 1510-1511 (CIT 1991) ("*significance to be assigned to a particular factor is for the ITC to decide.*" (emphasis in original)).

[68]Panel Decision II at 29.

[69]The evidence shows that during the seven quarters between August 1994 and April 1996, with no restraints in effect, subject imports market share increased from 32.6 percent in the

market conditions for this period, and finds that "this is dated information of little consequence in evaluating the validity of the Commission's ultimate conclusions."[70] The evidence in the existing record regarding market conditions during part of the period without import restraints before the SLA (1995-1996) demonstrates that subject imports entered the U.S. market at a rate higher than increases in U.S. apparent consumption.[71]

In requesting a reasonable period of time to conduct thorough remand investigations, we planned to reopen the record and gather information to further assess the Panel's concerns, including data on market conditions during 1994-1996, to consider whether any specific conditions affected the pattern of increases. We also planned to collect import data for the period immediately prior to our original vote (January-March 2002). By denying the Commission's request for a reasonable remand investigative period, however, the Panel has not permitted us sufficient time to collect and analyze any additional information.[72]

Nevertheless, the simple fact is that without restraints imports have increased from an already high level: increases stopped when the SLA was imposed; substantial increases in imports occurred when the SLA expired; and increases in imports slowed when preliminary duties were imposed. Substantial evidence clearly shows that there is a distinction in the level of

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third quarter 1994 to 37.4 percent in first quarter 1996. Petitioners' Prehearing Brief at Exh. 65. During the first full year under the SLA (1997), subject imports declined to a U.S. market share of 34.3 percent, with a range from 33.2 percent to 34.6 percent during the SLA period. USITC Pub. 3509 at Table IV-2.

[70]Panel Decision II at 28.

[71]Subject imports increased by 4.8 percent from 1995 to 1996, exceeding the U.S. apparent consumption increase of 4.0 percent. USITC Pub. 3509 at Table IV-2.

[72]Panel Decision on Motion (dated May 18, 2004) at 4.

imports depending on whether restraints are in place and that the import volumes are substantially higher during periods when they are not subject to restraining measures. This evidence supports our finding that subject imports are likely to increase in the imminent future, exacerbating already significant subject import volumes.

The Canadian Producers Had Excess Capacity, and Projected Increases in Capacity and Production in 2002 and 2003. The evidence regarding Canada's capacity, capacity utilization and production levels was extensive, and included both questionnaire data from Canadian producers as well as data from the Canadian government and the U.S. Department of Commerce. The record clearly indicates that Canada has very large capacity to produce softwood lumber, with capacity that could supply almost half of U.S. consumption.[73] We recognized that Canadian producers projected increases in capacity, capacity utilization and production in 2002 and 2003, despite having excess production capacity in 2001, as capacity utilization declined to 84 percent from 90 percent in 1999. Excess Canadian capacity in 2001 had increased to 5,343 mmbf, which was equivalent to 10 percent of U.S. apparent consumption.[74] Moreover, the Canadian producers expected to further increase their ability to supply the U.S. softwood lumber market, projecting increases in production of 8.9 percent from 2001 to 2003 and increases in their capacity utilization to 90 percent in 2003 (from 84 percent in

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[73]USITC Pub. 3509 at Tables VII-2 and VII-7.

[74]USITC Pub. 3509 at Tables VII-1 and C-1. The evidence showed that this increase in excess capacity could not be attributed to declines in home market shipments from 1999 to 2001, since increases in imports to the U.S. market for that period were nearly equal to the declines in home market shipments. Id. at Table VII-2. Based on questionnaire responses, home market shipments declined by 663 mmbf from 1999 to 2001 while shipments to the U.S. market increased by 525 mmbf from 1999 to 2001. Id.

2001).[75] These increases were projected even while the evidence demonstrated that demand in the U.S. market was forecast to remain relatively unchanged or increase only slightly.[76]

In sum, Canadian producers already possess excess capacity, and increases in capacity and production were projected for 2002 and 2003. The Panel acknowledges that "a decline in unused Canadian production capacity data *could* support such a [threat] finding," but holds that the Commission "has not tied any Canadian unused production capacity to 'the likelihood of substantially increased imports of the subject merchandise into the United States, taking into account the availability of other export markets to absorb any additional exports.'"[77] As discussed below, there is both substantial evidence on the record of Canada's likelihood of substantial and increasing exports to the United States, and a lack of any substantial evidence to demonstrate a shift to other export markets that could absorb the very significant volume of Canada's exports to the United States.

Canadian Production Is Tied to the U.S. Market. First, there is substantial evidence on the record regarding the tie between Canadian production and exports to the United States. The Canadian producers are predominantly export-oriented toward the U.S. market, relying on it for about two-thirds of their production; exports to the United States ranged from 63.1 percent to 68.1 percent of Canadian production from 1995 to 2001.[78] Canadian producers themselves

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[75]USITC Pub. 3509 at Tables VII-1 and VII-2.

[76]USITC Pub. 3509 at II-3 - II-4; CLTA's Posthearing Brief, Vol. 2, Tab R at 1 and 3; Petitioners' Posthearing Brief, Vol. II, Appendix H, Exhibit 28 at 5 (Table 3).

[77]Panel Decision II at 15.

[78]USITC Pub. 3509 at Table VII-7.

projected their production would increase from 2001 to 2003 by 8.9 percent.[79] Therefore, the Commission's finding of a significant and increasing volume of imports is supported by substantial evidence and is entitled to deference by the Panel. But the Panel suggests that the Canadian industry is somehow going to shift away from shipping to the U.S. market and instead ship substantial additional quantities to the home and other unspecified markets.[80]

The statute contemplates that the Commission will consider the importance of the export industry's markets in determining threat of material injury.[81] In this case, the U.S. market has been the most important market for Canadian producers and is expected to continue to be. Other export markets accounted for only 8 percent of Canadian production and the Canadian home market accounted for about 24 percent in 2001.[82] Therefore, the availability of markets (whether other export or home) other than the U.S. market to absorb additional Canadian production of softwood lumber is limited. Canadian softwood lumber production is projected to increase, and the U.S. market would be the most likely target of those additional goods.

The U.S. export-orientation of the Canadian producers clearly provides a "tie" of the excess capacity and projected increases in capacity and production to a likely substantial increase in subject imports in the imminent future. The Panel's requirement for a more specific "tie" is at odds with the recognition by the U.S. courts that the projection of future events in the

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[79]USITC Pub. 3509 at Table VII-2.

[80]Panel Decision II at 16-21.

[81]19 U.S.C. § 1677(7)(F)(i)(II).

[82]USITC Pub. 3509 at Table VII-7.

