

**UNITED STATES – INVESTIGATION OF THE  
INTERNATIONAL TRADE COMMISSION IN  
SOFTWOOD LUMBER FROM CANADA**

***Report of the Panel***

The report of the Panel on *United States-Investigation of the International Trade Commission in Softwood Lumber from Canada* is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 22 March 2004 pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/452). Members are reminded that in accordance with the DSU only parties to the dispute may appeal a panel report. An appeal shall be limited to issues of law covered in the Panel report and legal interpretations developed by the Panel. There shall be no *ex parte* communications with the Panel or Appellate Body concerning matters under consideration by the Panel or Appellate Body.

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## I. INTRODUCTION

1.1 On 20 December 2002, Canada requested consultations with the United States pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("the DSU"), Article XXII of GATT 1994, Article 17 of the Agreement on Implementation of Article VI of GATT 1994 ("the Anti-Dumping Agreement"), and Article 30 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement") concerning, *inter alia*, the United States International Trade Commission's (USITC) investigation and final determination in Softwood Lumber from Canada.<sup>1</sup> The United States and Canada consulted on 22 January 2003, but failed to settle the dispute.

1.2 On 3 April 2003, Canada requested the Dispute Settlement Body ("the DSB") to establish a panel pursuant to Articles 4 and 6 of the DSU, Article XXIII of the GATT 1994, Article 17 of the Anti-Dumping Agreement and Article 30 of the SCM Agreement.<sup>2</sup>

1.3 At its meeting on 7 May 2003, the DSB established a panel in accordance with Article 6 of the DSU to examine the matter referred to the DSB by Canada in document WT/DS277/2. At that meeting the parties to the dispute also agreed that the panel should have standard terms of reference. The terms of reference are, therefore, the following:

"To examine, in the light of the relevant provisions of the covered agreements cited by Canada in documents WT/DS277/2, the matter referred to the DSB by Canada in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

1.4 On 12 June 2003, Canada requested the Director-General to determine the composition of the panel, pursuant to paragraph 7 of Article 8 of the DSU. On 19 June 2003, the Director-General composed the Panel as follows:<sup>3</sup>

Chairman: H.E. Mr. Hardeep Singh Puri

Panellists: Mr. Paul O'Connor

Ms. Luz Elena Reyes de la Torre

1.5 The European Communities, Japan and Korea reserved their rights to participate in the panel proceedings as third parties.

1.6 The Panel met with the parties on 4-5 September 2003 and on 7 October 2003. It met with the third parties on 5 September 2003.

## II. FACTUAL ASPECTS

2.1 This dispute concerns the investigation and determination of the USITC in Softwood Lumber from Canada and the final definitive anti-dumping and countervailing duties applied following the final determination.

2.2 In this case, the USITC instituted preliminary anti-dumping and countervailing duty investigations in response to a petition filed on 2 April 2001 on behalf of the US softwood lumber industry. In the preliminary phase, the USITC determined, on 16 May 2001, that there was a reasonable indication that an industry in the United States was threatened with material injury by

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<sup>1</sup> WT/DS277/1.

<sup>2</sup> WT/DS277/2.

<sup>3</sup> WT/DS277/3.

reason of imports from Canada of softwood lumber that were alleged to be subsidized by the Government of Canada and sold in the United States at less than fair value ("LTFV").<sup>4</sup>

2.3 Subsequent to United States Department of Commerce's ("USDOC") affirmative preliminary determination that imports of softwood lumber from Canada were subsidized and sold in the United States at dumped prices, the USITC instituted the final phase of its investigations.

2.4 On 16 May 2002, the USITC unanimously determined that an industry in the United States was 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.<sup>5</sup> On 22 May 2002, the USDOC issued antidumping and countervailing duty orders on imports of softwood lumber from Canada found by the USDOC to be subsidized and sold in the United States at LTFV.<sup>6</sup>

2.5 In its final determination, the USITC found a single domestic like product consisting of softwood lumber products. Based on the domestic like product determination, the USITC concluded that there was a single domestic industry, which included all producers of softwood lumber in the United States. The USITC found that several conditions of competition pertinent to the softwood lumber industry were relevant to its analysis.<sup>7</sup> In particular, these conditions included the recently expired United States/Canada Softwood Lumber Agreement ("SLA"); demand, including factors affecting demand, actual demand data and forecasts; supply conditions; species of lumber and substitutability; prices; and integration of the North American lumber market. The USITC determined that the domestic softwood lumber industry was not materially injured by reason of subject imports from Canada found to be sold at LTFV and to be subsidized, but found that there was a threat of material injury by reason of such imports.

2.6 The USITC found that the domestic industry producing softwood lumber was vulnerable to injury in light of declines in its performance over the period of investigation, particularly its financial performance. The USITC noted that the USDOC had determined that there were 11 programmes that conferred countervailable subsidies to Canadian producers and exporters of softwood lumber, including: the Provincial Stumpage programmes in the Provinces of Quebec, British Columbia, Ontario, Alberta, Manitoba, and Saskatchewan; two programmes administered by the Government of Canada; two programmes administered by the Province of British Columbia; and one programme administered by the Province of Quebec. The USITC found that subject imports were likely to increase substantially based on: Canadian producers' excess capacity and projected increases in capacity, capacity utilization, and production; the export orientation of Canadian producers to the US market; the increase in subject imports over the period of investigation; the effects of expiration of the SLA; subject import trends during periods when there were no import restraints; and forecasts of strong and improving demand in the US market. The USITC found that there was a moderate degree of substitutability between subject imports of softwood lumber from Canada and the domestic like product, and that prices of different species affected the prices of other species. Given its finding of likely significant increases in subject import volumes, and its finding of at least moderate substitutability between subject imports and domestic product, the USITC concluded that subject imports were likely to have a significant price depressing effect in the immediate future. The USITC recognized that while inventories generally were not substantial in the softwood lumber industry, Canadian producers' inventories as a share of production had increased and were consistently higher than that reported by US producers during the period of investigation. Finally, the USITC noted that a number of domestic producers had reported actual and potential adverse effects on their development

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<sup>4</sup> 66 Fed. Reg. 28541 (23 May 2001). (CDA-4).

<sup>5</sup> 67 Fed. Reg. 36022 (22 May 2002). (CDA-2) and the USITC Report in Softwood Lumber from Canada, Investigations Nos. 701-TA-414 and 731-TA-928 (Final), Publication 3509, (May 2002).

<sup>6</sup> 67 Fed. Reg. 36068-36077 (22 May 2002). (CDA-2).

<sup>7</sup> USITC Report at 21-27 (Exhibit CDA-1).

and production efforts, growth, investment, and ability to raise capital due to subject imports of softwood lumber from Canada.

2.7 Thus, the USITC determined that further significant increases in dumped and subsidized imports were imminent, that these imports were likely to exacerbate price pressure on domestic producers, and that material injury to the domestic industry would occur.

### **III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS**

#### **A. CANADA**

3.1 Canada requests the Panel to find that the investigation and final determination of threat of material injury by the USITC in Softwood Lumber from Canada and the definitive anti-dumping and countervailing duties imposed as a result violate Articles 1, 3.1, 3.2, 3.4, 3.5, 3.7, 3.8, 12 and 18.1 of the *Anti-Dumping Agreement* and 10, 15.1, 15.2, 15.4, 15.5, 15.7, 22 and 32.1 of the *SCM Agreement* and Article VI:6 (a) of GATT 1994.

3.2 Canada requests that the panel recommend that the United States bring its measures into conformity with its WTO obligations, including by revoking the final determination of threat of material injury, ceasing to impose anti-dumping and countervailing duties and returning the cash deposits collected as a result of the United States' actions in Softwood Lumber from Canada.

#### **B. UNITED STATES**

3.3 The United States requests the panel to reject Canada's claims in their entirety.

### **IV. ARGUMENTS OF THE PARTIES**

4.1 The arguments of the parties are set out in their written and oral submissions to the Panel, and their answers to questions. The parties' arguments as presented in their submissions are summarized in this section. The parties' written answers to questions are set out in full as Annexes to this report. (see List of Annexes, page iv).

#### **A. FIRST WRITTEN SUBMISSION OF CANADA**

4.2 The following summarizes Canada's arguments in its first submission.

4.3 At issue in this dispute is the injury investigation of the United States International Trade Commission (Commission) in *Softwood Lumber from Canada* and the final definitive anti-dumping and countervailing duties applied as a result of the Commission's final determination made on 16 May 2002. In its final determination, the Commission concluded that the US domestic softwood lumber industry was *not* materially injured by reason of subject imports from Canada. However, it determined that the industry was *threatened* with material injury by reason of such imports.

4.4 As will be demonstrated below, the Commission's threat of material injury determination violated the requirements of Article VI of the *General Agreement on Tariffs and Trade* ("GATT 1994"), the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("*Anti-dumping Agreement*"), and the *Agreement on Subsidies and Countervailing Measures* ("*SCM Agreement*"). As a result of these violations, the United States imposed countervailing and anti-dumping duties inconsistently with these Agreements. Accordingly, these duties are not legal and should be withdrawn.

## 1. Standard of Review

4.5 As this dispute involves both the Anti-dumping Agreement and the SCM Agreement, both Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Article 17.6 of the Anti-Dumping Agreement apply. Article 11 of the DSU sets out the appropriate standard of review for panels established under all the covered agreements, subject to the special provisions that apply in the case of the Anti-Dumping Agreement. Given the Appellate Body's and panel's interpretations of Article 11 in past cases, this Panel should consider whether the Commission: evaluated all the relevant factors that it was required under the Agreements to investigate; examined all the facts in the record before it and all of the relevant facts it could have obtained (including those facts which might have supported a negative determination); and provided a reasoned and adequate explanation of how the facts as a whole supported the findings made on each legal issue. According to the Appellate Body in *US – Lamb Safeguard*, if there is a plausible alternative explanation of the facts as a whole, in the light of which the Commission's explanation does not seem adequate, the Panel should find that the Commission has not provided a reasoned and adequate explanation of how the facts support its determination.

4.6 In *US – Hot-Rolled Steel*, the Appellate Body determined that certain elements of Article 17.6 of the *Anti-Dumping Agreement* complement or supplement the standard of review contained in Article 11 of the DSU. With respect to the obligation of panels to make an objective assessment of the facts of the matter before them, the Appellate Body found that both provisions require panels to “assess” the facts and that this “clearly necessitates an active review or examination of the pertinent facts”. Noting the duty of panels under Article 11 to make an objective assessment of the facts, the Appellate Body stated that it is “inconceivable that Article 17.6(i) should require anything other than that panels make an objective ‘assessment of the facts of the matter’.”

## 2. The Requirement Under Article 3.1 of the Anti-dumping Agreement and Article 15.1 of the SCM Agreement to Base Injury Determinations on “Positive Evidence” and an “Objective Examination”

4.7 Given that “injury” is explicitly defined in the *Anti-Dumping Agreement* and the *SCM Agreement* to include both “material injury” and “threat of material injury” to a domestic industry, all of the requirements set forth in Article 3 of the *Anti-Dumping Agreement* and Article 15 of the *SCM Agreement* regarding injury determinations apply equally in the context of threat of injury determinations. Article 3.1 of the *Anti-Dumping Agreement* and Article 15.1 of the *SCM Agreement* contain fundamental, substantive obligations that apply to *Members and their investigating authorities* instructing them on how they must conduct their injury investigations and make their injury determinations. Both of these Articles require that a determination of injury, which includes threat of material injury, shall be “based on positive evidence and involve an objective examination of both: (a) the volume of the dumped [or subsidized] imports and the effect of the dumped [or subsidized] imports on prices in the domestic market for like products; and (b) the consequent impact of these imports on domestic producers of such products”. As demonstrated below, the Commission's evaluation of the requirements contained in paragraphs 2 through 7 of Articles 3 and 15 falls short of the fundamental, overarching obligations contained in Articles 3.1 and 15.1.

## 3. The Requirement Under Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement to Consider and Decide Threat of Injury with “Special Care”

4.8 The Commission also failed to satisfy the requirements of Article 3.8 of the *Anti-Dumping Agreement* and Article 15.8 of the *SCM Agreement* which stipulate that “with respect to cases where injury is threatened by dumped [subsidized] imports, the application of anti-dumping [countervailing]

measures shall be considered and decided with special care”. As demonstrated below, the Commission’s failure to take “special care” permeates its entire determination.

**4. The Requirements of Article 12 of the *Anti-Dumping Agreement* and Article 22 of the *SCM Agreement* to Provide a Reasoned Explanation for Injury Determinations, Including the Bases for Rejecting Relevant Arguments of the Parties**

4.9 Article 12.2 of the *Anti-Dumping Agreement* and Article 22 of the *SCM Agreement* impose upon investigating authorities the obligation to provide a reasoned and adequate explanation for the injury determinations they make. In particular, these provisions require investigating authorities to publish a notice of final determination of injury that provides: in sufficient detail, the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities; all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures; the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters or importers; and considerations relevant to the injury determination as set out in Article 3 and Article 15. As demonstrated below, the Commission’s Report falls short of these obligations, and is thus inconsistent with Article 12.2 of the *Anti-dumping Agreement* and Article 22 of the *SCM Agreement*.

**5. The United States Has Acted Inconsistently with Article 3.7 of the *Anti-Dumping Agreement* and Article 15.7 of the *SCM Agreement***

4.10 Article 3.7 of the *Anti-Dumping Agreement* and Article 15.7 of the *SCM Agreement* establish three distinct requirements for threat of injury determinations. First, they require that a determination of threat of material injury “shall be based on facts and not merely on allegation, conjecture or remote possibility.” Second, they require that “the change in circumstances which would create a situation in which the dumping [or subsidies] would cause injury must be clearly foreseen and imminent”. Finally, they require consideration of specific enumerated factors, the totality of which “must lead to the conclusion that further dumped [or subsidized] exports are imminent and that, unless protective action is taken, material injury would occur”.

4.11 **The Commission’s Determination Failed to Identify the Clearly Foreseen and Imminent Change in Circumstances Necessary to Establish a Threat of Injury.** The panel in *Egypt – Steel Rebar* observed that in a threat of injury investigation, “... the central question is whether there will be a ‘change in circumstances’ that would cause the dumping [or subsidies] to begin to injure the domestic industry”. In this case, the Commission failed to provide a reasoned answer to this fundamental question. In particular, the Commission did not explain how the evidence before it provided a non-conjectural basis for concluding that the *status quo* would change such that subject imports that were found to be non-injurious to the domestic industry during the period of investigation would cause material injury in the imminent future.

4.12 Indeed, one of the few “change in circumstances” identified in the Commission’s determination – its forecast of “strong and improving demand” in the US lumber market “as the US economy rebounds from recession” – would appear to make threat of injury *less likely*, rather than more likely. In fact, the demand forecasts endorsed by the Commission forecast steady growth in lumber demand beginning in the second half of 2002, leading to all-time record softwood lumber consumption by 2003 (within the period the Commission considered imminent). In the face of this evidence, the Commission never explained how the increase in imports it predicted would outstrip the strong and growing demand forecasted and therefore result in a material increase in Canadian market share above the 34 per cent level found non-injurious during the period of investigation. Thus, the Commission’s finding of “strong and improving demand”, combined with its finding of a relatively stable subject import market share in its negative current material injury determination, suggests a “change in circumstances” that would appear to make the threat of injury less likely, not more likely. Accordingly, the Commission failed to provide a reasoned, adequate and consistent explanation

supporting a finding that there was a change in circumstances that would create a situation in which the dumping or subsidy would cause injury imminently.

4.13 **The Commission Did Not Properly Consider the Enumerated Factors in Article 3.7 of the Anti-Dumping Agreement and Article 15.7 of the SCM Agreement.** The Commission also failed to consider properly the factors listed in Article 3.7 of the Anti-Dumping Agreement and Article 15.7 of the SCM Agreement and other relevant factors based on the evidence before it. Canada demonstrates that proper consideration of the totality of the relevant factors does not support the Commission's affirmative threat of injury determination.

4.14 The Nature of the Subsidies in Question. Pursuant to paragraph (i) of Article 15.7 of the *SCM Agreement*, the Commission should have considered the "nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom". The Commission's evaluation falls short of the requirements of Article 15.7 because the Commission failed to consider all the relevant evidence before it concerning the nature of the subsidies and, in particular, the trade effects likely to arise therefrom. Specifically, the Commission failed to consider properly all the relevant evidence before it regarding the absence of trade effects from the primary subsidies at issue – the provincial "stumpage" programmes.

4.15 The Commission had before it relevant economic evidence from an eminent natural resources economist demonstrating that the subsidy programmes in question do not increase the production of logs or lumber or lower their prices, or increase the quantity or lower the prices of lumber exports to the United States, in comparison with the outcome in a market in which government is not involved. In other words, there was significant evidence before the Commission that the subsidies at issue would have no trade effects.

4.16 The Commission's mere acknowledgement of the Canadian Trade Lumber Alliance (CLTA)'s argument regarding the absence of trade effects does not constitute adequate consideration of this factor. If the nature of the subsidy was such that it would not lead to an increase in imports above the non-injurious level observed over the period of investigation, then the Commission's finding that imports were likely to increase substantially and cause material injury could not be based on positive evidence.

4.17 Moreover, the Commission's characterization of the CLTA's evidence contains fundamental errors. First, the Commission erroneously stated that "Ricardian rent theory relies on the assumption of fixed supply", which it does not. Second, the Commission's observation that "*lumber* supply is not necessarily fixed" [emphasis added] is irrelevant because the stumpage subsidies relate to the market for *timber*, which is upstream from the market for lumber.

4.18 Significant Rate of Increase of Dumped and Subsidized Imports. By virtue of paragraph (i) of Article 3.7 of the *Anti-Dumping Agreement* and paragraph (ii) of Article 15.7 of the *SCM Agreement*, the Commission should have considered whether there was "a significant rate of increase of [dumped or subsidized] imports into the domestic market indicating the likelihood of substantially increased importation".

4.19 The Commission did not make the proper consideration required by these provisions. It merely observed that the "volume of subject imports from Canada increased by 2.8 per cent from 1999 to 2001" and that "[a]s a share of apparent domestic consumption, subject imports from Canada increased from 33.2 per cent in 1999 to 34.3 per cent in 2001". It did not conduct any evaluation of whether the rate of increase was "significant" and, if so, whether that rate of increase indicated a "likelihood of substantially increased importation". In short, the Commission failed to "go beyond a mere recitation of trends in the abstract and put the import figures into context", as it was obligated to do.

4.20 Sufficient Disposable Capacity or Imminent Substantial Increase in Capacity. Pursuant to paragraph (ii) of Article 3.7 of the *Anti-dumping Agreement* and paragraph (iii) of Article 15.7 of the *SCM Agreement*, the Commission should have considered whether there was “sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped [subsidized] exports to the importing Member’s market, taking into account the availability of other export markets to absorb any additional exports”. The Commission failed to consider properly either of the two elements of this requirement.

4.21 With respect to “an imminent, substantial increase in capacity of the exporter indicating the likelihood of substantially increased dumped [subsidized] exports”, the Commission did not find that there was an imminent, substantial increase in capacity, nor could the evidence before the Commission reasonably be construed to support such a finding. With respect to “sufficient freely disposable... capacity of the exporter indicating the likelihood of substantially increased dumped [subsidized] exports”, the Commission limited its consideration to the mere *existence* of Canadian producers’ freely disposable capacity without explaining how that theoretical ability to increase imports would translate into the likelihood of substantially increased dumped and subsidized exports to the United States that the Agreements require. The Commission ignored evidence of projections it solicited from Canadian producers regarding how they intended to distribute the projected increased production between their three principal markets – Canada, the United States, and third countries. These projections showed that exports to the United States were expected to increase only slightly in absolute terms from the non-injurious levels that occurred during 2001.

4.22 Price Depression and Suppression. Under Article 3.7(iii) of the *Anti-Dumping Agreement* and Article 15.7(iv) of the *SCM Agreement*, the Commission should have considered whether “imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices and would likely increase demand for further imports”.

4.23 In its threat of injury analysis, the Commission stated the following with respect to the effect of the pricing of the subject goods: “Given our finding of likely significant increases in subject import volumes, and our finding of at least moderate substitutability between subject imports and domestic product, *we conclude that subject imports are likely to have a significant price depressing effect in the future.* Therefore, we find that subject imports from Canada 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”. [emphasis is added]

4.24 In the last sentence of the above excerpt, the Commission stated that the subject imports from Canada “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”. However, that is simply a restatement of the wording in Article 3.7(iii) of the *Anti-Dumping Agreement* and Article 15.7(iv) of the *SCM Agreement*, and is not grounded in any way in the analysis that precedes it. That analysis deals with the impact of *forecasted volumes* of subject imports on prices, not with the impact of *current import prices* as required by Article 3.7(iii) of the *Anti-Dumping Agreement* and Article 15.7(iv) of the *SCM Agreement*.

4.25 Moreover, this absence of a proper evaluation becomes all the more striking when one recalls the Commission’s findings that there was no evidence on the record to demonstrate significant underselling by the subject imports, nor was there any evidence that the subject imports had significant price effects either prior to, or following, the filing of the petition.

4.26 In addition, because the Commission’s prediction of injurious price effects derives exclusively from its finding that the volume of imports was likely to increase substantially, the fundamental flaws in that finding, in particular the absence of any basis for concluding that such increase would upset the non-injurious *status quo* by outpacing strong and improving demand, render the Commission’s affirmative threat finding unsupported by any evidence at all.

4.27 Inventories of the Product Being Investigated. The Commission failed to properly consider “inventories of the product being investigated”, as required by Article 3.7(iv) of the *Anti-Dumping Agreement* and Article 15.7(v) of the *SCM Agreement*. The Commission’s consideration of this factor was limited to a single sentence: “[w]hile inventories generally are not substantial in the softwood lumber industry, Canadian producers’ inventories as a share of production increased and were consistently higher than that reported by US producers during the period of investigation”. The footnote appended to this sentence reveals that the “increase” to which the Commission referred was not significant – 0.6 percentage points over the 1999-2001 period. The Commission provided no further elaboration regarding how this observation, which relates solely to the period of investigation during which no material injury due to the subject imports was found, supported the Commission’s determination of threat of material injury to the domestic industry.

4.28 **None of the Other Factors Cited in Support of the Commission’s Finding that Imports Would Increase Substantially Supports its Affirmative Threat Determination.** The Commission’s affirmative threat of injury determination is grounded in its finding of a likely substantial increase in the subject imports. On the basis of this finding alone, the Commission concluded that the subject imports were likely to have a significant depressing or suppressing effect on domestic prices in the future. Canada has already demonstrated how this central finding of the Commission is not supported by its analysis of the factors listed in Article 3.7 of the *Anti-Dumping Agreement* and Article 15.7 of the *SCM Agreement*.

4.29 The other factors examined by the Commission that led to its finding that subject imports were likely to increase substantially were: forecasts of strong and improving demand in the US market; the export-orientation of Canadian producers to the US market; the annual allowable cut (AAC) requirements; the effects of the expiration of the *Softwood Lumber Agreement between the Government of Canada and the Government of the United States of America* (“SLA”); and subject import trends during periods when there were no import restraints. As shown below, none of those factors points to a clearly foreseen and imminent change in circumstances that would create a situation in which the subject imports would cause material injury.

4.30 Forecasts of Strong and Improving Demand in the US Market. One predicate for the Commission’s conclusion that subject imports would increase substantially in the imminent future was its finding of “forecasts of strong and improving demand in the US market” in 2002-2003. As discussed above, “strong and improving demand” would appear to be a factor making threat of injury to the domestic industry less likely, not more likely.

4.31 The Commission failed to evaluate how this factor supported its finding of a substantial increase in imports in the future and, more specifically, how moving from a period of “relatively stable” demand to a period of “strong and improving demand” would upset the non-injurious *status quo* and make future injury likely. It ignored a crucial consideration – the projected market share held by Canadian imports. Only if the increase in Canadian exports was likely to outstrip the “strong and growing demand” in the US market could Canadian market share increase materially above the 34 per cent level the Commission considered non-injurious. But the Commission did not make that finding. Therefore, there was no basis for it to conclude that the increased demand in the US market supported either a finding that imports would increase substantially or an affirmative finding of threat of injury.

4.32 The Export-Orientation of Canadian Producers to the US Market. The Commission observed that “Canadian producers are predominantly export-oriented toward the US market, with exports to the United States accounting for 68 per cent of their production in 2001.” The Commission provided no further elaboration regarding the significance of this finding to its affirmative threat determination. Significantly, the Commission failed to address the fact that Canadian producers were similarly export-oriented during the period of investigation, over which the Commission made a negative injury

finding and over which the level of imports from Canada was non-injurious. The Commission failed to demonstrate the change that is necessary to upset the non-injurious *status quo*.

4.33 The Annual Allowable Cut. The Commission observed that “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”. In its view, these cut requirements “increase production even when demand is low and thus increase the incentive to export more softwood lumber to the US market”.

4.34 The Commission failed to explain how these annual allowable cut requirements, which applied to Canadian producers throughout the period of investigation during which the level of imports from Canada did not increase to injurious levels, would nonetheless provide an incentive to Canadian producers to increase their exports to injurious levels in the imminent future. If anything, the record indicated that the Canadian cut requirements would have *less* impact in the imminent future: the Commission acknowledged that to the extent cut requirements created an incentive to increase exports, such incentive would occur “when demand is low”; however the Commission found that the imminent future would be characterized by “strong and improving” demand, rather than the “relatively stable” demand that occurred over the period of investigation.

4.35 Moreover, the Commission recognized that Québec, Alberta, New Brunswick and Nova Scotia did not have minimum cut requirements, yet failed to take these facts into account when making its conclusion that imports were likely to increase substantially in the future.

4.36 The Effects of the Expiration of the SLA. Under the SLA, the United States agreed for a five-year period not to initiate investigations or otherwise take action under several United States’ trade statutes with respect to imports of softwood lumber from Canada, in exchange for Canada’s commitment to impose export fees on shipments to the United States of lumber produced in the provinces of British Columbia, Alberta, Ontario and Québec above a negotiated baseline. The investigations that resulted in the final determination at issue were initiated on 2 April 2001, two days after the expiration of the SLA.

4.37 The Commission found that the “SLA *appears to* have restrained the volume of subject imports from Canada *at least to some extent*”, and had “*some* restraining effects on the volume of subject imports [emphasis added]. However, the Commission failed to explain how these inconclusive statements supported its finding that “subject imports are likely to increase substantially”.

4.38 It is notable that the Commission *did not* find that the SLA had a “significant” or “substantial” restraining effect on the volume of subject imports. Nor did the Commission find that the SLA’s removal would lead to an increase in import volumes sufficient to raise Canadian market share to injurious levels in an expanding US market. The Commission’s finding regarding the effect of the SLA may reflect its recognition that attributing a greater effect to the SLA could not be squared with the evidence that Canadian import volumes and market share *did not* increase substantially following the SLA’s expiration. Indeed, the data showed that subject import market share increased only 0.4 percentage points after the expiry of the SLA between April and December 2001 compared to the same period in 2000.

4.39 The Commission did not consider the slight increase in market share that took place after the expiration of the SLA to be sufficient to translate into material injury. To the contrary, it made a negative material injury finding for the period that included a full year after the SLA expired. The fact that any restraining effect from the SLA was not significant or substantial is also consistent with the Commission’s finding that “the record does not indicate that subject imports had a significant price effect either prior to or following the filing of the petition”, which occurred on the business day following the expiry of the SLA. Thus, the alleged restraining effects of the SLA do not explain why subject imports did not increase to injurious levels in the year following its expiration. It logically

follows that the Commission lacked a reasoned basis for concluding that imports would increase substantially in the imminent future in the SLA's absence.

4.40 Subject Import Trends During Period When There Were No Import Restraints. The Commission observed that imports of softwood lumber from Canada increased during periods in which there were no restraints on their entry into the US market, *i.e.*, prior to the SLA between 1994 and 1996, and during the period immediately after the SLA expired and before suspension of liquidation in these investigations (April to August 2001). It did not evaluate how these facts supported its conclusion that subject imports were likely to increase substantially in the future.

4.41 With respect to the Commission's reference to imports during 1994-1996, import trends for that time period say nothing about likely import trends some eight years later without a finding that market conditions in the two periods were similar. Yet the Commission cited these prior import trends without conducting any analysis whatsoever regarding market conditions in this earlier period or otherwise explaining its reliance on 6-8 year old data, well before the period of investigation, to project the likely level of imports in the foreseeable future.

4.42 With respect to the Commission's reference to imports during the period of April to August 2001, the Commission failed to evaluate whether the observed increase in imports over that period represented: (i) a measure of the allegedly higher level of imports that would have arrived absent any import restraint; or, instead, (ii) a shift in the timing of imports that otherwise would have been shipped to the United States because importers knew well in advance when the SLA would expire and when suspension of liquidation would begin, and had every incentive to delay or accelerate imports to avoid both SLA export fees and bonding requirements.

4.43 Moreover, the Commission failed to explain the inconsistency between: (i) its position that trends in imports in the "no restraint" period from April to August 2001 were indicative of what would happen in the absence of import restraints; and (ii) its statement that "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". Under the Commission's logic, given that the imposition of suspension of liquidation was the only intervening event after August 2001, it must have been the factor that prevented imports from increasing substantially, and material injury from ripening, prior to the Commission's vote in May 2002. However, the Commission explicitly concluded that it *was not* the suspension of liquidation that prevented injury from occurring. Thus, import trends for the April to August period cannot logically support a finding that imports would increase substantially and to injurious levels in the imminent future absent protective action.

4.44 Conclusions. On the basis of the foregoing, it is clear that the totality of these factors do not provide a non-conjectural basis for concluding that "subject imports are likely to increase substantially", much less lead to a substantial increase in Canadian market share in a US lumber market experiencing strong and improving demand. Accordingly, the single factor that forms the foundation for the Commission's affirmative threat of injury determination – a likely substantial increase in subject imports – is not supported by the evidence. For these reasons, the Commission's threat of injury determination does not comply with Articles 3.1 and 3.7 of the *Anti-Dumping Agreement* and Articles 15.1 and 15.7 of the *SCM Agreement*.

## **6. Volume and Price Effects of Subject Imports (Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement*)**

4.45 Article 3.2 of the *Anti-Dumping Agreement* and 15.2 of the *SCM Agreement* require an investigating authority to consider whether there has been a significant increase in the volume of the dumped or subsidized imports, either in absolute terms or relative to production or consumption in the

importing Member, whether there has been significant price undercutting by those imports, and whether the effect of such imports is to otherwise depress or suppress prices to a significant degree.

4.46 The Commission failed to explain properly how it could reach its affirmative threat of injury determination in the light of its findings that there had been a small increase in subject imports' market share during the period of investigation; it could not draw any conclusion from the collected pricing data as to whether there had been significant underselling by the subject imports; and it could not conclude from the record that the subject imports had a significant price effect during the period of investigation. By failing to do so, the Commission did not comply with Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement* in the context of threat of injury.

## **7. Impact of Imports on Domestic Industry (Article 3.4 of the *Anti-Dumping Agreement* and Article 15.4 of the *SCM Agreement*)**

4.47 When investigating authorities have determined that there will likely be an increase in dumped or subsidized imports, they must assess the likely impact of such an increase on the domestic industry. In *Mexico – High-Fructose Corn Syrup*, the Panel recognized that “an investigating authority cannot come to a reasoned conclusion {regarding threat}, based on an unbiased and objective evaluation of the facts, without taking into account the Article 3.4 factors relating to the impact of imports on the domestic industry”. As a result, it held that “the listed factors in Article 3.4 must be considered in all cases,” along with “other relevant economic factors in the circumstances of a particular case”.

4.48 In the section of its report concerning threat of material injury, the Commission assessed the current state of the domestic softwood lumber industry but failed to evaluate the likely state of the domestic industry in the future, and, in particular, how further dumped and subsidized imports would affect the domestic industry's condition during the period of “strong and improving demand” the Commission predicted for the imminent future. This constitutes a fatal deficiency in the Commission's threat of injury analysis. Without such an evaluation, it is impossible to reach a reasoned conclusion regarding threat of material injury.

4.49 The Commission did address a number of the mandatory factors listed in Article 3.4 of the *Anti-Dumping Agreement* and Article 15.4 of the *SCM Agreement*, but only with respect to the past. The Commission did not assess how any of the listed factors was likely to evolve in the future. Therefore, it failed to undertake any meaningful evaluation of the listed factors for the purpose of its threat of injury analysis.

4.50 Consequently, the United States has acted inconsistently with its obligations under Articles 3.1 and 3.4 of the *Anti-dumping Agreement* and under Articles 15.1 and 15.4 of the *SCM Agreement*.

## **8. The United States Has Acted Inconsistently with Article 3.5 and 3.7 of the *Anti-Dumping Agreement* and Article 15.5 and 15.7 of the *SCM Agreement* Which Require the Demonstration of a Causal Relationship Between the Dumped and Subsidized Imports and the Injury to the Domestic Industry**

4.51 The Commission failed to comply with the requirements in Articles 3.5 and 3.7 of the *Anti-Dumping Agreement* and Articles 15.5 and 15.7 of the *SCM Agreement* relating to causation. The requirements of Articles 3.5 and 15.5 can be broken down into two main elements: first, as confirmed by Articles 3.7 and 15.7, there must be a demonstration of a causal relationship between the dumped or subsidized imports and the injury to the domestic industry, which must be based on an examination of all relevant evidence before the authorities; and, second, the authorities must examine any known factors other than the dumped or subsidized imports which at the same time are injuring the domestic

industry, and the injuries caused by these other factors must not be attributed to the dumped or subsidized imports (“non-attribution” requirement).

**4.52 The Absence of a Causal Relationship Between the Dumped and Subsidized Imports and the Threat of Injury.** With respect to the first element, nowhere in its determination of threat of injury did the Commission explain how its predicted substantial increase in the volume of subject imports would be likely to have a significant price depressing effect in the future and therefore would threaten to cause injury to the domestic industry. In particular, the Commission failed to examine and evaluate all evidence before it relevant to the demonstration of the necessary causal relationship, including several “conditions of competition” it concluded were “pertinent to the softwood lumber industry” and “relevant to our analysis”.

4.53 One such finding was the Commission’s acknowledgment that the United States is not self-sufficient in lumber and that a significant volume of imports is needed to fulfil demand. This finding, together with the Commission’s prediction of “strong and improving demand” in the US market, suggests that any increase in imports would continue serving demand that the US industry could not meet, and thus not upset the non-injurious *status quo*.

4.54 The Commission also failed to evaluate the implications of its finding that subject imports were “at least moderately substitutable” with domestic product. That finding necessarily includes the concept that competition between subject imports and the domestic product is attenuated to some extent. Notwithstanding this, the Commission made no effort to assess what portion of the substantial increase in subject imports it predicted might serve end uses for which US species such as Southern Yellow Pine are not well suited, or that US producers otherwise cannot meet or can meet only to a limited extent.

4.55 The Commission further failed to integrate into its causation analysis its findings that there was increasing integration in the North American lumber market, and that US domestic producers were responsible for purchasing or importing “a sizable volume” of the subject imports. A reasonable inference, and one supported by the factual record in this case, is that domestic producers purchase subject imports to complement their own production, not displace it, and hence such imports are unlikely to adversely affect the domestic industry.

**4.56 The Absence of the Required Non-attribution Analysis.** In the reasons for its affirmative threat determination, the Commission failed to identify, much less examine, *any* other known factors that could threaten injury to the domestic industry in addition to the subject imports. Having neglected even to identify other causal factors, the Commission also did not separate out and distinguish the injurious effects of those other factors from the alleged injurious effects of the dumped and subsidized imports.

4.57 This deficiency in the Commission’s determination is particularly acute given the strong evidence before it that factors other than the subject Canadian softwood lumber imports were having substantial adverse effects on the US domestic industry during the period of investigation. The Commission found that: “*the deterioration in the condition of the domestic industry during the period of investigation is largely the result of substantial declines in price*. In light of our finding that subject imports have not had a significant price effect, and the small increase in their market share, we conclude that subject imports did not have a significant impact on the domestic industry”. [emphasis added]

4.58 This finding indicates that there were very significant “other factors” that adversely affected the US domestic softwood lumber industry. The Commission explicitly identified another known source of injury to the domestic industry in its current injury analysis that it deemed sufficient to break any alleged causal link between subject imports and injury, *i.e.*, the industry’s *own contribution* to the oversupply that led to the price declines over the period of investigation. The domestic

industry's likely response to the "strong and improving demand" conditions that the Commission forecast for the US market in the imminent future (i.e., increased output) was thus a potential source of injury, in addition to any likely increase in subject imports, that the Commission was obligated to take into account in its threat analysis. However, the Commission failed to do so. Similarly, the Commission failed to examine the likely future role of non-subject imports and their potential contribution to any threatened injury to the US industry, as well as other known factors potentially injurious to the domestic industry, such as changes in the patterns of consumption.

4.59 Accordingly, the United States acted inconsistently with Articles 3.1 and 3.5 of the *Anti-Dumping Agreement* and Articles 15.1 and 15.5 of the *SCM Agreement*.

## **9. The Commission Combined Injury Analysis is Inconsistent with the *SCM Agreement* and the *Anti-Dumping Agreement***

4.60 The *Anti-Dumping Agreement* and the *SCM Agreement* each contain detailed provisions outlining the specific requirements that must be fulfilled by an investigating authority when making a determination of injury, or threat of injury, in an anti-dumping or subsidy investigation. When an investigation involves both dumped and subsidized imports, the investigating authority is obliged to comply with the specific requirements of both the *Anti-Dumping Agreement* and the *SCM Agreement*, as well as of Article VI of *GATT 1994*.

4.61 The Commission's threat of injury analysis combined dumped and subsidized imports. In these circumstances, in order to apply both anti-dumping and countervailing duties, the United States was obliged to comply with the specific requirements of both the *Anti-Dumping Agreement* and the *SCM Agreement*, as well as of Article VI of *GATT 1994*.

4.62 The Commission failed to comply with these requirements by failing to undertake all of the necessary evaluations specified in the *Anti-Dumping Agreement* and *SCM Agreement* respectively. The Commission's failures in this regard include, for example: (i) it did not properly consider the nature and trade effects of the subsidies in question as required by Article 15.7(i) of the *SCM Agreement* and failed to provide a reasoned and adequate explanation of how this factor, as well as the other factors set out in Articles 3.7 and 15.7, supported its threat of injury determination; (ii) it failed to consider all the mandatory factors under Articles 3.4 of the *Anti-dumping Agreement* and Article 15.4 of the *SCM Agreement*; and (iii) it failed to conduct a proper causation analysis under Article 3.5 of the *Anti-Dumping Agreement* and Article 15.5 of the *SCM Agreement*. Moreover, the Commission never provided a reasoned explanation of why, in the particular circumstances of this case, it was appropriate to conduct its analysis as it did.

## **B. FIRST WRITTEN SUBMISSION OF THE UNITED STATES**

4.63 The following summarizes the United States' arguments in its first written submission.

4.64 In this dispute, Canada challenges the determinations of the US International Trade Commission ("ITC") that an industry in the United States producing softwood lumber 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").

4.65 The ITC's determinations are based on positive evidence and on an objective examination of all relevant factors and facts. Moreover, the ITC articulated reasoned and adequate explanations demonstrating how the facts as a whole support its determinations, permitting the Panel to adequately discern the rationale for the ITC's findings. Contrary to Canada's claims, the ITC's determinations are consistent with US obligations under Article 3 of the Antidumping Agreement and Article 15 of the SCM Agreement. As such, there is also no basis for Canada's claim that the ITC's determinations

are inconsistent with Articles 1 and 18.1 of the Anti-Dumping Agreement, Articles 10 and 32.1 of the SCM Agreement, or Article VI:6(a) of the GATT 1994.

4.66 **Standard of Review.** This dispute is covered by both the standard of review set forth in Article 11 of the DSU and the special standard of review for disputes arising under the Anti-Dumping Agreement, set forth in Article 17.6 of that Agreement. In considering the relationship of Article 17.6 of the Antidumping Agreement to Article 11 of the DSU, the Appellate Body has indicated that these provisions are complementary or supplementary. Canada, however, ignores the Appellate Body's explicit statements that neither of these articles permits, let alone requires, a Panel to conduct a *de novo* review of the evidence or to substitute the Panel's conclusions for those of the competent authority. Instead, Canada repeatedly, whether implicitly or explicitly, requests the Panel to reweigh the evidence and decide the case *de novo* by substituting Canada's view of the evidence for that of the ITC.

4.67 **Objective Assessment Is Not *De Novo* Review.** Canada tends to blur the distinction between the functions of a panel and those of an investigating authority. In making an "objective assessment" of the matter, the Appellate Body has stated that a panel is to consider whether the national "authorities had examined all the relevant facts and had provided a reasoned explanation of how the facts supported their determination". The Appellate Body describes the panel's role as one of evaluating a competent authority's acts rather than directly evaluating the underlying facts. The Appellate Body has recognized that it is for the investigating authority to "determine, objectively, and on the basis of positive evidence, the importance to be attached to *each* potentially relevant factor and the weight to be attached to it".

4.68 **Obligation to Base Determinations on Positive Evidence.** The investigating authority must ensure that its determination of injury is made on the basis of "positive evidence", which involves the facts underpinning and justifying the injury determination, and involves an "objective examination", which is concerned with the investigative process itself. The ITC considered the totality of the evidence and based its determination on "positive evidence"; that is, evidence which is affirmative, objective, verifiable and credible. Moreover, the ITC conducted an "objective examination" in which the "identification, investigation and evaluation of the relevant factors [was] . . . even-handed".

4.69 **Obligation to Provide Reasoned and Adequate Explanations.** The requirement to provide a reasoned explanation has not been interpreted to impose any specific method for assessing the injury or for explaining the basis for such a determination. The Appellate Body in *EC-Pipe* recognized that the evaluation of a factor does not necessarily require an explicit separate evaluation of that factor if the analysis of the factor is implicit in the analyses of other factors. The guidance essentially is that the investigating authority "must be in a position to demonstrate that it did address the relevant issues" As evident in the Views of the Commission, the ITC considered all relevant arguments raised by parties and provided adequate explanations. Moreover, the Views of the Commission "contain a persuasive explanation as to how the evaluation of relevant factors led to the determination of injury".

#### 1. **The ITC's Determinations Are Consistent with US Obligations Under Article 3 of the Antidumping Agreement and Article 15 of the SCM Agreement**

4.70 A common thread in Canada's claims is its repeated assertions that there could be no threat of material injury because there allegedly were no injurious effects found in the present material injury analysis and that the ITC did not identify any imminent and abrupt change in the status quo. Canada portrays the ITC's present material injury finding as a negative with no subsidiary findings or evidence to support an affirmative finding. This simply is wrong. The ITC found, based on the facts as a whole, that the volume of imports was significant and thus supported an affirmative present material injury finding. However, while the subject imports had resulted in some price effects, the ITC recognized that excess supply of both imported and domestic products had contributed to price declines, particularly in 2000, and thus could not find that subject imports had had significant price

effects. The condition of the domestic industry, particularly its financial performance, had declined during the period of investigation as a result of the price declines. The ITC found that the domestic industry was vulnerable to injury. The ITC's subsidiary findings regarding present material injury foreshadow and clearly support the existence of a threat of material injury.

4.71 The ITC considered **all factors relevant to a threat of material injury determination** provided for in the covered Agreements, including Articles 3.2, 3.4, and 3.7 of the Anti-Dumping Agreement and Articles 15.2, 15.4, and 15.7 of the SCM Agreement. Canada has not met its burden of establishing a *prima facie* case of any violation or inconsistencies with US obligations under the covered Agreements

4.72 Continuum of an Injurious Condition Ascending from Threat to Injury. Threat of material injury is material injury that has *not* yet occurred, but remains a future event whose actual materialization cannot be assured with absolute certainty but with clear likelihood. Threat of injury, thus, is an anticipation of material injury that must be on the verge of occurring, *i.e.*, clearly foreseen and imminent.

4.73 The Anti-Dumping Agreement and the SCM Agreement recognize that injury to the domestic industry does not generally occur suddenly, but rather often involves a progression of injurious effects ascending from a threat of material injury, and if not prevented, to present material injury. Therefore, a determination that an industry is threatened with material injury would be warranted when conditions of trade clearly indicate that material injury likely will occur imminently if demonstrable trends in trade adverse to the domestic industry continue, or if clearly foreseeable adverse events occur.

4.74 Canada reads the threat provision to require the investigating authority to identify "a" change in circumstances, *i.e.*, "an event," that will abruptly change the status quo from a threat of material injury to present material injury, rather than the clearly foreseeable result of a sequence of events. Canada argues that the ITC should have identified a specific event or change in the status quo in order to justify its threat determination. But this interpretation is not necessitated, if even justified, by the text of the covered Agreements, the negotiating history of the Agreements, or the Appellate Body's analysis in other dispute settlement proceedings involving the threat of injury. Rather, as the Appellate Body in *US-Line Pipe* recognized, generally there is a continuum of an injurious condition of a domestic industry that ascends from a threat of injury up to injury.

4.75 Future-Oriented Analysis Based on Projections Extrapolating from Existing Data. A threat analysis is a future-oriented analysis, based not on allegation or conjecture but rather on the facts. But facts by definition pertain to the present and past rather than the future. While the occurrence of future events can never be definitely proven by facts, projections necessarily are based on extrapolations from existing data. In *US-Lamb Meat*, the Appellate Body discussed this tension between the future-oriented threat analysis and the need for a fact-based determination, and recognized that ultimately it calls for a degree of "conjecture" about the likelihood that the threat will ascend to injury. While the prospective nature of the analysis will not provide for certainty, the use of facts from the present and the past provides the basis for projections about the future.

