

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

Recourse to Article 21.5 of the DSU by Canada

*Report of the Panel*



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**Annex A** Request for the Establishment of a Panel – Document WT/DS277/8

**TABLE OF CASES CITED IN THIS REPORT**

Short Title	Full Case Title and Citation
<i>Canada – Aircraft (Article 21.5 – Brazil)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft, Recourse by Brazil to Article 21.5 of the DSU</i> , WT/DS70/AB/RW, adopted 4 August 2000, DSR 2000:IX, 4299.
<i>EC – Bed Linen (Article 21.5 – India)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/RW, adopted 24 April 2003.
<i>EC – Tube or Pipe Fittings</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/AB/R, adopted 18 August 2003.
<i>Mexico – Corn Syrup (Article 21.5 – US)</i>	Appellate Body Report, <i>Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6675
<i>Thailand – H-Beams</i>	Panel Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/R, adopted 5 April 2001, as modified by Appellate Body Report, WT/DS122/AB/R, DSR 2001:VII, 2741.
<i>US – Cotton Yarn</i>	Appellate Body Report, <i>United States – Transitional Safeguard Measures on Combed Cotton Yarn from Pakistan</i> , WT/DS192/AB/R, adopted 5 November 2005
<i>US – Countervailing Duty Investigation on DRAMS</i>	Appellate Body Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea</i> , WT/DS296/AB/R, adopted 20 July 2005
<i>US – Hot-Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697
<i>US – Lamb Safeguard</i>	Appellate Body Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001



Short Title	Full Case Title and Citation
<i>US – Shrimp (Article 21.5 – Malaysia)</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia</i> , WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6481
<i>US – Softwood Lumber IV (Article 21.5 – Canada)</i>	Panel Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada-Recourse to Article 21.5 by Canada</i> , WT/DS257/RW, circulated 1 August 2005
<i>US – Softwood Lumber VI</i>	Panel Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada</i> , WT/DS277/R, adopted 26 April 2004
<i>US – Steel Safeguards</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323



## I. INTRODUCTION

1.1 On 14 February 2005, Canada requested the establishment of a panel pursuant to Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter "DSU") concerning the United States' alleged failure to implement the recommendations and rulings of the Dispute Settlement Body (hereinafter "DSB") in the dispute "*United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*".

1.2 At a special meeting on 25 February 2005, the DSB referred this dispute to the original panel, in accordance with Article 21.5 of the DSU, to examine the matter referred to the DSB by Canada in document WT/DS277/8. 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 document WT/DS277/8, 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".

1.3 On 2 March 2005, the Panel was composed as follows:

Chairman: Mr. Hardeep Singh Puri

Members: Mr. Paul O'Connor  
Ms. Luz Elena Reyes de la Torre

1.4 China and the European Communities reserved their rights to participate in the Panel proceedings as third parties.

1.5 The Panel met with the parties on 28-29 June 2005. It met with the third parties on 29 June 2005. The Panel issued its interim report to the parties on 29 August 2005.

## II. FACTUAL ASPECTS

2.1 This dispute concerns the parties' disagreement as to the consistency with the *Agreement on Implementation of Article VI of GATT 1994* (hereinafter "AD Agreement") and the *Agreement on Subsidies and Countervailing Measures* (hereinafter "SCM Agreement") of the measure taken by the United States to comply with the recommendation of the DSB arising out of the Panel's report *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*.<sup>1</sup>

2.2 The original dispute concerned the investigation and determination of threat of material injury of the United States International Trade Commission (USITC) in *Softwood Lumber from Canada* and the final definitive anti-dumping and countervailing duties applied following the final determination. In that determination, the USITC had 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 dumped prices, and antidumping and countervailing duty orders on imports of softwood lumber from Canada were subsequently issued.

2.3 In its final determination, the USITC had determined that the domestic softwood lumber industry was not materially injured by reason of subject imports from Canada found to be dumped and

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<sup>1</sup> Panel Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada* ("US – Softwood Lumber VI"), WT/DS277/R, adopted 26 April 2004.

subsidized, but found that there was a threat of material injury by reason of such imports. In making that determination, 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 United States Department of Commerce (USDOC) had determined that there were 11 programs that conferred countervailable subsidies to Canadian producers and exporters of softwood lumber. The USITC found that Canadian dumped and subsidized imports (subject imports) were likely to increase substantially based on a series of factors. The USITC found that there was a moderate degree of substitutability between subject imports 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 and production efforts, growth, investment, and ability to raise capital due to subject imports from Canada. 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.

2.4 Before the Panel, Canada had alleged violations of various provisions of the AD and SCM Agreements in the USITC's determination of injury. In particular, Canada alleged specific violations of Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement, arguing that the USITC failed to properly consider the particular factors relevant in threat of injury determinations, and violations of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement, arguing that the USITC failed to properly analyze causation and failed to properly apply the "non-attribution" requirement, which specifies that injury caused by other factors must not be attributed to dumped and/or subsidized imports. These claims required the Panel to consider the substance of the USITC's final determination of threat of material injury to determine whether it was consistent with US obligations under the AD and SCM Agreements.

2.5 The Panel found, *inter alia*:

- (a) that the USITC determination was **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 was 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 SCM Agreement in respect of other aspects of the USITC determination, the Panel concluded that the USITC determination was **not inconsistent** with the asserted provisions.<sup>2</sup>

2.6 In light of these findings, the Panel concluded

- (a) that the USITC determination was **not consistent** with Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement in that the causal analysis was based on a finding which was, itself, not consistent with Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement.

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<sup>2</sup> Panel Report, *US – Softwood Lumber VI*, *supra* note 1, at para. 8.1.

- (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, the Panel concluded that it was neither necessary nor appropriate to make findings with respect to these claims.<sup>3</sup>

2.7 Accordingly, the Panel concluded that to the extent the United States had acted inconsistently with the provisions of the AD and SCM Agreements, it had nullified or impaired benefits accruing to Canada under that Agreement, and therefore recommended that the Dispute Settlement Body request the United States to bring its measures into conformity with its obligations under the AD and SCM Agreements.

2.8 Under US law (commonly referred to as "section 129"), if a WTO Panel or Appellate Body report finds that a determination by the USITC is not consistent with US obligations, then, upon request by the USTR, the USITC "shall issue a determination in connection with the particular proceeding that would render the Commission's action...not inconsistent with the findings of the panel".<sup>4</sup> In this case, the USTR made such a request to the USITC on 27 July 2004. The USITC issued its "section 129" determination within the statutory deadline set out in US law, on 24 November 2004. In that determination, the USITC again concluded that there would be a substantial increase in imports, at prices which would adversely affect the vulnerable domestic industry, threatening material injury, and that no other known causes of threatened material injury to the domestic industry. It is that determination which is challenged by Canada in this Article 21.5 dispute.<sup>5</sup>

2.9 In the course of the section 129 proceeding, the USITC reopened the record of the original investigation to gather additional information from public data sources and from questionnaires sent to US and Canadian producers, held a public hearing, and gave parties opportunities to submit written comments. The USITC stated that its task was to "mak[e] a determination that would render its original action not inconsistent with the findings of" the Panel.<sup>6</sup> Therefore, the USITC addressed in its determination only the issues related to the Panel's findings set forth in the request from USTR, and did not address issues that were not in dispute in the original Panel proceeding or which the Panel had found not inconsistent with the United States' obligations under the WTO Agreements.<sup>7</sup>

2.10 In its section 129 determination, the USITC found, based on a significant rate of increase in imports from a significant baseline level, and taking into account increases in imports during periods of no import restraints, that there was a likelihood of substantially increased imports, and concluded that dumped and subsidized imports would increase in the imminent future. Looking at current import trends, the restraining effects of the US-Canada Softwood Lumber Agreement (SLA), excess Canadian capacity and projected increases in capacity, capacity utilization and production, and demand projections, the USITC concluded that imports would increase at a substantial rate in the

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<sup>3</sup> Panel Report, *US – Softwood Lumber VI*, *supra* note 1, at para. 8.2.

<sup>4</sup> 19 USC. §3538(a)(4).

<sup>5</sup> Similar to the situation during the original dispute, this is one in a series of Canadian challenges, now to the US implementation of the various Panel and Appellate Body reports in the original cases. A WTO Panel recently considered a challenge to the US Department of Commerce's Section 129 determination regarding subsidisation and calculation of the amount of countervailing duties, (*United States – Final Countervailing Duty Determination with respect to Certain Softwood Lumber from Canada - Recourse to Article 21.5 by Canada*, WT/DS257 (circulated 1 August 2005)) and another Panel is now considering the US Department of Commerce's final anti-dumping determination (*United States – Final Dumping Determination on Softwood Lumber from Canada - Recourse to Article 21.5 by Canada*, WT/DS264 (pending before Panel)). However, these disputes do not have any direct bearing on the issues before the Panel in this case, which concerns exclusively the Section 129 determination regarding the injury aspects of the investigations, which is not at issue in the other disputes

<sup>6</sup> Views of the Commission, Exhibit CDA-1, at 4.

<sup>7</sup> *Ibid.*

imminent future beyond historical levels. The USITC concluded that imports were entering the United States at prices that were likely to have a significant depressing or suppressing effect on domestic prices and likely to increase demand for further imports, that imports were therefore likely to adversely impact the US lumber industry in the imminent future. Looking at the question of other factors threatening injury, the USITC concluded that excess supply from the domestic industry, third country imports, importation relative to demand, the integration of the North American softwood lumber industry, substitute products, and domestic production constraints, were not other factors potentially causing injury to the domestic industry, and therefore considered that there was no basis to examine whether any injury could be attributed to them.<sup>8</sup>

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

3.1 In its first written submission, Canada requested that the Panel:

(a) find the USITC's Section 129 affirmative threat of injury determination, and the definitive anti-dumping and countervailing duty orders that remain in effect, inconsistent with the United States' obligations under Articles 3.5 and 3.7 of the AD Agreement and Articles 15.5 and 15.7 of the SCM Agreement;

(b) find that the US measures taken to comply are inconsistent with the rulings and recommendations of the DSB; and

(c) 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.

3.2 In its first written submission, the United States requested that the Panel reject Canada's claims in their entirety.

3.3 In its second written submission, the United States requested that, in the event the Panel were to accept Canada's arguments, it nevertheless decline Canada's requested recommendation.

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

4.1 The arguments of the parties are set out in their written submissions and oral statements to the Panel. The parties' arguments as presented in their written submissions and oral statements are summarised in this section.

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

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

#### **1. INTRODUCTION**

4.3 This case is about the failure of the United States to implement the rulings and recommendations of the DSB. The new affirmative threat of injury determination made by the

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<sup>8</sup> One Commissioner of the USITC dissented, finding that the domestic industry producing softwood lumber was not threatened with material injury. Views of the Commission, Exhibit CDA-1 at 89.

USITC reaches the same conclusion on essentially the same record and the same reasoning as the original determination and does not comply with Articles 3.7 and 3.5 of the AD Agreement and Articles 15.7 and 15.5 of the SCM Agreement.

4.4 The USITC's new determination remains based principally on its finding of a likely substantial increase in imports in the imminent future. The USITC majority rationalized what was essentially a cosmetic rewriting of its original decision with little change in substantive analysis. This was done in a number of ways: (i) by changing, without acknowledgement or explanation, findings in its original determination; (ii) by ignoring the Panel's concerns with the evidence, or more appropriately lack of evidence, for the USITC's original threat determination; (iii) by repeating previous findings without addressing concerns the Panel raised about those findings; and (iv) by saying it would rely on the new evidence gathered in the proceeding it had conducted in response to the DSB's rulings and recommendations and then ignoring most of this evidence.

## 2. BACKGROUND

4.5 USITC's Section 129 Determination. The United States issued its new determination pursuant to Section 129(a) of the *Uruguay Round Agreements Act*, which authorizes the USITC to "make a new [or second] determination ... that is not inconsistent with the [WTO] panel or Appellate Body recommendations." At the outset of its Section 129 proceeding, the USITC re-opened the administrative record it previously described as "reliable, comprehensive and complete," without offering any rationale for doing so.

4.6 In its Section 129 Determination the USITC states that it thought the Panel's primary concern was with the USITC's failure to explain itself sufficiently. It rarely acknowledged that the Panel's concerns went far beyond this issue. The USITC discussed a number of factors in support of its renewed affirmative threat determination, namely; (i) the volume of imports during the POI and in the imminent future, including the new finding of a "significant rate of increase" in subject imports and the new finding that Canadian market share would increase (but it did not find that increase would be "significant"); (ii) the new finding that the restraining effect of the SLA was significant; (iii) imports during periods of no import restrictions; (iv) Canadian producers' capacity and production in 2002/03, including "excess capacity"; (v) the export orientation of Canadian producers; and (vi) US demand forecasts, including the USITC's new finding that US demand in the imminent future would be essentially unchanged.

4.7 In its original determination, the USITC concluded that subject imports were likely to have a significant price-depressing effect in the future because of likely substantial increases in subject import volumes and the at least moderate substitutability between subject imports and domestic product. In its Section 129 Determination, the USITC again relied on these findings.

4.8 The new determination also considered the vulnerability of the domestic industry. The USITC admitted the financial recovery of the US industry at the end of the period of investigation, but found that this performance was less favourable when compared to first quarter 2000.

4.9 The USITC's new causal link conclusions were a consequential effect of its findings regarding likely substantial increases in subject imports and the likely price effect these would have on the domestic industry. Instead of conducting a non-attribution analysis, the USITC discussed six "other factors" that it indicated Canadian parties identified as threatening the US industry. The USITC dismissed each factor in turn. In other words, the USITC took the position that, in the context of the USITC's threat analysis, the only source of injury to the US industry was or could be imports of Canadian softwood lumber.

4.10 Commissioner Pearson, who did not participate in the original determination, dissented. He relied on evidence that the majority failed to acknowledge. He concluded, as did the USITC

originally, that there was no significant rate of increase in subject imports and that the effects of the SLA had been “quite modest.” He also concluded that any short-term changes in import trends did not outweigh the long history of steady participation in the US market by subject imports and were usually explained by their correlation with the imposition of or relief from provisional measures. Finally, he found that subject import prices were not likely to have any significant suppressive or depressive effect in the imminent future.

### 3. LEGAL ARGUMENT

4.11 Standard of Review. In its report, the Panel stated that its role is not to substitute its judgment for that of the USITC, but it must carry out a detailed and searching analysis of the evidence relied upon and the reasoning and explanations given by the USITC. Canada agrees.

4.12 With respect to this Article 21.5 review, the principal task of the Panel is to determine whether the measure taken by the United States is consistent with the United States’ obligations under the AD and SCM Agreements. The Appellate Body has held that “a panel acting pursuant to Article 21.5 of the DSU would be expected to refer to the initial panel report, particularly in cases where the implementing measure is closely related to the original measure, and where the claims made in the proceeding under Article 21.5 closely resemble the claims made in the initial panel proceedings.”

4.13 Legal Requirements for a Finding of Threat of Material Injury. Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement require that a determination of threat of material injury “shall be based on facts and not merely on allegation, conjecture or remote possibility” and that any threatened injury must be “clearly foreseen and imminent.” Factors must be considered in their totality and that “totality” “must lead to the conclusion that further dumped [or subsidized] exports are imminent and that, unless protective action is taken, material injury would occur.” Taken together, these requirements reflect the longstanding recognition of the “danger of taking an antidumping [countervailing duty] action too easily and without sufficient evidence.”

#### (a) Factors Cited By The USITC Do Not Support Its Conclusion That There Would Be A Substantial Increase In Imports

4.14 Volume Trends. In its Section 129 Determination, the USITC made a “new” finding of a significant rate of increase in imports, which it did not even consider, let alone make, in its original determination. The USITC’s rationale for this “new” finding suffers from a number of deficiencies.

4.15 First, in saying that subject import volumes were significant, the USITC offered nothing new in terms of evidence. Similarly, in saying that the market share of subject imports was significant, the USITC failed to add that in its original negative injury determination it found that subject imports had essentially the same market share. In fact, in the original determination the USITC found that this same market share was “relatively stable” during the POI and that the increase in market share was “small.” These findings were not retracted in the Section 129 Determination. Moreover, in now saying that “subject imports would increase their market share in the imminent future,” the USITC did *not* find that the increase in market share would be *significant*.

4.16 Second, in now claiming that the 2.8 percent absolute increase in imports over the POI “is a significant rate of increase in the volume of imports” the USITC has not only reversed itself without explanation, it has done so notwithstanding the Panel’s recognition that the USITC originally did not find this increase to be “significant.” The USITC’s substantive analysis continues to address only the *absolute* increase in the volume and market penetration of subject imports, rather than their *rate* of increase during that time. The actual “*rate* of increase” in the volume of imports from 1999 to 2001 was essentially flat at only 1.4 percent annually.



4.17 Regarding additional evidence to which the USITC referred – the “14.6 percent” increase in subject import volume in the first quarter of 2002 over the same period in 2001 – the USITC failed to put this number in perspective. This 14.6 percent increase in subject import volume, represented a 0.4 percentage point increase in Canadian market share for all of 2001 and a 1.5 percentage point increase in Canadian market share compared to the first quarter of 2001. Yet an increase of either 0.4 or 1.5 percentage points fits comfortably within the market share “range” the USITC discussed as “relatively stable” and the increase it described as “small” in its original determination and that the Panel accepted as being well within historical patterns. There is simply no basis in the evidence for the USITC claim that subject imports “will increase at a substantial rate in the imminent future beyond historical level.”

4.18 Furthermore, the first quarter of 2002 was not a period of normal conditions because the provisional countervailing duty measures had been withdrawn in December (this period between remedies is referred to as the “gap period”). The majority’s failure to acknowledge and take into account the effects of the “gap” in the application of provisional measures is even more difficult to understand when one realizes that US industry representatives and their counsel conceded that the first quarter spike in imports was due to the gap in duties. Comparing import trends for the first quarter of 2002 with the same period in 2001 is particularly unhelpful because opposite commercial incentives existed in the two quarters. While Canadian producers had a short-term *incentive* to increase shipments to the United States during the “gap period” in the first quarter of 2002 before final duties were imposed, they had a short-term *disincentive* to ship to the United States in the first quarter of 2001 until the SLA expired on March 31.

4.19 The Panel’s finding that, at most, the volume evidence relied upon by the USITC could support a conclusion that imports would continue at historic levels remains true regarding the Section 129 Determination. The evidence and explanation provided do not support USITC’s conclusions on volume trends and its “new” finding of a “significant rate of increase.”

4.20 Softwood Lumber Agreement. Perhaps the most extraordinary of the new “findings” in the USITC’s Section 129 Determination was its “new” finding that the effects of the SLA were “significant.” The majority not only changed, without explanation, its original finding that the SLA “appears to have restrained the volume of subject imports at least to some extent” but it did so even though it acknowledged that virtually all of the evidence it cited was in the record of the original investigation.

4.21 The evidence demonstrates that the USITC was right the first time. For instance, the USITC now emphasizes the fact that subject imports increased during the pendency of the SLA – yet this was true before, and as has been seen, the USITC found no material injury, in part on the basis of the “small increase” in the market share of subject imports during the POI.

4.22 The USITC also relied on certain studies that it stated “appraise or quantify the magnitude or impact of the SLA [and] are consistent with our findings that the SLA had constrained subject imports.” What is first noteworthy about this statement is that the USITC did not use the word “significant” to characterize the findings of these studies. There is no dispute that the SLA may have had “some” effect on subject imports at some point during the five years it was in effect, which is at most what these studies show. All of these studies were in the original record, and the USITC did not interpret them in its original determination to show that any restraining effect of the SLA was *significant*.

4.23 Moreover, these studies do not address the key issue of whether the SLA had any significant restraining effect *at the time it expired*. If the SLA no longer had a significant effect at that time, its expiration could not have led to any significant increase in subject imports. The petitioner’s own economist acknowledged at the hearing that these studies were not probative with respect to that issue. The data on which these studies were based ended in 1999, well over a year before the SLA

expired. The evidence in fact shows that the effect of the SLA changed during the period it was in effect as reflected in shifts in production within Canada, increased imports from third countries and the very significant decline in the purchase of “\$50 tickets” (fee quota) during the final year of the agreement.

4.24 The only “new” evidence cited by the USITC was a study by Dr. Stoner submitted by the US petitioners and a memorandum from the USITC’s Office of Economics. In citing the Stoner study, the USITC appeared oblivious to serious methodological criticisms levelled by the USITC’s own staff economists. Although the USITC relied on its economists’ memorandum as supportive for its finding, the principal point of that memorandum was that the Stoner study did not effectively control for other factors during the SLA that affected the volume of imports and the price of lumber.

4.25 The majority also never addressed evidence, noted by Commissioner Pearson, that indicated the SLA “exerted little influence on price” and that “the expiration of the SLA would not lead to significant or lasting price changes, just as the expiration would not likely lead to significant changes in volume.”

4.26 Therefore, the implications of the Panel’s observation that the USITC did not originally find that the SLA had significantly restrained exports remain the same. The evidence relied on by the USITC in the Section 129 Determination and the explanation the USITC provided for its “new” conclusions, do not support those conclusions.

4.27 Periods of No Import Restrictions. In rejecting the USITC’s reliance on import trends in the April – August 2001 period, the Panel noted that the USITC had not discussed whether this period represented an accurate gauge of what would happen in the future in the absence of anti-dumping or countervailing duty measures or whether the increase represented nothing more than a shift in timing of exports to take advantage of the window between the expiry of the SLA and the provisional measures.

4.28 The USITC did not conduct the analysis the Panel required. Instead it largely repeated its earlier analysis and concluded that “[c]laims that the substantial increase in imports during the April – August 2001 period only reflects ‘a shift in the timing of imports’ fail to address the simple fact that imports increased *both* during the period *and* afterward.” In rejecting the ‘shift in the timing of imports’ argument, the USITC analysis contains several critical deficiencies.

4.29 First, by focusing on *total* imports during this entire five-month period, the USITC failed to confront the central question the Panel raised– whether the increase in imports represented simply a shift in their timing. Only by examining month-to-month changes, including the months *before* the SLA expired and *after* the imposition of bonding requirements, could the USITC determine whether imports fluctuated in anticipation of and in response to these events.

4.30 Second, it focused exclusively on increases in the absolute volume of subject imports, not market share. The change in market share was not “significant,” as the USITC found in its original determination.

4.31 Moreover, comparing the absolute volumes of imports in April – August 2001 to levels in prior years would be appropriate only if US consumption had been the same in prior years, but it demonstrably was not. For this reason, and given the USITC’s finding of “relatively stable” Canadian market share in reaching its negative current injury determination, the USITC would have needed to examine monthly market share shifts during the April – August 2001 period. However, had it done so, it could not have supported its finding of likely substantial increases in imports in the imminent future.

4.32 As Exhibit CDA-26 demonstrates, the record evidence does not support the inferences the USITC drew from the *aggregate* trends in the *absolute* volume of imports for the April – August 2001 period. This exhibit uses Canadian market share rather than absolute volumes, in order to control for the higher US demand in 2001. As even a cursory glance at this chart shows, the fluctuations in subject imports' share of the US market – and particularly the sharp spike in April just after the SLA expired – are entirely consistent with the obvious explanation that importers adjusted the timing of their exports to avoid export restraints.

4.33 Finally, the USITC's reliance on the increase in imports between April and August 2001 also cannot be reconciled with its renewed finding that “[b]ased on the record of these investigations, Canada does 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.” In other words, the USITC found that imports *would not* have increased to injurious levels in the period before its vote in May 2002 *even if* the provisional measures had not been imposed in August 2001. There is no way to reconcile this conclusion with the USITC's proposition that import trends from April to August 2001 foreshadowed a substantial increase in imports in the imminent future sufficient to threaten material injury.

4.34 In an effort to bolster its claim that imports increased substantially after the expiration of the SLA, the USITC also relied on new data showing that imports increased in the first quarter of 2002. As with its flawed analysis of volume trends discussed above, here again the majority ignored the role that timing played on first quarter 2002 imports. The USITC's failure to acknowledge and take into account the effects of the four-month “gap” in the application of provisional measures is not understandable, particularly when one takes into account the exactly opposite incentives facing Canadian producers regarding their shipments to the United States in the first quarter of 2001 compared to the first quarter of 2002.

4.35 The USITC again relied on import trends in the period between 1994 and 1996. However, the USITC did not address the Panel's concerns with its failure to provide an analysis of whether market conditions in this period before the POI were sufficiently similar to predicted market conditions to warrant the conclusion that imports would increase substantially.” The USITC considered only one factor – apparent US consumption. The USITC did not analyze *why* imports were increasing then, *i.e.*, whether conditions other than the absence of import restraints affected the volume. It did not analyze why imports also increased in the immediately preceding 1991 – 94 period as well when import restraints *were* in effect. Nor did the USITC even collect the data necessary to analyze whether increasing imports had any injurious effect on the US industry during that time, even though it would be impossible to draw inferences about the future effect of increasing imports without knowing what impact they had had in earlier periods.

4.36 The deficiencies the Panel identified in the USITC's reliance on information for each of these two periods and the lack of meaningful analysis of the information concerning these periods persists unabated in the Section 129 Determination.

4.37 Excess Capacity, Production and Export Orientation. As the Panel observed, “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.” The Panel concluded that “[t]his 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.” The USITC agreed when it recognized that the increases in capacity projected by Canadian producers were “slight.” Nonetheless, it continued to rely on these slight increases to support its finding that subject imports would increase substantially in the imminent future.

4.38 Because the record showed only “slight” increases in total Canadian capacity, the Panel recognized that “it is only the existing excess capacity that might be viewed as supporting a finding

that imports would increase substantially in the future.” Nothing in the “new” data supports a different conclusion. The Canadian producers’ projections of the percentage of production that they expected to export to the United States in 2002 and 2003 remain the same as those the Panel already concluded to be “well within the historical range” of their own prior experience. Equally important, it is now clear that those projections were completely consistent with the historical average for the Canadian industry as a whole. As the USITC reluctantly admitted in a footnote, “the revised [production and export] percentages are consistent with those reported by Canadian producers in questionnaire responses in the original investigation.” The USITC nonetheless continued to cling to its position that “Canadian Producers’ Export Projections Are Inconsistent with Other Record Evidence.”

4.39 The new data demonstrate that the USITC was simply wrong, and vindicates the projections of the Canadian producers. The revised data in Table VII-7 of the Posthearing Staff Report for the Section 129 proceeding show that the subset of Canadian producers that responded to the original questionnaires had basically the same past and projected export orientation as all Canadian producers, including those that did not respond. The USITC acknowledged this revision, but did not recognize that the new data completely vitiated its argument that these producers’ export projections were inconsistent with their historical experience.

4.40 The USITC’s conclusion that Canadian producers would have the same export orientation in the future that they had during the POI does not support an affirmative threat finding because it means a continuation of the non-injurious status quo.

4.41 US Demand Forecasts. The final factor on which the Panel found the USITC had relied was the forecast of “strong and improving” demand in the US market. The Panel noted that all the USITC found in this regard was that the United States would continue to be an important market for Canadian producers. The Panel held that “a conclusion which simply posits the continuation of the historical situation” did not support the USITC’s finding of a substantial increase in imports.

4.42 In response, the USITC has once again reversed itself without acknowledging the switch in its position or trying to reconcile it with its prior finding of “strong and improving” demand – and again, did it almost entirely on the basis of evidence from the original record. The USITC stated in one place that “[t]he evidence dispels any claims that projected substantial growth in demand for softwood lumber in the imminent future” and in another that “demand in the US market was forecast to remain relatively unchanged or increase only slightly as the economy improved.” Elsewhere in the Section 129 Determination the USITC stated that “demand is either static or improving slightly” and again “forecasts expected [demand] to be relatively unchanged until the second half of 2002, and then would begin to increase in 2003 as the US economy rebounded from a recession.”

4.43 Perhaps this about-face reflects a tacit acknowledgement by the USITC that it could not reconcile an affirmative threat finding with forecasts of improving demand, because the record contains no evidence that any increase in subject imports would outstrip improving US demand. Whatever the explanation, the fact remains that the forecasts in the record for the Section 129 Determination were the same as those in the original record. *All* of these forecasts agreed that demand would improve in the 18 months after the USITC’s vote in mid-2002.

4.44 The one forecast on which the USITC relied in the Section 129 Determination, (the November 2001 Bank of America report), was issued *five months* before the RISI and Clear Vision forecasts, and thus well before the US economy began its recovery from the post-9/11 recession. By March – April 2002, a consensus had developed among forecasters that the 2001 recession caused by the terrorist attacks of September 11 were over. Moreover, forecasters in the first quarter of 2002 were continuously revising *upwards* their predictions for GDP growth in 2002 and 2003. The USITC therefore could not objectively have concluded that the Bank of America forecast undermined its prior reliance on the RISI and Clear Vision forecasts.

4.45 As for the USITC's new-found suggestion that demand for softwood lumber did not really correlate with housing starts, its own Staff Report observed that "US housing starts nearly always consume the greatest portion of softwood lumber, with changes in overall consumption generally tracking those starts."

4.46 The USITC's final attempt to justify its about-face with respect to future demand conditions is equally unconvincing. While acknowledging that "housing starts increased in January and February of 2002 to the highest levels for single-family home starts in over 20 years," the USITC seized upon the 10.2 percent decline in March as evidence that "the improvements in demand during the mild winter of 2001-2002 were not sustainable." But even with this decline, the March 2002 housing starts were the fifth or sixth highest monthly total for the preceding 26 months, and housing starts in the first quarter of 2002 were 5.5 percent higher than in 2001, foreshadowing a future increase in demand for softwood lumber and confirming the forecasted consensus.

4.47 Nothing in the Section 129 Determination addressed the Panel's holding that a conclusion that posits the continuation of the non-injurious historical situation does not support the USITC's finding of a substantial increase in imports.

**(b) The Factors Cited Do Not Support The USITC's Finding Of Likely Adverse Price Effects**

4.48 Article 3.7 (iii) of the AD Agreement and Article 15.7 (iv) of the SCM Agreement provide that an investigating authority should consider "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." The focus of this factor is, therefore, on actual *current* prices, as a predictor of future price and demand effects.

4.49 In its original determination, the USITC concluded that subject imports were likely to have a significant price-depressing effect in the future because of likely substantial increases in subject import volumes and the at least "moderate substitutability" between subject imports and domestic product. In its new determination, the USITC again relied on these findings. It also noted that prices declined in mid and late 2001 to levels as low as 2000 and that there was "limited" improvement in the first quarter of 2002, which it attributed "largely" to an increase in consumption. The USITC found that "this improvement was not likely to be sustained, in light of the decline in housing starts in March 2002 from the record high reported for February 2002. Further, record US housing starts throughout the period clearly did not guarantee higher prices in the US market, given price competition and excess supply."

4.50 These conclusions were also based in part on a "price trends" analysis the USITC undertook that simply described the decline in prices in the last two quarters of 2001 without any analysis of the cause of that decline.

4.51 What is first of interest about the USITC's new price trends analysis is that it did not acknowledge the pricing analysis the USITC undertook in its original determination. At that time, the USITC found no evidence of significant price underselling by subject imports, and found unsubstantiated all of the US industry's allegations of lost sales and lost revenues due to lower-priced imports. Because the USITC attributed these declining prices to excess supply caused by "both subject imports and the domestic producers," it could not "conclude from this record that the subject imports had a *significant* price effect during the POI.". With respect to its original affirmative threat finding, the USITC again referenced the declining price trends in the third and fourth quarters of 2001 in its original price effects discussion, but *did not* cite these trends in support of its original finding that imports "are entering" at prices likely to cause future significant price suppression.

4.52 In its Section 129 Determination, the USITC cited the same declining trends in prices in the third and fourth quarter of 2001 that it considered in its negative injury determination and now found that they supported the “conclusion that imports at the end of the period are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices.”

4.53 What is missing in the new determination is any explanation of how the USITC could conclude that the same “price trends” analysis that could not support a finding that subject imports had significant current price effects could demonstrate that imports are likely to cause significant future price suppression. Perhaps no explanation was offered because the two findings simply cannot be reconciled. Nor is there any question regarding which of the two findings can be sustained. The evidence supports the USITC’s first finding and not its new finding in the Section 129 determination.

4.54 The USITC’s new price trends “analysis” is essentially nothing more than a recitation of the undisputed fact that prices of both imported and domestic lumber declined in the final two quarters of 2001. The fact that prices declined, however, says nothing about “whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices.” More specifically, the fact that prices declined says nothing about the *cause* of their decline – in particular, whether it can be attributed to Canadian imports. As noted above, in its negative injury determination, the USITC identified the general cause when it concluded that the price declines during the POI were the result of excess supply from *both* domestic production and subject imports and also found that while subject imports had “*some* effect on prices,” they had not yet “had a *significant* price effect” so as to be a substantial cause of material injury to the domestic industry.

4.55 The USITC’s “new” price trends analysis suffers from another defect – it is incomplete and inaccurate. While the USITC repeatedly referred to the substantial decline in prices at the end of the POI, it discounted the fact that prices *rose steadily* after the fourth quarter of 2001. By the time the record closed in mid-April 2002 – the actual “end of the period of investigation” – first quarter 2002 prices were more than 10 percent above prior year levels, and higher than the fourth quarter 2001 lows by roughly the same amount. The USITC attempted to dismiss this evidence of 2002 prices on the ground they were not as high in *absolute terms* as in prior years or prior quarters. But by the USITC’s own (flawed) reasoning, this was beside the point: the key question according to the USITC was the *direction* in which prices were moving at the end of the POI, not their level relative to the same period in prior years. The direction in the first quarter of 2002 was precisely opposite to what the USITC claimed.

4.56 In the absence of a sustainable price trends analysis and in the light of extensive, contrary record evidence, the USITC’s finding that subject imports are likely to have a significant price-depressing effect necessarily is dependent on its finding of likely future substantial increases in import volumes. As has been shown above, that volume finding remains unsupported. Moreover, it is important to recall that the Panel has already held that a substantial increase in imports in *absolute* terms, without a finding of a significant increase in market share, was insufficient to support a finding that subject imports will cause significant price depression or suppression in the future. Therefore, the USITC’s pricing analysis fails to support its finding that subject imports are likely to enter at prices that will have a significant depressing or suppressing effect on prices.

4.57 Substitutability Analysis. In its original determination, the USITC found the degree of substitutability between subject imports and domestic product was not “high” but “at least moderate.” In its Section 129 determination, the USITC characterized this relationship as “substitutable” but never rejected its prior characterization. A finding of “at least moderate substitutability” means that competition between imported and domestic goods is “attenuated to a certain extent,” and in such circumstances, it is necessary to consider what portion of any predicted increase in subject imports would involve lumber with limited substitutability because such imports would be unlikely to have a material adverse effect on domestic prices. Thus the USITC’s finding of “at least moderate substitutability” requires it to consider whether, and to what extent, the predicted increase in subject

imports would likely involve purchases by US consumers that do not consider Canadian and US lumber to be close substitutes, because the greater the percentage of subject imports that serve these segments of the US market, the lower would be the potential for price suppression.

4.58 Rather than confront the implications of its own finding of “at least moderate substitutability,” the USITC described evidence supporting the proposition that imported and domestic lumber are interchangeable in certain applications, while ignoring evidence that many purchasers do not consider them substitutable to a significant extent. The USITC still does not acknowledge, much less analyze, the evidence in its own Staff Report that many customers list timber species as the most important factor in their lumber purchasing decisions, and for these purchasers, competition among different species of lumber is attenuated.

