

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

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

**(WT/DS277)**

**SECOND WRITTEN SUBMISSION OF THE  
UNITED STATES**

---

**May 17, 2005**

## TABLE OF CONTENTS

<b>I.</b>	<b>Introduction</b> .....	1
<b>II.</b>	<b>The Commission’s Material Injury and Threat of Material Injury Findings in its Section 129 Determination are Consistent With the Covered Agreements.</b> .....	5
<b>A.</b>	<b>Likelihood of Substantially Increased Imports</b> .....	9
<b>1.</b>	<b>Volume of Imports is Already Significant and is Likely to Increase Substantially in the Imminent Future</b> .....	11
<b>a.</b>	<b>The SLA had a Restraining Effect on Subject Imports.</b> ....	16
<b>b.</b>	<b>During Periods With No Import Restraints, There Were Substantial Increases in Subject Imports.</b> .....	25
<b>c.</b>	<b>Importation Relative to Demand</b> .....	32
<b>2.</b>	<b>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 Beyond Historical Levels.</b> .....	37
<b>B.</b>	<b>Likely Adverse Price Effects</b> .....	43
<b>1.</b>	<b>Prices Declined During the Period of Investigation.</b> .....	43
<b>2.</b>	<b>Imports were Entering at Prices Likely to Have a Significant Depressing or Suppressing Effect on Domestic Prices.</b> .....	45
<b>3.</b>	<b>Imported and Domestic Softwood Lumber are Interchangeable and Substitutable.</b> .....	49
<b>C.</b>	<b>Impact of the Subject Imports on the Domestic Industry and Vulnerability to Threat of Injury</b> .....	52
<b>III.</b>	<b>The Causal Relationship and Alleged Other “Known” Factor Analyses</b> .....	57
<b>A.</b>	<b>U.S. Obligations Under Article 3.5 of the Antidumping Agreement and Article 15.5 of the SCM Agreement</b> .....	58

<b>B.</b>	<b>Causal Relationship Between Likely Substantial Increases in Subject Imports at Depressed Prices and Threat of Injury to the Domestic Industry in the Imminent Future</b>	<b>63</b>
<b>C.</b>	<b>Alleged Other “Known” Factors Analysis</b>	<b>65</b>
<b>1.</b>	<b>Excess Supply From the Domestic Industry</b>	<b>67</b>
<b>2.</b>	<b>Third-Country or Nonsubject Imports</b>	<b>71</b>
<b>3.</b>	<b>Integration of North American Softwood Lumber Industry</b>	<b>74</b>
<b>IV.</b>	<b>Conclusion</b>	<b>77</b>

## I. Introduction

1. Canada's critique of the ITC's Section 129 Determination relies heavily on certain generic lines of argumentation, which Canada outlines at the outset of its first written submission.<sup>1</sup> Most prominent among these is the contention that the ITC made "unacknowledged or unexplained shifts in its conclusions" as compared with the original determination and that the "the USITC failed to address the Panel's concerns."<sup>2</sup> That line of argumentation is flawed for three basic reasons. First, it 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.<sup>3</sup> Second, it relies on mischaracterizations of findings in both the original determination and the new determination. And, third, it is based on the patently incorrect assumption that, in view of the findings in the original panel report, only a negative determination could bring the United States into compliance with the covered agreements.<sup>4</sup>

---

<sup>1</sup>Canada First Written Submission, para. 5.

<sup>2</sup>Canada First Written Submission, paras. 6-7.

<sup>3</sup>See U.S. First Written Submission, paras. 8-9; *see also* Appellate Body Report, *Canada - Measures Affecting the Export of Civilian Aircraft (Article 21.5 - Brazil)*, WT/DS70/AB/RW, adopted August 4, 2000, paras. 40-41.

<sup>4</sup>As discussed in note 23 of the U.S. first submission, 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, including the fact that the proceeding in the NAFTA is outside the terms of reference of this Article 21.5 Panel; the panel's decisions in the NAFTA proceedings are the subject of a pending review by an Extraordinary Challenge Committee; and the Section 129 Determination is based on a different evidentiary record than that in the NAFTA proceedings.