Commission's threat analysis is inherently less amenable to quantification.[83]

Furthermore, the Panel ignores the evidence of Canadian incentives to produce more softwood lumber and export it to the U.S. market. Many Canadian provinces subject tenure holders (lumber producers) to requirements to harvest at or near their annual allowable cut ("AAC") or be subject to penalties/reductions in future AACs.[84] We recognized that these mandatory cut requirements stimulate increased production even when Canadian demand is low and thus increase the incentive to export more softwood lumber to the U.S. market. Subject imports were at significant levels during the period of investigation with the AAC requirements in place.[85] Finally, while only certain provinces have AAC requirements, we note that one that does is British Columbia, which accounts for almost 50 percent of Canada softwood lumber

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[83]The Commission's reviewing courts have recognized that "[a]s it deals with the projection of future events . . . [the Commission's threat] analysis is inherently less amenable to quantification . . . ." NEC Corp., 36 F. Supp.2d at 391(CIT 1998); see also Hannibal Indus., Inc. v. United States, 710 F. Supp. 332, 338 (CIT 1989); Rhone Poulenc, S.A. v. United States, 592 F. Supp. 1318, 1329 (CIT 1984). The Federal Circuit has held that predictive determinations by the Commission are by nature not "verifiable," but rather are "based on currently available evidence and on logical assumptions and extrapolations flowing from that evidence." Matsushita, 750 F.2d at 933 (Fed. Cir. 1984). Projections involve extrapolations from existing data.

[84]See, e.g., Canadian Forest Act §§ 64 and 66-67 (British Columbia) (tenure holders are required to harvest within 10 percent of their AAC over five years and within 50 percent in any year, or face penalties for undercutting including loss of tenure in later years). Petition at Exh. IV B-3. The evidence also demonstrated that certain provincial governments also may require major forest tenure holders to operate specific timber processing facilities and prohibit or restrict closures and reductions in capacity. Petitioners' Prehearing Brief at 89-92; Petitioners' Posthearing Brief at Appendix B-23.

[85]Moreover, for most of the period of investigation imports were subject to the SLA or preliminary measures. With the SLA in effect, fees of $50 or $100 per mbf were imposed after specified import levels were reached, which would certainly result in different import levels than if there had been no such restraint in place.

production and 50 percent of Canadian exports to the U.S. market.[86]

Canadian Producers' Export Projections Are Inconsistent with Other Record Evidence. Canadian producers' export projections implausibly posited that the U.S. market would suddenly not continue to account for at least 65 percent of additional Canadian production, consistent with historical levels, but rather projected that only 20 percent of their additional production would be exported to the United States.[87] The Canadian producers projected that export shipments to the U.S. market would increase, but only by 3 percent, while exports to non-U.S. markets were projected to increase by 21 percent, and shipments to the home market were projected to increase by 13 percent from 2001 to 2003.[88] Thus, the Canadian home market and non-U.S. markets were predicted to receive substantially higher shares of projected production increases, shares wholly inconsistent with the historic trends.

Given the inconsistencies with other record evidence, we reasonably discounted the Canadian producers' unsupported expectations regarding export projections and concluded that projected increases in production would likely be distributed among the U.S. market, Canadian home market, and non-U.S. export markets in shares similar to those prevailing during the prior seven years.[89] Parties offered no positive evidence to refute our reasonable conclusion; that is,

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[86]USITC Pub. 3509 at Tables VII-5 and VII-7.

[87]USITC Pub. 3509 at Table VII-7. Over the period of investigation, while exports to the U.S. market accounted for 63 - 68 percent of Canadian production, the Canadian home market accounted for about 24 - 29 percent of Canadian production and non-U.S. export markets accounted for about 8 percent of Canadian production. Id.

[88]USITC Pub. 3509 at Table VII-2.

[89]From 1995 to 2001, exports to the U.S. market as a share of Canadian production ranged from 63.1 percent to 68.1 percent, for an average of 65.5 percent. USITC Pub. 3509 at Table VII-7.

no positive evidence, such as a new supplier contract or evidence of increased sales to another specific country, that would indicate that a large share of the increased production was to shift to markets other than the U.S. market. Moreover, even though Canadian demand had declined by almost 20 percent from 2000 to 2001 and was not forecast to imminently return to 2000 levels, the Canadian producers projected that home market shipments would somehow increase beyond 2000 levels.[90] By statute, Congress has tasked the Commission with weighing the evidence, including interpreting and making assessments of the credibility of the evidence.[91] Given the evidence from all sources pointing to significant and increasing imports to the U.S. market, and the lack of substantial evidence of a marked shift in shipment patterns, the Commission's conclusions are supported by substantial evidence.

The Panel simply is wrong when it contends that the Commission "relied on these very same exporters' projections in its Final Determination" that the Panel rejected on remand.[92] The fact that all of the evidence considered was available in the existing record at the time of the original determination does not control whether we can amend our finding on remand, or set

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[90]USITC Pub. 3509 at Tables VII-2 and VII-7.

[91]See, e.g., Matsushita, 750 F.2d at 935 (Fed. Cir. 1984); Kern-Liebers USA, Inc. v. United States, 19 CIT 87, 108 (CIT 1995) ("This court has recognized, however, that 'assessments of the credibility of witnesses are within the province of the trier of fact. This [c]ourt lacks authority to interfere with the Commission's discretion as trier of fact to interpret reasonably evidence collected in the investigation," quoting, Negev Phosphates, 699 F. Supp. at 953 (footnote omitted)).

[92]Panel Decision II at 17-18. The Commission's sole reference to Canadian producers' export projections is the listing in footnote 258 of its original determinations of actual and projected exports by volume and by share of Canadian shipments. This footnote also lists actual Canadian export data as a share of Canadian production. The cite is for a sentence indicating that "Canadian producers are predominately export-oriented toward the U.S. market, with exports to the United States accounting for 68 percent of their production in 2001." USITC Pub. 3509 at 41 and n. 258.

forth our reasoning for our finding for the first time on remand, as is the case here. We provided a detailed explanation to the Panel on remand as to why the Canadian export projections were inconsistent with actual data showing excess Canadian capacity, declines in home market shipments, declines in exports to other markets, and projected increases in production.[93] While we do not believe that we reformulated our position on remand, even if we had, we are allowed to do so under U.S. law.[94]

The Panel weighed the evidence regarding export projections itself and concluded that the projected increases in export shipments to the U.S. market of three percent from 2001 to 2003 "would be a minimal increase in absolute Canadian exports to the United States."[95] Again, the Panel substituted its view of the evidence for that of the Commission; a substitution that, under U.S. law, reviewing courts are proscribed from making,[96] and again ignored the already significant volume of subject imports

Thus, we find a likelihood of substantially increased imports based on consideration of several factors, including: the significant volume of subject imports and their likely increase in the imminent future; the increase in subject imports over the period of investigation; the effects

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[93]Remand Determination at 61-63.