4.59 As with its price trends analysis, the USITC’s revised substitutability analysis simply does not stand up to scrutiny. Its price effects finding remains predicated entirely on its finding of the likelihood of a substantial increase in imports in the imminent future, a finding that is neither supported by the evidence on which the USITC relied nor its explanation for the finding.

**(c) Factors Cited By The USITC Do Not Support Its Finding That The US Domestic Industry Was “Vulnerable”**

4.60 The USITC emphasized that in both its original determination and in its Section 129 determination it found that the domestic industry’s condition was “deteriorating.” However, new data obtained in its Section 129 proceeding for the first quarter of 2002 showed significant improvement in the US industry’s condition, including capacity, production, capacity utilization, shipments, per-unit revenues, operating income, cash flow, employment, wages, productivity, and, most importantly, financial performance.

4.61 The USITC acknowledged this improvement in the US industry’s condition, but sought to dismiss this evidence that contradicted its claim of a deteriorating US industry because “financial data for a single quarter ... is not necessarily an accurate indicator of the industry’s performance for the entire year.” But on the very next page of its determination the USITC argued that the increase in US consumption of softwood lumber would not be sustained because of a drop in housing starts for a single *month*. Nor did the USITC acknowledge that housing starts for the entire first quarter of 2002 were well above first quarter 2000 or 2001, and remained at very high levels compared to the prior 26 months.

4.62 Moreover, the evidence before the USITC showed that the profitability of the US industry had been improving over a period much longer than three months. After reporting a negative operating margin for the final three quarters of 2000 and the first quarter of 2001, the domestic industry reported a positive operating margin of 3.7 percent in the final three quarters of 2001, notwithstanding the adverse effects caused by the 9/11 induced recession. Seen in this light, the improvement in the first quarter of 2002 compared to the first quarter of 2001 is a continuation of a consistent trend that had developed over the course of a full year, a pattern that does not support a finding that an industry is “vulnerable.”

4.63 It is also hard to see the relevance to the likelihood of injury to the US industry that its financial performance in the first quarter of 2002 was less favourable than in the first quarter of 2000. The more important consideration was whether the US industry’s condition was deteriorating or improving as the US economy emerged from the post-9/11 recession. As Commissioner Pearson noted, the data showed “notable improvements in the condition of the domestic industry” and that “[i]n the first quarter of 2002, the domestic industry appeared neither injured nor particularly vulnerable.” Nor was any “injury” that the US industry may allegedly suffer “on the brink of happening.”

4.64 Thus, when considered in the context of the totality of factors considered, it is clear that the USITC's renewed affirmative threat finding is not one that could have been reached by an objective and unbiased investigating authority.

**(d) The USITC's "Causal Link" Continues To Suffer From The Same Defects As Originally Determined By The Panel**

4.65 In its single page of causation analysis in its Section 129 determination, the USITC repeated its previous finding that the deterioration in the condition of the US industry flowed from excess supply in the market which led to price declines. The USITC found that going forward it is the Canadian producers that will engage in "excess production which will result in excess supply in the US market," while "US producers have brought their production in line with consumption" in the United States.

4.66 Yet, the basis for the conclusion about US producers curbing production is a single footnote in the section of the Section 129 Determination discussing price declines during the POI. 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." Here, the USITC is again relying on the same Bank of America report that the Panel previously found insufficient to support the USITC's conclusion. The USITC cited no new evidence for the proposition that US producers brought their production into line with US consumption. Even more striking, new data gathered in the Section 129 proceeding relating to the first quarter of 2002 directly refuted the USITC finding: they showed that US production was up by nearly 5 percent, while Canadian production declined by over 2 percent.

4.67 The significance of these new data is difficult to overstate. The USITC said that the "central problem" facing the US industry was that lumber was still being overproduced by Canadian producers, although US producers had curbed such overproduction. However, the undisputed facts described above from the USITC's own Staff Report in the Section 129 proceeding conclusively demonstrated that the USITC got the facts concerning the "central problem" *exactly backwards*: Because the US industry was at least as likely as the Canadian industry to contribute to any oversupply in the imminent future, no objective and unbiased decision maker could conclude that subject imports presented a threat of material injury.

4.68 As the Section 129 Determination contains no objective basis for the finding concerning any imminent increase in subject imports, the causation analysis remains inconsistent with Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement.

**(e) The USITC's Consideration Of "Other Factors" Fails To Satisfy The Requirements Of The AD And SCM Agreements**

4.69 The USITC's analysis in the Section 129 Determination fails to solve the Panel's "serious concerns" about its non-attribution analysis. The USITC was required to undertake the appropriate analysis that would result in separating and distinguishing the injurious effects of any substantial increase in imports from the injurious effects of other causal factors. The USITC did not conduct such an analysis. Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement require authorities to 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.

4.70 In *US – Hot-Rolled Steel*, the Appellate Body found that the non-attribution language in Article 3.5 of the AD Agreement required investigating authorities:



[A]s part of their causation analysis, first, to examine *all* “known factors”, “other than dumped imports”, which are causing injury to the domestic industry “at the same time” as dumped imports. Second, investigating authorities must ensure that injuries which are caused to the domestic industry by known factors, other than dumped imports, are not “*attributed* to the dumped imports.” (emphasis added)

4.71 In that case, the Appellate Body recognized that there may be a number of different causal factors interacting and affecting the domestic industry at the same time and that “their effects may well be inter-related, such that they produce a *combined* effect on the domestic industry.” In *EC – Pipe Fittings*, the Appellate Body went on to state that “we recognize that there may be cases where, because of the specific factual circumstances therein, the failure to undertake an examination of the collective impact of other causal factors would result in the investigating authority improperly attributing the effects of other causal factors to dumped imports.”

4.72 In its Section 129 Determination, the USITC purported to demonstrate, in defiance of the evidence and its own current injury analysis, that there were no “other causal factors” relevant to its investigation that could constitute a threat of injury to the domestic industry. The position taken by the USITC was that it had no obligation to conduct a non-attribution analysis, because in 2002 there were no other known threat factors to the US industry other than Canadian softwood imports.

4.73 It is clear from the record that factors other than the subject Canadian softwood lumber products were having substantial adverse effects on the US domestic industry during the POI. In the context of its original current injury analysis, the USITC acknowledged that the substantial declines in price during the POI could not be explained by a slight increase in market share by Canadian imports. The USITC was compelled to make this finding because it could not credibly assert that substantial price declines and a decline in operating profit by over one billion dollars between 1999 and 2000 could be explained by a 0.4 percent shift in market share for Canadian imports. Other factors must have contributed to this reality.

4.74 However, in its Section 129 Determination, the USITC purported to consider and dismiss as irrelevant a number of “potential” or “alleged” other factors. The following discussion addresses three of these other causal factors affecting the US industry.

4.75 Role of the US Industry. In its negative injury determination, the USITC found that subject imports did not have any material injurious price effects during the POI because domestic lumber contributed to the excess supply during that time and precluded a finding that the subject imports had a significant impact on the domestic industry. In the discussion of causation in the previous section, Canada saw that the evidence before the USITC showed that Canadian producers curbed production significantly (down 2.6 percent in the first quarter of 2002, *i.e.*, at the end of the POI) while US producers increased their production by 5 percent in the same quarter – a substantial shift in relative production. These data make it impossible to credibly say that the central problem facing the US industry in the imminent future was Canadian overproduction. The facts show the central problem was US overproduction.

4.76 The USITC itself acknowledged that “the evidence does not support allegations that there are constraints on domestic production which would render the US industry unable to increase supply, if demand increases substantially. On this basis, it is hard to see how the USITC could categorically dismiss threat of injury from domestic oversupply.

4.77 Third Country Imports. The USITC concluded that non-subject imports from third countries were not a causal factor in any injury to the US industry. However, none of its reasons withstands scrutiny. At the very least, its reasons for dismissing non-subject imports are inconsistent with the reasoning in its threat analysis for subject imports.

4.78 The USITC's principal reason for refusing to consider non-subject imports was their small market share. However, the real issue was the expected rate of increase in their market share at the expense of the domestic industry. The USITC cited the increase of 1.1 percentage points in Canadian market share from 1999 to 2001 in support of its finding that Canadian imports would increase substantially in the future. However, third-country market share rose by a similar amount in this period – 0.9 percentage points. Moreover, the rate of increase in market share was dramatically higher for non-subject imports, compared to a static market share for subject imports. Third-country imports more than doubled in absolute terms between 1998 and 2001, increasing by an average of 30 percent a year. This pattern accelerated in the first quarter of 2002, in which non-subject imports rose by 50 percent compared to the first quarter of 2001 and increased their market share by nearly 0.8 percentage points in the process. The rate of increase in market share, especially at the end of the POI, is a critical factor in any prediction of future trends. The USITC simply ignored it.

4.79 The USITC's second basis for rejecting non-subject imports as a causal factor was that "individual country non-subject imports would have been deemed negligible under US law and the WTO Agreements ... ." But that fact, while true, is wholly irrelevant to whether the USITC attributed to subject imports injury that would be caused by the *cumulative* effect of the continued increase of these imports *as a group*.

4.80 The USITC's third reason was that the market share of third-country imports was not likely to increase relative to subject imports because subject imports, but not third-country imports, were subject to import restraints for most of the POI. Putting aside the lack of any basis for the USITC's new finding that the SLA had a significant restraining effect, even if non-subject imports kept pace with subject imports, they would have at least an equal effect on the US industry. In any event, the USITC failed to analyze how the projected rate of continued increase in third-country imports would compare with the projected rate of increase of subject imports, even though the first quarter of 2002 provided an opportunity to conduct such an analysis in light of the "gap period."

4.81 The USITC suggested that it is "speculative" that non-subject imports would continue to increase if no order were imposed. But nothing in the record indicates that the factors causing third-country imports to increase would change, and it was the USITC's obligation to determine whether the factors that caused the large increase during the POI would continue in the imminent future.

4.82 Cross-Border Integration. The USITC dismissed as "speculative" the notion that "integrated firms will not harm their related companies." This was not speculation but a common-sense proposition recognized by the USITC itself in other cases where it has found, for example, that the Canadian affiliate of a US producer is "not likely" to export subject merchandise "to the United States in competition with" the US company's US product. Many US producers that import or purchase subject merchandise informed the USITC that they use this lumber to complement, not supplement, their own production.

4.83 The USITC stated that "this integration is not new," but the salient fact is the USITC's own acknowledgement that integration in the North American lumber market was "increasing." The USITC also cited its decision not to exclude any domestic producers under the "related parties" provision under US law. But this finding supports, rather than contradicts, the point that integrated producers are unlikely to import lumber in injurious volumes or at injurious prices. The USITC excluded domestic producers that import or that are related to foreign producers *only* when it concluded that their interests were in effect more aligned with the foreign industry than the domestic industry. The fact that the USITC in this case concluded that there were a number of "related" parties, but that they should not be excluded, supports the proposition that these producers are more closely aligned with the domestic industry and would not import or purchase subject merchandise in a way that depresses or suppresses prices.

#### 4. REQUEST FOR FINDINGS

4.84 Canada requests that the Panel find the USITC's Section 129 affirmative threat of injury determination, and the definitive anti-dumping and countervailing duty orders inconsistent with the United States' obligations under Articles 3.5 and 3.7 of the AD Agreement and Articles 15.5 and 15.7 of the SCM Agreement. Canada further requests that the Panel find that the US measures taken to comply are inconsistent with the rulings and recommendations of the DSB. Finally, 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 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.

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

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

#### 1. INTRODUCTION

4.86 At issue in this proceeding is the measure taken by the United States to comply with the recommendations and rulings adopted by the DSB in the underlying dispute concerning the investigation of the USITC in Softwood Lumber from Canada. To comply with those recommendations and rulings, the United States followed the procedure set out in domestic law, in particular, section 129 of the Uruguay Round Agreements Act ("URAA"). That procedure resulted in a new determination by the USITC, issued on November 24, 2004 ("Section 129 Determination"). The new determination was implemented as a matter of domestic law on December 20, 2004, through an amendment by the United States Department of Commerce ("USDOC") to the antidumping and countervailing duty orders on softwood lumber from Canada to reflect the new determination.

4.87 The recommendations and rulings implemented in the Section 129 Determination relate to the USITC's determination that an industry in the United States is threatened with material injury by reason of imports of softwood lumber from Canada found to be subsidized and sold in the United States at less than fair value ("LTFV"). The USITC's Section 129 Determination fully implements the recommendations and rulings of the DSB and is consistent with the AD and the SCM Agreements. The Panel should find, therefore, that Canada's claims are unfounded, and reject them in their entirety.

#### 2. PROCEDURAL HISTORY

4.88 At issue in the underlying dispute was the USITC's original determination of May 16, 2002, in which it was found 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. The Panel Report in the underlying dispute found that action by the USITC in connection with its *Softwood Lumber* investigation was not in conformity with the obligations of the United States under the AD and SCM Agreements. Following the DSB's adoption of the Panel Report on April 26, 2004, the United States undertook to come into compliance with its obligations under the covered agreements.

4.89 On July 27, 2004, the USTR transmitted a request to the USITC "to issue a determination . . . that would render the Commission's action in connection with [its *Softwood Lumber* investigation] . . . not inconsistent with the findings of the dispute settlement panel."

4.90 After receiving the request from the USTR, the USITC issued a notice of institution in the *Federal Register* on August 5, 2004 and a notice of scheduling in the *Federal Register* on August 26,

2004. In these notices, the USITC established procedures for conducting the Section 129 proceeding, including reopening the record to gather additional information (from public data sources and from questionnaires sent to domestic producers and Canadian producers) to be used to supplement the information gathered in the original investigations.<sup>9</sup> The USITC sought such additional information primarily to provide it with a more complete data series for the period closest to the USITC's original determination, and thereby to assist it in considering and addressing issues raised by the Panel Report regarding the imminent future. Additional data from questionnaire responses were limited, because the majority of Canadian producers either expressly refused to answer, or simply did not respond to, requests in the Section 129 proceeding for additional data. The USITC held a public hearing and provided parties to the proceeding three opportunities to submit written comments in the form of pre-hearing briefs, post-hearing briefs, and final comments.

4.91 After conducting its analysis, the USITC, on November 24, 2004, issued the Section 129 Determination, which found that "an industry in the United States is threatened with material injury by reason of imports of softwood lumber from Canada found to be subsidized and sold in the United States at less than fair value." On December 20, 2004, the USDOC, at the direction of the USTR, amended the antidumping and countervailing duty orders on softwood lumber from Canada to reflect the new USITC determination. Accordingly, the United States had come into compliance with its obligations under the AD and SCM Agreements, and so informed the DSB on January 25, 2005.

### **3. THE USITC ISSUED A NEW DETERMINATION CONSISTENT WITH THE AD AND SCM AGREEMENTS AND THE DSB'S RECOMMENDATIONS AND RULINGS**

4.92 As discussed in detail in the Section 129 Determination, the USITC responded to the DSB's recommendations and rulings by gathering additional information, conducting a thorough analysis, and providing detailed and reasoned explanations for its findings. On the basis of its analysis of the record evidence, the USITC made a new determination that an industry in the United States is threatened with material injury by reason of imports of softwood lumber from Canada found to be subsidized and dumped in the United States.<sup>10</sup> The USITC's new determination is based on positive evidence and an objective and unbiased evaluation of the facts.

#### **(a) Standard Of Review And Burden Of Proof**

4.93 In this Article 21.5 proceeding, the measure at issue is the USITC's Section 129 Determination, which was taken to comply with the recommendations and rulings of the DSB. The Appellate Body has recognized that "Article 21.5 proceedings involve, in principle, not the original measure, but rather a new and different measure which was not before the original panel" and that "the task of the Article 21.5 Panel" is to determine whether the new measure is consistent with the covered agreements. While "a panel acting pursuant to Article 21.5 of the DSU would be expected to

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<sup>9</sup> These procedures are contemplated in US law. See Statement of Administrative Action to the Uruguay Round Agreements Act of 1994, H.R. Rep. No. 103-316, Vol. I at 1024 ("This 120-day limit will provide the ITC sufficient time to gather additional information if necessary for it to decide on appropriate implementing action.").

<sup>10</sup> The record evidence in the Commission's Section 129 proceeding incorporated the record in the Commission's original *Softwood Lumber* investigations, the Panel Report, additional information gathered in this Section 129 proceeding, and comments received in response to the Commission's notice published in the *Federal Register* on August 26, 2004. In addition, the Commission adopted from the original Commission report its prior views and findings in their entirety regarding domestic like product, domestic industry and related parties, use of publicly available information, conditions of competition, cross-cumulation, Maritime Provinces, effects of subsidies or dumping, and consideration of the nature of the subsidy and its likely trade effects. See USITC Pub. 3509 at 3-13, 16-27, 27-29, 30-31, and 39. (Exhibit CDA-2). The findings by the Commission in each of these portions of its original views were either not challenged or were found by the original panel to be not inconsistent with US obligations under the covered agreements.

refer to the initial panel report,” the panel’s role is not to compare the old measure to the new measure, as Canada repeatedly urges, but rather to review whether the measure taken to comply is consistent with the covered agreements.<sup>11</sup> In conducting that review, the Panel should apply the same standard of review that the original panel applied in considering the original measure.

4.94 As the original panel observed in the underlying proceeding, given that the USITC’s determination applies in both the antidumping and countervailing duty contexts, the standards set out in both Article 17.6 of the AD Agreement and Article 11 of the DSU are relevant here. In the Panel Report, the original panel stated, “[I]n 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.” That rationale should guide the Panel’s review in this proceeding too. Similarly, the original panel’s observation that its “task is not to carry out a *de novo* review of the information and evidence on the record of the underlying investigation,” nor to “substitute its judgment for that of the investigating authorities” applies with equal force to the present proceeding.

4.95 Canada glosses over these points, relying instead on selected quotations from the Appellate Body reports in *US - Cotton Yarn* and *US - Lamb*. Rather than dwell on the matter, the United States simply refers the Panel to the report in the underlying proceeding as an accurate statement of the standard that should guide the Panel in its present review.

4.96 Similarly, the burden of proof in this proceeding, as in the original proceeding, lies with Canada. As the original panel correctly stated, “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.”

#### **(b) The DSB's Recommendations And Rulings**

4.97 In considering how to come into compliance with the DSB’s recommendations and rulings, the United States took note of the fact that the original panel focused on the explanation provided by the USITC in support of its determinations in light of the evidence it had before it. For example, the original panel discussed “the necessity of [the investigating authority] . . . 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.”

4.98 Earlier in the Panel Report, the original panel made clear that it based its findings on what it saw as “no rational explanation in the USITC determination, based on the evidence cited, for the conclusion that there would be a substantial increase in imports imminently.” This concern regarding insufficient explanation is repeated in the Report for several of the factors considered by the USITC in its original threat of material injury determination.

4.99 Given the original panel’s consistent focus on this point, the USITC understood that to comply with the recommendations and rulings it should reconsider its analysis with a view to providing detailed and thorough explanations supporting its determinations. Thus, in the Section 129 Determination, the USITC articulated more reasoned and detailed explanations for issues material to its determination so that its decisional path may reasonably be discerned by the Panel.

4.100 By contrast, at the heart of Canada’s argument that the United States has failed to come into compliance is the strong suggestion that, based on the findings in the Panel Report, only a negative

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<sup>11</sup> Of course, the determination of what is the measure taken to comply can be a complicated one. See Appellate Body Report, *European Communities - Anti-dumping Duties on Imports of Cotton-Type Bed Linen from India (Article 21.5)*, WT/DS141/AB/RW, adopted April 24, 2003, paras. 78-79.

determination would be consistent with the covered agreements.<sup>12</sup> Of course, that premise is patently incorrect, as evidenced by the fact that the original panel in the underlying dispute expressly declined Canada's request that it suggest that the United States come into conformity by, *inter alia*, "revoking the final determination of threat of injury." As the original panel recognized, its findings did not compel one means of implementation to the exclusion of any other.

4.101 In suggesting that only a negative determination would constitute a measure taken to comply, Canada makes a number of inconsistent and otherwise erroneous arguments. For example, in portraying the Section 129 Determination, Canada inexplicably vacillates between faulting it for being essentially the same as the original determination and faulting it for making findings not contained in the original determination. In a number of cases, Canada simply recycles arguments it made in the original panel proceeding, disregarding the DSB's recommendations and rulings, as well as the additional information gathered in the Section 129 proceeding and the new analysis conducted by the USITC, on which the new determination is based. In fact, Canada even goes so far as to question the USITC's reopening the record to collect additional information in the Section 129 proceeding to address the original panel's concerns, while at the same time contending that the original panel found deficiencies in the evidence relied on by the USITC in the original determination. The United States will discuss each of these flaws in Canada's argument briefly below.

#### (c) **Interrelationship Between Material Injury And Threat Of Material Injury Analysis**

4.102 Article VI of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), as well as the AD and SCM Agreements, permit a WTO Member to take an appropriate measure where dumped or subsidized imports cause present material injury or threaten material injury to a domestic industry. Accordingly, in its Section 129 proceeding, the USITC examined and made determinations with respect to both present and threatened material injury.

4.103 In referring to the threat of material injury as a basis for taking appropriate action, the covered agreements recognize that even though material injury to a domestic industry may not yet have occurred (or injury to the industry may not yet be "material"), there may exist a progression or accretion of adverse effects by reason of subject imports such that, in the imminent future, a threat of material injury would become present material injury if protective measures were not taken. Threat of material injury is material injury that has not yet occurred, and thus is a future event whose actual materialization cannot be assured with certainty. Nonetheless, the determination of its existence must

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<sup>12</sup> In support of this view, Canada makes repeated references to the decisions and determinations in the proceeding reviewing the ITC's original determination pursuant to the dispute settlement provisions of the North American Free Trade Agreement ("NAFTA"). See Canada First Written Submission, paras. 4, 16 and n. 6, and Exhibits CDA-3, CDA-17, CDA-27, CDA-28, CDA-44, and CDA-45. Those references are inappropriate for a number of reasons. First, the proceeding in the NAFTA is outside the terms of reference of this WTO DSU Article 21.5 Panel. "Article 21.5 proceedings are limited to those 'measures taken to comply with the recommendations and rulings' of the DSB." AB Report, *Canada-Aircraft (Article 21.5 - Brazil)*, para. 36. Any determination or decision in the NAFTA proceeding is not a measure taken to comply with the recommendations and rulings of the DSB. Second, in issuing its third determination in the NAFTA proceeding, the Commission majority recognized that the NAFTA "Panel's Decision and Order can only be seen as a reversal of the Commission's affirmative determination of threat of material injury, despite the fact that neither the NAFTA nor US law gives the Panel the authority to reverse the Commission's determination in these circumstances" and noted that "[b]ecause the Panel has precluded the Commission from engaging in any analysis of substantive issues, the Commission has not reached and cannot reach any determination regarding whether there is substantial evidence to support this negative determination." See *Views of the Commission in Response to Panel Decision and Order of August 31, 2004*, at 13 and n. 51 (September 10, 2004) (Exhibit CDA-3). That remand determination and the panel's decisions in the NAFTA proceedings are the subject of a pending review by a NAFTA Extraordinary Challenge Committee. See Article 1904.13 and Annex 1904.13 of the North American Free Trade Agreement. Finally, Canada fails to point out that the Commission was erroneously precluded by the NAFTA panel from reopening the record and that, accordingly, the Section 129 Determination is based on a different record than that in the NAFTA proceedings.

be based on evidence that is real, and not mere conjecture or supposition. Therefore, the threat of material injury and present material injury analyses are intertwined, with many of the same factors necessarily being considered in both analyses.

4.104 The USITC's analysis in its Section 129 Determination includes consideration of all the facts in the record, particularly regarding the volume of subject imports, their effect on prices of the domestic like product, and their consequent impact on the domestic industry. Consideration of these facts establishes the background against which the USITC evaluated the threat factors and whether subsidized and dumped imports will imminently affect the industry's condition in such a manner that material injury would occur in the absence of protective action.

4.105 Canada, however, ignores the interrelationship between the present injury and threat of injury factors. Canada suggests that, in reviewing the USITC's Section 129 Determination, the Panel should consider only the facts that may involve an incremental change from the industry's present state, rather than the totality of the facts. In rejecting Canada's urging of a similar approach in the underlying dispute, the original panel recognized that the threat factors "are thoroughly intertwined with" the present injury factors and that the determination of threat must be based on the "totality of the factors considered." The same principle applies to the present review.

**(d) The USITC Addressed Each Of The Panel Report's Findings**

4.106 In its Section 129 Determination, the USITC fully addressed the findings in the Panel Report. Canada's assertions to the contrary simply are incorrect. For example, the Panel Report recognized that subject imports already were at significant levels in terms of absolute volume and in terms of market share, but questioned whether the USITC relied on a significant rate of increase during the period of investigation as support for its conclusion that subject imports would increase substantially in the future. The Panel Report also found that the USITC did not address why the expiration of the Softwood Lumber Agreement ("SLA") would result in a further substantial increase in imports, rather than a reallocation of imports from non-covered to previously covered provinces or merely a shift in timing of imports to avoid duties associated with new antidumping and countervailing duty petitions.

4.107 In its Section 129 Determination, the USITC addressed these and other findings in the Panel Report. Specifically, the USITC evaluated the significance of the import levels and increases in imports during the period of investigation, taking into account the significant restraining effect of the SLA. Moreover, the USITC considered the impact that the expiration of that agreement would have on the market for softwood lumber, analyzing import trends before and during the period of investigation, specifically in the context of the prevailing market conditions. The record evidence in the Section 129 proceeding further indicated that there was a significant rate of increase of imports during the period examined, especially considering that the baseline volume was significant,<sup>13</sup> and that there was an even greater increase during periods with no import restraints in place. The record also indicated that imports increased after bonding requirements associated with preliminary countervailing duties were imposed, thereby dispelling the theory that a shift in timing accounted for the higher level of imports immediately following the expiration of the SLA. Similarly, when the expiration of the SLA left no restraint on imports from any of the Canadian provinces, imports from the formerly covered provinces increased, but imports continued at near SLA levels from the non-covered provinces as well, resulting in an overall increase in subject imports.

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<sup>13</sup> The Commission recognized that even substantial increases in absolute volume from a significant baseline will not result in large percentage increases. This, however, does not mean that such absolute volume increases are not significant. Increases of the same absolute volume over a small baseline will result in substantially higher percentage rates of increase than those same volume increases over a large baseline. Canada ignores the significance of the baseline in discussing the importance of incremental increases in import volume.

4.108 The USITC's discussion in its Section 129 Determination of the evidence regarding the import trends after expiration of the SLA illustrates the thorough evaluation undertaken by the USITC to address each issue raised by the original panel. The USITC stated:

During the period between expiration of the SLA (April 2001) and before suspension of liquidation resulting from the investigation (August 2001), subject import volume was substantially higher, by a range of 738 mmbf to 959 mmbf, or by 9.2 percent to 12.3 percent, than the comparable April-August period in each of the preceding three years (1998-2000). While the rate of increase in imports slowed when bonding requirements associated with the preliminary countervailing duties were imposed in August 2001, subject imports entered the US market in the April-December 2001 period at a rate 4.9 percent higher than the comparable 2000 period. The evidence in this proceeding demonstrates an even more significant increase of 14.6 percent for the first quarter of 2002 compared with the first quarter of 2001, and a significant increase of 6.2 percent compared with the first quarter of 2000. During these periods, market conditions other than the expiration of the SLA, such as increases in consumption, do not lessen the impact of these significant increases in subject imports. For example, while apparent US consumption for first quarter 2002 increased compared with first quarter 2001, it was at a substantially lower rate, 9.7 percent, than the 14.6 percent increase in subject imports. Moreover, subject imports were 6.2 percent higher in the first quarter of 2002 compared with the first quarter of 2000, while apparent US consumption declined by 2.3 percent for first quarter 2002 compared with first quarter 2000.

Claims that the substantial increase in imports during the April-August 2001 period only reflects "a shift in the timing of imports" fail to address the simple fact that subject imports increased *both* during this period *and* afterward. Imports increased after expiration of the SLA and have continued to substantially increase, even after bonding requirements associated with the preliminary CVD findings were imposed. Thus, the evidence does not support a theory that a shift in timing accounted for the higher level of imports immediately after the SLA expired; rather, it indicates a change in import behavior.

We find these import trends during the most recent period in which there were no trade restraints to be highly indicative of whether imports are likely to substantially increase in the imminent future. The fact that subject imports increased substantially after expiration of the SLA and have continued to increase affirms our conclusion that subject imports threaten material injury to the domestic industry.

4.109 This discussion is representative of the USITC's thorough analysis of the record and of the totality of the facts that were before it. The USITC's analysis of those facts demonstrates that there is positive evidence to support the USITC's finding of the likelihood of substantially increased imports.

4.110 Regarding the issue of demand relative to importation, the Panel Report found that the USITC did not make any findings in its original determination that imports from Canada would increase more than demand, thereby garnering an increased share of the US market, and that the USITC did not discuss market share at all in the context of its original threat of material injury determination. In its Section 129 Determination, the USITC considered and provided analysis of this issue. Specifically, the USITC found that there is no basis in the record evidence to conclude that likely substantial increases in subject imports would be outpaced by increases in demand. Demand was high by historical standards, but relatively stable during the period of investigation. Forecasts expected demand to be relatively unchanged until the second half of 2002, and then begin to increase in 2003 as the US economy rebounded from a recession. Record evidence showed that increases in subject imports significantly outstripped the small increases in demand during the period of investigation. In its evaluation of demand relative to importation during the period examined, the USITC stated:



First, the actual evidence in 2001 shows that the increase in subject imports outstripped demand; imports of softwood lumber from Canada increased by 2.4 percent from 2000 to 2001 and US apparent consumption increased by only 0.2 percent for the same period. Moreover, subject imports after removal of the restraining effect of the SLA were 11.3 percent higher for the April-August 2001 period compared to the same period in 2000, and 4.9 percent for the April-December 2001 period compared to the April-December 2000 period, while apparent US consumption for the entire year was only 0.2 percent. The evidence in this Section 129 proceeding demonstrates that while apparent US consumption for first quarter 2002 increased compared with first quarter 2001, it was at a substantially lower rate, 9.7 percent, than the 14.6 percent increase in subject imports. Moreover, subject imports were 6.2 percent higher in the first quarter of 2002 compared with the first quarter of 2000, while apparent US consumption declined by 2.3 percent for first quarter 2002 compared with first quarter 2000. Thus, the actual increases in subject imports during the period of investigation substantially outstripped demand; similarly, actual data shows that subject imports after expiration of the SLA have increased at a significantly higher rate than any forecasts for increases in demand for softwood lumber for 2002 and 2003.

4.111 Based on its analysis of the totality of the facts, the USITC found that subject imports would increase their market share in the imminent future.

4.112 On the issue of available excess Canadian capacity, the Panel Report found that the USITC's discussion regarding the Canadian industry's export orientation did not support the conclusion that excess capacity would be exported to the United States beyond the "historical" level. In its Section 129 Determination, the USITC analyzed capacity and found that Canadian producers had sufficient excess capacity, and projected increases in capacity and production in 2002 and 2003, to substantially increase exports to the United States beyond the already significant historical level. The record indicated that Canadian production is tied to the US market, which continues to be the most important market for Canadian producers. The US market accounts for about two-thirds of Canadian production and shipments, whereas in 2001, other export markets accounted for only 8 percent of Canadian production, and the Canadian home market accounted for only about 24 percent of production. Therefore, the USITC recognized that there are limited other markets to absorb the projected increase in production of Canadian softwood lumber.

4.113 The record in the Section 129 proceeding provided further support for the USITC's finding: in first quarter 2002, as apparent Canadian consumption declined, Canadian producers shifted sales from the home market to the US market. Given the positive record evidence on the export orientation of Canadian lumber producers, the USITC discounted Canadian producers' projections that additional production would be exported to the United States at below historical levels. Significantly, the USITC found that the record was devoid of evidence, such as new supplier contracts or evidence of increased demand in or sales to another country, that would indicate that increased production was likely to deviate substantially from past shipment patterns. Indeed, the USITC found that the record suggested that imports into the US market would increase beyond historical levels.

4.114 The USITC also evaluated, in its Section 129 Determination, the effects of the likely substantial increases in subject imports on prices and the condition of the domestic industry. The USITC found that, during the period of investigation, the substantial and increasing volume of subject imports had *some* adverse effects on prices for the domestic product. Moreover, there was evidence that the SLA had an effect on prices in the US market. The evidence further demonstrated that the condition of the domestic industry, and in particular its financial performance, deteriorated over the period of investigation, largely as a result of the substantial decline in prices. The declines in the industry's performance, particularly its financial performance, made it vulnerable to future injury. Thus, the USITC found that the price trend evidence, particularly the fact that prices reached their lowest levels as imports increased significantly after expiration of the SLA, provided positive evidence that subject imports were entering at prices that were likely to have a significant depressing

or suppressing effect on domestic prices, and thereby were likely to adversely impact the US industry in the imminent future.

4.115 Finally, the Panel Report expressed concern with the discussion, or more precisely what it saw as an inadequate treatment, of other factors potentially causing injury in the context of the USITC's threat analysis in the original determination. In its Section 129 Determination, the USITC provided a detailed and reasoned analysis of such alleged other factors. In particular, it analyzed whether such alleged other factors are other "known factors" within the meaning of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement. The alleged other factors analyzed were: (1) the excess supply from the domestic industry itself; (2) third-country or non-subject imports; (3) increases in importation to meet demand in the US market; (4) integration in the North American market; (5) the growth in importance of engineered wood products ('EWPs'); and (6) constraints on domestic production/insufficient timber supplies in the United States.

4.116 The USITC 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 argues (as it did in the underlying proceeding) that further consideration or examination is required even if an alleged factor is found not to be an "other known factor." As is plain from Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement, Canada simply is incorrect.

4.117 The covered agreements do not require an investigating authority to use any particular methodology in examining the causal relationship between dumped or subsidized imports and injury, provided that it "does not attribute the injuries of other causal factors to dumped imports." Moreover, such an analysis is warranted only if an alleged other factor is in fact having, or threatening to have, a causal impact. If the factor is found not to have, or threaten to have, injurious effects on the domestic industry, such a 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. If a factor is not an "other known factor," no further consideration or examination of the factor is called for.

4.118 Based on its analysis of the evidence in the Section 129 proceeding, the USITC found that the alleged other factors identified by the original panel were not other known factors or causal factors in the context of its threat analysis. In light of that finding, it had no basis to undertake a further examination to ensure that injury from them was not attributed to subject imports in the context of its threat determination.

4.119 One instance in which the evidence demonstrated that an alleged other factor was not a "known" other factor was nonsubject imports. As in the underlying proceeding, Canada attempts to portray nonsubject imports as other known factors, notwithstanding evidence to the contrary. Non-subject imports never accounted for more than 2.6 percent of apparent consumption; subject imports accounted for at least 34 percent 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 percent of imports, while Canadian imports accounted for about 93 percent of all imports. In light of the evidence regarding non-subject imports, the USITC found them not likely to be an other factor potentially causing injury to the domestic industry in the imminent future. Thus, the USITC found no basis to examine whether any injury could be attributed to non-subject imports in the imminent future.