4.76 Meaning of "Special Care". Article 3.8 of the Antidumping Agreement and Article 15.8 of the SCM Agreement provide no discussion regarding what constitutes "special care," nor has any panel explicitly interpreted this provision. Canada's argument notwithstanding, the "special care" provision does not mean that there is a stricter, higher standard of review for threat analysis than for present material injury analysis in the context of the covered Agreements. In fact, in the safeguards context, the Appellate Body suggested that the distinction between threat of injury and present injury "serves the purpose of setting a *lower threshold* for establishing the *right* to apply a safeguard measure". The same logic would apply to the covered Agreements.

4.77 Meaning of "Consider". The covered Agreements require the ITC to consider all listed factors. What Canada fails to recognize is that they do not require the ITC to *make findings* on each factor. The term "consider" has been interpreted to mean, "*inter alia*: 'contemplate mentally, especially in order to reach a conclusion;' 'give attention to'; and 'reckon with; take into account.'" Accordingly, the term "consider" has not been read to require an explicit "finding" by the investigating authority. Rather it is sufficient, if it is apparent in the relevant documents in the record, that the ITC has given attention to and taken the factor into account.

4.78 In *EC-Pipe*, the Appellate Body recognized that consideration of a factor does not necessarily require an explicit separate evaluation of that factor if the analysis of the factor is implicit in the analyses of other factors. In the same manner, the investigating authority is not required to explicitly address every minute detail or specific aspect of every argument that is raised by parties. Canada fails to acknowledge that the ITC clearly considered the relevant evidence and arguments raised by parties but found other evidence to be more persuasive.

## **2. The ITC's Consideration of All Factors and Facts Relevant to the Threat of Material Injury Analysis in this Case and Its Findings Are Consistent with US Obligations Under the Covered Agreements**

4.79 The ITC found that there was a likelihood of substantial increases in subject imports based on evidence regarding, *inter alia*, Canadian producers' excess production capacity and projected increases in capacity, capacity utilization and production, the export orientation of Canadian producers to the US market and subject import trends during periods when there were no import restraints, such as the SLA. Furthermore, each of the six subsidiary factors considered by the ITC related directly to threat factors set forth in Article 3.7 of the Antidumping Agreement and Article 15.7 of the SCM Agreement, specifically whether there is a significant rate of increase in imports and sufficient freely disposable production capacity. The ITC addressed the effect of each of these factors in its findings. The ITC determined that these increases in imports were likely to exacerbate price pressure on domestic producers, and that material injury to the domestic industry would occur. Moreover, the ITC found that the domestic industry was vulnerable to injury in light of declines in its performance over the period of investigation, particularly its financial performance.

4.80 **The ITC's Finding of Likely Substantial Increases in Subject Imports: a) Demand in US Market – Forecasts and Possible Effects Supports ITC's Determinations**. Canada emphasizes a single factor, demand in the US market, which was only one of six subsidiary factors considered by the ITC in its determinations. Canada attempts to persuade the Panel that a purported significant increase in US demand for softwood lumber was imminent and that this anticipated spike in demand would restore the US industry's financial health and insulate it from any further adverse effects from additional subject imports from Canada. The Achilles heel in Canada's argument is that it disregards substantial portions of the investigatory record and, despite the presence of significant contrary evidence, offers little more than conjecture to support its theory that future increases in demand would improve prices. The ITC considered and rejected this theory because it was not supported by the facts.

4.81 Contrary to Canada's theory, strong demand over the period of investigation not only did not translate into price improvements but did not prevent substantial declines in prices for softwood lumber. Moreover, the evidence demonstrated that supply rather than demand had played the pivotal role in the movement of prices of softwood lumber in the US market, as the excess supply had resulted in price declines through 2000. Canada has not refuted the fact that even with strong demand during the period of investigation, prices declined and the condition of the domestic industry deteriorated – effects opposite to those Canada speculates should occur in the future. Nevertheless, Canada argues that the ITC should have agreed to this optimistic theory about what effects growth in demand would have on industry performance and prices.

4.82 Moreover, Canada has not refuted the ITC's finding regarding forecasts for US demand, that the US market would continue to be a very attractive and necessary one for Canadian lumber (a market that accounts for about 65 per cent of Canadian production), that subject imports would continue to play an important role in the US market, and even that there would likely be increases in such imports. Rather, Canada contends, relying again largely on the thin premise of increases in demand, so great as to outpace supply increases, that increases in subject import volumes and market penetration would not be injurious.

4.83 b) Canadian Producers' Excess Capacity and Projected Increases in Capacity, Capacity Utilization, and Production Support ITC's Determinations. The ITC found that the evidence demonstrated that Canadian producers had excess capacity, and increases in capacity and production were projected in 2002 and 2003. In addition, Canadian producers, which rely on sales in the US market for about two-thirds of their sales, had incentives to produce more softwood lumber and export it to the US market. In light of those facts, the ITC reasonably found that excess capacity and further projected increases in Canadian production would likely result in substantial increases of subject imports.

4.84 *The Canadian producers rely on sales in the US market for about two-thirds of their production.* The significance of Canada's export-orientation is clear. When a single market accounts for two-thirds of a country's production, the exporting industry's success, and probably survival, is tied to the importing market. Canada's argument ignores the ITC's affirmative finding in its present injury analysis that the volume of imports from Canada, equal to one-third of US apparent consumption, was significant. The evidence demonstrated that the US market had been very important to Canadian producers and was expected to continue to be.

4.85 *The Canadian producers had excess capacity.* Canadian producers' capacity utilization had peaked in 1999 at 90 per cent, and then declined to 84 per cent in 2001. This contrasted with the relatively stable level for Canadian capacity utilization in the three years prior to the period of investigation, while operating under the SLA. *The Canadian producers projected increases in capacity and production, and improvements in capacity utilization in 2002 and 2003.* The evidence showed that there had been a steady increase in Canadian producers' capacity from 1995 to 1999, with a more gradual increase from 1999 to 2001. Thus, despite the excess capacity already available in 2001 as capacity utilization declined to 84 per cent, the evidence demonstrated that Canadian producers expected to further increase their ability to supply the US softwood lumber market. In particular, capacity utilization was projected to increase to 90 per cent in 2003, as capacity also was projected to increase.

4.86 *There was evidence of incentives to produce more softwood lumber and export it to the US market.* The ITC found there was evidence that mandatory cut requirements stimulated increased production even when demand was low and thus increased the incentive to export more softwood lumber to the US market. The ITC found that imports with the annual allowable cut ("AAC") requirements in place were at significant levels in its present injury analysis. It is disingenuous for Canada not to acknowledge that one of the provinces with AAC requirements is British Columbia, which accounts for almost 50 per cent of Canadian softwood lumber production and 50 per cent of imports to the US market.

4.87 *Canadian producers' export projections.* The ITC found that more weight should be given to actual data showing excess Canadian capacity, declines in home market shipments, and declines in exports to other markets, as well as projected increases in production than to the export projections, which were inconsistent with the other data. While Canadian producers projected that exports to the US market would increase slightly in 2002 and 2003, these projected increases in exports to the United States accounted for only about 20 per cent of the planned increases in production. The US market accounted for 68 per cent of the Canadian softwood lumber production in 2001. It was reasonable, given the evidence as a whole, for the ITC to discount the Canadian producers' projected

export data and assume that projected increases in production would likely be distributed between the US market, home market, and other non-US export markets in shares similar to those prevailing during the last five years. Canada has offered no positive evidence to refute the ITC's reasonable position that production increases would be distributed according to historic proportions. In this case, the evidence demonstrated that the US market had been very important to Canadian producers and was expected to continue to be.

4.88 c) Likely Increases in Subject Imports Support ITC's Determinations. In evaluating whether there was a likelihood of substantially increased imports of softwood lumber from Canada, the ITC considered, *inter alia*, evidence regarding the increase in imports over the period of investigation, the effects of expiration of the SLA, and subject import trends during periods when imports were not subject to restraints. The ITC found that the evidence demonstrated that the volume of subject imports was already significant and had increased even with the restraining effect of the SLA in place, and that subject imports had increased substantially during periods without export restraints as well. Canada is simply incorrect in contending that the ITC found such levels of import penetration were insufficient, much less "non-injurious", in its present material injury finding. Moreover, contrary to Canada's charges, the ITC did not find that the 2.8 per cent increase in the volume of imports during the period of investigation was insignificant. It expressly found the volume of imports significant and that such imports would be injurious if combined with evidence of significant price and impact effects.

4.89 In this case, the threat analysis begins with subject import volumes already at significant levels. The evidence demonstrates that subject imports will continue to enter the US market at this significant level and are projected to increase. Canada acknowledges that imports at this level would continue and even increase; its argument principally concerns whether the increases would be substantial.

4.90 *Restraining effects of the SLA*. Canada ignores the evidence supporting the ITC's finding that trade during most of the period of investigation was affected by the SLA. Canada claims that imports after the SLA increased by only 0.4 per cent, but its comparison of import data for April-December 2001 to April-December 2000 ignores the imposition of other trade restraining measures, *i.e.*, preliminary countervailing duties, in August 2001. Thus, Canada's argument is predicated on a false notion – that trade during the identified period was free of trade incumbrances. In contrast, when the period with no formal trade restraining measures is considered, the evidence shows that subject imports increased by 11.3 per cent for the April-August 2001 period compared with the same 2000 period. The facts are, there is a distinction in the level of imports depending on whether restraints are in place and the import volumes are substantially higher during periods when they are not subject to restraining measures.

4.91 *Trends in subject imports during periods when such imports were not subject to some type of formal or informal restraint*. Subject imports during these non-restraint periods increased substantially. The ITC considered import trends during the period prior to the adoption of the SLA, between 1994 and 1996. During the seven quarters, from August 1994, when the appeals for the 1991-1992 cases were terminated and imports of softwood lumber from Canada were not subject to any trade restraining measure, until the SLA took effect in April 1996, subject imports' market share increased from 32.6 per cent in 3<sup>rd</sup> quarter 1994 to 37.4 per cent in 1<sup>st</sup> quarter 1996. With the SLA in effect, the market share for softwood lumber from Canada declined to 34.3 per cent in 1997 and remained fairly stable within a range of 2.7 percentage points. The ITC appropriately considered these trends. It did not rely solely on this evidence to support its affirmative threat determination. Moreover, the evidence for the earlier period was consistent with the evidence for the more recent restraint-free period (April-August 2001), which showed that imports substantially increased.

4.92 Subject imports increased during the period immediately after the SLA expired (April 2001) and before suspension of liquidation (August 2001). Subject imports by volume for the period of

April to August 2001 were higher than the comparable April-August period in each of the preceding three years (1998-2000) by a range of 9.2 per cent to 12.3 per cent. This evidence provides a clear indicator of how subject imports have entered, and would enter, the US market in the imminent future if not subject to trade restraints, and supports the ITC's finding of likely substantial increases in subject imports.

4.93 Canada's claim that the ITC should have considered if this increase was due to a shift in timing resulting from the pending imposition of duties ignores the simple fact that imports would be entering the US market without restraints in substantially increased amounts, and continues to focus on the magnitude of increases rather than the underlying fact that imports already are, and would continue to be, at injurious levels. Canada's attempts to portray the ITC's finding as inconsistent with its negative finding on the misunderstood "but for" provision in US law that must be considered in affirmative threat determinations also fails for a number of reasons. First, the ITC found that the volume of imports supported a present material injury finding; there would have been no need to change its determination from threat to present if it had been based only on this factor. Second, Canada is suggesting that the ITC should have based its entire present material injury determination on one factor based on only five months of data. However, as the Appellate Body in *US-Lamb Meat* explained in the safeguards context, the data for the entire period of investigation must be assessed in making a threat of injury determination.

4.94 Canada fails to refute the simple fact that without restraints imports have increased: increases stopped when the SLA was imposed; substantial increases in imports occurred when the SLA expired; and increases in imports stopped when preliminary duties were imposed. Canada offers nothing but speculation about other reasons why imports were not restrained during those periods.

4.95 **The ITC's Finding of Likely Price Effects by Subject Imports.** At the heart of Canada's arguments regarding the ITC finding of likely price effects is its disagreement with the finding of a likely substantial increase in subject imports. Canada again mischaracterizes the evidence and findings in the ITC's present material injury analysis.

4.96 In evaluating the present price effects of the subject imports, the ITC **found that the substantial volume of subject imports had some adverse effect on prices** for the domestic like product during the period of investigation, albeit not significant effects. The ITC concluded that while subject imports had adversely affected prices of domestic products, it could not find significant price effects because the price declines were due to excess supply in 2000 by both Canadian exports and domestic product. While the evidence again showed substantial declines in prices in the third and fourth quarters of 2001, to levels as low as 2000, the evidence regarding supply, which generally was considered the cause for the substantial price declines in 2000, indicated that US producers had curbed their production, but that overproduction "remains a problem in Canada". Therefore, the ITC reasonably found that the additional subject imports, which it concluded were likely, would further increase the excess supply in the market, putting further downward pressure on prices. Moreover, the evidence demonstrated that pressure would come from excess Canadian supply rather than a combination of import and domestic supply.

4.97 Canada would have the Panel preclude findings of likely price effects in a threat analysis because present price effects were not found. This view simply has no basis in the covered Agreements, particularly when, as here, prices declined at the end of the period of investigation. The ITC's explanation regarding likely price effects builds, in particular, on its explanation in its present price effects discussion, among others.

4.98 **The ITC's Consideration of the Nature of the Countervailable Subsidies.** The ITC also considered the nature of the subsidies granted by Canada, consistent with the requirement of Article 15.7(i) of the SCM Agreement. The ITC examined the information presented to it by the US Department of Commerce regarding the 11 programmes that it found conferred countervailable

subsidies to Canadian producers and exporters of softwood lumber. The ITC took into account that none of the subsidies were of the kind described in Article 3 or 6.1 of the SCM Agreement.

4.99 At the centre of Canada's claim is a misperception that the SCM Agreement requires the ITC to make a finding concerning the nature of the subsidies and their likely trade effects. However, the plain language of the Agreement requires the ITC to consider this factor but not to make a finding.

4.100 While the ITC clearly considered parties' arguments on the nature and effect of the subsidies, it declined to adopt the positions of any of the parties due to the conflicting evidence and economic theories regarding the effects of stumpage fees on lumber output. Canada has provided the Panel with a one-sided analysis of this issue, and ignored the conflicting evidence presented to the ITC regarding the applicability of the economic models and their alleged effects. Canada would have the Panel believe that the Canadian producers' economic theory was the only information before the ITC on this issue and that this theory was a proven fact. Neither assertion is true. The domestic producers presented the ITC with arguments, economic analysis and economic studies to refute the economic theory provided by Canadian parties. Indeed, evidence presented to the ITC during its investigation squarely placed in question whether the Ricardian rent theory was applicable to the timber and lumber markets, whether the underlying premise to the theory regarding fixed supply was correct, and whether the results regarding the effects of the stumpage fees on output were very different. The ITC made an objective examination of this issue by considering all of the evidence and arguments presented.

4.101 The ITC found that, despite all the evidence of record, the uncertainties regarding these competing economic theories provided by the parties were such as to preclude reasoned and adequate conclusions. Therefore, the ITC appropriately considered the parties' arguments and provided a reasoned explanation but found it could not reach a finding on the competing economic theories. As evident in the Views of the Commission, its consideration of this threat factor was not a reason that led to its determinations and thus, it neither supported nor detracted from those determinations that the domestic industry was threatened with material injury by reason of the subject imports.

4.102 **The ITC's Consideration of the Threat Inventory Factor.** The ITC has given attention to and taken the inventory factor into account. The ITC is not required to make findings on each factor, but instead is only directed to consider the "totality" of the threat factors in making a determination. The ITC's determination is reasonably based on numerous factors, including consideration of the inventories of the subject product.

### **3. ITC's Determinations are Consistent with US Obligations Under Articles 3.2 and 3.4 of the Antidumping Agreement and Articles 15.2 and 15.4 of the SCM Agreement**

4.103 In a threat analysis, the investigating authority should consider the evidence regarding the factors listed in Article 3.7 of the Anti-Dumping Agreement and Article 15.7 of the SCM Agreement, as well as the present and past evidence regarding the factors listed in Articles 3.2 and 3.4 of the Antidumping Agreement and Articles 15.2 and 15.4 of the SCM Agreement.

4.104 **ITC Properly Considered Volume and Price Effects of Subject Imports.** The ITC considered all of the facts from the present and past, specifically regarding the volume of imports, price effects and the consequent impact of continued dumped and subsidized imports on the domestic industry, in its threat analysis. The ITC's evaluation of the evidence regarding relevant factors, pursuant to Articles 3.2 and 3.4 of the Anti-Dumping Agreement and Articles 15.2 and 15.4 of the SCM Agreement, resulted in subsidiary findings that the volume of imports was significant, that there were some price effects, that the condition of the domestic industry had deteriorated primarily as a result of declining prices and that the industry was in a vulnerable state. Moreover, projections based on the facts provide positive evidence justifying the ITC's determination that the domestic industry

was on the verge of material injury by reason of the continued dumped and subsidized softwood lumber imports from Canada.

4.105 Canada's arguments are merely variations of the same arguments already raised regarding likely substantial increases in imports and likely price effects, and are based on Canada's premise that there could be no threat because there allegedly were no findings of injurious effects in the present material injury analysis. That premise is demonstrably incorrect.

4.106 **ITC Properly Considered the Impact of Subject Imports on the Domestic Industry.** The ITC also properly conducted a "meaningful evaluation" of the relevant factors listed in Article 3.4 of the Anti-Dumping Agreement and Article 15.4 of the SCM Agreement, and reasonably concluded that the deterioration in the performance of the domestic industry, particularly its financial performance, made it vulnerable to injury. Canada fails to recognize that a finding of vulnerability by its nature is a finding about the future, *i.e.*, a future assessment of the industry's susceptibility to injury.

4.107 Canada's reliance on the panel's findings in *Mexico-HFCS* to challenge whether the ITC conducted a "meaningful evaluation" of these factors is misplaced. The issue in *HFCS* was not the manner in which these factors were evaluated but that they did not appear to be considered at all. Two very important differences distinguish this case from *HFCS*: first, it is possible, by reading the ITC's final determination here, where it was not in *HFCS*, to understand the overall condition of the domestic industry with respect to the Article 3.4 factors; and second, in this case, the domestic industry was currently experiencing substantial declines in its condition, particularly its financial performance, which was not the case in *HFCS*.

#### **4. The ITC's Determinations are Consistent with US Obligations Under Article 3.5 of the Antidumping Agreement and Article 15.5 of the SCM Agreement**

4.108 **The ITC Demonstrated a Causal Relationship Between the Dumped and Subsidized Imports and the Threat of Injury to the Domestic Industry.** Canada's claims under Article 3.5 and 15.5, respectively, are merely variations of the same arguments already raised regarding likely substantial increases in imports and likely price effects, and are based on its premise that there could be no threat because there allegedly were no injury findings in the present material injury analysis. The totality of the facts when examined in an unbiased and objective manner support the ITC's findings.

4.109 Demand and self-sufficiency. The ITC, not surprisingly since subject imports from Canada have accounted for about one-third of US consumption for more than seven years, recognized that the United States was not self-sufficient in the production of lumber. Canada's argument, however, implies that, if demand increases substantially, the US industry will not be capable of increasing supply, because its capacity is fully utilized. Not only is this argument incorrect, it also is inconsistent with Canada's own argument regarding attribution to dumped and subsidized imports of injury caused by other known factors. In that context, Canada assumes that the US industry has the capability to contribute to excess supply in the future and would be the cause of injury. The facts do not support either theory. The ITC appropriately considered the conditions of competition regarding demand and the US industry's ability to supply the US market.

4.110 Substitutability/Attenuated Competition. Canada ignores the analysis conducted by the ITC and its findings based on consideration of the totality of the facts, including the evidence provided by purchasers and home builders, that there are other products that both countries produce that compete with each other; Canadian softwood lumber and the domestic like product generally are interchangeable; subject imports and domestic species are used in the same applications; regional preferences exist, but do not reflect a lack of substitutability, but instead simply reflect a predisposition toward locally-milled species; and evidence demonstrated that prices of different

species have an effect on other species' prices, particularly those that are used in the same or similar applications.

4.111 North American integration. Canada recognizes that the ITC considered the integration of the North American lumber industry, but criticizes the ITC for not speculating that integrated companies would not harm related companies. Yet, Canada provides no evidence whatsoever to support its supposition that integrated firms will not harm their related parties. Moreover, this integration is not new. This raises the question of why would it have a different effect in the future than during the period of investigation, when, with integration in place, the evidence demonstrated that import volumes were significant, and imports had some adverse price effects.

4.112 **The ITC Examined Any Known Causal Factors to Ensure Injury Was Not Attributed to Subject Imports**. Neither Article 3.5 of the Anti-Dumping Agreement nor Article 15.5 of the SCM Agreement provides any particular methodology that authorities must use in examining other known causal factors. The Appellate Body in *EC-Pipe* indicated that, provided that an investigating authority does not attribute the injurious effects of other causal factors to dumped imports, "it is free to choose the methodology it will use in examining the 'causal relationship' between dumped imports and injury."

4.113 Canada principally alleges that domestic supply is a known causal factor which the ITC found contributed to injury in its present material injury analysis, but ignored in its threat analysis. The ITC examined constraints on domestic producers' ability to meet demand. The ITC also took into consideration domestic producers' past contribution to oversupply conditions. Canada ignores, however, the evidence cited by the ITC indicating that the domestic producers had curbed their production, but that "overproduction remains a problem in Canada." Thus, while domestic overproduction had contributed to adverse price effects in 2000, the evidence demonstrated that it was no longer contributing to excess supply while Canadian imports continued to oversupply. Canada also omits the fact that domestic production capacity was fairly level during the period of investigation, a time when apparent consumption was increasing. These facts concerning domestic supply reinforce the ITC's affirmative determinations.

4.114 The ITC considered parties' arguments regarding three other alleged causal factors – nonsubject imports, other substitutes, and cyclical demand and housing construction cycles – that Canada refers to in footnotes to its first submission. However, upon examination of the record evidence regarding these issues, it is clear that none of them rise to the level of "other known factors injuring the domestic industry".

## **5. The ITC's Combined Investigations are Consistent with US Obligations Under Covered Agreements**

4.115 The ITC's decision to cross-cumulate subsidized and dumped imports of softwood lumber from Canada in its consideration of whether the volume and price effects of subject imports threatened the domestic industry with material injury is consistent with US obligations under the Antidumping Agreement and the SCM Agreement. The fact that neither Agreement speaks to the issue of cross-cumulation does not mean that such an analysis is precluded or inconsistent with either Agreement. The purpose of the covered Agreements is to provide a remedy against unfair trade practices causing injury to a domestic industry. To deny a remedy where the cumulative effect of dumped and subsidized imports is injury to the domestic industry would frustrate the purpose of these Agreements.

4.116 Finally, Canada's allegations that the ITC conducted combined investigations and cross-cumulated Canadian imports of softwood lumber so as to more likely result in an affirmative determination in this case has no merit. Canada provides no basis to support this allegation and fails to acknowledge that the ITC's consistent practice is to cumulate both subsidized and dumped imports

from a single country for purposes of the ITC's injury analyses. More significantly, Canada has failed to explain to the Panel why it considers such practice to be inconsistent with obligations under the Anti-Dumping and SCM Agreements, when Canada itself takes the identical approach in its own trade remedy proceedings, cross-cumulating subsidized and dumped imports.

## C. FIRST ORAL STATEMENTS OF CANADA

4.117 The following summarizes Canada's arguments in its first oral statements.

### 1. Opening Statement of Canada at the First Meeting of the Panel

4.118 The United States has imposed countervailing and antidumping duties on imports of Canadian softwood lumber products. These duties are imposed in violation of the SCM and Anti-Dumping Agreements, as well as GATT 1994.

4.119 Even with the market share enjoyed by Canadian imports during the period of investigation, the United States International Trade Commission ("Commission") did not find present injury. What change in circumstances would transform what the Commission determined to be a non-injurious status quo into a situation of imminent material injury? The Commission provided no reasoned answer to this question.

#### 1. Standard of Review

4.120 Canada is asking this Panel to assess whether the Commission made an objective and reasoned determination based on the facts before it. Such an assessment is not de novo review, nor does it seek to have the Panel reweigh evidence or substitute its judgement for that of the Commission.

#### 2. The Overarching Obligations in Articles 3.1 and 15.1

4.121 The United States has not complied with Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement, overarching provisions that require an investigating authority to ensure that its threat determination is based on "positive evidence" and involves an "objective examination". The record reveals that the Commission's examination of the evidence on the likely volume of the dumped or subsidized imports, their likely effect on prices in the domestic market for like products, and the likely consequent impact of these imports on domestic producers of such products failed to meet these overarching requirements.

#### 3. The Obligation to "Consider"

4.122 Article 3 of the Anti-Dumping Agreement and Article 15 of the SCM Agreement require an investigating authority to "consider" certain factors. The Commission did not properly consider the required factors in this case - either explicitly or implicitly. Moreover, the requirement to "consider" should not be viewed in isolation from the other obligations imposed upon the United States under Articles 3.1 and 3.7 of the Anti-Dumping Agreement and Articles 15.1 and 15.7 of the SCM Agreement. In other words, the requirement to "consider" went alongside the Commission's obligation to ensure that its determination was based on facts and not on allegation or conjecture; its obligation that findings be based on positive evidence and involve an objective examination; and its obligation to examine all relevant facts and provide a reasoned and adequate explanation of how the facts supported its determination under the applicable standard of review.

#### **4. The Requirement to Take Special Care and the Threshold for Threat of Injury**

4.123 The requirement to take “special care” in Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement forms an independent obligation with which a Member conducting a threat analysis must comply. A failure to take such “special care” permeates the Commission’s entire determination. The United States now implies that the obligations imposed upon investigating authorities are somehow lessened when evaluating threat of injury, as opposed to present injury. This is incorrect. If anything, the standard for determining threat is higher than that for injury.

#### **5. Article 3.7 of the *Anti-Dumping Agreement* and Article 15.7 of the *SCM Agreement***

4.124 Central to the proper interpretation of Article 3.7 of the Anti-Dumping Agreement and Article 15.7 of the SCM Agreement is that some imminent and foreseeable change from the non-injurious present must be identified. Perhaps realizing that its affirmative threat of injury determination fails to identify the requisite change in circumstances, the United States now seeks to introduce ex post facto justifications for its finding. US revisionism cannot salvage the obvious defects in the Final Determination, including the failure to comply with the explicit obligation in Articles 3.7 and 15.7 to identify a clearly foreseen and imminent change in circumstances that would transform conditions so as to cause injury to the domestic industry.

#### **6. Articles 3.7 and 15.7 - The Five Listed Factors**

4.125 None of the five factors listed in Articles 3.7 and 15.7 supported the Commission’s affirmative threat determination. In summary:

- The Commission did not conclude that the nature of the subsidy and its likely trade effects supported an affirmative threat determination or were likely imminently or foreseeably to change to cause material injury to occur.
- The Commission did not conclude there was any significant rate of increase in dumped or subsidized imports.
- The Commission did not conclude there was any imminent, substantial increase in Canadian capacity indicating the likelihood of substantially increased dumped or subsidized exports, and identified no positive evidence that Canadian producers were likely to utilize their existing unused capacity to increase exports to the United States.
- The Commission improperly concluded that imports were entering during the period of investigation at prices that would have a significant price-depressing or -suppressing effect.
- The Commission did not base its affirmative threat determination on a conclusion that Canadian producers were likely to use their inventories to increase imports to the United States.

#### **7. The “Other” Factors Examined by the Commission**

4.126 The Commission also considered other factors that, in its view, supported its finding of likely substantial increase in imports. Those factors are: forecasts of strong and improving demand in the US market; the export orientation of Canadian producers to the US market; annual allowable cut; the effects of the expiration of the SLA; and subject import trends during periods when there were no import restraints. Like the factors listed in Articles 3.7 and 15.7, none of the other factors on which the Commission relied was sufficient to support its finding that the volume of imports was likely to

increase to injurious levels in the imminent future. The Final Determination, therefore, did not identify, based on positive evidence in the record, a clearly foreseen and imminent change in circumstances that would create a situation in which the subject imports would cause injury.

## **8. Articles 3.2 and 15.2**

4.127 Articles 3.2 and 15.2 set out obligations relating to the examination of the volume of dumped and subsidized imports and their effect on prices. With respect to volume, they provide that an investigating authority consider whether there has been a significant increase in the volume of dumped or subsidized imports, in either absolute or relative terms. The Commission's actual findings regarding volume, support the view that present volumes would not lead to a substantial increase in imports.

4.128 Articles 3.2 and 15.2 also provide that investigating authorities consider whether there has been a significant price undercutting by the subject imports or whether the effects of the subject imports were likely to be otherwise to depress prices to a significant degree or prevent price increases to a significant degree. The Commission's findings regarding price effects made in its current injury analysis supported a negative current injury determination and provided no support to an affirmative threat of injury determination.

## **9. Articles 3.4 and 15.4**

4.129 The first sentence of Article 3.4 of the Anti-Dumping Agreement and Article 15.4 of the SCM Agreement is key: "The examination of the impact of the dumped [or subsidized] imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry." In the context of a threat determination, a proper application of Articles 3.4 and 15.4 requires an assessment of how the Articles 3.4 and 15.4 factors and indices are likely to change in the future. The essential problem affecting the Commission's 3.4/15.4 analysis is that it only refers to the present state of the domestic industry and does not assess the impact of the subject imports on the domestic industry in the future. A finding of vulnerability is not enough. The Commission had to analyse the likely impact of the subject imports in the future. It failed to do so.

## **10. Articles 3.5 and 15.5**

4.130 Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement establish two main obligations: the first element is the requirement to demonstrate "a causal relationship" and the second element is what panels and the Appellate Body have characterized as the "non-attribution" requirement. The Commission failed to satisfy either requirement. In order to conduct a proper causation analysis, the Commission had to take into account its finding of strong and improving demand in the US market and the absence of any evidence that Canadian market share would grow beyond the non-injurious levels of the period of investigation. It failed to do so. In conducting its analysis with respect to the causal relationship, the Commission also should have considered the impact of several conditions of competition that it concluded were "pertinent to the softwood lumber industry" and "are relevant to our analysis". These conditions of competition include the fact that subject imports were at least moderately substitutable with domestic products and that there was increasing integration in the North American lumber market.

4.131 Turning to the second element of causation, the United States failed to identify, much less examine, any other known factors that could threaten injury to the domestic industry in addition to Canadian imports. Notably, there was no basis for the United States to ignore the US industry's likely contribution to future supply conditions when conducting its threat analysis. The failure to evaluate the effects of this factor, and indeed of any other factor, in its threat analysis – not to mention its

failure to separate and distinguish such effects from those attributed to Canadian imports – constitutes a clear violation of Articles 3.5 and 15.5.

## 11. The Commission's Combined Injury Analysis

4.132 Canada's argument is not that an investigating authority cannot cross-cumulate, but that when an investigating authority chooses to cross-cumulate, it must do so in a manner consistent with both the Anti-Dumping Agreement and the SCM Agreement. In other words, it must ensure that it has complied with the specific requirements of each Agreement. The Commission failed to do so.

## 12. Conclusion

4.133 In conclusion, Canada returns to the fundamental question that it asked at the beginning: where in its Final Determination does the Commission identify positive evidence of an imminent and foreseeable change in circumstances that would transform the non-injurious status quo into a situation of material injury? The Commission provided no reasoned answer to this question and there is therefore no justification for its affirmative threat of injury finding.

### 2. Closing Statement of Canada at the First Meeting of the Panel

4.134 The central finding made by the Commission of a likely substantial increase in imports was neither supported by the Article 3.7/15.7 factors nor by the other factors that the Commission listed. Canada would not go over these failures again here.

4.135 The United States tried to defend the Commission's final determination as comprehensive. But it did not and could not fill critical gaps in the final determination.

4.136 **First**, the United States said that the predicted substantial increase in imports would likely have a significant price-depressing effect. What is missing from this assertion, however, is an examination of the causal linkage between increase in subject imports and the adverse impact on prices. The Commission did not examine whether these increased imports would outstrip the increase in demand. In its present injury determination, the Commission found that Canadian imports did not have a significant price effect particularly because of their stable market share. Yet, the Commission omitted consideration of this highly relevant factor in its threat determination. Would the market share held by Canadian imports increase from its stable non-injurious level? The Commission did not consider, much less answer, this question. Indeed, the United States told the Panel that the market share issue was simply not part of its threat analysis – even though it was central to the negative current injury determination.

4.137 **Second**, the United States tried to explain away the Commission's finding of strong and improving demand by telling the Panel about the adverse price effects that occurred during periods of strong demand in the period of investigation. What is missing from this explanation is an examination of the factors other than subject imports that caused the poor performance of the domestic industry during the period of investigation, and whether they or other factors might threaten the industry in the future. The most notable and unexplained of these factors was the domestic industry's own contribution to the over-supply and its consequent effect on price. Nothing in the Commission's final determination, nor in the US presentations to this Panel, deals with other possible causes of injury or sources of threat, especially the domestic industry's own conduct.

4.138 **Third**, the United States said that threatened injury would evolve along a continuum into actual injury because of adverse trade trends. The final determination, however, found no adverse import-related trends during the period of investigation that, if continued, would cause an imminent and foreseeable change in the non-injurious status quo.

4.139 The Commission did not perform an objective examination that considered all relevant factors and that identified positive evidence of a clearly imminent and foreseeable change in circumstances that would create a situation in which material injury would occur. Instead, its threat determination is based on nothing more than conjecture and speculation about Canadian imports and their impact on the US domestic industry.

#### D. FIRST ORAL STATEMENTS OF THE UNITED STATES

4.140 The following summarizes the United States' arguments in its first oral statements.

##### 1. Opening Statement of the United States of America at the First Meeting of the Panel

4.141 **Overview.** In raising numerous claims regarding the ITC's affirmative threat determinations, Canada substantially distorts both the evidence that was before the ITC and the nature of its determinations. For example, the majority of Canada's claims rely for support on its erroneous assertion that the ITC made a negative present injury finding with no evidence or subsidiary findings that could support an affirmative finding. This simply is not an accurate portrayal of the facts or the findings. In reviewing the ITC's determinations, one should be mindful of the following points:

- First, injury to the industry does not generally occur suddenly, but rather often involves a continuum of injurious effects ascending from a threat of material injury to injury – a concept recognized in the Anti-Dumping Agreement (ADA) and the Subsidies Agreement (SCMA).
- Second, the term “consider” as used in the covered Agreements does not mean “make findings”. The ITC appropriately considered all factors relevant to a threat analysis consistent with US obligations under the covered Agreements and its findings reflect the facts as a whole.
- Third, the ITC made subsidiary findings in its present injury analysis that supported an affirmative present injury finding, *e.g.*, the volume of imports was significant, imports had some adverse price effects on domestic prices and the condition of the domestic industry had deteriorated, primarily as a result of declining prices, and thus was in a vulnerable state. These findings foreshadow present injury and clearly support the existence of a threat. Canada's claims of no present injurious effects are untrue.
- Fourth, the ITC's affirmative threat determinations are based on: (1) six subsidiary factors showing a likelihood of substantial increases in subject imports; (2) likely price pressure resulting from these increases in imports, particularly with evidence that prices declined substantially at the end of the period of investigation; and (3) the consequent threat of injury to an industry, already in a vulnerable state, resulting from the likely increases in imports and price effects.
- Finally, the ITC's determinations are based on positive evidence, and an objective examination of all relevant factors and facts. The ITC provided a reasoned and adequate explanation of its findings and, therefore, its determinations are consistent with US obligations.

4.142 **Standard of Review.** While Canada acknowledges the applicable provisions on standard of review, its arguments would apply a *de novo* standard of review. However, the covered Agreements, as consistently interpreted by the Appellate Body and prior panels, preclude *de novo* review by a Panel in trade remedy cases. They make clear the distinction between the role of an investigating authority, as the finder of fact, and the role of a panel, as evaluator of an authority's acts rather than directly evaluating the underlying facts. Thus, objective assessment by the Panel is not *de novo* review.

4.143 **Continuum of an Injurious Condition Ascending from Threat to Injury.** Canada and the United States have fundamental differences in interpretations of what constitutes a threat and its distinction from present injury. The texts of the ADA and the SCMA show that 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. The covered Agreements, by inclusion of the threat provision, recognize that injury to the domestic industry need not suddenly occur, but rather often involves a continuum of an injurious condition that may ascend from threat to present material injury. While the text of the threat provisions provide a clear example of a sequence of events, Canada reads these provisions to require the identification of “an event”, that will abruptly change the status quo from a threat to present material injury. Canada argues that the ITC should have identified a specific event. Mischaracterizing the ITC’s present material injury determinations and ignoring the underlying findings, Canada argues that there could be no threat of injury because there allegedly had been no present injurious effects and the ITC did not identify any imminent and abrupt change in the status quo. Canada’s argument fails on both the law and the facts.

4.144 The existence of threat of injury must be based on projections extrapolating from existing data affirming a continuation of adverse trade trends. Accordingly, an authority should consider the past and present evidence regarding the factors listed in Articles 3.2 & 3.4 of the ADA and Articles 15.2 & 15.4 of the SCMA to provide the basis for projections about the future. While Canada speculates about the future, it is evident that the ITC’s threat findings are based on consideration of all relevant facts, *i.e.*, the volume of imports, price effects and the consequent impact of continued dumped/subsidized imports on the domestic industry. These projections based on facts provide positive evidence justifying the ITC’s determination that the domestic industry was on the verge of injury by reason of the continued dumped/subsidized imports.

4.145 **“Consider” does not mean “make findings”**. The covered Agreements require the ITC to “consider” all listed factors in its threat analysis, but do not require the ITC to *make findings* on each factor; no dispute settlement report has identified such a requirement. Rather, it is sufficient, if it is apparent in the relevant documents in the record, that the ITC has given attention to and taken each factor into account. Canada also fails to recognize that the Agreements state unmistakably that the determinations are to be made on the basis of the totality of the factors considered and that consideration, or any findings, regarding one specific factor is not necessarily dispositive.

4.146 **ITC’s Present Injury Findings**. The ITC’s subsidiary findings regarding present material injury reflect the facts as a whole; the facts foreshadow actual injury and support the ITC’s determination of the existence of a threat of material injury. A common thread in Canada’s claims is its repeated assertions that there could be no threat because there allegedly were no present injurious effects. Inherent in Canada’s argument is a conclusion that a legal determination of no present material injury negates any affirmative subsidiary facts or findings. Canada’s underlying premise regarding the facts, findings, and law simply is wrong. The ITC found, based on the facts as a whole, that the volume of imports was already significant and thus supported an affirmative present material injury finding. Moreover, subject imports had been subject to the restraining effect of the Softwood Lumber Agreement (SLA) or the pendency of trade remedy action during virtually the entire period of the investigation, and that restraint was now lifted. The ITC also found that subject imports had caused some adverse price effects, despite Canada’s selective quotations of the ITC Report. However, the ITC recognized that excess supply of both imported and domestic products had contributed to price declines, particularly in 2000. The condition of the domestic industry, particularly its financial performance, had declined resulting largely from substantial declines in price, which the ITC found made it vulnerable to injury. The ITC’s subsidiary findings regarding present injury were not negative and clearly support the existence of a threat of material injury. These findings, when coupled with the likely increase in imports, a further decline in price levels, and additional deterioration in the domestic industry’s condition, fully justified the ITC’s threat determination.

4.147 **ITC’s Threat of Material Injury Findings**. The ITC considered all relevant threat factors provided for in the covered Agreements, including Articles 3.2, 3.4, & 3.7 of the ADA and Articles 15.2, 15.4, & 15.7 of the SCMA.

4.148 **The ITC found that there was a likelihood of substantial increases in subject imports** based on six subsidiary factors: (1) Canadian excess capacity and projected increases in capacity, capacity utilization, and production; (2) the export orientation of Canadian producers to the US market; (3) the increase in subject imports over the period of investigation; (4) the effects of expiration of the SLA; (5) subject import trends during periods when there were no import restraints; and (6) forecasts of strong and improving demand in the US market. Each of the six subsidiary factors related directly to threat factors regarding a significant rate of increase in imports and sufficient freely disposable production capacity.

4.149 **Demand in US Market** Canada emphasizes a single factor in its challenge to whether there would likely be increases in subject imports: demand in the US market. Demand was only one of six subsidiary factors considered by the ITC. Canada attempts to persuade the Panel that a purported significant increase in US demand was imminent and that this anticipated spike in demand would restore the US industry's financial health and insulate it from any further adverse effects from additional subject imports. The flaw in Canada's argument is that it disregards substantial portions of the record. Despite significant contrary evidence, Canada offers little more than conjecture to support its theory that future increases in demand would improve prices. The ITC expressly rejected this theory because it was not supported by the facts. Demand, which was strong and at record levels, during the period of investigation not only failed to translate into price improvements but did not prevent substantial declines in softwood lumber prices. Moreover, supply rather than demand had played the pivotal role in the movement of softwood lumber prices in the US market, as the excess supply had resulted in price declines through 2000. Canada seeks to have the Panel reweigh the record evidence. But, Canada has not refuted the ITC's findings regarding forecasts for US demand, *i.e.*, that the US market would continue to be a very attractive, and necessary, one for Canadian imports (a market that consumes about 65 per cent of Canadian production); that subject imports would continue to play an important role in the US market; and even that there would likely be increases in such imports. Rather, Canada contends that increases in subject import volumes and market penetration would not be injurious on the basis of its discredited demand theory.

4.150 **Sufficient Freely Disposable Production Capacity.** The facts clearly support the ITC's findings that excess capacity and further projected increases in Canadian production would likely result in substantial increases of subject imports:

- *First, Canadian producers rely on sales in the US market for about two-thirds of their production.* When a market accounts for two-thirds of a country's production, the exporting industry's success, and probably survival, is tied to the importing market. The fact is, the US market had been very important to Canadian producers and was expected to continue to be.
- *Second, the Canadian producers had excess capacity and projected increases in capacity and production, and improvements in capacity utilization in 2002 and 2003.* Thus, despite the excess capacity available in 2001 as capacity utilization declined to 84 per cent from 90 per cent in 1999, Canadian producers expected to further increase their ability to supply the US market by increasing capacity utilization to 90 per cent in 2003, as capacity also was projected to increase.
- *Third, Canadian producers had incentives such as mandatory cut requirements to produce more softwood lumber and export it to the US market.*
- *Finally, Canadian export projections were inconsistent with other data.* Given the evidence as a whole, the ITC reasonably discounted Canadian producers' projected export data and assumed that projected increases in production would likely be distributed between the US market, home market, and other non-US export markets in shares similar to those prevailing during the previous five years. Canada has offered no positive evidence to refute the ITC's reasonable conclusion.

4.151 **The ITC's Finding of Likely Substantial Increases in Subject Imports** begins with subject import volumes already at significant levels. It shows increases even with the restraining effect of the

SLA in place, and substantial increases during periods without trade restraints. Canada does not dispute that subject imports will continue to enter the US market at this significant level and are projected to increase, but challenges whether the increases would be substantial. Canada's argument that imports after the SLA increased by only 0.4 per cent is predicated on the false notion that trade during the April-December 2001 period was free of trade incumbrances. Its comparison of import data ignores the imposition of the preliminary countervailing duties in August 2001. During the April-August 2001 period, however, subject imports ranged from 9.2 to 12.3 per cent higher than the comparable April-August period in each of the preceding three years (1998-2000). A similar pattern was observed during the 1994-1996 period prior to the adoption of the SLA. The facts demonstrate that without restraints imports have increased. Increases stopped when the SLA was imposed; substantial increases in imports occurred when the SLA expired; and increases in imports stopped when preliminary CVD duties were imposed. This evidence provides a clear indicator of how subject imports have entered, and would enter, the US market in the imminent future if not subject to trade restraints and supports the ITC's finding of likely substantial increases in subject imports. Canada offers nothing but speculation about other reasons why imports were not restrained during those periods.

4.152 **Likely Price Effects.** Given its finding of likely significant increases in subject import volumes, its finding of at least moderate substitutability, its finding that prices of a particular species affect the prices of other species, and its present finding that the substantial volume of subject imports had *some* adverse effects on prices for the domestic product, the ITC concluded that subject imports were likely to have a significant price-depressing effect on domestic prices in the immediate future, and are likely to increase demand for further imports. The evidence at the end of the period of investigation showed substantial declines in prices in the third and fourth quarters of 2001. Evidence indicated that US producers had curbed their production, but that overproduction "remains a problem in Canada". The ITC reasonably found that the additional subject imports, which it concluded were likely, would further increase the excess supply in the market, putting further downward pressure on prices, thereby resulting in a threat of material injury to the US industry.

4.153 **Nature of the subsidies.** The ITC examined information on 11 programmes that Commerce found conferred countervailable subsidies to Canadian producers and exporters of softwood lumber, and took into account that none of them were export subsidies. While the ITC clearly considered parties' arguments, it declined to adopt the positions of any of the parties due to the conflicting evidence and economic theories specifically regarding the effects of stumpage fees on lumber output. Canada has provided the Panel with a one-sided analysis of this issue. Canada would have the Panel believe that the Canadian economic theory was the only information before the ITC and that this theory was an uncontested and proven fact. Neither assertion is true. Indeed, evidence presented to the ITC squarely placed in question the very applicability of Canada's economic theories and the alleged trade effects of the subsidies. The ITC made an objective examination of this issue by considering all of the evidence and arguments presented.