[94]Bando Chemical, 17 CIT at 811 (CIT 1993) ("If a Commissioner were unable to revise his analysis on remand, that route following judicial review would be devoid of purpose."); see also Asociacion Colombiana de Exportadores de Flores v. United States, 693 F. Supp. 1165, 1172 (CIT 1988); SEC v. Chenery Corp, 332 U.S. 194, 201 (1946) ("After the remand was made, therefore, the Commission was bound to deal with the problem afresh, performing the function delegated to it by Congress.").

[95]Panel Decision II at 17; Panel Decision I at 83-84.

[96]Universal Camera, 340 U.S. at 488. Accordingly, the Panel "cannot substitute its judgment for that of the agency, nor may it reweigh the evidence." Acciai Speciali Terni, 19 CIT at 1054 (1995).

of expiration of the SLA; subject import trends during periods when there were no import restraints; Canadian producers' excess capacity and projected increases in capacity, capacity utilization, and production; and the export orientation of Canadian producers to the U.S. market.

B. Likely Adverse Price Effects

In making a determination regarding the existence of a threat of material injury, "the Commission shall consider, among other relevant economic factors –

> (IV) whether imports of the subject merchandise are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices and are likely to increase demand for further imports.[97]

Imports are Entering at Prices Likely to Have a Significant Depressing or Suppressing Effect on Domestic Prices. During the period of investigation, prices for softwood lumber declined substantially, particularly in 2000, due to excess supply in the price sensitive U.S. market, despite high, but relatively stable, demand.[98] Prices in 2001 at the end of

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[97]19 U.S.C. § 1677(7)(F)(i)(IV).

[98]USITC Pub. 3509 at Tables IV-2, V-1, and V-2, and Figures V-3 - V-5. In particular, prices of both the domestically-produced and imported Canadian softwood lumber products increased through the second or third quarters of 1999, before falling substantially through the third and fourth quarters of 2000 to their lowest point for the 1999-2001 period. For example, the price of SYP fell 32.9 percent, from a peak of $434/mbf in the third quarter 1999 to a low of $291/mbf in the fourth quarter 2000. The price of WSPF (a product mostly imported from Canada) fell 39.3 percent, from a peak of $336/mbf in the second quarter 1999 to $204/mbf in the fourth quarter 2000. USITC Pub. 3509 at Tables V-1 and V-2.

the period of investigation were again at levels as low as they were in 2000.[99] [100] These price declines occurred while demand, considered on a seasonal basis, remained relatively stable at historically very high levels. As the Commission has repeatedly found, during the period of investigation, the substantial volume of subject imports had *some* adverse effects on prices for the domestic product.[101] The condition of the domestic industry, and in particular its financial performance, deteriorated over the period of investigation, largely a result of the substantial declines in price.[102] The declines in the industry's performance, particularly its financial performance, made it vulnerable to future injury. Thus, the price trend evidence supports our conclusion that subject imports are entering at "current prices" that are likely to have a significant depressing or suppressing effect on domestic prices.[103]

The Panel relies on data outside the period of investigation, pricing data for part of the

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[99]While prices for softwood lumber increased in mid-2001, at a time of considerable uncertainty in the market due to the expiration of the SLA and the commencement of these investigations, prices began to decline in the third quarter of 2001 and fell substantially in the fourth quarter of 2001 to levels as low as those in 2000. USITC Pub. 3509 at V-11, Tables V-1 and V-2, and Figures V-3 - V-5.

[100]Other evidence such as average unit values for imports and domestic shipments confirms these declining trends. For example, the average unit value of imports of softwood lumber from Canada, based on official Commerce statistics, decreased from $395.72 in 1999 to $347.89 in 2000 and $323.57 in 2001. USITC Pub. 3509 at Table C-1. Similarly, the average unit value of U.S. shipments of softwood lumber decreased from $416.13 in 1999 to $361.07 in 2000, and $347.86 in 2001 according to questionnaire responses. Id.

[101]USITC Pub. 3509 at 32-35; Remand Determination at 80-84.

[102]USITC Pub. 3509 at 36-39.

[103]In evaluating the evidence in these investigations, we consider present and likely price effects by evaluating price trends for softwood lumber during the period of investigation. See 19 U.S.C. § 1677(7)(F)(i)(IV).

first quarter of 2002[104] supplied by Canadian parties, to hold that the record evidence does not support the ITC's conclusion that prices declined substantially at the end of the period of investigation.[105] But the Panel's selective adoption of certain comparisons proffered by Canadian parties does not withstand scrutiny in light of all of the record evidence. We note that the Panel addressed pricing data outside the period of investigation for the first time in its Decision circulated on April 29, 2004. If the Commission had been provided sufficient time to conduct thorough remand investigations, we would have reopened the record to collect all first quarter 2002 pricing data, not only that proffered by Canadian Parties and relied upon by the Panel.

However, even the first quarter 2002 data do not undercut our findings. The evidence demonstrates that the composite price for part of the first quarter of 2002 at $312 was lower than the composite price for the entire third quarter of 2001 at $322 and substantially lower than that for the entire second quarter of 2001 at $364.[106] Moreover, the Panel did not recognize that seasonality generally affects comparisons between fourth and first quarter prices,[107] i.e., composite prices for the fourth quarter in 1999, 2000, and 2001 were lower than those for the

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[104]The Panel relies on first quarter 2002 pricing data that averages weekly pricing data for only 11 of the 13 weeks in the first quarter of 2002, and as such is not necessarily comparable with full quarter data. See note CLTA's Prehearing Brief, Vol. 3 at Exh. 56 ("Q1 2002 RL Framing Lumber Composite through 11 weeks").

[105]Panel Decision II at 35.

[106]Compare CLTA's Prehearing Brief, Vol. 3, at Exh. 56 (Q1 2002 RL Framing Lumber Composite – $312) with ITC Report at Figure V-3 and Petitioners' Posthearing Brief, App. G at Chart 8 (RL Framing Lumber Composite, Q2 2001 – $364; Q3 2001 – $322).