2. An example of this flawed argumentation is Canada's assertion on the issue of demand forecasts.<sup>5</sup> In its list of "unacknowledged or unexplained shifts," Canada characterizes the Section 129 Determination as finding that "U.S. demand in the imminent future would now be essentially unchanged instead of 'strong and improving' . . . ."<sup>6</sup> This assertion assumes incorrectly that the purpose of the present review is to compare the new determination to the original determination. It ignores the fact that precisely because the new determination is based on new analysis of the evidence, which was supplemented during the Section 129 proceeding, it may well contain new findings.

3. Moreover, Canada's summary of the ITC's finding on demand forecasts mischaracterizes that finding. The ITC never found the evidence to demonstrate that "demand would improve substantially in the 18 months after its vote in mid-2002."<sup>7</sup> That is Canada's characterization of the evidence. What the Commission found in the threat analysis in its original determination was that "[d]emand for softwood lumber is forecast to remain relatively unchanged or increase slightly in 2002, followed by increases in 2003 as the U.S. economy rebounds from recession."<sup>8</sup> The ITC summarized this finding as "forecasts of strong and improving demand in the U.S. market."<sup>9</sup> In the Section 129 Determination, the Commission elaborated on, but did not change,

---

<sup>5</sup>Canada First Written Submission, paras. 6, 87-93.

<sup>6</sup>Canada First Written Submission, para. 6.

<sup>7</sup>Canada First Written Submission, para. 6.

<sup>8</sup>USITC Pub. 3509 at 42 (Exhibit CDA-2).

<sup>9</sup>USITC Pub. 3509 at 40 (Exhibit CDA-2).

its findings regarding forecasts for demand; in fact, it provided additional explanation to enhance the clarity of its findings.<sup>10</sup>

4. For similar reasons, Canada's other assertions of "unacknowledged or unexplained shifts" are flawed. Those assertions, concerning increases in the volume of subject imports and the restraining effects of the Softwood Lumber Agreement ("SLA"), ignore the existence of additional evidence and analysis and mischaracterize what the ITC found in its original and new determinations. Other lines of argumentation – for example, Canada's claims that the ITC failed to address the Panel's concerns – seem to flow from the incorrect assumption that only a negative threat of injury determination could address the original panel's concerns.<sup>11</sup> They ignore the possibility, plainly indicated in the original panel report, that a more well developed explanation, enabling reasonable discernment of the agency's decisional path, could address the underlying concerns.<sup>12</sup>

5. We will discuss each of these flaws in Canada's argument in detail, below. Before doing so, we briefly address data issues raised by Canada.

6. Although Canada contends that the original ITC determination suffered from a lack of evidentiary support, Canada questions the ITC's reopening of the record in the Section 129 proceeding, which was done precisely to collect additional information.<sup>13</sup> The Commission

---

<sup>10</sup>Section 129 Determination at 75-80 (Exhibit US-1).

<sup>11</sup>Canada First Written Submission, paras. 6-7.

<sup>12</sup>See U.S. First Written Submission, paras. 13-15.

<sup>13</sup>See, e.g., Canada First Written Submission, paras. 18, 29, and 30.

reopened 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>14</sup> The Commission sought such additional information primarily to provide it with a more complete data series for the period closest to the Commission's original determination, and thereby to assist it in considering and addressing issues raised by the original panel report regarding the imminent future.<sup>15</sup> 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.<sup>16</sup>

7. Moreover, Canada raises concerns about the Commission's use of certain data in the

---

<sup>14</sup>These procedures are contemplated in U.S. 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>15</sup>*See* Section 129 Determination at 7-8. (Exhibit US-1). In the original investigation, the Commission collected data from questionnaires for the period of January 1999-December 2001 and considered information from public data sources primarily for the period of 1995 to 2001. In the Section 129 proceeding, the Commission sought specific additional data from questionnaires and public sources for periods in 2002 prior to the original determination. In the original investigation, the Commission closed its record on April 25, 2002, voted on May 2, 2002, and issued its determination on May 16, 2002. *Id.*

