VIEWS OF THE COMMISSION IN RESPONSE TO THE PANEL DECISION AND ORDER OF AUGUST 31, 2004[1] [2]

By decision dated August 31, 2004, a United States-Canada Binational Panel remanded the Commission's determinations on remand in Softwood Lumber from Canada, Inv. Nos. 701-TA-414 and 731-TA-928 (Remand) (Second) (June 10, 2004), with explicit instructions directing "the Commission to make a determination consistent with the decision of this Panel that the evidence on the record does not support a finding of threat of material injury."[3] In its decision, the Panel "precludes the Commission on remand from undertaking yet another analysis of the substantive issues" and therefore the only determination consistent with the Panel's decision is a negative threat finding.[4] [5] [6]

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[1]Commissioner Pearson was not a member of the Commission at the time of the original determinations and had only recently joined the Commission when the first remand determinations were reached. He finds it curious and somewhat frustrating that the Panel has exerted its authority in ways that effectively have precluded him from making substantive determinations on the issues of these investigations. The extremely short deadlines imposed by the Panel and the Panel's explicit instruction not to undertake additional substantive analysis have prevented him from prudently discharging his responsibilities as a Commissioner. He joins with his fellow Commissioners in this analysis of the law and of the Commission's responsibilities in this situation.

[2]Chairman Stephen Koplan concurs with the views of his colleagues but respectfully dissents from their conclusion that they issue a determination, consistent with the Panel's decision, that the U.S. softwood lumber industry is not threatened with material injury by reason of subject imports from Canada. See Dissent of Chairman Koplan at 14.

[3]Certain Softwood Lumber Products from Canada, USA-CDA-2002-1904-07, Second [sic] Remand Decision of Panel (August 31, 2004) ("Panel Decision III") at 7 and 13.

[4]Panel Decision III at 4 and 7.

[5]The Panel, in compelling negative determinations, states:

The Panel goes on to state that the Commission is "unwilling to accept this Panel's review authority under Chapter 19 of the NAFTA."[7] That review authority permits the Panel to either uphold a Commission determination or to remand the determination to the Commission for action not inconsistent with the Panel's decision.[8] The Commission has never disputed the Panel's authority to review its determinations, pursuant to the substantial evidence standard.[9] But the proper role of the Panel is not to review the evidence de novo and make its own factual findings, as this Panel has done here. United States law, and the express authority provided to the Panel under the North American Free Trade Agreement ("NAFTA"),[10] simply do not permit the Panel to refind the evidence and compel a negative determination.[11]

> As this Panel specifically precludes the Commission on remand to undertake yet another analysis of the substantive issues, the only remedy that is consistent with the mandate of Rule 2 of the NAFTA Article 1904 Panel Rules to secure the just, speedy review of final determinations is for this Panel to issue an Order explicitly instructing the Commission to make a determination consistent with the decision of this Panel.

Panel Decision III at 7.

[6]Chairman Koplan disagrees that the Panel's decision compels the Commission to issue a negative threat determination. See Dissenting Views of Chairman Koplan at 14.

[7]Panel Decision III at 3.

[8]NAFTA Article 1904.8.

[9]Contra Panel Decision III at 3.

[10]NAFTA Article 1904.8 provides that "[t]he Panel may uphold a final determination or remand it for action not inconsistent with the panel's decision."

[11]The U.S. Supreme Court recently emphasized that when a court is reviewing agency action "the proper course, except in rare circumstances, is [for the court] to remand to the agency for additional investigation or explanation." Immigration and Naturalization Service v. Ventura, 123 S.Ct. 353, 355 (2002). The Court reaffirmed the fundamental principle of judicial review of agency action:

The Commission has accepted the Panel's authority to review its determinations throughout this proceeding. In its initial remand to the Commission, the Panel directed the Commission to consider specific issues related to the threat of material injury.[12] In that decision, the Panel expressly instructed the Commission to issue its remand based on the evidence already on the administrative record.[13] Despite the fact that it is solely within the Commission's authority to reopen the record to collect additional data to address issues on remand as directed by a court or a Panel,[14] the Commission complied fully with the instructions of the Panel and issued its remand determinations addressing each aspect of the Panel's decision while relying only on the original record.[15] The Commission discussed in