[107]See, e.g., USX Corp. v. United States, 682 F. Supp. 60, 75-76 (CIT 1988) ("reliance on customary annual data is especially warranted in this case given seasonal fluctuations in production levels which likely skew the reliability of quarterly figures.").

first quarter in 2000, 2001, and 2002, respectively.[108] While the composite price for the partial first quarter of 2002 at $312 was higher than that for the entire first quarter of 2001 at $284, it was substantially lower than the composite price of $384 for the entire first quarter of both 1999 and 2000. Prices at the first quarter of 2001 had not yet recovered from the low levels of the third and fourth quarters of 2000 ($294 and $277, respectively) and were subject to considerable uncertainty in the market due to the pending expiration of the SLA.[109] Thus, the fact that the composite price for part of the first quarter of 2002 was higher than the entire fourth quarter of 2001 does not undermine our conclusion that imports at the end of the period "are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices," as first quarter prices were always higher than the preceding fourth quarter, and first quarter 2002 prices were only slightly higher than one of the three quarters with the lowest prices when imports were adversely effecting the financial performance of the domestic industry,

The Panel concluded that "the Commission has not shown that subject imports, based on volume, are likely to have a significant depressing effect on domestic prices."[110] To do so, the Panel alleged the Commission was required to "make a finding that the increase in imports from Canada would outstrip the 'strong and improving demand' that it found in the U.S. market."[111] But such a requirement has no basis in law. Moreover, it also has no basis in fact since it is

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[108]The composite prices for the fourth quarter in 1999 ($375), 2000 ($277), and 2001 ($279) were lower than those for the first quarter in 2000 ($384), 2001 ($284), and 2002 ($312), respectively. CLTA's Prehearing Brief, Vol. 3, at Exh. 56 *with* ITC Report at Figure V-3 and Petitioners' Posthearing Brief, App. G at Chart 8.

[109]See Remand Determination at 81, n. 233.

[110]Panel Decision II at 37.

[111]Panel Decision II at 36.

based on the incorrect premise that forecasts for demand projected substantial growth for softwood lumber in the imminent future.[112]

We did not change our findings regarding the demand forecasts on remand as the Panel contends.[113] We have continued to find that the record indicates that demand in the United States was strong during the period of investigation, and that forecasts indicate continued strong, but not substantially growing, demand.[114] Moreover, it is the evidence and not the characterization that matters. And the evidence, that is, all of the evidence, and not only the selective sources cited by the Panel and Canadian Parties,[115] has never supported the theories of "substantial growth" in demand outstripping increases in imports.

The evidence demonstrates, as we stated in our original determinations and our first remand determinations, that "demand for softwood lumber is forecast to remain relatively unchanged or increase slightly in 2002, and then begin to increase in 2003 as the U.S. economy

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[112]We note that the actual evidence in 2001 shows that the increase in subject imports outstripped demand; imports of softwood lumber from Canada increased by 2.4 percent from 2000 to 2001 and U.S. apparent consumption increased by only 0.2 percent for the same period. USITC Pub. 3509 at Table C-1. Moreover, subject imports after removal of the restraining effect of the SLA were 11.3 percent higher for the April-August 2001 period compared to the same period in 2000, and 4.9 percent for the April-December 2001 period compared to the April-December 2000 period. Thus, the actual increases in subject imports at the end of the period of investigation substantially outstripped any forecasts for increases in demand for softwood lumber for 2002 and 2003.

[113]Even if the Commission had changed its finding, it is not precluded under U.S. law from changing its characterization of the evidence on remand, as discussed above.

[114]We characterized demand as "strong" because the absolute level was higher during the period of investigation than in the preceding years. USITC Pub. 3509 at 22 and Table IV-2.

[115]For example, the Panel, as did Canadian Parties, selectively omits the less optimistic Bank of America forecasts for lumber demand from its cites to the evidence. See Panel Decision II at 31-32, n.9 which references as evidence only the RISI and Clear Vision forecasts.

rebounds from recession."[116] First, most producers and importers, in response to Commission questionnaires, indicated that they believed overall demand would remain relatively unchanged until the second half of 2002 or the beginning of 2003, and then would begin to increase as the U.S. economy rebounded from recession.[117]

Second, the demand forecasts for softwood lumber from industry analysts show somewhat mixed results and do not correlate to forecasts for U.S. housing starts.[118] Moreover, the forecasts do not correlate to the actual data for 1995 to 2001, where U.S. housing starts (i.e., new residential construction) substantially outpaced softwood lumber demand.[119] For example, while industry analysts Clear Vision forecasted that demand for softwood lumber from 2001-2002 would increase by 3.7 percent,[120] its forecast for U.S. housing starts for the same period

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[116]Remand Determination at 77-78 and 110-114. In the original determinations, the Commission found that: "Demand for softwood lumber is forecast to remain relatively unchanged or increase slightly in 2002, followed by increases in 2003 as the U.S. economy rebounds from recession." USITC Pub. 3509 at 42-43. The Commission made a similar finding in its Conditions of Competition section, stating "lumber consumption is forecast to either remain flat or increase slightly in 2002, followed by increases in 2003." Id. at 23.

[117]USITC Pub. 3509 at II-3-4.

[118]In an attempt to place these mixed demand forecasts for softwood lumber in perspective, we consider data regarding the primary end-use -- new residential construction -- which accounted for about 38 percent of demand for softwood lumber in 2000. USITC Pub. 3509 at Table I-1.

[119]From 1995 to 2001, U.S. housing starts increased by 18.3 percent while increases in apparent domestic consumption for softwood lumber at 13.1 percent had not kept pace with its primary end use. USITC Pub. 3509 at IV-3 and Table IV-6. Housing starts reached a peak in 1999, declining in 2000 and remaining relatively flat in 2001. Housing starts were 23.0 percent higher in 1999 and 18.3 percent higher in 2001 compared with housing starts in 1995. Id.

[120]Industry analyst Clear Vision Associates forecasted U.S. demand for softwood lumber to increase by 3.7 percent from 53.6 mmbf in 2001 to 55.6 mmbf in 2002, and then further increase by 4.7 percent to 58.2 mmbf in 2003. CLTA's Prehearing Brief, Vol. 3, Tab 1 at 1 and 3; CLTA's Posthearing Brief, Vol. 2, Tab R at 1-3.

was slightly lower at 3 percent.[121] In contrast, RISI forecasted lower demand increases for softwood lumber for 2001-2002 (1 percent) compared with its U.S. housing start forecasts (4.3 percent),[122] but its related forecasts for the 2002-2003 period showed the opposite correlation (4 percent for softwood lumber demand compared with 1.89 percent for U.S. housing starts).[123]

Moreover, another industry analyst report, from the Bank of America, projected a slight decline in demand for lumber in 2002 and increases below the 2 percent range in 2003.[124] Thus, the U.S. demand forecasts for softwood lumber in 2002 include a forecast for a slight decline (Bank of America), an 1 percent increase (RISI), and a 3.7 percent increase (Clear Vision). When this evidence is considered together with the mixed evidence regarding forecasts for demand and U.S. housing starts and questionnaire responses,[125] there is substantial evidence to

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[121]Industry analyst Clear Vision Associates forecasted U.S. housing starts to increase by 3 percent from 1.6 million units in 2001 to 1.65 million units in 2002, and then further increase by 6 percent to 1.75 million units in 2003. CLTA's Prehearing Brief, Vol. 3, Tab 1 at 1 and 2; CLTA's Posthearing Brief, Vol. 2, Tab R at 1-3.