<sup>16</sup>In the original investigation, 27 Canadian producers, accounting for 79 percent of production in Canada in 2001, provided requested information; only six of those Canadian producers responded to the Commission's supplemental questionnaire, accounting for 20 percent of production in Canada for the January-March 2002 period. Section 129 Report at 6 and 41. (Exhibit US-5). At least eight Canadian producers informed the Commission directly that they would not respond to supplemental questionnaires; other Canadian parties simply did not respond. Notwithstanding the lack of full cooperation, the ITC obtained sufficient public and questionnaire data to make findings necessary to implement the DSB's recommendations and rulings.

Section 129 Determination that may not have been available at the time of the Commission's original determination.<sup>17</sup> The data at issue covered the years during the period of investigation and first quarter of 2002.<sup>18</sup> The Commission noted that, while some of the data may not have been available at the time of the original determination, all of the data at issue covered a period prior to that original determination. The Commission found that the covered agreements did not preclude it from considering this information, and therefore, based its determination on the record in its entirety.

**II. The Commission's Material Injury and Threat of Material Injury Findings in its Section 129 Determination are Consistent With the Covered Agreements.**

8. In its Section 129 Determination, the Commission'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 U.S. 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.

---

<sup>17</sup>Canada First Written Submission, para. 30.

<sup>18</sup>The Commission noted that limiting its analysis to data available at the time of the original determination would preclude the use of public data for March 2002 (which is included in data totals for the first quarter of 2002), data for first quarter 2002 submitted in questionnaire responses in this section 129 proceeding, public data from Statistics Canada for the years 2000 and 2001 that was revised in 2004, and public data on U.S. production for 2001 that was revised in 2002. Section 129 Determination at 9-10 (Exhibit US-1).

As the Commission recognized, central to a threat analysis is the assessment of whether subject imports, which in this case already were at significant levels, are likely to be injurious in the imminent future. The Commission found that the evidence demonstrated that subject imports were entering the U.S. market at a significant and increasing volume level, and that they were projected to increase substantially beyond this level.

9. The Commission found that the likely substantial increases in subject imports would result in excess supply in the U.S. 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. Thus, the Commission 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 U.S. industry in the imminent future, unless protective action were taken.

10. Much of Canada's argument avoids discussion of the specific data. Throughout its argument, Canada provides a snapshot focus on a given incremental increase or decrease that it views as favorable to its assertions. In doing so, it often disregards the totality of the evidence in the record on a particular issue, let alone the record as a whole.

11. A crucial aspect of the record evidence that Canada ignores is the significance of the size of baseline volume, whether of imports or production. By focusing on incremental percentage increases or decreases in volume, Canada overlooks the starting point – the volume that existed prior to those incremental increases or decreases. The Commission recognized that this is an important factor, because, where the baseline is significant, a substantial increase in absolute volume will not necessarily translate into a large percentage increase.<sup>19</sup> Absence of a large percentage increase does not necessarily mean absence of a substantial increase in the absolute volume of subject imports where the starting point was already significant. Moreover, an increase in absolute volume over a small baseline will result in a substantially higher percentage rate of increase than an increase in the same absolute volume over a large baseline.

12. In addition to focusing on incremental percentage changes while disregarding the significance of absolute volume increases or decreases, Canada makes another analytical flaw in its argument. It frequently compares percentage increases or decreases in two numbers – such as U.S. production and Canadian production – which may not be comparable, because the baseline for the numbers being compared is different. For example, the fact that each country (hypothetically) exhibited a 5 percent increase in production is of little relevance if one does not know the levels of production prior to the increases. If the level of production was high from the outset, a 5 percent increase will represent a greater absolute level of increased production than if the level of production was low from the outset. Moreover, such a comparison can be misleading if it involves only a snapshot focus on one incremental change and is not placed in

---

<sup>19</sup>Section 129 Determination at 21, n. 49 (Exhibit US-1).