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when Congress has entrusted a particular decision to an agency by statute, "judicial judgment cannot be made to do service for an administrative judgment." Id., citing SEC v. Chenery Corp., 318 U.S. 80, 88 (1943). Moreover, this case is not the "exceptional situation in which [a] crystal-clear [agency] error renders a remand an unnecessary formality." National Labor Relations Board v. Food Store Employees Union, 417 U.S. 1, 8 (1974). See also Nippon Steel Corp. v. International Trade Commission, 345 F.3d 1379, 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, 370 F.3d 1108, 1111, n.2 (Fed. Cir. 2004).

[12]Certain Softwood Lumber Products from Canada, USA-CDA-2002-1904-07, Decision of the Panel at 112-113 (September 5, 2003) ("Panel Decision I").

[13]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." Panel Decision I at 112.

[14]Nippon Steel, 345 F.3d at 1382 (Fed. Cir. 2003). Accord Carbon and Certain Alloy Steel Wire Rod from Canada, USA-CDA-2002-1904-09 (Aug. 12, 2004) at 14 and n.30.

[15]Softwood Lumber from Canada, Inv. Nos. 701-TA-414 and 731-TA-928 (Remand), USITC Pub. 3658 (Dec. 2003) (public or non-proprietary version). References throughout this submission are to the proprietary version of the first remand determinations, which the Commission submitted to the Panel on December 15, 2003 (referred to herein as "First Remand Determination").

its first remand determination why the record evidence supported a finding of threat of material injury,[16] and why each of the alleged potential other causes of injury raised by the Panel (excess supply from the domestic industry, third country imports, engineered wood products, alleged insufficient timber supplies and cyclical demand/housing construction cycles) did not rise to a level that would break the causal link between the significant volume of low-priced imports from Canada and the threat of material injury to the U.S. softwood lumber industry.[17] In so doing, the Commission clearly accepted the review authority of the Panel as provided in the NAFTA and fully complied with all of the instructions of the Panel.

In its second decision, however, the Panel again reweighed all of the evidence in the record and reached its own conclusions about the statutory factors the Commission is required to consider, determining on its own how much weight to give to each piece of evidence. For example, the Panel again made its own finding that the increase in subject imports would be "minimal"[18] despite the Commission's having found the existing volume of subject imports to be already significant and a likely substantial increase in that volume. In so doing, the Panel concluded that the evidence demonstrating a 9 to 12 percent increase in the volume of imports during the period when there were no restraints on imports was "of little significance"[19] despite the fact that it was the most direct evidence of how imports

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[16]First Remand Determination at 45-101.

[17]First Remand Determination at 84-87 and 101-114; see also Second Remand Determination at 46-50.

[18]Certain Softwood Lumber Products from Canada, USA-CDA-2002-1904-07, Remand Decision of the Panel at 20 (circulated April 29, 2004) ("Panel Decision II"); Panel Decision I at 84.

[19]Panel Decision II at 29.

behaved when not constrained by either the Softwood Lumber Agreement or countervailing duties.[20] Moreover, the Panel also faulted the Commission for not relying on "new" evidence or data, despite explicitly instructing the Commission not to collect any new evidence, and instructing the Commission to rely solely on the already existing record evidence.[21]

The Commission then responded again to the Panel's decision, addressing at some length each of the four conclusions of the Panel and citing additional evidence in the record to support the Commission's conclusions.[22] In so doing, the Commission once again clearly accepted the review authority of the Panel and the right of the Panel to remand determinations to the Commission.

While claiming it "has thoroughly analyzed the Commission's views in the *Second Remand Determination*,"[23] the Panel provides no analysis of the substance of that Commission determination, although the remand involved specific issues of substantial evidence to which the Commission fully responded. The Panel's lack of substantive review is apparently based on its claim that "the

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[20]Softwood Lumber from Canada, Inv. Nos. 701-TA-414 and 731-TA-928 (Remand) (Second) (June 10, 2004) ("Second Remand Determination") at 22-23 ("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' 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.").

[21]See, e.g., Panel Decision II at 15, 19, and 22.