#### **4. CONCLUSION**

4.120 For the reasons stated above, Canada's claims against the US implementation of the DSB's recommendations and rulings in this dispute are groundless. The United States therefore requests that the Panel reject Canada's claims in their entirety.

C. SECOND WRITTEN SUBMISSION OF CANADA

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

**1. INTRODUCTION**

4.122 Normally, a second or rebuttal submission in an Article 21.5 proceeding would provide a response to the arguments put forward in the first written submission of the Member defending a claim that a measure it has taken to implement the rulings and recommendations of the DSB is WTO inconsistent. It is difficult for Canada to provide such a response in the present case as the United States has offered no analysis in support of the USITC's Section 129 Determination. Rather, the US First Written Submission is little more than a summary of the USITC's Section 129 Determination interspersed with conclusory assertions to the effect that the United States has fully implemented the DSB's recommendations and rulings and that Canada is asking this Panel to exceed its authority under Article 21.5 of the DSU.

4.123 If the United States were correct, there would be very little for Canada to say and for this Panel to do. The United States has approached the WTO review of a threat of injury determination as if it is a simple process of checking off findings made by the USITC and presuming that when the USITC announces a finding or asserts that it has analyzed something then it must be taken at its word. This approach would negate this Panel's obligation to make an objective assessment of the facts of this case in order to determine whether the Section 129 Determination satisfies the relevant requirements of the AD and SCM Agreements.

4.124 Canada's second submission will be relatively brief. It will focus on responding to the following positions that emerge in the US submission:

(i) The US characterization of Canada's position with respect to the Article 21.5 process and the Panel's role in that process –

4.125 Canada's linkage of the flaws in the Section 129 Determination with the same flaws that the Panel found in the Final Determination is entirely proper in light of the Appellate Body's holding that a compliance panel "would be expected to refer to the initial panel report, particularly in cases where the implementing measure is closely related to the original measure, and where the claims made in the proceeding under Article 21.5 closely resemble the claims made in the initial panel proceedings." In fact, the United States itself argues that the Section 129 Determination is compliant precisely because it claims to address the Panel's concerns with the original determination;

(ii) The US view of what constitutes an adequate response to the Panel's recommendations and rulings –

4.126 The United States contends that all it needed to do to comply was to provide a more detailed and thorough explanation of its original determination. However, as Canada demonstrated in its First Written Submission, the Panel rejected many of the evidentiary underpinnings for the findings supporting the USITC's original determination. Yet the Section 129 Determination essentially repeats the same findings, based on the same evidence that the Panel has already held insufficient, and fails to respond to a number of the problems the Panel raised;

(iii) The US position that Canada has "ignored" the interrelationship between the present injury and threat of injury factors –

4.127 It is in fact the United States that continues to ignore the implications of the USITC's present negative injury determination and the findings underlying that determination for its failed efforts to sustain a positive threat of injury determination;

(iv) The US characterization of USITC's non-attribution analysis –

4.128 The United States continues to insist that the only thing that threatened to injure the US industry was softwood lumber from Canada. However, clear evidence shows, among other things, that it is overproduction by the US domestic industry and not Canada that has posed and will pose the “central problem” facing the US industry.

**(a) Standard Of Review And Panel Role**

4.129 There is very little disagreement between Canada and the United States as to the applicable standard of review. Both parties agree that the Panel accurately articulated and applied the standard of review in the original proceeding. While the United States highlights the deferential aspects of this standard, it omits any reference to the Panel's acknowledgement of its duty to carry out a detailed and searching analysis of the evidence. As Canada noted in its First Written Submission, the Panel understood that, while its role is not to conduct a *de novo* review or substitute its judgment for that of the USITC, it nonetheless must carry out a detailed and searching analysis of the evidence relied upon and the reasoning and explanations given by the USITC. That is exactly the function the Panel performed in the original case in concluding that the principal finding underlying the USITC's affirmative threat determination was not one which could have been made by an objective and unbiased investigating authority.

4.130 The United States complains that Canada has relied on “selected quotations” from the Appellate Body reports in *US – Cotton Yarn* and *US – Lamb*, but does not seriously question that those decisions identify important aspects of the standard of review.

4.131 Nor is there any real disagreement between the parties regarding the Panel's proper role in this Article 21.5 proceeding. The United States agrees with Canada that the Panel's principal task is to determine whether the Section 129 Determination is consistent with the United States' obligations under the AD and SCM Agreements. The United States concurs as well with the Appellate Body's acknowledgment in *Mexico – Corn Syrup (Article 21.5 – US)* that “a panel acting pursuant to Article 21.5 of the DSU would be expected to refer to the initial panel report, particularly in cases where the implementing measure is closely related to the original measure, and where the claims made in the proceeding under Article 21.5 closely resemble the claims made in the initial panel proceedings.”<sup>14</sup>

4.132 In *US – Shrimp (Article 21.5 – Malaysia)*, the Appellate Body endorsed the Article 21.5 panel's frequent references to the reasoning in the original panel and Appellate Body reports:

Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute.<sup>15</sup>

4.133 The United States itself recognizes the importance of the Panel's Report to this case when it repeatedly, although erroneously, claims that all it needed to do to bring itself into conformity was “reconsider its analysis with a view to providing detailed and thorough explanations supporting its determinations.” Thus, the United States closely links the Section 129 Determination to the Final Determination.

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<sup>14</sup> *Mexico – Corn Syrup (Article 21.5 – US)*, at para. 109.

<sup>15</sup> *US – Shrimp (Article 21.5 – Malaysia)*, Appellate Body Report, at para. 108. The text of Article 21.5 of the DSU underscores the role the original panel report can play in an Article 21.5 proceeding in requiring that the disputes regarding the consistency of measures taken to comply with the DSB's recommendations and rulings shall be decided “wherever possible [by] resort to the original panel.” Were the original panel report and underlying dispute settlement proceeding not relevant, there would be no reason for Article 21.5's requirement to resort to the original panel wherever possible.

4.134 The United States was correct to make this connection. Not only are the measures in question – the Section 129 Determination and the Final Determination – closely related, but also the claims made by Canada in this Article 21.5 proceeding mirror claims made by Canada in the original proceeding. The Section 129 Determination reached the same conclusion on essentially the same evidence and reasoning as the Final Determination. Thus, there can be no doubt that the Panel’s consideration of and rulings with respect to the Final Determination are relevant to the WTO consistency of the Section 129 Determination.

**(b) The Provision Of An Allegedly "More Detailed and Thorough Explanation" Of The USITC's Final Determination Does Not Bring The United States Into Compliance**

4.135 While the Panel found various explanations provided by the USITC in its Final Determination wanting, the Panel’s concerns with the Final Determination went well beyond the USITC’s original explanations. In rejecting the USITC’s conclusion that there would be a substantial increase in imports, the Panel made not one but three references to the insufficiency of the evidence the USITC cited to support this conclusion. For this reason as well, the Panel concluded that the USITC’s finding was one that could not have been reached by an objective and unbiased investigating authority. The USITC’s previous statement that the record was “reliable, comprehensive and complete” confirms that the fundamental problem is the lack of positive evidence to support an affirmative threat determination. Furthermore, the USITC’s claim that more detailed explanation is all that was needed appears to be at odds with its decision to re-open the record and gather more evidence in the Section 129 proceeding. If only additional explanations were necessary, there would have been no need to be concerned about the evidence and no reason to re-open the record.

4.136 It is extraordinary that, having decided to re-open the record, the USITC subsequently turned a blind eye to most of the evidence it gathered. Nowhere in its First Written Submission does the United States provide an adequate explanation for this failure. At the same time, it does not contest that the new evidence demonstrated the substantially improved financial position of the US industry in the first quarter of 2002. Similarly, the United States does not contest Canada’s demonstration that the new evidence shows that it was the US industry, not its Canadian counterparts, that continued to be the source of lumber overproduction at the end of the POI and that Canadian producers’ projections were consistent with historical experience. What the new evidence emphatically did not show was an industry on the “brink” of being injured as a result of imports of softwood lumber from Canada.

4.137 The USITC has had two opportunities to compile a record and two opportunities before this Panel to identify record evidence that would support an affirmative threat determination. Notwithstanding the fact that the Panel found that most of the evidence the USITC cited in the Final Determination did not support its findings, the USITC proceeded largely to rely on the same evidence to support the same conclusions in the Section 129 Determination.<sup>16</sup> Thus, the Panel should have no doubt that the USITC’s failure to provide an objective and unbiased affirmative threat determination means that the evidence does not support such a finding.

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<sup>16</sup> The United States also claims that Canada “inexplicably vacillates between faulting it for being essentially the same as the original determination and faulting it for making findings not contained in the original determination.” (see US First Written Submission, at para. 17). The United States is correct that Canada is faulting the Section 129 Determination both for repeating errors contained in the Final Determination and for changing findings without explanation and without proffering new evidence and explanation to justify a change of views. There is nothing inexplicable or “vacillating” about this. The requirement to base a decision on positive evidence, among other things, requires an unbiased and objective investigating authority to explain any changes to its views. Being responsive to the deficiencies the Panel found in the Final Determination, which the USITC claims it was trying to be, requires the USITC to acknowledge when it relies on evidence already found by the Panel to be insufficient or not probative to the point made.

4.138 The United States complains that Canada mischaracterized the Panel's report when it argued that only a negative determination would constitute compliance. Canada has not argued that the Panel's rulings and recommendations required the USITC to issue a negative determination. Rather, Canada has demonstrated that only a negative determination would be consistent with the Panel's findings and logic and the underlying evidence. The problem with the Final Determination was not that the USITC neglected to cite sufficient record evidence to support an affirmative threat determination. The problem was, and remains, that the record does not contain evidence that will support a finding of an imminent threat of injury.<sup>17</sup>

**(c) The Section 129 Determination Does Not Respond To The Deficiencies In The USITC's Final Report Identified By The Panel**

4.139 What is perhaps most striking about the US submission is its near complete failure to address any of Canada's substantive challenges to the USITC's Section 129 Determination, including each of the following arguments:

That the Panel found that the USITC did not make a finding of a significant rate of increase in imports in the Final Determination. Moreover, the USITC's "new" finding concerning a significant rate of increase was incoherent and inconsistent with its previous findings (or lack of findings), including that subject import market share remained "relatively stable" and showed a "small" increase over the period of investigation. The USITC also displayed no recognition of the difference between an increase and a *rate* of increase.

That the USITC's arguments about the effect of the SLA did not address the USITC's unexplained about-face from the Final Determination, the SLA's (lack of) effect at the time it expired, and the contrary analysis of the USITC's own Office of Economics and the USITC's sister agency, the USDOC.

That the USITC's findings about the April-August 2001 period ignored the fact that the overwhelming portion of the increase in subject imports was in April because Canadian producers delayed shipments until the SLA expired on March 31, 2001. The USITC itself had found in its Final Determination that the increase in imports after the case was filed on April 2, 2001, had no significant price effect, but never explained how a predicted similar increase in the future would suppress prices.<sup>18</sup>

That the USITC's treatment of import data for the first quarter of 2002 was inconsistent and arbitrary. That the USITC's analysis of the period of no restraints in 1994-1996 simply repeated the analysis that the Panel found to be impermissible.

That the USITC's findings concerning capacity were inconsistent with the Panel's prior ruling that the record evidence did not support a conclusion that there would be a substantial increase in capacity sufficient to infer an imminent substantial increase in subject imports.

That the USITC's continued criticisms of Canadian producers' projections of exports to the United States ignored the fact that the Panel had already ruled that the projections were "well within the historical range," a fact conclusively confirmed by the new evidence obtained in the USITC's Section 129 investigation.

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<sup>17</sup> The United States argues unpersuasively that this Panel should not consider the binational panel decisions and USITC remand determinations issued in the separate NAFTA panel proceeding involving the Final Determination. (See US First Written Submission, at para. 16, fn. 23.) That such decisions and determinations are outside the terms of reference of this Panel's proceeding would be a relevant objection only if Canada were citing them as "measures taken to comply" with the DSB's rulings and recommendations, which it is not.

<sup>18</sup> The United States' claim that subject imports continued to increase after preliminary bonding requirements were imposed in the countervailing duty case in August 2001 is contradicted by the record. Measured by market share, which is the only appropriate benchmark in light of differing demand conditions from year to year (see Canada's First Written Submission, at para. 76), subject imports in the September-December 2001 period were *lower than* in the same period in each of the previous three years (see Exhibit CDA-24).

That the USITC's analysis of projections of US demand for the second half of 2002 and for 2003 ignored unanimous record evidence, which led the USITC to conclude in its Final Determination that US demand would be "strong and improving."

That the USITC's repeated assertions that "imports were entering at prices" likely to depress US prices ignored the USITC's own findings that there was no evidence of significant price underselling by subject imports and that the same "price trends" the USITC now asserts show likely future price depression confirmed that subject imports did *not* have any significant price effects during the period of investigation.<sup>19</sup>

That the USITC ignored the implications of its own finding that substitutability between subject imports and US lumber was only "moderate" in many applications.

That the USITC provided no reasoned explanation for its dismissal of evidence that the US industry was getting stronger, not more vulnerable, in the last 12 months of the POI – despite increased subject imports in the so-called "gap" period.<sup>20</sup>

4.140 The United States also contends that Canada "ignore[d] the interrelationship between the present injury and threat of injury factors." Nowhere in its First Written Submission does Canada make this argument. To the contrary, one of Canada's principal arguments is that the USITC's affirmative threat determination is inconsistent with its negative current injury determination.<sup>21</sup> The USITC's Section 129 Determination continues to ignore key findings in the negative current injury determination that had significant implications for the threat analysis in this case. These findings include the express linkage between relatively stable Canadian market share and the absence of significant price effects, the lack of any evidence of adverse pricing by subject imports, and the US industry's role in contributing to the "excess supply" that was responsible for the price declines during the period of investigation. Moreover, while Canada understands that a "progression of circumstances" may establish the basis for an affirmative threat finding, the improving condition of the US industry in the last 12 months of the POI and the US industry's continued overproduction conclusively demonstrate that the progression of circumstances in this case did not and could not establish an industry on the brink of experiencing material injury.

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<sup>19</sup> The United States seeks to rewrite history when it asserts that "the Commission found that the price trend evidence, particularly the fact that prices reached their lowest levels as imports increased significantly after expiration of the SLA, provided positive evidence that subject imports were entering at prices that were likely to have a significant depressing or suppressing effect on domestic prices." US First Written Submission at para. 28, citing Section 129 Determination, at 66-67. The USITC found no such correlation between increasing imports and lower prices in the US market during the POI, in the cited pages or anywhere else in its Section 129 Determination. Nor could such a finding withstand scrutiny. To the contrary, as Commissioner Pearson noted in dissent, the final year of the POI established the *opposite* correlation: US prices increased substantially during the period immediately after the SLA when subject imports increased, declined in the final quarter of 2001 while Canadian market share declined, and increased again in the first quarter of 2002 while Canadian market share increased. See Section 129 Determination, at 97-98 (Exhibit CDA-1). These are precisely the opposite trends one would expect if subject imports were suppressing or depressing domestic prices.

<sup>20</sup> Nor does the United States respond to Canada's points that the USITC's decision to consider (selectively) post-vote day information was inconsistent not only with its prior practice, but with its stated intent in the Section 129 proceeding to use only data available as of April 30, 2002. See Canada's First Written Submission, at para. 30.

<sup>21</sup> In addition to the high standard reflected in the specific requirements set out in Articles 3.7 of the AD Agreement and 15.7 of the SCM Agreement (see Canada's First Written Submission, at para. 45), Articles 3.8 of the AD Agreement and 15.8 of the SCM Agreement provide that in threat of injury cases the application of antidumping or countervailing measures "shall be considered and decided with special care."

**(d) The United States' Characterization Of Its Non-Attribution Analysis And Its Continued Insistence That The Only Thing That Threatened Injury To The United States' Industry Was Softwood Lumber From Canada**

4.141 The US discussion of non-attribution issues is equally non-responsive. The United States does not even try to respond to Canada's points that the USITC got exactly backwards its analysis of the "central problem" facing the US industry – alleged Canadian overproduction – and still relies on the same Bank of America report that the Panel effectively dismissed as inadequate to support the USITC's conclusion.

4.142 The USITC relied on what are at most accretive changes in subject imports to support its affirmative threat finding by reason of Canadian imports. Yet it dismissed as insignificant comparable accretive changes in other factors affecting the US industry. The United States has offered no explanation for this inconsistency. Why, for example, would increasing US production at the end of the POI pose no threat to the domestic industry while Canadian production, which was decreasing at the end of the POI, allegedly constitute an imminent threat?

4.143 The double standard employed by the USITC is obvious in the significance it attributed to a 1.1 percent increase in market share for subject imports from 1999 to 2001 while, at the same time, dismissing a 0.9 percent market share increase for non-subject imports for this same period. The US explanation is that these comparable increases in market share cannot be compared because they are starting from different baselines. This argument is nonsensical. The impact of a one percent loss of market share will have the same effect on the domestic industry, regardless of source. It is even harder to justify in the context of a threat analysis when one compares the relatively stable trend lines for imports of Canadian softwood lumber to the approximately 30 percent annual rate of increase in non-subject imports during the POI.

4.144 The USITC attempted to dismiss other known factors by considering their impact individually, and then dismissing them one at a time using a negligibility standard of its own creation. In *EC – Pipe Fittings*, the Appellate Body stated that "we recognize that there may be cases where, because of the specific factual circumstances therein, the failure to undertake an examination of the collective impact of other causal factors would result in the investigating authority improperly attributing the effects of other causal factors to dumped imports." The "specific factual circumstances" in the softwood lumber dispute provide exactly the sort of circumstances referred to by the Appellate Body.

4.145 The USITC's threat of injury determination is premised on its prediction that excess supply of Canadian softwood lumber will suppress prices in the US market. Domestic overproduction and non-subject imports, however, also are potential contributors of excess supply in that market and should have been considered not just separately, but also collectively, and their effects distinguished from subject imports.

4.146 The USITC alludes to high unit values for non-subject imports to justify its refusal to conduct a non-attribution analysis. This apparent reliance on an argument about attenuated substitutability in order to avoid cumulating other known supply factors is in stark contrast to USITC's failure to analyze the attenuated substitutability of Canadian imports. Given that the USITC has failed to evaluate the implications of its own finding that Canadian imports and US lumber are only moderately substitutable in many applications, the United States cannot, in this proceeding, raise attenuated substitutability to avoid considering non-subject imports.<sup>22</sup>

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<sup>22</sup> Canada notes that the United States also has failed to respond to Canada's arguments that a substantial portion of Canadian imports was imported by affiliated US companies, which used these imports to complement and not supplant US production. See Canada's First Written Submission, at paras. 135-138.



4.147 Finally, the United States has relied on the Appellate Body report in *EC – Pipe Fittings* to excuse the USITC’s failure to conduct a non-attribution analysis. Such reliance is misplaced. Nowhere in *EC – Pipe Fittings* or elsewhere does the Appellate Body suggest that an investigating authority can simply declare other factors to be non-existent, when the evidence demonstrates otherwise. The United States fails to note that, in *EC – Pipe Fittings*, the Appellate Body found that a non-attribution analysis was not required – *in that dispute* – because the complainant had not adduced *any* evidence that injury was caused by other factors. In this dispute, Canada has presented ample evidence that other factors were having effects equal to or exceeding the effects of Canadian imports. The US argument elevates form over substance and would preclude a detailed and searching analysis of the evidence and the reasons and explanations given by the USITC.

## **2. CONCLUSION**

4.148 It is clear that the Section 129 Determination could not have been made by an objective and unbiased investigating authority in the light of the totality of factors considered and the reasoning provided. Therefore, Canada reiterates its request that the Panel find the USITC’s Section 129 Determination, and the definitive anti-dumping and countervailing duty orders that remain in effect, inconsistent with US obligations under Articles 3.7 and 3.5 of the AD Agreement and Articles 15.7 and 15.5 of the SCM Agreement. Canada also reiterates its request 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 injury, ceasing to impose anti-dumping and countervailing duties and returning the cash deposits imposed as a result of US actions in this matter.

### **D. SECOND WRITTEN SUBMISSION OF THE UNITED STATES**

4.149 The following summarizes the United States’ arguments in its second written submission.

## **1. INTRODUCTION**

4.150 Canada’s critique of the USITC’s Section 129 Determination inappropriately assumes that the Panel’s task is to compare the new determination with the original determination, rather than review the new determination for consistency with the covered agreements. It also relies on mischaracterizations of findings in both determinations. And, it is based on the patently incorrect assumption that only a negative determination could bring the United States into compliance.

4.151 Canada questions the USITC’s reopening of the record in the Section 129 proceeding, which was done precisely to collect additional information, primarily to provide it with a more complete data series for the period closest to the original determination, and thereby to assist it in considering and addressing issues raised by the original panel regarding the imminent future. Additional data from questionnaire responses were limited, because the majority of Canadian producers either expressly refused to answer, or simply did not respond to, requests for additional data.

4.152 Canada raises concerns about the USITC’s use of certain data in the Section 129 Determination that may not have been available at the time of the USITC’s original determination. The data at issue covered the years during the period of investigation and first quarter of 2002. All of the data at issue covered a period prior to the original determination.

## **2. THE USITC’S SECTION 129 DETERMINATION IS CONSISTENT WITH THE COVERED AGREEMENTS**

4.153 In its Section 129 Determination, the USITC’s analysis of likely substantial increases in subject imports first took into account the fact that subject import volumes already were at significant levels during the investigative period – accounting for between 33.2 percent and 34.7 percent of the US market. The evidence showed volume increases from Canada even with the restraining effect of

the SLA in place and significant increases in subject import volume at the end of the period of investigation, when such imports were no longer subject to the SLA, including when they were not yet subject to preliminary antidumping or countervailing duties. Moreover, Canadian producers had increasing excess capacity during the period of investigation.

4.154 The USITC found that the likely substantial increases in subject imports would result in excess supply in the US market, putting further downward pressure on prices. Excess supply generally caused the substantial price declines in 2000 that led to the deterioration in the condition of the domestic industry. The evidence demonstrated that prices were weak toward the end of the period of investigation, with prices in the third and fourth quarters of 2001 again at levels as low as they had been in 2000. While prices increased in the first quarter of 2002, as consumption temporarily increased, they were still at the low levels reported in 2000 when subject imports were impacting the financial performance of the domestic industry.

4.155 Throughout its argument, Canada provides a snapshot focus on a given incremental increase or decrease that it views as favorable to its assertions. For example, Canada ignores the significance of the size of baseline volume, whether of imports or production. In addition, Canada frequently compares percentage increases or decreases in two numbers – such as US production and Canadian production – which may not be comparable, because the baseline for the numbers being compared is different. Finally, Canada ignores the interrelationship between factors relevant to the determination of present injury and factors relevant to the determination of threat of injury, as well as the fact that evidence regarding any one factor often is intertwined with evidence regarding other factors.

4.156 **Likelihood of Substantially Increased Imports.** The original panel recognized that subject imports already were at significant levels but questioned whether the USITC had relied on a significant rate of increase during the period of investigation as support for its conclusion that subject imports would increase substantially in the future. The panel report also found that the USITC did not address why the expiration of the SLA would result in a further substantial increase in imports, rather than a reallocation of imports from non-covered to previously covered provinces or merely a shift in timing of imports to avoid duties associated with the new petitions. In its Section 129 Determination, the USITC evaluated the significance of the import levels and increases in imports before and during the period of investigation, taking into account the significant restraining effect of the SLA and considered the impact that the expiration of that agreement would have on the market for softwood lumber.

4.157 **Volume of Imports Already Significant and Likely to Increase Substantially in the Imminent Future.** In the Section 129 Determination, the USITC found that subject imports were already at a significant level during the investigation period, increasing during 1999 to 2001 from 17,983 to 18,483 million board feet (mmbf) out of a total US market of about 54,000 mmbf. Subject imports held a consistently large and increasing share of the US market, accounting for 33.2 percent to 34.7 percent of the US market for softwood lumber in the period examined. The USITC found that the rate of increase in the volume of subject imports from 1999 to 2001 was 2.8 percent and stated that “2.8 percent is a significant rate of increase when the baseline volume is already so significant.” The USITC also recognized that the 2.8 percent increase in subject imports from 1999 to 2001 had occurred even though such imports had been subject to the restrictive impact of the SLA, and even though apparent US consumption had declined slightly, by 0.4 percent.

4.158 Canada focuses on the percentage without regard to the enormous size of the baseline, the SLA’s restraining effects, and the relatively flat demand for softwood lumber. Moreover, Canada dismisses evidence showing a pattern of substantially increasing subject imports at the end of the period of investigation (increases of 2.4 percent (comparing 2001 to 2000), 4.9 percent (comparing April-December 2001 to April-December 2000), and 14.6 percent (comparing first quarter 2002 to

first quarter 2001)). The USITC placed the 14.6 percent increase during the first quarter of 2002 compared with the same period in 2001, in perspective. The USITC found that “[w]hile apparent US consumption also increased, it did so at a substantially lower rate, 9.7 percent for first quarter 2002 compared with first quarter 2001, leading subject import market share to be higher at 34.7 percent in first quarter 2002 compared with 33.2 percent in first quarter 2001.” By focusing on the theory that “opposite commercial incentives existed in the[se] two quarters” – that is, that there was an alleged “short-term disincentive to ship to the United States in the first quarter of 2001” – Canada misses the point that subject imports still were 6.2 percent higher in the first quarter of 2002 compared with the first quarter of 2000, while apparent US consumption declined by 2.3 percent. In any event, Canada’s argument rests on the incorrect assumption that there was a four-month gap in the application of preliminary measures.

**4.159 The SLA had a Restraining Effect on Subject Imports.** To place subject imports in the appropriate context, the USITC considered the restraining effects of the SLA on imports and trends in subject imports during periods when such imports were not subject to some type of restraint. Canada incorrectly assumes that the USITC’s finding in the Section 129 determination diverged from its finding in the original determination. It also incorrectly assumes that when it came to present material injury, the USITC found that subject imports did not support an affirmative determination.

4.160 The evidence demonstrated that while the volume of subject imports increased even with the SLA in place, substantial increases occurred during periods when such imports were not subject to import restraints. The USITC also considered evidence demonstrating the impact of the SLA on the domestic market, including evidence that the constraints on the volume of imports resulted in higher prices for such imports and higher costs for construction than in the absence of the SLA. Additional evidence demonstrating the restraining effect of the SLA included the fact that increases in subject imports while the SLA was in effect did not keep pace with increases in demand from 1995 to 2001.

4.161 Canada’s focus on the economic studies referred to in a footnote is misplaced for two reasons. First, Canada suggests incorrectly that the USITC relied more heavily on one economic study than others. Second, Canada provided no comments on that study during the Section 129 proceeding, although specifically requested to do so by the USITC.

4.162 Another aspect of the SLA discussion that Canada mischaracterizes concerns the fact that, during the final year of the SLA, a portion of one of the quotas provided for under the SLA went unused. Canada misleadingly implies that this means that subject imports declined in the last year of the SLA. They did not. Moreover, Canada ignores the fact that in each year during the pendency of the SLA, including 2000-2001, Canadian producers exported significant quantities of softwood lumber under the \$100 fee quota and significant quantities of “bonus” exports.

4.163 Finally, the USITC recognized that, during the pendency of the SLA, Canadian shipments from provinces not covered by the SLA to the United States more than doubled. The USITC found, however, that the evidence demonstrated that when the expiration of the SLA left no restraint on imports from any of the provinces, imports from the provinces formerly under the SLA increased, while imports from the non-covered provinces continued at levels much higher than those prior to the SLA. The USITC also found that the redistribution theory failed to recognize that the volume of production is much greater in formerly covered provinces than in non-covered provinces.

**4.164 During Periods With No Import Restraints, There Were Substantial Increases in Subject Imports.** To place subject imports in context in the Section 129 Determination, the USITC considered trends in subject imports during periods when such imports were not subject to some type of restraint (such as the SLA or preliminary countervailing duties). The evidence demonstrated that during the period following expiration of the SLA (April 2001) and before suspension of liquidation

of softwood lumber entries due to the investigation (August 2001), subject import volume was substantially higher, by a range of 9.2 percent to 12.3 percent, than in the comparable April-August period in each of the preceding three years (1998-2000). The USITC acknowledged that the rate of increase in imports slowed when bonding requirements associated with the preliminary countervailing duties were imposed in August 2001, but recognized that subject imports still entered the US market in the April-December 2001 period at a rate 4.9 percent higher than in the comparable 2000 period. The evidence in the Section 129 proceeding demonstrated an even more significant increase of 14.6 percent for the first quarter of 2002 compared with the first quarter of 2001, and a significant increase of 6.2 percent compared with the first quarter of 2000.

4.165 Canada faults the USITC for not taking account of an alleged “four-month ‘gap’ in the application of provisional measures” – *i.e.*, the period from the expiration of provisional countervailing duties, in December 2001 through the end of the investigation in April 2002. However, what Canada fails to acknowledge is that even though bonding requirements with respect to preliminary countervailing duties expired in December 2001, bonding requirements associated with preliminary antidumping duty findings did not expire until April 2002.

4.166 Nor does the supposed existence of “opposite commercial incentives” in the first quarters of 2002 and 2001, respectively, explain away the increase in imports during the first quarter of 2002. The suggestion that this comparison is anomalous is belied by the fact that there also was a significant increase of 6.2 percent in subject imports in the first quarter of 2002 compared with the first quarter of 2000. Market conditions (other than the presence or absence of the SLA), such as differences in consumption, did not explain the significant increases in subject imports.

4.167 Another concern of the original panel was that the USITC had not addressed claims that the substantial increase in imports during the April-August 2001 period only reflects “a shift in the timing of imports.” In its Section 129 Determination, the USITC found that subject imports increased *both* during the April-August 2001 period *and* afterward, a fact inconsistent with the suggestion that import volumes during the period could be explained as a simple timing shift. Canada’s focus on monthly subject import data for the April-August 2001 period does nothing to undermine this finding. First, the USITC found that “monthly subject import volumes were higher in each month between April and August 2001 than the comparable month in 2000, with the exception of June, by a range of 7.5 percent to 25.6 percent;” similarly, monthly import volumes were higher in each month between October 2001 and March 2002 than the comparable month in the preceding year, with the exception of November. These increases in the already significant volume were not the result of increases in demand, which was relatively flat (0.4 percent) in 2001. Second, Canada contends that “[i]f the USITC were correct, one would expect to see a steady increase in imports.” But, that is exactly what the evidence demonstrates.

4.168 The USITC also considered the similar pattern of increases in subject imports during 1994-1996, immediately prior to the adoption of the SLA, increases which ceased when the SLA entered into force. The evidence in the record for 1995 to 1996 showed that subject import volume rose at a rate higher than increases in US apparent consumption.

4.169 **Importation Relative to Demand.** The USITC found that there was no basis in the record evidence to conclude that likely substantial increases in subject imports would be outpaced by increases in demand. First, the USITC found that evidence in 2001 showed that the increase in subject imports outstripped demand. Moreover, subject imports after removal of the restraining effect of the SLA were 11.3 percent higher for the April-August 2001 period compared to the same period in 2000, and 4.9 percent higher for the April-December 2001 period compared to the April-December 2000 period, while apparent US consumption for all of 2001 was only 0.2 percent higher than it had been in 2000. The evidence in the Section 129 proceeding demonstrates that while apparent US consumption for first quarter 2002 increased compared with first quarter 2001, it was at a substantially lower rate, 9.7 percent, than the 14.6 percent increase in subject imports. Moreover,

subject imports were 6.2 percent higher in the first quarter of 2002 compared with the first quarter of 2000, while apparent US consumption declined by 2.3 percent for first quarter 2002 compared with first quarter 2000.

4.170 The USITC found that the evidence dispelled any claims that projected substantial growth in demand for softwood lumber in the imminent future. Canada points out that, in the Section 129 Determination, the USITC found that “[f]orecasts expected it [demand] to be relatively unchanged until the second half of 2002, and then begin to increase in 2003 as the US economy rebounded from a recession.” That finding is almost identical to the USITC findings in the original determination, where it stated that “[d]emand for softwood lumber is forecast to remain relatively unchanged or increase slightly in 2002, followed by increases in 2003 as the US economy rebounds from recession.”

4.171 The USITC found that the demand forecasts for softwood lumber from industry analysts were somewhat mixed. Whereas Canada focuses on the demand forecasts for softwood lumber in isolation, the USITC considered those forecasts together with forecasts for softwood lumber’s primary end-use, US housing. The USITC found that the lack of a correlation between forecasted lumber demand growth and forecasted housing starts and the lack of any agreement among forecasters raised questions about the usefulness of these forecasts. The USITC also found that the sharp decline in housing starts in March 2002 showed that the improvements in demand during the mild winter of 2001-2002 were not sustainable.

4.172 The Canadian Producers Had Sufficient Freely Disposable Excess Capacity and Projected Increases in Capacity and Production in 2002 and 2003 to Substantially Increase Exports to the United States. On the issue of available excess Canadian capacity, the panel report found that the USITC’s discussion regarding the Canadian industry’s export orientation did not support the conclusion that excess capacity would be exported to the United States beyond the “historical” level. In its Section 129 Determination, the USITC analyzed capacity and found that Canadian producers had sufficient excess capacity, and projected increases in production and capacity in 2002 and 2003, to substantially increase exports to the United States.

4.173 Canada has substantial capacity to produce softwood lumber, equal to about 60 percent of US consumption. Excess Canadian capacity in 2001 had increased to 5,343 mmbf, which was equivalent to 10 percent of US apparent consumption, as capacity utilization declined to 84 percent from 90 percent in 1999. Even more telling was the fact that Canadian producers expected to further increase their ability to supply the US softwood lumber market, projecting increases in production of 8.9 percent from 2001 to 2003 and increases in their capacity utilization to 90 percent in 2003 (from 84 percent in 2001). These increases were projected at the same time that demand in the US market was forecast to remain relatively unchanged or increase only slightly. Canada’s claim focuses inappropriately on the incremental increase in production capacity.

4.174 Canadian production is tied to the US market, which continues to be the most important market for Canadian producers. The US market accounts for 60-65 percent of Canadian production and shipments, whereas in 2001 other export markets accounted for only 8 percent of Canadian production, and the Canadian home market accounted for only about 24 percent of production. The record in the Section 129 proceeding provided further support for the USITC’s finding: in the first quarter 2002, as apparent Canadian consumption declined by 23 percent compared with the first quarter of 2001, Canadian producers shifted sales from the home market to the US market. In the first quarter of 2002, Canadian exports to the US market accounted for 63.8 percent of Canadian production compared with 54.2 percent for the first quarter of 2001 and 55.8 percent for the first quarter of 2000. Given the positive record evidence on the export orientation of Canadian lumber producers, the USITC discounted Canadian producers’ self-interested projections that additional production would be exported to the United States at below historical levels of 20 percent of production.