the perspective of the entirety of the evidence. More meaningful are percentage comparisons that begin with a common baseline – *e.g.*, a comparison of the share that producers in each of two countries has in the market of an importing country, where the baseline for each is the market of the importing country. Canada’s reliance on comparisons of rates of increase or declines for different items can be misleading, or not comparable. Such comparisons are analytically far less useful than the evidence on which the Commission relied, such as volumes in absolute terms, or percentage changes from a common baseline.<sup>20</sup>

13. 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. An objective examination involves considering the totality of the evidence rather than assessing it in a piece-meal manner. For example, Canada inappropriately discusses the evidence regarding the volume of subject imports in the abstract. A more meaningful analysis places the volume of subject imports in context, which includes the SLA and its restraining effect on imports in conjunction with subject import trends in periods when no import restraints were in place. Similarly, Canada’s argument often focuses narrowly on particular facts that may involve an incremental change from the industry’s present state, disregarding other relevant facts bearing on the question of threat of injury.<sup>21</sup> In rejecting this

---

<sup>20</sup>For example, a comparison of U.S. market share shows subject imports with a 34.7 percent share of this market, with non-subject imports never exceeding 3 percent of apparent domestic consumption. Section 129 Staff Report at Table C-1B. (Exhibit US-5); USITC Pub. 3509 at Table C-1 (Exhibit CDA-2).

<sup>21</sup>*See* Canada First Written Submission, para. 47 and n. 45.

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.”<sup>22</sup> The same principle applies to the present review.

**A. Likelihood of Substantially Increased Imports**

14. Two of the factors considered in a threat of material injury analysis focus on the likelihood of substantially increased subject imports. The existence of (i) a significant rate of increase in imports and (ii) sufficient freely disposable unused production capacity may contribute to a finding of threat of material injury.<sup>23</sup> These factors must be considered in light of relevant context. In the ITC’s Section 129 Determination, the relevant context was an already substantial and increasing volume of imports.

15. The original 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 Commission had relied on a significant rate of increase during the period of investigation as

---

<sup>22</sup>Panel Report, para. 7.60.

<sup>23</sup>These factors are as follows:

(i) a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation,

(ii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing Member’s market, taking into account the availability of other export markets to absorb any additional exports,

Article 3.7(i) and (ii) of the Antidumping Agreement and Article 15.7(ii) and (iii) of the SCM Agreement.

support for its conclusion that subject imports would increase substantially in the future.<sup>24</sup> The panel report also found that the Commission 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.<sup>25</sup>

16. In its Section 129 Determination, the Commission addressed these and other findings made in the panel report. Specifically, the Commission 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.<sup>26 27</sup> Moreover, the Commission 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 indicated that there was a significant rate of increase of imports during the period examined, especially considering that the baseline volume was significant, and that there was an even greater increase

---

<sup>24</sup>Panel Report, para. 7.90.

<sup>25</sup>Panel Report, paras. 7.93 and 7.94.

<sup>26</sup>Section 129 Determination at 20-31. (Exhibit US-1).

<sup>27</sup>The Commission found that the consistently large volume and market share of imports from Canada were significant, and that the increases in the volume and market share of subject imports were significant. Positive evidence demonstrated, and no party disputed, that subject imports would continue to enter the U.S. market at a large and significant level, and that they were projected to increase from that already large and significant level. The only dispute goes to whether the rate of increase was significant and indicated the likelihood of substantial increases in subject imports in the imminent future. The Commission's establishment of the facts was proper and its evaluation was unbiased and objective

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.<sup>28</sup>

**1. Volume of Imports is Already Significant and is Likely to Increase Substantially in the Imminent Future**

17. In the Section 129 Determination, the Commission 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 U.S. market of about 54,000 mmbf.<sup>29</sup> Subject imports held a consistently large and increasing share of the U.S. market, accounting for 33.2 percent to 34.7 percent of the U.S. market for softwood lumber in the period examined.<sup>30</sup> Simply stated, one-third of the U.S. market, or one out of every three boards of

---

<sup>28</sup>Section 129 Determination at 26-27. (Exhibit US-1).