4.154 **"Other Known Causal Factors".** The ITC's determinations reflect its consideration of other factors identified to it as potentially causing material injury to ensure that it did not attribute injury from any *known* other factors to the subject imports. The other factors examined include: domestic supply, nonsubject imports, cyclical demand and housing construction cycles, North American integration, and other product substitutes. The fact is, the alleged "other" factors identified by Canada in its first written submission either were not other known causal factors or did not constitute a cause of injury at the same time as the subject imports.

4.155 **Combined Investigations.** The ITC's decision to cross-cumulate subsidized and dumped imports of softwood lumber from Canada is also consistent with the covered Agreements. Canada provides no basis to support its contention that the combined investigations were conducted to more likely result in an affirmative determination and fails to acknowledge the ITC's consistent cross-cumulation practice. More significantly, Canada has failed to explain why it considers such practice

to be inconsistent with obligations under the covered Agreements, given its identical approach to cross-cumulating subject imports in trade remedy proceedings.

4.156 As demonstrated in the ITC Report, the ITC articulated reasoned and adequate explanations, indicating its objective consideration of relevant factors on which it relied in making its determinations, demonstrating how the facts as a whole support its determinations, and enabling this Panel to determine the rationale and evidentiary basis for the ITC's findings. These determinations are based on positive evidence and are consistent with US obligations.

4.157 The United States notes that Canada's request that the Panel recommend a particular course of action – that the United States revoke the final determination of threat of injury, cease to impose duties, and return the cash deposits imposed – seeks action not called for under the WTO agreements and is inconsistent with Article 19.1 of the DSU.

## 2. Closing Statement of the United States of America at the First Meeting of the Panel

4.158 Canada continues to seek to have the Panel impose requirements on the ITC that have no basis in the covered Agreements. For example, in numerous instances where Canada finds no specific basis to support a given requirement in the Agreements, it instead reverts to a general obligation to provide a reasoned explanation and argues that the ITC did not provide such an explanation for a given action, *e.g.*, cross-cumulation, consideration of the competing economic theories, and consideration of market share. The “reasoned explanation” obligation apparently flows from Article 12.2 of the ADA and Article 22.5 of the SCMA, which require an investigating authority to state the facts, law, and reasons supporting its determination. The ITC has done so here. These articles are not catch-all provisions encompassing the obligations that Canada posits but for which it is unable to find any other basis in the Agreements.

4.159 Canada made certain concessions at the first panel meeting, including: (1) “consider” does not mean “make a finding”; (2) “special care” does not involve a standard for determining threat that is higher than that for determining injury; and (3) the ITC was not required to make a finding regarding the economic theories concerning the nature of the subsidy if the evidence did not permit one. Canada's concessions should narrow the issues in dispute and reinforce the conclusion that the ITC's determinations did not violate US obligations under the covered Agreements.

4.160 Finally, the United States provides a few brief comments clarifying certain issues Canada raised in its oral presentation. **On the issue of cross-cumulation**, Canada listed several alleged specific requirements distinct to each covered Agreement. The United States notes that, with the exception of the nature of the subsidies, these alleged requirements are not distinct but rather common to both Agreements. Thus, none of Canada's claims seem to relate to cross-cumulation. **On the issue of Articles 3.4 of the ADA and 15.4 of the SCMA**, Canada's reliance on the Panel's findings in *Mexico-HFCS* to challenge whether the ITC conducted a “meaningful evaluation” is misplaced. The issue in *Mexico-HFCS* was not the manner in which these factors were evaluated but rather the failure to consider them at all. Unlike *Mexico-HFCS*, it is evident that the ITC conducted a “meaningful evaluation” in this case. **On the issue of substitutability/ attenuated competition**, Canada has misstated that the ITC found that “competition was therefore attenuated” and that “products [had] limited substitutability”. The ITC found, based on the evidence in the record, that subject imports and domestic species are used in the same applications, and that prices of a particular species will affect the prices of other species.

## E. SECOND WRITTEN SUBMISSION OF CANADA

4.161 The following summarizes Canada's arguments in its second written submission.

## 1. Introduction

4.162 Canada demonstrates that the United States has violated its WTO obligations by imposing anti-dumping and countervailing duties on imports of Canadian softwood lumber on the basis of an injury investigation and final determination by the United States International Trade Commission (Commission) that were fundamentally flawed and that do not comply with the provisions of the *Anti-Dumping* and *SCM Agreements*, as well as the *GATT 1994*.

4.163 Having examined the record evidence, the Commission made a finding of no present injury. Despite attempts by the United States to argue otherwise, nowhere in its present injury analysis did the Commission make a finding that the current volume of subject imports was injurious. Nor did the Commission find that Canadian imports had a significant price effect during the period of investigation.

4.164 Having determined no present injury, the Commission proceeded to examine threat of injury. In its analysis of threat, the Commission failed to comply with the provisions of Articles 3.7 and 15.7. Nowhere in its Determination does the Commission identify what clearly foreseeable and imminent change in circumstances would create a situation in which the dumping/subsidy, found to be non-injurious in the present, would cause injury to the domestic industry.

4.165 Without identifying any clearly foreseen and imminent change in circumstances, the Commission based its affirmative threat determination on the erroneous finding of “a likely substantial increase in subject imports” and then, without reasoned and careful analysis, reached the conclusion that “these imports are likely to exacerbate price pressure on domestic producers and that material injury to the domestic industry would occur”. However, and as will be discussed in more detail below, unless Canadian market share increased significantly above the 34 per cent level that the Commission found non-injurious in its present injury analysis – a finding that the Commission did not and could not make on the record before it - the future adverse price effects the Commission attributed to subject imports would not occur.

4.166 Moreover, the finding of a likely substantial increase in imports – the central basis for the Commission’s threat determination - is unsupported by the Commission’s own analysis of the relevant threat factors, not to mention the evidence on the record. None of the factors outlined in Articles 3.7 and 15.7 provides a non-conjectural basis for the Commission’s conclusion of a likely substantial increase in subject imports. The Commission’s analyses of the other factors it cites in support of its finding are similarly flawed. As a result, the Commission’s investigation and determination does not satisfy a fundamental requirement of a threat of injury determination; namely, to demonstrate that the totality of the factors considered leads to the conclusion that further dumped/subsidized imports are imminent and that, unless protective action is taken, injury would occur.

4.167 Compounding the deficient evidentiary analysis by the Commission is its failure to perform an adequate causation analysis. In particular, the Commission’s finding that subject imports “are likely to have a significant price depressing effect in the future” was made without any examination of whether a causal linkage could be drawn between predicted increased imports and predicted adverse price effects. Without any evidence that the predicted increase in subject imports would outstrip the “strong and improving” demand, there was no basis for the Commission to assume that the increase in imports would indeed send prices down. The Commission also failed to consider the extent to which the increase in subject goods would serve market segments for which the US and Canadian goods are not close substitutes, thereby minimizing the impact of the subject goods on pricing and the state of the domestic industry. Thus, there was no basis for the Commission to find a causal link between the anticipated growth in subject imports and injury.

4.168 Furthermore, in its present injury analysis, the Commission found that other known factors, most notably the domestic industry’s own contribution to the oversupply in the US market,

contributed to price declines and poor performance of the domestic industry over the period of investigation. However, nowhere in its threat analysis does the Commission examine, let alone “separate and distinguish”, the effects of these other known factors from those attributed to the subject imports.

4.169 Faced with defending an affirmative threat determination whose central finding provides no rational support for that determination and is also unsupported by the evidence before the Commission, the United States now tries to argue that findings made in its present injury analysis somehow “foreshadow” injury and support the threat determination. The record evidence, however, lends no support to this *ex post facto* attempt to rehabilitate the Commission’s flawed determination.

4.170 In sum, the final affirmative threat determination by the Commission is an example of precisely what the Agreements are designed to prevent. It is a threat determination that is based on a central finding that is unsupported by a reasoned and adequate explanation and positive evidence; that fails to identify a change in circumstances; that fails to establish a causal link between the subject imports and threatened injury; and that fails to separate and distinguish the effects of the subject imports from the effects of other factors, such as the domestic industry’s own oversupply, on the domestic industry. As such, the determination is grounded in speculation and conjecture, and most certainly does not demonstrate the “special care” to be employed in threat of injury determinations.

4.171 In this submission, Canada first provides a brief overview of the Commission’s present injury analysis, followed by an examination of the Commission’s unsupported central finding of a likely substantial increase in imports. Canada next demonstrates the flaws in the Commission’s causation and non-attribution analyses and then demonstrates how the Commission’s determination cannot be rehabilitated by *ex post facto* rationalizations now offered by the United States.

## **2. No Present Injury**

4.172 Given the *ex post facto* emphasis now placed by the United States on the Commission’s present injury analysis, it is useful to review what findings the Commission actually made in its current injury determination. The Commission found that the US domestic industry did not suffer present injury by reason of subject imports. This was due, in large part, to the fact that the Commission could not conclude that subject imports had a significant price effect during the period of investigation “particularly in light of relatively stable market share”.

4.173 Contrary to what the United States has argued, Canada does not claim that a negative present injury determination necessarily precludes an affirmative threat finding. In this case, however, the findings made by the Commission in its present injury analysis and the record evidence left the Commission without a non-conjectural basis for arriving at its affirmative threat determination.

4.174 Findings made by the Commission in reaching its negative present injury determination that also had an important bearing on whether a threat of injury existed, include: subject imports from Canada maintained a relatively stable market share during the period of investigation and at levels lower than in prior years; there was no evidence of price underselling by the subject imports, either from the confidential pricing data or from the public pricing data; there was no evidence of confirmed lost sales or revenues due to the subject imports; and there was no other evidence of significant adverse price effects from the subject imports. In terms of the condition of the domestic industry, the Commission also found that declines in performance had levelled off in 2001.

4.175 The Commission summed up its present injury analysis with the statement: “In light of our finding that subject imports have not had a significant price effect, and the small increase in their market share, we conclude that subject imports did not have a significant impact on the domestic industry.”

4.176 The above summary of the Commission's present injury findings and conclusion is drawn directly from the Final Determination. What most certainly cannot be drawn from the Final Determination are the current attempts by the United States to insert explanations into the Commission's present analysis in an effort to make up for the absence of analysis and record evidence underpinning its affirmative threat determination.

### **3. Threat Finding Not Supported**

4.177 The Commission based its threat of injury determination on its central finding of "likely substantial increases in subject import volumes" and its conclusion that "subject imports are likely to have a significant price depressing effect in the future".

4.178 None of the factors listed in Article 3.7 of the *Anti-Dumping Agreement* and Article 15.7 of the *SCM Agreement* supported the Commission's central finding of a likely substantial increase in imports or its affirmative determination of threat of injury. Nor did the other factors relied upon by the Commission provide a non-conjectural basis for its affirmative determination of a threat of injury.

#### **❖ Listed Factors**

##### **▪ Significant Rate of Increase of Subject Imports**

4.179 The Commission lists "the increase in subject imports during the period of investigation" as one of the factors supporting its finding of "a likely substantial increase in imports". However, in its Final Determination, the Commission simply observed trends in subject import volume and market share without further explanation and without indicating whether the rate of increase of subject imports during the period of investigation was significant.

4.180 Not only did the Commission fail to explain how its analysis of this factor supports its finding of a likely substantial increase in imports, but the record evidence relied upon by the Commission also provides no support for the proposition that there was, as set out in Articles 3.7(i) and 15.7(ii), "a significant rate of increase of dumped/subsidized imports into the domestic market". In its current injury analysis, the Commission found only a 2.8 per cent increase in volume over the period of investigation, did not find this volume to be injurious, and said nothing about the "rate" of increase. The Commission also noted the "relatively stable market share maintained by subject imports over the period of investigation". These findings certainly do not equate to a finding of "a significant rate of increase". Moreover, there is nothing in either the Commission's determination or the record evidence to indicate that anything would change in the context of threat of injury.

##### **▪ Capacity**

4.181 The Commission lists "Canadian producers' excess capacity and projected increases in capacity, capacity utilisation and production" as supporting its finding of a likely substantial increase in imports. With respect to the "imminent, substantial increase in capacity of the exporter indicating the likelihood of substantially increased dumped [subsidized] exports" referred to in Articles 3.7(ii) and 15.7(iii), the Commission simply noted that "Canadian producers projected additional capacity increases". The Commission did not find that those increases were substantial nor did the record permit such a finding given that the only available evidence indicated that the predicted increase in capacity would be less than one per cent annually.

4.182 With respect to the "sufficient freely disposable... capacity of the exporter indicating the likelihood of substantially increased dumped [subsidized] exports", the Commission simply stated in the course of its threat of injury analysis that "Canadian producers expect to further increase their ability to supply the US softwood lumber markets." This ambiguous statement does not support the Commission's finding of a likely substantial increase in imports, particularly as it offers no

explanation on how the available Canadian capacity would translate into a likelihood of substantially increased imports. The inadequate analysis performed by the Commission is all the more striking given the record evidence that Canadian producers had had sufficient freely disposable capacity during the period of investigation to export more subject goods to the United States, but did not do so.

4.183 In addition, the Commission reached its finding that Canadian producers expected to increase their ability to supply the US softwood lumber markets without taking into account the projections of the Canadian exporters showing that exports to the United States were expected to increase only slightly in absolute terms from the non-injurious levels of 2001. In its First Written Submission and in its Oral Statement, the United States argues that it was reasonable for the Commission to discount the Canadian producers' projected export data. The United States further argues that Canada has offered no positive evidence to refute the ITC's conclusion that production increase would be distributed according to historic proportions.

4.184 This argument by the United States constitutes another *ex post facto* attempt to justify the Commission's decision. An analysis of the reliability of Canadian producers' projections or the likely distribution of the Canadian exports is nowhere to be found in the Final Determination. On this basis alone, the US argument should be rejected.

4.185 Even assuming that the Commission made the analysis and came to the conclusion now attributed to it by the United States, the Commission would have had to explain how it could justify relying on these projections of Canadian producers to find that they would increase production, but then disregard the very same projections on the likely destination of such increased production. In order to satisfy the requirements of the WTO Agreements, viewed in the light of the standard of review, the Commission could not "pick and choose" data from a set of internally reconciled projections without providing an adequate justification for so doing.

- **Price Depression and Suppression**

4.186 The Commission arrived at its conclusion that "subject imports are entering at prices that are likely to have a significant depressing or suppressing effect" based on its findings of "likely significant increases in subject import volumes" and "at least moderate substitutability between subject imports and domestic product". Such an analysis plainly distorts the focus of the factor listed in Articles 3.7(iii) and Article 15.7(iv) which directs an investigating authority to look at the impact of current prices on future volume and not at the impact of volume and/or substitutability on future prices. Not only did the Commission therefore fail to conduct the proper analysis associated with this factor, but in any event, there was no evidence on the record to support its conclusion that imports "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". As acknowledged by the Commission in its present injury analysis, it was unable to draw conclusions regarding the current effect of current prices of subject imports during the period of investigation. As a result, the Commission had no basis on which to reach a conclusion regarding the future effect of current prices. Finally, the United States' argument that it relied on an analysis of "price trends" to support its conclusion is nothing more than another *ex post facto* rationalization. Nowhere in the Commission's discussion of this factor in the Determination is there any reference to a "price trends" analysis.

- **Inventories**

4.187 In its report, the Commission indicated that Canadian producers' inventories as a share of production increased and were consistently higher than that reported by US producers during the period of investigation. However, the Commission did not explain how this observation supported its finding of a likely substantial increase in imports. In fact, the Commission did not list inventories as one of the factors supporting its finding and during the first substantive meeting of the Panel, the United States acknowledged that the Commission did *not* rely on inventories to support that finding.

- **Nature of the Subsidies and Likely Trade Effects**

4.188 In its Oral Statement, the United States claims that the Commission made an objective examination of the evidence and arguments related to the nature of the subsidies and its trade effects. As indicated in Canada's First Written Submission and Oral Statement, as well as in its answer to Question #15 posed by the Panel, the United States did not conduct an objective examination. The Commission's analysis is vitiated by its mischaracterization of the applicable economic principles as well as Canada's argument and record evidence. Given that the nature of the subsidy was such that it did not, and would not, affect the volume or price of lumber produced in Canada or exported to the United States, the Commission was required to give proper consideration to this factor. It could not avoid the issue merely because it thought that the evidence was conflicting. Canada does not argue that the Commission was required to make a finding had the evidence not permitted one, but Canada does contend that the Commission had to consider this factor and provide a reasoned and adequate explanation for any finding of inconclusiveness, just as it would have had to explain any other finding. In any event, this factor in no way supported the Commission's finding of a likely substantial increase in imports.

- ❖ **Other Factors Considered by the Commission**

- **Export Orientation of Canadian Producers to the US Market**

4.189 The Commission cited "the export orientation of Canadian producers to the US market" as a basis for its finding of a likely substantial increase in imports. The total attention devoted by the Commission to this factor in its report is limited to a few short sentences, the crux of it being that: "Canadian producers are predominantly export-oriented toward the US market, with export to the United States accounting for 68 per cent of their production in 2001."

4.190 The footnote appended to this sentence refers to Tables VII-2 and VII-7 of the Staff Report and includes the following text: "According to Canadian producers' questionnaire responses (covering nearly 80 per cent of production in Canada) exports to the United States increased from 13,021 mmbf in 1999 to 13,041 mmbf in 2000, and to 13,456 mmbf in 2001, and are projected to increase to 13,660 mmbf in 2002, and to 13,954 mmbf in 2003." In other words, Canadian producers projected that exports to the United States would increase 0.84 per cent from 2001 to 2002 and increase 2.1 per cent from 2002 to 2003. Importantly, the footnote further notes that, *as a share of total Canadian shipments*, Canadian exports to the United States were projected to decrease from 60.9 per cent in 2001 to 58.8 per cent in 2002, and decrease still further from 58.8 per cent in 2002 to 58.5 per cent in 2003.

4.191 In the light of the projected *decrease* in the percentage of total Canadian shipments exported to the United States, and the longstanding export orientation of Canadian producers to the US market, the Commission failed to provide a reasoned and adequate explanation of how this factor supported its finding of a likely substantial increase in imports. Absent evidence that the degree of export orientation would substantially increase in the future – evidence lacking on the record before the Commission - this factor does not support the Commission's finding.

- **Annual Allowable Cut**

4.192 Annual allowable cut requirements were in place in Canada throughout the period of investigation when the Commission found no present injury, and the Commission made no finding that these requirements would change in the imminent future. The Commission did not provide any explanation as to how a continuation of the same requirements would result in substantially increased imports in the imminent future. To the contrary, given the Commission's statement that these requirements provide an incentive to export when demand is low, and its finding that demand was

projected to be strong and improving, the record evidence indicated that, if anything, the cut requirements would have *less* of an impact in the imminent future.

- **Expiration of the SLA**

4.193 As for the effects of the expiration of the SLA, the Commission found only that the SLA “appears to have restrained the volume of subject imports from Canada at least to some extent”. As Canada pointed out in its First Written Submission, the Commission failed to explain how this inconclusive finding supported its finding of a likely substantial increase in imports.

4.194 Furthermore, the Commission began the discussion that led it to that inconclusive finding by stating that:

Each year during the pendency of the SLA, Canadian producers used all of their fee-free quota, all of their \$50 fee quota, and imported some softwood lumber with \$100 fees, suggesting that in the absence of the SLA they would have shipped more, given the near prohibitive level of the \$100 fee.

4.195 This statement is plainly wrong. As has been acknowledged subsequently by the United States, Canadian producers did not use all of their \$50 fee quota during the period 2000-01. In fact, they used only 31.4 per cent of that quota. Therefore, even the Commission’s weak finding that the SLA “appears to have restrained the volume of subject imports from Canada at least to some extent” is not supported by the evidence on the record.

- **Subject Import Trends During Periods When There Were No Import Restraints**

4.196 The Commission relied on the subject import trends during periods when there were no import restraints as a basis for its finding of a likely substantial increase in subject imports. The Commission first looked at the import trends during the period 1994-1996 and found that the imports had increased from 32.6 per cent in the 3<sup>rd</sup> quarter of 1994 to 37.4 per cent in the 1<sup>st</sup> quarter of 1996. However, the Commission failed to examine whether the market conditions during that period were sufficiently similar to present conditions to warrant the use of eight year-old data.

4.197 In addition, the Commission failed to take into account its own statement that the evidence showed that subject import market share increased from 27.5 per cent in 1991 to 35.9 per cent in 1996. Those data show that the increase in imports during the 1994-1996 period constituted a mere continuation of the increase that had taken place during the 1991-1994 period, a period during which import restraints were in place. Therefore, those data do not support an inference that subject imports would grow at a significantly greater rate during a period without import restraints than during a period with import restraints in place. Consequently, the import trends during the 1994-1996 period could not be relied upon by the Commission to support its finding of a likely substantial increase in imports.

4.198 The Commission also looked at the import trends during the April 2001 to August 2001 period, the period between the expiration of the SLA and the suspension of liquidation. However, it did not analyse whether the increase in imports it observed compared to the same period during preceding years constituted: (a) a fair measure of the allegedly higher import level that would arise as a result of the lifting of import restriction; or rather reflected (b) a shift in the timing of imports that otherwise would have been shipped to the United States because importers knew well in advance when the SLA would expire and when suspension of liquidation would begin, and had every incentive to delay or accelerate imports to avoid both SLA export fees and bonding requirements.

4.199 The Commission's analysis on that point was all the more essential because evidence on the record suggested that the increase in imports during the period reflected the latter scenario – in other words, a shift in the timing of imports in reaction to the opening of a narrow window of opportunity. Canada further notes that this explanation for the increases during that short period is supported by the fact that overall, for 2001, the level of subject imports was similar to that of 2000. Moreover, the Commission had to take into account its own finding that the expiration of the SLA had only “some restraining effect” on the volume of subject imports when analyzing what caused the increase in imports during the April to August 2001 period. For these reasons, the Commission's reliance on import trends does not support its finding of a likely substantial increase in imports.

- **Strong and Improving Demand**

4.200 Having considered the “strong and improving demand” projected for the US market, the Commission came to the conclusion that the “United States will continue to be an important market for Canadian producers”. However, this trite conclusion does not point to any increase in subject imports from Canada, even less to a substantial increase.

4.201 All other things being equal, “improving demand” would make injury less, not more, likely. In a situation of strong and improving demand, the market share of subject imports would not increase unless the increase in volume outstripped the increase in demand. However, the Commission made no such finding. Without a predicted increase in market share, there is no reason to believe that the subject imports, which the Commission found did not reach injurious levels during the period of investigation, would reach such levels in the imminent future.

4.202 As for the United States' observation that prices declined even with relatively high and stable demand during the period of investigation, Canada makes two points. First, it is neither Canada's argument nor obligation to establish that strong and improving demand would *improve* the condition of the domestic industry; Canada's point is simply that this finding cannot support the Commission's threat determination absent a further finding, which the Commission did not make, that the predicted increase in subject imports would outstrip the growing demand, thus leading to a significant increase in Canadian market share. Second, the US observation underscores Canada's causation argument. Any decline in the performance of the domestic industry during a period of *stable* demand would not foreshadow (to use the United States' newly adopted term) any decline in performance during a period of *improving* demand. Had the domestic industry's condition deteriorated during the period of investigation when both demand and subject import market share were stable, other factors had to have contributed to the decline. The Commission ignored these other factors in its threat analysis, as will be discussed in more detail below.

#### **4. Causation**

4.203 Even had the Commission properly found a likely substantial increase in imports, it could not have properly found that this increase would cause injury to the domestic industry. To properly find that the increase in subject imports would have a significant price depressing effect and cause injury in the future, the Commission also would have had to find, at minimum, that the increase in imports would outstrip the strong and improving demand that it found in the US market. During the period of investigation, the Commission could not conclude that the subject imports had a significant price effect, particularly in light of relatively stable market share maintained by subject imports. With “strong and improving demand”, a growth in imports could not be threatening unless the growth promised to exceed the increase in demand. As stated above, the Commission did not make such a finding of future increased market share and there was no evidence on the record to support it.

4.204 Moreover, the Commission's analysis of the impact of the subject imports in the future did not take into account the impact of several conditions of competition that it concluded were “pertinent to the softwood lumber industry” and “relevant to our analysis”.

4.205 With respect to substitutability, the Commission failed to consider the extent to which the increase in subject goods would serve market segments for which the US and Canadian goods are not close substitutes, thereby minimizing the impact of the subject goods on pricing and the state of the domestic industry. There was evidence on the record demonstrating that many US domestic purchasers do not consider Canadian and US lumber to be close substitutes.

4.206 Similarly, the Commission failed to consider that the domestic producers import or purchase a sizeable volume of subject import themselves and that integration in the North American market is increasing. This record evidence detracted from the Commission's conclusions regarding price effect and injury to the domestic industry.

4.207 In concluding as it did that the imports would cause injury to the domestic industry, the Commission also failed to examine the impact of the subject imports on the domestic industry in the future in terms of the relevant economic factors and indices listed in Articles 3.4 and 15.4. The Commission examined the evolution of listed factors during the period of investigation, but in the context of threat, it needed to assess how these factors were likely to change. A threat determination requires a change from the non-injurious *status quo*. In order to support its finding that the subject imports would cause injury to the domestic industry in the future, the Commission had to consider the relevant economic factors and indices in terms of the future.

4.208 With respect to the non-attribution requirement contained in Articles 3.5 and 15.5, the United States claims that the Commission's Report reflects the Commission's consideration of other factors identified as potentially causing injury and confirms that it did not attribute injury from any known other factors to the subject imports. The other factors allegedly examined by the Commission include: domestic supply; non-subject imports; cyclical demand and housing construction cycles; North American integration; and other product substitutes.

4.209 The Commission Report does not bear out the United States' claim that the non-attribution analysis was done. There is a complete lack of analysis with respect to the injurious effects of factors other than the subject imports in the future. Moreover, the Commission explicitly rejected the requirement, articulated by the Appellate Body, to separate and distinguish the effects of other known factors from those attributed to subject imports.

4.210 With respect to domestic contribution to oversupply, Canada has set out in its Oral Statement the problems affecting the *ex post facto* attempt by the United States to demonstrate that the Commission considered that known factor. The finding that the United States now ascribes to the Commission is nothing more than an industry analyst's report that was used by the Commission only in its present injury analysis and only to support the finding that "both subject imports and the domestic producers contributed to the excess supply" during the period of investigation. The use of that report for the new US rationale is all the more surprising given that it projected Canadian production to decline more than US production in 2001, a projection that was proven true by the data on the record.

4.211 With respect to the other listed factors that the United States claims the Commission considered, while they are discussed in the Commission Report section entitled "Conditions of Competition", they are clearly not considered in the context of their likely impact in the future. The discussion of non-subject imports is a case in point. In the "Conditions of Competition" section, the Commission wrote: "While nonsubject imports were present in the US market during the period of investigation, they never exceeded 3 per cent of apparent domestic consumption." Given the fact that the incremental increases in the volume and market share of both subject imports and non-subject imports were virtually equivalent during the period of investigation, clearly a proper non-attribution analysis would have required an evaluation of the injurious effects of the non-subject imports in the future and a separation of those injurious effects from any injurious effects of the subject goods.

## 5. Adverse Trade Trends

4.212 The United States attempts to rehabilitate the Commission's determination and make up for the lack of analysis and record evidence supporting the affirmative threat finding by arguing that the Commission's present injury findings somehow "foreshadow" and provide support for the threat determination. The argument appears to be that the Commission demonstrated "an evolution or progression of adverse trends in conditions" and thus satisfied the requirements for establishing threat of injury.

4.213 While Canada agrees that it is appropriate to extrapolate from past and present facts in a threat analysis, the Commission simply did not do this in its Final Determination. Nowhere in the Final Determination can be found the explanations and linkages from the Commission's present findings to the future threat determination that the United States would have this Panel believe exist. For example, there is no evaluation by the Commission of the impact of the supposed "adverse trade trends" on the condition of the domestic industry in the future and no analysis of a causal link between the predicted injury to the domestic industry and subject imports.

4.214 The absence of support in the Final Determination for the US "adverse trends" argument is not surprising given that the central theory in the Commission's analysis is not that there would be a "continuum of adverse trade trends", but rather that there would be a likely substantial increase in subject imports. However, as shown above, this central finding is unsupported by analysis and evidence. Perhaps in acknowledgement of the weakness of the Commission's reliance on its erroneous volume finding, the United States now seeks to create other explanations for the affirmative threat determination. In its First Oral Statement, Canada highlighted some of the most obvious attempts by the United States to insert such *ex post facto* reasoning into the Final Determination. Such attempts by the United States to alter the Commission's analysis *ex post facto* should be rejected by this Panel.

4.215 Furthermore, the record does not support any finding of adverse trade trends. Are there adverse trends in volume? No, because Canadian imports increased less than 3 per cent over the period of investigation and their market share was, according to the Commission, "relatively stable". Indeed, as noted above, the Commission based its conclusion that subject imports had no significant present price effect "particularly in light of relatively stable market share". In addition, the Commission did not find the "significant rate of increase" in import volume that Articles 3.7 and 15.7 contemplate as indicating a substantial increase in imports in the future and importantly, failed to analyse whether the relatively stable market share of subject imports would change in the future.

4.216 Are there adverse trends in prices? No, because the Commission did not find any underselling by Canadian imports and found that Canadian imports did not cause any significant price effects "particularly in light of relatively stable market share maintained by subject imports over the period of investigation". The Commission described significant price increases as well as price declines during the period of investigation, but identified no overall trend. Moreover, the record showed that the price trend in the first quarter of 2002 was of rising prices: prices had increased steadily for three months, running to levels more than 10 per cent higher than the fourth quarter of 2001. A review of the Final Determination, therefore, reveals that the alleged "adverse price trends" finding referred to by the United States in its First Written Submission is yet another example of an *ex post facto* rationalization that appears nowhere in the Commission's Final Determination.

4.217 Are there adverse trends in the condition of the domestic industry? Again, no, because although the Commission characterized the domestic industry as vulnerable, it acknowledged that most of the decline in industry performance occurred in the first half of the period of investigation and its performance "levelled off" in 2001.

4.218 Moreover, the Commission failed to establish a causal link between the future state of the industry and subject imports. As described above, the Commission failed to analyse whether the predicted increase in imports would result in an increase in market share. Without such an increase, what would change from the *status quo* where subject imports were non-injurious? Furthermore, the Commission failed to assess whether the alleged adverse trends that it now claims would lead to injury, could reasonably be attributed to subject imports and not to other known causes – other known causes that were taken into account by the Commission in its present injury analysis, but ignored in its analysis of threat. The failure to perform the requisite causal analysis highlights the lack of any analysis in the Final Determination of the likely state of the domestic industry in the future.

4.219 In sum, the positive evidence in the record did not demonstrate, and the Commission did not find, any adverse trends that, if continued, would cause a clearly foreseeable and imminent change in the non-injurious conditions prevalent over the period of investigation. The US “adverse trends” argument, therefore, does not remedy the Commission’s failure to identify what clearly foreseen and imminent change in circumstances would create a situation where the dumping/subsidy would cause injury.

4.220 The finding of the Commission that the domestic industry was “vulnerable” does not excuse the Commission from the obligation to identify what would transform the non-injurious *status quo* in accordance with Articles 3.7 and 15.7. Something must change to explain why the dumping/subsidy that did not produce injury during the period of investigation would cause injury in the clearly foreseeable and imminent future.

4.221 In this context, it is useful to recall that the Commission found no current injury even though the US domestic industry was as “vulnerable” during most of the period of investigation as it was at the end of that period. Indeed, as described above, the Commission’s findings indicated that if anything, the US domestic industry’s “vulnerability” was decreasing.

4.222 Moreover, vulnerability is less problematic when demand is improving and gives the domestic industry an opportunity to avoid further deterioration in its performance. Yet, in the Final Determination, the Commission did not consider the relationship between its vulnerability finding and its finding of improving demand. A vulnerable domestic industry may be at a greater risk of injury when demand is flat or decreasing, but the Commission did not find injury during the period of investigation even though US demand was flat and the domestic industry was, under the Commission’s analysis, “vulnerable”. The decline in US prices between 1999 and 2000 during a period of stable demand does not mean that prices would decline during a period of improving demand like the Commission projected for the imminent future.

4.223 In sum, the Commission did not provide a reasoned and adequate explanation, supported by positive evidence and addressing contrary evidence, that any significant increase in the volume of subject imports would cause even a “vulnerable” US industry to suffer injury.

4.224 Finally, while recognizing that the decision on how to bring a measure into conformity remains the sovereign right of the Member concerned, a Panel nevertheless may offer suggestions on how best to perform this task. In this regard, and as demonstrated in Canada’s submissions to this Panel, the nature and extent of the violations by the United States in this dispute are so pervasive and the Commission’s affirmative threat determination so clearly fails to meet the standard required by the Agreements, that the appropriate action would be for the United States to revoke the Final Determination, cease to impose the duties and return the cash deposits.

#### F. SECOND WRITTEN SUBMISSION OF THE UNITED STATES

4.225 The following summarizes the United States' arguments in its second written submission.

## 1. Overview

4.226 Canada has failed to demonstrate that the determinations of the ITC are inconsistent with US obligations under the covered agreements. The ITC's determinations are supported by positive evidence and are based on an objective examination of all relevant factors and facts. Moreover, as evidenced in the ITC Report, the ITC articulated reasoned and adequate explanations demonstrating how the facts as a whole support its determinations and permitting the Panel to adequately discern the rationale for its findings.

4.227 Canada identifies supposed requirements that have no basis in the covered agreements. Instead, Canada refers to general provisions in the agreements; those provisions do not support the particular requirements asserted. Canada's misguided approach should fail because its allegations are not based on the text of the agreements and because the Panel, under DSU Article 19.2, "cannot add to or diminish the rights and obligations provided in the covered agreements".

4.228 Canada's asserted "requirements" involve a number of different issues and take on a variety of diverse forms. For instance, Canada originally sought to have the Panel construe the term "consider" to mean "make findings," at least regarding certain issues/factors that Canada alleges are relevant to the ITC's determination. The covered agreements do not require such findings. Canada conceded at the first panel meeting that "consider" as used in the covered agreements does not require an investigating authority to "make findings". However, invoking "overarching obligations," Canada contends that, although the ITC may have "considered" factors, it failed in its obligation to provide "reasoned explanations".

4.229 Canada invokes the alleged failure to provide reasoned explanations for many other claims as if it were a catch-all provision encompassing the obligations that Canada posits but for which it is unable to find any other basis in the covered agreements. The "reasoned explanation" obligation Canada asserts apparently flows from Article 12.2.2 of the Antidumping Agreement and Article 22.5 of the SCM Agreement. Those articles, in relevant part, require an investigating authority to state the facts, law, and reasons supporting its determination. The ITC has done so here. The articles do not provide for the very specific obligations that Canada attempts to read into them.<sup>8</sup>

4.230 Nevertheless, Canada repeatedly asserts that the United States failed to meet an alleged "requirement" or "obligation" because it did not provide a reasoned explanation. Examples include its claims that the ITC was required to: (1) "identify" a changed circumstance; (2) explain its decision to cross-cumulate; (3) explain its finding that the competing evidence on economic rent theories was inconclusive; and (4) provide certainty regarding future events, such as projections of future market shares or whether future imports would outstrip demand.

4.231 "Reasoned explanation" is not the only basis Canada cites for asserted obligations not based in the covered agreements. Another basis is Article 3.1 of the Antidumping Agreement and Article 15.1 of the SCM Agreement. These overarching provisions "require[] an investigating authority to ensure that its threat determination is based on 'positive evidence' and involves an 'objective examination'". Canada relies on these provisions to argue that the ITC was required to consider Articles 3.2 and 3.4 of the Anti-Dumping Agreement, and Articles 15.2 and 15.4 of the SCM Agreement, for a second time, *i.e.*, in the context of the ITC's threat analysis. However, nothing in the covered agreements requires an investigating authority to treat its present injury and threat of injury analyses as two separate undertakings with one having no bearing on the other. Canada's asserted requirement that certain of these factors be considered a second time in the context of a threat

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<sup>8</sup> The requirement to provide a reasoned explanation does not prescribe a specific method for assessing injury or for explaining the basis for such a determination; nor does it require an explicit, separate evaluation. *See EC-Pipe*, Appellate Body Report, paras. 160-161. Simply, an investigating authority "must be in a position to demonstrate that it did address the relevant issues". *See Korea-Dairy*, Panel Report, para. 7.31.

analysis in order for a determination to be based on positive evidence has no basis in the covered agreements and is not supported by any Appellate Body or panel report. In fact, even Canada's own practice does not involve the additional analysis it claims is required.

4.232 Finally, Canada urges this Panel to find that the "special care" language in Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement requires a higher standard of review for threat cases than for present injury cases. Canada bases this alleged higher standard on its view that "in addition to considering all of the factors that are required in an injury analysis, an investigating authority must meet at least three additional requirements for threat: first, the requirement to identify a foreseen and imminent change in circumstances; second, the requirement to consider the factors set out in Articles 3.7 and 15.7; and third, the requirement to take 'special care' as outlined in Articles 3.8 and 15.8".

4.233 While Canada conceded at the first panel meeting that the standard for determining threat was not higher than that for injury, it still improperly asserts a requirement to "identify a change in circumstances," and a vague concept of what constitutes special care. Canada contends that the ITC's "failure to take such 'special care' permeates the Commission's entire determination". Yet, Canada's only explanation as to what this elusive obligation involves is that it "requires [investigating authorities] to undertake an especially careful examination of the required elements of Article 3 of the *Anti-Dumping Agreement* and Article 15 of the *SCM Agreement* as a crucial safeguard against the dangers inherent in the predictive nature of threat determinations".

4.234 Contrary to Canada's attempt to establish a special review standard for either the Panel or the investigating authority, the United States understands the "special care" language to be a recognition that projections about the future must be based on present and past facts. Projections involve extrapolations from existing data, which reinforces the requirement to base determinations on positive evidence. For example, a threat determination must be based on positive evidence tending to show that future imports are likely to be at injurious levels. Special care is the recognition that projections are about future events, and that such projections must be based on past and present facts. Moreover, basing the future-oriented determination on facts is in accord with the requirements that the investigating authority conduct an "objective examination".

## **2. Continuum of an injurious condition ascending from threat to injury.**

4.235 The covered agreements recognize that injury need not, and frequently does not, occur suddenly, but rather often involves a progression of injurious effects ascending from a threat of material injury, and if not prevented, to present material injury. Therefore, a determination that an industry is threatened with material injury would be warranted when conditions of trade clearly indicate that material injury likely will occur imminently if demonstrable trends in trade adverse to the domestic industry continue, or if clearly foreseeable adverse events occur.

4.236 Canada fails to recognize that threat of injury generally involves an accretion of adverse conditions and thus that the threat and present material injury analyses necessarily are intertwined rather than entirely separate. Canada reads the threat provision as requiring the investigating authority to "identify a change in circumstance," *i.e.*, "an event" that will abruptly change the status quo from a threat of material injury to present material injury. Canada ignores that injury may be the clearly foreseeable result of a sequence of events.

4.237 Moreover, Canada's alleged "explicit obligation in Articles 3.7 and 15.7 to identify" the change in circumstance does not exist. The Anti-Dumping Agreement provides as an example of the change in circumstances "that there is convincing reason to believe that there will be, in the near future, substantially increased importation of the product at dumped [or subsidized] prices". However, it contains no requirement to explicitly "identify" a change in circumstances, as Canada alleges. Consistent with all of its actual obligations, the ITC provided a detailed explanation of how

the totality of the evidence supported its conclusion that there will be in the near future substantially increased importation of softwood lumber from Canada at dumped and subsidized prices. In doing so, the ITC addressed the likely events and facts that were clearly foreseen for dumped and subsidized imports in the imminent future which would affect the US market and would cause injury to the US industry to occur.

**3. The facts and likely events demonstrating the progression or change in circumstances which would create a situation in which the dumping and subsidies would cause injury included:**

4.238 (1) subject import volumes already at significant levels in both absolute terms and relative to consumption, which supported an affirmative present material injury finding; (2) increases of 2.8 per cent in the significant volume of subject imports from 1999 to 2001, even with the restraining effect of the Softwood Lumber Agreement (“SLA”) in place; (3) conversely, declines of 16 per cent in subject imports by value from 1999 to 2001; (4) expiration of the trade restraining SLA; (5) substantial increases in import volumes ranging from 9.2 per cent to 12.3 per cent during the April-August 2001 period without trade restraints compared to the same period in the previous three years with trade restraints in place; (6) increases in imports stopped when preliminary countervailing duties were imposed in August 2001; (7) a similar pattern of increases in subject imports during the 1994-1996 period prior to the adoption of the SLA, which stopped when the SLA was imposed; (8) no dispute that subject imports will continue to enter the US market at this significant level and are projected to increase<sup>9</sup>; (9) Canadian producers had excess production capacity already available in 2001 as capacity utilization declined to 84 per cent from 90 per cent in 1999; (10) excess Canadian capacity in 2001 had increased to 5,343 mmbf, which was equivalent to 10 per cent of US apparent consumption; (11) Canadian producers expected to further increase their ability to supply the US softwood lumber market, projecting to increase their capacity utilization to 90 per cent in 2003 (from 84 per cent in 1999), as they also projected to increase their production capacity; (12) Canadian producers, which rely on sales in the US market for about two-thirds of their production, had incentives such as mandatory cut requirements to produce more softwood lumber and export it to the US market; (13) since the US market had been very important to Canadian producers and was expected to continue to be so, it was reasonable for the ITC to conclude, with no positive evidence offered to the contrary, that Canadian production increases would be distributed among markets, including the United States, according to historic proportions; (14) forecasts for US demand, *i.e.*, that it would remain relatively unchanged or increase slightly in 2002, followed by increases in 2003 as the US economy rebounds from recession, ensured that the US market (a market that consumes about 65 per cent of Canadian production) would continue to be a very attractive, and necessary, one for Canadian exports and thus that subject imports would continue to play an important role in the US market; (15) many domestic industry performance indicators declined significantly from 1999 to 2000, and then declined slightly or stabilized from 2000 to 2001; (16) 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; (17) the domestic industry “is vulnerable to injury in light of declines in its performance over the period of investigation, particularly its financial performance”; (18) excess supply played a pivotal role in the decline of softwood lumber prices in the US market through 2000, which led to the deterioration in the condition of the domestic industry; (19) both subject imports and domestic producers contributed to the excess supply in the US market, which resulted in substantial price declines in 2000 and led to the deterioration in the condition of the domestic industry; (20) US producers had curbed their production after excesses in supply in 2000, but overproduction remained a problem in Canada; (21) Canada acknowledges that it is a “much smaller market with abundant timber resources” and, as noted above, its producers projected to increase capacity and production in 2002 and 2003; (22) during the period of investigation, the substantial volume of subject imports had *some* adverse

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<sup>9</sup> Canada acknowledges that imports at this level would continue and even increase, and that Canada is “a much smaller market with abundant timber resources”.

effects on prices for the domestic product; (23) subject imported and domestic softwood lumber were at least moderately substitutable and are used in the same applications; (24) prices of a particular species affect the prices of other species; and (25) prices for softwood lumber in the US market declined substantially at the end of the period of investigation (third and fourth quarters of 2001).

4.239 In light of the foregoing factors, the ITC reasonably found that the additional subject imports, which it concluded were likely, would further increase the excess supply in the market, putting further downward pressure on declining prices, thereby resulting in a threat of material injury to the US industry.

4.240 Canada dismisses any evidence from the present injury analysis showing that the US industry was on the verge of injury by reason of subject imports. Canada contends that it has not argued that the “Commission’s negative current injury finding ‘precluded’ a finding of threat”. According to Canada, its argument is that “the evidence before the Commission did not provide any non-conjectural basis for finding a clearly foreseeable and imminent change in circumstances that would upset the non-injurious *status quo*”.

4.241 Inherent in Canada’s repeated assertions, that there could be no threat of material injury because there allegedly were no present injurious effects, is a conclusion that a legal determination of no present material injury negates any affirmative subsidiary facts or findings of adverse or injurious circumstances already existing or evolving. Canada’s view is that if the amalgamated current circumstances do not support a legal conclusion of current injury, they must be wholly disregarded in addressing threat. Canada’s underlying premise is wrong.

4.242 Moreover, Canada’s claims of a “non-injurious *status quo*” rest on its dismissal or avoidance of affirmative subsidiary facts or findings. The ITC found, based on the facts as a whole, that the volume of imports was already significant and thus supported an affirmative present material injury finding. While a finding that the volume of imports is significant may not “by itself” be sufficient to support an affirmative present injury finding, this affirmative subsidiary finding is an integral factor in making an affirmative present material injury determination and cannot be dismissed as an isolated finding lacking broader implications. Moreover, Canada urges the Panel to disregard the ITC’s present price effects findings by denying that certain findings exist and simply ignoring them when it selectively quotes from the ITC’s Report.<sup>10</sup> In particular, Canada’s quotation from the Report at page 35 ignores the two sentences immediately preceding the quotation, which state:

The evidence indicates that both subject imports and the domestic producers contributed to the excess supply, and thus the declining prices. We conclude that subject imports had *some* effect on prices for the domestic like product during the period of investigation, in particular due to their large share of the market.