4.175 The USITC recognized that revisions to the public data for Canadian production resulted in slightly lower levels for exports to the United States as a share of revised Canadian production, ranging from 57.5 percent to 61.3 percent for the 1999-2001 period, compared with the range reported in the original investigation (63.1 percent to 68.1 percent). Canada's claim that this "vindicates the projections of the Canadian producers" is misplaced. The USITC discounted projections that showed that only 20 percent of the projected additional production would be exported to the US market. Canada's claim only involves whether the accurate historical level of exports as a share of production is 65 percent (under the original data) or 60 percent (under the revised data). Either of these numbers is far greater than the 20 percent projected by Canadian producers.

4.176 **Likely Adverse Price Effects.** The USITC found that the price trend evidence, particularly the fact that prices reached their lowest levels as imports increased significantly after expiration of the SLA, constituted positive evidence that subject imports were entering at prices that were likely to have a significant depressing or suppressing effect on domestic prices, and thereby were likely to adversely impact the US industry in the imminent future.

4.177 **Prices Declined During the Period of Investigation.** The evidence demonstrated that prices for softwood lumber declined substantially during the period of investigation, particularly in 2000. In mid-2001, at a time of considerable uncertainty in the market due to the expiration of the SLA and the commencement of the original investigations, prices for softwood lumber increased. However, these increases were temporary; prices began to decline in the July - September 2001 period and fell substantially in the October - December 2001 period to levels as low as those in 2000. Even with an improvement in the January - March 2002 period, prices at the end of the period of investigation were still near the lowest levels reported for the period examined. The USITC found that the price increase in the first quarter of 2002 was largely due to an increase in consumption— an improvement that was not likely to be sustained, in light of the sharp decline in housing starts in March 2002 from the record high reported for February 2002. Further, the USITC found that record US housing starts throughout the period of investigation clearly did not guarantee higher prices in the US market, given price competition and excess supply.

4.178 **Imports were Entering at Prices Likely to Have a Significant Depressing or Suppressing Effect on Domestic Prices.** Substantial price declines in 2000, and resulting deterioration of the condition of the domestic industry, were due to excess supply from both subject imports and domestic production. Thus, while the evidence supported a finding that subject imports had *some* adverse price effect, the USITC concluded that during the period of investigation, they had not yet had a *significant* price effect so as to be a substantial cause of material injury to the domestic industry. However, the USITC also found that the prices at the end of the period of investigation (*i.e.*, July-September and October-December, 2001 and January-March, 2002) were at levels as low as those in 2000, and that subject import prices, combined with the imminent significant increase in subject import volume, were likely to have a significant depressing or suppressing effect on domestic prices in the imminent future. Moreover, the SLA had a significant restraining effect on the volume of subject imports and, therefore, limited the effect of subject imports on prices in the US market.

4.179 Canada's discussion of the pricing data in the Section 129 Determination focuses, in a snapshot approach, on the first quarter 2002 data and mischaracterizes the USITC's analysis. In evaluating the quarterly composite pricing data, the USITC found that the data showed that the composite price per mbf for January - March 2002 period – \$318 – was lower than the composite price per mbf for July - September 2001 period – \$322 – and substantially lower than for April - June 2001 period – \$364. The USITC recognized that seasonality generally affects quarterly price comparisons. Moreover, while the composite price for the January - March 2002 period – at \$318 – was higher than for the January - March 2001 period – at \$284 – it was substantially lower than \$384, which was the composite price in the January - March period for both 1999 and 2000. Canada focuses on the comparison between first quarters 2002 and 2001. In so doing, it ignores the evidence that composite prices for the January - March 2001 period had not yet recovered from the low levels

of the July - September and October - December periods of 2000 (\$294 and \$277, respectively) and were subject to considerable uncertainty in the market due to the pending expiration of the SLA.

4.180 Canada incorrectly asserts that the USITC made a finding of no significant price underselling. Instead, the USITC found that, as agreed to by all parties to the investigations, making direct cross-species price comparisons in order to assess underselling was inappropriate. Although the differences in many of the imported and domestic species of softwood lumber limit the meaningfulness of any direct price comparisons, the evidence indicates competition across species, such that prices of a particular species will affect the prices of other species, particularly those that are used in the same or similar applications.

**4.181 Imported and Domestic Softwood Lumber are Interchangeable and Substitutable.** Rather than challenging interchangeability, Canada bases its argument with respect to price effects on the premise that “purchasers do not consider them [*i.e.*, subject imports and domestic softwood lumber] substitutable to a significant extent.” Yet, the evidence demonstrated that Canadian spruce-pine-fir (SPF), which accounted for more than 85 percent of Canadian product imported into the United States, and US Southern Yellow Pine (SYP), which accounted for about 45 percent of US production, compete and are substitutable. Moreover, Canada also exports Douglas fir, hem-fir, western red cedar, and a few other products; all of these species also are produced in the United States, and thus there is direct competition between subject imports and domestic product. The USITC found that regional preferences do not reflect a lack of purchasers’ willingness to substitute subject imports for domestic product to a significant extent, as Canada suggests, given an available lower priced interchangeable product.

**4.182 Impact of the Subject Imports on the Domestic Industry and Vulnerability to Threat of Injury.** The condition of the domestic industry, and in particular its financial performance, deteriorated over the period of investigation, as a result of the substantial decline in prices. Subject imports were increasing substantially after expiration of the SLA and at the end of the period examined and were entering at prices at their lowest levels during the period of investigation. Thus, the USITC found that the industry was vulnerable to future injury.

4.183 Domestic producers’ share of apparent domestic consumption decreased from 65.0 percent in 1999 to 64.4 percent in 2000 and to 63.1 percent in 2001. The data collected in the Section 129 proceeding showed a similar trend, with domestic producers accounting for a 62.3 percent market share in the first quarter of 2002, down from 64.6 percent and 66.2 percent in the first quarters of 2001 and 2000, respectively.

4.184 The domestic industry’s financial performance declined during the period of investigation, with a dramatic drop from 1999 to 2000 as excess total supply contributed to price declines. The domestic industry’s unit net sales value decreased from 1999 to 2001 with the largest decrease occurring from 1999 to 2000. While unit cost of goods sold declined throughout the period of investigation, unit net sales value fell by a greater amount, and the ratio of operating income to net sales fell from 14.3 percent in 1999 to 1.8 percent in 2000, and 1.3 percent in 2001. Total operating income declined from \$1.26 billion in 1999 to \$93 million in 2001, and over \$1 billion of that decline occurred in one year, from 1999 to 2000. Net income as a share of net sales followed a similar trend, decreasing from 13.7 percent in 1999 to 0.8 percent in 2000 and 0.1 percent in 2001. Total net income declined from \$1.21 billion in 1999 to \$8 million in 2001. While the data collected in the Section 129 proceeding showed some improvements in the domestic industry’s financial performance in the first quarter of 2002 compared with the first quarter of 2001, a single quarter’s performance did not change the fact that, overall, the industry’s performance had deteriorated and remained weak. The USITC, moreover, recognized that financial data for a single quarter is not necessarily an accurate indicator of the industry’s performance for the entire year.

### 3. THE CAUSAL RELATIONSHIP AND ALLEGED OTHER “KNOWN” FACTOR ANALYSES

4.185 **US Obligations Under Article 3.5 of the Antidumping Agreement and Article 15.5 of the SCM Agreement.** Consistent with the finding of the Appellate Body in *EC - Pipe*, a methodology for evaluating causation that first asks whether an alleged other factor is an “other known factor” – *i.e.*, more than a tangential or minimal cause of injury or threat – and, only if the first question is answered affirmatively, undertakes a further analysis to ensure that any injury from an other known factor is not attributed to subject imports is permissible under Article 3.5 and 15.5. In the Section 129 Determination, the USITC found the evidence to demonstrate that none of the factors alleged to be other known factors were other known factors.

4.186 **Causal Relationship Between Likely Substantial Increases in Subject Imports at Depressed Prices and Threat of Injury to the Domestic Industry in the Imminent Future.** The USITC found that the evidence demonstrated that subject imports, already at significant and increasing levels even with the restraining effect of the SLA in place, and with significant increases in volume after expiration of the SLA, would continue to enter the US market at significant levels and were projected to further increase substantially. Prices were weak toward the end of the period of investigation, with prices in the third and fourth quarters of 2001 again at levels as low as they had been in 2000. While prices increased in the first quarter of 2002, as consumption temporarily increased, they were still at the low levels reported in 2000 when subject imports were impacting the financial performance of the domestic industry. The USITC found that the likely substantial increases in subject imports would result in excess supply in the US market, putting further downward pressure on prices.

4.187 Excess supply generally caused the substantial price declines in 2000 that led to the deterioration in the condition of the domestic industry. Although both U.S and Canadian producers had contributed to the excess supply in 2000, by the end of 2001, US producers had brought their production into line with consumption. Canadian producers, however, had excess capacity, and projected increased production, with the United States being the likely market for this excess production. This latter condition would result in excess supply in the US market. Thus, the USITC found that subject imports were likely to increase substantially and were entering at prices, particularly at the low levels seen at the end of the period of investigation, that were likely to have a significant depressing or suppressing effect on domestic prices, were likely to increase demand for further imports, and thereby were likely to adversely impact the US industry in the imminent future, unless protective action were taken.

4.188 In the Section 129 Determination, the USITC integrated its causation discussion into its analysis of the threat factors, particularly its analysis of the likely volume and likely price effects of subject imports on the already vulnerable domestic industry. Rather than address this integrated analysis, Canada focuses its critique of the USITC’s causation findings on a separate section of the Determination that merely reviewed the factors involved in those findings. Moreover, in a glaring mischaracterization of the USITC’s Section 129 Determination, Canada incorrectly asserts that “the basis for the conclusion about US producers curbing production is a single reference in a footnote in the section of the Section 129 Determination discussing price declines during the POI.”

4.189 **Alleged Other “Known” Factors Analysis.** In its Section 129 Determination, the USITC provided a detailed and reasoned analysis of the following alleged other factors potentially causing injury to the domestic industry: (1) excess supply from the domestic industry itself; (2) third-country or non-subject imports; (3) increases in importation to meet demand in the US market (discussed above, as a possible factor weighing against the threat of injury); (4) integration in the North American market; (5) the growth in importance of engineered wood products (‘EWPs’); and (6) constraints on domestic production/insufficient timber supplies in the United States. The USITC found none of these factors to be more than a tangential or minimal threat to the domestic



industry. Canada makes arguments regarding only three of these factors: domestic supply, third-country imports, and integration in the North American market.

4.190 **Excess Supply From the Domestic Industry.** While the USITC found in its present material injury analysis that excess supply from both subject imports and the domestic industry were contributing factors to price declines in 2000 that adversely affected the performance of the domestic industry, it found that the evidence demonstrated that domestic supply would not be an other known factor in the imminent future, as it had been in the 1999-2000 period. The USITC based its finding on evidence regarding domestic production and capacity as well as evidence indicating that the domestic producers had brought their production in line with consumption. Canadian producers, however, had excess capacity, and projected increases in production; the likely market for this excess production was the US market, and Canadian exports continue to oversupply the US market.

4.191 Canada's contention that the "USITC got exactly backward what it called the 'central problem'" is based on a single snapshot of the incremental rate for Canadian and US production in the first quarter of 2002 compared with the first quarter of 2001. Domestic production capacity was fairly level during the period of investigation, following a small but steady increase between 1995 and 1999, as apparent consumption increased. Public data indicate that domestic production of softwood lumber steadily declined from a peak of 36,606 mmbf in 1999 to 34,996 mmbf in 2001, a decline of 4.4 percent. While domestic production in the first quarter of 2002 was 4.9 percent higher than the first quarter of 2001, apparent US consumption was 9.7 percent higher; moreover, domestic production in the first quarter of 2002 was 9.3 percent lower than in the first quarter of 2000. Domestic capacity utilization was 87.4 percent in 2001 and, with the exception of a peak in 1999 at 92 percent, had consistently held this level from 1995-2001. Based on revised US production data, domestic capacity utilization was 86.4 percent in 2001.

4.192 In contrast to US industry capacity utilization, Canadian capacity utilization had declined from 90 percent in 1999 to 84 percent in 2001 (a rate substantially lower than that reported for any other year in the 1995-2001 period). In 2001, excess Canadian capacity was equivalent to 10 percent of apparent US consumption. Still, Canadian producers projected increases in production of 8.9 percent from 2001 to 2003, and a return of capacity utilization to 90.4 percent in 2003.

4.193 While production data for the 2000-2001 period show that both Canadian and US production declined by similar quantities, the evidence also demonstrated that Canadian exports to the US market increased for this period. Moreover, Canadian producers projected increases in production of 8.9 percent from 2001 to 2003. When Canadian consumption declined by 23 percent in the first quarter of 2002 compared with the first quarter of 2001, Canadian producers apparently made some adjustments to production, but primarily shifted sales to the US market, since subject imports were 14.6 percent higher in the later of the same comparable periods.

4.194 **Third-Country or Non-subject Imports.** Non-subject imports never accounted for more than 3.0 percent of apparent consumption; in contrast, subject imports accounted for at least 34 percent 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 percent of imports, while Canadian imports accounted for about 93 percent of all imports. Canada ignores the significance of the baseline in focusing on incremental increases in import volume. The USITC recognized that the incremental increase in subject import volume in mmbf between 1999 and 2001 was approximately the same as the increase in nonsubject import volume. However, placed in perspective, subject imports are responsible for an enormous volume of imports (18,483 mmbf in 2001) and accounting for about 34 percent of US apparent consumption in the 1999-2001 period, compared with higher valued non-subject imports, which never exceeded 1,378 mmbf or 2.6 percent of apparent domestic consumption.

4.195 Imports from Canada were subject to import restraints for most of the period of investigation; non-subject imports were not restrained. Canada's assertions regarding "projected rates of continued increases in third-country imports" are based entirely on its contention that what is relevant is the rate of increase, even when comparing small baselines to large baselines, and not the absolute volumes. Furthermore, Canada relies on the incorrect assumption that a "gap period" began in December 2001, even though subject imports were still subject to preliminary AD duties for the entire first quarter of 2002, which duties remained in place until April 2002. Canada fails to explain its basis for believing that any significant increase in non-subject imports would be imminent and how any likely imminent increase in such a small volume of non-subject imports relative to apparent consumption might rise to the level of having a causal impact on the domestic industry.

4.196 **Integration of North American Softwood Lumber Industry.** The USITC pointed out that "[n]o evidence whatsoever has been proffered to support speculative assertions that integrated firms will not harm their related companies." Canada contends that its assertions were "not speculation but a common-sense proposition," at least based on the facts in a completely unrelated case concerning a different product (pipe and tube). The USITC properly declined to rely on the evidence in an unrelated case for its findings in this case. Similarly, Canada fails to support its assertion that integration "would be even less likely to cause any adverse price effects." It relies only on its incorrect contention that the USITC found no price effects in its present material injury analysis.

4.197 Canada refers to the USITC's decision not to exclude from its analysis any domestic producers under the "related parties" provision under US law. In Canada's view, "this finding supports, rather than contradicts, the point that integrated producers are unlikely to import lumber in injurious volumes or at injurious prices." But, in this case, no related parties were excluded precisely because there was no evidence that they were "closely aligned" and likely to be shielded from harm. Furthermore, such claims about related firms says nothing at all about the impact of the integrated companies' operations on the remainder of the US industry or on the industry as a whole, which is the required focus of the injury analysis.

#### **4. CONCLUSION**

4.198 For the reasons stated above and in the First US Submission, Canada's claims are groundless. The United States therefore requests that the Panel reject Canada's claims in their entirety. In the event the Panel were to accept Canada's arguments, it nevertheless should decline Canada's requested "recommend[ation]," for the reasons stated in the original panel report.

#### **E. ORAL STATEMENTS OF CANADA**

4.199 The following summarizes Canada's arguments in its oral statements

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

###### **(A) INTRODUCTION**

4.200 Based on the totality of the factors considered, the Section 129 Determination is not consistent with Articles 3.7 and 3.5 of the AD Agreement and Articles 15.7 and 15.5 of the SCM Agreement. It does not bring the United States into compliance with the rulings and recommendations of the DSB. The problem for the United States is not lack of explanation but that the explanation given is neither reasoned nor adequate and the evidence relied on does not support the USITC's conclusions.

**(B) THE USITC'S FINDING OF A THREAT OF MATERIAL INJURY**

*(i) The Inconsistency Between The Negative Injury Determination And The Affirmative Threat Determination*

4.201 The USITC's negative present injury analysis was straightforward. The USITC found that lumber prices declined from 1999 to 2001 and, as a result, asked whether subject imports were a material cause of that price decline. Even though both the volume and market share of subject imports were found to be significant, the USITC found that subject imports were not a material cause "particularly in light of relatively stable market share" and because domestic US producers contributed to the excess supply that drove prices down.

4.202 As this Panel stated, the "change in circumstances" requirement in Articles 3.7 and 15.7 make it "critical ... 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". The USITC found that subject imports had not caused adverse price effects during the POI in light of relatively stable Canadian market share and the US industry's contributory role. Therefore, the USITC could not conclude that subject imports would cause adverse price effects in the imminent future without finding a material change in either one of these factors.

4.203 As the Panel stated, "In the absence of some increase in Canadian market share in the future, it is difficult to see how the [Commission] 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 significant and increased volume and market share". In the Final Determination, the USITC concluded only that subject imports would increase on an absolute basis during a period of "strong and improving demand" in the US lumber market. It failed to inquire whether this increase would lead to a significant increase in Canadian market share, or how the US industry would respond.

4.204 The United States does not dispute that the Final Determination failed to reconcile the affirmative threat finding with the negative present injury finding. The United States argues, in effect, that the USITC eliminated the inconsistency in its Section 129 Determination based on four new findings: (i) that the rate of increase in subject imports during the POI was "significant" even though it had made no such finding before; (ii) the Softwood Lumber Agreement that the USITC found "appears to have restrained the volume of subject imports at least to some extent" now had a "significant" restraining effect; (iii) US demand that the USITC characterized as "strong and improving" now has become "strong and relatively stable"; and (iv) the US industry, but not the Canadian industry, curbed overproduction at the end of the POI. No objective and unbiased investigating authority could reach these conclusions based on the record before the USITC.

*(ii) Factors Relating To The USITC's Conclusion That There Would Be A Substantial Increase In Imports*

4.205 The United States argues that the rate of increase in absolute volume during the POI was significant because the absolute baseline volume was large. However, market share, not volume was the key to the USITC's negative present injury determination, and the USITC found market share remained "relatively stable" – a finding that is inconsistent with the new finding that the "rate" of increase in volume was significant.

4.206 In emphasizing the USITC's new finding that the 2.8 percent *absolute* increase in subject imports over the POI "is a significant rate of increase" in the volume of imports, the USITC relied on essentially the same evidence cited in the Final Determination that this Panel found "at most ... support[s] a conclusion that imports of softwood lumber would continue at historical levels, and might increase somewhat, in keeping with demand, and consistent with historical patterns". As the Panel

recognized, the USITC did *not* find this increase to be “significant,” and the USITC cited no new evidence nor provided any reasoned or adequate explanation whatsoever in support of why the rate of increase had become significant. Moreover, the USITC’s substantive analysis continues to address the *absolute* increase in the volume of subject imports, rather than their *rate* of increase during that time. The actual “*rate* of increase” in the volume of imports year over year from 1999 to 2001 was essentially flat at 1.4 percent.

4.207 With respect to the first quarter of 2002, the United States tries to make much of the only new data regarding volume in the Section 129 proceeding: the “14.6 percent increase” in absolute volume of subject imports in the first quarter of 2002 compared to the same period in 2001. However, that increase still left Canadian market share within the “range” the USITC itself found to be “relatively stable” in coming to its negative present injury determination. The 34.7 percent Canadian market share in 1st quarter of 2002 represented only a 0.4 percentage point increase in Canadian market share over full year 2001. Furthermore, the data regarding the first quarter of 2002 can only be analyzed in context. There must be *some* recognition that the first quarter of 2002 was not a period of normal commercial conditions. The reason is obvious: the timing effects of the Gap Period – the period from December 2001 through the first quarter of 2002 – when provisional countervailing duty measures were withdrawn. As the US industry representatives acknowledged at the USITC’s hearing, the temporary absence of these measures resulted in a shift in shipments as Canadian producers anticipated the imposition of final measures.

4.208 The United States claims that there was no Gap Period because provisional measures in the anti-dumping proceeding were not removed. But the anti-dumping measures accounted for only one-third of the total measures imposed. The United States is effectively arguing that the completely anticipated and temporary removal of the 19 percent countervailing duty, two-thirds of the provisional measures, had no effect on the commercial incentives of Canadian importers. The United States’ argument is simply not credible.

4.209 Taken together, the evidence on volume trends and the USITC’s “new” finding of a “significant rate of increase” in subject imports do not support the conclusion of a substantial increase in imports in the imminent future, let alone one sufficient to increase Canadian market share beyond historical levels.

4.210 The United States relies heavily on the expiration of the SLA to support its volume finding. The USITC’s new finding diverges dramatically from its findings in the Final Determination. In its Final Determination, the USITC found that the SLA “appears to have restrained the volume of subject imports at least to some extent”. In the Section 129 Determination the USITC majority found the restraining effects of the SLA were “significant”. “Some” does not mean or equate to “significant”. The USITC itself understood this when it found in its negative present injury determination that the subject imports had “some” price effect but not a “significant” one. The USITC offers no reasoned or adequate explanation for contradicting itself.

4.211 The United States claims that Canada unduly focused on the USITC’s reliance on one study – the Stoner study. Canada focused on that study because it was the only new evidence concerning the SLA’s effect in the Section 129 proceeding. The US industry submitted it precisely because all the studies in the original record suffered from an obvious flaw: none of those studies addressed the final year of the SLA, so none of them addressed the central question of whether the SLA had a restraining effect *at the time of its expiration*. However, Stoner chose not to address the last year of the SLA specifically, and instead discussed only average effects over its full five-year period. Moreover, as the USITC Staff Report made clear, the Stoner study did not even establish the average effects it claimed. In its Section 129 Determination, the USITC never addressed this devastating critique by its own staff. Thus, the Stoner study, like the studies on the original record, simply could not support a finding of an imminent increase in imports once the SLA expired.

4.212 Canada has addressed each of the other arguments presented by the USITC relating to the effect of the SLA. In particular, the USITC has failed to acknowledge the evidence discussed by Commissioner Pearson that prices increased immediately after the expiration of the SLA and in the first quarter of 2002, two periods during which the USITC claimed that subject imports increased substantially. As Commissioner Pearson explained, the correlation between increasing US prices and increasing subject imports during these two periods shows that subject imports would not have a price suppressing or depressing effect in the imminent future.

4.213 The United States continues to claim that alleged increases in imports during periods of no import restraints indicated that, with the SLA gone, there would be an imminent substantial increase in imports. The USITC discussed this issue in the context of three periods – 1994 to 1996, April to August 2001, and the first quarter of 2002.

4.214 With respect to the 1994-1996 period, the US submissions do not contest that the Section 129 Determination does not address, much less cure, the problem that the Panel identified: the USITC failed to consider whether market conditions other than the lack of restraints led to the increase in imports during those years. With regard to April to August 2001, this Panel has already recognized the significant impact of “timing” on imports in that period. Nevertheless, the USITC continued to treat the April-to-August period on an aggregate basis. This aggregate analysis avoids the central question the Panel raised regarding this issue – whether the increase in imports represented simply a shift in their timing in response to commercial incentives. Consider March and April, where market share declined in the last month of the SLA, and then temporarily increased in the following month, just after the SLA expired. These month-to-month shifts are entirely consistent with the obvious explanation that importers adjusted the timing of their exports to avoid export restraints. Even the US industry acknowledged that the increase in imports in April 2001 reflected the incentive of Canadian producers to delay shipments until the second quarter of 2001 after the SLA expired.

4.215 Canada sees a timing effect again in July and August, as subject imports rose in July, the last month prior to the imposition of provisional CVD measures, and then declined in August after those measures were imposed. Yet the United States claims there is no relationship between these monthly market share shifts, the expiry of the SLA, and the approach of new trade restrictions in August 2001.

4.216 The United States now argues that the increase from 2000 to 2001 in absolute volume during April to August was significant because demand was “relatively flat” over this period. But it cites a demand number – a 0.4 percent increase – for all of 2001 rather than the April to August time period in question, when demand in fact increased 6.2 percent year over year. The data show that market share during these five months was within the historical range.

4.217 The USITC also claimed that the absolute volume increase during the April to August 2001 period cannot reflect “a shift in timing” because subject imports continued to increase even after the CVD bonding requirements were imposed in August 2001. This claim is wrong. Canadian market share declined between September and December when provisional measures were in place: 1.4 percentage points from the same period in 2000 and 0.8 percentage points from the average in 1998 through 2000. Thus the data on shipments in April to August, when placed in the context of shipments for the whole year, show that importers acted on the commercial incentive created by the US government to condense their shipments into this narrow window.

4.218 The USITC also failed to reconcile its conclusion concerning the April-to-August period with the USITC’s conclusion that it would not have found present injury even if subject imports had not been subject to provisional measures starting in August 2001. US law allows antidumping and countervailing duties to be imposed retroactively based on a USITC’s threat determination if the USITC also finds that it would have made an affirmative current injury determination “but for” the application of provisional measures. By the USITC’s own reasoning, its negative “but for” finding

means that imports would not have increased to injurious levels in the twelve months after the SLA expired even in the complete absence of provisional measures.

4.219 As for the third no restraint period – the first quarter of 2002 – the USITC failed to recognize that normal commercial conditions did not exist because it was the Gap Period with no countervailing duties. As Commissioner Pearson concluded, changes in volume during this period are explained by the imposition and removal of provisional measures. Even the US industry agreed, as reflected in its testimony in the Section 129 proceeding.

4.220 The Panel recognized that Canadian capacity was projected to increase by only a small amount in the imminent future and that increases during the POI had not resulted in a finding of a significant increase in subject imports. The United States argues that this factor does not matter because the USITC did not rely on it. Rather, it relied on sufficient disposable capacity and the assumption that projected increases in Canadian production would flow to the United States in higher percentages than Canadian producers projected.

4.221 Three comments need to be made here. 1. The evidence regarding excess capacity, a factor set out in Articles 3.7 and 15.7, *does not* support an affirmative threat determination. Instead of addressing this clear Panel finding, the USITC just ignores it. 2. The increase in unused Canadian capacity at the end of the POI reflects the fact that Canadian producers decreased production, and did so more than US producers. The USITC contradicts itself by claiming that decreases in Canadian production were inadequate, but the resultant unused productive capacity was excessive. It can't have it both ways. 3. The USITC's conclusion that Canadian producers would use previously unused capacity to substantially increase imports to the United States in the imminent future was predicated on its decision to discount Canadian producers' export projections. The USITC's rationale for discounting these projections was that they were inconsistent with historical export patterns. However, the Panel already concluded that these export projections were "well within the historical range". In addition, new evidence collected in the Section 129 proceeding shows that these projections were completely consistent with the historical average for the Canadian industry as a whole, which the USITC admitted in a footnote. Inexplicably, the USITC ignored both the Panel's finding and the new data that reconfirm the correctness of that finding.

4.222 A fundamental weakness of the USITC's threat finding in the Final Determination was that it was divorced from any consideration of demand. This weakness was particularly glaring given the USITC's finding that demand would be "strong and improving". Curiously, the United States implies that the "strong and improving demand" language is no longer relevant and then goes on to state that the Section 129 Determination "elaborated on but *did not change*" findings regarding forecasts for demand. To the extent that the United States has conceded that demand was "strong and improving", this case is over. It is over because the record contains no evidence that any increase in subject imports would outstrip strong and improving US demand. If there is no evidence that this historical pattern will alter, there is no support for a finding of a substantial increase in imports, much less for any finding that any increase in imports would cause significant price effects.

4.223 The evidence supports the USITC's original conclusion that US demand would be strong and improving. In its Section 129 Determination, the USITC was simply wrong in stating that the evidence "dispelled" any claims that there would be substantial growth in demand in the imminent future. The forecasts in the record for the Section 129 Determination all agreed that demand would improve in the 18 months after the USITC's vote in mid-2002.

4.224 RISI forecasted increases in lumber demand in the third and fourth quarters of 2002 of 2 percent and 6 percent, respectively, followed by an additional increase of 4 percent in 2003. This represents a cumulative increase over the 2002-2003 period of 5.3 percent. Clear Vision Associates forecasted increases in the third and fourth quarters of 2002 of 4 percent and 8 percent, respectively,

and a further 4.7 percent increase in 2003. This represents a cumulative increase over the 2002-2003 period of 8.6 percent.

4.225 The only “new” evidence cited in the Section 129 Determination is a less optimistic forecast from the original record: the November 2001 Bank of America report. This report was issued *five months* before the RISI and Clear Vision forecasts were issued in March 2002, and thus well before the US economy began its recovery from the post-9/11 downturn, as discussed in more detail in Canada's First Submission. Consistent with the observation of the USITC staff, the RISI and Clear Vision forecasts reflect the continuous *upward* revisions in forecasts in the first quarter of 2002. The USITC therefore could not have objectively concluded that the Bank of America forecast undermined its prior reliance on the RISI and Clear Vision forecasts in finding that demand would be “strong and improving” in the imminent future.

4.226 Nothing in the Section 129 Determination satisfies the conditions identified by this Panel as necessary in order to have demand forecasts support an affirmative threat finding. The evidence supports the continuation of the non-injurious status quo.

(iii) *Likely Price Effects*

4.227 The USITC's future price effects finding remains dependent on its finding of a likely future substantial increase in imports. As Canada has just shown, this remains unsupported. In addition, the record does not support a finding that there would be a significant increase in Canadian market share, which as the Panel has already held, is necessary to support a finding that subject imports would cause significant price depression or suppression in the future.

4.228 The only new rationale the USITC offered in the Section 129 Determination for its renewed price effects finding is its so-called “price trends analysis”. Four points demonstrate the flaws in this analysis: (i) there was no evidence of price underselling or lost sales or lost revenues due to subject imports; (ii) the new “price trends analysis” was no different from the Final Determination's reference to price trends, which could not support an affirmative finding; (iii) price declines in the last two quarters of 2001 (although they reflect improvements over the same quarters in 2000) say nothing about “whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices” or about the *cause* of the decline in prices; and (iv) prices rose steadily in the first quarter of 2002 so that by the end of the POI – mid-April 2002 – prices were more than 10 percent above prior year levels, and higher than the fourth quarter 2001 lows by roughly the same amount.

4.229 In response, the United States claims that Canada's discussion of the pricing data in the Section 129 Determination focuses on first quarter 2002 data and claims that this focus is an example of Canada's snapshot approach. As the brief summary of Canada's submissions shows, the US characterization of Canada's arguments here, as elsewhere, is inaccurate.

4.230 The United States engages in an extensive discussion of pricing that highlights the years 1999 and 2000, which at best have a limited relevance to a threat determination being made in May 2002. The United States does acknowledge that prices rose in the first quarter of 2002, but tries to dismiss that increase as a temporary trend based on a USITC finding, ironically, of an increase in demand. It also ignores, as Commissioner Pearson recognized, that this increase in prices occurred while imports were increasing – a fact inconsistent with the USITC's finding that its predicted increase in subject imports would cause significant adverse price effects. The USITC has identified no evidence that the trend in prices would reverse, particularly given the forecasts discussed by Canada that predicted continued increases in demand in the second half of 2002 and 2003.

(iv) *Vulnerability of the Domestic Industry*

4.231 The US discussion of vulnerability of the domestic industry is replete with references to data that show that, to the extent that the US industry suffered deterioration, it did so predominantly in 2000. However, the data for the last 12 months of the POI tell a dramatically different story – a story of continuous improvement that accelerates in the first quarter of 2002. During the POI, when the USITC found that the US industry was not injured, the US industry moved from a negative operating margin in 2000 and the first quarter of 2001 to a positive operating margin of 3.7 percent for the last three quarters of 2001. This improving trend continued in the first quarter of 2002, when its operating margin rose to 6.2 percent. Thus, the US industry achieved a positive margin of 4.3 percent for the last full year of the POI. This is not the picture of an industry on the “brink” of experiencing material injury.

4.232 The USITC tried to discount this evidence on the basis that “financial data for a single quarter ... is not necessarily an accurate indicator of the industry’s performance for the entire year”. However, it is data for the entire final year of the POI that the USITC ignores.

4.233 These financial data from the full 12-month period immediately preceding the USITC’s vote point away not only from a vulnerability finding but also from a threat finding. Canada has properly put more emphasis on evidence from the last year of the POI, as opposed to the earlier part of the POI, because this case involves a threat determination, not a present injury determination. In contrast, the USITC relied on data from 1999 to 2000. But this case is about what the evidence in the record shows about the imminent future and, therefore, evidence from 2001 and 2002 has to be more probative than evidence from 1999 and 2000.

4.234 Thus, when considered in the context of the totality of factors considered, it is clear that the USITC’s renewed affirmative finding of threat of material injury based on a likely substantial increase in subject imports, is not a finding that could have been reached by an objective and unbiased investigating authority. It should, therefore, be found to be inconsistent with Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement.

**(C) THE USITC’S CONCLUSION REGARDING CAUSAL RELATIONSHIP**

4.235 Without citation, the United States claims that Canada has failed to appreciate that the USITC’s causation analysis was integrated into its analysis of threat factors. However, the USITC itself never explained its causation analysis in this manner. The USITC did explain its causal analysis in a one-page section of its Section 129 Determination, entitled “Likely Substantial Increases in Subject Imports at Depressed Prices Threaten to Injure the Domestic Industry in the Imminent Future”. The causal analysis in the Section 129 Determination, like its predecessor, rests upon the conclusion that Canadian imports would increase substantially. Because this element of the causal analysis is not supported, the causal analysis itself is not consistent with Articles 3.5 and 15.5.

4.236 The USITC originally found that subject imports were not a material cause of injury because the US lumber industry contributed to overproduction. In its Section 129 Determination, the USITC states that subject imports, but not US lumber, would be a material cause of imminent price declines because “US producers have brought their production in line with consumption” but Canadian producers have not. However, the undisputed evidence in the USITC’s own staff report conclusively proved that Canadian lumber companies had reduced production *more* – not less – in 2001 than US companies reduced their production. According to the data collected in the Section 129 proceeding, from 2000 to 2001, Canadian production declined 4.3 percent while US production declined 3.9 percent. Indeed, relative overproduction in the US industry accelerated even more in the first quarter of 2002: in the months immediately preceding the USITC’s decision, US production was up nearly 5 percent, while Canadian production was down by over 2 percent. The United States has attempted to minimize this central fact by calling it a snapshot. If it were only a snapshot, it would be a very



compelling one, coming at the end of the POI, the most relevant time period for making a threat determination. But it was far more than a snapshot because it continued a trend that began in 2001.

4.237 The importance of these data is difficult to overstate. By the USITC's own reasoning, these data show that the central problem facing the US industry was not Canadian overproduction at the end of the POI, as the USITC found, but rather US overproduction. The record clearly establishes that Canadian producers curbed production more in 2001 and in the first quarter of 2002. As a result, the US industry faced a threat at the end of the POI, not from Canadian producers, but from its own oversupply.

4.238 The USITC's conclusion in the Section 129 Determination that US producers had curbed oversupply at the end of the POI was based on the same Bank of America report that this Panel has already indicated was insufficient to support that claim. To be sure, the USITC has embellished its defence of this claim by asserting that it is now based on other factors in addition to the Bank of America report. However, the only factors the United States mentions are US production declines from 1999 and the fairly level US production capacity in the POI.