<sup>29</sup>Section 129 Determination at 20-23 (Exhibit US-1); *see also* Section 129 Report at Tables IV-2 and C-1 (Exhibit US-5); USITC Pub. 3509 at Table IV-2 and C-1 (Exhibit CDA-2). The data collected in the Section 129 proceeding showed further increases from 4,141 mmbf in the first quarter of 2001 to 4,745 mmbf in the first quarter of 2002. Section 129 Report at Table C-1B (Exhibit US-5).

<sup>30</sup>Section 129 Report at Tables IV-2 and C-1 (Exhibit US-5); USITC Pub. 3509 at Table IV-2 and C-1 (Exhibit CDA-2). Based on the revised U.S. production data for 2001, subject imports market share was 34.6 percent in 2001. Calculated from Table IV-2 in INV-BB-138 (Oct. 29, 2004) (Exhibit US-5). The data collected in the Section 129 proceeding showed an increasing trend between first quarters, with subject imports accounting for a 31.9 percent

softwood lumber purchased in the United States, is an import from Canada.

18. The Commission 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.”<sup>31</sup> The Commission 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 U.S. consumption had declined slightly, by 0.4 percent.<sup>32</sup>

19. Canada takes the ITC’s finding of a 2.8 percent rate of increase out of context. It focuses on the percentage without regard to the enormous size of the baseline, the SLA’s restraining effects on subject imports, and the relatively flat demand for softwood lumber when the increase was occurring.

20. Moreover, Canada dismisses evidence showing a pattern of substantially increasing subject imports at the end of the period of investigation. It does so by suggesting that the “actual ‘rate of increase’” relevant to the threat of injury analysis is the average rate of increase over the period of investigation.<sup>33</sup> Canada evidently recognizes, as did the Commission, that more telling than the average rate of increase over the entire period of investigation is the significant rate of

---

market share in the first quarter of 2000, increasing to 33.2 percent and 34.7 percent in the first quarters of 2001 and 2002, respectively. Section 129 Report at Table C-1B.

<sup>31</sup>Section 129 Determination at 21 (Exhibit US-1).

<sup>32</sup>Section 129 Report at Tables IV-1, IV-2, and C-1 (Exhibit US-5); USITC Pub. 3509 at Tables IV-1, IV-2, and C-1 (Exhibit CDA-2).

<sup>33</sup>Canada First Written Submission, para. 54.

increase in the volume of subject imports following the expiration of the SLA on March 31, 2001. For example, from 1999 to 2000, a period in which the SLA was in effect from start to finish, subject imports increased by 0.4 percent.<sup>34</sup> In 2001, a period in which the SLA was in effect only for the first quarter, they increased by 2.4 percent, compared with the 2000 level; in contrast, apparent U.S. consumption increased by only 0.2 percent.<sup>35</sup> The rate of increase for the April-December 2001 period, after expiration of the SLA, was even more significant, 4.9 percent, compared with the same period in 2000.<sup>36</sup> The additional evidence gathered in the Section 129 proceeding showed subject imports continuing to increase rapidly, by 14.6 percent, during the first quarter of 2002 compared with the first quarter of 2001.<sup>37</sup>

21. The Commission, contrary to Canada's assertion,<sup>38</sup> placed the 14.6 percent increase during the first quarter of 2002 compared with the same period in 2001, in perspective. The

---

<sup>34</sup>Section 129 Report at Table C-1 (Exhibit US-5); USITC Pub. 3509 at Table C-1 (Exhibit CDA-2). Apparent U.S. consumption declined by 0.6 percent from 1999 to 2000. *Id.*

<sup>35</sup>Section 129 Report at Table C-1 (Exhibit US-5); USITC Pub. 3509 at Table C-1 (Exhibit CDA-2).

<sup>36</sup>Section 129 Report at Table C-1 (Exhibit US-5) and Official import statistics (Exhibit US-8). The Commission recognized that during part of this period (August-December) imports were subject to the August CVD preliminary finding. As discussed below, during the April-August 2001 period, when subject to the pending investigation but free of any preliminary measures associated with the investigation, subject imports increased by 11.3 percent compared with the same period in 2000. Official import statistics (Exhibit US-8).