#### **4. Specific issues regarding the threat of material injury analysis.**

4.243 Canada urges the Panel to consider the threat factors listed in Article 3.7 of the Anti-Dumping Agreement and Article 15.7 of the SCM Agreement in isolation. It suggests that other factors and facts that the ITC found were related to the listed factors are distinct and should be considered separately. But the factors considered, the record evidence, and, most importantly, the likely effects being assessed are interrelated and should not be considered and analyzed as isolated fragments. Implicit in Canada’s approach is that the non-listed factors or facts should be given less weight than those listed in the covered agreements. However, the covered agreements provide that relevant factors other than those listed should be considered. Such consideration of other factors demonstrates a reasoned analysis.

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<sup>10</sup> Canada’s Opening Statement at First Panel Meeting, para. 44.

## 5. The ITC's finding of likely substantial increases in subject imports.

4.244 The ITC found that there was a likelihood of substantial increases in subject imports based on evidence regarding, *inter alia*, Canadian producers' excess production capacity and projected increases in capacity, capacity utilization and production, the export orientation of Canadian producers to the US market and subject import trends during periods when there were no import restraints, such as the SLA. Furthermore, each of the six subsidiary factors considered by the ITC relates directly to threat factors set forth in Article 3.7 of the Antidumping Agreement and Article 15.7 of the SCM Agreement. Specifically, they relate to whether there is a significant rate of increase in imports and sufficient freely disposable production capacity. The ITC determined that these increases in imports were likely to put pressure on already declining prices, and that material injury to the domestic industry would occur. Moreover, the ITC found that the domestic industry was vulnerable to injury in light of declines in its performance over the period of investigation, particularly its financial performance.

4.245 The ITC found that the evidence demonstrated that the volume of subject imports was already significant and had increased even with the restraining effect of the SLA in place, and that subject imports had increased substantially during periods without export restraints as well. Canada is simply incorrect in contending that the ITC found such levels of import penetration were not significant, much less "non-injurious," in its present material injury finding. Moreover, contrary to Canada's assertion, the ITC did not find that the 2.8 per cent increase in the volume of imports during the period of investigation was "only a small increase".<sup>11</sup> It expressly found that the volume of imports was significant and would be injurious if combined with evidence of significant price effects and impact effects. Moreover, it recognized that the subject imports had increased despite being subject to the SLA for most of the period of investigation.

4.246 Canada's claims that the ITC ignored the projections made by Canadian producers simply are inaccurate. The ITC considered that data but concluded that Canadian producers' export projections were inconsistent with other data. The ITC found that more weight should be given to actual data showing excess Canadian capacity, declines in home market shipments, and declines in exports to other markets, as well as projected increases in production. While Canadian producers projected that exports to the US market would increase slightly in 2002 and 2003, these projected increases accounted for only about 20 per cent of the planned increases in production. The US market accounted for 68 per cent of the Canadian softwood lumber production in 2001. It was reasonable to conclude that projected increases in production would likely be distributed in shares similar to those prevailing during the prior five years. Canada has offered no positive evidence to refute the ITC's reasonable conclusion.

## 6. Likely price effects.

4.247 Given its findings of likely significant increases in subject import volumes, its finding of at least moderate substitutability, its finding that prices of a particular species affect the prices of other species, and its finding that the substantial volume of subject imports presently had *some* adverse effects on prices for the domestic product, the ITC concluded that subject imports were likely to have a significant price-depressing effect on domestic prices in the immediate future, and likely to increase demand for further imports. Canada ignores the evidence at the end of the period of investigation showing substantial declines in prices in the third and fourth quarters of 2001. Evidence regarding likely excess supply, which generally caused the substantial price declines in 2000 that led to the

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<sup>11</sup> Canada's Opening Statement at the First Panel Meeting, para. 58. Canada acknowledged during the first panel meeting that there were situations where a significant volume of imports, and not necessarily a significant rate of increase, particularly if volumes were large, would cause injury and support an affirmative determination. The United States contends that such a situation exists here, despite Canada's claims to the contrary.

deterioration in the condition of the domestic industry, indicated that US producers had curbed their production, but that overproduction “remains a problem in Canada”. Therefore, the ITC reasonably found that the additional subject imports, which it concluded were likely, would further increase the excess supply in the market, putting further downward pressure on declining prices, resulting in a threat of material injury to the US industry by reason of subject imports.

## **7. Inventories.**

4.248 Canada acknowledges that the ITC considered the evidence regarding inventories. That is all the ITC is required to do. Moreover, Canada recognizes that “there is no indication in the Commission’s analysis that it relied on the level of inventories to reach its conclusion of threat of injury”. Nevertheless, resorting to the general “reasoned explanation” obligation, Canada makes an argument that would be relevant only if the ITC had made a finding on this factor. Specifically, Canada states: “Canada has shown that the Commission did not explain how its observation supported the Commission’s determination and that the Commission ignored the Canadian producers’ projections that their inventories would remain virtually unchanged over the 2002-2003 period, and therefore not lead to a substantial increase in exports to the United States.” It is evident that the ITC appropriately considered this listed threat factor but did not make a finding.

## **8. Nature of the subsidies.**

4.249 The ITC also considered the nature of the subsidies granted by Canada, consistent with the requirement of Article 15.7(i) of the SCM Agreement, and took into account that none of the subsidies were of the kind described in Articles 3 or 6.1 of the SCM Agreement. The ITC clearly considered parties’ arguments, but declined to adopt the positions of any of the parties due to conflicting evidence and economic theories, specifically regarding the effects of stumpage fees on lumber output. The relevant provisions of the covered agreements state that the ITC “should consider” the nature of the subsidies, but do not require it to make a finding. In spite of its concession that “consider” does not mean “make a finding”, Canada’s argument essentially is that unless the ITC made a finding, its determination would be in violation of the SCM Agreement. However, the ITC is not required to make a finding, particularly when the conflicting record evidence did not provide “a sufficient factual basis to allow [it] to draw reasoned and adequate conclusions”.<sup>12</sup>

4.250 Further, Canada has provided the Panel with a one-sided analysis of this issue and ignored the conflicting evidence. Canada would have the Panel believe that the Canadian producers’ economic theory was the only information before the ITC and that this theory was uncontested and equivalent to proven fact. Neither assertion is true. Indeed, evidence presented to the ITC during its investigation squarely placed in question the very applicability of Canada’s economic theories and the alleged trade effects of the subsidies. The ITC made an objective examination, considering all of the evidence and arguments presented.

## **9. Articles 3.2 and 3.4 of the Anti-Dumping Agreement and Articles 15.2 and 15.4 of the SCM Agreement.**

4.251 The ITC considered all of the facts from the present and past, specifically regarding the volume of imports, price effects and the consequent impact of continued dumped and subsidized imports on the domestic industry, in its threat analysis. The ITC’s evaluation resulted in findings that the volume of imports was significant, that there were some price effects, that the condition of the domestic industry had deteriorated primarily as a result of declining prices and that the industry was in a vulnerable state. Projections based on these facts constitute positive evidence justifying the ITC’s threat determination.

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<sup>12</sup> *US-Lamb Meat*, Appellate Body Report, paras. 130-131.

4.252 Canada's arguments on Articles 3.2 and 3.4 of the Anti-Dumping Agreement and Articles 15.2 and 15.4 of the SCM Agreement are merely variations on its arguments regarding likely substantial increases in imports and likely price effects, and are based on Canada's premise that there could be no threat, because there allegedly were no findings of injurious effects in the present material injury analysis. That premise is demonstrably incorrect. Canada's claims that, having considered these factors once, the ITC was required to consider them a second time in the context of the threat analysis has no basis in the two Agreements.

4.253 Canada's reliance on the panel's findings in *Mexico-HFCS* to challenge whether the ITC conducted a "meaningful evaluation" of the Article 3.2 and 3.4 and Article 15.2 and 15.4 factors is misplaced. The issue in *Mexico-HFCS* was not the manner in which these factors were evaluated but that they did not appear to have been considered at all. It is possible, by reading the ITC's final determination here, where it was not in *Mexico-HFCS*, to understand the overall condition of the domestic industry with respect to the Article 3.4 factors. Also, in this case, the domestic industry was currently experiencing substantial declines in its condition, particularly its financial performance, which was not the case in *Mexico-HFCS*.

**10. The ITC demonstrated a causal relationship between the dumped and subsidized imports and the threat of injury to the domestic industry.**

4.254 Canada's claims under Articles 3.5 and 15.5, respectively, are merely variations on its arguments regarding likely substantial increases in imports and likely price effects, and are based on its premise that there could be no threat of injury, because there allegedly were no findings of any injurious effects in the present material injury analysis. Moreover, the ITC considered each of these issues, but the evidence did not support the findings urged by Canada.

4.255 The evidence demonstrates that the volume of subject imports, already at significant levels, will continue to enter the US market at significant levels and are projected to increase substantially. The ITC found that the additional subject imports would increase the excess supply in the market, putting further downward pressure on declining prices. Prices at the end of the period of investigation had substantially declined to levels as low as they had been in 2000. The ITC reasonably found that subject imports were likely to increase substantially and were 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. The ITC's findings support the existence of a threat of material injury caused by subject imports.

4.256 Canada argues with respect to the likelihood of substantially increased imports, particularly in claiming that future Canadian market share must "outstrip" demand, that the investigating authority must identify an absolute amount or percentage change in import volumes that would necessarily be "substantial" in all or most cases. However, determination of a threat of injury is, by its nature, industry specific and dependent on the particular industry's circumstances. As part of the threat analysis, the covered agreements direct the investigating authority to consider whether the evidence indicates the likelihood of substantially increased imports but, recognizing that this is a future event whose actual materialization cannot be assured with certainty, does not require the investigating authority to find that imports will increase by a certain amount. In *Mexico-HFCS*, the Appellate Body recognized that a threat analysis involves projections extrapolating from existing data and as such can never be definitely proven by facts.

4.257 Canada ignores the ITC's consideration of Canada's theory about the effects of demand, which the ITC rejected because it was not supported by the facts. The evidence showed that while demand remained relatively stable in 2000 and 2001 at the record levels it reached in 1999, substantial declines in price occurred, particularly in 2000, which resulted in a deterioration in the condition of the domestic industry. Thus, contrary to the Canadian exporters' and now Canada's theory, strong demand did not translate into price improvements. In fact, the evidence demonstrated that it had been

excess supply rather than demand that had played a pivotal role in the price declines of softwood lumber in the US market.

4.258 Moreover, the ITC appropriately considered the conditions of competition regarding demand as well as the substitutability between domestic and imported species of softwood lumber, and North American integration. On the issue of substitutability/attenuated competition, Canada has stated incorrectly that the ITC found that “competition was therefore attenuated” and that “products [had] limited substitutability”. Canada ignores the evidence in the record and the ITC’s analysis and findings. Subject imports and domestic species of softwood lumber are used in the same applications and compete with each other. Moreover, prices of a particular species will affect the prices of other species. Canada ignores the ITC’s findings based on consideration of facts, 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 exist, but do not reflect a lack of substitutability, and instead simply reflect a predisposition toward locally-milled species; there are other products that both countries produce that compete with each other; and evidence demonstrated that prices of different species have an effect on other species’ prices, particularly those that are used in the same or similar applications.

4.259 Canada recognizes that the ITC considered the integration of the North American lumber industry, but criticizes the ITC for not speculating that integrated companies would not harm related companies. Yet, Canada provides no evidence to support its supposition that integrated firms will not harm their related parties. This integration is not new, and there was no evidence that it would have a different effect in the future than during the period of investigation, when import volumes were significant, and imports had some adverse price effects.

#### **11. The ITC examined any known causal factors to ensure injury was not attributed to subject imports.**

4.260 Consistent with Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement, the ITC’s methodology involves examining other factors to determine if any of them are other “known” causal factors and to ensure that injury from any such causal factors is not attributed to subject imports. When the ITC has found a factor not to have injurious effects on the domestic industry, such factor is not an “other known factor”, and no further consideration or examination of the factor is called for. In *EC-Pipe*, the Appellate Body stated (paras. 175, 178-179) that when injury has “effectively been found not to exist”, there is no factor to examine further, pursuant to the covered agreements.

4.261 Neither Article 3.5 of the Anti-Dumping Agreement nor Article 15.5 of the SCM Agreement prescribes any particular methodology that authorities must use in examining other known causal factors. The Appellate Body in *EC-Pipe* indicated that, “provided that an investigating authority does not attribute the injurious effects of other causal factors to dumped imports, it is free to choose the methodology it will use in examining the ‘causal relationship’ between dumped imports and injury”.

4.262 Canada urges the Panel to find the ITC’s methodology in violation of the covered agreements, based on Canada’s selective reading of the ITC’s statements regarding US case law. Canada ignores the ITC’s reference to the appropriate methodology: “[T]he Commission need not isolate the injury caused by other factors from injury caused by unfair imports. . . . Rather, the Commission must examine other factors to ensure that it is not attributing injury from other sources to the subject imports.”<sup>13</sup> The ITC’s methodology is consistent with US obligations.

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<sup>13</sup> ITC Report at 31, n. 195 quoting *Taiwan Semiconductor Industry Ass’n v. USITC*, 266 F.3d 1339, 1345 (Fed. Cir. 2001) (emphasis in original).

4.263 Canada principally alleges that domestic supply is a known causal factor which the ITC found contributed to injury in its present material injury analysis, but ignored in its threat analysis. However, the ITC examined constraints on domestic producers' ability to meet demand. The ITC also took into consideration domestic producers' past contribution to oversupply conditions. Canada charges that the evidence cited by the ITC could not support the ITC's threat of injury finding merely because of its location in the ITC Report.

4.264 Canada attempts to challenge the facts regarding domestic production by comparing percentage decreases in production and ignores the absolute levels as well as the evidence regarding domestic and Canadian production capacity utilization. Domestic capacity utilization was 87.4 per cent in 2001 and, with the exception of a peak in 1999 at 92 per cent, had consistently held this level from 1995 to 2001. In contrast, Canadian capacity utilization had declined in 2001 to 83.7 per cent, a rate substantially lower than that reported for any other year in the 1995-2001 period. Moreover, in spite of this decline in capacity utilization rates, Canadian producers projected slight increases in capacity, increases in production, and a return of capacity utilization to 90.4 per cent in 2003.

## **12. Conclusion.**

4.265 As demonstrated in the Views of the Commission, the ITC articulated reasoned and adequate explanations, indicating its objective consideration of relevant factors on which it relied in its determinations, demonstrating how the facts as a whole support its determinations, and enabling this Panel to determine the rationale and evidentiary basis for its findings in order to perform its review function. The ITC's determinations are based on positive evidence and are consistent with US obligations under Article 3 of the Anti-Dumping Agreement and Article 15 of the SCM Agreement. As such, there is also no basis for Canada's claim that the ITC's determinations are inconsistent with Articles 1 and 18.1 of the Anti-Dumping Agreement, Articles 10 and 32.1 of the SCM Agreement, or Article VI:6(a) of the GATT 1994. The Panel should reject Canada's claim in its entirety.

## **G. SECOND ORAL STATEMENTS OF CANADA**

4.266 The following summarizes Canada's arguments in its second oral statements.

### **1. Opening Statement of Canada at the Second Meeting of the Panel**

#### **1. INTRODUCTION**

4.267 The Final Determination of the International Trade Commission ("Commission") represents exactly what the WTO Agreements were negotiated to prevent. Among its fundamental shortcomings: the Determination is based on a central finding that is unsupported by a reasoned and adequate explanation and positive evidence; it fails to identify what clearly foreseen and imminent change in circumstances would create a situation in which the dumping or subsidies would cause injury; it fails to establish a causal link between the subject imports and the alleged threat of injury; and it fails to separate and distinguish the injurious effects of other known factors from any injurious effects of the subject imports on the domestic industry. As a result, the United States has imposed countervailing and anti-dumping duties on imports of softwood lumber from Canada in violation of the Anti-Dumping Agreement, the SCM Agreement and the GATT 1994.

4.268 Several key elements must be present for an affirmative threat determination to be WTO-consistent. For example, the requirement to provide reasoned and adequate explanations is a substantive obligation that is encompassed in Articles 3 and 15, viewed in the light of the applicable standard of review, as confirmed by the panel report in *Mexico – HFCS*. Articles 3 and 15, viewed in the light of the applicable standard of review, require an investigating authority to: explain why particular factors were deemed relevant and supported the determination; explain why factors that

detract from a finding of threat of injury did not weigh significantly in the decision or were dismissed as not being relevant; and explain fully the nature and complexities of the data.

4.269 The Commission's failure to provide reasoned and adequate explanations forms an integral part of the United States' violations of Articles 3.1, 3.2, 3.4, 3.5 and 3.7 of the *Anti-Dumping Agreement* and of the equivalent provisions of the *SCM Agreement*. Canada's Articles 12 and 22 claim is separate.

## **2. THE COMMISSION'S FLAWED THREAT DETERMINATION**

4.270 With that introduction, Canada responds to the United States' attempt to salvage the Commission's Final Determination on five key issues.

### **A. THE SIX FACTORS DO NOT SHOW A LIKELIHOOD OF SUBSTANTIAL INCREASES IN SUBJECT IMPORTS**

4.271 The Commission did not provide a reasoned and adequate explanation as to how the six factors it lists as supporting its volume finding, considered individually or cumulatively, supported this finding. The Commission simply stated: "Therefore, based on the factors discussed above, we find a likely substantial increase in subject imports." There is no discussion in the Final Determination of the interrelationship between the factors.

#### **1. Canadian Producers' Excess Capacity and Projected Increases in Capacity, Capacity Utilization and Production**

4.272 The first factor listed by the Commission is that Canadian producers had excess capacity and projected increases in capacity, capacity utilisation and production. Canada has already demonstrated the inadequacies of the Commission's treatment of that factor. Rather than respond to Canada's demonstration of inadequacies, the United States proffers an *ex post facto* justification. The United States argues that, since the US market had been very important to Canadian producers and was expected to continue to be so, it was reasonable for the Commission to conclude that Canadian production increases would be distributed among markets, including the US market, according to historic proportions. This *ex post facto* argument should be rejected notably because footnote 258 of the Final Determination – the only source that the United States cites for this assertion – contains no such analysis.

4.273 With respect to this factor, the Commission concluded that: "Canadian producers expect to further increase their ability to supply the US softwood lumber markets." This statement is ambiguous and inconclusive and does not support the Commission's finding of a likely substantial increase in imports. There is no indication in the Commission Report as to how this so-called "ability to supply the US softwood lumber market" was likely to translate into substantially increased imports.

#### **2. Export Orientation of Canadian Producers to the US Market**

4.274 As a second factor, the Commission relied on the export orientation of Canadian producers to the US market, but it did not find, and no positive evidence would have supported a finding, that this export orientation would increase in the imminent future. On the contrary, the projections referred to by the Commission indicate a decrease in export orientation.

#### **3. Increase in Subject Imports Over the Period of Investigation**

4.275 The Commission's treatment of the third factor it cites in support of its central volume finding, the increase in subject imports over the period of investigation, also is minimal. The Commission did not indicate that the rate of increase in subject imports during the period of

investigation was significant. Indeed, such a conclusion would have been difficult to justify given the Commission's finding in its current injury analysis that the market share maintained by subject imports during the period of investigation had been "relatively stable".

4.276 The United States refers constantly to the volume of subject imports being at injurious levels during the period of investigation. The US statement is merely another *ex post facto* justification presented by the United States. That no such statement can be found in the Final Determination is not surprising given that the Commission found no current injury. The Commission found only that the volume was significant, and because it also found that Canadian imports did not have a significant impact on the US industry, the United States must recognize that import volumes that are significant are not necessarily injurious.

#### **4. Effects of Expiration of the SLA**

4.277 In its list of six factors on which it based its finding of a likely substantial increase in imports, the Commission refers to the effects of expiration of the SLA. However, the discussion found in the Final Determination does not concern the effects of expiration of the SLA. Rather, the Commission refers to some data and makes some statements with respect to what happened during the period of investigation. It does not make any projections as to what the effects of the expiration of the SLA would be in the future. Moreover, the Commission's conclusion that the SLA "appears" to have restrained subject imports "at least to some extent" does not support its finding of a likely substantial increase in imports.

#### **5. Subject Import Trends During Periods When There Were No Import Restraints**

4.278 Subject import trends during periods when there were no import restraints constitutes the fifth factor that the Commission listed as a basis for its finding of a likely substantial increase in imports. The US has provided no direct response to Canada's demonstration that the Commission could not properly rely on these trends to project the likely volume of subject imports in the imminent future.

#### **6. Forecasts of Strong and Improving Demand in the US Market**

4.279 The sixth factor on which the Commission based its finding of a likely substantial increase in imports is its forecast of strong and improving demand in the US market. Having referred to the forecasts for softwood lumber demand and US housing starts, the Commission concluded that the United States "will continue to be an important market for Canadian producers".

4.280 This uncontroversial statement about the continued importance of the US market does not support a finding of a likely substantial increase in imports in the imminent future. After all, during the period of investigation, the United States was an important market for the Canadian producers, yet Canadian imports did not increase substantially. Canada also notes that without a predicted increase in their market share, there is no reason to believe that the subject imports, which the Commission found did not reach injurious levels during the period of investigation, would reach such levels in the imminent future.

4.281 By failing to base its volume finding on positive evidence and reasoned consideration of the six identified factors, or the factors set out in Articles 3.2, 3.7, 15.2 and 15.7, the Commission failed to satisfy the requirements of these Articles, and the US acted inconsistently with its WTO obligations.

4.282 A listed factor that is relevant to likely projected import volumes is the nature of the subsidy and its likely trade effects. The United States contends that the Commission was entitled to end its consideration of this critical issue merely because the parties submitted allegedly conflicting evidence. But the existence of conflicting evidence necessitates an adequate explanation of the nature and

complexities of that evidence. As for the US assertion that the Commission found the evidence “inconclusive”, the short answer is the Commission made no such finding. The United States also does not provide any answer to Canada’s demonstration that the Final Determination fundamentally mischaracterized the economic and empirical arguments of the Canadian parties.

**B. THE COMMISSION COULD NOT DEMONSTRATE THAT SUBJECT IMPORTS WOULD LIKELY HAVE A SIGNIFICANT PRICE EFFECT**

4.283 The second basis cited by the United States for the Commission’s affirmative threat determination is a finding of significant price effects. The Commission’s price analysis is fundamentally flawed, as Canada has demonstrated. What is the US response? It repeats essentially verbatim the points that Canada has already addressed.

4.284 The United States continues to defend the Commission’s price effects conclusion as being based on a purported analysis of “price trends”. This is not in the Commission’s determination. It is pure fiction. The only basis for the Commission’s price finding is its volume finding, which is in itself fundamentally flawed. Another fiction is the US invocation of a purported finding that producers in the US, but not in Canada, had curbed their production. The Commission did not find that US overproduction had been curbed, much less that it would be relative to Canadian production.

4.285 The United States also continues to ignore the fact that the Commission failed to reconcile its conclusion on price effects with its finding regarding demand. The finding of strong and improving demand should have prevented the Commission from simply concluding, without analysis or explanation, that additional subject imports would increase the excess supply in the market, put further downward pressure on prices and have a significant price depressing effect. For the increase in the volume of subject imports to have a significant impact on pricing, the Commission would have had to find, at a minimum, that the increase in subject imports would translate into a significantly higher market share.

**C. THE COMMISSION DID NOT ESTABLISH A CAUSAL LINK BETWEEN SUBJECT IMPORTS AND THREAT OF INJURY**

4.286 The Commission did not establish a causal link between subject imports and the threat of injury. The Commission failed to comply with either of the obligations set out in Articles 3.5 of the *Anti-Dumping Agreement* and 15.5 of the *SCM Agreement*.

4.287 In order to conduct a proper causation analysis, the Commission had to take into account its finding of strong and improving demand in the US market and the absence of any evidence that Canadian market share would grow beyond the non-injurious levels of the period of investigation. It failed to do so. The mere fact that Canadian producers might respond to improving demand in the US cannot justify a finding that imports would increase to injurious levels unless the increase was likely to outstrip the growth in demand and materially increase Canadian market share above the present level that the Commission had found to be non-injurious.

4.288 With regard to causation, the Commission also failed to address other factors that it explicitly found earlier in the final determination to be “pertinent” and “relevant to our analysis”. The Commission therefore did not comply with the obligation under Articles 3.5 and 15.5 to base a finding of a causal relationship “on an examination of all relevant evidence before the authorities”.

4.289 For example, despite evidence of moderate substitutability and increasing integration in the North American lumber market, the Commission failed to address these factors in its threat analysis. Similarly, the Commission failed to consider the evidence that domestic US producers import or purchase a sizeable volume of subject imports themselves when reaching its conclusions of price effect and injury to the domestic industry.

4.290 In concluding that the imports would cause injury to the domestic industry, the Commission also failed to examine the impact of the subject imports on the domestic industry in the future, in terms of the relevant economic factors and indices listed in Articles 3.4 of the *Anti-Dumping Agreement* and 15.4 of the *SCM Agreement*. It was not sufficient for the Commission to examine the state of the domestic industry in the past, a period during which it found that the subject imports had not caused injury. In order to arrive at its threat determination, as indicated by Articles 3.1, 3.4, 15.1 and 15.4, the Commission had to conduct a related but distinct analysis of the impact of the predicted increased volume of subject imports on the domestic industry. However, it failed to do so.

#### **D. THE COMMISSION DID NOT CONDUCT A NON-ATTRIBUTION ANALYSIS**

4.291 The Commission did not conduct a non-attribution analysis. The US claim that the other factors it identified as significant to understanding the condition of the US industry are not “other known factors injuring the domestic industry” is incomprehensible. The US points to no passage in the Commission's determination where such a conclusion can be found. In addition to the likely contribution of the domestic industry to future supply conditions, other factors also were clearly known and relevant. For example, the Commission ignored the likely future role of non-subject imports and their potential contribution to any threatened injury to the US industry.

4.292 The US argues that the Commission's failure to examine non-subject imports was justified because their market share was small in absolute terms during the POI and they were not subject to import restraints. Not only is this explanation not found in the threat section of the Final Determination, but the Commission did not address the fact that non-subject imports increased in absolute terms nearly as much as subject imports and that their annual rate of increase during the POI was over 20 per cent – compared to only 1.4 per cent for subject imports. These facts were undeniably relevant because the Commission's threat of injury analysis focused exclusively on the effect of the projected incremental increase in subject imports.

#### **E. NO CHANGE IN CIRCUMSTANCES**

4.293 The Commission failed to identify, based on positive evidence in the record, what clearly foreseen and imminent change in circumstances would create a situation in which the subject imports would cause injury.

4.294 In response, the US mischaracterizes Canada's argument as requiring an event “that will abruptly change the status quo”. This is an argument that Canada has never made. Throughout this dispute, Canada has relied on the wording of Articles 3.7 of the *Anti-Dumping Agreement* and 15.7 of the *SCM Agreement* that “the change in circumstances . . . must be clearly foreseen and imminent”.

4.295 Then, the United States introduces a theory that appears nowhere in the Commission's Final Determination – namely, that the Commission found a change in circumstances because it found a “progression of circumstances”. However, a theory cannot replace facts, and the facts in this case do not support the US *ex post facto* explanation.

4.296 With respect to the twenty-five factors listed by the United States in paragraph 18 of its Second Written Submission, Canada notes that the US has taken statements scattered throughout the Commission's Final Determination – plus some assertions nowhere to be found in that Determination – and combined them into a single paragraph with 25 numbered subparagraphs, as if their bulk will somehow make them credible and coherent. But this repackaging does not make the whole any greater than the sum of the parts. The problems with the Final Determination are substantive, not presentational, and they are not remedied by a superficial reshuffling.

4.297 The US argument that the analysis of threat should not be divorced from the analysis of current injury mischaracterizes Canada's argument and misses Canada's point. Canada agrees that

the threat analysis should be related to, and consistent with, the current injury analysis. Indeed, that proposition forms the basis of Canada's argument that the Commission's determination completely failed to consider how several critical findings in the current injury analysis relate to its threat analysis. Most notably, the Commission considered the role of relatively stable market share and the response of the US industry in its current injury analysis, but it ignored these factors in its threat analysis. It is not Canada, but the United States, that "would start the threat of injury analysis with a clean slate".

4.298 In sum, the positive evidence in the record did not demonstrate, and the Commission did not find, any adverse trends that, if continued, would cause a clearly foreseeable and imminent change in the non-injurious conditions prevalent over the period of investigation. The United States has therefore failed to comply with its obligations under Articles 3.7 and 15.7.

## CONCLUSION

4.299 The United States has not satisfied the essential requirements set out in the *SCM* and *Anti-Dumping Agreements* for the determination of a threat of material injury. As such, its Final Determination has no basis and must be revoked.

## 2. Closing Statement of Canada at the Second Meeting of the Panel

4.300 In this Closing Statement, Canada only responds to a few contentions made by the United States in its Oral Statement.

4.301 The United States asserts (in para. 5) that Canada argued "that the circumstances of this case give rise to obligations that might not exist in other cases". This is not true. The obligations under the Agreements do not vary from case to case. Canada has argued that the *application* of these principles may be different in different cases depending on the facts. For example, the United States questions (para. 43) the basis for Canada's claim that the Commission was required to assess the likely future market share of subject imports. But Article 3.5 and 15.5 require that the demonstration of a causal relationship between subsidized/dumped imports and injury to the domestic industry "shall be based on an examination of all relevant evidence before the authorities". Canada contends that the Commission's treatment of causation in its threat analysis in the circumstances of this case should have included consideration of likely future market share because market share was not merely relevant but a decisive factor in its negative current injury determination.

4.302 The United States asserts (in paras. 3 and 16) that neither the *Anti-Dumping* nor the *SCM Agreement* imposes any obligation to "identify" the change in circumstances required by Articles 3.7 and 15.7. Canada would draw the Panel's attention to the United States' First Written Submission to the Appellate Body in the *High Fructose Corn Syrup* case. There, the United States faulted the investigating authority for failing to "demonstrate why there was a clearly foreseen and imminent change in circumstances that threatened injury to an industry not currently injured, as the Panel ruled was required in Article 3.7".<sup>14</sup> If there is any difference between "identify" and "demonstrate", it is not apparent to Canada. If this Panel cannot determine from the Commission's final determination what was the change in circumstances required by Articles 3.7 and 15.7, how can the Panel conclude that the United States satisfied this obligation?

4.303 In addition, the United States contends (in para. 26) that "[i]mplicit in Canada's approach, of course, is that the non-listed factors, or facts related to those factors, should be given less weight than those factors listed in the covered agreements". Canada recognizes that the investigating authority

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<sup>14</sup> First Written Submission of the United States of America, 17 November 2000 before the Panel - Recourse to Article 21.5 of the DSU by the United States in *Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS)* From the United States. [emphasis added] (Exhibit CDA-33)

may appropriately consider factors that are not listed. Canada's point is that the Commission's analysis of both listed and non-listed factors, individually and collectively, does not support its affirmative threat finding.

4.304 Next, Canada responds to the US Oral Statement concerning several instances where the United States continues to try to re-write the Commission's final determination.

4.305 The United States continues to assert (for example, in paras. 13, 15) that the Commission found in its current injury analysis that subject imports had injurious effects. However, if the Commission had found such effects, it would have reached an affirmative, not a negative, current injury determination. It is true that the Commission found that subject imports had some price effects, but it also found that they were not significant.<sup>15</sup>

4.306 A related point involves the United States' claim (in para. 39) that the Commission conducted a price trends analysis, can be found on page 43 of the Commission's Final Determination. However, that page merely recited information about prices and changes in prices during the period of investigation. The Panel would not find on page 43, or anywhere else in the Final Determination, a conclusion that these changes in price were caused by subject imports during the period of investigation; in fact, the Commission explicitly found that subject imports had no significant price effect. Nor did the Commission rely anywhere on price trends to support a finding of material injury in the imminent future.

4.307 On another price-related issue, the United States faults (in para. 40) Canada for failing to point out that the composite price for the first quarter of 2002 was lower than the composite price for the third quarter of 2001 and substantially lower than that for the second quarter of 2001". However, the United States correctly recognizes (and falsely accuses Canada of failing to recognize) that "seasonality generally affects comparisons between fourth and first quarter prices." Para. 40. A comparison of prices in the first quarter of 2002 with prices in the first quarter of 2001, which avoids the seasonality problem, shows that prices were roughly 10 per cent higher in the corresponding quarters of 2002 and 2001.<sup>16</sup>

4.308 The United States now suggests (in paras. 22 and 36) that the SLA had a substantial restraining effect, as shown by the slight decrease in Canadian market share between 1996 and 2001. In fact, in the Final Determination, the Commission stated only that the SLA "appears" to have restrained subject imports "at least to some extent", and then continued to note that "market share remained relatively constant" from 1995 to 2001.<sup>17</sup> Moreover, the final determination contains no analysis demonstrating that the slight decline in Canadian market share was in fact due to the SLA and not to other factors that the Commission did not analyze.

4.309 The United States continues to assert (para. 33) that the Commission had reasonable grounds to question the projections of Canadian producers concerning exports to the United States in 2002 and 2003. But the Commission's Final Determination contains no such finding. Canada asks the Panel to look at the data reported in the Final Determination, which show that the percentage of their production projected to be exported to the United States in 2002 and 2003 (58.8 and 58.5 per cent) was entirely consistent with the three prior years (57.4, 57.4 and 60.9 per cent).<sup>18</sup>

4.310 Finally, in discussing non-attribution, the United States implies that the Commission found certain factors "not to have injurious effects on the domestic industry" and that these factors were

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<sup>15</sup> Commission Report, p. 35.

<sup>16</sup> CLTA pre-hearing brief, Ex. 56; CLTA post-hearing brief, Ex.1 – showing lumber prices trending up in the first quarter of 2002. (Exhibit CDA-29)

<sup>17</sup> Commission Report, p. 41.

<sup>18</sup> Commission Report, p. 41, n.258, citing Table VII-2.

therefore not “other known factors” for purposes of Article 3.5 and 15.5. However, the United States explicitly acknowledges in its answers to questions that “[t]he Commission had found in its present material injury analysis that excess domestic supply was an other known factor” that contributed to injury during the period of investigation.<sup>19</sup> The Commission utterly failed to analyze the likely role of the domestic industry, and all factors other than subject imports, in the imminent future.

4.311 Although the Panel has received voluminous submissions from the parties, the fundamental question is whether the cursory threat analysis contained in the Commission’s final determination complies with the relevant US obligations under the WTO Agreements. Canada respectfully submits it does not.

## H. SECOND ORAL STATEMENTS OF THE UNITED STATES

4.312 The following summarizes the United States' arguments in its second oral statements.

### 1. Opening Statement of the United States at the Second Meeting of the Panel

4.313 Canada consistently fails to locate in the covered agreements certain obligations that it claims the United States has breached. Two examples illustrate the point. First, Canada asserts an obligation to explicitly identify a change in circumstances that would cause a threat of injury to ripen into actual injury. It claims that “[i]n the circumstances of this dispute” an “objective examination,” as required by Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement “could not be achieved without identifying the change in circumstances from the non-injurious *status quo*”. However, it does not explain what about this dispute supports an obligation that might not exist in other disputes. Second, Canada claims that the ITC was required to explain why it conducted a combined injury analysis. Once again, Canada reverts to “the circumstances of this case” as the supposed basis for the obligation, but fails to explain how the circumstances of this dispute give rise to an obligation that does not apply to all disputes.

4.314 The most striking example of Canada reading into the WTO agreements an obligation that applies to the particular circumstances of this dispute only, but not necessarily to other disputes, is its assertion of breaches of a general obligation to provide a “reasoned and adequate explanation” of certain conclusions. Canada appears to rely on “reasoned and adequate explanation” as a sort of placeholder obligation. Given the importance of “reasoned and adequate explanation” in its argument, one would expect Canada to have clearly defined its basis, but it has not done so.

4.315 An additional general observation concerns Canada’s argument that certain statements by Canadian lumber producers and exporters were not appropriately considered by the ITC. For example, Canada claims that the ITC did not take into account exporters’ projections of exports to the United States. Elsewhere, Canada reasons, somewhat circularly, that its economic theory regarding the effects of the subsidy should have given decisive guidance to the ITC. It cannot possibly be the case that an investigating authority violates WTO obligations simply by discounting self-interested statements by parties to an investigation.

4.316 In considering this dispute, it should be borne in mind that: First, the legal determination of no present material injury by reason of dumped and subsidized imports does not negate the subsidiary affirmative findings made in the present injury analysis. Second, the ITC conducted an objective examination, as evident in the ITC Report, in which its evaluation of the relevant factors and facts was unbiased and even-handed; Canada, on the other hand, focuses on only those facts and findings that favour its arguments. Third, all of the factors considered by the ITC, whether or not listed in Articles 3.7 and 15.7 of the covered agreements, the record evidence, and the likely effects being assessed are interrelated, and should not be considered and analyzed in isolation. Fourth, Canada

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<sup>19</sup> US Answers, para. 31 n.50.

frequently asserts that the United States failed to meet an alleged obligation, when no such obligation exists. Fifth, the theories presented by Canada, including the demand theory and the economic rent theory, are not proven facts and are not uncontested, as it asserts. Finally, the ITC's determinations are based on positive evidence, and an objective examination of all relevant factors and facts.

**4.317 Legal Determination of No Present Material Injury Does Not Negate Subsidiary Affirmative Findings.** The ITC made subsidiary findings in its present material injury analysis that supported an affirmative present injury finding. Specifically, the volume and market share of imports were significant, imports had some adverse effects on domestic prices, and the condition of the domestic industry had deteriorated, primarily as a result of declining prices, and thus was in a vulnerable state. These findings foreshadow injury and clearly support the existence of a threat of material injury. Canada erroneously argues that if the current circumstances taken together do not support a legal conclusion of present injury, they must be wholly disregarded in addressing threat.

4.318 Canada simply ignores the existence of any evidence from the present injury analysis showing that the US industry was on the verge of injury by reason of subject imports. For example, the ITC found that the volume and market share of subject imports, accounting for 34 per cent of the US market, were already significant and thus supported an affirmative present material injury finding. Canada, however, erroneously describes this as a finding that such imports were not injurious and thus dismisses its importance in the context of the threat of injury analysis. Its claims rest largely on this error. For example, while Canada observes that the ITC recognized that the 34 per cent market share held by Canadian imports was relatively stable, it omits that the ITC recognized that it had been higher prior to the imposition of the restraining effect of the Softwood Lumber Agreement (SLA). The relatively stable market share during the SLA period does not negate the finding that the market share was significant. Rather, it is an indicator of the SLA's restraining effect and supports an affirmative threat of injury finding.

4.319 Regarding present price effects, Canada selectively quotes from the ITC Report, omitting the ITC's finding that subject imports had *some* price effects and its reasoning for why such effects were not significant. The ITC found that "the deterioration in the condition of the domestic industry during the period of investigation is largely the result of substantial declines in price". Canada states that "the [ITC] also found that declines in performance had levelled off in 2001". But, it disregards the ITC's prior statement that "[t]he record indicates that prices did increase in the second quarter of 2001, coincident with the filing of the petition, and this price increase abated some of the domestic industry's declining performance indicators".

**4.320 Threat of Material Injury Analysis – General Issues.** Canada urges the Panel to consider the threat factors listed in Articles 3.7 and 15.7 in isolation from other factors. But all of the factors considered by the ITC, whether listed or not, are interrelated, as are the different pieces of record evidence, and the likely effects being assessed. The text of the covered agreements provides a clear example of the change in circumstances as a sequence or accretion of events and does not include an "obligation to identify" the change in circumstances, as Canada alleges. Consistent with all of the US obligations under the covered agreements, the ITC provided a detailed explanation of how the totality of the evidence supported its conclusion, including addressing the facts and likely events demonstrating the progression or change in circumstances, as set forth in paragraph 18 of the US second written submission.

**4.321 Specific Issues Regarding Threat of Material Injury Analysis.** The ITC found that there was a likelihood of substantial increases in subject imports based on evidence regarding, *inter alia*, Canadian producers' excess production capacity and projected increases in capacity, capacity utilization and production, the export orientation of Canadian producers to the US market and subject import trends during periods when there were no import restraints. The ITC determined that these increases in imports were likely to put pressure on already declining prices, and that material injury to the domestic industry would occur. It also found that the domestic industry was vulnerable to injury

from likely increases in imports and price pressure in light of declines in performance, particularly financial performance.

4.322 **Likely Substantial Increases in Subject Imports.** Contrary to Canada's characterization, the ITC found that the volume and market share of subject imports were already significant and had increased even with the restraining effect of the SLA in place. Moreover, subject imports had increased substantially during the periods without import restraints.

4.323 Capacity. Canada selectively quotes from the ITC's Report to claim that the ITC performed an "inadequate analysis" and offered "no explanation" for its finding that Canadian producers expect to further increase their ability to supply the US market. Yet the ITC provided an explicit explanation (ITC Report, page 40) that Canada simply has ignored. Moreover, the ITC also recognized that "Canadian producers projected . . . capacity utilization increases to 90.4 per cent" in 2003 from the low of about 84 per cent in 2001. Further, regarding capacity, Canada would require a showing of both sufficient freely disposable capacity and an imminent substantial increase in capacity, even though these factors in the relevant provisions are separated by "or" rather than "and".

4.324 Export Orientation and Export Projections. The US market has generally accounted for about 65 per cent of Canadian softwood lumber production. Yet, Canadian producers' projected increases in exports to the United States accounted for only about 20 per cent of their planned increases in production. This aspect of producers' projections, coupled with projected home market shipments that did not correlate to Canadian demand forecasts, reasonably caused the ITC to conclude that projected production increases would likely be distributed among the US, Canadian, and other markets in shares similar to those prevailing during the prior five years.

4.325 Restraining Effect of the SLA. Canada's claims regarding the ITC's use of "all" rather than "some" for \$50 fee imports in 2000-2001 ignore the significant quantities of exports subject to \$100 fees for the period. The fact is, since \$100 fee imports entered in the 2000-2001 period, some Canadian producers had used all of their \$50 fee quota in that period. Moreover, this does not affect the ITC's conclusion that the significant quantities of imports subject to \$100 fees indicated that "in the absence of the SLA they [Canadian producers] would have shipped more, given the near prohibitive level of the \$100 fee".

4.326 Substantial Increases in Imports in Periods with No Import Restraints. Canada's arguments regarding the ITC's finding that subject imports increased substantially during periods with no import restraints rely on the omission of significant evidence and findings. In fact, at one point, Canada claims that the 1994-1996 period does not support an "inference" regarding the subject imports. But the ITC did not need to make an inference to determine what occurred when the trade restraint, *i.e.*, the SLA, was imposed, because it relied on and discussed actual data showing a decline in subject imports to 34.3 per cent with the SLA in effect from 35.9 per cent prior to its imposition. Moreover, Canada's challenge to the ITC's consideration of import data for the 1994-1996 period on the basis that market conditions were not taken into account is not consistent with its own reliance on data outside the period of investigation. In addition, Canada's claim that the substantial increase in imports during the April-August 2001 period only reflects "a shift in the timing of imports" fails to respond to the simple fact that imports did increase. For example, subject imports increased by 11.3 per cent for the April-August 2001 period compared with the same period in 2000, and by 4.9 per cent for the April-December 2001 period compared with 2000. The fact that imports increased after expiration of the SLA and have continued to increase does not support Canada's argument that a shift in timing accounted for the higher level of imports after the SLA expired.

4.327 **Likely Price Effects.** Canada's arguments regarding likely price effects largely ignore the ITC's analysis and findings. For example, Canada has claimed that "[n]owhere in the [ITC's] discussion of this factor in the Determination is there any reference to a 'price trends' analysis." The facts refute this claim. The ITC did analyze price trends in its threat analysis (ITC Report, page 43)

and found that prices declined substantially at the end of the period of investigation, supporting a conclusion that imports "are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices". Canada's attempt to show that prices increased after the period of investigation fails to point out that the composite price for the first quarter of 2002 was lower than the composite price for the third quarter of 2001 and substantially lower than that for the second quarter of 2001.

4.328 **Causation.** Canada's claims on causation are variations on its arguments regarding likely substantial increases in imports and likely price effects. When the ITC finds a factor not to have injurious effects on the domestic industry, such factor is not an "other known factor," in which case there is no obligation to further examine it. Canada states that the ITC was required to "assess[] the future market share of subject imports". However, such a requirement does not exist in the covered agreements.

4.329 **Substitutability.** Regarding substitutability, subject imports and domestic species of softwood lumber are used in the same applications and compete with each other. Moreover, prices of a particular species will affect the prices of other species. Canada quotes selectively from the ITC's preliminary investigation and ignores the totality of the facts, including the evidence provided by purchasers and home builders that Canadian softwood lumber and the domestic like product generally are interchangeable and are used in the same applications.

4.330 Canada's claims regarding attenuated competition centre on whether Canadian SPF, which accounts for about 85 per cent of its production, and US Southern Yellow Pine (SYP), which accounts for about 45 per cent of US production, are interchangeable and compete. Canada provides the Panel a single quote from an employee of Home Depot, a large US retailer. However, other evidence, including testimony from another employee of Home Depot from Texas, show both SPF and SYP are used for the same applications, with regional preferences reflecting availability and a predisposition for locally-milled species, but not a lack of substitutability (USA-23). In addition, there are other species, such as Douglas fir and hem-fir, that both countries produce that compete with each other, and with SPF and SYP. There was significantly more evidence in the record demonstrating the interchangeability of the species.

4.331 **Domestic Supply.** Canada has made two charges regarding the evidence cited by the ITC indicating that domestic producers have curbed their production, but that overproduction remains a problem in Canada. First, Canada argues that, based on the location of this finding in the ITC Report, it could not support the ITC's threat of injury finding. Second, Canada alleges that this "excerpt therefore referred only to '*overproduction in order to secure wood chips for pulp and paper manufacturing*' and not to overproduction in the lumber industry generally." But, the motivation for lumber overproduction does not eliminate or lessen the central problem – lumber is being overproduced. Moreover, it actually is more problematic, because it indicates that the production of lumber is not tied exclusively to the demand for lumber.