[122]Industry analyst RISI forecasted U.S. demand for softwood lumber to increase by 1.0 percent from 53.2 mmbf in 2001 to 53.7 mmbf in 2002, and then further increase by 4.0 percent to 56 mmbf in 2003. Petitioners' Posthearing Brief, Vol. II, Appendix H, Exhibit 28 at 5 (Table 3; CLTA's Posthearing Brief, Vol. 2, Tab R at 2.

[123]Industry analyst RISI forecasted U.S. housing starts to increase by 4.3 percent from 1.61 million units in 2001 to 1.68 million units in 2002, and then further increase by 1.8 percent to 1.71 million units in 2003. Petitioners' Posthearing Brief, Vol. II, Appendix H, Exhibit 28 at 3 (Table 2); CLTA's Posthearing Brief, Vol. 2, Tab R at 1.

[124]Bank of America, "Wood & Building Products Quarterly," at 12 (Nov. 2001) (Bank of America projected "U.S. consumption [for lumber] to decline by a little less than 1% next year [2002] . . . . consumption growth should remain below the 2% range in those two years [2003 and 2004]") in Petitioners' Posthearing Brief at 2 and Appendix H, Exh. 2 at 11. (See Exhibit 2 to ITC's January 26, 2004 Comments).

[125]Moreover, in examining the most recent actual data, we find that while U.S. housing starts increased in January and February of 2002 to the highest levels for single-family home starts in over 20 years, they then fell by 7.8 percent in March 2002 to the lowest level in two

support the Commission's finding of relatively stable (flat) or slight increases in demand.

The evidence of record is mixed and clearly does not demonstrate "substantial growth" in demand for softwood lumber. The Commission's finding that demand is forecast to remain relatively unchanged or flat in 2002 and then begin to increase in 2003 as the U.S. economy rebounds from recession is supported by substantial evidence and should be affirmed by the Panel.

This strong demand (i.e., a high absolute level of consumption) would continue to make the U.S. market a very attractive, and necessary, one for Canadian producers (as the U.S. market has consistently accounted for about 65 percent of Canadian production). Thus, subject imports would continue to play an important role in the U.S. market, and conditions in the market indicate that there would likely continue to be increases in such imports.

The evidence also demonstrates that imported and domestic softwood lumber are substitutable or interchangeable and compete with each other.[126] Thus, since subject imports and the domestic product are substitutable, it is not clear why the Commission would undertake an analysis to consider "whether, and to what extent, its predicted increase in imports from Canada would likely serve segments of the U.S. market *where purchasers do not consider Canadian and U.S. lumber to be close substitutes*," as the Panel requires.[127]

In claiming that the Commission's "chart does not comport with the testimony elicited at

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years. There also is evidence in the record that this decline in housing starts might be a signal that the market was giving back some of the strong gains made during the mild winter of 2001-2002. USITC Pub. 3509 at II-3-4, n.10.

[126]See Remand Determination at 90-94.

[127]Panel Decision II at 41 (emphasis in original).

the ITC hearing," the Panel claims it "has reviewed all the record testimony relied upon by the Commission. See ITC Hearing Transcript at 198-99, 189-90, 191-92, 201-02."[128] Yet, the Panel does not cite to all of the evidence relied on by the Commission as noted in the Commission's citation on the "chart" to Commission Hearing Transcript at 185-190 and 204-207; in particular, the Panel fails to take into account the contradictory evidence provided upon questioning by Commissioner Okun (pages 204-207) from the same four witnesses on which the Panel relies.

The four "unnamed lumber purchasers" who were testifying on behalf of the respondents at the Commission's hearing were: Barry Rutenberg, President of Rutenberg Homes in **Florida**;[129] Ron Jarvis, Vice President, Merchandising of Home Depot in **Texas**;[130] Edward Hussey, Vice President and General Counsel of Liberty Homes in **Indiana and Northwest (e.g., Oregon)**;[131] and Mike Fritz, President of Rugg Lumber Company in **Massachusetts**.[132]

The Panel's claim that the "Commission's chart is in clear conflict with the evidence and

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[128]Panel Decision II at 41, n.13.

[129]Mr. Rutenberg's affirmative testimony is on pages 185-190 of the Commission's Hearing Transcript and his response to Commissioner Okun's questioning is on page 204 of the Hearing Transcript.

[130]Mr. Jarvis' affirmative testimony is on pages 198-200 of the Commission's Hearing Transcript and his response to Commissioner Okun's questioning is on pages 204-205 of the Hearing Transcript.

[131]Mr. Hussey's affirmative testimony is on pages 200-203 of the Commission's Hearing Transcript and his response to Commissioner Okun's questioning is on pages 206-207 of the Hearing Transcript.

[132]Mr. Fritz' affirmative testimony is on pages 190-192 of the Commission's Hearing Transcript and his response to Commissioner Okun's questioning is on page 206 of the Hearing Transcript.

does not support any substitutability between the subject imports and the domestic product"[133] again demonstrates where the Panel has overstepped its authority by substituting its view of the evidence for that of the Commission. The responses of the four lumber purchasers (Florida - Rutenberg; Texas - Jarvis; Indiana and West - Hussey; and Massachusetts - Fritz) considered together shows that both SPF and SYP are used for each of the four major applications.[134]

While regional preferences exist – species often are used in close proximity to where they are milled – these preferences simply reflect the availability of species in certain areas, which is

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[133]Panel Decision II at 41, n.13.

[134]These responses were given to a question from Commissioner Okun at the Commission's hearing regarding which lumber species – SPF or SYP – is used for four major applications in their region. The responses were tabulated and included as Exhibit 1 to the Commission's first Remand Determination. See Hearing Transcript at 185-190 and 204-209. The Panel has referred to this Exhibit as the Commission's "chart." Panel Decision II at 41, n. 13.

affected by transportation costs.[135] [136] These regional preferences do not reflect a lack of substitutability but simply a predisposition toward locally-milled species.[137]

Specifically, these home builders and purchasers provided the following break-out by region of the products used for floor joists, wall/framing, headers, and trusses: Florida (Rutenberg): floor joists - SYP, wall/framing - SPF, headers - SYP, trusses - SYP[138]; Texas

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[135]USITC Pub. 3509 at II-8-9, V-2, V-3, and V-5. For example, in his affirmative testimony, Mr. Jarvis of Home Depot stated:

> There is a strong regional component to species preferences. The overwhelming majority of our customers around the country will not buy Southern Yellow Pine studs even if they are less expensive than Spruce because they do not provide the desired result in that application. The exception is in the southern regions where Southern Yellow Pine grows.
>
> Our customers buy many more SPF studs than SYP studs there even though the SYP is cheaper almost day in and day out. We do not sell a single Southern Yellow Pine stud anywhere else in the U.S. What this tells you is that in the South some builders prefer Southern Yellow Pine studs and will not switch. But even in the South, most builders prefer SPF and will not switch to a cheaper species like SYP.
>
> In the West and pockets of the Northeast builders prefer Green Doug Fir. In other regions some builders prefer SPF, some prefer Hem Fir, but most do not switch.