<sup>37</sup>Section 129 Report at Table C-1B (129) (Exhibit US-5).

<sup>38</sup>Canada's assertion seems to be based on the Commission's placement of its analysis partially in text and partially in a footnote rather than all of its analysis in text. Canada First Written Submission, para. 55 ("the USITC failed to quantify or discuss this volume in terms of market share in the text of its determination. Instead, one finds in a footnote that Canadian import market share was '34.7 percent' in first quarter 2002.").

Commission found that “[w]hile apparent U.S. 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.”<sup>39</sup> In sum, this evidence showed increases in subject imports and increases in their market share immediately prior to the end of the period examined. As the Commission found, “[T]he significant rate of increase in the subject imports in the most recent periods, after expiration of the SLA, is a clear indicator of likely substantial increases in imports in the imminent future and serves as a basis for our determination that subject imports threaten material injury to the domestic industry.”<sup>40</sup>

22. Canada attempts to downplay the relevance of these increases.<sup>41</sup> As in other parts of its argument, it restates the evidence in terms of incremental percentage changes (in this case, percentage point changes of market share). That restatement fails to place the increases in the proper perspective, in which subject imports already accounted for significant volume and market share.

23. A similar failure to place evidence in the proper perspective taints Canada’s dismissal of the ITC’s comparison of subject import trends in the first quarter of 2002 with the same period in 2001 on the theory that “opposite commercial incentives existed in the two quarters.”<sup>42</sup> By

---

<sup>39</sup>Section 129 Determination at 22, n. 53 (Exhibit US-1).

<sup>40</sup>Section 129 Determination at 23 (Exhibit US-1).

<sup>41</sup>Canada First Written Submission, para. 55.

<sup>42</sup>Canada First Written Submission, para. 58.

focusing exclusively on 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 U.S. consumption declined by 2.3 percent.<sup>43</sup> Reference to a period in which no such “short-term disincentive” could have existed undercuts Canada’s implication that the comparison between first quarter 2002 and first quarter 2001 is merely aberrational. Indeed, the difference between first quarter 2000 and first quarter 2002 is that in the former period subject imports were subject to the restraining effects of the SLA (but not to a “short-term disincentive”), and in the latter period they were not. Moreover, Canada’s repeated contentions that increases in subject imports after expiration of the SLA or provisional measures<sup>44</sup> only “reflects the commercial pressures to import as much as possible” demonstrates clearly that without protective action, Canadian producers have the ability to export as much as possible to the U.S. market. In any event, Canada’s argument rests on the incorrect assumption that there was a four-month gap in the application of preliminary measures. In fact, while preliminary CVD measure expired in December 2001, the preliminary antidumping duty measure was in effect through the entire first quarter of 2002, expiring in April 2002.

24. The Commission found that the consistently large volume and market share of imports from Canada were significant,<sup>45 46</sup> and that the increases in the volume and market share of

---

<sup>43</sup>Section 129 Report at Table C-1B (129) (Exhibit US-5).

<sup>44</sup>Canada First Written Submission, para. 57.

<sup>45</sup>Canada mistakenly suggests that because the Commission offered no new evidence in its Section 129 Determination in support of its finding of significant volume and market share of

subject imports were significant. The evidence demonstrated, and no party disputed, that subject imports would continue to enter the U.S. market at a large and significant level, and that they were projected to increase from that already large and significant level. The Commission found that the significant rate of increase in subject imports in the most recent periods indicated the likelihood of substantial increases in subject imports in the imminent future. The Commission also found that the other evidence in the record regarding the restraining effect of the SLA and the import trends during periods of no import restraints further indicated the likelihood of substantial increases in imports of softwood lumber from Canada in the imminent future.

**a. The SLA had a Restraining Effect on Subject Imports.**

25. In the Section 129 Determination, the Commission recognized that these investigations, in contrast to most original antidumping or countervailing duty investigations, involved imports that were subject to a trade restraining agreement during the period of investigation and were

---

subject imports, that finding is impermissible. Canada First Written Submission, para. 53 (“The USITC’s rationale for its ‘new’ finding suffers from a number of deficiencies. 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, no new evidence was required to support this finding, as the evidence in the original proceeding supported the Commission’s finding that “this large volume of subject imports both in absolute terms and relative to consumption in the United States is significant.” USITC Pub. 3509 at 32.