4.332 Finally, Canada's renewed request for a suggestion by the Panel as to how the United States should come into compliance with its WTO obligations goes beyond anything contemplated by the WTO agreements and should be rejected.

## **2. Closing Statement of the United States at the Second Meeting of the Panel**

4.333 As we indicated this morning, the Commission conducted an objective examination, as evident in the ITC Report, in which its evaluation of the relevant factors and facts was unbiased and even-handed. Canada, on the other hand, continues to draw to the Panel's attention only those facts and findings that favour Canada's arguments. Canada overlooks substantial parts of the ITC's discussion of various issues and arguments, and substantial parts of the record evidence, in presenting its arguments to the Panel.

4.334 Canada frequently asserts that the United States in relying on *ex post facto* rationalizations and justifications in its defence of the ITC determinations.<sup>20</sup> Yet in making these assertions Canada dismisses and omits explicit statements made by the Commission in its opinion. We have cited to a number of these omissions in our written submissions. This morning, in our opening statement, we quoted statements explicitly made by the Commission, or referred the Panel to pages, in the ITC's Report, that Canada has ignored and instead often characterizes as *ex post facto* rationalizations.<sup>21</sup> One example, discussed this morning involves Canada's claims that the ITC did not discuss price trends in its threat of injury analysis.<sup>22</sup> It is clear on pages 43 of the ITC Report (attached to the US opening statement) that the ITC explicitly did conduct a price trends analysis.

4.335 An examination of the ITC Report demonstrates that the Commission's determinations reflect the facts as a whole and are consistent with all US obligations under the covered agreements. Contrary to Canada's claims, it is important to understand that consideration and explanation of a factor in any section of the ITC Report does not limit its application to that section of the report. The report must be viewed as a whole, with analysis conducted in any particular section potentially having a bearing on analysis in other sections.

4.336 The United States has addressed the issues in detail in written submissions to this Panel and will not repeat those arguments here. We will, however, provide a few brief comments clarifying or placing in perspective certain issues raised by Canada.

- The Commission properly examined any known factors other than the dumped and subsidized imports that might be injuring the domestic industry to ensure that it did not improperly attribute injury from other causal factors to the subject imports. Canada implies that further consideration or examination is required even if an alleged factor is found not to be an "other known factor."<sup>23</sup> When the Commission finds a factor not to have injurious effects on the domestic industry, such factor is not an "other known factor" for purposes of Article 3.5 of the Anti-Dumping Agreement or Article 15.5 of the SCM Agreement. If a factor is not an "other known factor," there is no obligation to further examine it. Canada is wrong.
- One example where evidence demonstrates that an alleged other factor is not a "known" other factor is nonsubject imports. Canada continues to attempt to portray nonsubject imports as other known factors in face of the facts to the contrary. Non-subject imports never accounted for more than 2.6 per cent of apparent consumption; subject imports accounted for at least 34 per cent of the US market. Moreover, individual country non-subject imports would have been deemed negligible, with no individual country accounting for more than 1.3 per cent of imports while Canadian imports accounted for about 93 per cent of all imports.<sup>24</sup>
- On the issue of substitutability/attenuated competition, it is Canada that has failed to address the evidence before the Commission. As discussed in the US first written submission and the ITC Report, and this morning, the simple fact is, subject imports and domestic species of softwood lumber are used in the same applications, and

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<sup>20</sup> See Canada Oral Statement at Second Panel Meeting, para. 3

<sup>21</sup> See, e.g., US Opening Statement at Second Panel Meeting, paras. 23, 25-27, 31, 36, and 43.

<sup>22</sup> Canada Second Written Submission, para. 26.

<sup>23</sup> See Canada's Oral Statement at Second Panel Meeting, paras. 43-47.

<sup>24</sup> See US Response to Panel Question 26, para. 33, n. 60; ITC Report at II-7, n. 23 ("Official statistics from the Department of Commerce reveal that nonsubject imports accounted for 6.9 per cent of the overall quantity of softwood lumber imports into the US market in 2001, with Brazil, Chile, and New Zealand accounting for 1.3, 1.1, and 1.0 per cent, respectively. Germany, Sweden, and Austria accounted for 1.0, 0.8, and 0.5 per cent, respectively, while Lithuania, the Czech Republic, Mexico, and all other countries accounted for the remaining 1.2 per cent of 2001 softwood lumber imports.").

prices of a particular species will affect the prices of other species.<sup>25</sup> Canada states that “some Canadian imports in high demand in the United States were employed for end uses for which domestic products competed only on a limited basis.”<sup>26</sup> But, the facts do not support its claim. Canadian imports are primarily SPF; SPF accounts for about 87.7 per cent of Canadian imports and about 85 per cent of Canadian softwood lumber production. As demonstrated by Exhibit USA-23, discussed this morning, Canadian SPF and US Southern Yellow Pine are used for the same applications. Thus, these products compete. Canada also imports Douglas fir, hem-fir, western red cedar, and a few other products; all of these species also are produced in the United States. Canada now attempts to rely on a US court case with a very different fact pattern to support its attenuated competition arguments. But, this attempt should fail because in that court case about 20 per cent of the imports were for a niche product which had no comparable domestic product, *i.e.*, the products were not used in the same applications nor were they interchangeable.

4.337 Mr. Chairman, members of the Panel, we have just one final point to make. In its opening statement, Canada took issue with the US discussion of Canada’s request for a suggestion pursuant to DSU Article 19.1. The United States does not deny—as implied by Canada’s statement—that Article 19.1 allows a panel to make a suggestion in appropriate cases. What we have argued is that no suggestion, and certainly not the suggestion Canada proposes, is appropriate in this case. Canada asks the Panel to make a suggestion that goes well beyond steps to bring about conformity with WTO obligations. For that reason, this Panel, like the panel in *United States-Hot Rolled Steel*, should decline the request for a suggestion. Of course, as we discussed in our earlier submissions, there is no need for any suggestion in this case because the ITC’s determination was entirely consistent with WTO obligations.

4.338 Mr. Chairman and members of the Panel, our arguments today and in our prior submissions demonstrate that the ITC’s determination in this case was entirely consistent with US obligations under the covered agreements. For the reasons we have laid out, the Panel should reject Canada’s claim in its entirety.

## V. ARGUMENTS OF THE THIRD PARTIES

5.1 The arguments of the third parties, the European Communities, Japan, and Korea are set out in their written submissions and oral statements, and are summarized in this section. Third parties’ answers to questions are annexed in full to this report (see List of Annexes, page iv).

### A. THIRD PARTY WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES

5.2 The following summarizes the European Communities arguments in its third party written submission.

#### 1. The Applicable Standard of Review

5.3 This dispute concerns a determination that is mixed (involving subsidised and dumped imports) and consists, in the strict sense of two legally separate determinations on which the final countervailing and anti-dumping duties are based which are to be reviewed separately under the *SCM Agreement* and the *Anti-Dumping Agreement*. The European Communities agrees with Canada that the applicable standard of review under the *SCM Agreement* is Article 11 of the DSU. The European Communities also agrees with both parties that Article 17.6 of the *Anti-Dumping Agreement*

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<sup>25</sup> US First Written Submission, paras. 269-278 and ITC Report at 25-27 (USA-1).

<sup>26</sup> Canada’s Oral Statement at Second Panel Meeting, para. 40.

complements Article 11 of the DSU and that the duties of the Panels under both provisions do not differ significantly.

5.4 However, the European Communities strongly disagrees with Canada that the standard of review developed for the purpose of reviewing safeguard measures should automatically be applied in this dispute.

5.5 Article 11 of the DSU defines generally a panel's mandate in reviewing the consistency with the covered agreements of measures taken by Members. However, the specific standard of review a Panel is called upon to apply parallels the substantive and procedural obligations of the domestic authorities. Thus, the Appellate Body explained the standard of review concerning a violation of Article 4.2 of the *Agreement on Safeguards*, in the following way:

5.6 Because the standard of review reflects the underlying substantive obligation, an automatic transfer of the standard of review from one Agreement to the other could result in a *de facto* modification of the substantive obligations.

5.7 The European Communities would give one example where the standard of review proposed by Canada on the basis of the standard of review applied in the context of safeguard cases would not have a legal basis in the *Anti-Dumping Agreement* and the *SCM Agreement* and would, indeed, amount to a *de facto* modification of the substantive obligations.

5.8 Thus, the European Communities fails to see, on which legal basis Canada would ask this Panel to determine whether the USITC has considered all the facts, including those that *should have been* before the ITC but were not raised by the interested parties. The latter standard was developed in the particular context of the *Agreement on Safeguards*, where the competitive authorities may not satisfy themselves with the facts and arguments provided by interested parties but must actively seek to obtain all relevant facts. As already explained above, this particular role of the investigating authorities is justified by the fact that safeguard measures apply to fairly traded imports irrespective of their source, while anti-dumping and countervailing duties, apply to dumped or subsidised products from specific sources.

5.9 Article 17.5 of the *Anti-Dumping Agreement* confirms that domestic authorities have no investigative duties to obtain facts in addition to the facts submitted by the interested parties.

5.10 The European Communities considers that the same principle applies under the *SCM Agreement* although that Agreement does not contain an explicit confirmation to that end. This is supported by the fact that both, the *Anti-Dumping Agreement* and the *SCM Agreement*, contain the same very detailed and elaborate provisions regulating the conduct of the investigation, including the "best facts available" rule as provided under 6.8 ADA and 12.7 SCM.

5.11 The European Communities considers that the review this Panel is called upon to exercise in reviewing an injury determination involving both subsidised and dumped products can be deduced, in particular, from the overarching obligations of domestic authorities in an injury (or threat thereof) determination under Articles 3.1 ADA/15.1 SCM.

5.12 Given that the wording of Articles 3.1 ADA/ 15.1 SCM is identical, the European Communities considers that the jurisprudence on the standard of review for Article 3.1 of the *Anti-Dumping Agreement* may also apply to the review of an injury determination under Article 15.1 of the *SCM Agreement*. Moreover, both provisions relate to a "determination of injury for purposes of Article VI of GATT 1994", thus suggesting that injury determinations from subsidised and dumped products do, in principle, not differ.

5.13 In short, the European Communities submits that the applicable standard of review cannot be “imported” from the *Agreement on Safeguards*, but that the Panel should determine the appropriate standard of review for the injury determination involving both dumped and subsidised imports in accordance with Articles 11 of the DSU and 17.6 of the *Anti-Dumping Agreement* by carefully considering the substantive obligations of the domestic authorities under the *Anti-Dumping Agreement* and *SCM Agreement*, in particular the requirements under the general obligation in Articles 3.1 ADA/15.1 SCM.

## 2. Threat of Injury Determination

5.14 Notwithstanding these minor deviations in the text, the European Communities agrees with the main parties that both, Article 3.7 ADA and Article 15.7 SCM should be read harmoniously to require a prospective analysis of the situation of the domestic industry in addition to the analysis of the current state of the domestic industry to be carried out under Articles 3.1- 3.6 ADA and Article 15.1-15.6 SCM.

5.15 A proper threat analysis must fulfil three different requirements. First, the threat analysis “shall be based on facts and not merely on allegation, conjecture or remote possibility”. This element relates to the factual basis of the determination, requiring that the prospective analysis must be based on existing facts from which reasonable predictions can be made about the state of the industry in the future. Second, the purpose of the threat analysis is to demonstrate that a “change in circumstances” is “clearly foreseen and imminent”. Third, as regards the methodology, domestic authorities should consider “the totality of factors” and that consideration “must lead to the conclusion that further dumped imports are imminent and that, unless protective action is taken, material injury would occur”. The factors enumerated in Articles 3.7 ADA/ 15.7 SCM essentially relate to the likelihood of increased imports (rate of increase of imports, capacity of exporters to increase exports, availability of other export markets and inventories) and the effects of import prices on future prices and demand. The list of factors is not exhaustive and none of them can by itself give decisive guidance.

- *Change in Circumstances under Articles 3.7/15.7*

5.16 The European Communities disagrees with the United States that there is no requirement to identify a “change in circumstances”. The United States would want to make the Panel believe that it is not feasible or meaningful to analyse possible changes in circumstances, because it is impossible, as clarified by the Appellate Body in the context of safeguard disputes, to make out a point in time at which a threat of injury becomes material injury”.

5.17 However, the case law relating to the *Agreement on Safeguards* is of no relevance to the interpretation of the phrase “change of circumstances”, because only the *Anti-Dumping Agreement* and the *SCM Agreement* contain the specific requirement of a “change of circumstances” analysis. The ordinary meaning of the second sentence of Article 3.7 ADA/ 15.7 SCM is straightforward: The domestic authorities are required to determine that a “change in circumstances” that would “create a situation” in which the dumping/subsidisation would cause injury must be “clearly foreseen and imminent”.

5.18 The European Communities agrees with the commonplace that the economic development from the current (non-injured) state of the domestic industry to a situation where material injury realises is a continuous one and that it is not possible to predict the precise moment in time when the change occurs. However, that is not the point. The second sentence of Articles 3.7 ADA/ 15.7 SCM does not require a determination of when circumstances change, but rather analysis of factors that would create a change in circumstances.

5.19 Read contextually with the example contained in footnote 10 of the *Anti-Dumping Agreement*) and the specific factors listed in the third sentence of Article 3.7 ADA/ 15.7 SCM, the requirement of a change of circumstances analysis essentially breaks down in two basic questions: (i) Is there a high likelihood of continued dumped/subsidised imports and (ii) would the effects of these imports compel the conclusion that “unless protective action is taken” material injury as defined under Articles 3.1-3.6 ADA and 15;1-15.6 SCM would occur.

5.20 This analysis does not require identification of an “abrupt change in circumstances” within the meaning of, e.g., “unforeseen developments”, but rather an analysis of particular factors relating to the occurrence of facts of future dumped/subsidised imports resulting in the conclusion that the domestic industry is on the brink of being injured.

- *Individual Threat of Injury Factors*

5.21 The European Communities supports Canada’s interpretation of Articles 3.7(ii) ADA/ 15.7(iii) SCM that the authorities must analyse the likelihood of increased dumped/subsidised exports in relation to establishing the existence of sufficient disposable capacity or imminent, substantial increase in capacity. This is consistent with the requirement to consider the availability of other export markets and the general purpose of the individual threat factors to establish a high likelihood of continued dumped/subsidised imports.

5.22 The European Communities also agrees with Canada’s position that Article 3.7(iii) ADA/ 15.7(iv) SCM requires the authorities to consider the impact of the current import prices. This can be deduced from the use of the present continuous in the phrase “imports are entering at prices”.

5.23 The European Communities would, however, take issue with Canada’s interpretation of Articles 3.7(iv) ADA/ 15.7(v) SCM. According to Canada, the authorities are required to establish that inventories are likely to be liquidated in the imminent future. Such requirement is not supported by the text of Article 3.7(iv) ADA/ 15.7(v) SCM which only refers to an assessment of “inventories”. Contextually, this is further corroborated by the difference in language with Article 3.7(i) and (ii) ADA/15.7(ii) and (iii) SCM. The factors relating to increased imports and the capacity of exporters to increase imports contain an explicit requirement to establish the likelihood of substantial increases of importation’s or dumped/subsidised imports.

5.24 It is true that the *chapeau* of Article 3.7 ADA/15.7 SCM would require consideration of all specific enumerated factors with a view of whether they point to the likelihood of further increased imports. However, in that respect it would be sufficient, as implicitly admitted by the United States in its defence on that point, that inventories provide exporters “with the added ability to likely increase substantial imports to the US market”.

- *Meaning of “Consider” in Article 3.7 ADA/ 15.7 SCM*

5.25 The European Communities supports the US argument relating to the meaning of the term “consider” that the investigating authority is not obliged to make an explicit finding or determination on each of the factors for the following reasons:

5.26 The term “consider” is defined, *inter alia*, as “look at attentively”, “pay heed to”, “think over”, “weigh the merits of”, “take note of”, “think carefully, reflect”. Thus, the ordinary meaning does not suggest that a separate determination must be made on each of the factors, but rather, that the determination is based on an evaluation that takes note of the different factors. This is corroborated by the interpretation of the phrase “shall consider” in Article 3.2 of the *Anti-Dumping Agreement in Thailand – H- Beams*:

5.27 The same approach was taken by the Appellate Body in *EC – Tube and Pipe*. With respect to the examination of injury factors under Article 3.4 of the *Anti-Dumping Agreement* the Appellate Body explicitly confirmed the finding of the Panel:

5.28 It is noteworthy that the first sentence of Article 3.7 ADA/ 15.7 SCM does not even require that the domestic authorities “shall” consider all those factors as Articles 3.2 ADA/ 15.2 SCM do, but only that they “should” consider, “inter alia” such factors as enumerated. Neither does it require an “examination” of factors as Article 3.4 ADA/15.4 SCM does. Thus, it appears that Article 3.7 ADA/ 15.7 SCM leaves an even broader measure of discretion to investigating authorities regarding the *manner* in which they make a threat of injury determination.

5.29 What is more, a conclusion that a threat of injury exists may be justified by at least one threat factor pointing towards a threat of material injury. Thus, the phrase “none of these factors can necessarily give decisive guidance” in the third sentence of 3.7/15/7 clarifies that, indeed, one of these factors may give decisive guidance and it may be sufficient to justify a threat of injury determination on the basis of one sole factor pointing towards a threat of injury.

## B. THIRD PARTY ORAL STATEMENT OF THE EUROPEAN COMMUNITIES

5.30 The following summarizes the European Communities arguments in its third party oral statement.

### 1. Introduction

5.31 As noted in the European Communities written third party submission, many of the issues before the Panel in this dispute relate to detailed questions of fact which the European Communities is not in a position to comment upon. Therefore, the European Communities concentrates on some of the systemic issues raised by the European Communities regarding the interpretation of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the “Anti-Dumping Agreement” or “ADA”) and the Agreement on Subsidies and Countervailing Measures (the “SCM Agreement” or “SCMA”). The European Communities comments would not repeat the detailed comments already provided in its third party submission, but would briefly add some comments on the legal issues relating to the causation analysis carried out by the USITC and the applicable standard of review in relation to “known factors”.

### 2. Interpretation of Articles 3.5 ADA/15.5 SCM Agreement

5.32 The parties to the dispute disagree over whether the USITC carried out an analysis of the existence of a causal link which conformed with Article 3.5 of the *Anti-Dumping Agreement* and Article 15.5 of the *SCM Agreement*. In particular, Canada claims that the USITC failed to identify, much less examine any known factors that could have threatened injury to the domestic industry in addition to the relevant imports. Having neglected even to identify other causal factors, the US authorities, according to Canada, also did not separate out and distinguish the injurious effects of those other factors from the alleged injurious effects of the dumped and subsidised imports.

5.33 Canada appears concerned that the US even denies its very obligation under WTO because, in its report, the US authority explicitly stated that it is not required, under US case law, to separate and distinguish the injurious effects of the other known factors from the injurious effects of the dumped and subsidised imports.<sup>27</sup> Therefore, according to Canada, the determination does not comply with

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<sup>27</sup> USITC Report “Softwood Lumber From Canada”, Investigations Nos. 701-TA-414 and 731-TA-928(Final), Publication 3509, Ma 2002 (hereinafter the “ITC Report”) (Exh.CDA-1), p. 31. Footnote 195.

the requirements in the third and fourth sentences of Article 3.5 of the *Anti-Dumping Agreement* and Article 15.5 of the *SCM Agreement* relating to non-attribution.<sup>28</sup>

5.34 Article 3.5 ADA provides in relevant part:

It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

5.35 Article 15.5 SCMA states:

It must be demonstrated that the subsidized imports are, through the effects of subsidies, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the subsidized imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the subsidized imports.

5.36 The European Communities considers that Article 3.5 ADA/15.5 SCM requires a detailed examination of other factors causing injury to the domestic industry and a rigorous segregation of those factors from the effects of dumping. The European Communities would agree that a detailed examination must take place. The European Communities notes with satisfaction that the United States does not, as alleged by Canada, deny its obligations to comply with Articles 3.5 ADA/15.5 SCMA. The United States accepts, as the EC understands from the first US written submission, that Articles 3.5 and 15.5 require investigating authorities in their causation determinations not to attribute to dumped [subsidized] imports the injurious effects of other causal factors, so as to ensure that dumped [subsidized] imports are, in fact, "causing injury" to the domestic industry.

5.37 The European Communities argued before the Appellate Body and the Appellate Body agreed that "provided that an investigating authority does not attribute the injuries of other causal factors to dumped imports, it is free to choose the methodology it will use in examining the "causal relationship" between dumped imports and injury".<sup>29</sup> The EC also agrees with the US that factors that are found not to have injurious effects are not an "other known factor" for purposes of Article 3.5 ADA or Article 15.5 SCM and no further consideration or examination of the factor is called for. Moreover, if a factor has been found not to cause injury, it does not need to be separated.

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<sup>28</sup> Canada's First Written Submission, para. 163.

<sup>29</sup> EC-Pipe, AB Report, para. 189, citing US-Hot-Rolled Steel, AB Report, para. 224.

5.38 As stated at the outset, the European Communities is not in a position to appreciate the factual aspects and whether the USITC has properly analysed other factors, e.g., the industry's own contribution to the oversupply that led to price declines.<sup>30</sup>

### 3. Standard of Review

5.39 Turning now to the standard of review, the EC would like to add one more argument why Panels should not review whether a competent authority has considered any facts that *should* have been before them.<sup>31</sup> According to Articles 3.5 ADA/15.5 SCM domestic authorities in antidumping and countervailing duty investigation only have a duty "to examine any known factors".

5.40 In *Thailand – H Beams* the Panel stated:

We consider that other "known" factors would include those causal factors that are clearly raised before the investigating authorities by interested parties in the course of an AD investigation. We are of the view that there is no express requirement in Article 3.5 ADA that investigating authorities seek out and examine in each case on their own initiative the effects of all possible factors other than imports that may be causing injury to the domestic industry under investigation<sup>32</sup>.

5.41 This statement suggests that the onus lies on the interested parties to raise factors which may be relevant to the causal link before the investigating authorities. It would seem logical that in raising other relevant issues, the interested parties must provide some *prima facie* evidence or argument that a particular factor may be relevant and merits detailed examination by the investigating authority. Otherwise, an interested party would simply list the factors set out in Article 3.5 and an investigating authority would be obliged to fully investigate such factors, hence circumventing the deliberate choice of language of Article 3.5 illustrated in the use of the term "any known factors", by transforming the list of factors into mandatory factors to be examined.

5.42 This further confirms that the domestic authorities do not have an independent obligation to investigate each and every factor listed in the relevant provision of the ADA/SCMA ex officio, as is the case under the Safeguards Agreement. Consequently, Panels are not mandated to review whether the domestic authorities have considered any facts that *should* have been before them, but are limited to review if the authorities have considered those facts which were effectively before them.

## C. THIRD PARTY WRITTEN SUBMISSION OF JAPAN

5.43 The following summarizes Japan's arguments in its third party written submission.

### 1. Introduction

5.44 The Government of Japan ("Japan") wishes to address crucial systemic issues raised by the Government of Canada ("Canada") relating to the authorities' obligations in making threat of material injury determinations. As explained in detail below, Article 3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "AD Agreement") requires the authorities, in determining a threat of material injury, to comply with all the provisions of Article 3,

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<sup>30</sup> Canada's First Written Submission, para. 166.

<sup>31</sup> See EC Third Party Submission.

<sup>32</sup> Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* ("Thailand – H-Beams"), WT/DS122/R, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS122/AB/R, para. 7.273.

not limited to Article 3.7. The Agreement on Subsidies and Countervailing Measures (the “SCM Agreement”) also impose the same obligations on the authorities. The United States International Trade Commission (the “ITC”) failed to make its threat determination in accordance with these Agreements, particularly Articles 3.1, 3.4 and 3.5 of the AD Agreement and Articles 15.1, 15.4 and 15.5 of the SCM Agreement, and thus acted inconsistently therewith.

5.45 The following arguments discuss WTO-inconsistency of the ITC’s final determination of threat of material injury in *Softwood Lumber from Canada*<sup>33</sup> with the AD Agreement. These arguments are, however, not limited to the AD Agreement, but are equally applicable to WTO-inconsistency of the determination with the SCM Agreement. Footnote 45 and Articles 15.1, 15.4, 15.5, and 15.7 of the SCM Agreement relevant to the following arguments are corollary to footnote 9, and Articles 3.1, 3.4, 3.5, and 3.7 of the AD Agreement. Further, the ITC made the final determination, simply referring to both dumped and subsidized imports as the subject imports without making any distinctions between them. Thus, there are no differences in underlying facts and rationales in connection with the inconsistency of the final determination with the SCM Agreement and the AD Agreement. By presenting the following argument, therefore, Japan also argues that the ITC acted inconsistently with the SCM Agreement.

## 2. Argument

### (a) The AD Agreement Requires the Authorities to Determine Threat of Material Injury in Accordance with All the Provisions of Article 3

5.46 Japan agrees with Canada that the AD Agreement requires the authorities to make threat of material injury determination in accordance with all the provisions of Article 3, not limited to Article 3.7. Perhaps, most relevant provisions for the Panel’s review of ITC’s threat determination in this case would be Articles 3.1, 3.4 and 3.5. The text of the AD Agreement explicitly provides that provisions in Articles 3.1, 3.4 and 3.5, *i.e.*, analysis on state of injury of the domestic industry and impact of dumped imports thereon, causation, and non-attribution of other factors to dumped imports, apply to Article 3.7.

5.47 Article 3.7 provides:

. . . The change in circumstances which would create a situation in which the dumping would cause *injury* must be clearly foreseen and imminent.

. . . the totality of the factors considered must lead to the conclusion that further dumped imports are imminent and that, unless protective action is taken, material *injury* would occur. (emphasis added.)

5.48 The term “injury” must be interpreted to include the “threat of material injury” stipulated in Article 3.7. Footnote 9 defines the term “injury” that:

Under this Agreement the term “injury” shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

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<sup>33</sup> *Softwood Lumber from Canada, Investigations Nos. 701-TA-414 and 731-TA-928 (Final)*, Publication 3509, May 2002 (Exhibit CDA-1).

**Footnote 9 clarifies that, when the AD Agreement uses the term “injury,” it means to include threat of material injury.**

5.49 The context of Article 3 also provides that all the provisions of Article 3 apply to a determination of threat of material injury under Article 3.7. A previous panel in *Mexico – HFCS* explained:

Moreover, the entirety of Article 3, which serves as context for the interpretation of Article 3.7, supports this conclusion. Article 3 as a whole deals with the determination of injury in anti-dumping investigations, which is defined as material injury, threat of material injury, or material retardation of the establishment of a domestic industry.<sup>34</sup>

To find “threat of material injury,” therefore, provisions in Article 3 setting forth requirements for finding “injury”, such as those in Articles 3.1, 3.4 and 3.5, must be satisfied.

5.50 The texts of the individual provisions of Articles 3.1 and 3.4 further clarify that requirements in Articles 3.1 and 3.4 apply to a determination of threat of material injury under Article 3.7. Article 3.1 sets forth general requirements for a determination of “injury.” There is no language that limits the meaning of “injury” in Article 3.1. The requirements for a determination of “injury” in Article 3.1 thus apply to a determination of threat of material injury. The Appellate Body has also confirmed that “Article 3.1 is an overarching provision that set forth a Member’s fundamental, substantive obligation in this respect, Article 3.1 informs the more detailed obligations in succeeding paragraphs.<sup>35</sup>” Among others, Article 3.1 requires the authorities to base their determination of threat of material injury on positive evidence and objective examination of “the consequent impact of these imports on domestic producers of such products.” The term “these imports” means dumped imports in this context, and the term “domestic producers of such products” means the domestic industry under the definition of Article 4.1. Article 3.1 thus requires the authorities to examine the impact of dumped imports on the domestic industry for determining threat of material injury. Article 3.4 then set forth how “the impact of dumped imports on the domestic industry” must be examined. It requires the authorities to evaluate all individual factors as listed in Article 3.4 for that purpose. As such, Article 3.4 provides the detailed requirements for the examination of the impact of dumped imports under Article 3.1, and therefore, for a determination of threat of material injury. As such, the authorities must satisfy the requirements in Articles 3.1 and 3.4 to determine threat of material injury.

5.51 Article 3.5 also has no language modifying the meaning of the term “injury”. The term “injury” in Article 3.5, thus also includes “threat of material injury” in accordance with Footnote 9. The causation and non-attribution requirements under Article 3.5, therefore, must be satisfied to make a determination of threat of material injury.

5.52 Japan notes that Article 3.7 provides that “the change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent”. It also provides that the authorities must find “further dumped imports are imminent” and “material injury would occur”. These phrases clarify that the authorities must demonstrate that a situation, in which “injury” in terms of Article 3.4 is caused by effects of dumping of further dumped imports without attributing effects of other known factors thereto in terms of Article 3.5, is foreseen and imminent. The authorities must further demonstrate that the change in circumstances would bring such a situation.

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<sup>34</sup> *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States* (“*Mexico – HFCS*”), WT/DS132/R (28 January 2000) para. 7.132.

<sup>35</sup> *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, Appellate Body Report, WT/DS122/AB/R (12 March 2001), para. 106.

5.53 In this respect, the United States misplaced the Appellate Body's statement in *US-Pipe Line*.<sup>36</sup> It appears that the United States argues that "an abrupt change"<sup>37</sup> needs not be identified because injuries are imminent if *status quo* that is adverse to the domestic industry continues. The Appellate Body did not go that far. Rather, the Appellate Body simply indicated that "[p]resent serious injury is often preceded in time by an injury that threatens clearly and imminently to become serious injury."<sup>38</sup> In this case, however, the ITC concluded "we do not find present material injury by reason of subject imports". (emphasis added.)<sup>39</sup> Thus, mere continuation of "no injury" situation could not develop a "threat of material injury," unless any "change in circumstances" will take place. Moreover, for the treaty interpretation, Canada first looks at explicit language of Article 3.7. It explicitly provides that the authorities must show that "change in circumstances" is "foreseeable and imminent". Canada may not ignore the explicit text. This text obliges the authorities to make a reasoned conclusion that the change in circumstance is imminent based on positive evidence and objective examination.<sup>40</sup>

**(b) The ITC Failed to Satisfy Requirements in Articles 3.4 and 3.5, and Thus, Acted Inconsistently with the AD Agreement**

5.54 Canada claims that the ITC made its final determination of threat of material injury in *Softwood Lumber from Canada*<sup>41</sup> without satisfying requirements under Articles 3.4 and 3.5.<sup>42</sup> It appears that the ITC's final determination supports Canada's claims.

5.55 In the final determination, the ITC found that the domestic industry was "vulnerable to injury in light of declines in its performance over the period of investigation", based on the evidence showing past and current economic situations of the domestic industry.<sup>43</sup> In the same final determination, the ITC also found, based on the same evidence, that the dumped imports "did not have a significant impact on the domestic industry".<sup>44</sup> These findings demonstrate that the dumped imports were not a cause of the current "vulnerable to injury" situations of the domestic industry. The ITC's analysis on the vulnerability of the domestic industry alone does not constitute a valid basis to find a threat of material industry. The ITC must evaluate the impact of likely further dumped imports on the domestic industry in accordance with Articles 3.1 and 3.4. Canada, however, were not able to find any such evaluation by the ITC in its final determination. The ITC thus has acted inconsistently with Articles 3.1 and 3.4.

5.56 The ITC also failed to show that dumped imports would cause material injury to the domestic industry in accordance with Articles 3.1 and 3.5. The ITC found that dumped imports from Canada were "likely to have a significant depressing or suppressing effect on domestic prices"<sup>45</sup> and were "likely to exacerbate price pressure on domestic industry".<sup>46</sup> The ITC, however, made no demonstration that such price effects would be foreseen and imminent to cause material injury to the domestic industry. Instead, the ITC leaped to the conclusion "material injury to the domestic industry would occur" without any explanation.<sup>47</sup> Such unsubstantiated determination cannot be a reasoned conclusion based on the positive evidence and objective examination in accordance with Article 3.1

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<sup>36</sup> See *US First Written submission* (15 August 2003), paras 99-101.

<sup>37</sup> *Id.*, para. 101

<sup>38</sup> See *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, Appellate Body Report, WT/DS202/AB/R (15 February 2002), para. 168.

<sup>39</sup> *The Final Determination, supra*, n.1., p37.

<sup>40</sup> Japan notes that the text does not require the authorities to show "an abrupt change."

<sup>41</sup> *The Final Determination, supra*, n. 1.

<sup>42</sup> See *Canada's First Written Submission* (18 July 2003), paras 141-167.

<sup>43</sup> *The Final Determination, supra*, n. 1., at pp. 37-39.

<sup>44</sup> *Id.*, at p. 36

<sup>45</sup> *Id.*, at pp. 43-44.

<sup>46</sup> *Id.*, at p. 44

<sup>47</sup> See *id.*

and 3.5. The ITC thus has acted inconsistently with the causation requirement under Articles 3.1 and 3.5.

5.57 More significantly, the ITC made no attempt to separate and distinguish effects of other known factors on the domestic industry from effects of dumping of further dumped imports thereon in accordance with Article 3.5. The ITC found that “both subject imports and the domestic producers contributed to the excess supply, and thus the declining prices”.<sup>48</sup> The ITC, however, could not separate or distinguish effects of domestic producers themselves from effects of subject imports.<sup>49</sup> The ITC also recognized the existence of imports from countries other than Canada.<sup>50</sup> The ITC thus knew, at minimum, the existence of these two other factors actually or potentially contributing to the threat of material injury. In making a determination of a threat of material injury, however, the ITC did not even consider contributory effects of these known factors to the future state of the domestic industry. The ITC thus acted inconsistently with the non-attribution requirement under Article 3.5.

5.58 Japan would like to note that United States Department of Commerce’s erroneous “dumping” determination, which is pending in the other panel of WTO,<sup>51</sup> may render the “dumped imports” and “injury” determination by the ITC inconsistent with Article 3 of the AD Agreement.

### **3. Conclusion**

5.59 For the reasons set forth above, Japan respectfully requests this Panel to clarify that the ITC acted inconsistently with Articles 3.1, 3.4, 3.5 and 3.7 of the AD Agreement, and Articles 15.1, 15.4, 15.5, and 15.7 of the SCM Agreement.

#### **D. THIRDPARTY ORAL STATEMENT OF JAPAN**

5.60 The following summarizes Japan's arguments in its third party oral statement.

### **1. Introduction**

5.61 The Government of Japan welcomes the opportunity to present its views as a third party in the present dispute. Japan joined this dispute to address a critical systemic issue in the AD and SCM Agreements of methodologies for determining threat of material injury. This case will have significant impact on operation of the vital provisions of the AD and SCM Agreements, and accordingly on practice of the AD and CVD regime of WTO Members. Japan would not repeat its arguments in its written submission. Rather, Japan would like to focus on certain arguments presented by other parties that Japan did not address in details in its written submission.

### **2. Insufficient Threat Analysis By ITC**

5.62 In this case, the United States International Trade Commission (“ITC”) found that the other “known” factor had also contributed in causing the current state of the domestic industry, and concluded that no material injury had been caused by the effects of the dumping or subsidies. The question presented in this dispute is thus how the authorities shall make a threat of material injury

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<sup>48</sup> *Id.*, at p. 35.

<sup>49</sup> *Id.*, at p. 35 (“However, particularly in light of relatively stable market share maintained by subject imports over the period of investigation, we cannot conclude from this record that the subject imports had a *significant* price effect during the period of investigation.”)

<sup>50</sup> *Id.*, at p. 25, n. 152.

<sup>51</sup> See *United States – Final Dumping Determination on Softwood Lumber from Canada, Constitution of the Panel Established at the Request of Canada - Note by the Secretariat*, WT/DS264/3 (5 March 2003); See also *United States - Final Dumping Determination on Softwood Lumber from Canada - Request for the Establishment of a Panel by Canada*, WT/DS264/2 (9 December 2002).

determination, where the other “known” factor at least partly caused the current state of the domestic industry.

5.63 It appears that all parties, including the United States, agree that provisions of Articles 3.1, 3.4, and 3.5 of the AD Agreement and Articles 15.1, 15.4, and 15.5 of the SCM Agreement apply to a threat of material injury determination. It appears, however, that the United States attempts to undermine applicability of these provisions to a threat of material injury. The United States explained in its first written submission that the ITC’s threat determination was consistent with the AD and SCM Agreements because it found that “the condition of the domestic industry had deteriorated primarily as a result of declining prices, and that the industry was in a vulnerable state”<sup>52</sup>, and therefore the domestic industry was “on the verge of material injury by reason of the continued dumped and subsidized imports”.<sup>53</sup>

5.64 In this case, the ITC also found that such current “vulnerable” state of the domestic industry was partly caused by other known factors, such as oversupply by the domestic industry of the product under consideration. For the purpose of the threat of material injury determination, however, the ITC paid no attention to its own causal analysis on the current state of the domestic industry.

5.65 Instead, the ITC narrowed the scope of a threat of material injury determination into whether the potential volume increase of the subject imports would give the last push to make the domestic industry fall from the “verge” into the state of material injury. Such determination made Articles 3.1, 3.4 and 3.5 of the AD Agreement and Articles 15.1, 15.4 and 15.7 of the SCM Agreement effectively inapplicable to a threat of material injury determination, and therefore was inconsistent with these Articles.

5.66 As Japan discussed in its written submission, these provisions are applicable to determination of material injury and a threat of material injury with an equal force. The only difference is set forth in Articles 3.7 and 15.7 of the AD and SCM Agreements that the authorities must determine whether further dumped or subsidized imports are “imminent” and material injury would occur in a threat case.<sup>54</sup> This difference affect only the time of the occurrence of material injury. In case of a material injury determination, the authorities must examine the occurrence of material injury at the time of investigation. In case of a threat of material injury determination, the authorities must examine the occurrence of material injury at the time of the imminent future. This difference of the time of occurrence of material injury, however, have no effects on the applicability of requirements in Articles 3.1, 3.4 and 3.5 of the AD Agreement and Articles 15.1, 15.4 and 15.5 of the SCM Agreement to the authorities’ examination of “material injury.”

5.67 In a threat case, the authorities must analyze the impact of the subject imports to the state of the domestic industry at the time of an imminent future in accordance with Articles 3.4 and 15.4 of the AD and SCM Agreements. The authorities also must demonstrate that dumping or subsidization of the subject imports would cause material injury in an imminent future, in accordance with Articles 3.5 and 15.5 of the AD and SCM Agreements. Furthermore, the authorities must separate and distinguish effects of the other known factors to material injury in an imminent future from the effects of dumping or subsidization thereto to make an affirmative determination in accordance with these provisions. There are no provisions, in either Article 3.7 of the AD Agreement or Article 15.7 of SCM Agreement, or in any other parts of these Agreements, that allow the authorities not to examine the impact of the subject imports or effects of the other known factors for the purpose of a threat of material injury determination. The examination of these factors must be included in the authorities’ considerations and demonstration of foreseen and imminent material injury through the effects of dumping or subsidies.

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<sup>52</sup> The First Written Submission by the United States, para. 228.

<sup>53</sup> *Ibid.*

<sup>54</sup> See *Third Party Submission of Japan* (22 August 2003), para. 9 for further discussion on this issue.

5.68 By ignoring the impact of the subject imports and effects of other “known” factors for determining a threat of material injury, the United States acted inconsistently with Articles 3.1, 3.4, 3.5 and 3.7 of the AD Agreement and Articles 15.1, 15.4, 15.5 and 15.7 of the SCM Agreement.

### 3. Consideration to Factors Enumerated in Articles 3.7 And 15.7

5.69 Japan discusses here the EC’s view that the authorities are not mandated to consider individual factors in Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement.<sup>55</sup> According to the EC, Articles 3.7 and 15.7 require only that the authorities “should” consider, *inter alia*, these factors, and therefore, “a conclusion that a threat of injury exists may be justified by at least one threat factor pointing towards a threat of material injury”.<sup>56</sup> Japan disagrees.

5.70 The EC assumes that the word “should” is hortatory, not mandatory, and failed to consider this term in the context of Articles 3 and 15 of the AD and SCM Agreements in accordance with Article 31 of the *Vienna Convention on the Law of Treaties* (“*Vienna Convention*”). The EC’s view also ignores a Member’s general obligation to perform a treaty in good faith under Article 26 of the *Vienna Convention*, which states “every treaty in force is binding upon the parties to it and must be performed by them in good faith”. The importance of the basic principle of the treaty interpretation and the general obligation of the good faith performance was recognized by previous panels and the Appellate Body.

5.71 The WTO jurisprudence shows that, contrary to the EC’s assumption, the word “should” is used in a mandatory sense in the context of certain provisions of the WTO Agreements. For example, the Appellate Body found “the word ‘should’ in the third sentence of Article 13.1 of the Dispute Settlement Understanding is, in the context of the whole of Article 13, used in a normative, rather than a merely exhortative, sense” such that it creates “a duty and an obligation” on Members.<sup>57</sup> The panel in *US – Steel Plate* also found that paragraph 3 of Annex II of the AD Agreement, which uses the term “should”, is mandatory in the context of Article 6.8 and Annex II of the AD Agreement.<sup>58</sup>

5.72 The term “should” in the third sentence of Articles 3.7 and 15.7 of the AD and SCM Agreements must also be interpreted in the context of Articles 3.7 and 15.7, and other provisions of Articles 3 and 15. The first sentence in Articles 3.7 and 15.7 explicitly mandates that the authorities shall base its threat determination on facts. The last sentence of these Articles also explicitly mandates the authorities to base their threat determination on “the totality of the factors considered” and provides “no one of these factors by itself can necessarily give decisive guidance”. These provisions mandate the authorities to consider relevant factors. In this context, four (five) factors as enumerated in Articles 3.7 and 15.7 represent Members’ agreement that these factors would be relevant to the authorities’ consideration on a threat of material injury.

5.73 Further, Articles 3.1 and 15.1 of the AD and SCM Agreements set forth that the authorities must examine “the volume of the dumped {subsidized} imports” and “the effect of the dumped {subsidized} imports on prices”. Articles 3.2 and 15.2 then mandate the authorities to consider whether there has been “a significant increase in dumped {subsidized} imports” and whether there has been “a significant price undercutting by the dumped {subsidized} imports” or whether the effect of dumped imports is “otherwise to depress prices to a significant degree or prevent price increases”. In

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<sup>55</sup> EC Third Party Submission (22 August 2003), at para 52.

<sup>56</sup> *Ibid*, at para 53.

<sup>57</sup> *Canada – Measures Affecting the Export of Civilian Aircraft*, Report of the Appellate Body, WT/DS70/AB/R (2 August 1999), para. 187; *accord United States – Tax Treatment for Foreign Sales Corporations*, Report of the Appellate Body, WT/DS108/AB/R, AB-1999-9, para. 111 n. 124 (“In our view, many binding legal texts employ the word ‘should’ and, depending on the context, the word may imply either an exhortation or express an obligation.”).

<sup>58</sup> *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India* (“*US – Steel Plate*”), the Panel Report, WT/DS206/R (28 June 2002) at para. 7.56.

a threat determination, therefore, the authorities must consider these factors. Factors of “a significant rate of increase of dumped {subsidized} import” and “a significant depressing or suppressing effect on domestic prices” in Articles 3.7 and 15.7 are quite relevant to the authorities’ factual examination in accordance with Articles 3.1 and 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

5.74 The capacity and inventory factors in Articles 3.7 and 15.7 of the AD and SCM Agreements also represent the Members’ understanding on the relevancy of these factors to the threat analysis. For example, the text of the item of the capacity explicitly states that the capacity factor is closely related to the future export volume of the dumped or subsidized products. Indeed, if foreign producers’ capacity has been fully utilized to produce the product under consideration, without any inventory, it would be less than probable for these producers to increase their export volumes. On the other hand, foreign producers would be ready to export additional volume to an importing Member, if they have substantial production capacity available for immediate increase of production or have excessive volume of inventory, but had no other markets to sell additional production. As such, these factors also represent the Members’ understanding that they are relevant to the authorities’ threat analysis.

5.75 Japan would also like to recall the normative requirement of the good faith performance of a treaty under the *Vienna Convention*. Ignoring these factors, which Members agreed to put into the AD and CVD Agreements as relevant and essential to a threat analysis, would not be a good faith performance required by the *Vienna Convention*.

5.76 In sum, the authorities have a normative duty and obligation to consider all four (five) factors in Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement. Japan thus submits that the Panel should find that the authorities must consider all these factors in making a threat of material injury determination.

#### **4. Conclusion**

5.77 As such, Japan asks this Panel to find that (i) the United States acted inconsistently with Articles 3.1, 3.4, 3.5 and 3.7 of the AD Agreement, and Articles 15.1, 15.4, 15.5 and 15.7 of the SCM Agreement; and, (ii) the authorities have a normative duty and obligation to consider all factors as shown in Articles 3.7 and 15.7 of the AD and SCM Agreements to make a threat of material injury determination.

#### **E. THIRD PARTY WRITTEN SUBMISSION OF KOREA**

5.78 The following summarizes Korea's arguments in its third party written submission.

##### **1. Introduction**

5.79 In Korea’s view, the United States International Trade Commission’s (USITC) investigations, findings and reviews and the manner in which that interpretation is applied in this particular case, are inconsistent with the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (“*Anti-Dumping Agreement*”) and the *Agreement on Subsidies and Countervailing Measures* (“*SCM Agreement*”).