Hearing Transcript at 199.

[136]Hearing Transcript at 185-190 and 204-209; USITC Pub. 3509 at II-8 and II-9, INV-Z-049 (4/19/02) at II-11 and II-12, and NLBMDA/NAHB's Prehearing Brief at Exhs. 2, 3, 4, 6, 8, 9, 11, 13, 14 15, 16, 17, 21, and 23; Petitioners' Posthearing Brief at 5-6.

[137]We note that the evidence presented to the Commission, even by representatives of some of the so-called "Big Boxes" retailers, show that regional preferences reflect the local availability of species. See Remand Determination at 92, n. 269 citing INV-Z-049 (4/19/02) at II-11 and II-12; see also NLBMDA/NAHB's Prehearing Brief at Exhs. 2, 3, 4, 6, 8, 9, 11, 13, 14 15, 16, 17, 21, and 23; Petitioners' Posthearing Brief at 5-6.

[138]Hearing Transcript at 185-190 ("we have a Southern Yellow Pine sill plate . . . . This is a Southern Yellow Pine floor joist . . . this model will show Spruce and SBF [sic] going vertically on the walls. . . .We now have over the window, this will be called a header. We use Southern Yellow Pine for those in short and medium length. We will also use Southern Yellow Pine in forming the concrete foundation, and that wood can be taken from here, the form board,

(Jarvis): floor joists - SYP, wall/framing - SYP, headers - SYP, trusses - SYP;[139] Indiana and Northwest (Hussey): floor joists - SPF, wall/framing - SPF, headers - SPF, trusses - SPF[140]; Massachusetts (Fritz): floor joists - SPF, wall/framing - SPF, headers - SYP, trusses - SYP.[141]

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and used up here as a header over the windows. . . . the Southern Yellow Pine trusts [sic] in my market and in the Southeast and many other markets across the country, Southern Yellow Pine is the preferred product. We do not see our producers switching between Fir, Spruce, and Southern Yellow Pine. In other parts of the country there is a preference for other species, but in my market it's Southern Yellow Pine.") and 204 ("MR. RUTENBERG: This was actually done in D.C., an [sic] it was done without my direction. It just happens to be the same as what I would do in Florida with the exception of the header which would make you think that my practice is more widespread. It was done in D.C. without any direction from me. VICE CHAIRMAN OKUN: But other than the header it would be typical, the Southern Yellow Pine truss, the Spruce Pine Framing, the things you described would be typical of – MR. RUTENBERG: Yes, ma'am.").

[139]Hearing Transcript at 205 ("MR. JARVIS: Yes, ma'am. Ron Jarvis with the Home Depot. We do have certain pockets in the South where we do sell Southern Yellow Pine studs, but even if you look at Texas and Louisiana area we'll sell non-Southern Yellow pine studs four to one to Southern Yellow Pine even though Southern Yellow Pine is cheaper. VICE CHAIRMAN OKUN: But in Florida you could see this house with, I'm looking now at the wall framing with that says Spruce Pine Fir, that would be Southern Yellow Pine studs in some places? MR. JARVIS: Just in pockets of Texas. In Florida it's almost for us 99 percent of what we sell down there is SPF or another type of U.S. inland studs.").

[140]Hearing Transcript at 205-207 ("VICE CHAIRMAN OKUN: Okay. If I could have Mr. Hussey, Indiana, is that right? Liberty Homes are in Indiana? MR. HUSSEY: That's correct. Ed Hussey. VICE CHAIRMAN OKUN: If you were building this home in your region, how would it look different in terms of, give me the main structurals. The trusses would be – MR. HUSSEY: The trusses would be Spruce Pine Fir rather than Southern Yellow Pine and the headers generally also would be Spruce Pine Fir.". . . VICE CHAIRMAN OKUN: Representatives here, is there anyone who builds in the West? MR. HUSSEY: We build in the Northwest, in Oregon. . . .VICE CHAIRMAN OKUN: So in the West what would this structure look like, trusses, floor joist and frames? MR. HUSSEY: Again, our floor trusses, our roof trusses and our framing lumber would all be SPF.")

[141]Hearing Transcript at 206 ("MR. FRITZ: That's correct. Mr. Fritz from Greenfield, Massachusetts. Ours would be relatively the same except there would be no Southern Pine joists used in the floor framing for the home. That would be SPF, or as you see there, the manufactured product. The roof trusses in my case are all Southern Yellow Pine. We specify that product. And I do know the largest manufacturer of roof trusses in New England, I sure in Maine and probably in New England is Wood Structures from Bedeford, Maine, and they use

Far from the Commission's chart providing a "clear conflict with evidence," the chart tabulates the evidence – provided by these four lumber purchasers in response to direct questioning from a Commissioner, and that may conflict with their affirmative testimony – that SPF and SYP are each used interchangeably (and thus are substitutes) for floor joists, wall/framing, headers, and trusses. As the Federal Circuit has explained, the Commission's decision depends "on the expert judgment of the Commission based on the evidence of record."[142] And such substitution by the Panel has clearly been proscribed by the U.S. Supreme Court, even as to matters not requiring expertise.[143]

In addition, there was more substantial evidence in the record demonstrating the interchangeability of the species, some of which is confidential. In particular, we refer the Panel to the confidential results of the Annual Builders Survey by the National Association of Home Builders Research Center (NAHBRC) discussed on page 93 of our first Remand Determination. The results of this survey provides substantial evidence that SPF, SYP, and Douglas fir/hem fir are all used in such same construction applications as lumber joists, light frame exterior walls, roof trusses, and roof rafters.[144] This is further supported by responses to Commission questionnaires. A majority of purchasers (36 of 51) responding to the Commission questionnaire

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exclusive Southern Yellow Pine for trusses.").

[142]Matsushita, 750 F.2d at 933.

[143]Universal Camera, 340 U.S. at 488 (The Supreme Court has held that under the substantial evidence standard the court, or as in this case the reviewing panel, may not, "even as to matters not requiring expertise . . . displace the [agency's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.").