[22]Softwood Lumber from Canada, Inv. Nos. 701-TA-414 and 731-TA-928 (Remand) (Second) (June 10, 2004).

[23]Panel Decision III at 4.

Commission's decision has added nothing to its views;"[24] a claim that simply is not true.[25]

The Commission has undertaken the responsibilities explicitly delegated to it by Congress to weigh the evidence, make the complex determinations required by law, and ensure that its determinations are supported by substantial evidence. The Commission rejects the Panel's branding such actions as "an effort to preserve its finding of threat of material injury."[26] It is the Panel that has preordained the outcome as negative determinations and ignored the Commission's analysis and exposition of record evidence that addressed the Panel's concerns in its prior decisions. The Commission consistently has sought to ensure that substantial evidence supports any Commission determination, whether affirmative or negative.

By failing to apply the correct standard of review and by substituting its own judgment for that of the Commission, the Panel has violated U.S. law and exceeded its authority as established by the NAFTA.[27] 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;[28] that

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[24]Panel Decision III at 4.

[25]See Second Remand Determination at 20-21, 23-24, 34-36, 39-44, and 48-50.

[26]Panel Decision III at 3.

[27]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. 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).

[28]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 "unsupported by

is, the question for the Panel is "does the administrative record contain substantial evidence to support it and was it a rational decision?"[29] Congress has allocated the task of making the determinations solely to the Commission.[30]

Underlying the Panel's position is the premise that there is only one "correct" result to these investigations. But the basic tenet of the substantial evidence standard is that there may be many conclusions, even contradictory conclusions, that can be drawn from the evidence, with each conclusion supported by substantial evidence.[31]

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substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i); 19 U.S.C. § 1516a(a)(2)(B)(i). 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).

[29]Matsushita Electric Industrial Co. v. United States, 750 F.2d 927, 933 (Fed. Cir. 1984).

[30]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.

U.S. Steel Group v. United States, 96 F.3d 1352, 1357 (Fed. Cir. 1996). Moreover, the Supreme Court in Consolo v. Federal Maritime Commission held that Congress has freed the reviewing courts from the "difficult task of weighing the evidence," instead delegating that task to the expertise of the relevant agency so as "to minimize the opportunity for reviewing courts to substitute their discretion for that of the agency." 383 U.S. 607, 620-621 (1966).

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

While the Panel may have "articulated the appropriate standard of review" in its decisions,[32] it must also *apply* the appropriate standard of review. It has not done so. Simply stated, in applying the appropriate standard of review, the Panel is not permitted to substitute its view of the record for the Commission's judgment, as the Panel has done here.[33]

This Panel has done exactly what the Federal Circuit held exceeded the Court of International Trade's (CIT) authority, i.e., refind the facts[34] and provide the Commission instructions compelling it to make negative determinations on causation and material injury,[35] instead of returning the case to the Commission for further consideration.[36] The Federal Circuit, whose decisions are binding upon the

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[32]Panel Decision III at 4.

[33]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 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).

[34]See, e.g., Panel Decision II at 23 and 29. For example, while the Panel recognized "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 . . . [was] supported by substantial evidence," the Panel substituted its view that "this finding is of little significance" for the Commission's view that it is a clear indicator and "highly significant to the Commission's ultimate conclusion." Compare Panel Decision II at 29 with Second Remand Determination at 22-23. In another example, the Panel reweighed the evidence and made a finding "that the 2.8 percent increase in volume of subject imports is neither significant nor substantial." Panel Decision II at 23; Panel Decision I at 70.

[35]Chairman Koplan disagrees that the Panel's decision compels the Commission to issue a negative threat determination. See Dissenting Views of Chairman Koplan at 14.

[36]Nippon Steel, 345 F.3d at 1381 (Fed. Cir. 2003); accord Altx, Inc. v. United States, 370 F.3d at 1111, n.2 (Fed. Cir. 2004).