4.239 It is difficult to see how production declines by US producers between 1999 and 2000 are relevant to the issue of likely US production after the first quarter of 2002. It is especially hard to see how US production declines in that earlier period can be *more* relevant than the comparative production data in 2001 and early 2002 that the USITC dismissed.

4.240 Nor does the "fairly level" use by the US industry of its production capacity in the POI provide any basis for the view that domestic oversupply had been curbed. This is especially true since the USITC recognized, in its negative present injury determination, that US overproduction precluded any causation finding in spite of this "fairly level" use of production capacity.

4.241 The information in the record on the relative trends in production at the end of the POI certainly undermines the very basis of the threat determination. It also makes untenable the notion that the threat of domestic oversupply, a known factor during the POI, had simply disappeared.

#### **(D) THE USITC'S CONCLUSION REGARDING "OTHER FACTORS"**

4.242 Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement require an investigating authority to examine any known factors other than the imports under investigation. It must ensure that any injury caused by other known factors is not attributed to the subject imports. In the context of the AD Agreement, the Appellate Body has said: "Logically, such an assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports".

4.243 In its report, the Panel highlighted "the fundamental significance of the non-attribution requirement" and expressed "serious concerns" about the US failure to conduct such an analysis. To be sure that its meaning was clear, the Panel provided examples of other known factors that should be addressed by the USITC. These included the impact of third country imports, demand forecasts, and the increasing integration of the North American lumber market. The Panel singled out one key factor that it called "a glaring omission". The United States had failed to discuss the threat of domestic oversupply. This was a glaring omission on the facts of this case because the USITC itself recognized domestic oversupply as a contributing factor in the price declines and vulnerability of the domestic industry in 2000 and early 2001. It was also a glaring omission because the USITC itself had identified future oversupply in the market as likely to cause price effects and thereby injure the domestic industry in the imminent future.

4.244 How did the USITC respond to the guidance provided by the Panel? In its Section 129 Determination, the USITC denied the need to conduct a non-attribution analysis, finding that only

subject imports threatened injury to the US industry. In its submissions to this Panel, the United States has again denied any obligation to separate and distinguish the threat it attributed to Canadian imports from the threat posed by other factors.

4.245 Canada will first respond to two mischaracterizations of Canada's position on non-attribution by the United States. First, Canada has not argued that a non-attribution analysis is required in all cases. Canada agrees with the Appellate Body in *EC – Pipe Fittings* that no non-attribution analysis is required in the absence of any evidence of the existence of other causal factors. In this instance, however, ample evidence in the record for the existence of other factors helps explain the Panel's original "serious concern" about non-attribution. Second, Canada does not contend that a particular methodology must be used in any non-attribution analysis. Canada recognizes – as the Appellate Body found in *EC – Pipe Fittings* and *US – Hot Rolled Steel* – that a non-attribution analysis is highly fact-specific. *US – Hot Rolled Steel* states that the objective of the non-attribution requirement is to separate and distinguish the threat of injury caused by the imports under investigation from the threat of injury posed by other known factors. To separate and distinguish is not a methodology. What it describes is the fundamental non-attribution obligation under the AD and SCM Agreements.

4.246 The Section 129 Determination's failure is different from that of the Final Determination in that the Section 129 Determination does acknowledge other factors relevant to causation, including those identified by the Panel. The USITC discussed these factors but only to deny their existence as other factors. The USITC's conclusion that no other factor posed a threat to the US industry is contradicted by the record and cannot be reconciled with the USITC's negative present injury determination. It is simply not responsive to the Panel's "serious concerns" about the failure to conduct a proper non-attribution analysis.

4.247 What were the other factors? Two of them have already been discussed: the interplay between demand and volume and, the most critical factor, domestic oversupply. A third is increasing integration in the North American lumber industry. Here, the United States does not rebut Canada's point that the USITC's own consistent decisions prior to this case recognize that importers who are also domestic producers and aligned with the domestic industry are not going to sell imports at prices or in quantities that will materially injure the domestic industry. Canada agrees that another factor – timber shortages during the imminent future – is not another known factor for the US industry, which has ample supply and capacity to keep pace with improving US demand. The US discussion of a fifth known factor, engineered wood products – or EWPs – ignores the evidence that EWPs have a small but growing share of the US market and that every \$100 in EWP sales causes a loss of \$66 in sales of softwood lumber.

4.248 The balance of this presentation will focus on third country imports and their relationship to other sources of supply. This merits emphasis because this case, as framed by the United States, is all about the alleged threat of oversupply.

4.249 The USITC's conclusion that third country imports were not a causal factor does not stand up to scrutiny. At the very least, the USITC's reasons for dismissing third country imports are inconsistent with the reasoning in its threat analysis for Canadian imports. The United States now recognizes that the absolute increase in non-subject imports was approximately the same as the increase in Canadian imports over the POI. However, it considers that this increase in Canadian imports foreshadows an imminent material threat while this same increase in third country imports is immaterial, negligible and non-existent. This is a stunning double standard.

4.250 The United States has offered no rebuttal to Canada's argument – based on the USITC's own staff report – that third country imports increased from 1998 through 2001 at a dramatic 30 percent annual rate, which doubled their market share. In contrast, the market share of Canadian producers barely fluctuated. The United States has offered no reason why the dramatic rate of increase in non-subject imports would level off in the imminent future. This is especially disturbing because the rate

of increase actually climbed to 50 percent in the first quarter of 2002. Third country imports were becoming more significant, not less so.

4.251 The United States has attempted to excuse its failure to separate and distinguish the threat of injury from third country imports by noting the uncontested fact that third country market share is dwarfed by Canadian market share. The United States also stresses – in its Section 129 Determination and in its submissions to this panel – the fact that no one country is a dominant source of third country imports. With respect, these points are completely irrelevant. What is relevant is the very substantial rate of increase in third country imports and their impact on prices and the market share held by the US industry. From 1996 to 2001, Canadian market share declined by 1.6 percentage points, while third country market share increased by the exact same amount as reflected on this slide.

4.252 Third country imports must be considered in conjunction with sources of supply other than Canadian imports. The Appellate Body in *EC - Pipe Fittings* recognized that factual circumstances may require cumulation of other known factors in order to comply with the non-attribution requirement. This is such a case with respect to at least the other sources of supply in the market. The primary concern of the USITC is volume and oversupply. The data are available in the record in a way that makes it easy to separate and distinguish between supply from Canada and supply from all other sources during the POI: third country imports and the domestic industry itself.

4.253 The USITC chose not to undertake such a cumulative analysis. Where the facts strongly favour a cumulative assessment of the likely threat posed by other known supply sources, an objective and unbiased investigating authority should provide a rationale for not doing so.

4.254 The Section 129 Determination is an exercise in avoidance when it comes to non-attribution. The failure of the United States to conduct a proper non-attribution analysis, on the facts of this case, is a violation of Articles 3.5 and 15.5.

## **(E) CONCLUSION**

4.255 The USITC was only able to come to an affirmative threat determination by ignoring critical facts that undermined its conclusion that subject imports threatened injury to the US industry.

4.256 With respect to the USITC's conclusion that imports would increase significantly, the record facts ignored by the USITC include:

Canadian imports did not exhibit a significant rate of increase and in fact remained within historical patterns throughout the POI; - the SLA did not have a “significant restraining effect”;  
increases in Canadian imports after the SLA expired reflected nothing more than a shift in the timing of shipments and had no material price effect;

factors such as export capacity, production and production projections and the export orientation of Canadian producers did not support a finding that Canadian producers would oversupply the US market;

US demand for softwood lumber would be “strong and improving”.

the USITC's other findings essential to its threat determination, as well as its causation conclusions, failed to consider:

alleged increased imports from Canada would not negatively affect US lumber prices;

in the first quarter of 2002 the US industry was neither injured nor particularly vulnerable;

in the last year of the POI, Canadian producers decreased production more than US producers, and, in fact, in the first quarter of 2002, Canadian producers continued to reduce production while US production increased;

the USITC never conducted a proper non-attribution analysis and with no credible basis found that the only problem threatening the US industry was imports from Canada.

4.257 For these reasons, Canada requests that the Panel find the USITC's Section 129 Determination, and the definitive anti-dumping and countervailing duty orders that remain in effect, inconsistent with US obligations under Articles 3.5 and 3.7 of the AD Agreement and Articles 15.5 and 15.7 of the SCM Agreement. As a result, the United States has not brought itself into compliance with the rulings and recommendations of the DSB. Finally, 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 injury, ceasing to impose anti-dumping and countervailing duties, and returning cash deposits imposed as a result of US actions in this matter.

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

4.258 In Canada's Closing Statement, Canada will do three things. First, Canada will respond briefly to the five general attacks on its position that the United States made at the beginning of its Oral Statement. Second, Canada will rebut five specific assertions in the US Oral Statement. And third, Canada will briefly summarize why the Panel should conclude that the Section 129 Determination is WTO-inconsistent and does not bring the United States into compliance with the rulings and recommendations of the DSB.

4.259 The first general attack in the US Oral Statement is that Canada is wrong to say that the USITC changed its position on several issues, including US demand projections, the SLA effect, and the rate of increase in subject imports. If the United States were correct that the USITC did not change any of its findings (and it is not, for all the reasons explained by Canada), that would only mean that the USITC simply made the same findings on essentially the same record as in the Section 129 Determination, as it had in its Final Determination. That would make it all the more clear that it did not cure the problems that this Panel identified in its Report.

4.260 Second, the United States accuses Canada of focusing on snapshots. This claim is false. One clear example involves the US argument that Canada focused only on the improvement in the financial condition of the US industry in the first quarter of 2002, when in fact, Canada has shown that the US industry's position had improved substantially for the entire 12 months after the SLA expired.<sup>23</sup> Another example involves relative changes in US and Canadian production: not only did Canadian mills reduce production in the first quarter of 2002, while US mills increased production, but Canadian mills reduced production more in 2001 as well.<sup>24</sup>

4.261 Third, the United States faults Canada for ignoring baselines during the POI and focusing on incremental changes from those baselines. Canada focused on changes from the baselines because this is a threat case, and as this Panel stated, the "change in circumstances" requirement in Articles 3.7 and 15.7 means that the investigating authority must demonstrate how the future will be different from the POI when subject imports did not cause material injury.<sup>25</sup> Here, the USITC found that subject imports did not cause material injury during the POI, even though imports were significant by any measure. As the Panel recognized, if market share would not increase significantly in the imminent future, subject imports would pose no threat, just as they caused no present injury.<sup>26</sup> Similarly, if the US industry continued to contribute to excess supply in the United States in the imminent future, as it did in the POI, subject imports could not threaten material injury.

4.262 The United States' fourth general point is related to its third one – that Canada compares percentage increases and decreases even though the baselines are different. The fact that the baselines are different is precisely why it is appropriate, and indeed necessary, to compare percentage increases and decreases. Otherwise, comparisons of changes from the baseline are meaningless. For example,

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<sup>23</sup> See Slide 6 accompanying Canada's Oral Statement.

<sup>24</sup> See Slide 7 accompanying Canada's Oral Statement.

<sup>25</sup> See Panel Report, at para. 7.58.

<sup>26</sup> *Ibid.*, at paras. 7.95 and 7.134.

the United States claims that Canada's analysis of production trends is flawed, because the baseline production for each country is different.<sup>27</sup> Of course the baselines are different. But that point is completely irrelevant, because what is at issue in the causal analysis are the relative trend lines in production – down for the Canadian industry, up for the US industry.

4.263 Fifth, the United States accuses Canada of ignoring the interrelationship between factors relevant to present injury and those relevant to the threat of injury. Nothing could be further from the truth. In fact, one cornerstone of Canada's submissions is that the USITC did not, and could not, reconcile its affirmative threat finding with its negative present injury finding.

4.264 Canada now turns to its rebuttal of five specific assertions in the US Oral Statement.

4.265 First, the United States asserts that Canadian producers' export projections were unreliable because the incremental increases in production projected for 2002 and 2003 were not distributed among domestic and export markets in the same percentages as total production for prior years.<sup>28</sup> The United States made exactly the same argument in the original proceeding before this Panel.<sup>29</sup> The Panel recognized the key point: the projected distribution of total production was completely consistent with overall historical experience.<sup>30</sup> Evidence in the Section 129 proceeding reconfirmed the correctness of that finding.<sup>31</sup> In any event, even if the predicted incremental production increases would be distributed in the same way as total production in prior years, the USITC did not find that the predicted increase in total subject imports would outstrip improving US demand and cause material price effects.

4.266 Second, the United States asserts that there were "sharp declines in US housing starts in March 2002".<sup>32</sup> However, the United States does not acknowledge that March 2002 housing starts were among the highest monthly totals for the preceding two years, and that housing starts for the entire first quarter of 2002 were above the first quarters of 2000 and 2001. This is discussed in more detail in Canada's First Written Submission.<sup>33</sup>

4.267 Third, the United States asserts that Canada improperly analyzed projected US demand because it did not consider full-year projections for all of 2002. With respect, this claim is nonsensical. Only projections for the second half of 2002 are relevant because only the second half was in the imminent future after the USITC's vote in May 2002.

4.268 Fourth, the United States asserts that the evidence collected in the Section 129 proceeding "was taken into account in the Section 129 Determination".<sup>34</sup> However, the USITC sought to dismiss virtually all of the new evidence, which contradicted several key findings supporting its affirmative threat determination. Ironically, the USITC reopened the record "primarily to provide a more complete data series for the period closest to the Commission's original determination".<sup>35</sup>

4.269 Fifth, the United States asserts that a non-attribution analysis considers whether another known factor "constitutes more than a tangential or minimal cause of injury or threat".<sup>36</sup> The Appellate Body rejected this argument in *US – Steel Safeguards* when it stated:

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<sup>27</sup> US Oral Statement, at para. 14.

<sup>28</sup> *Ibid.*, at para. 35.

<sup>29</sup> See Panel Report, at para. 4.324.

<sup>30</sup> *Ibid.*, at paras. 7.91 and 7.92.

<sup>31</sup> See Slide 4 accompanying Canada's Oral Statement.

<sup>32</sup> US Oral Statement, at para. 48.

<sup>33</sup> See Canada's First Written Submission, at paras. 92 and 109.

<sup>34</sup> US Oral Statement, at para. 9.

<sup>35</sup> Section 129 Determination, at 7.

<sup>36</sup> US Oral Statement, at para. 37.

we did not rule [in EC – Pipe Fittings] that minimal (or not significant) factors need not be considered by the competent authorities in conducting non-attribution analyses. Rather, we ruled that only factors that have been found to exist need be taken into account in the non-attribution analysis.<sup>37</sup>

4.270 Further, it is simply not credible to assert that other sources of supply – in a case focusing on oversupply – are of “tangential” concern. The USITC’s non-attribution analysis still fails to separate and distinguish the impact of other known factors from the effect of subject imports.

4.271 Finally, Canada would like to summarize why the Section 129 Determination is not WTO-consistent and does not bring the United States into compliance with the rulings and recommendations of the DSB.

4.272 Canada is in complete agreement with the United States on one important point: in this case, as it did in the original case, the Panel should assess whether the USITC’s determination was supported by the “totality of the factors considered”.<sup>38</sup> As the Panel stated in its original report:

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.<sup>39</sup>

4.273 As Canada has demonstrated, the totality of the factors in this case do not demonstrate a threat of material injury. The USITC found that as of May 2002, the US industry was not suffering material injury by reason of subject imports. Thus, the pertinent question is whether trends at that time indicated a change from the status quo such that subject imports would cause material injury to the US industry in the imminent future. The answer is no. Demand was rising. Prices were rising. Every indicia of domestic industry performance, including profitability, was improving. Canadian producers had curbed their production more than the US industry. All the evidence suggested that Canadian share of the US market would remain relatively stable and well within its historical range.

4.274 In sum, the Section 129 Determination fails to comply with the rulings and recommendations of the DSB, and to satisfy the requirements of Articles 3.7 and 3.5 of the AD Agreement and Articles 15.7 and 15.5 of the SCM Agreement. Canada respectfully requests that the Panel so find.

#### F. ORAL STATEMENTS OF THE UNITED STATES

4.275 The following summarizes the United States' arguments in its oral statements

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

4.276 In this Article 21.5 proceeding, the measure at issue is the measure taken by the USITC to comply with the recommendations and rulings of the Dispute Settlement Body in the underlying dispute. Following the adoption of those recommendations and rulings, the USITC undertook a four-month-long process that involved reopening its evidentiary record and revising its analysis to develop a determination consistent with US obligations under the *AD* and *SCM Agreements*. Its new determination (referred to here as the “Section 129 Determination”) concluded that an industry in the United States is threatened with material injury by reason of softwood lumber imports from Canada found to be subsidized and sold in the United States at less than fair value. In reaching that

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<sup>37</sup> *United States - Definitive Safeguard Measures on Imports of Certain Steel Products*, Report of the Appellate Body, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, at para. 491.

<sup>38</sup> US Oral Statement, at para. 16.

<sup>39</sup> Panel Report, at para. 7.69.

conclusion, the USITC took careful account of the findings of the Panel in the underlying dispute. In particular, the USITC recognized that central to those findings was a concern about the explanation provided by the USITC of the evidence it relied upon and its analysis in the original determination. In its Section 129 Determination, the USITC relied on additional evidence from the period of investigation, engaged in analysis of the additional evidence as well as further analysis of the evidence from the original proceeding, and elaborated on and clarified its reasoning.

4.277 The question now is whether the Section 129 Determination is consistent with the obligations of the United States under Articles 3.5 and 3.7 of the *AD Agreement* and Articles 15.5 and 15.7 of the *SCM Agreement*. The answer, as demonstrated in the United States' written submissions and will reinforce at the meeting with the Panel, is "yes."

4.278 In examining the question at hand, the Panel is not being asked what conclusions it would have reached had it been the investigating authority. As in the underlying proceeding, the Panel is being asked "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." There does not appear to be any disagreement that this is the appropriate standard of review. Nor does there appear to be any disagreement that it is Canada that bears the burden of proving that the conclusions reached by the USITC could not have been reached by an unbiased and objective decision maker.

4.279 Canada has not met that burden and, indeed, cannot do so. In the United States' written submissions, the United States demonstrated in detail that the Section 129 Determination is consistent with US obligations under the *AD* and *SCM Agreements*. The United States' presentation at the meeting with the Panel will focus on two things. First, the United States will highlight certain errors underlying Canada's challenge to the Section 129 Determination. Second, the United States will highlight how the USITC addressed each of the original panel's concerns – contrary to what Canada asserts at paragraph 7 of its first submission and paragraph 17 of its second submission – and, in doing so, issued a determination that is consistent with US obligations under the covered agreements.

4.280 In reviewing the Section 129 Determination, it is important to bear in mind that the original panel did not compel the USITC to make a negative threat of injury determination. Appropriately, it did not take a position on what the USITC should or should not determine. Rather, it made a finding about the relationship between the combination of the evidence and reasoning relied upon by the USITC – as explained in the USITC's original determination – on the one hand, and the conclusion the USITC reached, on the other. In fact, the original panel expressly declined Canada's request that it go further and suggest a particular form of implementation. Yet, Canada persists in maintaining that "only a negative determination would be consistent with the Panel's findings and logic and the underlying evidence."

4.281 In view of the original panel's findings, the USITC reconsidered its analysis and articulated more reasoned and detailed explanations for issues material to its determination, thus making its decisional path reasonably discernable. Moreover, in order to better address issues raised by the original panel report regarding the imminent future, the USITC reopened the record to gather additional information (from public data sources and from questionnaires sent to domestic producers and Canadian producers). The new information was used to supplement the information gathered in the original investigations.

4.282 Paradoxically, Canada questions the USITC's collection of additional information even as it insists that the original USITC determination suffered from a lack of evidentiary support. Equally paradoxically, the majority of Canadian producers either expressly refused to answer, or simply did not respond to, requests in the Section 129 proceeding for additional data. It is difficult for the United States to see how a party can complain that a determination lacks evidentiary support at the same time that its own constituents have openly obstructed efforts to more fully develop the record. In any

event, notwithstanding this obstruction, the USITC's reopening of the record did yield additional evidence which was taken into account in the Section 129 Determination. The USITC also gathered information at a public hearing and from the written comments submitted by parties to the proceeding.

4.283 The additional information that the USITC collected in its Section 129 proceeding, coupled with the additional analysis it undertook and the further explanation it articulated, resulted in a new determination, which is consistent with US obligations under the covered agreements. Before examining the highlights of that new determination, the United States briefly addresses a number of overarching themes in Canada's portrayal of the new determination as inconsistent with US obligations.

4.284 **First**, in both of its written submissions, Canada makes a point of cataloguing what it calls "unacknowledged or unexplained shifts" in the USITC's conclusions from the original determination to the Section 129 Determination. In fact, examples that Canada highlights do not amount to shifts in conclusions at all. What Canada has done is mischaracterize the USITC's analysis in the original determination, the Section 129 Determination, or both and then assert the existence of a "shift." A good illustration of this is Canada's assertion with respect to the USITC's findings on demand forecasts in the US market. Canada states that there was a shift from a finding that demand would be "strong and improving" to a finding that demand would be essentially unchanged. In fact, the USITC's findings on demand forecasts did not change at all from the original determination to the Section 129 Determination. In both determinations, the USITC found that demand for softwood lumber is forecast to remain relatively unchanged or increase slightly in 2002, followed by increases in 2003 as the US economy rebounds from recession.

4.285 **Second**, Canada's arguments generally avoid discussion of specific data. Typically, in discussing a particular quantitative indicator, Canada provides a snapshot focus on an incremental increase or decrease in that indicator that it views as favorable to its assertions, often disregarding the totality of the evidence in the record on a particular issue, let alone the record as a whole. A good example of this appears at paragraph 116 of Canada's first submission, where Canada focuses narrowly on the incremental change in Canadian and US production in the first quarter of 2002 compared with first quarter 2001. Canada's discussion of this comparison fails to take account of relevant context, such as prior increases and decreases in each country's production levels. It also ignores the 14.6 percent increase in subject imports in the first quarter of 2002.

4.286 **Third**, Canada ignores the significance of the absolute size of baseline volume, whether of imports or production. Instead, Canada repeatedly focuses on incremental percentage increases or decreases in volume. In doing so, Canada overlooks the crucial starting point – the volume that existed prior to those incremental increases or decreases. It is logically impossible to draw a meaningful conclusion from a given percentage increase or decrease in volume without taking into account the starting point.

4.287 **Fourth**, Canada frequently compares a percentage increase or decrease in one number – say, US production – with a percentage increase or decrease in another number – say, Canadian production – even though the two numbers may not be comparable, because each may be associated with a different baseline. Moreover, a comparison that involves only a snapshot focus on one incremental change can be misleading if not placed in the perspective of the entirety of the evidence. More meaningful are comparisons between percentage changes where the changes are occurring over a common baseline – such as a comparison of the share that producers in each of two countries have in the market of an importing country, where the baseline for each is the market of the importing country. For example, a comparison of US market share shows subject imports with a 34.7 percent share of this market, with non-subject imports never exceeding 3 percent of apparent US consumption.



4.288 **Finally**, Canada ignores the interrelationship between factors relevant to the present injury analysis and those relevant to the threat of injury. An important distinction between the original determination and the Section 129 Determination is the absence of discrete “present injury” and “threat of injury” sections in the latter. Rather, in the Section 129 Determination, the USITC discussed the evidence in a holistic way, deliberately avoiding any suggestion that some evidence was only relevant to present injury and other evidence only relevant to threat. Canada completely ignores this difference between the original determination and the Section 129 Determination.

4.289 Moreover, this is not the only instance of Canada urging a piece-meal assessment of the evidence, disregarding the way different evidence fits together. For example, Canada suggests considering the volume of subject imports in the abstract rather than more meaningfully in the context of the expiration of the Softwood Lumber Agreement (“SLA”) and the increase in imports during periods of no trade restraints. In rejecting this approach to analyzing the evidence in the underlying dispute, the original panel recognized that the threat factors “are thoroughly intertwined with” the present injury factors and that the determination of threat must be based on the “totality of the factors considered.” The same principle applies to the present review.

4.290 *Likelihood of Substantially Increased Imports.* The Panel Report recognized that subject imports already were at significant levels in terms of absolute volume and in terms of market share, but questioned whether the USITC relied on a significant rate of increase during the period of investigation as support for its conclusion that subject imports would increase substantially in the future. The Panel Report also found that the USITC did not address why the expiration of the SLA would result in a further substantial increase in imports, rather than a reallocation of imports from non-covered to previously covered provinces or merely a shift in timing of imports to avoid duties associated with new antidumping and countervailing duty petitions.

4.291 In the Section 129 Determination, the USITC evaluated the significance of the volume of subject imports and increases in imports in context, which included taking into account the significant restraining effect of the SLA and the impact that the expiration of that agreement would have on the market for softwood lumber, and analyzing import trends before and during the period of investigation, specifically in the context of the prevailing market conditions.

4.292 *Volume of Imports Already Significant and Likely to Increase Substantially in the Imminent Future.* The USITC’s analysis began with the simple fact that subject import volumes already were at significant levels during the investigative period – accounting for between 33.2 percent and 34.7 percent of the US market. In the Section 129 Determination, the USITC also found that the 2.8 percent rate of increase from 1999 to 2001 “is a significant rate of increase when the baseline volume is already so significant.” Moreover, the USITC recognized that this 2.8 percent increase occurred even with the restraining effect of the SLA in place and even though apparent US consumption had declined slightly, by 0.4 percent. Canada focuses on the percentage without regard to the enormous size of the baseline, the SLA’s restraining effects, and the relatively flat demand for softwood lumber.

4.293 Even more telling, there was an even greater increase in subject imports at the end of the period of investigation, when such imports were no longer subject to the SLA, including when they were not yet subject to preliminary antidumping or countervailing duties. There is a pattern of substantially increasing subject imports at the end of the period of investigation, increases of 2.4 percent from 2000 to 2001, 4.9 percent from April to December 2001, and 14.6 percent when the first quarter of 2002 is compared to the first quarter of 2001.

4.294 The 14.6 percent increase in the first quarter of 2002 compared to the first quarter of 2001 occurred while apparent US consumption increased by only 9.7 percent. Accordingly, market share was higher at 34.7 percent in the first quarter of 2002 compared with 33.2 percent in the first quarter of 2001. Canada’s theory that “opposite commercial incentives” existed in these two quarters misses

the point that subject imports still were 6.2 percent higher in the first quarter of 2002 compared with the first quarter of 2000, while apparent US consumption declined between those two quarters by 2.3 percent.

4.295 *The SLA had a Restraining Effect on Subject Imports.* To place subject imports in the appropriate context, the USITC considered the restraining effects of the SLA on subject imports. In particular, in the Section 129 Determination, the USITC considered evidence demonstrating that the constraints on the volume of subject imports resulted in higher prices for such imports and higher costs for construction than in the absence of the SLA. For example, respondents estimated that increases in prices caused by the SLA added about \$50 per mbf to the average price of framing lumber, which translated into increasing the cost of a typical new home by \$1,000. In addition, the USITC compared prices in Toronto, Canada to those in the US Great Lakes region and found that “the SLA restrained Canada’s exports to the United States, increasing supply in Canada and resulting in a widening gap between US and Canadian prices.”

4.296 Canada misleadingly implies that, since a portion of one of the quotas provided for under the SLA went unused in the final year of the SLA, this means that subject imports declined in the last year of the SLA. They did not. Moreover, in each year during the pendency of the SLA, including 2000-2001, Canadian producers exported significant quantities of softwood lumber under the \$100 fee quota and significant quantities of “bonus” exports.

4.297 The redistribution theory – that is, the theory that termination of the SLA simply would cause Canadian exports to shift from provinces not covered by the SLA to provinces that were covered – also is not supported by the facts. When the expiration of the SLA left no restraint on imports from any of the Canadian provinces, imports from the formerly covered provinces increased, but imports continued at near SLA levels from the non-covered provinces as well, resulting in an overall increase in subject imports.

4.298 *During Periods of No Import Restraints, There Were Substantial Increases in Subject Imports.* To place subject imports in context in its Section 129 Determination, the USITC considered the import trends during periods when such imports were not subject to some type of restraint. During the period following expiration of the SLA (April 2001) and before suspension of liquidation of softwood lumber entries due to the investigation (August 2001), subject import volume was substantially higher as compared with import volumes over the same period in each year from 1998 to 2000. The subject import volume in the April to August 2001 period was higher by a factor ranging from 9.2 percent to 12.3 percent. While the rate of increase in imports slowed when bonding requirements associated with the preliminary countervailing duties were imposed in August 2001, subject imports still entered the US market in the April-December 2001 period at a rate 4.9 percent higher than in the comparable 2000 period. In contrast, subject imports increased by 2.8 percent from 1999 to 2001. The evidence in the Section 129 proceeding demonstrated an even more significant increase of 14.6 percent for the first quarter of 2002 compared with the first quarter of 2001, and a significant increase of 6.2 percent compared with the first quarter of 2000.

4.299 Canada’s arguments rest on an alleged “four-month ‘gap’ in the application of provisional measures.” But that alleged gap did not exist. Bonding requirements associated with preliminary antidumping duty findings did not expire until April 2002. Nor does the supposed existence of “opposite commercial incentives” in the first quarters of 2002 and 2001, respectively, explain away the increase in imports during the first quarter of 2002, since there also was a significant increase of 6.2 percent in subject imports in the first quarter of 2002 compared with the first quarter of 2000. Market conditions (other than the presence or absence of the SLA), such as differences in consumption, did not explain the significant increases in subject imports.

4.300 Another concern of the original panel was that the USITC had not addressed claims that the substantial increase in imports during the April to August 2001 period only reflects “a shift in the

timing of imports.” In its Section 129 Determination, the USITC found that subject imports increased *both* during the April to August 2001 period *and* afterward, a fact that indicates a change in import behaviour and is inconsistent with the suggestion that import volumes during the period could be explained as a simple timing shift.

4.301 Canada’s focus on monthly subject import data for the April to August 2001 period does nothing to undermine this finding. First, the USITC found that “monthly subject import volumes were higher in each month between April and August 2001 than the comparable month in 2000, with the exception of June, by a range of 7.5 percent to 25.6 percent.” Similarly, monthly import volumes were higher in each month between October 2001 and March 2002 than the corresponding month in the preceding year, with the exception of November. These increases in the already significant volume were not the result of increases in demand, which was relatively flat – at 0.2 percent – in 2000 and 2001. Second, Canada contends that “[i]f the USITC were correct, one would expect to see a steady increase in imports.” But, that is exactly what the evidence demonstrates. The USITC found “these import trends during the most recent period in which there were no trade restraints to be highly indicative of whether imports are likely to substantially increase in the imminent future.”

4.302 *Demand relative to importation.* The Panel Report found that the USITC did not make any findings in its original determination that imports from Canada would increase more than demand, thereby garnering an increased share of the US market, and that the USITC did not discuss market share at all in the context of its original threat of material injury determination. In its Section 129 Determination, the USITC found that there was no basis in the record evidence to conclude that likely substantial increases in subject imports would be outpaced by increases in demand.

4.303 First, the USITC found that the 2.8 percent increase in subject imports significantly outstripped the 0.4 percent decline in demand from 1999 to 2001. Second, the evidence in the Section 129 proceeding demonstrates that while apparent US consumption for the first quarter of 2002 increased compared with the first quarter of 2001, it was at a substantially lower rate – 9.7 percent – than the 14.6 percent increase in subject imports. Thus, the actual increases in subject imports during the period of investigation substantially outstripped demand. Similarly, actual data show that subject imports after expiration of the SLA have increased at a significantly higher rate than any forecasts for increases in demand for softwood lumber for 2002 and 2003. The United States requests the Panel to look at the annual data rather than the quarterly forecasts that Canada provides so as to imply larger increases than the annual forecasts show. The annual forecasts are the more appropriate forecasts to consider. Based on its analysis of the totality of the facts, the USITC found that subject imports would increase their market share in the imminent future.

4.304 *Available Excess Canadian Capacity.* The Panel Report found that the USITC’s discussion regarding the Canadian industry’s export orientation did not support the conclusion that excess capacity would be exported to the United States beyond the “historical” level. In its Section 129 Determination, the USITC analyzed capacity and found that Canadian producers had sufficient excess capacity, and projected increases in production and capacity in 2002 and 2003, to substantially increase exports to the United States.

4.305 Canada has substantial capacity to produce softwood lumber, equal to about 60 percent of US consumption. Excess Canadian capacity in 2001 had increased to 5,343 mmbf, which was equivalent to 10 percent of US apparent consumption, as capacity utilization declined to 84 percent from 90 percent in 1999. Even more telling was the fact that Canadian producers expected to further increase their ability to supply the US softwood lumber market, projecting increases in production of 8.9 percent from 2001 to 2003 and increases in their capacity utilization to 90 percent in 2003 (from 84 percent in 2001). These increases were projected at the same time that demand in the US market was forecast to remain relatively unchanged or increase only slightly. Canada’s discussion of this evidence is a good example of Canada focusing inappropriately on the incremental increase in production capacity without regard to the starting point over which that increase is occurring.

4.306 Canadian production is tied to the US market, which continues to be the most important market for Canadian producers. The US market accounts for 60 to 65 percent of Canadian production and shipments, whereas in 2001, other export markets accounted for only 8 percent of Canadian production, and the Canadian home market accounted for only about 24 percent of production.

4.307 The record in the Section 129 proceeding provided further support for the USITC's finding: In the first quarter of 2002, as apparent Canadian consumption declined by 23 percent compared with the first quarter of 2001, Canadian producers shifted sales from the home market to the US market. In the first quarter of 2002, Canadian exports to the US market accounted for 63.8 percent of Canadian production compared with 54.2 percent for the first quarter of 2001 and 55.8 percent for the first quarter of 2000. Given the positive record evidence on the export orientation of Canadian lumber producers, the USITC discounted Canadian producers' self-interested projections that additional production would be exported to the United States at 20 percent of production – well below historical levels of about 60 percent.

4.308 The USITC discounted projections that showed that only 20 percent of the projected additional production would be exported to the US market. Canada's argument on this point involves only whether the accurate historical level of exports as a share of production is 65 percent (under the original data) or 60 percent (under the revised data). Either of these numbers is far greater than the 20 percent projected by Canadian producers. In sum, the USITC found that the evidence demonstrated that subject imports were entering the US market at a significant and increasing volume level, and that they were projected to increase substantially beyond this level.

4.309 *Causal Relationship and Analysis of Other "Known" Factors.* Finally, the Panel Report expressed concern with the discussion, or more precisely what it saw as an inadequate treatment, of other factors potentially causing injury in the context of the USITC's threat analysis in the original determination.

4.310 In the Section 129 Determination, the USITC 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. In particular, the USITC's methodology for evaluating causation first asks whether an alleged other factor is an "other known factor" – that is, whether it constitutes more than a tangential or minimal cause of injury or threat. Only if the first question is answered affirmatively would the USITC undertake a further analysis to ensure that any injury from an other known factor is not attributed to subject imports. This approach to causation analysis is entirely consistent with Articles 3.5 and 15.5, of the *AD* and *SCM Agreements*, respectively, as the Appellate Body discussed in its *EC – Pipe* report.