[144]NLBMDA/NAHB's Posthearing Brief at Exhibit 3 at 5, 10, and 15.

reported that U.S. and Canadian softwood lumber can be used in the same general applications, recognizing that performance characteristics and customer preferences place some limitations on interchangeability among species.[145]

When all the evidence provided by purchasers and home builders is considered, there is substantial evidence that subject imports and domestic species of softwood lumber are used in the same applications and that regional preferences merely reflect availability of species.[146] The evidence clearly demonstrates that virtually all Canadian lumber in the United States is employed for the same end uses for which domestic products compete. Canadian SPF and U.S. SYP are used for many of the same applications, and therefore these products compete. Moreover, Canada also exports Douglas fir, hem-fir, western red cedar, and a few other products; all of these species also are produced in the United States.[147]

We find, based on consideration of the entire record, including the evidence provided by purchasers and home builders, that Canadian softwood lumber and the domestic like product generally are interchangeable; subject imports and domestic species are used in the same applications; regional preferences do not reflect a lack of substitutability, but instead simply reflect a predisposition toward locally-milled species; there are other products that both countries

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[145]USITC Pub. 3509 at II-6, II-8, and Table II-5. In Commission questionnaire responses, 32 of 57 purchasers indicated that they have switched between different species of softwood lumber for use in the same application, citing availability and price as factors in their substitution decisions and citing most frequently substitution between Douglas fir, hem-fir, and SPF. Id. at II-8. Purchasers' questionnaire responses indicated that all eight major species groups are used in residential and commercial construction and in construction of prefabricated components, such as joists and trusses. Id. at Table II-5; Petitioners' Prehearing Brief, Vol. II at Exhibit 85.

[146]See Remand Determination at 90-94 and USITC Pub. 3509 at 25-27, 33, and 43, incorporated by reference here.

[147]USITC Pub. 3509 at Tables III-11 and VII-6.

produce that compete with each other; and evidence demonstrated that prices of different species have an effect on other species' prices,[148] particularly those that are used in the same or similar applications.

U.S. Overproduction Has Been Considerably Curbed, While Canadian Oversupply Has Not. The Panel claims that the Commission's conclusion as to likely price depressing effects "is too heavily dependent on the finding that the domestic industry has curbed oversupply, on which there is simply insufficient record evidence."[149] Yet it is the Panel, and not the Commission, that looks almost exclusively at an excerpt from a Bank of America publication regarding lumber oversupply.[150] [151] We, on the other hand, have relied on a variety of factors in

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[148]See Remand Determination at 89-90 and n.259; USITC Pub. 3509 at 27 and n.166, and 43, n.273.

[149]Panel Decision II at 38.

[150]See Remand Determination at 80-87 and 103-104. The Commission relied on U.S. and Canadian capacity, capacity utilization and production data.

[151]The Panel discounts the Bank of America report on the basis that it "is appended by a broad disclaimer as to accuracy and completeness of the report." Panel Decision II at 39; see also Panel Decision II at 49-50. We note that such disclaimers are not uncommon in industry analyst reports. For example, a very similar disclaimer is included in the RISI forecast relied on by the Panel (Panel Decision II at 31-32 and n. 9). The disclaimer of warranty in the RISI forecast states:

> Although RISI shall use its best efforts to provide accurate and reliable information, RISI does not warranty the accuracy thereof. RISI MAKES NO WARRANTIES, EXPRESSED OR IMPLIED, AS TO THE RESULTS TO BE OBTAINED FROM THE USE OF ITS SERVICES AND MAKES NO WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. RISI SUPPLIES ALL SERVICES ON AN "AS IS" BASIS. If notified of an error in its Services, RISI shall take reasonable steps to correct such error.

RISI Lumber Commentary – March 2002 at 14, in Petitioners' Posthearing Brief, Vol. II. Appendix H, Exhibit 28 at 14; see also CLTA's Posthearing Brief, Vol. 2, Tab R at 1-3 (this RISI forecast is referred to by CLTA in responses to Commission questions).

reaching our conclusion that the U.S. industry had restrained its overproduction.

While domestic overproduction had contributed to adverse price effects in 2000, the evidence demonstrates that it is no longer contributing to excess supply, in contrast to the continued Canadian oversupply of the U.S. market. The record indicates that, at the end of the period of investigation, U.S. producers had curbed their production. Domestic production capacity was fairly level during the period of investigation, following a small but steady increase between 1995 and 1999, as apparent consumption increased.[152] Domestic capacity utilization was 87.4 percent in 2001 and, with the exception of a peak in 1999 at 92 percent, had consistently held this level from 1995-2001.[153] In contrast, Canadian capacity utilization had declined in 2001 to 83.7 percent, a rate substantially lower than that reported for any other year in the 1995-2001 period.[154] Thus, in 2001, excess Canadian capacity had increased to 5,343

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[152]USITC Pub. 3509 at Table III-6 and C-1 (public data). Public data show domestic producers' production capacity at 39,800 mmbf in 1999, 40,100 mmbf in 2000, and 40,040 mmbf in 2001. Id. Domestic producers' questionnaire responses reported production capacity of 22,847 mmbf in 1999, 24,233 mmbf in 2000, and 24,709 mmbf in 2001, but the industry coverage for those responses differs from that for, and is not necessarily comparable to, the public data. Id. at Table III-7 and C-1.

[153]USITC Pub. 3509 at Tables III-6 and C-1 (public data). Domestic capacity utilization, based on public data, was 86.1 percent in 1995, 87.6 percent in 1996, 89.9 percent in 1997, 88.5 percent in 1998, 92.0 percent in 1999, 89.7 percent in 2000 and 87.4 percent in 2001. Id. Domestic producers' questionnaire responses reported similar capacity utilization rates: 92.8 percent in 1999, 88.5 percent in 2000, and 86.1 percent in 2001. Id. at Tables III-7 and C-1.

[154]USITC Pub. 3509 at Tables VII-1 (public data). Canadian capacity utilization, based on public data, was 87.8 percent in 1995, 87.7 percent in 1996, 87.4 percent in 1997, 87.3 percent in 1998, 90.5 percent in 1999, 88.9 percent in 2000 and 83.7 percent in 2001. Id. Canadian producers' questionnaire responses reported similar capacity utilization rates: 90.3 percent in 1999, 88.8 percent in 2000, 84.4 percent in 2001 and projections of 88.5 percent in 2002, and 90.4 percent in 2003. Id. at Table VII-2.

mmbf, which was equivalent to 10 percent of U.S. apparent consumption.[155] Moreover, in spite of this decline in capacity utilization rates from 90 percent in 1999 to about 84 percent in 2001, Canadian producers projected slight increases in capacity, increases in production, and a return of capacity utilization to 90.4 percent in 2003.[156] We recognize that while production data for the 2000-2001 period (public data) shows that both Canadian and U.S. production declined by similar quantities, the evidence also demonstrates that Canadian exports to the U.S. market increased for this period.[157] Moreover, Canadian producers projected increases in production of 8.9 percent from 2001 to 2003.[158]

Thus, Canadian producers expected to further increase their ability to supply the U.S. softwood lumber market. In contrast, evidence regarding production, in addition to evidence from industry analysts indicate that U.S. production had been curbed at the end of the period of investigation. Nevertheless, if the Commission had been provided sufficient time to conduct a thorough remand investigation, we would have reopened the record to attempt to collect additional information regarding domestic and Canadian supply in the first quarter of 2002 and in the imminent future.