**2. Article 3.1 of the *Anti-Dumping Agreement* and Article 15.1 of the *SCM Agreement* Require the Injury Determination to be Based on “Positive Evidence” and an “Objective Examination.”**

5.80 The *Anti-Dumping Agreement* and the *SCM Agreement* require that an injury investigation and its subsequent determination comply with all of the relevant requirements set forth in Article 3 of the *Anti-Dumping Agreement* and Article 15 of the *SCM Agreement*.

5.81 The text of Article 3.1 of the *Anti-Dumping Agreement* and Article 15.1 of the *SCM Agreement* contain general standards that require a Member to base its determination of injury or threat of material injury<sup>59</sup> “on positive evidence and involve an objective examination of both: (a) the volume of the dumped [or subsidized] imports and the effect of the dumped [or subsidized] imports on prices in the domestic market for like products; and (b) the consequent impact of these imports on domestic producers of such products”.

5.82 Korea is of the view that the US investigating authority failed to develop “positive evidence” that dumped or subsidized imports had an effect on domestic prices, or any impact on the domestic industry. The failure by the United States to base its determination of injury in this case on “positive evidence” that dumped or subsidized imports had an effect on domestic prices, or any impact on the domestic industry, constitutes a violation of the “positive evidence” requirement of Article 3.1 of the *Anti-Dumping Agreement* and Article 15.1 of the *SCM Agreement*.

**3. The United States Violated the Requirement of Article 3.5 of the *Anti-Dumping Agreement* and Article 15.5 of the *SCM Agreement* to Demonstrate that the Dumped or Subsidized Imports were Causing Injury.**

5.83 Article 3.5 of the *Anti-Dumping Agreement* and Article 15.5 of the *SCM Agreement* provide that, in demonstrating the causal relationship between dumped or subsidized imports and injury, “[t]he authorities shall also examine any known factors other than the dumped [or subsidized] imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped [or subsidized] imports.”

5.84 In particular, the United States violated Article 3.5 of the *Anti-Dumping Agreement* and Article 15.5 of the *SCM Agreement* when it failed to take account of the effects of several other “known factors” that were injuring the domestic industry, and instead attributed the effects of those other known factors to the dumped or subsidized imports of lumber.

5.85 Evidence on record shows that the United States did not meet its obligation under Articles 3.5 and 15.5 to demonstrate the existence of a causal link between the allegedly dumped or subsidized imports and the injury to the domestic industry.

**4. There are at Least Two Facts that Would Lead the Panel to the Inevitable Conclusion that the US Investigating Authority Did Not Demonstrate the Existence of a “Causal Relationship” Between the Imports and the Injury to the US Market.**

- **First, the USITC Failed to Evaluate Properly Its Own Findings During the Causal Analysis in Order to Determine Whether or Not a Threat of Injury in Fact Existed**

5.86 The USITC acknowledged, but ultimately and inexplicably ignored, the fact that the competition between Canadian imports and domestic lumber products are virtually non-existent since

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<sup>59</sup> See footnote 9 of the *Anti-Dumping Agreement* and footnote 45 of the *SCM Agreement*.

the two are at most moderately substitutable – the majority of Canadian lumber imports come from different species that have different characteristics and uses than the predominant US species of lumber.

5.87 The USITC also acknowledged that the United States domestic industry cannot supply the entire US market for lumber, thus making substantial softwood lumber imports necessary to satisfy US consumer and industrial demands.

5.88 In addition, cross border investment is prevalent among the lumber industry since US *producers* import or purchase a “sizable volume of subject imports” (emphasis added). Thus, there has been “substantial and increasing integration of the North American lumber market”.

5.89 In connection with the evidence shown, the US investigating authority did not demonstrate the existence of a causal relationship, that there was a foreseen increase in the absolute volume of subject imports in response to “strong and improving demand” in the US domestic market.<sup>60</sup>

5.90 Only if the US industry failed to take advantage and thus respond to this favourable market condition of strong and improving demand by also increasing its own output could the predicted increase in Canadian import volumes substantially outpace the increase in US production and result in increased Canadian market share materially above the 34 per cent the USITC found to be non-injurious.

5.91 However, the US industry did not increase its own production, and therefore failed to take advantage and thus respond to this favourable market condition of strong and improving demand. That is why the increase in import volumes of Canadian lumber substantially outpaced the increase in US production and led to an increase in Canada’s market share beyond the 34 per cent that the USITC found to be non-injurious.

5.92 Therefore, the injury that the domestic industry allegedly suffered must be attributed not to dumped imports but rather to United States’ own failure to keep up with the increase in domestic demand.

- **The Second Fact that Should Lead the Panel to Conclude that the US Investigating Authority Did Not Demonstrate the Existence of a “Causal Relationship” is that the USITC Attributed to the Subject Imports the Injury to the Domestic Industry Caused by Other Facts, in Violation of Article 3.5 of the *Anti-Dumping Agreement***

5.93 The other factors that injured the domestic industry and which the USITC failed to separate and distinguish from subject imports include the domestic industry’s own contribution to the oversupply that led to the price declines over the period of investigation.

5.94 In USITC’s current injury analysis, it explicitly identified the domestic industry’s contribution to oversupply as a known source of injury that it could not attribute to the Canadian imports and that therefore broke the causal link between the Canadian imports and injury.<sup>61</sup>

5.95 However, in its injury threat determination, the USITC failed to consider the domestic industry’s most likely action in response to the future “strong and improving” demand that it cited as a basis for concluding that Canadian imports would increase substantially to injurious levels in the imminent future.

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<sup>60</sup> Commission Report, pp. 40,42-43

<sup>61</sup> Commission Report, p. 35

5.96 In concluding that subject imports threatened injury, the USITC ignored the likelihood of US production contributing to any future price decline.

## **5. USITC's Presumption of Likelihood of Threat of Dumping is Inconsistent with Article 17.6 of the *Anti-Dumping Agreement***

5.97 It is Korea's view that the investigating authority's determination of the facts was not "proper", and its evaluation of the facts was not "objective" and "unbiased," as required by Article 17.6 of the *Anti-Dumping Agreement*.<sup>62</sup> Article 17.6(i) of the *Anti-Dumping Agreement* governs the standard of review applicable to the review of a dumping order. It is similar to Article 4.2 of the *Safeguards Agreement* in that it contains both formal and substantive requirements

5.98 The Appellate Body in *Thailand – H-Beam* stated that the ordinary meaning of the word "proper" in Article 17.6(i) is "accurate" or "correct".<sup>63</sup> The Appellate Body further stated that: "the ordinary meaning of 'establishment' suggests an action to 'place beyond dispute: ascertain, demonstrate, prove'."<sup>64</sup> With respect to the term "objective" in Article 17.6(i), the Appellate Body in *US-Safeguards on Lamb Meat*, stated that an "objective" assessment under Article 4.2 of the *Safeguard Agreement* has two elements. First, a panel must review whether (a) the competent authorities have evaluated all relevant factors; and, (b) second, a panel must review whether those authorities have, as a *substantive* matter, provided a reasoned and adequate explanation of how the facts support their determination.<sup>65</sup>

5.99 The US determination failed to observe these standards. The USITC replaced the process of making unbiased and objective assessment of facts with the consideration of these limited facts that must satisfy arbitrarily pre-determined scenarios in order to support an affirmative determination.

5.100 The USITC's affirmative threat determination rests solely on its prediction that the Canadian imports would "increase substantially" absent anti-dumping and countervailing duty orders, and thereby "increase the excess supply in the market, putting further downward pressure on prices". In its injury analysis, the USITC failed to evaluate and consider how all the other economic factors had a bearing or affected the state of the domestic industry.

5.101 The USITC also failed to properly take into account its own finding of only a small increase in the market share of the Canadian imports and of a lack of evidence either that there had been significant underselling by the subject imports or that they had a significant price effect during the period of investigation. Thus, the United States did not meet the standard under Article 17.6(i).

## **6. Conclusion**

5.102 In conclusion, Korea is of the view that the USITC did not base its threat of injury determination on positive evidence or conduct an objective examination of all of the factors it was required to consider.<sup>66</sup>

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<sup>62</sup> Article 17.6(i) provides, in relevant part, that "in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective."

<sup>63</sup> *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel H-Beams from Poland*, Report of the Appellate Body, WT/DS122/AB/R, adopted April 5, 2001, para. 116 ("Thailand – H-Beams, AB Report").

<sup>64</sup> *Ibid.*

<sup>65</sup> *US-Safeguards on Lamb Meat*, WT/DS177,178/AB/R, para.141

<sup>66</sup> Article 3.7 of the *Anti-Dumping Agreement* and Article 15.7 of the *SCM Agreement* state the requirement to base injury determinations on positive evidence by mandating that threat of injury determinations "shall be based on facts and not merely on allegation, conjecture or remote possibility".

5.103 Furthermore, although the USITC identified other factors that caused injury to the domestic industry, such as the domestic industry's own contribution to oversupply, it nevertheless attributed such injuries to Canadian imports.

5.104 Moreover, the USITC's affirmative threat determination rests solely on its unscientific prediction that subject imports would "increase substantially" absent anti-dumping and countervailing duty orders.

5.105 For the reasons stated above, the investigation and final determination of the USITC, along with the final anti-dumping and countervailing duties imposed as a result of this determination, constitute a violation by the United States of its obligation under the *Anti-Dumping Agreement*, the *SCM Agreement* and GATT 1994.

5.106 Korea requests that the Panel recommend that the United States bring its measures into conformity with its WTO obligations.

#### F. THIRDPARTY ORAL STATEMENT OF KOREA

5.107 The following summarizes Korea's arguments in its third party oral statement.

5.108 Korea agrees generally with the points made by Canada in its first submission, and wishes to focus on certain issues which deserve clarification.

5.109 The *Anti-Dumping Agreement* and the *SCM Agreement* require that an injury investigation and its subsequent determination comply with all of the relevant requirements set forth in Article 3 of the *Anti-Dumping Agreement* and Article 15 of the *SCM Agreement*. The text of Article 3.1 of the *Anti-Dumping Agreement* and Article 15.1 of the *SCM Agreement* contain general standards that require a Member to base its determination of injury or threat of material injury "on positive evidence and objective examination of both: (a) the volume of the dumped or subsidized imports and the effect of the dumped or subsidized imports on prices in the domestic market for like products; and (b) the consequent impact of these imports on domestic producers of such products".

5.110 Korea is of the view that the US investigating authority failed to develop "positive evidence" that dumped or subsidized imports had an effect on domestic prices, or any impact on the domestic industry. Consequently, the United States also violated the requirement of Article 3.5 of the *Anti-Dumping Agreement* and Article 15.5 of the *SCM Agreement* to demonstrate that the dumped or subsidized imports were causing injury.

5.111 In particular, the United States acted inconsistently with Article 3.5 of the *Anti-Dumping Agreement* and Article 15.5 of the *SCM Agreement* when it failed to take account of the effects of several other "known factors" that were injuring the domestic industry, and instead attributed the effects of those other known factors to the dumped or subsidized imports of lumber.

5.112 Evidence on record shows that the United States did not meet its obligation under these Articles to demonstrate the existence of a causal link between the allegedly dumped or subsidized imports and the injury to the domestic industry. There are at least two facts that would show that the US investigating authority did not demonstrate the existence of a "causal relationship" between the imports that were specifically found to be dumped or subsidized and the injury to the US market.

5.113 First, the USITC failed to evaluate properly its own findings during the causation analysis in order to determine whether or not a threat of injury in fact existed. The USITC acknowledged, but ultimately and inexplicably ignored, the fact that the competition between Canadian imports and domestic lumber products are virtually non-existent since the two are at most moderately substitutable since the majority of Canadian lumber imports come from different species that have different

characteristics and uses than the predominant US species of lumber. In addition, cross border investment is prevalent among the lumber industry since US *producers* import or purchase a “sizable volume of subject imports”.

5.114 It is also important to note, in connection with the evidence that shows that the US investigating authority did not demonstrate the existence of a causal relationship, that there was a foreseen increase in the absolute volume of subject imports in response to “strong and improving demand” in the US domestic market. The US industry did not increase its own production, and therefore failed to take advantage of and thus respond to this favourable market condition of strong and improving demand. That is why the increase in import volumes of Canadian lumber substantially outpaced the increase in US production and led to an increase in Canada’s market share beyond the 34 per cent that the USITC found to be non-injurious. Therefore, the injury that the domestic industry allegedly suffered must be attributed not to dumped imports but rather to its own failure to keep up with the increase in domestic demand.

5.115 The second fact indicating that the US investigating authority did not demonstrate the existence of a “causal relationship” is that the USITC attributed to the subject imports the injury to the domestic industry caused by other factors, in violation of Article 3.5 of the *Anti-Dumping Agreement*. Specifically, the other factors that injured the domestic industry and which the USITC failed to separate and distinguish from subject imports include the domestic industry’s own contribution to the oversupply that led to the price declines over the period of investigation. In USITC’s current injury analysis, it explicitly identified the domestic industry’s contribution to oversupply as a known source of injury that it could not attribute to the Canadian imports. However, in its threat determination, the USITC failed to consider the domestic industry’s most likely action in response to the future “strong and improving” demand that it cited as a basis for concluding that Canadian imports would increase substantially to injurious levels in the imminent future. In concluding that subject imports threatened injury, the USITC ignored the likelihood of US production contributing to any future price decline.

5.116 It is Korea’s view that the investigating authority’s determination of the facts was not “proper”, and its evaluation of the facts was not “objective” and “unbiased,” as required by Article 17.6 of the *Anti-Dumping Agreement* which governs the standard of review applicable to the review of a dumping order.

5.117 The Appellate Body in *Thailand – H-Beam* stated that the ordinary meaning of the word “proper” in Article 17.6(i) is “accurate” or “correct”. The Appellate Body further stated that: “the ordinary meaning of ‘establishment’ suggests an action to ‘place beyond dispute: ascertain, demonstrate, prove’.”

5.118 With respect to the term “objective” in Article 17.6(i), the Appellate Body in *US-Safeguards on Lamb Meat*, stated that an “objective” assessment under Article 4.2 of the *Safeguard Agreement* has two elements. A panel must review whether (a) the competent authorities have evaluated all relevant factors; and, (b) a panel must review whether those authorities have, as a *substantive* matter, provided a reasoned and adequate explanation of how the facts support their determination.

5.119 Korea is of the view that the US determination failed to observe these standards. The USITC replaced the process of making unbiased and objective assessment of facts with the consideration of these limited facts that would satisfy arbitrarily pre-determined scenarios in order to support an affirmative determination. The USITC’s affirmative threat determination rests solely on its prediction that the Canadian imports would “increase substantially” absent anti-dumping and countervailing duty orders, and thereby “increase the excess supply in the market, putting further downward pressure on prices”. In its injury analysis, the USITC failed to evaluate and consider how all the other economic factors had a bearing or affected the state of the domestic industry. The USITC also failed to properly take into account its own finding of only a small increase in the market share of the Canadian imports

and of a lack of evidence either that there had been significant underselling by the subject imports or that they had a significant price effect during the period of investigation.

5.120 In conclusion, Korea is of the view that the USITC did not base its threat of injury determination on positive evidence or conduct an objective examination of all of the factors it was required to consider. Furthermore, although the USITC identified other factors that caused injury to the domestic industry, such as the domestic industry's own contribution to oversupply, it nevertheless attributed such injuries to Canadian imports. Moreover, the USITC's affirmative threat determination rests solely on its unscientific prediction that subject imports would "increase substantially" absent anti-dumping and countervailing duty orders.

5.121 For the reasons stated above, the investigation and final determination of the USITC, along with the final anti-dumping and countervailing duties imposed as a result of this determination, should be found to constitute a violation by the United States of its obligation under the *Anti-Dumping Agreement*, the *SCM Agreement* and GATT 1994.

## VI. INTERIM REVIEW

6.1 On 19 December 2003, we transmitted the interim report in this dispute to the parties. Both parties submitted written requests for the review of precise aspects of the interim report. Each party also subsequently submitted written comments on the other party's comments. Neither party requested an interim review meeting.

6.2 We have made certain necessary technical revisions and corrections to our report, some based on comments by the parties and others based on our own review of the report. We address below those of the parties' comments that concerned more than merely technical or typographical corrections.

6.3 The United States requests that we reconsider our findings at paragraphs 6.89 to 6.96, 6.122, and 6.132 to 6.137 of the interim report, in light of the record as a whole. The United States presents no new arguments or reasons in support of this request, stating rather that it believes that the Panel should have reached contrary conclusions in view of the reasons set forth in the United States' previous submissions to the Panel. The United States asks us to reconsider our conclusions in light of the record and USITC analysis as a whole, asserting that the record and analysis amply support the USITC's conclusion that the US lumber industry was threatened with material injury by reason of dumped and subsidized imports.

6.4 Canada opposes this aspect of the United States' request.

6.5 We decline to change our views and conclusions as set forth in the referenced paragraphs. In the course of our consideration of this dispute, we have carefully considered the record in the underlying investigation, the USITC's analysis and conclusions, and the argument of the parties before reaching our conclusions. Given no new arguments, we see no basis to alter our views in any material respect.

6.6 The United States requests that, in the first sentence of paragraph 6.10 of the interim report, and first, third, and last sentences of paragraph 6.11 of the interim report, we change the word "determination" to "determinations" and make conforming changes in those sentences.

6.7 Canada considers that it would be inappropriate to pluralize "determination" in these sentences. Canada understands the USITC to have issued a single threat of injury determination with respect to both dumped and subsidized imports.

6.8 We decline to make the changes requested by the United States to paragraphs 6.10 and 6.11 of the interim report. We share the view of Canada that the USITC issued a single threat of injury determination, which was equally applicable in the anti-dumping and countervailing investigations. We note that our view in this regard does not, of course, affect the fact that under US law, it may be that, formally, separate determinations are made in anti-dumping and countervailing duty investigations. However, we considered the USITC's report as constituting a single determination on the question of injury and threat of injury throughout our analysis, and we see no reason to change that treatment in these paragraphs. We note that in a few instances, we referred to "determinations" in the plural in the interim report. We have changed such references in the final report at paragraphs 6.1, 6.41, and 6.144, as these were inadvertent or typographical errors.

6.9 The United States proposes a change to the text of paragraph 6.13 of the interim report, to clarify its meaning. Canada made no comment on this aspect of the United States' request.

6.10 We agree with the United States that this paragraph could be clearer, and have therefore modified it along the lines suggested by the United States.

6.11 The United States requests that we amend the last sentence of paragraph 6.31 of the interim report to more accurately reflect its position, as set out in its first submission. Canada made no comment on this aspect of the United States' request.

6.12 We have reviewed the United States' submissions, and agree that the proposed text more accurately reflects the United States arguments, and have therefore made the requested modification to this paragraph.

6.13 Canada notes that, in the third sentence of paragraph 6.34, the interim report states that "Canada has not asserted any specific legal requirements with respect to special care". Canada asserts, it did make submissions in this regard, referring to paragraph 64 of its First Written Submission ("the standard of special care is one that requires an investigating authority to undertake "an especially meticulous examination"), and to paragraph 7 of Canada's response to Question #3 from the First Meeting with the Panel ("Canada articulated the standard as being "a particularly careful examination"). Canada considers that these formulations echo the first sentence of paragraph 6.34 of the interim report, which states that this obligation requires an investigating authority "to act with an enhanced degree of attention" and paragraph 6.37, which refers to "this obligation to act with an extra degree of attention". Accordingly, Canada requests that we replace the word "specific" in the third sentence of paragraph 6.34 of the interim report with the word "additional" to more accurately reflect Canada's submissions.

6.14 The United States made no comment on this aspect of Canada's request.

6.15 We decline to make the change proposed by Canada. As set out in the report, we found the parameters of the "special care" requirement set forth in Article 3.8 of the AD Agreement and Article 15.8 of the SCM Agreement unclear. It is in our discussion of this point that we observed that Canada had not asserted any specific legal requirements with respect to special care – that is, Canada made no arguments as to what might constitute the special care required by the Agreements in threat cases. This is not a question of **additional** requirements, but rather a question of specifying, in the sense of defining, the requirement of special care set out in the Agreements themselves. While the special care obligation might be considered an "additional" obligation in the sense that it is an obligation on investigating authorities considering threat of material injury *in addition* to other obligations set out in Articles 3 and 15 of the AD and SCM Agreements, the use of the word "additional" as proposed by Canada might be misunderstood to imply that Canada could have, or should have, suggested obligations in addition to those set out in the text of Article 3.8 of the AD Agreement and Article 15.8 of the SCM Agreement themselves. Nonetheless, we have modified this paragraph in order to clarify our views in this respect.

6.16 The United States proposes the addition of a sentence to paragraph 6.83 of the interim report, to more accurately reflect the USITC analysis discussed in that paragraph. Canada made no comment on this aspect of the United States' request.

6.17 We have reviewed the USITC determination in this respect, and have made clarifying changes to this paragraph, along the lines suggested by the United States.

6.18 The United States proposes deleting the fourth sentence of paragraph 6.93 of the interim report, asserting that it is somewhat redundant of the preceding sentence, but is a less accurate characterization of the USITC Final Report.

6.19 In Canada's view, the sentence proposed by the United States for deletion in paragraph 6.93 of the interim report is not redundant of the preceding sentence because the two sentences cover two different concepts. Canada asserts that the third sentence deals with the increase in the volume of imports during the period of investigation while the second sentence deals with the rate of increase during the period of investigation. Canada, referring to the Panel's findings at paragraphs 6.77-6.78 of the Interim Report, considers that the two sentences constitute an accurate characterization of the USITC Final Report, and therefore requests that the Panel retain its current wording.

6.20 We share Canada's view that the two sentences in question deal with different aspects of analysis of threat of injury, the increase in import volume, and the rate of increase in imports. The existing wording, which addresses the two concepts separately, accurately describes our assessment of the USITC determination in this regard, and we therefore decline to change it.

6.21 Canada comments that, in paragraph 6.131 of the interim report, the sentence immediately following the quote from the footnote 195 of the USITC Final Report does not reflect fully Canada's submissions concerning that footnote. Canada argues that its submissions focused on the USITC's explicit rejection of the requirement, articulated by the Appellate Body, to separate and distinguish the effects of other known factors from those attributed to subject imports as part of fulfilling the non-attribution requirements in Articles 3.5 and 15.5. Accordingly, Canada proposes modifications to the last three sentences of this paragraph.

6.22 The United States expresses concern that Canada's proposed modification of paragraph 6.131 of the interim report could be misconstrued as not simply a summary of Canada's argument, but as an implication by the Panel itself that the Appellate Body has articulated a specific methodology that investigating authorities *must* employ in ensuring that they do not attribute injuries caused by other known factors to dumped or subsidized imports. The United States asserts that the Appellate Body in *EC Pipe* explicitly indicated that no specific methodology for this analysis is required. (Appellate Body Report, *European Communities - Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted August 18, 2003, para. 189 ("provided that an investigating authority does not attribute the injuries of other causal factors to dumped imports, it is free to choose the methodology it will use in examining the 'causal relationship' between dumped imports and injury")) Moreover, the United States comments that Canada's characterization of the meaning of the quoted portion of the USITC Final Report and the US case law it referenced omits the response made in the US submissions and could be misconstrued as the Panel's statement regarding US law. Therefore, the United States urges the Panel not to adopt the proposed modification, in order to avoid any confusion between Canada's arguments and the Panel's own views, and because the implication that could be attributed to the Panel under Canada's proposal is inaccurate. The United States further comments that Canada's argument on the issue of non-attribution is accurately set forth at paragraphs 4.56 and 4.209 of the interim report, and the summary statement in paragraph 6.131 is consistent with the arguments set forth at those two paragraphs. Because the summary as drafted is accurate, while the proposed modification is potentially confusing, the United States requests that the Panel decline to make the modification to this paragraph that Canada proposed.

6.23 The referenced text to which Canada proposes modifications is merely a summary statement of Canada's arguments on this issue, which are more fully set forth earlier in the Report, as are the United States' arguments in response. Particularly since our resolution of this aspect of Canada's claims did not turn on our evaluation of the quoted footnote from the USITC's Final Report, nor on Canada's arguments regarding the import of that footnote, we see no need to expand on the summary of Canada's arguments in this paragraph.

## VII. FINDINGS

### A. INTRODUCTION

7.1 At issue in this dispute is the United States International Trade Commission's investigation and determination of threat of material injury caused by dumped and subsidized imports of softwood lumber imports from Canada and the anti-dumping and countervailing measures imposed on such imports. This is the latest in a series of Canadian challenges to various aspects of these investigations. WTO Panels have previously considered, *inter alia*, challenges to the United States Department of Commerce's preliminary countervailing duty and critical circumstances determinations<sup>67</sup>, the United States Department of Commerce's final countervailing duty determination<sup>68</sup>, and the United States Department of Commerce's final anti-dumping duty determination.<sup>69</sup> However, those previous disputes do not have any direct bearing on the issues before the Panel in this case, which concerns exclusively the injury aspects of the investigations, which were not addressed in the other disputes. The majority of the claims put forward by Canada in this case challenge the United States International Trade Commission's consideration of the evidence underlying its determination of threat of material injury by reason of dumped and subsidized imports of softwood lumber from Canada.

### B. FACTUAL ASPECTS

7.2 Under US law, two agencies share responsibility for the conduct of anti-dumping and countervailing duty investigations – the United States Department of Commerce (USDOC) and United States International Trade Commission (USITC). USDOC has responsibility for the formal initiation of investigations, and the determination of the existence and margins of dumping and/or subsidization. USITC has responsibility for the determination of material injury to a domestic industry caused by dumped or subsidized imports. USITC conducts its investigation in every case on a timetable which is separate from but overlaps the time table for USDOC's investigation of dumping and subsidization. Moreover, USITC and USDOC both conduct their investigations in two phases, preliminary and final. The preliminary phase of the injury investigation begins on the day an application for anti-dumping or countervailing duty measures is filed, and is completed before the preliminary determination of dumping and/or subsidization is made by USDOC. The final phase of USITC's injury investigation usually is begun after USDOC's preliminary determination and overlaps the issuance of USDOC's final determination of dumping and/or subsidization. If USDOC's final determination is affirmative, USITC completes the final phase of its investigation and issues a final determination.

7.3 In this case, USITC instituted preliminary anti-dumping and countervailing duty injury investigations in response to a petition filed on 2 April 2001 on behalf of the US softwood lumber industry. In the preliminary phase, USITC determined, on 17 May 2001, that there was a reasonable

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<sup>67</sup> Panel Report, *United States – Preliminary Determinations with Respect to Certain Softwood Lumber from Canada* ("US – Softwood Lumber III"), WT/DS236/R, adopted 1 November 2002.

<sup>68</sup> Panel Report, *United States – Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada* ("US – Softwood Lumber IV"), WT/DS257, circulated 29 August 2003, appeal pending.

<sup>69</sup> *United States – Final Dumping Determination on Softwood Lumber from Canada* ("US – Softwood Lumber V") WT/DS264 (pending before Panel).

indication that an industry in the United States was threatened with material injury by reason of imports from Canada of softwood lumber that were alleged to be subsidized by the Government of Canada and sold in the United States at dumped prices - less than fair value ("LTFV") in US parlance.<sup>70 71</sup>

7.4 Subsequent to USDOC's affirmative preliminary and final determinations that imports of softwood lumber from Canada were subsidized and sold in the United States at dumped prices, USITC instituted the final phase of its investigation.

7.5 On 16 May 2002, the USITC unanimously determined that an industry in the United States was 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.<sup>72</sup> On 22 May 2002, USDOC issued antidumping and countervailing duty orders on imports of softwood lumber from Canada.<sup>73</sup>

7.6 In its final determination, the USITC found a single domestic like product consisting of softwood lumber products. Based on the domestic like product determination, the USITC concluded that there was a single domestic industry, which included all producers of softwood lumber in the United States. The USITC found that several conditions of competition pertinent to the softwood lumber industry were relevant to its analysis.<sup>74</sup> In particular, these conditions included the recently expired United States/Canada Softwood Lumber Agreement ("SLA"); demand, including factors affecting demand, actual demand data and forecasts; supply conditions; species of lumber and substitutability; prices; and integration of the North American lumber market. The USITC determined that the domestic softwood lumber industry was not materially injured by reason of subject imports from Canada found to be sold at LTFV and to be subsidized, but found that there was a threat of material injury by reason of such imports.

7.7 The USITC found that the domestic industry producing softwood lumber was vulnerable to injury in light of declines in its performance over the period of investigation, particularly its financial performance. The USITC noted that the USDOC had determined that there were 11 programmes that conferred countervailable subsidies to Canadian producers and exporters of softwood lumber, including: the Provincial Stumpage programmes in the Provinces of Quebec, British Columbia, Ontario, Alberta, Manitoba, and Saskatchewan; two programmes administered by the Government of Canada; two programmes administered by the Province of British Columbia; and one programme administered by the Province of Quebec. The USITC found that subject imports were likely to increase substantially based on: Canadian producers' excess capacity and projected increases in capacity, capacity utilization, and production; the export orientation of Canadian producers to the US market; the increase in subject imports over the period of investigation; the effects of expiration of the SLA; subject import trends during periods when there were no import restraints; and forecasts of strong and improving demand in the US market. The USITC found that there was a moderate degree of substitutability between subject imports of softwood lumber from Canada and the domestic like product, and that prices of different species affected the prices of other species. Given its finding of likely significant increases in subject import volumes, and its finding of at least moderate substitutability between subject imports and domestic product, the USITC concluded that subject imports were likely to have a significant price depressing effect in the immediate future. The USITC recognized that while inventories generally were not substantial in the softwood lumber industry,

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<sup>70</sup> 66 Fed. Reg. 28541 (23 May 2001). (Exhibit CDA-4).

<sup>71</sup> Under US law, the standard of determination in preliminary antidumping or countervailing duty investigations is whether there is a "reasonable indication" of material injury or a threat of material injury by reason of dumped and subsidized imports of softwood lumber from Canada.

<sup>72</sup> 67 Fed. Reg. 36022 (22 May 2002) (Exhibit CDA-2) and USITC Report in Softwood Lumber from Canada, Investigations Nos. 701-TA-414 and 731-TA-928 (Final), Publication 3509, (May 2002) (hereinafter USITC Final Report) (Exhibit CDA-1).

<sup>73</sup> 67 Fed. Reg. 36068-36077 (22 May 2002). (Exhibit CDA-2).

<sup>74</sup> USITC Final Report at 21-27 (Exhibit CDA-1).

Canadian producers' inventories as a share of production had increased and were consistently higher than that reported by US producers during the period of investigation. Finally, the USITC noted that a number of domestic producers had reported actual and potential adverse effects on their development and production efforts, growth, investment, and ability to raise capital due to subject imports of softwood lumber from Canada.

7.8 Thus, the USITC determined that further significant increases in dumped and subsidized imports were imminent, that these imports were likely to exacerbate price pressure on domestic producers, and that material injury to the domestic industry would occur as a result.

### C. CLAIMS SET FORTH IN CANADA'S PANEL REQUEST

7.9 Canada alleges violations of various provisions of the Anti-Dumping (AD) and SCM Agreements. Canada characterizes three of these as "overarching" violations, specifically the alleged violations of Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement, Article 3.8 of the AD Agreement and Article 15.8 of the SCM Agreement, and Article 12 of the AD Agreement and Article 22 of the SCM Agreement. Canada also alleges violations of specific provisions of Article 3 of the AD Agreement, Article 15 of the SCM Agreement and Article VI of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), in particular Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement, Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement, Article 3.4 of the AD Agreement and Article 15.4 of the SCM Agreement, Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement. Finally, Canada alleges violations of Articles 1 and 18.1 of the AD Agreement, Articles 10 and 32.1 of the SCM Agreement and Article VI:6(a) of the GATT 1994.

7.10 These claims for the most part require us to consider the substance of the USITC's final determination to determine whether it is consistent with US obligations under the AD and SCM Agreements. There are also several issues of interpretation of the Agreements raised by Canada's claims. Therefore, we address below first the general issues of standard of review and relevant principles of treaty interpretation, and then go on to address the specific claims.<sup>75</sup>

### D. STANDARD OF REVIEW

7.11 The injury determination of the USITC was based on a single analysis of the facts, and applies without distinction in the context of the anti-dumping and the countervailing duty measures issued by USDOC. The provisions of the AD and SCM Agreements governing injury determinations are in large part identical, and the differences that do exist do not undermine the extensive similarity. Thus, in order for us to find that the United States acted consistently with its obligations under the provisions AD and SCM Agreements, we must conclude that the determination of the USITC is consistent with the requirements of both Agreements. This raises the question of the standard of review to be applied in our examination of the USITC's determination.

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<sup>75</sup> On 14 August 2003, the Secretariat received an unsolicited *amicus curiae* communication in connection with this dispute from the Northwest Ecosystem Alliance, which indicated that copies had been sent to each of the parties and third parties to the dispute. Having considered carefully the question of how to treat that communication, and any further such communications that might be received, and in light of the absence of consensus among WTO Members on the question of how to treat *amicus* submissions, we decided not to accept unsolicited *amicus curiae* submissions in the course of this dispute. However, we noted that we would consider any arguments raised by *amici curiae* to the extent that these arguments were taken up in the written submissions and/or oral statements of any party or third parties, noting that the communication in question had been received prior to the first meeting with the parties, and had been sent to the parties and third parties. We noted that, as a consequence of our decision in this regard, the communication from the Northwest Ecosystem Alliance does not form part of the record in this dispute. The parties, third parties, and the submitter were informed of our decision on 1 September 2003.

7.12 Article 11 of the DSU sets forth the appropriate standard of review for panels for all covered agreements, including the SCM Agreement. Article 11 imposes upon panels a comprehensive obligation to make an "objective assessment of the matter", an obligation which embraces all aspects of a panel's examination of the "matter", both factual and legal. Article 17.6 of the AD Agreement sets forth a special standard of review applicable to anti-dumping disputes. It provides, with respect to the evaluation of factual issues:

“(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities’ establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;”

With respect to questions of legal interpretation, Article 17.6 provides:

“(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities’ measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations”.

Thus, together, Article 11 of the DSU and Article 17.6 of the AD Agreement set out the standard of review the Panel is to apply with respect to both the factual and legal aspects of its examination of the claims and arguments raised by the parties in a case under the AD Agreement.<sup>76</sup>

7.13 To date, no WTO panel has addressed to what extent, if any, these two standards are different. Thus, it is not clear from previous decisions whether the application of the Article 11 standard to a determination could, in appropriate factual circumstances, lead to differing outcomes than the application of the Article 11 and Article 17.6(i) standards together to the same determination. That issue would appear to be presented by this case.

7.14 Canada's argument as originally presented suggested that, in Canada's view, the Article 11 standard required something different and perhaps stricter than the Article 17.6 standard. This raised the possibility that, in Canada's view, different conclusions might be reached, on the basis of the same determination, regarding violations of corollary provisions of the AD and SCM Agreements. However, in response to questions from the Panel, Canada clarified that it did not consider that the standard of review under Article 11 of the DSU is stricter than that under Article 17.6 of the AD Agreement, but rather that they complement each other and should be read together.<sup>77</sup> Canada further clarified that it was not claiming that the USITC should have obtained additional information during the course of its investigation. Rather, Canada specified, its challenge concerned the USITC's evaluation of the evidence that was on the record before it. Finally, Canada observed that its understanding of the applicable standard of review for this dispute was compatible with the Declaration of Ministers relating to Dispute Settlement under the AD and SCM Agreements, which recognized the need for consistent resolution of disputes arising from anti-dumping and countervailing duty measures.

7.15 Under the Article 17.6 standard, with respect to claims involving questions of fact, Panels have concluded that whether the measures at issue are consistent with relevant provisions of the AD Agreement depends on whether the investigating authority properly established the facts, and

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<sup>76</sup> Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ("US – Hot-Rolled Steel"), WT/DS184/AB/R, adopted 23 August 2001, paras. 54-62.

<sup>77</sup> Canada's Responses to Questions from the Panel and the United States - First Meeting, question 1.

evaluated the facts in an unbiased and objective manner. This latter has been defined as assessing whether an unbiased and objective decision maker, taking into account the facts that were before the investigating authority, and in light of the explanations given, could have reached the conclusions that were reached. A panel's task is not to carry out a *de novo* review of the information and evidence on the record of the underlying investigation. Nor may a panel substitute its judgment for that of the investigating authorities, even though the Panel might have arrived at a different determination were it considering the record evidence for itself.

7.16 Similarly, the Appellate Body has explained that, under Article 11 of the DSU, a panel's role is not to substitute its analysis for that of the investigating authority.<sup>78</sup> The Appellate Body has stated:

"We wish to emphasize that, although panels are not entitled to conduct a *de novo* review of the evidence, nor to *substitute* their own conclusions for those of the competent authorities, this does *not* mean that panels must simply *accept* the conclusions of the competent authorities".<sup>79</sup>

7.17 In light of Canada's clarification of its position, and based on our understanding of the applicable standards of review under Article 11 of the DSU and Article 17.6 of the AD Agreement, we do not consider that it is either necessary or appropriate to conduct separate analyses of the USITC determination under the two Agreements.

7.18 We consider this result appropriate in view of the guidance in the Declaration of Ministers relating to Dispute Settlement under the AD and SCM Agreements. While the Appellate Body has clearly stated that the Ministerial Declaration does not require the application of the Article 17.6 standard of review in countervailing duty investigations,<sup>80</sup> it nonetheless seems to us that in a case such as this one, involving a single injury determination with respect to both subsidized and dumped imports, and where most of Canada's claims involve identical or almost identical provisions of the AD and SCM Agreements, we should seek to avoid inconsistent conclusions.

7.19 With respect to the question of legal interpretation, Article 3.2 of the DSU provides that Members recognise that the dispute settlement system serves to clarify the provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". Article 31.1 of the Vienna Convention on the Law of Treaties ('Vienna Convention')<sup>81</sup>, which is generally accepted as such a customary rule, provides:

"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

7.20 There is a considerable body of WTO case law dealing with the application of these provisions on treaty interpretation in dispute settlement in the WTO. It is clear that interpretation must be based above all on the text of the treaty<sup>82</sup>, but that the context of the treaty also plays a role in

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<sup>78</sup> Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan* ("US – Cotton Yarn"), WT/DS192/AB/R, adopted 5 November 2001, para. 74; Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia* ("US – Lamb"), WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, para. 106.

<sup>79</sup> Appellate Body Report, *US – Cotton Yarn*, para. 69, n.42, citing Appellate Body Report, *US – Lamb*, para. 106.

<sup>80</sup> Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* ("US – Lead and Bismuth II"), WT/DS138/AB/R, adopted 7 June 2000, DSR 2000:V, 2601 at para 49.

<sup>81</sup> (1969) 8 *International Legal Materials* 679.

<sup>82</sup> Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* ("Japan – Alcoholic Beverages II"), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97, p. 11.

certain circumstances. It is also well-established that these principles of interpretation "neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended".<sup>83</sup> Furthermore, panels "must be guided by the rules of treaty interpretation set out in the Vienna Convention, and must not add to or diminish rights and obligations provided in the WTO Agreement".<sup>84</sup>

7.21 In the context of WTO disputes under the AD Agreement, the Appellate Body has made it clear that Article 17.6(ii)

"The *first* sentence of Article 17.6(ii), echoing closely Article 3.2 of the DSU, states that *panels* "shall" interpret the provisions of the *Anti-Dumping Agreement* "in accordance with customary rules of interpretation of public international law." Such customary rules are embodied in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* ("*Vienna Convention*"). Clearly, this aspect of Article 17.6(ii) involves no "conflict" with the DSU but, rather, confirms that the usual rules of treaty interpretation under the DSU also apply to the *Anti-Dumping Agreement*. ...

The *second* sentence of Article 17.6(ii) ... *presupposes* that application of the rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention* could give rise to, at least, two interpretations of some provisions of the *Anti-Dumping Agreement*, which, under that Convention, would both be "*permissible interpretations*". In that event, a measure is deemed to be in conformity with the *Anti-Dumping Agreement* "if it rests upon one of those permissible interpretations".<sup>85</sup>

7.22 Thus, it is clear to us that under the AD Agreement, a panel is to follow the same rules of treaty interpretation as in any other dispute. The difference is that if a panel finds more than one permissible interpretation of a provision of the AD Agreement, it may uphold a measure that rests on one of those interpretations. It is not clear whether the same result could be reached under Articles 3.2 and 11 of the DSU. However, it seems to us that there might well be cases in which the application of the Vienna Convention principles together with the additional provisions of Article 17.6 of the AD Agreement could result in a different conclusion being reached in a dispute under the AD Agreement than under the SCM Agreement. In this case, it has not been necessary for us to resolve this question, as we did not find any instances where the question of violation turned on the question whether there was more than one permissible interpretation of the text of the relevant Agreements.

#### E. BURDEN OF PROOF

7.23 While the parties have not raised burden of proof as an issue, we have kept in mind the general principles applicable to burden of proof in WTO dispute settlement, which require that a party claiming a violation of a provision of a WTO Agreement by another Member must assert and prove its claim.<sup>86</sup> In this dispute, Canada, which has challenged the consistency of the United States' measures, thus bears the burden of demonstrating that the measures are not consistent with the relevant provisions of the relevant Agreements. It is generally for each party asserting a fact to provide proof thereof.<sup>87</sup> Therefore, it is also for the United States to provide evidence for the facts

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<sup>83</sup> Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* ("*India – Patents (US)*"), WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9, para. 45.

<sup>84</sup> *Ibid.*, para. 46.

<sup>85</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 57.

<sup>86</sup> Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India* ("*US – Wool Shirts and Blouses*"), WT/DS33/AB/R and Corr. 1, adopted 23 May 1997, DSR 1997:I, 323, p. 337.

<sup>87</sup> *Ibid.*

which it asserts. We note in addition that a *prima facie* case is one which, in the absence of effective refutation by the other party, requires a panel, as a matter of law, to rule in favour of the party presenting the *prima facie* case.

F. ALLEGED VIOLATIONS OF ARTICLE 3.1 OF THE AD AGREEMENT AND ARTICLE 15.1 OF THE SCM AGREEMENT - OBLIGATIONS REGARDING "POSITIVE EVIDENCE" AND "OBJECTIVE EXAMINATION"

7.24 Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement are substantively identical. Article 3.1 provides

"A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products".

Article 15.1 of the SCM Agreement states:

"15.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the subsidized imports and the effect of the subsidized imports on prices in the domestic market for like products and (b) the consequent impact of these imports on the domestic producers of such products". (footnote omitted)

7.25 Canada asserts that the obligations set out in Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement contain substantive, overarching obligations that must be observed by investigating authorities in making injury determinations. Canada considers that the alleged violations of other, more specific provisions of Article 3 of the AD Agreement and Article 15 of the SCM Agreement demonstrate the asserted violations of Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement in this case. Thus, Canada has not made separate arguments supporting these claims of violation. In response to questions from the Panel, Canada clarified that it did not consider these claims to be dependent on the more specific claims it raised, but acknowledged that they are closely related. Canada explained that the "same facts give rise to violations under the overarching provisions as well as the specific provisions Canada has invoked in this dispute".<sup>88</sup>

7.26 In the absence of independent argument supporting these overarching claims under Articles 3.1 and 15.1, and in light of Canada's explanation, it is our view that the resolution of these claims is substantively dependent on our resolution of the specific claims. In this regard, we note Canada's statement that, "Given substantive differences in the obligations in Articles 3.1 and 15.1 compared to [Articles 3.2, 3.4, 3.5 and 3.7 of the AD Agreement and Articles 15.2, 15.4, 15.5 and 15.7 of the SCM Agreement], certain factual scenarios could give rise to violations of Article 3.1 and 15.1 without violating the provisions of the other Articles. **However, Canada is not raising such facts in this dispute**".<sup>89</sup> Thus, in the absence of any additional arguments supporting the allegations of violation of Articles 3.1 and 15.1, if we find that the facts give rise to a conclusion of no violation under one of Canada's specific claims, we will also consider that those facts give rise to the same conclusion, no violation, with respect to the overarching claims under Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement. With respect to any aspect of the determination that is found to be inconsistent with any other provision of Articles 3 and 15 of the Agreements asserted by Canada, we can see no reason to conclude, in addition, that it also violates Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement. In the absence of

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<sup>88</sup> Canada's Responses to Questions from the Panel and the United States - First Meeting, question 6.

<sup>89</sup> *Ibid.*, (emphasis added).

additional arguments in support of these claims, to say that a violation of a specific provision of the Agreements also violates the overarching obligations in Articles 3.1 and 15.1 does not clarify the obligation set out in Articles 3.1 of the AD Agreement and 15.1 of the SCM Agreement. Nor would it provide any guidance in the context of implementation of any recommendation of the DSB. Therefore, we will make no findings with respect to these claims.

7.27 Of course, we recognize the importance of the obligations in Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement to our evaluation of the USITC determination at issue in this dispute.<sup>90</sup> Thus, in considering Canada's specific claims of violation, we have considered the obligations established in those provisions in evaluating the USITC's determination in light of the specific allegations of violation.