4.311 In its Section 129 Determination, the USITC provided a detailed and reasoned analysis of six other factors alleged to be causing injury to the domestic industry. The USITC found that the evidence did not demonstrate that any these factors was an other known factor.

4.312 In challenging the USITC's causation analysis, Canada focuses on three of the factors alleged to have been other known factors. One of these is non-subject imports. Non-subject imports never accounted for more than 3.0 percent of apparent consumption; in contrast, subject imports accounted for at least 34 percent 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 percent of imports, while Canadian imports accounted for about 93 percent of all imports.

4.313 Its discussion of non-subject imports is another instance in which Canada ignores the significance of the baseline and focuses instead on incremental increases in import volume. Canada's assertions regarding "projected rates of continued increases in third-country imports" are based entirely on its contention that what is relevant is the rate of increase, even when comparing small baselines to large baselines, and not the absolute volumes. However, placed in perspective, subject

imports are responsible for an enormous volume of imports (18,483 mmbf in 2001) and account for about 34 percent of US apparent consumption in the 1999-2001 period, compared with higher valued non-subject imports, which never exceeded 1,378 mmbf or 2.6 percent of apparent domestic consumption. Moreover, imports from Canada were subject to import restraints for most of the period of investigation; non-subject imports were not restrained.

4.314 In light of the evidence regarding non-subject imports, the USITC found them not likely to be an other factor potentially causing injury to the domestic industry in the imminent future. Thus, the USITC found no basis to examine whether any injury could be attributed to non-subject imports in the imminent future.

4.315 One additional factor alleged to be an “other known factor”– excess supply – warrants mention here. The evidence before the USITC showed that both Canadian and US production declined by similar quantities for the 2000-2001 period. Yet, with demand relatively flat, Canadian exports to the US market increased for this period. Moreover, Canadian producers projected increases in production of 8.9 percent from 2001 to 2003. Finally, Canadian producers shifted sales to the US market when Canadian consumption declined by 23 percent, but US imports increased by 14.6 percent, in the first quarter of 2002 compared with the first quarter of 2001. One additional issue raised is the integration of the North American market. Canada argues that the exporters and subsidiaries are aligned. However, the USITC did not find any firms to be aligned, such that they could be excluded as related parties. No parties in the underlying proceeding disputed or requested related-party exclusions and, thus, there were no contentions or findings that firms were aligned and shielded from harm.

4.316 *Likely Price Effects.* With respect to price effects, Canada puts a great deal of emphasis on data from the first quarter of 2002. Canada suggests that a brief improvement in price trends in that quarter is inconsistent with the conclusion that the US industry faced a threat of material injury. There are at least two basic flaws in this logic. First, it suggests that an up-turn in prices, no matter how brief, and regardless of anything that came before it, will necessarily preclude a finding that an industry faces a threat of material injury. By that bizarre logic, even a month’s worth of improved prices at the end of a period of investigation would compel a negative finding. Second, Canada’s logic ignores the fact that prices in the first quarter of 2002 were still low by historical standards, even if they happened to have turned upward for a brief period.

4.317 The substantial price declines in 2000 led to the deterioration in the condition of the domestic industry. Prices again were weak toward the end of the period of investigation, with prices in the third and fourth quarters of 2001 and the first quarter of 2002 at levels as low as they had been in 2000.

4.318 Canada’s discussion of pricing data in the Section 129 Determination focuses, in a snapshot approach, on the first quarter of 2002 compared with the first quarter of 2001. While prices increased in the first quarter of 2002, as consumption temporarily increased, they were still at levels as low as those reported in the second half of 2000, when subject imports were impacting financial performance of the domestic industry. Specifically, while the composite price for the first quarter of 2002 – at \$318 – was higher than for the first quarter of 2001 – at \$284 – it was substantially lower than \$384, which was the composite price in the first quarters of both 1999 and 2000. Canada’s focus on a comparison only of the first quarter of 2002 to 2001 ignores the evidence that the composite price for the first quarter of 2001 had not yet recovered from the low levels of the third and fourth quarters of 2000 (\$294 and \$277, respectively) and were subject to considerable uncertainty in the market due to the pending expiration of the SLA.

4.319 *Likely Impact of Subject Imports.* Canada’s over-emphasis on price trends in the first quarter of 2002 also skews its outlook on the domestic industry’s financial performance in that quarter. The condition of the domestic industry, in particular its financial performance, deteriorated and remained

weak over the period of investigation, as a result of the substantial declines in prices. Subject imports were increasing substantially after the expiration of the SLA and at the end of the period examined and were entering at prices at their lowest levels.

4.320 In discussing the question of the industry's vulnerability, Canada, again in a snapshot approach, focuses only on the new data collected in the Section 129 proceeding for the first quarter of 2002, and only in comparison with the first quarter of 2001. This data when placed in perspective do not undermine the USITC's finding that the domestic industry was vulnerable to the likely substantial increases in subject imports at low prices. The simple fact is that financial data for a single quarter are not necessarily an accurate indicator of the industry's performance for the entire year. For example, for the first quarter of 2000, the domestic industry reported an operating income margin of 9.2 percent, which translated into an operating income margin of only 1.8 percent for the year 2000 taken as a whole. Moreover, the improvement in the domestic industry's financial performance in the first quarter of 2002 resulted from increases in prices, as consumption temporarily increased. The evidence of sharp declines in US housing starts in March 2002 demonstrated that this increase in consumption was not likely to be sustained.

4.321 In conclusion, Canada has not – and indeed cannot – demonstrate that the USITC's Section 129 Determination is inconsistent with US obligations under the covered agreements. Nor has Canada shown that the Section 129 Determination did not respond to each and every one of the original panel's concerns. The United States therefore requests that the Panel reject Canada's claims in their entirety.

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

4.322 In Canada's oral statement, two themes were featured prominently. First, Canada selectively stresses the importance of certain evidence from the end of the period of investigation to the virtual exclusion of evidence from earlier parts of that period. Second, Canada asserts that a threat analysis must take account of, and be consistent with, the USITC's finding of a non-injurious status quo. In its closing remarks, the United States will address these two themes. The United States then will respond to certain of Canada's particular arguments from its oral statement.

4.323 In analyzing whether an industry is threatened with injury, an investigating authority necessarily is making a projection about future events based on data it has about the past. Canada's arguments prompt the question of how far into the past the investigating authority should look to make a determination as to whether an industry faces a threat. Should the investigating authority look back only one month, discounting any earlier events? Should it look back one quarter? Or, should the authority's analysis establish a background, consisting of all of the record evidence, against which it may determine whether material injury will occur in the absence of protective action?

4.324 Canada's answer, apparently, is that, at least with respect to some aspects of its analysis, the investigating authority should look primarily to the very recent past – perhaps only to the most recent quarter – in evaluating whether the industry faces a threat of injury. Canada would heavily discount earlier events. To make a projection about whether injury will occur in the future, the investigating authority need only to identify what is happening today, according to Canada, without regard to how that evidence fits within the context of what happened yesterday.

4.325 The United States does not disagree that, as a general proposition, recent events are relevant to the determination of threat. However, the United States does differ with Canada in two critical respects. First, in the US view, the focus on data from the end of the period of investigation must be comprehensive, rather than selective. That is, in taking account of evidence from the end of the period of investigation, the investigating authority should take account of evidence on all relevant factors, not just isolated factors. Second, in the US view, evidence from the end of the period of investigation must be examined in context. It would not be appropriate for an investigating authority

to examine evidence from the latter part of the period of investigation without regard to evidence from the earlier part of the period. In both of these respects, Canada's argument is seriously flawed.

4.326 The United States wants to call attention to this issue of the selectivity of Canada's focus, because it came up in a number of points that Canada raised in its oral statement. For example, with respect to price effects, Canada argued that prices in 1999 and 2000 had "at best . . . limited relevance to a threat determination being made in May 2002." (Oral Statement, para. 43.) Similarly, in discussing the vulnerability of the domestic industry, Canada stated that "evidence from 2001 and 2002 has to be more probative than evidence from 1999 and 2000." (Oral Statement, para. 46.) Again, when it comes to rates of change in relative production by US and Canadian producers, Canada dismisses the evidence of absolute volumes from earlier in the period of investigation, as well as market conditions. Instead, Canada emphasizes a snapshot of the rates of change at the very end of the period examined. (Oral Statement, para. 53). What is striking about these statements is the selectivity of Canada's focus on only certain evidence from the latter part of the period of investigation. Canada is content to focus on the more recent months when it comes to price effects, vulnerability, and rates of change in production, presumably because evaluating the data in these periods in the abstract favours a negative threat finding. However, when it comes to import volumes and market share, Canada takes quite a different view.

4.327 When it comes to import volumes and market share, Canada actually would discount the latter part of the period of investigation. First, it would dismiss import trends in the period from April to August 2001 as aberrational. In Canada's view, imports during that period simply represent exporters timing their exports to occur after the expiration of one restraint and prior to the anticipated imposition of a new restraint. Canada also discounts these increases in imports on the basis that demand for the April to August 2001 period was 6.2 percent higher than the same period in the prior year, neglecting the fact that subject imports were actually 11.3 percent higher. When it is pointed out that the trend in increased imports is evident even when the period examined extends beyond imposition of the new restraint in August 2001— that is, through the end of 2001 — Canada responds that market share was lower for that period in 2001 than for the corresponding period in 2000. However, Canada does not place the comparison in context. That is, it fails to note that the second half of 2000 was when the US market was oversupplied by subject imports, which resulted in price declines and serious deterioration in the condition of the domestic industry. Taking account of that context would explain why the market share was higher in 2000 and would weaken the relevance of that comparison. When the period examined is broadened to include the first quarter of 2002, Canada objects on the grounds that the first quarter 2002 amounts to an aberrational "gap period," given the expiration of provisional countervailing duties.

4.328 In point of fact, when one looks at Canada's own summary of the evidence — in Slide 2 of its oral presentation — one sees precisely why a focus on the end of the period of investigation must take account of volume and market share as well as the other factors to which Canada alluded. As that slide shows, the market share of subject imports rose steadily from December 2001 to the end of the period of investigation, reaching a level of 37 percent in March 2002 — substantially higher than the 33 to 34 percent market share held by subject imports during the earlier part of the period of investigation. The United States fails to see why Canada would have an investigating authority ignore this end-of-period evidence while emphasizing other end-of-period evidence.

4.329 In short, in Canada's view, an objective and unbiased investigating authority would have focused its threat analysis on the end of the period of investigation when it comes to price trends, industry vulnerability, and changes in rate of production, but would discount information from this period when it comes to import volumes and market share. Canada tries to explain away that latter category of information — an entire year's worth of data — as not indicative of exporter conduct relevant to a threat analysis. The United States fails to see how it is objective and unbiased for an investigating authority to arbitrarily focus on one part of the period of investigation for some purposes but then to disregard that part of the period of investigation for other purposes.

4.330 Moreover, the United States disagrees with the suggestion that data from the earlier part of the period of investigation should be discounted for purposes of a threat analysis. In assessing industry vulnerability, for example, events throughout the period of investigation may have cumulatively deteriorated the condition of the domestic industry. A focus on improvements at the end of the period simply disregards that an industry that remains in a weakened state is vulnerable to the injurious effects of likely substantial increases in subject imports at low prices. Data from throughout the period will be relevant to assessing the state of the industry and its vulnerability to injury from dumped and subsidized imports in the future.

4.331 It is also important to recognize that the data proffered by Canada for operating incomes in Slide 6 of its oral presentation are based on a subset of the industry – indeed, a subset that is substantially more profitable than the industry as a whole, as indicated in data submitted in the original investigation. For example, the operating income margin reported in the original investigation for the 73 reporting firms was 1.3 percent in 2001. The operating income margin reported in the Section 129 proceeding for the subset of 54 reporting firms was 2.2 percent in 2001. Thus, those firms that did not report in the Section 129 proceeding accounted for a total of more than a \$50 million loss in 2001.

4.332 The United States would like to turn now to the second prominent theme in Canada's presentation – the consistency between the USITC's present injury findings and its threat findings. The United States emphasized that in evaluating the question of threat to the domestic industry it is crucial to focus on the starting point – what the United States refers to as the baseline. The United States pointed to the fact that Canada's challenge addresses incremental changes in particular factors usually without regard to the base over which those changes are occurring. Canada states that it focuses on incremental changes because the starting point is a status quo found to be non-injurious.

4.333 But, this is a gross over-simplification of the USITC's findings with respect to the status quo. Yes, the USITC found an absence of present injury to the domestic industry. But, it is important to examine the main reason for that finding. The USITC did not find that import volumes during the period of investigation were inherently non-injurious. In fact, the USITC explicitly stated that it would find these “significant increases and consistently large levels of subject imports to be injurious for purposes of a present material injury determination.” Nor did it find that “market share . . . was the key to the Commission's negative present injury determination,” as Canada alleges. Rather, it found that a separate factor – oversupply by the domestic industry in addition to subject imports and the resultant effects on prices and impact – precluded reaching a present material injury finding. That conclusion does not diminish the significance of subject import volumes or market share during the period of investigation. It does not mean that subject import volumes or market share were themselves non-injurious. It simply means that the injurious effects of subject import volumes could not be disaggregated from the injurious effects of US oversupply.

4.334 This goes to the question of the relevance of baselines. Starting from the erroneous assumption that the volume of subject imports during the period of investigation is irrelevant because that volume was found to be non-injurious, Canada contends that it would have been appropriate for the USITC to make an affirmative threat finding only if the evidence showed that subject imports would increase in the future at a rate greater than their rate during the period of investigation. According to this logic, if the rate of increase is expected to be equal to or less than the rate of increase during the period of investigation, then there is no threat to the domestic industry. However, because the premise is incorrect, the rest of this line of reasoning necessarily falls apart. Not to mention, that this logic is refuted by the facts. Subject imports after expiration of the SLA increased at rates higher than when subject imports were subject to the restraints of the SLA – increases of 2.4 percent from 2000 to 2001 (as contrasted to 0.4 percent for 1999-2000), 4.9 percent from April to



December 2001, and 14.6 percent when the first quarter of 2002 is compared to the first quarter of 2001.

4.335 The volume and market share of subject imports during the period of investigation were sufficiently high as to be injurious. Therefore, Canada is incorrect to argue that a threat finding would have been permissible only if there had been a rate of increase sufficient to overcome a non-injurious status quo. It also is incorrect to argue that the USITC's affirmative threat determination cannot be reconciled with its negative present injury determination. The two are compatible precisely because the negative present injury determination subsumes a finding that the volume of subject imports during the period of investigation would have been found to be injurious but for the existence of another factor. The threat analysis cannot simply ignore the already existing volume and market share of subject imports. In short, the baseline of subject import volume is relevant, even though other factors were found to have contributed in a material manner to injury.

4.336 The United States turns now to some of the more troubling particular assertions that Canada made in its oral presentation. Canada makes the point that in the first quarter of 2002, Canadian production was actually decreasing while US production was increasing. But Canada fails to put this observation in context. The changes in production levels occurred while demand in Canada declined by 23 percent and demand in the United States increased by 9.7 percent. Indeed, even as Canadian producers made some adjustments to production during this period, Canada's exports to the United States increased by 14.6 percent. Thus, the changes in production on which Canada relies were not necessarily probative of import behaviour.

4.337 Canada argues that the USITC provided no new evidence or explanation to support its finding that the 2.8 percent increase in subject import volume over the period of investigation was significant. That argument misses the point that the USITC made its finding regarding the rate of increase to address a concern raised in the original Panel Report. The original panel noted that the USITC had not addressed rate of increase in its original determination. The USITC responded by addressing it in its Section 129 Determination.

4.338 Canada argues that the first quarter of 2002 must be viewed as a "gap period" for purposes of considering import data, because provisional countervailing duties had expired at the end of December 2001. It dismisses the significance of the continuation of preliminary antidumping duties after December 2001, which generally account for about a third of all duties imposed. Its argument that the first quarter of 2002 should be considered a "gap period" notwithstanding the continuation of provisional antidumping duties should be rejected, because of its selective disregard of inconvenient evidence. There is a pattern of increasing imports for a whole year after the expiration of the SLA. Canada tries to dismiss evidence of increases during particular intervals as timing shifts. But, it stretches logic to dismiss a consistent pattern over an entire year as something other than a change in import behaviour, demonstrating an ability of the Canadian industry to supply the US market with increasing volumes.

4.339 Canada asserts that the co-existence of increasing imports and rising prices immediately after the SLA expired and in the first quarter of 2002 undermines the USITC's conclusion that subject imports would have a price suppressing or depressing effect. That assertion is incorrect. The co-existence of these facts is a result of US apparent consumption increasing. In fact, prices remained at low levels. Moreover, historically, prices in the first quarter are higher than in the fourth quarter, and in this case the composite price in the first quarter of 2002 at \$318 was also lower than the third quarter of 2001 at \$322 and the second quarter of 2001 at \$364.

4.340 Canada argues that the USITC's negative "but for" finding means that imports would not have increased to injurious levels in the 12 months after the SLA expired even absent preliminary antidumping and countervailing duties. That is not a correct inference to draw from the negative "but for" finding. That finding does not mean that subject import volumes were at non-injurious levels.

Rather, it means that other factors – in particular, oversupply by the US industry – precluded a finding of present injury.

4.341 With respect to demand forecasts, Canada faults the USITC for relying on one analysis – the Bank of America report – over others – RISI and Clear Vision. That assertion has no basis. It is evident on pages 77 to 80 of the Section 129 Determination that the USITC did not disregard the RISI and Clear Vision demand forecasts in lieu of the Bank of America forecast. Nor did the USITC ignore questionnaire responses. The USITC considered the demand forecasts in conjunction with the forecasts for the primary end-use of softwood lumber, US housing starts. The evidence showed a correlation between the actual data for lumber demand and housing starts during the period of investigation. But, the forecasts, particularly the more optimistic ones, did not have a similar correlation between demand for softwood lumber and US housing starts.

4.342 Canada accuses the United States of applying a double standard by virtue of the fact that the USITC found non-subject imports not to be an “other known factor” causing injury to the US industry, while it found the same absolute increase in Canadian imports to support a finding of threat to the US industry. This accusation is misleading, inasmuch as it fails to acknowledge differences in size between the already injurious large volume of Canadian imports and the extremely small volume of fairly traded non-subject imports. Further, Canada’s discussion of the rate of increase in non-subject imports is misleading. Canada attempts to dramatize the relevance of non-subject imports by observing that “the rate of increase actually climbed to 50 percent in the first quarter of 2002.” (Opening Statement, para. 66). However, the increase referred to occurred over a very small baseline, such that the conclusion Canada asserts to be inescapable – that is, that third country imports were a causation factor relevant to future oversupply – is not well founded at all.

4.343 The USITC found that the simple increase in the still extremely small volume of non-subject imports, which never exceeded 3 percent of the market and were not restrained, was not a basis for finding that such fairly traded imports were causing injury to the domestic industry. In its analysis, the USITC pointed out that non-subject imports were higher-valued and from a wide variety of other countries, and as such did not act as a collective entity. Moreover, contrary to Canada’s assertion in its oral statement, the Appellate Body report in *EC-Pipe* did not indicate that a collective analysis was required or even the norm.

4.344 Canada argues that an objective and unbiased investigating authority would have undertaken a cumulative analysis of third country imports and domestic supply as a potential other known factor threatening injury to the US industry. The Panel should reject that argument because it is based on Canada’s assumption that these factors are causing injury. The evidence does not warrant such a finding. The USITC considered factors alleged to be other known factors. If these factors are found not to be causing injury to more than a minimal or tangential degree, there is nothing further to consider and thus no basis to conduct a further analysis in order to attribute no injury from these factors to subject imports.

4.345 For all of the reasons set forth in the United States written submissions and at this Panel meeting, the Panel should reject Canada’s challenge and find the Section 129 Determination to be consistent with the covered agreements. The United States notes that Canada urges not only that the Panel reach the opposite result, but that it go further and recommend particular actions by way of implementation. For reasons the Panel discussed in the original report, such a recommendation – or “suggestion” – would be inappropriate. The radical suggestions that Canada proposes, including a retroactive remedy in the form of returning cash deposits imposed under the antidumping and countervailing duty orders supported by the Section 129 Determination, have no basis in the WTO Agreement and, therefore, should be rejected. In any event, the United States expects that there will be no need even to reach that issue, in light of the fact that the Section 129 Determination is consistent with US obligations under the covered agreements.

## V. ARGUMENTS OF THE THIRD PARTIES

5.1 China and the European Communities have reserved their rights to participate in the Panel's proceedings as third parties. The arguments of China are set out in its written submission and oral statement to the Panel. The European Communities provided neither a written submission nor an oral statement to the Panel. China's arguments as presented in its written submission and oral statement are summarized in this section.

### A. THIRD PARTY WRITTEN SUBMISSION OF CHINA

5.2 The following summarizes China's arguments in its third party written submission

#### 1. INTRODUCTION

5.3 China's third party submission addresses the following two issues: Significant Rate of Increase of Dumped and Subsidized Imports, and USITC 129 Consideration of "Non-Attribution" Factors

#### 1. CHINA'S ARGUMENTS

##### (a) Significant Rate Of Increase Of Dumped And Subsidized Imports

5.4 The original Panel finds that USITC did not rely on a significant rate of increase during POI in support of its conclusion that subject imports would increase substantially in the future.<sup>40</sup>

5.5 However, it seems that in 129 Determination, USITC found 2.8 percent is a significant rate of increase when the baseline volume is already so significant.<sup>41</sup> Such significant rate of increase during the POI conclusion also constituted an important factor for USITC to determine that the volume of imports is likely to increase substantially in the imminent future.

5.6 China understands that rate of increase and the volume of import are two related but different factors. A modest rate of increase based on significant import volume or a baseline volume may lead to relatively great increased quantities. The rate of increase is usually a factor to be considered in a determination of threat of material injury, since this factor is more indicative of any change in circumstances.

5.7 Furthermore, in 129 Determination, the USITC attempted to provide more evidence, which was the comparison between the import volume during the first quarter of 2002 and the first quarter of 2001, to support its conclusion of there would be a substantial increase in imports immediately.

5.8 This most recent data may be more telling. However, according to Canada's assertion, the first quarter of 2002 was a special period which was between the end of provisional countervailing duty measures and the imposition of final measures.<sup>42</sup> It is referred to as the "gap period".

5.9 China notes that when considering the imports from April to August 2001 the period between expiration of the SLA and provisional measures, the original panel found it necessary to discuss whether the increase in imports during that period of represented an accurate gauge of what would happen in the future.<sup>43</sup> China thinks that the same logic should apply to the analysis of import trends with respect to the first quarter of 2002.

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<sup>40</sup> Original Panel Report 7.90

<sup>41</sup> 129 Determination, page 21

<sup>42</sup> Canada's First Written Submission, para. 57 and para. 58

<sup>43</sup> Original Panel Report 7.94.

**(b) USITC 129 Consideration Of “Non-Attribution” Factors**

5.10 “Non-Attribution rule” of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement requires the authority to examine “any known factors” in order to ensure that injuries which are caused to the domestic industry by known factors, other than dumped imports, are not “attributed to the dumped imports.”

5.11 In the original Panel report, the Panel stated although it is meaningless to evaluate the question of violation of the non-attribution, since the Panel concluded that the USITC’s affirmative injury threaten determination was not consistent with Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement, the Panel still stated that the USITC did not exam any factor under this “Non-Attribution” test.

5.12 Regarding “known” factors, China agrees with the Panel Report in Thailand H-Beams case, in which the Panel stated 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. And the authorities shall 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>44</sup>

5.13 In USITC’s 129 Determination, the USITC considered the “other known factors” under “Non-attribution” test before it made the affirmative injury threaten decision. The “other known factors” the USITC considered included “Excess supply from the domestic industry”, “Third-country or non-subject imports”, “Importation relative to Demand”, “Integration of North American Softwood Lumber Industry”, “Engineered Wood Products and other substitute products” and “Alleged constraints on domestic production or insufficient timber supplies”, among which both original Panel’s recommendations were covered.

**B. THIRD PARTY ORAL STATEMENT OF CHINA**

5.14 The following summarizes China’s arguments in its third party oral statement.

5.15 In this statement, China summarizes major view of points in its written submission.

**(a) The First Issue Is About “Significant Rate Of Increase Of Dumped And Subsidized Imports”**

5.16 The original Panel began its analysis by addressing the interpretation of the term “consider” in Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement. According to the original Panel’s rules, China understands that this “consideration” shall go beyond a mere recitation of the facts, and a rational explanation based on evidence is necessary.

5.17 The original Panel focused on the explanation provided by the USITC in support of its determinations. The original Panel made clear that it based its findings on what it saw as “no rational explanation in the USITC determination”. China therefore understands that to comply with the covered agreements and the recommendations and rulings of the DSB, USITC should reconsider its analysis with a view to provide detailed and thorough explanations supporting its determinations.

5.18 In the original Panel report, the Panel examined all the factors the USITC considered in its original determination. China notes that in 129 Determination, the USITC provided more explanation than it did in its original determination in order to support its affirmative injury threaten finding. As a third party, China is neither in a position, nor intends to comment on the facts, but based on the

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<sup>44</sup> Thailand-H-Beams, Panel Report, para, 7.273

arguments of the parties to the dispute, China finds “significant rate of increase of dumped and subsidized imports” worthy consideration.

5.19 The original Panel finds that USITC did not rely on a significant rate of increase during POI in support of its conclusion that subject imports would increase substantially in the future, but it seems that in 129 Determination, USITC found 2.8 percent is a significant rate of increase when the baseline volume is already so significant. Such significant rate of increase during the POI conclusion also constituted an important factor for USITC to determine that the volume of imports is likely to increase substantially in the imminent future.

5.20 China understands that “rate of increase” and the “volume of import” are two related but different factors. A modest rate of increase based on significant import volume or a baseline volume may lead to relatively great increased quantities. The rate of increase is usually a factor to be considered in a determination of threat of material injury, since this factor is more indicative of any change in circumstances.

5.21 Furthermore, in 129 Determination, in order to support its conclusion of there would be a substantial increase in imports immediately, the USITC attempted to provide more evidence, which was the comparison between the import volume during the first quarter of 2002 and 2001.

5.22 This most recent data may be more telling. However, according to Canada’s assertion, the first quarter of 2002 was a special period which was between the end of provisional countervailing duty measures and the imposition of final measures. It is referred to as the “gap period”.

5.23 China notes that when considering the imports from April to August 2001 the period between expiration of the SLA and provisional measures, the original panel found it necessary to discuss whether the increase in imports during that period of represented an accurate gauge of what would happen in the future. China thinks that the same logic should apply to the analysis of import trends with respect to the first quarter of 2002.

**(b) The second issue is about “USITC 129 Consideration of “Non-Attribution” Factors”**

5.24 When China reads Article 21.5 of the DSU, China finds that there may be two disputes that could be brought to a compliance panel: 1. where there is disagreement as to the existence of measures taken to comply with the recommendations and rulings; 2. where there is disagreement as to the consistency with a covered agreement of measures taken to comply with the recommendation and rulings. In short, there are two stages of the examination of the compliance, first is the “existence” stage and the second is the “consistency of the existing measures” stage.

5.25 “Non-Attribution rule” of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement requires the authority to examine “any know factors” in order to ensure that injuries which are caused to the domestic industry by known factors, other than dumped imports, are not “attributed to the dumped imports.”

5.26 In the original Panel report, the Panel stated although it is meaningless to evaluate the question of violation of the non-attribution, since the Panel concluded that the USITC’s affirmative injury threaten determination was not consistent with Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement, the Panel still stated that the USITC did not exam any factor under this “Non-Attribution” test.

5.27 Regarding “known” factors, China agrees with the Panel Report in Thailand H-Beams case, in which the Panel stated 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. And the authorities shall 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.

5.28 In USITC's 129 Determination, the USITC considered the "other known factors" under "Non-attribution" test before it made the affirmative injury threaten decision. The "other known factors" the USITC considered included "Excess supply from the domestic industry", "Third-country or non-subject imports", "Importation relative to Demand", "Integration of North American Softwood Lumber Industry", "Engineered Wood Products and other substitute products" and "Alleged constraints on domestic production or insufficient timber supplies", among which both original Panel's recommendations were covered.

5.29 Thus, with respect to the first stage, ie. "existence" stage, China understands that the USITC complied with its obligation under "Non-Attribution" test by analyzing the "other known factors" before it made the injury threaten determination.

5.30 However, with respect to the second stage, China also agrees that mere mention of the other factors is not enough under the agreements, and the USITC shall give some rational explanation on each factor before they decided whether or not the factor was qualified as another known factor in the imminent future. Since this explanation is about the facts, as a third party, China takes no view on facts without the panel's comments (the reason China analyzed facts in the above content is the original panel had clear comments on these facts, and then China can make the decision based on these comments).

## **VI. INTERIM REVIEW**

6.1 In accordance with the timetable for these proceedings, both parties were given the opportunity to submit comments on the interim report, requesting review of precise aspects of the interim report, no later than 5 September 2005. On that date, the United States submitted a request for the Panel to review precise aspects of the interim report, but not requesting a meeting with the Panel on the interim report. In addition, the United States pointed out certain typographical and grammatical errors in the report. On that same date, Canada submitted a letter indicating that it had no comments on the interim report. On 12 September 2005, Canada submitted comments on the United States' request for interim review. We have made typographical and grammatical corrections to the report, including as suggested by the United States at paragraphs 7.12, 7.27, 7.29, 7.33, 7.35, 7.43, 7.61, 7.62, and 7.65. We address below the substantive comments of the parties.

6.2 The United States comments, with respect to the fourth sentence of paragraph 7.18, that the list of factors, based on which the USITC concluded there would be a substantial increase in imports, should be modified to also refer to projected increases in capacity utilization and production. Canada did not comment on this suggestion.

6.3 We have reviewed the determination of the USITC, and in light of the discussion therein<sup>45</sup>, and the lack of objection from Canada, we have made the requested change.

6.4 The United States comments, with respect to the first sentence of paragraph 7.27, that it should be amended to reflect the fact that the USITC's conclusion was based not only on the overall rate of increase over the period of investigation but also on the rate of increase at particular moments during the period of investigation, in view of events occurring at those moments. Canada comments that the USITC never explained its conclusion in these terms, and therefore requests that the Panel not accept the United States' proposed amendment.

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<sup>45</sup> Views of the Commission, Exhibit CDA-1, at page 40.

6.5 We have reviewed the determination of the USITC, and we recognize that, as suggested by the United States, the USITC did find that the rate of increase in the volume of imports at certain times during the period of investigation was significant.<sup>46</sup> However, the first sentence of paragraph 7.27 refers only to the USITC's finding that the 2.8 percent increase over the period of investigation (1999-2001) was significant, and thus the additional point suggested by the United States is not pertinent to the discussion therein. We have, however, amended the last sentence of paragraph 7.27 to more clearly reflect the fact that the USITC specifically found the rate of increase in the volume of imports after the expiration of the SLA to be significant.

## VII. FINDINGS

7.1 This dispute concerns the parties' disagreement as to the consistency with the *Agreement on Implementation of Article VI of GATT 1994* (hereinafter "AD Agreement") and the *Agreement on Subsidies and Countervailing Measures* (hereinafter "SCM Agreement") of the measure taken by the United States to comply with the recommendation of the DSB arising out of the Panel's report *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*.<sup>47</sup>

7.2 The original dispute concerned the investigation and determination of threat of material injury of the United States International Trade Commission (hereinafter "USITC") in *Softwood Lumber from Canada* and the final definitive anti-dumping and countervailing duties applied following the final determination. In that determination, the USITC had 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 dumped prices, and antidumping and countervailing duty orders on imports of softwood lumber from Canada were subsequently issued.

7.3 In its final determination, the USITC had determined that the domestic softwood lumber industry was not materially injured by reason of subject imports from Canada found to be dumped and subsidized, but found that there was a threat of material injury by reason of such imports. In making that determination, 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 United States Department of Commerce (hereinafter "USDOC") had determined that there were 11 programs that conferred countervailable subsidies to Canadian producers and exporters of softwood lumber. The USITC found that Canadian dumped and subsidized imports (subject imports) were likely to increase substantially based on a series of factors. The USITC found that there was a moderate degree of substitutability between subject imports 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 those 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 from Canada. 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.

7.4 Before the Panel, Canada had alleged violations of various provisions of the AD and SCM Agreements in the USITC's determination of injury. In particular, Canada alleged specific

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<sup>46</sup> *Ibid.* at page 21.

<sup>47</sup> Panel Report, *US – Softwood Lumber VI*, *supra* note 1.

violations of Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement, arguing that the USITC failed to properly consider the particular factors relevant in threat of injury determinations, and violations of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement, arguing that the USITC failed to properly analyze causation and failed to properly apply the "non-attribution" requirement, which specifies that injury caused by other factors must not be attributed to dumped and/or subsidized imports. These claims required the Panel to consider the substance of the USITC's final determination of threat of material injury to determine whether it was consistent with US obligations under the AD and SCM Agreements.

7.5 The Panel found, *inter alia*:

- (a) that the USITC determination was **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 was 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, the Panel concluded that the USITC determination was **not inconsistent** with the asserted provisions.<sup>48</sup>

7.6 In light of these findings, the Panel concluded

- (a) that the USITC determination was **not consistent** with Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement in that the causal analysis was based on a finding which was, 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, the Panel concluded that it was neither necessary nor appropriate to make findings with respect to these claims.<sup>49</sup>

7.7 Accordingly, the Panel concluded that to the extent the United States had acted inconsistently with the provisions of the AD and SCM Agreements, it had nullified or impaired benefits accruing to Canada under those Agreements, and therefore recommended that the Dispute Settlement Body request the United States to bring its measures into conformity with its obligations under the AD and SCM Agreements.<sup>50</sup>

7.8 Under US law (commonly referred to as "section 129"), if a WTO Panel or Appellate Body report finds that a determination by the USITC is not consistent with US obligations, then, upon request by the USTR, the USITC "shall issue a determination in connection with the particular proceeding that would render the Commission's action...not inconsistent with the findings of the panel".<sup>51</sup> In this case, the USTR made such a request to the USITC on 27 July 2004. The USITC issued its "section 129" determination within the statutory deadline set out in US law, on 24 November 2004. In that determination, the USITC again concluded that there would be a substantial increase in imports, at prices which would adversely affect the vulnerable domestic

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<sup>48</sup> Panel Report, *US – Softwood Lumber VI*, *supra* note 1, at para. 8.1.

<sup>49</sup> Panel Report, *US – Softwood Lumber VI*, *supra* note 1, at para. 8.2.

<sup>50</sup> Panel Report, *US – Softwood Lumber VI*, *supra* note 1, at para. 8.3.

<sup>51</sup> 19 USC. §3538(a)(4).



industry, threatening material injury, and that there were no other known factors which threatened material injury to the domestic industry.