In discussing the Bank of America report,[159] the Panel apparently assumes, without any

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[155]USITC Pub. 3509 at Tables VII-1 and C-1.

[156]USITC Pub. 3509 at Table VII-2.

[157]USITC Pub. 3509 at Tables III-6 and VII-1.

[158]USITC Pub. 3509 at Table VII-2.

[159]The statement at issue in the report is as follows:

The U.S. industry was widely criticized in years passed for lumber overproduction in order to secure wood chips for pulp and paper manufacturing. This behavior has been

citation, that Canadian lumber mills grind up whole trees, i.e., sawtimber or sawlogs,[160] when the demand for wood chips for paper production is high, rather than produce more lumber in order to secure more of the byproduct – wood chips to meet the demand for paper production. Lumber mills, which process sawlogs, produce chips as a by-product of lumber production. Slabs and edgings, the outer circumference of the sawlog, are made into chips for use in pulp and paper mills.[161] Lumber mills do not cut up the entire sawlog into chips because the revenue from the sale of wood chips would not cover the cost of the sawlog, let alone the processing. That is, the revenue from the sale of the by-product wood chips at $38.62/mbf in 2001[162] would not cover the cost of U.S. sawtimber, averaging $260/mbf in 2001; this price is for the tree which still has to be harvested to obtain a sawlog.[163] There are separate wood chip mills which process much less expensive pulpwood logs into wood chips for pulp and paper mills; the revenue from the wood

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> curbed considerably here, but remains a problem in Canada, where Provincial forestry officials must also protect pulp mill employment, which is the lifeblood of many small towns. However, as the Canadian softwood lumber industry ships 65% of its output to the U.S., its general failure to manage production to new order volumes and its capacity growth in its eastern provinces have both undermined prices in recent years.

See, e.g., Bank of America, "Wood & Building Products Quarterly," at 11 (Nov. 2001) (emphasis added) in Petitioners' Posthearing Brief at 2 and Appendix H, Exh. 2 at 11.

[160]At the February 25, 2004 oral argument in this proceeding, Panelist Mastriani stated that "the only way I can interpret the Bank of America report is that they took the whole damn tree, cut it up, made it into wood chips, and it all went to the mills. That's the only way I can read that statement." Certain Softwood Products from Canada, USA-CDA-2002-1904-07, Oral Argument Transcript at 247-248 (February 25, 2004).

[161]USITC Pub. 3509 at Figure I-1.

[162]USITC Pub. 3509 at Table VI-2.

[163]Bank of America, "Wood & Building Products Quarterly," at 9 (Nov. 2001) in Petitioners' Posthearing Brief, Appendix H, Exh. 2 at 9.

chips will cover the cost of the pulpwood log. Wood chip mills do not process sawlogs, and thus do not produce lumber, but do cut up the entire pulpwood log into wood chips for use in pulp and paper production.[164] The Panel apparently did not recognize the difference between sawlogs compared to pulpwood and lumber mills compared to wood chip mills in reviewing the Bank of America report. Yet, the Bank of America report clearly distinguishes between timber prices used for lumber production and timber prices used for pulpwood.[165]

Finally, we note the Panel is equating "curbed" to "eliminated." However, it is the Commission, not the Panel, that has been tasked with interpreting the evidence, including whether "curbed" means "eliminated," as the Panel contends, or "a check, restraint, control," which is the Commission's interpretation.[166]

CONCLUSION

In the original Views of the Commission, we assessed the condition of the domestic industry, as incorporated by reference here.[167] We found that the domestic industry "is vulnerable to injury in light of declines in its performance over the period of investigation, particularly its financial performance."[168] In brief, the evidence shows that many performance

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[164]Sawlogs refer to logs that are large enough to be cut into lumber. Pulpwood refers to timber harvested from trees that are considerably smaller than sawlogs and cut primarily to be a source of wood fiber for the production of paper, fiberboard and other fiber products.

[165]See Bank of America, "Wood & Building Products Quarterly," at 8-13 (Nov. 2001) in Petitioners' Posthearing Brief, Appendix H, Exh. 2 at 8-13.

[166]The term "curb" is defined to mean "check, restraint, control." *Webster's Third New International Dictionary*, Merriam-Webster, Inc.: 1981, at 555.

[167]USITC Pub. 3509 at 37-39.

[168]USITC Pub. 3509 at 37. The Commission's analysis of the vulnerable condition of the domestic industry is on pages 36-39 of the USITC Pub. 3509.

indicators declined significantly from 1999 to 2000, and then declined slightly or stabilized from 2000 to 2001.[169] With respect to the domestic industry's financial performance in particular, the evidence also generally shows declines during the period of investigation, with a dramatic drop from 1999 to 2000, as prices declined.[170]

We consider the consequent impact of the likely significant volume of imports, likely substantial increases in imports, and their likely price effects, on the domestic industry. The evidence demonstrates that subject imports, already at significant levels, will continue to enter the U.S. market at significant levels and are projected to further increase substantially. The additional subject imports will increase the excess supply in the market, putting further downward pressure on prices. Prices at the end of the period of investigation, in the third and fourth quarters of 2001, had substantially declined to levels as low as they had been in 2000. Evidence regarding likely excess supply, which generally caused the substantial price declines in 2000 that led to the deterioration in the condition of the domestic industry, indicates that U.S. producers have curbed their production, but that overproduction remains a problem in Canada and that the likely market for this excess production is the U.S. market. Thus, we find that subject imports were likely to increase substantially and were entering at prices, particularly after substantial declines at the end of the period of investigation, that are likely to have a significant depressing or suppressing effect on domestic prices, are likely to increase demand for further imports, and thereby adversely impact the U.S. industry. The ITC's findings support the existence of a threat of material injury caused by subject imports.

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[169]See USITC Pub. 3509 at 37-38.

[170]See USITC Pub. 3509 at 38-39.

For the foregoing reasons, we determine that an industry in the United States is threatened with material injury by reason of imports of softwood lumber from Canada that are subsidized and sold in the United States at less than fair value.[171]

[171]Based on the record of these investigations, we do not find that material injury by reason of subject merchandise that is subsidized and sold at less than fair value would have been found but for any suspension of liquidation of entries of such merchandise. 19 U.S.C. §§ 1671d(b)(4)(B) and 1673d(b)(4)(B).