Panel, rejected a de facto reversal of the Commission's determination by the CIT as overstepping that lower court's authority.[37]

While specific remand instructions may be appropriate, depending on the facts and issues involved, instructions directing the outcome have been held by the Federal Circuit, most recently in Nippon Steel, to exceed even the CIT's authority, in spite of the CIT's authority, in "rare circumstances," to reverse, an authority the Panel has not been provided.[38] Tellingly, the cases relied upon by the Panel for the alleged authority to direct the outcome do not stand for the premise that the Panel should weigh the evidence and make findings on the merits, nor do they approve a remand that directs the outcome,[39] unless the only issue is the correct application of a legal principle that has not been followed by the agency. None of the issues remanded to the Commission in this case, however,

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[37]In Nippon Steel, the Federal Circuit stated:

> Under the statute, only the Commission may find the facts and determine causation and ultimately material injury – subject, of course, to Court of International Trade review under the substantial-evidence standard. The Court of International Trade . . . went beyond its statutorily-assigned role to "review" . . . . [and] abused its discretion by not returning the case to the Commission for further consideration. See, e.g., Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985). Thus, to the extent the Court of International Trade engaged in refinding the facts (e.g., by determining witness credibility), or interposing its own determinations on causation and material injury itself, the Court of International Trade, we hold, exceeded its authority. . . . [and] should have remanded once again for further proceedings rather than instructing entry by the Commission of a negative injury determination.

Nippon Steel, 345 F.3d at 1381-1382 (Fed. Cir. 2003) (emphasis added).

[38]See Altx, Inc. v. United States, 370 F.3d at 1111, n.2 (Fed. Cir. 2004) (Moreover, the Federal Circuit recently opined that "an outright reversal without a remand does not appear to be contemplated by the statute. . . .").

[39]Chairman Koplan disagrees that the Panel's decision compels the Commission to issue a negative threat determination. See Dissenting Views of Chairman Koplan at 14.

involves a legal principle, but rather involves whether there is substantial evidence supporting the Commission's findings.

We have provided the Panel with substantial evidence and a thorough analysis of that evidence,[40] which demonstrates that the volume of subject imports from Canada is significant, over 18,000 mmbf in 2001,[41] comprising over one-third of the U.S. market and likely to increase substantially from those significant levels;[42] 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. We recognize that the Panel, despite all of the evidence on the record supporting these conclusions, disagrees that substantial evidence supports our affirmative finding. The Panel's decision must therefore be read as either finding that a reasonable mind could not have come to the conclusion that this large and undisputed volume of imports at these prices could threaten injury to the domestic industry,[43] or that the Panel has not actually

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[40]Commissioner Pearson has not made a determination on the record in these investigations and thus takes no position as to the content of the record or its ability to support any particular determination.

[41]USITC Pub. 3509 at Table C-1.

[42]Indeed, 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. Second Remand Determination at 16 and 17.

[43]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

applied the standard of review it was required to apply.

Moreover, in setting the procedural parameters throughout this proceeding, the Panel has repeatedly directed the Commission to base its remand determinations on the existing original record; imposed extremely short deadlines for the second and third remands;[44] effectively barred the Commission from reopening the record to gather additional information to address concerns raised by the Panel; and in its latest decision, went so far as to "preclude" the Commission from undertaking any substantive analysis on remand. The Panel has on the one hand prevented the Commission from reopening the record to obtain new data responsive to the Panel's concerns and on the other, chastised the Commission for not presenting any "new" evidence. 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 NAFTA panels.[45] We did not reopen the record in the first remand from this Panel,

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(1951), quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

[44]For example, the Commission was first provided with the Panel's Second Decision (over 50 pages in length) on April 29, 2004. Notwithstanding that fact, the Commission was informed by a *Federal Register* notice published on May 5, 2004 (69 Fed. Reg. 25068, dated May 5, 2004) that its remand determination was due on May 10, 2004 – only 11 calendar days from the date on which the Panel's decision was first provided to the Commission and only 5 days from publication in the *Federal Register*. Moreover, after denying the Commission's requests for an extension of time and for reconsideration, the Panel required the Commission to conduct its second remand investigations and draft its determinations in a total of eight days.