7.28 In this regard, we have kept in mind statements of the Appellate Body regarding the meaning of "positive evidence" and "objective examination". While "positive evidence" involves the facts underpinning and justifying the injury determination, "objective examination" is concerned with the investigative process itself.<sup>91</sup> The Appellate Body has interpreted "positive evidence" as follows:

"The term "positive evidence" relates, in our view, to the *quality* of the evidence that authorities may rely upon in making a determination. The word "positive" means, to us, that the evidence must be of an *affirmative, objective and verifiable* character, and that it must be *credible* ."<sup>92</sup> (emphasis in original)

The Appellate Body has defined an "objective examination":

"The term "objective examination" aims at a different aspect of the investigating authorities' determination. While the term "positive evidence" focuses on the facts underpinning and justifying the injury determination, the term "objective examination" is concerned with the investigative process itself. The word "examination" relates, in our view, to the way in which the evidence is gathered, inquired into and, subsequently, evaluated; that is, it relates to the conduct of the investigation generally. The word "objective", which qualifies the word "examination", indicates essentially that the "examination" process must conform to the dictates of the basic principles of good faith and fundamental fairness."<sup>93</sup> (footnote omitted)

The Appellate Body summed up the requirement to conduct an "objective examination" as follows:

"In short, an "objective examination" requires that the domestic industry, and the effects of dumped imports, be investigated in an *unbiased* manner, *without favouring the interests of any interested party*, or group of interested parties, in the investigation. The duty of the investigating authorities to conduct an "objective examination" recognizes that the determination will be influenced by the objectivity,

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<sup>90</sup> We note in this respect the statement of the Appellate Body: "Article 3 as a whole deals with obligations of Members with respect to the determination of injury. Article 3.1 is an overarching provision that sets forth a Member's fundamental, substantive obligation in this respect. Article 3.1 informs the more detailed obligations in succeeding paragraphs." Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland (Thailand – H-Beams)*, WT/DS122/AB/R, adopted 5 April 2001, para. 106.

<sup>91</sup> Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India ("EC – Bed Linen (Article 21.5 – India)")*, WT/DS141/AB/RW, adopted 24 April 2003, para 114, quoting Appellate Body Report, *US – Hot-Rolled Steel*, para. 192.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*, quoting Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.

or any lack thereof, of the investigative process".<sup>94</sup> (footnote omitted, emphasis in original)

G. ALLEGED VIOLATIONS OF ARTICLE 3.8 OF THE AD AGREEMENT AND ARTICLE 15.8 OF THE SCM AGREEMENT REQUIREMENTS REGARDING "SPECIAL CARE"

7.29 Article 3.8 of the AD Agreement and Article 15.8 of the SCM Agreement provide that:

"with respect to cases where injury is threatened by dumped [subsidized] imports, the application of anti-dumping [countervailing] measures shall be considered and decided with special care".

No WTO panel has addressed the interpretation of these provisions to date.

(a) Parties' Arguments

7.30 Canada asserts that these provisions establish an independent obligation with which Members must comply, and that they provide context to assist in the interpretation of the other paragraphs of Article 3 of the AD Agreement and Article 15 of the SCM Agreement that govern threat of injury determinations. However, as is the case concerning the alleged violations of Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement, Canada does not make any independent arguments with respect to these claims, but rather asserts that the "failure to take "special care" permeates the entire determination of the [USITC]".<sup>95</sup>

7.31 The United States asserts that Canada's argument indicates it considers that the "special care" provision means that there is a stricter, higher standard of review for threat analysis than for present material injury analysis in the context of the covered Agreements. The United States, referring to the decision of the Appellate Body in a safeguards dispute, *US – Line Pipe*, noted that the Appellate Body suggested that the distinction between threat of injury and present injury "serves the purpose of setting a *lower threshold* for establishing the *right* to apply a safeguard measure".<sup>96</sup>

7.32 However, in response to questions from the Panel, Canada clarified that it was not arguing that the Panel must apply a different standard of review in cases involving threat of material injury.<sup>97</sup> Rather, Canada's argument was that the "special care" provisions imposed a stricter standard of determination in threat cases, requiring a "particularly careful examination of the required elements of Article 3 of the AD Agreement and Article 15 of the SCM Agreement".<sup>98</sup> Canada asserts that "special care" in threat cases is a crucial safeguard to protect against the dangers inherent in the predictive nature of such determinations.

(b) Analysis by the Panel

7.33 The adjective "special" is defined as, *inter alia*, "Exceptional in quality or degree; unusual; out of the ordinary".<sup>99</sup> The noun "care" is defined, *inter alia*, as "Serious attention, heed; caution, pains, regard".<sup>100</sup> Thus, it seems clear to us that a degree of attention over and above that required of

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<sup>94</sup> *Ibid.*

<sup>95</sup> Canada's first written submission at para 65.

<sup>96</sup> Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* ("US – Line Pipe"), WT/DS202/AB/R, adopted 8 March 2002, para. 169 (emphasis in original).

<sup>97</sup> Canada's Responses to Questions from the Panel and the United States - First Meeting, question 4.

<sup>98</sup> *Ibid.*

<sup>99</sup> The New Shorter Oxford English Dictionary (Clarendon Press 1993)

<sup>100</sup> *Ibid.*

investigating authorities in all anti-dumping and countervailing duty injury cases is required in the context of cases involving threat of material injury. We note that Articles 3.8 and 15.8 explicitly state that "**the application** of measures shall be considered and decided with special care" (emphasis added). Thus, it might be argued that the provision comes into play only after the investigation and consideration of all the relevant factors set out in other provisions of Articles 3 and 15 concerning the analysis of injury.<sup>101</sup> However, we consider that such a conclusion is not appropriate in the context of Article 3.8 of the AD Agreement or Article 15.8 of the SCM Agreement. These provisions are part of the Article of each Agreement, Articles 3 and 15, which, governs the overall determination of injury, which under both Agreements is defined as including threat of material injury.<sup>102</sup> Articles 3.7 and 15.7, set forth factors specific to the determination of threat of material injury, and state that investigating authorities shall base a determination of threat of material injury on facts and not allegation, conjecture or remote possibility. In our view, Articles 3.8 and 15.8 reinforce this fundamental obligation. Thus, we consider that Article 3.8 and Article 15.8 apply during the process of investigation and determination of threat of material injury, that is, in the establishment of whether the prerequisites for application of a measure exist, and not merely afterward when final decisions whether to apply a measure are taken.

7.34 Thus, we are faced with the question of what is entailed by this obligation to act with an enhanced degree of attention, so as to demonstrate compliance with the "special care" obligation. The Agreements require, as noted above, an objective evaluation based on positive evidence in making **any** injury determination, including one based on threat of material injury. Canada has not asserted any specific legal requirements with respect to special care – it has made no arguments as to what it considers might constitute the special care required by the Agreements in threat cases. It is not clear to us what the parameters of such "special care" in the context of an objective evaluation based on positive evidence would be. In these circumstances, we consider it appropriate to consider alleged violations of Articles 3.8 and 15.8 only after consideration of the alleged violations of specific provisions. While we do not consider that a violation of the special care obligation **could** not be demonstrated in the absence of a violation of the more specific provision of the Agreements governing injury determinations, we believe such a demonstration would require additional or independent arguments concerning the asserted violation of the special care requirement beyond the arguments in support of the specific violations,

7.35 Our review of Canada's arguments indicates that the factual circumstances Canada asserts demonstrate the failure of the USITC to take the requisite "special care" are the same factual circumstances that give rise to the asserted specific violations. Indeed, Canada points to examples of what it considers are aspects of the USITC determination that demonstrate a lack of special care which are the same aspects that Canada argues demonstrate violations of other provisions of Articles 3 of the AD Agreement and 15 of the SCM Agreement. Thus, it appears to us that Canada is asserting that the violations of the specific provisions cited in Canada's claims and the violations of Article 3.8 and 15.8 are co-extensive.

7.36 In light of the foregoing, in the circumstances of this case we can see no basis for a finding of violation of the special care requirement with respect to any aspect of the determination which is otherwise found to be **consistent** with the other provisions of Articles 3 and 15 asserted by Canada. On the other hand, with respect to any aspect of the determination that is found to be **inconsistent**

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<sup>101</sup> We note that, in the context of interpreting Article 15 of the AD Agreement, which requires Members to give special regard to the special situation of developing countries "when considering the application of anti-dumping measures", this phrase has been found to refer "to the final decision whether to apply a final measure, and not intermediate decisions concerning such matters as investigative procedures and choices of methodology during the course of the investigation." Panel Report, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India* ("US – Steel Plate"), WT/DS206/R and Corr.1, adopted 29 July 2002, para 7.111.

<sup>102</sup> Footnote 9 of the AD Agreement, and footnote 45 of the SCM Agreement.

with any other provision of Articles 3 and 15 the Agreements asserted by Canada, we can see no reason to conclude, in addition, that it also violates the special care requirement. Clearly, whatever the precise parameters of "special care" in the context of a threat determination may be, an aspect of the determination which does not satisfy the other, more specific obligations of Articles 3 and 15 cannot satisfy the special care obligation. However, to say so does not in any respect clarify the obligation set out in Articles 3.8 of the AD Agreement and 15.8 of the SCM Agreement. Nor would it provide any guidance in the context of implementation of any recommendation of the DSB. Therefore, we will make no findings with respect to this claim.

7.37 We do, nonetheless, consider the obligation of special care to be important in our evaluation of the allegations of violations of specific provisions. Even though we do not address the issue of special care as a separate violation, that obligation provides important context for our understanding of the obligations on the USITC in making a determination of threat of material injury. We have therefore kept this obligation on the investigating authority to act with an extra degree of attention in the forefront of our minds in evaluating the particular claims in this dispute.

#### H. ALLEGED VIOLATIONS OF ARTICLE 12 OF THE AD AGREEMENT AND ARTICLE 22 OF THE SCM AGREEMENT

7.38 Article 12.2.2 of the AD Agreement provides:

"A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6".

Article 12.2.1, referred to in Article 12.2.2, provides:

"A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular:

- (i) the names of the suppliers, or when this is impracticable, the supplying countries involved;
- (ii) a description of the product which is sufficient for customs purposes;
- (iii) the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2;
- (iv) considerations relevant to the injury determination as set out in Article 3;
- (v) the main reasons leading to the determination".

7.39 Article 22.5 of the SCM Agreement, and Article 22.4 referred to therein, are similar, and the minor textual differences are not relevant to this dispute.

7.40 As with its other overarching claims, Canada does not make specific arguments with respect to these claims. Rather, as Canada clarified in response to the Panel's questions, Canada's claims under these provisions are procedural, dealing with the content of the notices, and not with the substantive elements of the underlying USITC determination. Canada specified that the asserted requirement for a "reasoned and adequate explanations" of the USITC's determination, which it alleges was not provided in this case, did not derive from Articles 12.2.2 and 22.5, but rather from the substantive obligations of Article 3 of the AD Agreement and Article 15 of the SCM Agreement.<sup>103</sup> In our view, Canada's claims under Articles 12.2.2 of the AD Agreement and 22.5 of the SCM Agreement are thus dependent on the disposition of the specific claims of violation.

7.41 In evaluating these claims, we note that our conclusions with respect to each of the alleged substantive violations asserted by Canada rest on our examination of the USITC's published determination, which constitutes the notices provided by the United States under Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement with respect to the injury determination in this case. No additional materials have been cited to us with respect to the determination for consideration in determining whether or not the USITC's determination are consistent with the relevant provisions of the Agreements. Thus, if we find no violation with respect to a particular specific claim, such a conclusion must rest on the USITC's published determination. In this circumstance, it is clear to us that no violation of Articles 12.2.2 and 22.5 could be found to exist in this case, where it is not disputed that the USITC determination accurately reflects the analysis and determination in the investigations. On the other hand, if we find a violation of a specific substantive requirement, the question of whether the notice of the determination is "sufficient" under Article 12.2.2 of the AD Agreement or Article 22.5 of the SCM Agreement is, in our view, immaterial.

7.42 As was pointed out by the Panel in *EC – Bed Linen*:

"A notice may adequately explain the determination that was made, but if the determination was substantively inconsistent with the relevant legal obligations, the adequacy of the notice is meaningless. Further, in our view, it is meaningless to consider whether the notice of a decision that is substantively inconsistent with the requirements of the AD Agreement is, as a separate matter, insufficient under Article 12.2. A finding that the notice of an inconsistent action is inadequate does not add anything to the finding of violation, the resolution of the dispute before us, or to the understanding of the obligations imposed by the AD Agreement".<sup>104</sup>

We share the views of the *EC – Bed Linen* Panel in this respect, and adopt them as our own. In this regard, we note Canada's statement that "as a practical matter, Canada recognizes that it would be unusual for an injury determination to either satisfy the obligations in Articles 3 and 15 but not Articles 12.2.2 and 22.5 or *vice versa*".<sup>105</sup> Canada has made no arguments to suggest that this is such an unusual case. Therefore, we will make no findings with respect to the alleged violations of Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement.

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<sup>103</sup> Canada's Responses to Questions from the Panel and the United States - First Meeting, question 7.

<sup>104</sup> Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* ("EC – Bed Linen"), WT/DS141/R, adopted 12 March 2001, as modified by the Appellate Body Report, WT/DS141/AB/R, at para. 6.259.

<sup>105</sup> Canada's Responses to Questions from the Panel and the United States - First Meeting, question 7.

## I. ALLEGED VIOLATIONS OF ARTICLE 3.7 OF THE AD AGREEMENT AND ARTICLE 15.7 OF THE SCM AGREEMENT

7.43 Article 3.7 of the AD Agreement provides:

"A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.<sup>10</sup> In making a determination regarding the existence of a threat of material injury, the authorities should consider, *inter alia*, such factors as:

(i) a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation;

(ii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;

(iii) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and

(iv) inventories of the product being investigated.

No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur.

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<sup>10</sup> One example, though not an exclusive one, is that there is convincing reason to believe that there will be, in the near future, substantially increased importation of the product at dumped prices".

Article 15.7 of the SCM Agreement is the same except that it sets out an additional factor the authorities should consider – "nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom".

7.44 Canada alleges a series of violations of these provisions, which are addressed below.

### 1. "Change in circumstances"

(a) Parties' Arguments

7.45 Canada asserts that Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement require that the "change in circumstances" from the non-injurious period of investigation that will create a situation in which the dumping or subsidy will cause injury must be "clearly foreseen and imminent". Canada refers to this as the "logical predicate" for an affirmative finding of threat of material injury.<sup>106</sup> Canada asserts that the change in circumstances which would create a situation in which the dumping or the subsidy would cause injury must be clearly anticipated and on the brink of

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<sup>106</sup> Canada's first written submission at para. 76.

happening. Canada argues that in this case, the USITC failed to provide a reasoned evaluation of this fundamental question. In particular, Canada argues that the USITC did not explain how the evidence before it provided a non-conjectural basis for concluding that the *status quo* would change such that imports that did **not** cause injury to the domestic industry during the period of investigation **would** cause material injury in the imminent future.

7.46 Canada argues that one of the few “change[s] in circumstances” identified in the USITC’s determination, the prediction of “strong and improving demand” in the US lumber market, would appear to make threat of injury less likely, not more likely. Thus, Canada asserts, the USITC failed to provide a reasoned, adequate and consistent explanation supporting a finding that there was a change in circumstances that would create a situation in which the dumping or subsidy would cause injury imminently. Canada notes that the USITC found that imports were likely to increase and that subject imports were likely to have a significant price depressing effect in the future. However, Canada asserts that the USITC did not properly evaluate whether “the change in circumstances...would *cause* injury” or whether “unless protective action is taken, material injury *would occur*”.

7.47 The United States argues that threat of material injury is material injury that has not yet occurred, but remains a future event whose actual materialization cannot be assured with absolute certainty. Thus, the United States asserts that the Agreements recognize that a Member need not wait until material injury actually has occurred before taking remedial action. Moreover, the United States argues that the threat provision recognizes that injury may not occur suddenly but may result from a progression of trade conditions adverse to the industry. The United States points to the text in this regard, which provides an example of the requisite “change in circumstances” in footnote 10 -- “that there is convincing reason to believe that there will be, in the near future, substantially increased importation of the product at dumped [subsidized] prices”.

7.48 The United States takes issue with the view that the “change in circumstances” language requires the investigating authority to identify “**a**” change in circumstances, *i.e.*, “an event,” that will abruptly change the *status quo* from a threat of material injury to present material injury. In the US view, this interpretation is neither necessary nor justified. In this regard, the United States points to the statement of the Appellate Body in *US-Line Pipe* as describing the reality of how injury may occur to a domestic industry:

"In the sequence of events facing a domestic industry, it is fair to assume that, often there is a continuous progression of injurious effects eventually rising and culminating in what can be determined to be “serious injury”. Serious injury does not generally occur suddenly. Present serious injury is often preceded in time by an injury that threatens clearly and imminently to become serious injury, as we indicated in *US-Lamb*. Serious injury is, in other words, often the realization of a threat of serious injury. . . . the precise point where a “threat of serious injury” becomes “serious injury” may sometimes be difficult to discern. But, clearly, “the serious injury” is something *beyond* a “threat of serious injury”.<sup>107</sup>

7.49 The United States further argues that the Appellate Body has recognized generally that there is a continuum of an injurious condition of a domestic industry that ascends from a threat of injury up to injury, citing the Appellate Body statement that:

"In terms of the rising continuum of an injurious condition of a domestic industry that ascends from a “threat of serious injury” up to “serious injury”, we see “serious

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<sup>107</sup> Appellate Body Report, *US – Line Pipe*, para. 168 .

injury” – because it is something *beyond* a “threat” – as necessarily *including* the concept of a “threat” and *exceeding*” the presence of a “threat”.<sup>108</sup>

7.50 The United States argues that based on the facts regarding the present and past situation of the domestic industry, an investigating authority can make reasonable projections about the future, namely whether material injury is “clearly foreseen and imminent”. The United States argues that the USITC determined that the domestic industry was vulnerable based on its analysis of the factors in Article 3.4, found that the volume of dumped and subsidized imports was significant, but did not find that those imports had caused material injury in light of the lack of significant price effects. The USITC then found that dumped and subsidized imports were likely to increase, and were likely to have significant price effects in the near future, supporting a finding of threat of material injury. In the US view, there is no need to find that there will be an abrupt change in the *status quo* to justify a finding of threat of material injury – it is sufficient that material injury is the foreseeable result of the sequence of events.

7.51 The EC, as third party, considers that the investigating authorities are required to determine that there is a clearly foreseen and imminent change in circumstances that would create a situation in which dumping or subsidization would cause injury. However, the EC also is of the view that the condition of a domestic industry may develop in a continuous line from non-injury to injury, and that it is not possible to predict when the change occurs. However, in the EC's view, the point is not when circumstances will change, but that there must be an analysis of the factors that create a change in circumstances. Thus, the EC does not consider that an abrupt change in circumstances must be identified, but rather that there must be an analysis of the factors relating to the future dumped and/or subsidized imports that leads to the conclusion that the industry is on the brink of injury.

7.52 Japan, as third party, supports Canada's view that an investigating authority must comply with the obligation to identify the “change in circumstances” that is necessary to move from “no injury” at the time of the determination to imminent injury justifying a threat determination. However, Japan does not consider that there must be an abrupt change in this context.

(b) Analysis by the Panel

7.53 The text of Articles 3.7 and 15.7 concerning “change of circumstances” is not a model of clarity. It provides “The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.”<sup>108</sup> Thus, Articles 3.7 and 15.7 on their face seem to require that some “change of circumstances” must be clearly foreseen and imminent, and that it is this change of circumstances that would create a situation in which injury would occur. Footnote 10 in the AD Agreement, which is not repeated in the SCM Agreement, provides an example of what might constitute a change in circumstances: “One example, though not an exclusive one, is that there is convincing reason to believe that there will be, in the near future, substantially increased importation of the product at dumped prices”.

7.54 Thus, the sole example given of a “change of circumstances” in the text is that there will be substantially increased importation of the product at dumped prices. However, the likelihood of substantially increased imports is also one of the specific factors that Articles 3.7(i) and 15.7(ii) of the AD and SCM Agreements, respectively, provide should be considered in determining the existence of a threat of material injury. The text also specifies that no one of the factors listed in Article 3.7 or Article 15.7 “by itself can necessarily give decisive guidance, but the totality of the factors considered must lead to the conclusion that further [dumped/subsidized] exports are imminent, and that unless protective action is taken, material injury would occur”. Thus, the text indicates that both the change of circumstances, and further dumped or subsidized imports, must be imminent, and the likelihood of increased imports is both a relevant change of circumstances and a factor to be considered in

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<sup>108</sup> Appellate Body Report, *US – Line Pipe*, para. 170.

determining the existence of threat. In our view, based on the text of the Agreements, it is not clear that these various elements of Articles 3.7 and 15.7 need necessarily be distinct factual circumstances, each of which must be considered separately in assessing whether there is a threat of material injury.

7.55 Moreover, while the change in circumstances must be clearly foreseen and imminent, the text does not clearly require the identification of a single event as the relevant change in circumstances. Thus, the text does not give us clear guidance as to the nature of the change in circumstances, or the degree of specificity with which it must be identified.

7.56 Looking at the context of Articles 3.7 and 15.7, in particular the remainder of Articles 3 and 15 as a whole, we note that Article 3 of the AD Agreement and Article 15 of the SCM Agreement both deal with the determination of injury. "Injury" is defined in the Agreements to mean "material injury to a domestic industry, threat of material injury to a domestic industry, or material retardation of the establishment of such and industry".<sup>109</sup> It seems clear to us that these three concepts describe different types of injury, occurring at different times and potentially in different ways.<sup>110</sup> Thus, the focus of Article 3.7 and Article 15.7, in the context of Articles 3 and 15 as a whole, is the determination of one of these three types of injury, threat of material injury. The factors set out in Article 3.7 and Article 15.7 are elements that should be considered in making a determination of threat of material injury.

7.57 Following this view, we consider that the relevant "change in circumstances" referred to in Articles 3.7 and 15.7 is one element to be considered in making a determination of threat of material injury. However, we can find no support for the conclusion that such a change in circumstances must be identified as a single or specific event. Rather, in our view, the change in circumstances that would give rise to a situation in which injury would occur encompasses a single event, or a series of events, or developments in the situation of the industry, and/or concerning the dumped or subsidized imports, which lead to the conclusion that injury which has not yet occurred can be predicted to occur imminently.

7.58 Of course, a reviewing Panel must be able, in dispute settlement, to determine that the investigating authority has considered this element in its analysis. Thus, the investigating authorities' consideration must be discernible from its determination. The nature of that consideration would, in our view, necessarily vary depending on the facts of the particular case. Again, however, it must be possible for the reviewing Panel to ensure that the consideration of the investigating authority took into account relevant facts before it, and was an unbiased and objective evaluation of those facts. What is critical, however, is that it be clear from the determination that the investigating authority has evaluated how the future will be different from the immediate past, such that the situation of no present material injury will change in the imminent future to a situation of material injury, in the absence of measures.

7.59 In this case, Canada argues that the USITC failed to identify any circumstances that would change such that material injury would occur in the near future. The United States, on the other hand, argues that the discussion of facts and likely events throughout the USITC analysis, demonstrated a progression of circumstances which would create a situation in which dumping and subsidies would cause injury. In the US view, the continuation of adverse trends into the future, as identified in the USITC determination, is sufficient to satisfy the change in circumstances requirement.

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<sup>109</sup> AD Agreement footnote 9, SCM Agreement footnote 45.

<sup>110</sup> The Appellate Body, in interpreting the analogous injury provision of the Safeguards Agreement, which allows for a finding of "serious injury or threat thereof" and defines "threat of serious injury" as "serious injury that is clearly imminent", found that "we agree with the Panel that the respective definitions of "serious injury" and "threat of serious injury" are two distinct concepts that must be given distinctive meanings in interpreting the Agreement on Safeguards." Appellate Body Report, *US – Line Pipe*, para. 167.

7.60 As noted above, we do not disagree, in principle, with the United States' view that Article 3.7 and Article 15.7 do not require that the investigating authority identify a specific event that will change such that a situation of no injury will become a situation of injury in the future. In this case, the facts the United States points to as demonstrating the "progression" of circumstances which would create a situation in which injury would occur in the near future are thoroughly intertwined with the USITC's discussion of the present condition of the domestic industry, the present impact of imports, and the facts asserted in support of the conclusion that imports will increase substantially. Thus, in our view, the USITC considered these various elements in concluding that the continuation of the trends in the situation of the domestic industry, coupled with predicted substantially increased imports, would result in an imminent change in circumstances such that injury would occur. However, while this may be enough to allow us to conclude that the USITC considered whether there would be a change in circumstances such that the dumped and subsidized imports would cause injury, it does not answer the question whether the overall determination of threat, based on the totality of the factors considered, is consistent with the requirements of the Agreements. That question is addressed further below.

## **2. Consideration of factors in Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement**

### **(a) Parties' Arguments**

7.61 Canada argues that the USITC failed to consider properly the factors listed in Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement and other relevant factors based on the evidence before it. Canada points to the decision of the Panel in *Thailand – H-Beams* with respect to the meaning of the term "consider", asserting that that Panel found that "consider" means "contemplate mentally, especially in order to reach a conclusion"; 'give attention to'; and 'reckon with; take into account'.<sup>111</sup> The Panel went on to state that it must "be apparent in the relevant documents in the record that the investigating authorities have given attention to and taken into account" the factors required to be considered.<sup>112</sup> It found that the investigating authorities "considered" the significance of an increase in imports where they "went beyond a 'mere recitation of trends in the abstract and put the import figures into context'".<sup>113</sup> Canada asserts that the USITC failed in this regard.

7.62 Canada asserts that the USITC's affirmative threat of injury determination is grounded in its finding of a likely substantial increase in the subject imports. Canada considers that, on the basis of this finding alone, the USITC concluded that the subject imports were likely to have a significant depressing or suppressing effect on domestic prices in the future. Canada argues that this central finding is not supported by the USITC's analysis of the factors listed in Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement. Moreover, Canada maintains that this central finding is also not supported by the other factors examined by the USITC. Thus, Canada considers that the totality of the factors considered by the USITC do not provide a non-conjectural basis for concluding that "subject imports are likely to increase substantially," and therefore the USITC's threat of injury determination does not comply with Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement. Moreover, Canada maintains that the USITC's prediction that subject imports are likely to have a significant price depressing effect in the future is derived exclusively from its finding that the volume of subject imports was likely to increase substantially. In Canada's view, the fundamental flaws in the volume finding thus mean that the price finding is equally flawed and cannot be sustained.

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<sup>111</sup> Panel Report, *Thailand – H-Beams*, para. 7.161

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*, at para. 7.170.

7.63 The United States does not disagree with the contention that the USITC was required to consider the factors in Articles 3.7 and 15.7. However, the United States argues that the Agreements do not require the investigating authorities to make **findings** on each factor. Rather, the United States argues that it is sufficient, if it is apparent in the relevant documents in the record, that the USITC has given attention to and taken the factor into account. The United States notes that after interpreting the term "consider", the Panel in *Thailand - H-Beams* went on to state: "We therefore do not read the textual term 'consider' in Article 3.2 to require an explicit 'finding' or 'determination' by the investigating authorities".<sup>114</sup> The United States argues that while *Thailand - H-Beams* involved Article 3.2 of the AD Agreement, the conclusion that "consider" does not mean "make a finding" should equally apply to Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement.

7.64 Moreover, the United States asserts that consideration of a factor does not necessarily require an explicit separate evaluation of that factor if the analysis of the factor is implicit in the analyses of other factors, and that what is important is that the investigating authority's decisional path be reasonably discernible, not that there be an explicit explanation or finding for each factor to be considered.<sup>115</sup> The United States considers that this conclusion follows from the fact that the Agreements provide that "No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur". Further, the United States argues, the investigating authority is not required to explicitly address every minute detail or specific aspect of every argument that is raised by parties. The United States asserts that the USITC clearly considered the relevant evidence and arguments raised by parties but found other evidence to be more persuasive. In the US view, Canada's arguments have little to do with whether the USITC's findings are reasonable and supported by positive evidence, or whether the USITC addressed alternative arguments, but rather ask the Panel to weigh the evidence for itself. The United States maintains that the USITC's conclusion that imports would increase substantially, and would have significant price depressing or suppressing effects, was based on an adequate consideration of relevant factors.

7.65 The EC, as third party, supports the US argument that the term "consider" does not require an explicit finding on each of the relevant factors.

(b) Analysis by the Panel

7.66 We begin our analysis by addressing the interpretation of the term "consider" as used in Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement. The decision of the Panel in *Thailand - H-Beams* is pertinent to our analysis. While that Panel was faced with the question of interpreting the term "consider" as used in Article 3.2 of the AD Agreement, we find that a consistent interpretation is necessary, as the term "consider" has, in our view, the same purpose in Article 3.2 as in Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement. Article 3.2 of the AD Agreement establishes factors that the investigating authorities are to "consider" with regard to the volume of imports and the impact of imports on prices, in the context of making a determination of material injury. Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement similarly set forth a series of factors investigating authorities should "consider" in the context of making a determination of threat of injury. We can conceive of no basis for concluding that a different understanding of the term might be appropriate in these two contexts. Therefore, the views of the *Thailand - H-Beams* Panel are highly persuasive in our understanding of the term as used in Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement.

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<sup>114</sup> *Ibid.*, at para. 7.161.

<sup>115</sup> Appellate Body Report, *European Communities - Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil* ("EC - Tube or Pipe Fittings"), WT/DS219/AB/R, 22 July 2003, paras. 160-161.

7.67 Thus, we are of the view that, in order to conclude that the investigating authorities have "considered" the factors set out in Articles 3.7 and 15.7, it must be apparent from the determination before us that the investigating authorities have given attention to and taken into account those factors.<sup>116</sup> That consideration must go beyond a mere recitation of the facts in question, and put them into context.<sup>117</sup> However, the investigating authorities are not required by Articles 3.7 and 15.7 to make an explicit "finding" or "determination" with respect to the factors considered.<sup>118</sup>

7.68 In this context we note that the parties agreed that the use of the word "should" in Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement indicated that, unlike the situation under Article 3.4 of the AD Agreement, consideration of each of the factors listed in Articles 3.7 and 15.7 is not mandatory.<sup>119</sup> Consequently, a failure to consider a factor at all, or a failure to adequately consider, a particular factor would not necessarily demonstrate a violation of the provisions. Whether a violation existed would depend on the particular facts of the case, in light of the totality of the factors considered and the explanations given. In this case, it is clear from the face of the determination that the USITC in fact addressed the facts concerning each of the factors set out in Articles 3.7 and 15.7 of the Agreements. Indeed, Canada does not argue that any relevant factor was ignored by the USITC, or not addressed in the determination. Thus, we cannot conclude that the USITC failed to consider the factors set forth in Articles 3.7 and 15.7, in the sense of not taking them into account at all.

7.69 However, this does not answer the question whether the USITC's overall determination of a threat of material injury is consistent with the requirement of Articles 3.7 and 15.7 that the totality of the factors considered lead to the conclusion that further dumped and subsidized exports are imminent and that, unless protective action was taken, material injury would occur. In assessing this question, for the sake of clarity, we discuss each of the factors considered by the USITC, and the parties' arguments concerning that consideration individually. However, our determination is based on our assessment of the USITC's determination as a whole, taking into account the evidence that was before it and the analysis in the determination itself. This is, in our view, in line with the injunction in the text that no one factor can necessarily give decisive guidance, but the totality of the factors considered must lead to the conclusion regarding threat of material injury.

7.70 As is discussed in more detail below, the USITC's affirmative threat determination was based principally on the conclusion that dumped and subsidized imports were likely to increase substantially. In making this conclusion, the USITC relied on a number of factors it considered relevant which are not specifically identified in Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement. The USITC found that the projected increased imports were likely to have a significant price depressing effect in the future. Therefore, the USITC concluded that imports were entering at prices that were likely to have a significant depressing or suppressing effect on domestic prices and were likely to increase demand for further imports. The USITC determined that further dumped and subsidized imports were imminent, that these imports were likely to exacerbate price pressure on domestic producers, and that material injury to the domestic industry would occur.

(i) *The nature of the subsidies in question*

7.71 Canada argues that the USITC's evaluation of this factor was limited to a description of the programmes found by the USDOC to confer countervailable subsidies, a statement that "[n]one of the subsidies identified by Commerce are subsidies described in Article 3 or 6.1 of the WTO Subsidies Agreement," and a footnote regarding evidence submitted by the CLTA, a Canadian party

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<sup>116</sup> See *ibid.*

<sup>117</sup> See *ibid.*, at para. 7.170.

<sup>118</sup> See *ibid.*, at para. 7.161.

<sup>119</sup> See Canada's Responses to Questions from the Panel and the United States - First Meeting and United States Response to Questions from the Panel - First Meeting, question 34.

participating in the investigation, regarding the stumpage programmes.<sup>120</sup> Canada argues that the USITC failed to consider all the relevant evidence before it concerning the nature of the subsidies and, in particular, the likely trade effects of stumpage programmes. Specifically, Canada argues that the USITC failed to take account of evidence that stumpage programmes do not increase the production of logs or lumber or lower their prices, or increase the quantity or lower the prices of lumber exports, and thus have no trade effects. Canada relies, in this regard, principally on the studies that were presented as evidence to the USITC by representatives of Canadian producers.

7.72 The United States argues that Canada misperceives the obligation of the investigating authorities with respect to this factor. In the US view, Canada implies that a proper consideration would have required the USITC to make a finding concerning the nature of the subsidies and their likely trade effects. However, the United States contends that the Agreements do not require a finding. The United States maintains that the USITC's determinations reflect consideration of the information the USDOC provided the USITC regarding the subsidies, which was information regarding the nature of the subsidies, but not findings regarding the effects of the subsidies. The parties to the investigations did present such information, in the form of competing economic theories about the nature and effects of the countervailable subsidies. The United States asserts that the USITC considered all of the evidence presented on this issue by the parties, but did not make the finding sought by the Canadian parties. This is, in the US view, consistent with the requirements of the Agreement, particularly when the evidence did not provide a sufficient factual basis to allow the USITC to draw reasoned and adequate conclusions about the trade effects of the subsidies.

7.73 We note that during the investigation proceeding, Canadian parties presented arguments, economic theories and analysis, primarily based on studies prepared by an economist, Dr. William Nordhaus. Contrary arguments, theories, and analysis were presented to the USITC by US lumber producers. These same arguments, theories and analysis have been put before us in this dispute. The USITC did not accept the Canadian arguments, but did not make any specific factual findings as to the effects of the subsidies. Canada's argument suggests that it believes that the absence of a conclusion regarding the evidence and theories presented concerning the effects of the subsidies demonstrates that the USITC did not adequately consider this factor, and essentially asks the Panel to resolve the underlying issue regarding trade effects of the subsidies.

7.74 We do not agree with Canada's position on this point. It seems clear to us the USITC did in fact consider the evidence before it regarding the nature of the subsidies and the trade effects arising therefrom. As discussed above, we do not understand the obligation to "consider" a factor to require the investigating authorities to make an explicit finding regarding the evidence concerning that factor.

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<sup>120</sup> "Stumpage programmes" are the agreements under which enterprises are accorded the right, for a fee, to harvest timber on government lands in Canada. According to the Panel in *US – Softwood Lumber IV*, "stumpage programmes provide standing timber owned by the provinces to harvesters. The only way for harvesters to obtain the trees standing on government-owned Crown land for harvesting and processing is by concluding stumpage agreements (tenures or licences) with the governments concerning these trees. The only way for the government to provide the standing timber that it owns to the harvesters and the mills for processing is by allowing the harvesters to come on the land and harvest the trees. Such legal rights and obligations are transferred through the stumpage agreements. It is thus through the stumpage agreements that the governments provide the standing timber to the harvesters. The price to be paid for the timber, in addition to the volumetric stumpage charge for the trees harvested, consists of various forest management obligations and other in-kind costs relating to road-building or silviculture for example. In return, the tenure holders receive ownership rights over the trees during the period of the tenure. In other words, with the stumpage agreements, ownership over the trees passes from the government to the tenure holders. Standing timber has thus been provided to the tenure holders."

*US – Softwood Lumber IV*, para. 7.15 (footnotes omitted).

The USITC noted the types of subsidies found to exist by the USDOC, and considered the arguments by the parties on this issue. The USITC concluded that the economic theory underlying the Canadian party's argument was "not clearly applicable" in the market, and explained, albeit briefly, why it took that view.<sup>121</sup> In our view, this demonstrates that the USITC considered this factor. Moreover, to accept Canada's position in this dispute, we would have to resolve the underlying factual question in order to conclude that the USITC erred in not accepting the Canadian party's argument in this regard. Such a ruling would, we believe, require us to trespass into the realm of *de novo* fact-finding, which we will not do.

7.75 Moreover, the USITC did not rely on its consideration of the nature of the subsidies as an element of its affirmative determination of threat of material injury. In such a case, where the nature of the subsidies is **not** an element cited in support of the determination in dispute, we cannot conclude that the failure to make an explicit finding on this factor demonstrates a violation of the Agreement.

(ii) *Significant rate of increase of dumped and subsidized imports*

7.76 Canada argues that the USITC merely made observations concerning the increase in volume and apparent domestic consumption of dumped and subsidized imports without any evaluation of whether the rate of increase was "significant" and, if so, whether that rate of increase indicated a "likelihood of substantially increased importation". Moreover, Canada argues, the USITC could not have found a significant rate of increase in light of its earlier findings on material injury.

7.77 The United States does not appear to rely on this factor directly as support for the USITC's determination of threat. However, the United States notes that the USITC found that the level of imports was already significant during the period of investigation, and had increased, and that the volume increased substantially during periods when no restraints were in place.

7.78 We note that the USITC found that the volume of imports was likely to increase substantially, based on factors other than the rate of increase during the period of investigation. Thus, it appears that this factor was not an element supporting the USITC's affirmative determination of threat. Again, given our understanding of the term "consider", we believe that the discussion of this factor in the determination is sufficient to preclude a conclusion that the USITC failed to properly consider this factor.

(iii) *Sufficient disposable capacity or imminent substantial increase in capacity*

7.79 Canada argues that rather than considering this factor, the USITC merely made observations concerning the evidence on capacity. Canada notes that the USITC stated that Canadian capacity increases were projected, but did not find that there was an imminent, substantial increase in capacity. Moreover, Canada argues, the USITC merely noted the existence of excess Canadian capacity without explaining how that theoretical ability to increase imports would translate into the likelihood of substantially increased dumped and subsidized exports. In this respect, Canada asserts that the USITC ignored the projections provided by Canadian producers regarding their future exports to the United States.

7.80 The United States argues that the USITC gave more weight to the actual capacity data in concluding that capacity existed to increase exports. With respect to the Canadian producers' projections concerning likely future exports to the United States, the USITC found it likely that exports to the United States and other destinations would increase consistent with the historical distribution of exports, while the Canadian producers' export projections showed a lesser proportion of the projected increases being exported to the United States. Thus, the USITC concluded that

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<sup>121</sup> USITC Final Report (Exhibit CDA-1) at page 39, footnote 245.

information regarding capacity supported the conclusion that exports to the United States would increase.

7.81 Again, it seems clear to us the USITC considered the capacity factor in its analysis, but reached a conclusion divergent from that argued before it by the Canadian parties and by Canada in this dispute. This alone does not, of course, demonstrate a violation of the Agreements with respect to consideration of the relevant factors. This factor did play a part in the USITC's overall affirmative threat determination, as discussed further below.

*(iv) Price depression and suppression*

7.82 With respect to this factor, Canada argues that the USITC failed to evaluate **present** import prices to determine whether, given their level, they are likely to cause significant price depression or suppression in the future and whether that level of pricing is likely to increase demand for further imports. In Canada's view, the USITC's conclusion on this factor relies on an analysis of the impact of future imports on prices, and does not address the impact of current import prices. Moreover, Canada asserts that in light of the USITC's finding of no significant price effects during the period of investigation, there is no basis for a finding that imports would have a significant depressing or suppressing effect on prices in the future.

7.83 In its analysis of the present condition of the domestic industry, the USITC did consider present import prices. The USITC concluded that dumped and subsidized imports had some effect on prices in the domestic market, noting that both imports and domestic producers contributed to excess supply and thus declining prices. However, in light of the relatively stable (albeit large) share of the market held by imports, the USITC did not find any significant price effects. This conclusion, however, formed part of the basis for the USITC's conclusion that dumped and subsidized imports would have a significant price depressing effect in the future. Thus, in our view, it seems clear that the USITC considered this factor, and that it formed part of the USITC's overall threat determination, as discussed further below.

*(v) Inventories of the product being investigated*

7.84 Canada argues that the USITC's consideration of this factor was limited to a single sentence, which does not contain any explanation of how this factor weighed in the determination.

7.85 The United States asserts that this suffices as "consideration", and that in any event, the USITC did not rely on the level of inventories in order to reach its conclusion of threat of injury.

7.86 It is clear to us that, in light of the factors and analysis presented in the determination actually made, the USITC did not rely on this factor in support of its determination of threat of material injury. In light of this, we cannot conclude that the consideration of the inventories factor was so inadequate as to constitute a violation of Article 3.7 of the AD Agreement and 15.7 of the SCM Agreement.

*(vi) Consideration of other factors*

7.87 Having concluded that the USITC did not violate Articles 3.7 and 15.7 of the AD and SCM Agreements by failing to properly consider the factors listed therein, we are then left with the question whether the USITC's determination, based on the totality of the factors considered, including factors not listed in the Agreements, is consistent with those provisions. Thus, we turn now to an assessment of the elements that the United States relies on as demonstrating the adequacy of the reasoning and factual basis underlying the USITC's determination.

7.88 The United States asserts that the USITC determined that during the period of investigation, imports were at a significant level, and prices declined, particularly at the end of the period, such that

the condition of the industry had deteriorated and was vulnerable. The USITC concluded that imports were likely to increase substantially based on (1) Canadian producers' excess capacity and projected increases in capacity, capacity utilization, and production; (2) the export orientation of Canadian producers to the US market; (3) the increase in the volume of subject imports over the period of investigation; (4) the effects of expiration of the SLA; (5) subject import trends during periods when there were no import restraints; and (6) forecasts of strong and improving demand in the US market. The USITC then concluded that, in light of the at least moderate substitutability of domestic and imported lumber, the fact that prices of one species affected the prices of other species, and that the significant volume of imports during the period of investigation had some adverse effects on prices, the projected substantial increase in imports would likely have a significant price depressing effect on domestic prices and were likely to increase demand for imports.

7.89 It is clear to us that the fundamental basis of the USITC's affirmative threat determination is the conclusion that dumped and subsidized imports from Canada would increase **substantially**. However, looking at the evidence relied on by the United States in support of the determination, we cannot accept that this conclusion is one that could be reached by an objective and unbiased decision maker. It seems to us that, at most, the evidence relied upon by the USITC could support a conclusion that imports of softwood lumber would continue at the historical levels, and might increase somewhat, in keeping with increased demand, and consistent with historical patterns. But we can find no rational explanation in the USITC's determination, based on the evidence cited, for the conclusion that there would be a substantial increase in imports imminently. In reaching this decision we have kept in mind that we may not substitute our judgment for that of the USITC, but must nonetheless carry out a detailed and searching analysis of the evidence relied upon and the reasoning and explanations given.

7.90 During the period of investigation, dumped and subsidized imports from Canada were, in the USITC's judgement, already at significant levels in terms of absolute volume and in terms of market share. As noted above, the USITC did not rely on a significant rate of increase during the period of investigation in support of its conclusion that subject imports would increase substantially in the future. With respect to the capacity of Canadian producers, the evidence before the USITC indicated that Canadian capacity was projected to increase by less than one per cent in 2002, and a further 0.83 per cent in 2003.<sup>122</sup> This certainly does not, in our view, support a conclusion that there would be a substantial increase in capacity, and indeed, the USITC does not appear to have found otherwise.

7.91 Thus, it is only the existing excess capacity that might be viewed as supporting a finding that imports would increase substantially in the future. Excess capacity had increased during the period of investigation, without resulting in a finding by the USITC of a significant increase in imports to the United States. The share of total Canadian shipments represented by exports to the United States during the period of investigation was 57.4 in 1999 and 2000, and increased to 60.9 in 2001. Canadian producers projected a decline in that share, but only to 58.8 per cent in 2002 and 58.5 per cent in 2003, figures well within the historical range.<sup>123</sup> These figures cannot, in our view, support the conclusion that excess capacity indicates a likelihood of substantially increased exports.

7.92 The United States argues that reliance on the historical distribution of exports to the United States and other countries supports the USITC's finding. Nothing in the USITC's determination suggests that the share of production shipped to the United States would alter in any significant degree. Thus, we do not see how this factor supports the conclusion of a substantial increase in imports. Similarly, while the USITC relied on the "export-orientation" of the Canadian industry toward the United States market, this was true throughout the period of investigation. The data regarding exports to the United States do not, however, suggest that there would be any notable change in the levels of exports to the United States, but rather a continuation of the historical patterns.

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<sup>122</sup> USITC Final Report (Exhibit CDA-1) at Table VII-2.

<sup>123</sup> *Ibid.*

Nothing in the USITC determination addresses how the projected increases in exports to the United States supports the finding that imports would increase substantially.

7.93 The United States also relies on the effects of the expiration of the Softwood Lumber Agreement (SLA). The USITC found that "the SLA appears to have restrained the volume of subject imports from Canada at least to some extent as subject imports only increased by 8.8 per cent and market share remained relatively constant while apparent consumption increased by 13.1 per cent from 1995 to 2001".<sup>124</sup> First, we note that the increase in the volume of imports during the period of investigation was apparently not considered significant by the USITC. Nor did the USITC consider that there was a significant rate of increase during the period of investigation. Second, the USITC noted that shipments from provinces not covered under the SLA, and whose exports were therefore not affected, more than doubled. However, the USITC did not explain how it concluded that this indicated that the SLA had acted to restrain overall exports, as opposed to resulting in a shift in supply distribution from provinces covered by the SLA to those not covered. The USITC had not found that the SLA had significantly restrained exports during the period it was in effect, which might have suggested that its expiration would lead to a substantial increase in exports. The USITC determination simply does not address why the expiration of an agreement during the term of which exports nonetheless increased, would result in an imminent **substantial** increase in exports.