7.9 In the course of the section 129 proceeding, the USITC reopened the record of the original investigation to gather additional information from public data sources and from questionnaires sent to US and Canadian producers, held a public hearing, and gave parties opportunities to submit written comments. The USITC stated that its task was to "mak[e] a determination that would render its original action not inconsistent with the findings of" the Panel.<sup>52</sup> Therefore, the USITC addressed in its determination only the issues related to the Panel's findings set forth in the request from the USTR, and did not address issues that were not in dispute in the original Panel proceeding which the Panel had found not inconsistent with the United States' obligations under the WTO Agreements, or which it did not otherwise consider necessary to address.<sup>53</sup>

7.10 In its section 129 determination, the USITC found, based on a significant rate of increase in imports from a significant baseline volume level, and taking into account increases in imports during periods of no import restraints, that there was a likelihood of substantially increased imports, and concluded that dumped and subsidized imports would increase in the imminent future. Looking at current import trends, the restraining effects of the US-Canada Softwood Lumber Agreement (SLA), excess Canadian capacity and projected increases in capacity, capacity utilization and production, and demand projections, the USITC concluded that imports would increase at a substantial rate in the imminent future beyond historical levels. The USITC concluded that imports were entering the United States at prices that were likely to have a significant depressing or suppressing effect on domestic prices and likely to increase demand for further imports, and that imports were therefore likely to adversely impact the US lumber industry in the imminent future. Looking at the question of other factors potentially threatening injury, the USITC concluded that excess supply from the domestic industry, third country imports, importation relative to demand, the integration of the North American softwood lumber industry, substitute products, and domestic production constraints, were not other factors potentially causing injury to the domestic industry, and therefore considered that there was no basis to examine whether any injury could be attributed to them.<sup>54</sup>

7.11 The claims put forward by Canada in this case challenge the USITC's section 129 determination, and specifically its consideration of the evidence underlying its determination of threat of material injury, its determination of causal link, and its analysis of "other causes" of threat of injury. Canada has not challenged any of the procedural aspects of the section 129 process, including the reopening of the record and the receipt of additional evidence, although it does dispute the significance of that evidence. In addition, Canada has not challenged the principle underlying the USITC's section 129 determination, that in order to "bring its measure into conformity" with the United States' obligations, it suffices for the USITC to "fill the gaps" identified by the Panel in its original decision, and provide additional explanation and evidence in support of its conclusions, so as to render its determination not inconsistent with the United States' obligations under the relevant Agreements.<sup>55</sup> Of course, whether the United States has adequately done so in this case is the matter in dispute before us.

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<sup>52</sup> Views of the Commission, Exhibit CDA-1, at 4.

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

<sup>54</sup> One Commissioner of the USITC dissented, finding that the domestic industry producing softwood lumber was not threatened with material injury. Views of the Commission, Exhibit CDA-1 at 89.

<sup>55</sup> Canada does assert that this is not a case in which such "gap filling" can suffice to yield a determination consistent with the United States' obligations. Canada's answer to the Panel's question 1 at para. 1. Canada argues that the Panel originally found a lack of evidence supporting the USITC's determination, and inconsistencies between the determination with respect to material injury and threat of material injury. However, our original conclusions concerning lack of evidence did not refer to whether evidence existed on a particular point, but rather whether the USITC's determination relied upon and explained relevant evidence in such a way as to lend reasoned support to the determination. Indeed, under the applicable

7.12 The role of a Panel in an Article 21.5 proceeding is to evaluate the challenged measure to determine its consistency with the defending Member's obligations under the relevant WTO Agreements. Thus, the Panel is not limited by its original analysis and decision – rather, it is to consider, with a fresh eye, the new determination before it, and evaluate it in light of the claims and arguments of the parties in the Article 21.5 proceeding. While it is true that “a panel acting pursuant to Article 21.5 of the DSU would be expected to refer to the initial panel report, particularly in cases where the implementing measure is closely related to the original measure, and where the claims made in the proceeding under Article 21.5 closely resemble the claims made in the initial panel proceedings”,<sup>56</sup> in a case involving a new determination in the same case, it is clear that the facts are likely to be very similar to the original. Thus, what is most important for our analysis is the reasoning and explanation of the USITC in its section 129 determination. Consequently, our findings concerning the original determination have little if any persuasive effect in our review of the determination now before us. In this regard we note that Canada argues in a number of instances that the USITC's section 129 determination fails to address certain questions raised by the Panel in its original determination.<sup>57</sup> While we cannot preclude the possibility that a Member might implement a DSB recommendation by specifically answering points raised by a panel (or the Appellate Body) in the relevant decisions, this is by no means required by the DSU. Nor is it the only means by which implementation may be achieved. In this case, the USITC has provided a determination in the section 129 proceeding which purports to re-examine the evidence, and additional evidence, and address those aspects of its original decision we found to be insufficient in light of the obligations of the AD and SCM Agreements. We must review that determination on its own merits, as a whole. Whether the USITC addressed particular questions we raised may be relevant in our review, but is not necessarily determinative.

7.13 We must also keep in mind the nature of the determination we are reviewing. The USITC's determination in the section 129 proceeding was that dumped and subsidized imports of softwood lumber from Canada threatened material injury to the US industry. In this regard, we note the comments of the Appellate Body on the nature of the determination to be made by an investigating authority in a case involving threat of material injury:

"In our view, the "establishment" of facts by investigating authorities includes both affirmative findings of events that took place during the period of investigation as well as assumptions relating to such events made by those authorities in the course of their analyses. In determining the existence of a *threat* of material injury, the investigating authorities will necessarily have to make assumptions relating to "the occurrence of future events" since such *future* events "can never be definitively proven by facts".<sup>63</sup> Notwithstanding this intrinsic uncertainty, a "proper establishment" of facts in a determination of threat of material injury must be based on events that, although they have not yet occurred, must be "clearly foreseen and imminent", in accordance with Article 3.7 of the *Anti-Dumping Agreement*.<sup>64</sup>

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<sup>63</sup> Appellate Body Report, *United States – Lamb Safeguard*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, para 136.

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standard of review, we can imagine finding a *lack* of evidence to support a determination, in an absolute sense, only in the most extreme cases, such as where the record contains gaps in evidence, or the evidence contradicts the conclusions drawn, with no reasonable explanation.

<sup>56</sup> Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States, Recourse to Article 21.5 of the DSU by the United States ("Mexico – Corn Syrup (Article 21.5 – US)"),* WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6675, at para. 109.

<sup>57</sup> E.g., Canada's answers to the Panel's question 1 at para. 3, Canada's first written submission at paras. 70 and 93.

<sup>64</sup> As we noted in *United States – Hot-Rolled Steel*:

Article 17.6(i) ... defines when *investigating authorities* can be considered to have acted inconsistently with the *Anti-Dumping Agreement* in the course of their "establishment" and "evaluation" of the relevant facts. In other words, Article 17.6(i) sets forth the appropriate standard to be applied by *panels* in examining the WTO-consistency of the *investigating authorities'* establishment and evaluation of the facts under other provisions of the *Anti-Dumping Agreement*. (original emphasis)

Appellate Body Report, *supra*, footnote 59, para. 56.<sup>58</sup>

The possible range of reasonable predictions of the future that may be drawn based on the observed events of the period of investigation may be broader than the range of reasonable conclusions concerning the present that might be drawn based on those same facts. That is to say, while a determination of threat of material injury must be based on the facts, and not merely on allegation, conjecture, or remote possibility, predictions based on the observed facts may be less susceptible to being found, on review by a panel, to be outside the range of conclusions that might be reached by an unbiased and objective decision maker on the basis of the facts and in light of the explanations given.

7.14 In this case, there is no dispute as to the measure at issue, or as to the propriety of the claims raised by Canada. In addition, there are no new issues of legal interpretation raised. Thus, the principal task for us is to evaluate the USITC determination, applying the familiar concepts regarding standard of review and burden of proof, and reach a conclusion as to the consistency of the section 129 determination with US obligations under the asserted provisions of Articles 3.5 and 3.7 of the AD Agreement and Articles 15.5 and 15.7 of the SCM Agreement.

7.15 The concepts of standard of review and burden of proof applicable in this dispute are the same as those applied in our original report. In that report, we concluded as follows with respect to the standard of review:

"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

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<sup>58</sup> Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, *supra* note 56, at para. 85.

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> . . .

7.15 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 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>

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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>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>59</sup>

The parties have no disagreement regarding the applicability of this standard of review in this dispute, although of course, they do contest the outcome.

7.16 With respect to the burden of proof, we noted in our original report that:

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<sup>59</sup> Panel Report, *US – Softwood Lumber VI*, *supra* note 1, at paras 7.12, 7.15-7.16.

"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 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.

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<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.*<sup>60</sup>

Again, the parties have no disagreement regarding the applicability of the burden of proof in this dispute.

**A. ALLEGED VIOLATIONS OF ARTICLE 3.7 OF THE AD AGREEMENT AND ARTICLE 15.7 OF THE SCM AGREEMENT**

7.17 These asserted violations are at the heart of Canada's case. Canada argues that the factors relied upon by the USITC do not support its conclusion that there would be a substantial increase in imports, that there would be likely adverse price effects, and that the US industry was "vulnerable". Consequently, in Canada's view, imports could not be found to threaten material injury. Thus, Canada considers that the section 129 determination suffers from essentially the same flaws as were identified by the Panel in its original decision. Canada argues that the USITC's consideration of the evidence, and the weight of the evidence itself, fall short of the minimum necessary to support the determination of threat of material injury.

7.18 The United States asserts that the USITC determined that during the period of investigation, imports were at a significant level, prices had declined, and the condition of the industry had deteriorated and was vulnerable. The USITC, based in part upon evidence newly obtained, but relating to the original period of investigation and the period prior to the original determination, addressed each of the points identified by the Panel in its original decision, carrying out an entirely new analysis of the evidence. The USITC reached additional conclusions on certain factors considered, such as the rate of increase of dumped and subsidized imports, which it found to be significant, and addressed questions raised by the Panel such as the interplay between increases in import volumes and trends in US demand. The USITC's overall conclusion was that, based on 1) the trends during the period of investigation, which it concluded showed a significant rate of increase in imports, 2) the restraining effects of the SLA during the period of investigation and the likely effects of its expiration, 3) import volumes and trends in import volumes during periods of no import restrictions, 4) evidence of excess capacity, projected increases in capacity, capacity utilization and production, and export orientation in Canada, and 5) US demand forecasts, there would be a substantial increase in imports. The USITC also concluded that in light of price trends during the POI, and the degree of substitutability of US and imported Canadian lumber, increased imports would

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<sup>60</sup> Panel Report, *US – Softwood Lumber VI*, *supra* note 1, at para. 7.23.

have adverse price effects, and that the US industry was in a vulnerable condition, such that increased imports at the price levels at the end of the period of investigation threatened material injury.

7.19 In evaluating Canada's arguments with respect to the adequacy of the USITC's consideration of each of the factors upon which it relied, under the standard of review we must consider whether the USITC properly established the facts (a matter which is not disputed by Canada), evaluated the facts in an unbiased and objective manner, and whether the conclusions reached, in light of the explanations given, were such as could have been reached by an unbiased and objective decision maker based on the facts. We may not substitute our judgment for that of the USITC, although we are directed to carry out a detailed and searching analysis of the evidence relied upon and the reasoning and explanations given in carrying out our review.

7.20 In this context, we note the recent decision of the Appellate Body in *US – Countervailing Duty Investigation on DRAMS* concerning the proper role of Panels in reviewing decisions of national authorities.<sup>61</sup> In that report, the Appellate Body was addressing a case involving the conclusion of the USDOC that the Government of Korea had "entrusted or directed" certain private bodies to make financial contributions to Hynix, a Korean manufacturer of DRAMS, thereby providing countervailable subsidies within the meaning of Article 1.1(a)(i)(iv) of the SCM Agreement. The Panel in that case had noted that USDOC had based its finding on the totality of the evidence before it, and determined that it would follow the same approach in its review, an intention approved by the Appellate Body.<sup>62</sup> However, the Appellate Body, while it saw no error, in principle with a panel's review of individual pieces of evidence in such a case, concluded that the Panel had erred by focusing on whether each piece of evidence, in isolation, demonstrated entrustment or direction. The Appellate Body stated that "having accepted an investigating authority's approach, a panel normally should examine the probative value of a piece of evidence in a similar manner to that followed by the investigating authority".<sup>63</sup> The Appellate Body went on:

"Furthermore, in order to examine the evidence in the light of the investigating authority's methodology, a panel's analysis usually should seek to review the agency's decision on its own terms, in particular, by identifying the inference drawn by the *agency* from the evidence, and then by considering whether the evidence could sustain that inference. Where a panel examines whether a piece of evidence could directly lead to an ultimate conclusion—rather than support an intermediate inference that the agency sought to draw from that particular piece of evidence—the panel risks constructing a case different from that put forward by the investigating authority.<sup>278</sup> In so doing, the panel ceases to *review* the agency's determination and embarks on its own *de novo* evaluation of the investigating authority's decision. As we explain below, panels may not conduct a *de novo* review of agency determinations.

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<sup>278</sup> This is not to say that a panel is prohibited from examining whether the agency has given a reasoned and adequate explanation for its determination, in particular, by considering other inferences that could reasonably be drawn from—and explanations that could reasonably be given to—the evidence on record. Indeed, a panel must undertake such an inquiry. ....<sup>64</sup>

7.21 Applying these principles to the case before it, the Appellate Body found that the Panel had failed to examine the evidence in its totality, thus failing to assess the agency's determination.

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<sup>61</sup> Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea* ("US – Countervailing Duty Investigation on DRAMS"), WT/DS296/AB/R, adopted 20 July 2005.

<sup>62</sup> *Ibid.* at para. 143.

<sup>63</sup> *Ibid.* at para. 150.

<sup>64</sup> *Ibid.* at para. 151 (footnote omitted).

Rather, the Panel's assessment reflected its own views on the question of entrustment or direction, indicating that it had engaged, improperly, in a *de novo* review of the evidence. Consequently, the Appellate Body concluded that the Panel had "essentially "second-guessed" the investigating authority's analysis of the evidence and thus overstepped the bounds of its review".<sup>65</sup>

7.22 Although the Appellate Body was addressing the correct application of the standard of review under Article 11 of the DSU in cases of Panel review of a national agency's determination, we consider its views to be, if anything, even more pertinent to the understanding of the standard of review applicable to determinations of fact by national investigating authorities under Article 17.6 of the AD Agreement, and thus highly relevant to our task in this dispute.

7.23 Turning to Canada's specific allegations of error, we will address each of Canada's assertions individually, but keep in mind that our review must be based on the totality of the evidence relied upon by the USITC, and must respect the approach of the USITC to the analysis.

**(a) likely increase in imports**

7.24 Canada argues that the USITC made a "new" finding that there had been a significant rate of increase in imports, based on no new evidence, which is undermined by the fact that the USITC had found no material injury despite the fact that imports had much the same market share during the period of investigation. Canada considers that in concluding that the 2.8 percent increase in imports over the period of investigation was significant, the USITC reversed the position it had taken in the original determination. Moreover, Canada asserts that the *rate* of increase should be considered on a year to year basis, rather than over the period of investigation as a whole, in which case the rate of increase of imports would be seen to be essentially flat, at 1.4 percent annually, from 1999-2001. Canada also considers that the additional evidence referred to in the section 129 determination, the 14.6 percent increase in import volumes in the first quarter of 2002 as compared with the first quarter of 2001, represented an increase in Canadian market share within the historical pattern, and thus did not support the conclusion that imports will increase beyond historical levels. Moreover, Canada asserts that the comparison with the first quarter of 2002 was inappropriate because provisional countervailing duty measures expired in December 2001, resulting in a "gap" in the application of duties, and thus conditions in the first quarter of 2002 were not "normal". In Canada's view, the comparison of import trends for the first quarter of 2002 with the first quarter of 2001 is particularly unhelpful because opposite commercial incentives existed in the two quarters – Canadian producers had a short-term *incentive* to increase shipments to the United States during the first quarter of 2002 – the "gap" period – before final duties were imposed, while they had a short-term *disincentive* to ship to the United States in the first quarter of 2001 until the SLA expired on March 31.

7.25 The United States asserts that Canada's arguments concerning the volume of and increases in imports ignore the significance of the baseline volume of imports, make inappropriate comparisons of percentage changes in numbers having different baselines, and ignore the interrelationships between the factors considered by the USITC. The United States notes that the Panel had recognized the USITC's finding that the volume and market share of imports during the period of investigation were already at significant levels, and that this context is critical to understanding the analysis of import trends. The United States stresses the fact that imports held a consistently large and increasing share of the US market during the period of investigation, accounting for between 33.2 percent to 34.7 percent of the US market for softwood lumber in the period examined. The USITC found that the rate of increase in the volume of subject imports from 1999 to 2001 was 2.8 percent and concluded that this was a significant rate "when the baseline volume is already so significant"<sup>66</sup> The USITC also observed that this increase had occurred during a period when imports from Canada were subject to restraints under the SLA, and despite a slight decline in US apparent consumption. In the

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<sup>65</sup> *Ibid.* at para. 189.

<sup>66</sup> Views of the Commission, Exhibit CDA-1, at page 21.

US view, Canada's focus on the percentage increase, without reference to the context of the large baseline simply fails to appreciate the USITC's analysis. Similarly, the United States maintains that Canada's arguments concerning the increases in imports at the end of the period of investigation miss the point that subject imports were 6.2 percent higher in the first quarter of 2002 compared with the first quarter of 2000, while apparent US consumption had declined by 2.3 percent.<sup>67</sup>

7.26 It is clear that the USITC considered the question that the Panel had raised in its original determination, whether the rate of increase in imports during the period of investigation was significant, and a factor supporting the affirmative determination of threat of material injury. We can find no error in the mere fact that the USITC made a "new" determination in this regard – indeed, that is precisely what is expected in the context of implementing a panel's report – that the investigating authority will make a new determination. What is important at this juncture is whether the new determination is consistent with the United States' obligations under the asserted provisions of the AD and SCM Agreements.

7.27 The fact that the USITC concluded that the rate of increase was significant based on the overall rate of increase over the period of investigation rather than the year-on-year rate of increase is not demonstrably unreasonable, and we see no basis for concluding that the USITC erred in this regard. Moreover, we do not consider that, as argued by Canada, the USITC was required to explain this conclusion as a "departure" from its previous conclusions on the issue, as argued by Canada.<sup>68</sup> In our original decision, we observed that 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"<sup>69</sup> That is, we found that the USITC had made no conclusion on this issue, and consequently there is no prior conclusion from which it needed to explain its "departure" in the section 129 determination – even assuming such an explanation might be needed in the event of a change. Looking at the decision in the section 129 proceeding on this issue, the conclusion that a 2.8 percent increase in imports was significant is not unreasonable, in light of the totality of the factors considered by the USITC, including the significant baseline volume from which that increase occurred, the restraining effect of the SLA, increases in Canadian imports at a significant rate after the expiration of the SLA, increases in those imports during periods when they were not subject to restraints, and the slight decline in US consumption.

7.28 Clearly, an alternative view of the evidence, focussing on the annual increase and stressing the relatively small percentage change, might support a different conclusion, but this alone does not demonstrate that the USITC's analysis and determination are inconsistent with the US obligations under the AD and SCM Agreements. Nothing in Articles 3.7, 15.7, or any other provisions of the AD and SCM Agreements, establishes methodological requirements for the investigating authorities' consideration of the factors set out in those Articles, or sets out standards for determining the significance of the various factors. The requirements set out in Article 3.1, which governs injury determinations generally, are that the investigating authorities consider the relevant factors, and make a determination based on an objective examination of positive evidence concerning relevant factors. On review, a panel must consider whether the determination made is one that could be reached by an unbiased and objective investigating authority on the basis of the facts before it and in light of the explanations given. Merely that alternative conclusions might also be within the range of possible determinations that would satisfy that standard does not demonstrate that the conclusions actually reached are not consistent with the requirements of the AD and SCM Agreements.

7.29 Canada also asserts that the USITC reached a "new" finding that the restraining effects on imports of the SLA were significant, despite having originally found only that the SLA had restrained the volume of imports to some extent, and having virtually no new evidence on this issue. Canada

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<sup>67</sup> Views of the Commission, Exhibit CDA-1, at page 53.

<sup>68</sup> Canada's answer to the Panel's question 2.

<sup>69</sup> Panel Report, *US – Softwood Lumber VI*, *supra* note 1, at para. 7.90.



argues that the USITC emphasized the fact that imports increased during the period the SLA was in effect, but notes that the USITC found no material injury despite the increase in Canadian market share during the period of investigation. Canada also challenges the USITC's reliance on studies concerning the SLA's effects, which the USITC found consistent with its conclusion that the SLA had constrained imports, noting that the USITC did not categorize these effects as significant, and did not address whether the SLA had any significant restraining effect at the time it expired. In Canada's view, the evidence demonstrated that the effects of the SLA changed over the time it was in effect. Canada also challenges the USITC's reliance on the Stoner study, without recognizing methodological criticisms of that study. Canada also asserts that the USITC did not address evidence relied on by the dissenting Commissioner that indicated the SLA had little influence on prices and that its expiration would not result in significant price or volume changes.

7.30 The United States considers that Canada's arguments concerning the USITC's analysis incorrectly assume that the USITC's findings in the section 129 determination concerning the restraining effects of the SLA were different than in the original determination. In addition, the United States argues that Canada incorrectly assumes that the USITC had found, in its analysis of material injury, that the volume of imports did not support an affirmative determination. The United States maintains that the USITC had always recognized that imports increased even with the SLA in place, and that substantial increases occurred during periods when imports were not subject to restraints. The USITC also considered evidence demonstrating the impact of the SLA on the domestic market, including evidence that the constraints on the volume of imports resulted in higher prices for such imports and higher costs for construction than in the absence of the SLA. Additional evidence demonstrating the restraining effect of the SLA included the fact that increases in subject imports while the SLA was in effect did not keep pace with increases in demand from 1995 to 2001.<sup>70</sup> The United States maintains that Canada incorrectly suggests that the USITC relied principally on only one economic study with respect to the effects of the SLA. The United States notes that there were several studies in evidence. The United States also asserts that Canada mischaracterizes the facts concerning the use of different quotas available under the SLA, which information also supported the USITC's conclusions concerning the restraining effects of the SLA. Finally, the United States argues that the USITC had recognized that during the pendency of the SLA, shipments from provinces outside the SLA's effect had more than doubled, but found that imports from provinces covered by the SLA increased when it expired, while exports from the other provinces continued at levels higher than those reported prior to the SLA. Thus, the United States argues that the evidence did not demonstrate that the SLA had merely resulted in a shift in imports.

7.31 Canada maintains that the USITC failed to analyze whether import trends in the period April – August 2001 represented an accurate gauge of what would happen in the future in the absence of anti-dumping or countervailing duty measures or whether the increase represented nothing more than a shift in timing of exports to take advantage of the window between the expiry of the SLA and the imposition of provisional measures, an analysis Canada considers was necessary in light of the Panel's original report. Canada asserts that the USITC's conclusion rejecting the argument that these increases represented nothing more than a shift in the timing of imports contains several critical deficiencies. First, Canada asserts that the USITC focussed on total imports during this period, rather than examining month-to-month changes, thereby failing to address the question whether the increase in imports represented simply a shift in timing. Second, Canada maintains that the USITC focused exclusively on increases in the absolute volume of subject imports, not market share, and asserts that the change in market share was not significant. Moreover, Canada considers that a comparison of volumes of imports during the period April – August 2001 to levels in prior years would be appropriate only if US consumption had been the same in prior years, which Canada maintains it was not. Canada argues that a consideration of Canadian market share as the basis of comparison shows fluctuations consistent with shifts in timing by exporters. Finally, Canada argues that the USITC's reliance on an increase in imports during the period April – August 2001 to support the conclusion

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<sup>70</sup> Views of the Commission, Exhibit CDA-1, at page 26.

that imports were likely to increase substantially in the near future cannot be reconciled with the USITC's finding that it would not have found material injury even if provisional measures had not been in place as from August 2001.

7.32 With respect to the consideration of import trends in the period 1994 to 1996, Canada argues that the USITC did not analyze whether market conditions in this period before the period of investigation were sufficiently similar to predicted market conditions to warrant the conclusion that imports would increase substantially. Canada asserts that the USITC looked only at apparent US consumption in this regard, but did not analyze why imports were increasing. Nor did it analyze why imports also increased in the immediately preceding 1991 – 1994 period, a period during which import restraints were in effect. Nor did the USITC even collect the data necessary to analyze whether increasing imports had any injurious effect on the US industry during that time, even though it would be impossible to draw inferences about the future effect of increasing imports without knowing what impact they had had in earlier periods. Consequently, in Canada's view, the USITC failed to respond to the deficiencies identified by the Panel in its original determination concerning the USITC's analysis of the trend in import volumes.

7.33 The United States stresses that the USITC considered import trends during periods of no import restraints in order to establish the context for evaluating the significance of changes in Canadian imports. The USITC had found that, during the period between the expiration of the SLA and the imposition of preliminary countervailing duties (April – August 2001), imports were substantially higher than in the same period of each of the preceding three years, 1998-2000.<sup>71</sup> While the rate of increase in imports slowed when, as a result of the preliminary affirmative countervailing duty determination, bonding requirements on Canadian imports went into effect, Canadian imports for the period April – December 2001 were still higher than during the same period of 2000.<sup>72</sup> Moreover, the United States points out that the new data addressed in the section 129 proceeding demonstrated a significant increase in the first quarter of 2002 as compared with the first quarters of 2000 and 2001.<sup>73</sup> The United States argues that Canada's focus on the "gap" in application of provisional countervailing duty measures from December to April 2002 fails to recognize that provisional anti-dumping duty measures were still in place during that period. Moreover, the United States disputes Canada's assertion that "opposite commercial incentives" in the first quarters of 2002 and 2001, explain the increase in imports during the first quarter of 2002. The United States notes that there was a significant increase in the first quarter of 2002 as compared with the first quarter of 2000, and maintains that market conditions (other than the presence or absence of the SLA), such as differences in consumption, did not explain the significant increases in subject imports.

7.34 The United States argues that, in response to the Panel's concern that the USITC had not addressed the argument that the increase in imports during the April-August 2001 period only reflected a shift in the timing of imports, in its section 129 determination, the USITC found that subject imports increased both during the April-August 2001 period and afterward, a fact inconsistent with the suggestion that import volumes during the period could be explained as a timing shift. The United States maintains that Canada's focus on monthly import data for the April-August 2001 period does nothing to undermine this finding. In addition, the USITC also considered the pattern of increases in imports, which was at a rate higher than increases in US consumption during 1994-1996, immediately prior to the adoption of the SLA, and which increases ceased when the SLA entered into force.

7.35 Again, it is clear that the USITC re-examined the evidence concerning import trends, and considered that evidence in the light of the significant volume of imports during the period of investigation. We cannot conclude that the USITC's analysis of changes in demand and the effects of

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<sup>71</sup> Views of the Commission, Exhibit CDA-1, at page 28.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*, at page 29.

the SLA and provisional measures put in place as a result of this investigation is unreasonable. The USITC's section 129 determination explains why it determined that the SLA had restrained imports, rather than resulting in mere shifts in the source and timing of imports, and why it concluded that the expiry of the SLA, in the absence of anti-dumping and countervailing measures, would result in a substantial increase in imports, in the context of the already large baseline volume. While Canada's arguments demonstrate that there is a plausible alternative line of reasoning that could be followed, under the standard of review applicable in this case, this is not sufficient for us to find a violation. Moreover, we consider that while it may be possible to debate each aspect of the USITC determination, and come to different conclusions depending on the starting point and focus of each line of argument and analysis, our obligation is to consider whether the USITC's reasoning and conclusion as set forth in its determination were those of an objective decision maker in light of the facts, and not whether every possible argument is resolved in favour of that determination.

7.36 With respect to its consideration of forecasted US demand, Canada asserts that the USITC reversed its position in the section 129 determination from its original view, without a sufficient basis in evidence, which was largely unchanged from the original determination. In Canada's view, the USITC's conclusions regarding demand are not consistent with the evidence which indicated that demand would improve in the 18 months after the USITC's vote in mid-2002.

7.37 The United States asserts that the USITC's determination, that there would not be substantial growth in demand for softwood lumber in the imminent future, is almost identical to the finding in the original determination. The United States points out that the USITC found that the demand forecasts for softwood lumber from industry analysts were somewhat mixed, but overall indicate stable demand with some growth. In the US view, while Canada focuses on the demand forecasts for softwood lumber in isolation, the USITC properly considered those forecasts together with forecasts for softwood lumber's primary end-use, US housing starts. The USITC found that the lack of a correlation between some of the forecasts of lumber demand growth and forecasted housing starts and the lack of any agreement among forecasters raised questions about the usefulness of these forecasts. The USITC also found that the sharp decline in housing starts in March 2002 showed that the improvements in demand during the mild winter of 2001-2002 were not sustainable.

7.38 With respect to the issue of importation relative to demand, the USITC found that there was no basis in the record evidence to conclude that likely substantial increases in imports would be outpaced by increases in demand. The United States points out that the USITC found that in 2001, the increase in imports outstripped demand, and that after the SLA expired, imports were 11.3 percent higher for the April-August 2001 period compared to the same period in 2000, and 4.9 percent higher for the April-December 2001 period compared to the April-December 2000 period, while apparent US consumption for all of 2001 was only 0.2 percent higher than it had been in 2000.<sup>74</sup> The United States also notes that new data considered in the section 129 proceeding showed that apparent US consumption for first quarter 2002 increased at a substantially lower rate, 9.7 percent, than the 14.6 percent increase in imports, as compared with first quarter 2001.<sup>75</sup> Moreover, imports were 6.2 percent higher in the first quarter of 2002 compared with the first quarter of 2000, while apparent US consumption declined by 2.3 percent for first quarter 2002 compared with first quarter 2000.<sup>76</sup>

7.39 The USITC's section 129 determination provides a not unreasonable explanation for its conclusion that imports would not merely satisfy increasing demand in the US market in line with historical trends, but would increase more than demand. We have looked at the underlying information on demand relied upon by the USITC and cannot conclude that an objective and unbiased investigation authority could not find that it supported the conclusion reached by the USITC.

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<sup>74</sup> *Ibid.*, at page 21.

<sup>75</sup> *Ibid.*, at page 21-22.

<sup>76</sup> *Ibid.*, at footnote 53.

7.40 With respect to the USITC's consideration of Canadian excess capacity, production, and export orientation, Canada asserts that the USITC continued to rely on "slight" increases in projected capacity in support of its finding that imports would increase substantially in the imminent future, despite Canadian producer projections that were within the range of historical experience. In Canada's view, the USITC's conclusion that Canadian producer projections were inconsistent with other data, and therefore not to be relied upon, was improper in light of new data that was consistent with the projections originally reported by Canadian producers.

7.41 The United States points out that, on the issue of available excess Canadian capacity, the Panel had found that the USITC's discussion regarding the Canadian industry's export orientation did not support the conclusion that excess capacity would be exported to the United States beyond the "historical" level. In response, in its section 129 determination, the USITC analyzed capacity and concluded that Canadian producers had sufficient excess capacity, and projected increases in production and capacity in 2002 and 2003, to substantially increase exports to the United States. In this regard, the USITC noted that Canada has substantial capacity to produce softwood lumber, equal to about 60 percent of US consumption.<sup>77</sup> Excess Canadian capacity in 2001 had increased to a level equivalent to 10 percent of US apparent consumption, as capacity utilization declined to 84 percent from 90 percent in 1999.<sup>78</sup> The USITC found even more telling the fact that Canadian producers projected increases in production and capacity utilization from 2001 to 2003, a period during which demand in the US market was forecast to remain relatively unchanged or increase only slightly. In the United States' view, Canada's arguments focus inappropriately on the incremental increase in production capacity, without putting the information into context. In this regard, the United States notes that Canadian production is tied to the US market, the most important market for Canadian producers, accounting for 60-65 percent of Canadian production and shipments. Data considered in the section 129 investigation showed that in the first quarter 2002, as apparent Canadian consumption declined by 23 percent compared with the first quarter of 2001, Canadian producers shifted sales from the home market to the US market.<sup>79</sup> The United States maintains that the USITC properly focused on this evidence of the export orientation of Canadian lumber producers, and discounted Canadian producers' projections that additional production would be exported to the United States at below historical levels.

7.42 Once more, the explanation concerning the available excess capacity in Canada and the likelihood that a substantial portion of projected increases in production would enter the US market, set forth in the section 129 determination provides reasoned support for the USITC's conclusion that there would be a substantial increase in imports in the near future.

**(b) likely price effects**

7.43 Canada maintains that the factors relied upon by the USITC do not support its finding of likely adverse price effects. Canada stresses that the focus of an investigating authorities analysis under Article 3.7 (iii) of the AD Agreement and Article 15.7 (iv) of the SCM Agreement is on current prices as a predictor of future price and demand effects.<sup>80</sup> Canada asserts that in the section 129 determination, the USITC relied on likely substantial increases in subject import volumes and the at least "moderate substitutability" between subject imports and domestic product in finding likely adverse price effects, and also noted that prices declined in the second half of 2001 to levels as low as those observed in 2000. While the USITC found that there was some improvement in the first quarter of 2002, it attributed this largely to an increase in consumption, and concluded that the improvement

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<sup>77</sup> *Ibid.*, at page 32.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*, at page 37.

<sup>80</sup> Article 3.7 (iii) of the AD Agreement and Article 15.7 (iv) of the SCM Agreement provide that an investigating authority should consider "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."

was not likely to last, in light of a decline in housing starts (the primary component of demand for softwood lumber) in March 2002 from a record high in February. The USITC also noted that there had been record housing starts during the period of investigation, but that this did not guarantee higher prices in the US market. The USITC also looked at the price trends, which showed declines in the last two quarters of 2001.

7.44 Canada maintains that the USITC's analysis in the section 129 determination fails to acknowledge the pricing analysis it had undertaken in the original determination, in which no significant underselling had been found, and declines in prices during the period of investigation were attributed to excess supply from both domestic and Canadian sources, and consequently the USITC could not conclude that imports had significant price effects during the period of investigation in the context of its material injury analysis. In the context of its threat analysis, Canada maintains that the USITC had not originally cited declines in prices in support of its finding that imports were entering the US market at prices likely to cause adverse price effects, but in the section 129 determination, the USITC cited the declines in prices in the third and fourth quarter of 2001 as support for the conclusion that imports at the end of the period were entering at prices likely to have a significant depressing or suppressing effect on US domestic prices. In Canada's view, there is no explanation of how the USITC could conclude that the same price trends could result in different conclusions regarding the current effects of prices and the future effects of prices, and these two conclusions cannot be reconciled.

7.45 Canada maintains that the mere fact that prices declined says nothing about "whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices," and more particularly, says nothing about the cause of their decline – i.e., whether Canadian imports caused the observed price declines. Moreover, Canada maintains that the USITC's analysis of price trends is incomplete and inaccurate, because it discounts the fact that prices rose after the fourth quarter of 2001. Canada considers that the fact, cited by the USITC, that 2002 prices were not as high in absolute terms as in prior years or prior quarters, is not important in the context of a threat determination – what was important was the direction of price movements at the end of the period of investigation. Canada asserts that the USITC's finding that imports are likely to have a significant price-depressing effect necessarily is dependent on its finding of likely future substantial increases in import volumes, which finding Canada maintains is unsupported. Canada also asserts that the Panel found, in its original determination, that a substantial increase in imports in *absolute* terms, without a finding of a significant increase in market share, was insufficient to support a finding that subject imports will cause significant price depression or suppression in the future. Therefore, Canada maintains that the USITC's pricing analysis fails to support its finding that subject imports are likely to enter at prices that will have a significant depressing or suppressing effect on prices.