[45]In vacating a 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, 345 F.3d at 1382 (Fed. Cir. 2003). Accord Carbon and Certain Alloy Steel Wire Rod from Canada, USA-CDA-2002-1904-09 (Aug. 12, 2004) at 14 and n.30 ("the Commission does, indeed, have the authority and discretion to reopen the administrative record in response to a remand determination. . . .").

specifically because the Panel directed us not to do so[46] and we believed at that time we could adequately respond based on the original record.[47] 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 responded 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.[48] The Commission clearly stated its intent to reopen the record on remand had the Panel allowed adequate time for that process.[49] Contrary to the Panel's assumptions, reopening of the record was designed to collect additional data to address the Panel's concerns set forth in its previous remands.[50]

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[46]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." Panel Decision I at 112.

[47]In its June 2, 2004 order, the Panel stated that we could not at that point reopen the record because we did not do so in our first remand investigations. In other words, the Commission's good faith efforts to comply with the Panel's explicit instructions in the first remand have continued to be used against the Commission to confine its scope of action. Panel's Decision and Order at 3 (June 2, 2004). See also Panel Decision on Motion at 4 (dated May 18, 2004).

[48]Second Remand Determination at 9-10.

[49]The time restraints imposed by the Panel on the Commission, in requiring it to conduct its second remand investigation and draft its determination in a total of eight days, precluded the Commission from reopening the record to gather more information in order to address concerns raised by the Panel in its second decision. The Panel's imposition throughout this proceeding of extremely short deadlines for any Commission action appears to be an attempt to limit the Commission's authority to discharge its duties under the antidumping and countervailing duty statutes.

[50]While we believe that substantial evidence has supported our findings, the Commission does not presuppose what its findings would be if more evidence was collected to address the Panel's concerns and neither should the Panel. The Commission would weigh the evidence, as it has done throughout this proceeding, and make its findings and determination accordingly. But to do so, the Commission must have sufficient time to determine the additional information to collect, provide an

In sum, in its latest decision, the Panel has left no doubt that it has substituted its own judgment for that of the Commission and has decided that there can be only one outcome to these investigations – negative threat of material injury determinations. The Commission does not question the Panel's authority as delineated under the NAFTA and U.S. law. It is the Panel's substitution of its judgment for that of the Commission regarding what evidence the Commission is permitted to examine, what weight to give to that evidence, and, most importantly, what conclusions to draw from that evidence, with which the Commission disagrees.

Conclusion

The Panel's Decision and Order can only be seen as a reversal of the Commission's affirmative determination of threat of material injury, despite the fact that neither the NAFTA nor U.S. law gives the Panel the authority to reverse the Commission's determination in these circumstances. As such, the Panel's decision signals the end of this Panel proceeding.

Because the Commission respects and is bound by the NAFTA dispute settlement process, we issue a determination, consistent with the Panel's decision, that the U.S. softwood lumber industry is not threatened with material injury by reason of subject imports from Canada.[51] In so doing, we disagree with the Panel's view that there is no substantial evidence to support a finding of threat of material

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opportunity for parties to comment on that additional information, weigh the evidence, make its findings, and prepare a thorough explanation of its reasoning.

[51]Because the Panel has precluded the Commission from engaging in any analysis of substantive issues, the Commission has not reached and cannot reach any determination regarding whether there is substantial evidence to support this negative determination.

injury[52] and we continue to view the Panel's decisions throughout this proceeding as overstepping its authority, violating the NAFTA, seriously departing from fundamental rules of procedure, and committing legal error.

Chairman Stephen Koplan's Dissent

While I join in the Views of the Commission, I dissent from my colleagues' determination. The Views make clear that the enabling NAFTA Act, United States statutes and relevant case law, establish that the Panel lacks the authority to conduct an impermissible *de novo* review of the record and substitute its judgment for that of the Commission. The Panel's remand with specific instructions which attempt to compel a reversal, exceeds the Panel's authority under both the substantial evidence standard and NAFTA. I cannot accede to the Panel's instructions, which are contrary to the law. Having weighed the evidence before the Commission and having provided careful analysis of that evidence initially and in response to the prior remand instructions, and having provided the Panel with a determination based on the record, I again determine that the U.S. softwood lumber industry is threatened with material injury by reason of imports of softwood lumber from Canada.

[52]Commissioner Pearson has not made a determination on the record in these investigations and thus takes no position as to the content of the record or its ability to support any particular determination.