7.94 The United States argues that trends in imports during periods when the SLA was not in effect support the conclusion that imports were likely to increase substantially. There were two periods relied upon in this regard – the period prior to the SLA from 1994-1996, and the period from April 2001 to August 2001, immediately after the SLA expired and before the imposition of provisional measures. There is no discussion in the USITC's determination that would suggest that market conditions during the period before the imposition of the SLA, a period that precedes the period of investigation in this case, would be sufficiently similar to predicted market conditions, so as to warrant the conclusion that imports would increase substantially. With respect to the period from April to August 2001, the USITC did not discuss whether the increase in imports during that period represented an accurate gauge of what would happen in the future, in the absence of anti-dumping and countervailing measures, or simply a shift in timing of exports to take advantage of the window between expiration of the SLA and provisional measures. In this regard, we note that the applications for anti-dumping and countervailing measures were filed the business day after the expiration of the SLA, and thus exporters would be aware of the possibility of provisional measures at a predictable date. While it seems obvious that the expiration of the SLA would result in unrestrained exports, the facts cited by the USITC, in light of the lacunae in the explanations given, do not support the conclusion of an imminent substantial increase in imports.

7.95 The last factor relied on by the United States is the forecast of strong and improving demand in the US market. All the USITC found in this regard was that the United States would continue to be an important market for Canadian producers.<sup>125</sup> We cannot see how this conclusion, which simply posits the continuation of the historical situation, supports a finding that imports would increase substantially. This is particularly the case given the complete absence of any discussion of third country imports, which had increased during the period of investigation. A situation of strong and improving demand would certainly suggest that the US market would be an attractive one for exporters, but this would seem to be true for all exporters not only Canadian producers. Moreover, in a situation of strong and improving demand, increases in imports proportional to the increase in demand would seem to be without any injurious effect. The USITC did not make any findings that imports from Canada would increase more than demand, thereby accounting for an increased share of the US market. Indeed, the USITC did not address market share at all in the context of its threat of material injury determination.

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<sup>124</sup> USITC Final Report (Exhibit CDA-1) at p. 41.

<sup>125</sup> USITC Final Report (Exhibit CDA-1) at p. 43.

7.96 Based on the foregoing, we are of the view that, in light of the totality of the factors considered and the reasoning in the USITC's determination, we cannot conclude that the finding of a likely imminent substantial increase in imports is one which could have been reached by an objective and unbiased investigating authority. Therefore, we find that the USITC's determination is not consistent with the obligations set forth in Articles 3.7 and 15.7.

J. ALLEGED VIOLATIONS OF ARTICLES 3.2 AND 3.4 OF THE AD AGREEMENT AND ARTICLES 15.2 AND 15.4 OF THE SCM AGREEMENT

7.97 Articles 3.2 of the AD Agreement and 15.2 of the SCM Agreement require an investigating authority to consider whether there has been a significant increase in the volume of the dumped or subsidized imports, either in absolute terms or relative to production or consumption in the importing Member, whether there has been significant price undercutting by those imports, and whether the effect of such imports is to otherwise depress or suppress prices to a significant degree. Canada asserts that the provisions of Articles 3.2 and 3.4 of the AD Agreement and Article 15.2 and 15.4 of the SCM Agreement apply equally to investigations involving threat of injury determinations, in light of the definition of the term "injury" in footnote 9 to the AD Agreement and footnote 45 of the SCM Agreement to include "threat of material injury".

(a) Parties' Arguments

7.98 Canada argues that the USITC did not undertake the required consideration of these factors. Thus, Canada asserts that the USITC did not consider whether the increase in the volume of subject imports it observed over its period of investigation was significant, which Canada maintains it was not, and acknowledged that it could not draw any conclusion as to whether there had been significant underselling by the subject imports, and could not conclude that the dumped and subsidized imports had a significant price effect during the period of investigation. Canada then asserts that the USITC failed to explain properly how it could reach its affirmative threat of injury determination in the light of these findings, and thus violated Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement in the context of threat of injury.

7.99 Canada also argues that the USITC failed to assess the likely impact of the likely increase in imports on the domestic industry. In Canada's view, a threat of injury determination case "requires a meaningful evaluation of how each of the factors listed in Article 3.4 of the AD Agreement and Article 15.4 of the SCM Agreement will evolve in the future".<sup>126</sup> Canada notes that an evaluation of each of the factors is required, and asserts that in this context, "evaluation" has been interpreted to mean "a process of analysis and assessment requiring the exercise of judgment on the part of the investigating authority" and "not simply a matter of form".<sup>127</sup> Canada cites the decision of the Panel in *European Communities – Bed Linen (Article 21.5 – India)* in asserting that the investigating authority must "assess the role, relevance and relative weight of each factor in the particular investigation".<sup>128</sup> An "evaluation" "implies the analysis of data through placing it in context in terms of the particular evolution of the data pertaining to each factor individually, as well as in relation to other factors examined".<sup>129</sup> Canada argues that the USITC assessed the current state of the domestic softwood lumber industry in its "vulnerability" analysis, but failed to evaluate the likely state of the domestic industry in the future, and in particular, how further dumped and subsidized imports would affect the domestic industry's condition. In Canada's view, this constitutes a fatal deficiency in the USITC's threat of injury analysis. Canada considers that while the USITC did address a number of

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<sup>126</sup> Canada's first written submission at para. 145.

<sup>127</sup> Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India: Recourse to Article 21.5 of the DSU by India* ("*European Communities – Bed Linen (Article 21.5 – India)*"), WT/DS141/RW, adopted April 24, 2003, as modified by the Appellate Body Report, para. 6.162.

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*

the mandatory listed factors, but only with respect to the past, and did not assess how any of the listed factors was likely to evolve in the future. Therefore, it failed to undertake any meaningful evaluation of the listed factors for the purpose of its threat of injury analysis.

7.100 The United States argues that consideration of the factors listed in Articles 3.2 and 3.4 of the AD Agreement and Articles 15.2 and 15.4 of the SCM Agreement establishes a background against which the investigating authority can evaluate whether dumped and subsidized imports will likely increase substantially, likely will have price effects, and consequently will affect the industry's condition in such a manner that material injury would occur in the absence of protective action. The United States argues that the USITC addressed all of the factors in its analysis of present material injury analysis, finding that the volume of imports was significant, there were some price effects by subject imports, that the condition of the domestic industry had deteriorated primarily as a result of declining prices, and that the industry was in a vulnerable state. Moreover, the United States argues, projections based on the present and past facts, provide positive evidence justifying the USITC's determination that the domestic industry was on the verge of material injury by reason of the continued dumped and subsidized softwood lumber imports from Canada.

7.101 The United States asserts that Canada's arguments are variations of the arguments raised regarding likely substantial increases in imports and likely price effects, which the United States argues are based on Canada's premise that there could be no threat because there allegedly were no findings of injurious effects in the present material injury analysis. The United States considers that premise to be incorrect. The United States notes the finding of the USITC, in its material injury analysis, that the volume of imports was significant and supported a finding of material injury, but that there were no significant price effects. The United States argues that the USITC's findings in its present injury analysis regarding the impact of subject imports on the domestic industry foreshadows and supports its finding of threat of material injury. Like Canada, the United States refers to the Panel decision in *Mexico – Corn Syrup* to the effect that consideration of the factors relating to the impact of imports on the domestic industry "establish a background against which the investigating authority can evaluate whether imminent further dumped imports will affect the industry's condition in such a manner that material injury would occur in the absence of protective action, as required by Article 3.7".<sup>130</sup> The United States asserts that the USITC established such a background in finding that the domestic industry producing softwood lumber was vulnerable to injury in light of declines in its performance over the period of investigation, particularly its financial performance, and reasonably concluded that the deterioration in the performance of the domestic industry, particularly its financial performance, made it vulnerable to injury. In the US view, Canada's challenge suggests a requirement to quantify future events, a requirement the United States maintains does not exist in the relevant Agreements.

7.102 Japan, as third party, asserts that the dumped imports were not a cause of the vulnerable state of the domestic industry, and thus that conclusion does not form a valid basis for the determination of threat of injury. Japan considers that the USITC failed to evaluate the impact of likely further dumped (and subsidized) imports on the domestic industry and thus failed to comply with Article 3.4 of the AD Agreement and Article 15.4 of the SCM Agreement.

7.103 With respect to the alleged violations of Articles 3.4 of the AD Agreement and 15.4 of the SCM Agreement, Canada clarified its view, in response questions from the Panel, that an examination of the listed "injury" factors must be carried out in a "predictive context" in making a threat of injury determination.<sup>131</sup> Canada argues that in the absence of an evaluation of these factors in the future, it is impossible to determine whether future dumped/subsidised imports will cause injury. The United

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<sup>130</sup> Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States ("Mexico – Corn Syrup")*, WT/DS132/R and Corr.1, adopted 24 February 2000, DSR 2000:III, 1345, para. 7.132.

<sup>131</sup> Canada's Responses to Questions from the Panel and the United States - First Meeting, question 8.

States, on the other hand, argues that it is not necessary to specifically address these injury factors a second time where, as it asserts is the case here, it is clear from the discussion of these factors what the condition of the industry is, such that a background for the conclusion of likely future injury caused by dumped/subsidized imports is established.

(b) Analysis by the Panel

7.104 In this context, we recall that the Agreements define "injury" to include threat of injury unless otherwise specified. Thus, the requirements of Articles 3.2 and 3.4 of the AD Agreement and Articles 15.2 and 15.4 of the SCM Agreement might, as Canada argues, be understood to apply directly in the threat of injury context such that a predicted "impact" with respect to each of the listed factors must be assessed. However, in our view the text, context, and object and purpose of the relevant provisions do not lead to such an interpretation.

7.105 It seems clear to us that, as the Panel found in *Mexico – Corn Syrup*, there must, in every case in which threat of material injury is found, be an evaluation of the condition of the industry in light of the Article 3.4/15.4 factors to establish the background against which the impact of future dumped/subsidized imports must be assessed, in addition to an assessment of specific threat factors. However, once such an analysis has been carried out, we do not read the relevant provisions of the Agreements to require an assessment of the likely impact of future imports by reference to a consideration of projections regarding each of the Article 3.4/15.4 factors. There is certainly nothing in the text of either Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement, or Article 3.4 of the AD Agreement and Article 15.4 of the SCM Agreement, setting out an obligation to conduct a second analysis of the injury factors in cases involving threat of material injury. Of course, such an assessment could be undertaken, to the extent available information permitted, and might be useful. However, in many instances, it seems likely that the necessary information would not be available, for instance projected productivity, return on investment, projected cash flow, etc. Even if projections are made on the basis of the information gathered in the investigation, this might result in a degree of speculation in the decision-making process, which is not consistent with the requirements of the Agreements.

7.106 In this case, it is clear on the face of the USITC determination that the injury factors were considered in the context of finding no present material injury. Indeed, Canada does not contend otherwise. It also seems clear to us that the USITC took that consideration into account in its threat of material injury analysis. At least, that is our understanding of the USITC's statement at the beginning of the section of the report entitled "threat of material injury by reason of subject imports" that "[a]s an initial matter, we find that the domestic industry producing softwood lumber is vulnerable to injury in light of declines in its performance over the period of investigation, particularly its financial performance".<sup>132</sup> The USITC then went on to address the additional threat factors set out in Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement. In our view, this is an adequate approach to the analysis of threat of material injury with respect to the requirements of consideration of the elements set out in Articles 3.2, 3.4, and 3.7 of the AD Agreement, and the corresponding provisions of the SCM Agreement.

7.107 In this context, we note the findings of the Panel in *Mexico – Corn Syrup* with respect to the nature and purpose of consideration of the Article 3.4 factors in the context of a threat of material injury determination:

"With respect to the question of threat of material injury, we believe an investigating authority cannot come to a reasoned conclusion, based on an unbiased and objective evaluation of the facts, without taking into account the Article 3.4 factors relating to the impact of imports on the domestic industry. These factors all relate to an

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<sup>132</sup> USITC Final Report (Exhibit CDA-1) at p. 37.

evaluation of the general condition and operations of the domestic industry – sales, profits, output, market share, productivity, return on investments, utilization of capacity, factors affecting domestic prices, cash flow, inventories, employment, wages, growth, ability to raise capital. Consideration of these factors is, in our view, necessary in order to **establish a background** against which the investigating authority can evaluate whether imminent further dumped imports will affect the industry's condition in such a manner that material injury would occur in the absence of protective action, as required by Article 3.7".<sup>133</sup> (emphasis added)

7.108 We share the view of the *Mexico-Corn Syrup* Panel in this regard. In our estimation, this requirement of consideration of the Article 3.4 factors in a threat determination is satisfied by what the USITC did in this case. That is, the USITC did consider the Article 3.4/15.4 factors to establish a background against which to evaluate the effects of future dumped and subsidized imports.

7.109 Canada points to another passage in the Panel's decision in *Mexico – Corn Syrup Panel* in support of its argument that a "predictive analysis" of the Article 3.4/15.4 injury factors is required. That Panel, in finding a violation of Article 3.4, stated that SECOFI, the Mexican investigating authority:

"concluded that imports were likely to increase, based on the increases during the period of investigation, and the available capacity of the exporting producers, but there is no meaningful analysis, based on facts, concerning the likely impact of further dumped imports on the domestic industry in the final determination, e.g., whether such increased imports are likely to account for an increased share of the growing Mexican market, have an effect on production or sales of sugar, or affect the profits of the domestic producers, etc., in such a manner as to constitute material injury".<sup>134</sup>

In Canada's view, this demonstrates that an analysis of projections regarding the injury factors is required.

7.110 We do not agree. The *Mexico – Corn Syrup* Panel was faced with a case in which there was no discussion of the Article 3.4 injury factors **at all**. The Panel found that, in the absence of any discussion of the condition of the domestic industry against which the impact of future imports was to be assessed, findings that imports would increase and be priced below the domestic like product were insufficient to support a conclusion of threat of material injury. The issue of whether a second analysis of the Article 3.4 factors was required in the context of making a determination of threat of material injury was simply not a question in that dispute, and was not specifically addressed by the Panel. In this case, the USITC specifically found that the domestic industry was in a vulnerable condition, based on its consideration of the Article 3.4/15.4 injury factors. Against that background, conclusions that an imminent substantial increase in imports is likely, at prices likely to have significant price depressing and suppressing effects and likely to increase demand for imports, exacerbating price pressure on domestic producers, and thus that material injury would occur, could, if those conclusions are themselves consistent with the obligations of the Agreements, support a finding of threat of material injury.

7.111 With respect to the factors set out in Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement, we see even less basis for concluding that they must be directly considered in a "predictive" context in making a threat of material injury determination. These provisions require the investigating authorities to consider events in the past, during the period investigated, in making a determination regarding present material injury. Thus, the text directs the investigating authorities to

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<sup>133</sup> *Mexico – Corn Syrup*, para. 7.132.

<sup>134</sup> *Ibid.*, at para. 7.140

consider whether there "has been" a significant increase in imports, whether there "has been" significant price undercutting, or whether the effect of imports is otherwise to depress prices or prevent price increases which otherwise "would have" occurred. As with the consideration of the Article 3.4/15.4 factors, the consideration of the Article 3.2/15.2 factors forms part of the background against which the investigating authorities can evaluate the effects of future dumped and/or subsidized imports.<sup>135</sup>

7.112 We therefore find no violation of Articles 3.2 and 3.4 of the AD Agreement or of Articles 15.2 and 15.4 of the SCM Agreement.

K. ALLEGED VIOLATIONS OF ARTICLES 3.5 AND 3.7 OF THE AD AGREEMENT AND ARTICLE 15.5 AND 15.7 OF THE SCM AGREEMENT

7.113 Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement provide as follows:

"3.5 It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in patterns of consumption, trade-restrictive practices of and competition between foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry".

"15.5 It must be demonstrated that the subsidized imports are, through the effects<sup>47</sup> of subsidies, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the subsidized imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the subsidized imports. Factors which may be relevant in this respect include, *inter alia*, the volumes and prices of non-subsidized imports of the product in question, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

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<sup>47</sup> As set forth in paragraphs 2 and 4".

7.114 Canada asserts that these provisions have two main elements: first, there must be a demonstration of a causal relationship between the dumped or subsidized imports and the injury to the domestic industry, which must be based on an examination of all relevant evidence before the authorities; and, second, the authorities must examine any known factors other than the dumped or

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<sup>135</sup> Of course, the proper establishment of a background under Articles 3.2 and 3.4 and 15.2 and 15.4 of the AD and SCM Agreements does not determine whether the evaluation of the effects of future imports is consistent with the requirements governing determinations of threat of material injury set out in Articles 3.7 and 15.7 of the AD and SCM Agreements.

subsidized imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped or subsidized imports. In Canada's view, the USITC failed to satisfy the requirements relating to each element.

7.115 The United States does not dispute that there are two main elements to the establishment of the causal relationship in anti-dumping and countervailing duty investigations. However, the United States contends that the USITC determination in dispute fully complies with those requirements, in that the USITC considered all the relevant evidence in establishing the causal relationship, and properly avoided attributing injuries caused by other factors to the dumped and subsidized imports from Canada.

7.116 Japan, as third party, supports Canada's view that the USITC failed to demonstrate a causal relationship and failed to comply with the non-attribution requirement in Articles 3.5 and 15.5 of the AD and SCM Agreements, respectively. In the latter context, Japan focuses on the asserted failure of the USITC to separate and distinguish the effects of other known factors on the domestic industry from the effects of further dumped (and subsidized) imports.

7.117 Korea, as third party, considers that the USITC determination fails to properly demonstrate a causal relationship and non-attribution on positive evidence. Korea considers that the USITC identified other known factors causing injury, specifically the domestic industry's contribution to oversupply, but nevertheless attributed injury to the Canadian imports. Korea is also of the view that the USITC's threat determination rests on an "unscientific" prediction that imports would increase substantially in the absence of anti-dumping and countervailing duty orders.

7.118 We address below the two aspects of Canada's claim regarding the causal analysis separately.

## **1. Alleged failure to demonstrate a causal relationship**

### **(a) Parties' Arguments**

7.119 In Canada's view, the USITC failed to explain how the predicted substantial increase in the volume of imports would be likely to have a significant price depressing effect in the future and therefore would threaten to cause injury to the domestic industry. In particular, Canada considers that the USITC failed to examine and evaluate all evidence relevant to the question of causal relationship, including several "conditions of competition" USITC considered were pertinent to the softwood lumber industry and relevant to the analysis. In this regard, Canada points to the fact that the United States is not self-sufficient in lumber and that a significant volume of imports is needed to fulfil demand, the concept that competition between subject imports and the domestic product is attenuated to some extent, and the fact that there was increasing integration in the North American lumber market and US domestic producers were responsible for purchasing or importing lumber from Canada. Canada argues that the USITC stated that these conditions were both pertinent and relevant, but then ignored them in its threat of injury analysis. Canada also argues that there is nothing in the USITC's determination to support its finding that subject imports were likely to have a significant price depressing effect in the future.

7.120 The United States argues that, in making its determination, the USITC examined all record evidence and carried out a thorough analysis of all relevant factors that the dumped and subsidized imports threaten to cause injury to the domestic industry. The United States asserts that, in its present material injury analysis, the USITC found the domestic industry vulnerable to injury, but concluded that it could not find that subject imports had injured the domestic industry, largely because it had not found that there were significant price effects. The United States asserts that the USITC concluded in its threat analysis that dumped and subsidized imports already at significant levels would continue to enter the US market at significant levels and were projected to increase substantially. The additional imports would increase the excess supply in the market, putting further downward pressure on prices,

which at the end of the period of investigation had declined to levels as low as they had been in 2000. The United States asserts that USITC reasonably found that subject imports were likely to increase substantially and were entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices, and were likely to increase demand for further imports, thereby threatening material injury. The United States considers that Canada's claims under Article 3.5 and 15.5 are based on the premise that there could be no threat because there allegedly were no injury findings in the present material injury analysis, a premise which the United States rejects.

7.121 Moreover, the United States asserts that the USITC considered and addressed each of the issues raised by Canada, but reached different conclusions based on the evidence from those urged by Canada. Thus, for instance, the United States argues that the USITC considered growth in demand and the need for imports in light of the inability of US producers to satisfy demand, but found that demand was not likely to increase in the manner Canada suggests or to have the effects that Canada posits, as strong demand had not, during the period of investigation, translated into price improvements, and was not expected to do so in the future. The United States also maintains that the USITC appropriately considered the substitutability of subject imports and domestic product and properly took the record evidence into account in making its determinations as evident in its opinion. The USITC found that imports and domestic species of softwood lumber are used in the same applications and that regional preferences merely reflect availability of species, and that the differences in species between subject imports and domestic product did not attenuate competition in a significant manner. The United States maintains that Canada recognizes that the USITC considered the integration of the North American lumber industry as a condition of competition, but criticizes the USITC for not speculating that integrated companies would not harm related companies without referring to any evidence to support its supposition that integrated firms will not harm their related parties.

(b) Analysis by the Panel

7.122 As discussed above, we have found that the USITC's determination is inconsistent with the requirements of Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement in that the conclusion that imports would increase substantially is not one that could have been reached by an unbiased investigating authority based on an objective examination of the evidence concerning relevant factors in the investigation. The entire analysis of the USITC with respect to causation rests upon the likely effect of substantially increased imports in the near future. Having found that a fundamental element of the causal analysis is not consistent with the Agreements, it is clear to us that the causal analysis cannot be consistent with the Agreements. We therefore find that the determination is not consistent with Article 3.5 of the AD Agreement and Article 15.5. of the SCM Agreement in this regard.

## **2. Alleged absence of the required non-attribution analysis**

(a) Parties' Arguments

7.123 Canada argues that the USITC failed to identify, much less examine, any other known factors that could threaten injury to the domestic industry in addition to the subject imports. Canada maintains that having neglected even to identify other causal factors, the USITC also did not separate out and distinguish the injurious effects of those other factors from the alleged injurious effects of the dumped and subsidized imports. Canada notes that in a footnote to its report, the USITC stated that it is not required, under US case law, to separate and distinguish the injurious effects of the other known factors from the injurious effects of the dumped and subsidized imports.<sup>136</sup> Therefore, Canada argues that the USITC determination does not comply with the requirements in the third and fourth sentences

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<sup>136</sup> USITC Final Report (Exhibit CDA-1) at p. 31, footnote 195.

of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement relating to “non-attribution”.

7.124 In Canada's view, there was strong evidence before the USITC that factors other than the subject Canadian softwood lumber imports were having substantial adverse effects on the US domestic industry during the period of investigation. Canada also notes that the USITC found that the industry had itself contributed to the oversupply that led to price declines over the period of investigation, and argues that the USITC failed to examine this, as well as the likely future role of non-subject imports and their potential contribution to any threatened injury to the US industry, and other known factors potentially injurious to the domestic industry, such as changes in the patterns of consumption.

7.125 The United States argues that the USITC properly examined any known factors other than the dumped and subsidized imports which are injuring the domestic industry to ensure that it did not attribute injury from other causal factors to the subject imports. The United States asserts that the USITC's methodology was consistent with the AD and SCM Agreements, which it argues do not specify **how** the investigating authority is to satisfy the non-attribution test. In the US view, the purpose of the non-attribution requirements is to ensure the existence of an unsevered causal link between the dumped and subsidized imports and the injury to the domestic industry. In this context, the United States cites the decision of the Appellate Body in *EC – Tube or Pipe Fittings*, which stated that “provided that an investigating authority does not attribute the injuries of other causal factors to dumped imports, it is free to choose the methodology it will use in examining the ‘causal relationship’ between dumped imports and injury”.<sup>137</sup>

7.126 The United States maintains that the USITC's methodology ensures that the injurious effects of other causal factors are not attributed to subject imports. The United States describes that methodology as involving the examination of other “known” factors to assess whether they may be causing injury to the domestic industry. When the USITC finds a factor not to have injurious effects on the domestic industry, the United States states that such factor is not an “other known factor” for purposes of Article 3.5 of the AD Agreement or Article 15.5 of the SCM Agreement and no further consideration or examination of the factor is called for. The United States considers that this approach is sanctioned by the Appellate Body decision in *EC – Tube or Pipe Fittings*.

7.127 The United States considers that Canada's principal argument is that US domestic supply was a known causal factor which the USITC found contributed to injury in its present material injury analysis, but ignored in its threat analysis. The United States argues that in its threat evaluation, the USITC found that the domestic producers had curbed their production, but that overproduction remained a problem in Canada.<sup>138</sup> Thus, while US domestic overproduction had contributed to adverse price effects in 2000, the United States maintains that the evidence demonstrated that it was no longer contributing to excess supply while Canadian imports continued to oversupply. Consequently, the USITC was entitled to not consider this as an “other factor” causing injury, and was not required to address it further in its threat determination..

7.128 With respect to the other causal factors which Canada alleges the USITC failed to consider (non-subject imports, other substitutes for lumber, and cyclical demand and housing construction cycles) the United States maintains that it is clear from the determination that these issues were considered and parties' arguments were addressed, but that the USITC did not consider these issues as rising to the level of “other known factors injuring the domestic industry”. Consequently, the United States argues that there was no obligation to address them further.

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<sup>137</sup> Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 189, citing to Appellate Body Report, *US-Hot-Rolled Steel*, para. 224.

<sup>138</sup> USITC Final Report (Exhibit CDA-1) at p. 35, footnote 217.

## (b) Analysis by Panel

7.129 The non-attribution requirement in anti-dumping investigations has been addressed by the Appellate Body in several recent cases. Although it has not been specifically considered in a countervailing duty case, given that the relevant provisions in the two Agreements are identical, and in light of the Declaration of Ministers relating to Dispute Settlement under the AD and SCM Agreements, it is clear to us that the requirement is the same in the context of both anti-dumping and countervailing duty investigations.

7.130 In its most recent statement on the non-attribution requirement in anti-dumping cases, the Appellate Body explained that:

"This obligates investigating authorities in their causality determinations not to attribute to dumped imports the injurious effects of other causal factors, so as to ensure that dumped imports are, in fact, "causing injury" to the domestic industry. In *US – Hot-Rolled Steel* we described the non-attribution obligation as follows:

... In order that investigating authorities, applying Article 3.5, are able to ensure that the injurious effects of the other known factors are not "attributed" to dumped imports, they must appropriately assess the injurious effects of those other factors. Logically, such an assessment must involve *separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports*. If the injurious effects of the dumped imports are not appropriately separated and distinguished from the injurious effects of the other factors, the authorities will be unable to conclude that the injury they ascribe to dumped imports is actually caused by those imports, rather than by the other factors.

Non-attribution therefore requires separation and distinguishing of the effects of other causal factors from those of the dumped imports so that injuries caused by the dumped imports and those caused by other factors are not "lumped together" and made "indistinguishable".<sup>139</sup>

We underscored in *US – Hot-Rolled Steel*, however, that the *Anti-Dumping Agreement* does not prescribe the *methodology* by which an investigating authority must avoid attributing the injuries of other causal factors to dumped imports: . . . Thus, provided that an investigating authority does not attribute the injuries of other causal factors to dumped imports, it is free to choose the methodology it will use in examining the "causal relationship" between dumped imports and injury".<sup>140</sup>

7.131 In this case, in addition to pointing out what it considers to be the deficiencies in the USITC's analysis, Canada points to a statement in the USITC's decision:

"CLTA [a Canadian party] contended that the Commission "must separate and distinguish the injurious effects of the other factors from the injurious effects of dumped imports." CLTA's Prehearing Brief at 8; *see also*. Government of Canada's Prehearing Brief at 411. This argument does not have a basis in the case law. *Asociacion de Productores de Salmon y Trucha de Chile AG v. United States*, 180 F. Supp. 2d 1360, 1375 (Ct. Int'l Trade 2002) ("Chilean Salmon") (affirmed that "[t]he Commission is not required to isolate the effects of subject imports from other factors

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<sup>139</sup> *Ibid.*, para. 228.

<sup>140</sup> Appellate Body Report, *EC – Tube or Pipe Fittings*, paras. 188-189.

contributing to injury” or make “bright line distinctions” between the effects of subject imports and other causes. *Id.*); Taiwan Semiconductor Industry Ass’n v. USITC, 266 F.3d 1339, 1345 (Fed. Cir. 2001) (“[T]he Commission need not isolate the injury caused by other factors from injury caused by unfair imports. . . . Rather, the Commission must examine other factors to ensure that it is not attributing injury from other sources to the subject imports.” *Id.* (emphasis in original)).<sup>141</sup>

Canada contends that this statement makes it clear that the USITC failed to satisfy the non-attribution test. However, Canada does not dispute that non-attribution is required under US law. Thus, the question facing us in this dispute is whether the USITC analysis of causation satisfies the non-attribution requirement set forth in the Agreements.

7.132 As discussed above, having found that a fundamental element of the causal analysis is not consistent with the Agreements, we consider that the USITC's causal analysis cannot be consistent with the Agreements, and we therefore concluded that the determination is not consistent with Article 3.5 of the AD Agreement and Article 15.5. of the SCM Agreement in this regard. In light of this conclusion, we consider that we cannot meaningfully evaluate the question of violation of the non-attribution aspect of those provisions. In the absence of a finding that dumped and subsidized imports caused – in this case threatened – material injury that is consistent with the Agreements, the question of whether injuries caused by other factors are attributed to dumped and subsidized imports becomes meaningless. Nonetheless, we do have serious concerns with the analysis of the USITC in this regard. In order to elucidate our views should the Appellate Body reach the question and give some guidance should the issue arise in implementation, and in view of the fundamental significance of the non-attribution requirement, we set out our concerns below.

7.133 It is clear from the determination that USITC addressed other factors potentially causing injury in the context of its determination, in particular in discussing the "conditions of competition" relevant to the US softwood lumber industry, with respect to the finding of no present material injury. Thus, it would seem that there was some analysis in the USITC decision that addressed other factors potentially causing injury. For instance, the USITC noted in discussing the volume of imports that imports from countries not subject to investigation were small in volume but had increased during the period of investigation.<sup>142</sup> In this regard, we note particularly the USITC's finding that both domestic and imported Canadian softwood lumber contributed to excess supply in the market during the period of investigation, and thus to the declining prices.<sup>143</sup> This finding was fundamental to the further conclusion that Canadian imports had no **significant** effect on prices, and did not have a significant impact on the domestic industry, and the ultimate finding of no present material injury caused by the subject Canadian imports. Based on this reasoning, it seems to us that the USITC did undertake some analysis of other factors potentially causing injury, which analysis led in part to the negative finding with respect to present material injury caused by imports.

7.134 However, in the context of its analysis of threat of material injury, we see no similar discussion of other factors that are threatening injury at the same time as dumped and subsidized imports. There is no reference at all to imports from countries not subject to investigation. Yet, in light of the increase in such imports during the period of investigation, and given that the matter was specifically put before the USITC in arguments, it would seem that some discussion of the likely future impact of such imports should have been undertaken. Nor is there any discussion of the relationship between predicted increases in imports and the predicted strong and increasing demand for lumber in the US market. In the absence of some increase in Canadian market share in the future, it is difficult to see how the USITC could come to the conclusion that Canadian imports would cause injury in the future when they had not done so during the period of investigation, despite their

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<sup>141</sup> USITC Final Report (Exhibit CDA-1) at page 31, footnote 195.

<sup>142</sup> USITC Final Report (Exhibit CDA-1) at page 32, footnote 199.

<sup>143</sup> USITC Final Report (Exhibit CDA-1) at page 35.

significant and increased volume and market share. There is similarly no discussion of the effects of increasing integration of the North American lumber market on the behaviour of lumber producers and the potential effects on trade flows.

7.135 A glaring omission is the failure to discuss the likely future effects of domestic supplies of lumber. The single reference to domestic oversupply and its potential effect on the domestic industry in the future is in a footnote in the section of the report discussing price declines during the period of investigation. The last sentence of that footnote cites a consultant's report stating that lumber overproduction had been "curbed considerably [in the United States] but remains a problem in Canada".<sup>144</sup> Even were this single statement drawn from a consultant's report deemed sufficient to support the conclusion that there would be no US oversupply affecting lumber prices in the future, there is nothing in the report to link such a conclusion to the USITC's analysis of causation of material injury in the near future.

7.136 We do not mean to suggest that all aspects of the investigating authorities' determination must be entirely contained in the specific parts of the report dealing with particular issues. Certainly, in dispute settlement, a Member may argue the consistency of an anti-dumping or countervailing duty determination based on the entirety of that determination. However, that does not excuse the investigating authority from the necessity of, at the time of its determination, providing an adequate explanation of its analysis such that a Panel can, with confidence, understand the reasoning underlying the decision that was actually made in order to be able to assess its consistency with the relevant provisions of the Agreements.

7.137 Given the overall absence of discussion of other factors potentially causing injury in the future, we would conclude that the USITC determination is not consistent with the obligation in Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement that "injuries caused by these other factors must not be attributed" to the subject imports.

#### L. ALLEGED VIOLATIONS OF THE SCM AGREEMENT AND THE AD AGREEMENT IN THE USITC'S COMBINED INJURY ANALYSIS

##### (a) Parties' Arguments

7.138 Canada argues that by carrying out a combined injury analysis in the anti-dumping and countervailing duty investigations, the USITC failed to comply with the specific requirements that must be satisfied by an investigating authority when making a determination of injury, or threat of injury, in an anti-dumping or subsidy investigation. Specifically, Canada asserts that Articles 1, 9.1, and 18.1 of the AD Agreement establish that a final anti-dumping duty can be imposed only when the investigating authority has complied with the specific requirements of the AD Agreement, and that the same principle applies for the imposition of a final countervailing duty in light of parallel provisions in Articles 10 and 32.1 of the SCM Agreement. Canada asserts that when an investigation involves both dumped and subsidized imports, the investigating authority is obliged to comply with the specific requirements of both the AD Agreement and the SCM Agreement. Canada considers this obligation to satisfy the distinct requirements of both the AD Agreement and the SCM Agreement is reinforced by paragraph (a) of Article VI:6 of GATT 1994, which provides: "No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping *or* subsidization, *as the case may be*, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry" [emphasis added].

7.139 Canada asserts that by combining the dumped and subsidized imports in its threat of injury analysis, the USITC failed to comply with the specific requirements of the AD Agreement and the

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<sup>144</sup> USITC Final Report (Exhibit CDA-1) at page 35, footnote 217.

SCM Agreement, and of Article VI of GATT 1994, because it failed to undertake all of the necessary evaluations specified in the AD Agreement and SCM Agreement respectively. Canada points to several of the asserted substantive violations as examples in this regard – alleged failure to properly consider the nature and trade effects of the subsidies in question as required by Article 15.7(i) of the SCM Agreement, failure to consider all the mandatory factors under Articles 3.4 of the AD Agreement and Article 15.4 of the SCM Agreement; and failure to conduct a proper causation analysis under Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement. Moreover, Canada maintains, the USITC never provided a reasoned explanation of why, in the particular circumstances of this case, it was appropriate to conduct its analysis as it did.

7.140 Canada asserts that the USITC failed to satisfy the specific requirements of the AD and SCM Agreements by carrying out a combined analysis, thereby making it more likely that an affirmative determination would be the result. In this regard Canada refers to the statement of the Appellate Body in *US-Hot Rolled Steel* that, “investigating authorities are not entitled to conduct their investigation in such a way that it becomes more likely that, as a result of the fact-finding or evaluation process, they will determine that the domestic industry is injured”.<sup>145</sup>

7.141 In USITC practice, the consideration of subsidized and dumped imports jointly in the consideration of whether the volume and price effects of subject imports threatened the domestic industry with material injury is known as “cross-cumulation”. The United States contends that USITC’s cross-cumulation in this case, that is, the conduct of combined investigations, is consistent with US obligations under the AD Agreement and the SCM Agreement. The United States maintains that the requirements contained in the AD and SCM Agreements regarding the determination of injury are virtually identical. In the US view, the fact that neither Agreement speaks to the issue of cross-cumulation does not mean that such an analysis is precluded or inconsistent with either Agreement, as Canada alleges.

7.142 The United States argues that Canada’s reliance on the “effect of dumping or subsidization” language in Article VI:6 of GATT 1994 to mandate separate investigations fails to recognize the more specific language in each of the covered Agreements regarding the injury analysis, which specifies that the appropriate focus for an injury assessment is the “effect of dumped imports” and the “effect of subsidized imports” rather than the “effect of dumping or subsidization”. In this regard, the United States points to the decision of the Panel in *EC-Bed Linen* which stated that the language “through the effects of dumping” in Article 3.5 of the AD Agreement “did not require that the volume, price, and impact ‘effects’ to be considered be those of dumping, but rather those of the dumped imports, that is, the ‘effects of dumping’ were equated . . . with ‘the effects of dumped imports.’”<sup>146</sup>

7.143 The United States asserts that the purpose of the Agreements is to provide a remedy against unfair trade practices causing injury to a domestic industry, and suggests that it would frustrate that purpose to deny a remedy where the cumulative effect of dumped and subsidized imports is injury to the domestic industry. The United States points to the Appellate Body decision in *EC – Tube or Pipe Fittings* addressing the cumulation provision in the AD Agreement (Article 3.3) in support of its view. The Appellate Body stated that “the role of cumulation [is to] ensur[e] that each of the multiple sources of ‘dumped imports’ that cumulatively contribute to a domestic industry’s material injury be subject to anti-dumping duties”.<sup>147</sup> The United States argues that although the Appellate Body

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<sup>145</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 196.

<sup>146</sup> Panel Report, *EC-Bed Linen*, para. 6.141.

<sup>147</sup> Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 117. The Appellate Body observed: “A cumulative analysis logically is premised on a recognition that the domestic industry faces the impact of the “dumped imports” as a whole and that it may be injured by the total impact of the dumped imports, even though those imports originate from various countries. . . . negotiators appear to have recognized that domestic industry confronted with dumped imports originating from several countries may be injured by the cumulated effects of those

decision concerned Article 3.3 of the AD Agreement, and involved cumulation of dumped imports from more than one country, the same logic supports the USITC's consistent practice of considering dumped and subsidized imports from the same country together. The United States asserts that other countries, including Canada, have this same practice. Finally, the United States maintains that the allegation that the USITC conducted its investigations on a joint basis so as to more likely result in an affirmative determination in this case has no merit.

7.144 Canada clarified, in its oral statement and in its answer to the Panel's question 14 after the first meeting, that it is not arguing that a combined analysis of injury caused by dumped and subsidized imports is *per se* inconsistent with the Agreements. Rather, Canada argues that the alleged violations of Articles 1, 9.1, and 18.1 of the AD Agreement and Articles 10 and 32.1 of the SCM Agreement, and Article VI:1 of GATT 1994 are "consequential" to the asserted specific violations, and argues that any violation of any of the common provisions in Articles 3 and 15 of the AD and SCM Agreements respectively should result in a finding by the Panel that the injury determination as a whole is inconsistent with both Agreements. The United States does not appear to disagree with the principle underlying Canada's position, *i.e.*, that a finding of violation of a provision of either Agreement would undermine the entire determination. However, the United States argues that the attempt to raise the specific alleged violations a second time as separate violations based on the mere carrying out of combined investigations and making of a single determination should be rejected.

(b) Analysis by the Panel

7.145 Although the focus of Canada's argument was not entirely clear at the outset of this proceeding, over the course of the proceeding it was made clear that Canada is **not** arguing that a combined analysis or a single determination of injury caused by dumped and subsidized imports is *per se* inconsistent with the cited provisions of the Agreements.<sup>148</sup> However, in the absence of a challenge to a combined analysis or combined determination *per se*, it is less than clear to us what the alleged violation asserted by Canada is.

7.146 The request for establishment and the argument in the first submission both refer to the failure of the USITC to undertake the evaluations required by the AD and SCM Agreements. Thus, it seems to us that Canada is relying on the specific violations alleged in support of an argument that, if any provision of either Agreement is found to have been violated, both the anti-dumping and countervailing duty measures should be found to be inconsistent with the Agreements due to that fact that a single combined investigation and determination are at issue. It is clear to us that both measures depend on the single injury determination. We agree with the view that if that single determination is found to be inconsistent with a provision of either the AD or SCM Agreement, then a necessary underpinning of both measures is lacking, and both measures must be found to be inconsistent with the United States' obligations. Any other conclusion would of necessity involve the Panel in a speculative exercise of attempting to decipher what the analysis and conclusions of the USITC would

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imports, and that those effects may not be adequately taken into account in a country-specific analysis of the injurious effects of dumped imports."

Id. at para. 116.

<sup>148</sup> Indeed, it seems clear that, as the US asserts, Canada itself undertakes a combined analysis in similar circumstances. In a recent case involving dumped and subsidized imports of stainless steel bar from Brazil and subsidized stainless steel bar from India, the Canadian International Trade Tribunal conducted a single, integrated injury analysis. Moreover, although the CITT discussed whether to cumulate the imports from India and Brazil, it did not distinguish in any way between dumped and subsidized imports in that discussion, or elsewhere in its analysis. *Certain Stainless Steel Round Bar Originating In or Exported from Brazil and India*, Inquiry No.: NQ-2000-002. See also, *Certain Grain Corn Originating In or Exported from the United States of America and Imported into Canada for use or consumption west of the Manitoba-Ontario Border*, Inquiry No.: NQ-2000-005 (Exhibit USA-22) and cases cited therein at footnote 14.

have been in the absence of the aspect found to be in violation. We do not believe such an exercise could be carried out consistent with the standard of review in either Article 11 of the DSU, or Article 17.6 of the AD Agreement.

7.147 However, is not altogether clear to us that such a finding would also, without more, support a finding of violation of Articles 1, 9.1, and 18.1 of the AD Agreement, Articles 10 and 32.1 of the SCM Agreement, and paragraph (a) of Article VI:6 of GATT 1994. Canada has made no independent arguments in support of these claims. Indeed, Canada acknowledged in response to questions from the Panel that these violations are consequential to the finding of violations under the specific requirements of the AD and SCM Agreements.<sup>149</sup> Thus, in absence of any additional or independent argument in support of Canada's claims under these provisions, a finding of violation with respect to any of the specific allegations would result in a finding of violation of these provisions as well. However, such a finding would neither elucidate the scope of these provisions nor assist in any meaningful way in implementation of any recommendation of the DSB. Therefore, in these circumstances, we consider that it is neither appropriate nor necessary to make findings on these claims.

## VIII. CONCLUSIONS AND RECOMMENDATION

8.1 In light of the findings above, we conclude

- (a) that the USITC determination is not consistent with Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement in that the finding of a likely imminent substantial increase in imports is not one which could have been reached by an objective and unbiased investigating authority in light of the totality of the factors considered and the reasoning in the USITC determination.
- (b) With respect to the allegations of violations of Article 3.7 of the AD Agreement and Article 15.7 of the AD Agreement in respect of other aspects of the USITC determination, we conclude that the USITC determination is not inconsistent with the asserted provisions.

8.2 In light of the findings above, we conclude

- (a) that the USITC determination is not consistent with Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement in that the causal analysis is based on a finding which is, itself, not consistent with Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement.
- (b) With respect to the allegations of violations of Article 3.5 of the AD Agreement and Article 15.5 of the AD Agreement in respect of other aspects of the USITC determination, we conclude that it is neither necessary nor appropriate to make findings with respect to these claims.

8.3 In light of the findings above, we conclude that the USITC determination is not inconsistent with Articles 3.2 and 3.4 of the AD Agreement and Articles 15.2 and 15.4 of the SCM Agreement.

8.4 With respect to those of Canada's claims not addressed above, *i.e.*, alleged violations of Articles 1, 3.1, 3.8, 12, and 18.1 of the AD Agreement and Articles 10, 15.1, 15.8, 22, and 32.1 of the SCM Agreement, and Article VI:6(a) of the GATT 1994, we conclude, in light of the findings above, that it is neither necessary nor appropriate to make findings with respect to these claims.

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<sup>149</sup> Canada's Responses to Questions from the Panel and the United States - First Meeting, question 14.

8.5 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent the United States has acted inconsistently with the provisions of the AD and SCM Agreements, it has nullified or impaired benefits accruing to Canada under that Agreement.

8.6 We therefore recommend that the Dispute Settlement Body request the United States to bring its measures into conformity with its obligations under the AD and SCM Agreements.

8.7 In addition to its request for findings of violation, Canada requests that we recommend that the United States bring its measures into conformity with its WTO obligations, "including by revoking the final determination of threat of injury, ceasing to impose anti-dumping and countervailing duties and returning the cash deposits imposed as a result of the United States' actions in this matter".<sup>150</sup>

8.8 Article 19.1 of the DSU provides that:

"In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations".

While we are free to suggest ways in which we believe the United States could appropriately implement our recommendation, we decide not to do so in this case. We have found that the United States failed to act consistently with the requirements of the AD and SCM Agreements in its analysis and explanation of its determination of threat of material injury, and have recommended that the United States bring its measures into conformity with its obligations. In this regard, we note Article 21.3 of the DSU, which provides:

"At a DSB meeting held within 30 days after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB".  
(footnote omitted).

Thus, while a panel may suggest ways of implementing its recommendation, the choice of means of implementation is decided, in the first instance, by the Member concerned. In this case, we see no particular need to suggest a means of implementation, and therefore decline to do so.

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<sup>150</sup> Canada's first written submission at para. 181.