7.46 Canada maintains that, as the USITC found US and Canadian lumber to be "substitutable" but did not amend its prior characterization of "moderate" substitutability, the USITC was required to consider whether, and to what extent, the predicted increase in subject imports would likely involve purchases by US consumers that do not consider Canadian and US lumber to be close substitutes, because the greater the percentage of subject imports that serve these segments of the US market, the lower would be the potential for price suppression. Canada asserts that the USITC failed to undertake such an analysis, focusing instead on evidence that imported and domestic lumber are interchangeable in certain applications, while ignoring evidence that many purchasers do not consider them substitutable to a significant extent.

7.47 The United States observes that the USITC found that the price trend evidence, particularly the fact that prices reached their lowest levels as imports increased significantly after expiration of the SLA, supported the conclusion that imports were entering at prices that were likely to have a significant depressing or suppressing effect on domestic prices, and thereby were likely to adversely impact the US industry in the imminent future. In support of this conclusion, the USITC noted that prices for softwood lumber declined substantially during the period of investigation, particularly in

2000.<sup>81</sup> In mid-2001, at a time of considerable uncertainty in the market due to the expiration of the SLA and the commencement of the original investigations, prices for softwood lumber increased. However, these increases were temporary; prices began to decline in the July - September 2001 period and fell substantially in the October - December 2001 period to levels as low as those in 2000.<sup>82</sup> Even with an improvement in the January - March 2002 period, prices at the end of the period of investigation were still near the lowest levels reported for the period examined.<sup>83</sup> The USITC found that the price increase in the first quarter of 2002 was largely due to an increase in consumption— an improvement that was not likely to be sustained, in light of the sharp decline in housing starts in March 2002 from the record high reported for February 2002. Further, the USITC found that record US housing starts throughout the period of investigation clearly did not guarantee higher prices in the US market, given price competition and excess supply.

7.48 The United States asserts that, contrary to Canada's argument, the USITC had *not* found that imports had no effect on prices during the period of investigation. Rather, the USITC had concluded, in its material injury analysis that substantial price declines in 2000, and resulting deterioration of the condition of the domestic industry, were due to excess supply from both subject imports and domestic production. Thus, the evidence supported a finding that subject imports had *some* adverse price effect. However, the USITC concluded that during the period of investigation, they had not yet had a *significant* price effect so as to be a substantial cause of material injury to the domestic industry, and that domestic product contributed to the adverse price effects. The United States points out that the USITC also found that the prices at the end of the period of investigation (*i.e.*, July-September and October-December 2001 and January-March 2002) were at levels as low as those in 2000,<sup>84</sup> and that import prices, combined with the imminent significant increase in subject import volume, were likely to have a significant depressing or suppressing effect on domestic prices in the imminent future. Moreover, the USITC had found that the SLA had a significant restraining effect on the volume of subject imports and, had therefore limited the effect of subject imports on prices in the US market.

7.49 The United States considers that Canada's discussion of the pricing data in the section 129 determination focuses on the first quarter 2002 data and mischaracterizes the USITC's analysis. The United States asserts that Canada's focus on the comparison between first quarters 2002 and 2001 ignores the evidence that prices for the January - March 2001 period had not yet recovered from the low levels of the July - September and October - December periods of 2000 and were subject to considerable uncertainty in the market due to the pending expiration of the SLA. Moreover, the United States argues that Canada errs in asserting that the USITC made a finding of no significant price underselling. Rather, the United States maintains that the USITC found that, as agreed to by all parties to the investigations, making direct cross-species price comparisons in order to assess underselling was inappropriate. Thus, although differences in the imported and domestic species of softwood lumber limited the meaningfulness of any direct price comparisons, the evidence indicated competition across species, such that prices of a particular species would affect the prices of other species. The United States points out that the USITC had concluded that imported and US softwood lumber were interchangeable and substitutable, and that moderate substitutability is sufficient in the context of the USITC's determination of likely adverse price effects.

7.50 While we can certainly see the reasoning underlying Canada's arguments, we cannot see that they demonstrate that the USITC's determination was not one that could be reached by an unbiased and objective investigating authority, on the basis of the evidence and the explanations. Canada's arguments stress different aspects of the pricing information, focusing on the most recent trends, while the USITC's analysis integrates the pricing information into the context of the condition of the industry, the volume and trend of imports, and the effects of the SLA. As noted above, there is

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<sup>81</sup> Views of the Commission, Exhibit CDA-1, at page 41-42.

<sup>82</sup> *Ibid.*, at page 44.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*, at page 46.

nothing in the AD or SCM Agreements that establishes methodological requirements for an investigating authority's consideration of the factors relevant to a determination of material injury or threat of material injury. There is certainly nothing that would require a focus on one aspect of the information, such as the most recent data, so long as the ultimate conclusion is one that could be reached by an unbiased and objective investigating authority in light of the facts before it and explanations given.<sup>85</sup> Finally, we note that Canada's arguments stress aspects of the evidence other than those relied on by the USITC, such as the fact that underselling could not be substantiated, or price comparisons over different time periods. However, these arguments, while presenting reasoned alternative conclusions, do not persuade us that the USITC's determination regarding price effects, taken as a whole and on its own terms, is insufficiently reasoned or not based on positive evidence.

7.51 In this regard, we note the statement of the Appellate Body in *US – Countervailing Duty Investigation on DRAMS*:

"[t]he explanation provided by the investigating authority – with respect to its factual findings as well as its ultimate subsidy determination – should also address alternative explanations that could reasonably be drawn from the evidence, as well as the reasons why the agency chose to discount such alternative in coming to its conclusions."<sup>86</sup>

The USITC did not just make conclusions based on the facts before it, but did in fact address the arguments of the parties concerning the interpretation of that evidence. We note that many of the arguments presented by Canada in this proceeding, not only with respect to the pricing information, but in other aspects, are largely similar to arguments that were presented to, and rejected by, the USITC. While this does not, of course, necessarily mean that we will find the USITC's determination to be consistent with the AD and SCM Agreements, it does indicate to us that the USITC did in fact make its determinations after having considered possible alternatives, and explaining why, nonetheless, it reached the conclusions it did.

7.52 Taking into account the framework of the USITC's analysis, we cannot find that the determination that imports were entering the US at prices likely to have a depressing or suppressing effect on US prices is inconsistent with the obligations of the AD and SCM Agreements. While it is true, as Canada argues, that prices were increasing at the end of the period of investigation, it is also true, as the United States argues, that prices were as low as they had been earlier in the period, at a time when the financial condition of the domestic industry was poor. Moreover, the USITC had found prices at those levels were the cause of the poor condition of the industry, but that US lumber sales had contributed to the price effects. Thus, if that aspect were to change (as the USITC found to be the case, as discussed below), a finding of threat of material injury would not be unreasonable or

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<sup>85</sup> We recognize, as argued by Canada, that the AB has observed that "[t]he likely state of the domestic industry in the very near future can best be gauged from data from the most recent past... in principle, within the period of investigation as a whole, evidence from the most recent past will provide the strongest indication of the likely future state of the domestic industry." 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, at para. 137. The Appellate Body went on to add, however, that such information from the end of the period of investigation is not to be considered in isolation from data from the entire period of investigation. "The real significance of the short-term trends in the most recent data, evident at the end of the period of investigation, may only emerge when those short-term trends are assessed in the light of the longer-term trends in the data for the whole period of investigation." *Ibid.* at para. 138. It seems clear in this case that the USITC did in fact consider the most recent data, but did not focus exclusively on that data in isolation, but against the background of the information concerning the period of investigation as a whole. In that context, and in light of the explanations given by the USITC, we cannot find that its conclusions were not those of an unbiased and objective investigating authority.

<sup>86</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, *supra* note 61, at para. 186.

unsupported by the evidence considered. While we might (or might not) have reached the same conclusions were we making the decision in the first instance based on the evidence before the USITC, we are, of course, precluded from conducting a *de novo* review. We cannot conclude that the USITC acted unreasonably in finding that increased imports at such price levels posed a threat of injury to the US industry, when viewed, as the USITC did, against the background of the circumstances of the industry during the period of investigation.

**(c) vulnerability of the domestic industry**

7.53 Canada asserts that the USITC's finding that the US industry was vulnerable is unsupported by the factors relied upon. Canada notes that the USITC in both its original and its section 129 determination found that the domestic industry's condition was "deteriorating," despite the fact that new data obtained in its section 129 proceeding for the first quarter of 2002 showed improvement in the US industry's condition, including capacity, production, capacity utilization, shipments, per-unit revenues, operating income, cash flow, employment, wages, productivity, and, most importantly, financial performance. The USITC acknowledged this improvement, but concluded that information for a single quarter was not necessarily indicative of the industry's performance for the entire year, and therefore did not alter its finding of vulnerability. In Canada's view, this conclusion cannot be reconciled with the USITC's reliance on the decline in housing starts from February to March 2002 in support of its finding that increased consumption was not likely to be sustained. Moreover, Canada asserts that the profitability of the industry had been improving over a longer period, citing the fact that, after reporting negative operating margins for the final three quarters of 2000 and the first quarter of 2001, the domestic industry reported a positive operating margin of 3.7 percent in the final three quarters of 2001. In Canada's view, this indicates that the improvement in the first quarter of 2002 compared to the first quarter of 2001 is a continuation of a trend which undermines any finding that the industry is "vulnerable." Canada also considers it more important to consider whether the US industry's condition was improving or deteriorating following the 9/11 recession, than to consider whether its financial performance was poorer in the first quarter of 2002 than it had been in the first quarter of 2001.

7.54 The United States points out that the USITC found that the condition of the domestic industry, and in particular its financial performance, deteriorated over the period of investigation, as a result of the substantial decline in prices. Imports were increasing substantially after expiry of the SLA and at the end of the period of investigation, and were entering at prices at their lowest levels during the period of investigation. Thus, the USITC found that the industry was vulnerable to future injury. Domestic producers' market share had declined, and the financial performance had dropped dramatically from 1999 to 2000.<sup>87</sup> While the data in the section 129 proceeding showed some improvements in the domestic industry's financial performance in the first quarter of 2002 compared with the first quarter of 2001,<sup>88</sup> the USITC concluded that a single quarter's performance did not change the fact that, overall, the industry's performance had deteriorated and remained weak. The United States argues that these factors clearly support the conclusion that the US industry was vulnerable to injury.

7.55 With respect to the USITC's findings of vulnerability, we do not consider that the mere fact that the condition of the US industry was improving at the end of the period of investigation precludes a finding that its condition was nonetheless vulnerable. It is clear that the USITC had found the industry to be in poor condition during the period of investigation, a condition which might have supported an affirmative finding of material injury but for the fact that the USITC determined that factors other than Canadian imports contributed to that condition. Information concerning the domestic industry at the end of the period of investigation, while showing improvements, continued to

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<sup>87</sup> Views of the Commission, Exhibit CDA-1, at page 60-61.

<sup>88</sup> *Ibid.*, at page 62.



reflect less than robust performance, despite import restraints having been in place. In this context, we cannot conclude that the USITC's finding is unreasonable or not based on positive evidence.

7.56 Overall, it seems clear to us that Canada has presented a reasoned alternative interpretation of the evidence in the record. However, Canada has failed to demonstrate that the USITC's analysis and determination that imports were likely to increase substantially, taken as a whole and considered in light of the approach taken by the USITC in its analysis and determination, is not one that could be reached by an objective and unbiased investigating authority. This is particularly the case because Canada's arguments largely present an alternative, different interpretation of the evidence before the USITC. This is not, however, sufficient to demonstrate error in the interpretation on which the USITC actually based its decision, which relied in major part on the background and context of the poor financial performance of the domestic industry caused by low prices, the significant volume and increases of imports, and the substantial portion of apparent US consumption accounted for by those imports, during the period of investigation.<sup>89</sup>

7.57 Moreover, despite Canada's attempts to demonstrate inconsistencies between the findings with respect to present material injury and threat of material injury, it is clear to us that the finding of no material injury caused by Canadian imports during the period of investigation does not preclude a finding of threat of material injury in the circumstances of this case. The USITC did not find no material injury to the domestic industry during the period of investigation in the sense that the condition of the industry was good, but rather that the poor condition of the domestic industry could not be attributed to the effects of Canadian imports so as to support an affirmative determination and the imposition of measures. Against that background, while it is possible to disagree with the USITC's analysis, we cannot conclude that it is unreasonable. Finally, as we noted at the outset, we must review the section 129 determination on its own term. The fact that the USITC made somewhat different findings, or expressed different conclusions based on different or additional analysis and evidence than in the original determination is simply not dispositive in our decision whether the section 129 determination is inconsistent with the United States obligations under the AD and SCM Agreements. Thus, we conclude that the determination of the USITC with respect to the likely volume and price effects of imports from Canada is not inconsistent with the requirements of Articles 3.7 of the AD Agreement and 15.7 of the SCM Agreement

## **B. ALLEGED VIOLATIONS OF ARTICLE 3.5 OF THE AD AGREEMENT AND ARTICLE 15.5 OF THE SCM AGREEMENT**

### **(a) The USITC's Analysis of Causal Link**

7.58 Canada asserts that the USITC failed to make an adequate finding with respect to causation in violation of Articles 3.5 and 15.5 of the AD and SCM Agreements. Canada considers that the USITC's finding of causal link rests upon the conclusion that excess supply in the US market would result in price declines, and that excess supply would be from Canadian imports, because US producers had brought their production into line with consumption in the US market. Canada asserts that the USITC relied on a single consultant's report as support for this latter conclusion, which the Panel had previously found insufficient in this regard. In addition, Canada asserts that new data

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<sup>89</sup> In addition, we note that we find little significance in the fact that one Commissioner dissented from the decision of the USITC. Canada refers in several instances to this Commissioner's views as demonstrating that the evidence supports a different outcome from that reached by the USITC. This may well be true, but is not sufficient to demonstrate error in the USITC's section 129 determination, which is the determination before us on review. We have looked carefully at the dissenting Commissioner's views, which set out different conclusions that were reached by an unbiased and objective investigating authority, based on a different focus in the analysis and the interpretation and explanation of the evidence. This is not, of course, under the applicable standard of review, sufficient to demonstrate that the determination of the USITC is not one which could be reached by an unbiased and objective investigating authority, based on the facts before it and in light of the explanations given.

obtained in the section 129 determination showed that US production increased by nearly 5 percent during the first quarter of 2002, while Canadian production declined by over 2 percent. In Canada's view, this evidence refutes the conclusion that US producers had curbed overproduction. Overall, Canada considers that as the USITC's conclusion that imports were likely to increase substantially is unsupported, the USITC's causation analysis is perforce inconsistent with Articles 3.5 of the AD Agreement and 15.5 of the SCM Agreement.

7.59 The United States notes that the USITC found that imports, already at significant and increasing levels even with the restraining effect of the SLA in place, and with significant increases in volume after expiration of the SLA, would continue to enter the US market at significant levels and were projected to further increase substantially. In support of its conclusion the USITC observed that prices were weak toward the end of the period of investigation, with prices in the third and fourth quarters of 2001 at levels as low as they had been in 2000. While prices increased in the first quarter of 2002, as consumption temporarily increased, they were still at the low levels reported in 2000, a time when imports were affecting the financial performance of the domestic industry. The USITC found that the likely substantial increases in subject imports would result in excess supply in the US market, putting further downward pressure on prices.

7.60 However, the USITC found that, unlike the situation during the period of investigation, when both US and Canadian producers contributed to the excess supply which caused substantial price declines and led to deterioration in the condition of the domestic industry, by the end of 2001, US producers had brought their production into line with consumption. Canadian producers, however, had excess capacity, and projected increased production, with the United States being the likely market for this excess production. This latter condition would result in excess supply in the US market. Thus, the USITC found that subject imports were likely to increase substantially and were entering at prices, particularly at the low levels seen at the end of the period of investigation, that were likely to have a significant depressing or suppressing effect on domestic prices, were likely to increase demand for further imports, and thereby were likely to adversely impact the US industry in the imminent future, unless protective action were taken.

7.61 The United States notes that, in the section 129 determination, the USITC integrated its causation discussion into its analysis of the threat factors, particularly its analysis of the likely volume and likely price effects of subject imports on the already vulnerable domestic industry. Thus, the United States argues that Canada errs in focusing on the separate section of the section 129 determination that reviewed the factors involved in those findings. Moreover, the United States considers that Canada mischaracterizes the USITC's determination that US producers had brought production in line with consumption, arguing that contrary to Canada's argument, the basis for this conclusion was not a single footnote reference. Rather, the United States points out that the USITC relied on evidence regarding domestic production and capacity. Thus, the United States notes that US production capacity was fairly level during the period of investigation, and that while production increased during the first quarter of 2002 as compared with the first quarter of 2001, it did so less than apparent consumption, and was even so lower than it had been in the first quarter of 2000.

7.62 As with its arguments concerning the likely increases in imports and price effects of imports, Canada has presented a reasonable alternative interpretation of the evidence in the record, but has failed to demonstrate that the USITC's analysis and determination that the projected increased levels of imports, in light of the prices at the end of the period of investigation and given the vulnerable condition of the domestic industry, threatened material injury to the US industry is not one that could be reached by an objective and unbiased investigating authority. Having found, above, that the USITC's determination concerning likely increased volumes of imports is not inconsistent with the AD and SCM Agreements, it is in that context that we must consider the USITC's causal analysis. In this regard, we note that our original finding that the USITC's causation determination was not consistent with Articles 3.5 and 15.5 of the AD and SCM Agreements, respectively, rested on our

finding that because of an error in a fundamental element of its analysis, the USITC's entire causal analysis could not be sustained.

"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."<sup>90</sup>

In this proceeding, by contrast, we have found that the USITC's conclusion that imports would increase substantially is **not** inconsistent with Articles 3.7 and 15.7 of the AD and SCM Agreements. It is in light of that important difference in its underpinnings that we have assessed the USITC's causal analysis in the section 129 determination.

7.63 While it is possible to disagree with the USITC's analysis, we cannot conclude that it is unreasonable. Moreover, as we noted above, we do not consider that a determination can be sustained on review only if every argument and conflict in the evidence is resolved by the investigating authority in favour of the determination made. It is the task of the investigating authority to weigh the evidence and make a reasoned judgement – this implies that there may well be evidence, and arguments, that detract from the conclusions reached. Unless such evidence and arguments demonstrate that an unbiased and objective investigating authority **could not** reach a particular conclusion, we are obliged to sustain the investigating authorities' judgment, even if we would not have reached that conclusion ourselves. Thus, we conclude that the determination of the USITC with respect to causal link is not inconsistent with the requirements of Articles 3.5 of the AD Agreement and 15.5 of the SCM Agreement

**(b) The USITC's Consideration of "Other Factors"**

7.64 Canada also argues that the USITC's analysis of "other causes of injury" fails to satisfy the requirements of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement. In its section 129 determination, the USITC concluded that there were no known "other causal factors" relevant to its investigation that could constitute a threat of injury to the domestic industry. Therefore, the USITC concluded that it was not necessary for it to conduct a non-attribution analysis, because there were no known factors threatening material injury to the US industry other than Canadian imports. Canada considers that factors other than Canadian imports had substantial adverse effects on the US domestic industry during the period of investigation, as demonstrated by the USITC's material injury analysis. Canada argues that the USITC had acknowledged that other factors had contributed to the substantial declines in price during the period of investigation. Canada argues that at least three other causal factors were affecting the domestic industry, and the USITC erred in dismissing them as factors potentially threatening material injury.

**(i) US domestic oversupply**

7.65 Canada notes that in its original determination, the USITC had found that Canadian imports were not causing material injury because both US and Canadian lumber contributed to excess supply, precluding a finding that imports had a significant impact on the domestic industry. Canada, relying on its view that the USITC's conclusion that US producers had brought production in line with consumption was in error, argues that the central problem facing the US industry was US

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<sup>90</sup> Panel Report, *US – Softwood Lumber VI*, *supra* note 1, at para. 7.122.

overproduction, and that therefore the USITC erred in concluding that it did not threaten injury to the domestic industry.

7.66 The United States considers that Canada mischaracterizes the USITC's determination that US producers had brought production in line with consumption, arguing that that contrary to Canada's argument, the basis for this conclusion was not a single footnote reference. Rather, the United States points out that the USITC also relied on evidence regarding US production and capacity. Thus, the USITC noted that US production capacity was fairly level during the period of investigation, and that while production increased during the first quarter of 2002 as compared with the first quarter of 2001, it did so less than apparent consumption, and was even so lower than it had been in the first quarter of 2000. Canadian producers, however, had excess capacity, and projected increases in production. Moreover, while production data for 2000-2001 showed that both Canadian and US production declined by similar quantities, it also demonstrated that Canadian exports to the US market increased during this period. Thus, the USITC concluded that the likely market for excess Canadian production was the US market, and Canadian exports would continue to oversupply the US market. The United States also notes that Canadian producers projected increases in production of 8.9 percent from 2001 to 2003. When Canadian consumption declined by 23 percent in the first quarter of 2002 compared with the first quarter of 2001, production declined somewhat, but imports to the United States increased, indicating a shift in sales to the US market.

(ii) *Third country imports*

7.67 Canada considers that the USITC's principal reason for concluding that third country imports were not a factor threatening injury was their small market share. However, in Canada's view, the real issue was the expected rate of increase in their market share at the expense of the domestic industry, and not the absolute level of those imports. Canada notes that the USITC had cited an increase of 1.1 percentage points in Canadian market share from 1999 to 2001 in support of its conclusion that Canadian imports were likely to increase in the future, and argues that third country import market share increased by a similar amount – 0.9 percentage points. Moreover, Canada argues that the rate of increase in third country import market share was higher than for Canadian imports. Canada also argues that the fact that individual third country imports would be considered negligible in the context of a material injury analysis, cited by the USITC, is irrelevant to the question whether those increasing imports, as a whole, were a factor threatening injury to the US industry. Finally, Canada considers that the USITC's conclusion that third country imports were not likely to increase relative to Canadian imports because third country imports had not been subject to import restraints during the period of investigation, as Canadian imports were, fails to recognize that continued increase in third country imports equivalent to the increase in Canadian imports would have an equal effect on the US industry. Canada asserts that even if third country imports merely kept pace with Canadian imports, they would have at least an equal effect on the US industry. Canada argues that nothing in the record indicated that the factors causing the increase in third country imports would change, and that therefore there was no support for the USITC's view that it was speculative to conclude that such imports would continue to increase if no order were imposed. Canada considers that the USITC was obligated to determine whether the factors that caused the large increase during the period of investigation would continue in the imminent future.

7.68 With respect to third country imports, the USITC found that such imports never accounted for more than 3.0 percent of apparent consumption, while Canadian imports accounted for at least 34 percent 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 percent of imports, while Canadian imports accounted for about 93 percent of all imports. The United States asserts that Canada ignores the significance of the baseline in focusing on incremental increases in import volume. Thus, the United States points out that while the USITC recognized that the incremental increase in Canadian import volume between 1999 and 2001 was approximately the same as the increase in third country imports import volume, considered in perspective, Canadian imports were

enormous in volume and accounted for about 34 percent of US apparent consumption in the 1999-2001 period, while third country imports never exceeded 2.6 percent of US apparent consumption. Moreover, the USITC noted that the third country imports were higher value than the Canadian imports. The United States considers that Canada errs in focusing on the rate of increase Canadian and third country imports, while ignoring the absolute volumes. The United States also notes that the increases occurred during a period when imports from Canada were subject to restraint, while third country imports were not restrained. In the US view, Canada fails to explain its basis for believing that any significant increase in third country imports would be imminent and how any likely imminent increase in such a small volume of third country imports relative to apparent consumption might rise to the level of having a causal impact on the domestic industry, given the low level of such imports.

**(iii) Cross-Border Integration**

7.69 Canada argues that the view that integrated firms would not harm their related companies is a common-sense proposition recognized by the USITC in other cases, and not speculation, as the USITC characterized it in this case. Moreover, Canada argues that the USITC failed to consider the fact that integration in the North American lumber market was increasing, and the fact that the USITC did not exclude any US companies from the domestic industry as related parties supports the view that integrated firms are unlikely to import Canadian lumber at injurious prices or volumes.

7.70 The United States considers that Canada's argument that increasing integration in the North American lumber industry indicated that integrated firms would not import so as to harm related companies in the US industry is based on facts in a different case, and points out that the USITC found no evidence to support the assertion. The United States argues that the USITC's decision not to exclude from its analysis any domestic producers under the "related parties" provision was because there was no evidence that they were "closely aligned" and likely to be shielded from harm.

7.71 Canada argues that these three factors "indisputably" constitute other factors causing injury, and that therefore, the United States was required to carry out a non-attribution analysis. However, it is not clear to us why this should be the case. While it is clear that these are factors that are at play in the US lumber industry and market, and that they may have had some effects on the industry, that does not necessarily mean that they potentially threaten injury to the domestic industry, and must therefore be the subject of analysis and determinations under the non-attribution provisions of Articles 3.5 and 15.5 of the AD and SCM Agreements. In our view, there is nothing unreasonable in the USITC's conclusion that the mere fact of cross-border integration, even if increasing, does not pose a potential threat of injury to the US lumber industry.

7.72 Similarly, the mere fact that the volume of the increase in third country imports was approximately the same as the volume of increase in Canadian imports does not require the conclusion that third country imports potentially threaten injury to the US industry. When considered in the context of the absolute volume of such imports, as compared to the absolute volume of Canadian imports, and in light of the large number of third country suppliers, the fact that these imports were not restrained during the period of investigation and the higher unit values of third country imports, we cannot conclude that the USITC's conclusion, that these imports do not potentially threaten material injury to the US industry, is not one which an unbiased and objective investigating authority could reach.

7.73 Finally, with respect to potential US oversupply, we note that the principal basis for the USITC's conclusion that the condition of the industry during the period of investigation could not be attributed to Canadian imports was the fact that US supply contributed to the price declines in the market. In the section 129 determination, the USITC explained that, in light of the increased correlation between US production, capacity and demand at the end of the period of investigation, excess supply from US sources was not a potential threat of injury. The availability of capacity in Canada, likely increased production, and the likelihood that exports will be predominantly to the US

market are not relevant to the question whether the USITC erred in so concluding. While those factors support the conclusion that imports from Canada are likely to increase, they do not affect the question whether excess supply from domestic sources potentially threatens the domestic industry.

7.74 We therefore conclude that the USITC's determination regarding other factors potentially threatening injury to the US industry is not inconsistent with Articles 3.5 and 15.5 of the AD and SCM Agreements, respectively.

## **VIII. CONCLUSIONS AND RECOMMENDATION**

8.1 Based on the foregoing, we conclude that the determination of the USITC in the section 129 proceeding investigation is not inconsistent with the asserted provisions of:

- Article 3.5 of the AD Agreement,
- Article 3.7 of the AD Agreement,
- Article 15.5 of the SCM Agreement, and
- Article 15.7 of the SCM Agreement.

8.2 We therefore consider that the United States has implemented the decision of the Panel, and the DSB, to bring its measure into conformity with its obligations under the AD and SCM Agreements.

8.3 Having found that the United States did not act inconsistently with its obligations under the asserted WTO Agreements, we consider that no recommendation under Article 19.1 of the DSU is necessary, and we make none.

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**ANNEX A**

**REQUEST FOR THE ESTABLISHMENT OF A PANEL**

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# WORLD TRADE ORGANIZATION

WT/DS277/8  
15 February 2005

(05-0652)

Original: English

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

### Recourse to Article 21.5 of the DSU by Canada

#### *Request for the Establishment of a Panel*

The following communication, dated 14 February 2005, from the delegation of Canada to the Chairperson of the Dispute Settlement Body, is circulated pursuant to Article 21.5 of the DSU.

On 26 April 2004, the Dispute Settlement Body ("DSB") adopted the Panel report in *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*.<sup>1</sup> The Panel found that the US International Trade Commission's ("USITC") threat of injury determination in *Softwood Lumber from Canada*,<sup>2</sup> was not consistent with the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") and the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"). The Panel recommended that the DSB request the United States to bring its measures into conformity with its obligations under both the *AD Agreement* and the *SCM Agreement*.

Specifically, the Panel concluded that the USITC's finding of a likely imminent substantial increase in softwood lumber imports from Canada was not one which could have been reached by an objective and unbiased investigating authority in light of the totality of the factors and the reasoning in the USITC determination.<sup>3</sup> On this basis, the Panel concluded that the USITC determination was not consistent with the requirements of Article 3.7 of the *AD Agreement* and Article 15.7 of the *SCM Agreement*.<sup>4</sup>

The Panel also concluded that the USITC's determination was not consistent with the requirements of Article 3.5 of the *AD Agreement* and Article 15.5 of the *SCM Agreement* because the USITC's analysis rested upon its unsubstantiated finding of an imminent substantial increase in imports.<sup>5</sup>

<sup>1</sup> Dispute Settlement Body, *Minutes of Meeting (26 April 2004)*, WT/DSB/M/168, 2 June 2004, at para. 5. Also See *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, Report of the Panel, WT/DS277/R, adopted 26 April 2004 [hereinafter "Panel Report"].

<sup>2</sup> *Softwood Lumber from Canada*, Investigations Nos. 701-TA-414 and 731-TA-928 (Final), Publication 3509, May 2002.

<sup>3</sup> Panel Report, at paras. 7.89, 7.96 and 8.1(a).

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*, at paras. 7.122 and 8.2(a).



Finally, the Panel found that in the absence of a WTO-consistent causation finding, it was not necessary or appropriate to make findings with respect to whether the ITC attributed the injuries caused by other factors to the allegedly dumped and subsidized imports. In view of the fundamental significance of the non-attribution requirement and to give guidance should the issue arise in implementation, however, the Panel set out its serious concerns on this issue. The Panel concluded that given the overall absence of discussion of other factors potentially causing injury in the future, the Panel would conclude that the ITC 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 allegedly dumped and subsidized imports.<sup>6</sup>

On 1 October 2004, pursuant to Article 21.3(b) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Canada and the United States agreed on a "reasonable period of time" for the United States to comply with the recommendations and rulings of the DSB.<sup>7</sup> The United States undertook to bring its measure into conformity with the findings of the Panel no later than 26 January 2005.

After the adoption of the Panel report, the United States commenced implementation proceedings pursuant to its domestic law, specifically section 129(a) of the *Uruguay Round Agreements Act* ("URAA").<sup>8</sup> On 24 November 2004, the USITC issued an unpublished determination<sup>9</sup> pursuant to section 129(a)(4) that purported to comply with the DSB's recommendations and rulings ("the section 129 determination"). The USITC again reached the unsubstantiated conclusion that the US softwood lumber industry was threatened with material injury by reason of imports of softwood lumber from Canada alleged to be subsidized and sold in the United States at less than fair value (*i.e.*, dumped).<sup>10</sup> One of the 6 Commissioners issued a detailed dissenting opinion in which he found that the evidence before the USITC did not support a finding that the US domestic industry producing softwood lumber was materially injured or threatened with material injury by reason of the allegedly dumped and subsidized imports from Canada.<sup>11</sup>

On 10 December 2004, the US Trade Representative instructed the US Department of Commerce ("Commerce") to implement the section 129 determination by amending the anti-dumping and countervailing duty orders on softwood lumber products from Canada. On 20 December 2004, Commerce published a notice purporting to amend the anti-dumping and countervailing duty orders on softwood lumber products from Canada to reflect the section 129 determination.<sup>12</sup> At the DSB meeting of 25 January 2005, the United States informed the DSB that it had complied with its recommendations and rulings.

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<sup>6</sup> Panel Report, at para. 7.137.

<sup>7</sup> *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada, Agreement under Article 21.3 (b) of the DSU*, WT/DS277/7, 4 October 2004.

<sup>8</sup> *Tariff Act of 1930*, Subtitle IV – Countervailing and Antidumping Duties, 19 U.S.C. 3538 (2000) (also referred to as Subtitle A of Title VII of the *Tariff Act of 1930*).

<sup>9</sup> *Softwood Lumber from Canada*, Investigations Nos. 701-TA-414 and 731-TA-928, unpublished determination, 24 November 2004 [hereinafter "Section 129 Consistency Determination"].

<sup>10</sup> Section 129 Consistency Determination, page 85.

<sup>11</sup> *Ibid.*, page 101.

<sup>12</sup> 69 Fed. Reg. 75,917 (Dep't Commerce 20 December 2004).

Canada considers that the United States has failed to implement the DSB's recommendations and rulings by:

- failing to make a determination of threat of material injury based on facts rather than on allegation, conjecture and remote possibility, as required by Article 3.7 of the *AD Agreement* and 15.7 of the *SCM Agreement*. In particular, the findings of the USITC that allegedly dumped and subsidized imports were likely to increase imminently and substantially and have a significant depressing or suppressing effect on domestic prices are not findings that could have been reached by an objective and unbiased investigating authority in light of the totality of the evidence considered and the reasoning in the section 129 determination.
- failing to demonstrate a causal relationship between the allegedly dumped and subsidized imports of Canadian softwood lumber and the threatened injury to the domestic industry, as required by Article 3.5 of the *AD Agreement* and Article 15.5 of the *SCM Agreement*;
- failing to examine in an unbiased and objective manner any and all known factors other than the allegedly dumped imports and allegedly subsidized imports of Canadian softwood lumber that were injuring or threatening to injure the domestic industry based on the record before the USITC, and further failing to ensure that the injuries that could be caused by these factors in the future were not attributed to the allegedly dumped and subsidized imports of Canadian softwood lumber, as required by Article 3.5 of the *AD Agreement* and Article 15.5 of the *SCM Agreement*.

Because the final definitive anti-dumping and countervailing duty orders dated 22 May 2002<sup>13</sup> remain in effect pursuant to an invalid threat of injury determination, Canada considers that the United States has not taken measures to comply with the DSB's recommendations and rulings. Canada considers that the following measures, allegedly taken by the United States to comply with the DSB's recommendations and rulings, are inconsistent with the United States' obligations under Articles 3.5 and 3.7 of the *AD Agreement* and Articles 15.5 and 15.7 of the *SCM Agreement*:

- Section 129 Consistency Determination, Softwood Lumber from Canada, (24 Nov. 2004), Inv. Nos. 701-TA-414 and 731-TA-928;
- Notice of Amendment to Antidumping and Countervailing Duty Orders on Certain Softwood Lumber Products from Canada (20 Dec. 2004),<sup>14</sup> and the 22 May 2002 orders, as purportedly amended by this notice.

Accordingly, as there is a disagreement with respect to the existence or consistency with covered agreements of the measures taken to comply with the DSB's recommendations and rulings, Canada seeks recourse to Article 21.5 of the DSU in this matter. Therefore, Canada requests that a special meeting of the DSB be held on 25 February 2005 to consider the following agenda item:

*United States – Investigation of the International Trade Commission in Softwood Lumber from Canada;*

*Recourse by Canada to Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.*

Canada requests that the DSB refer the matter to the original panel, if possible, pursuant to Article 21.5 of the DSU.

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<sup>13</sup> 67 Fed. Reg. 36,067 and 67 Fed. Reg. 36,070 (Dep't Commerce 22 May 2002).

<sup>14</sup> 69 Fed. Reg. 75,917 (Dep't Commerce 20 December 2004).