<sup>46</sup>While the additional factors the Commission takes into account in making a threat of material injury determination include examining the rate of increase of the volume or market penetration of imports, nothing in the covered agreements suggests that the Commission must (or indeed can) ignore the already existing volume of imports or that in applying these provisions, the Commission should not consider what the total volume of imports would likely be, examining both the current level of imports and any projections for further increased imports in the future that are supported by positive evidence.

subject to these investigations immediately after the agreement expired.<sup>47</sup> Thus, to place subject imports in the appropriate context, the Commission considered the restraining effects of the SLA on imports and trends in subject imports during periods when such imports were not subject to some type of restraint, in making its findings. This context aided the Commission in determining the likelihood of substantial increases in subject imports if no restraint were in place in the future.

26. In addressing the effects of the SLA, Canada makes two incorrect assumptions about the ITC's findings. First, it incorrectly assumes that the ITC's finding in the Section 129 determination diverged from its finding in the original determination.<sup>48</sup> Second, it incorrectly assumes that when it came to present material injury, the ITC found that subject imports did not support an affirmative determination.<sup>49</sup> In the panel report, the original panel indicated that the Commission did not address why the expiration of the SLA would result in further substantial

---

<sup>47</sup>The SLA expired on March 31, 2002; the petition that led to the investigations was filed on April 2, 2002, the following business day.

<sup>48</sup>Canada First Written Submission, paras. 6 and 60.

<sup>49</sup>In the original determination, the Commission found that the volume and market share of subject imports were significant. USITC Pub. 3509 at 32 (Exhibit CDA-2). In the Section 129 Determination, the Commission clarified that this finding supported an affirmative present material injury determination. The Commission stated:

We note that we would find these significant increases and consistently large level of subject imports to be injurious for purposes of a present material injury determination if combined with sufficient evidence of significant price effects and an adverse impact on the domestic industry.

Section 129 Determination at 23, n. 56 (Exhibit US-1).

increases in imports.<sup>50</sup> In response to the original panel's concerns about the Commission's somewhat limited explanation in the original determination, the Commission provided a detailed and thorough explanation for its finding in the Section 129 Determination.

27. The Commission found that substantial positive evidence supported finding that the SLA had significantly constrained the volume and market share of subject imports. The evidence demonstrated that while the volume of subject imports increased even with the restraining effect of the SLA in place, substantial increases occurred during periods when such imports were not subject to import restraints.<sup>51</sup> Moreover, imports of softwood lumber from Canada had held a higher share of the domestic market (35.7 percent) prior to the entry into force of the SLA than during the period examined; the evidence also demonstrated that the market share increased after the expiration of the SLA.<sup>52</sup> Subject imports held a U.S. market share of 35.7 percent in 1995, the year prior to the SLA, and 35.9 percent in 1996, the year the SLA entered into force (on May 29, 1996). During the first full year under the SLA (1997), subject imports declined to a U.S. market share of 34.3 percent, the same market share held in 2001, and market share ranged between 33.2 percent to 34.6 percent during the SLA period.<sup>53</sup>

---

<sup>50</sup>Panel Report, para. 7.93.

<sup>51</sup>Section 129 Report at Tables IV-1 and C-1 (Exhibit US-5); USITC Pub. 3509 at Tables IV-1 and C-1 (Exhibit CDA-2).

<sup>52</sup>Section 129 Report at Tables IV-2 and C-1 (Exhibit US-5); USITC Pub. 3509 at Table IV-2 and C-1 (Exhibit CDA-2).

<sup>53</sup>USITC Pub. 3509 at Table IV-2 (Exhibit CDA-5). Based on the revised U.S. production data for 2001, subject imports held a U.S. market share of 34.6 percent in 2001. Calculated from Table IV-2 in INV-BB-138 (Oct. 29, 2004) (Exhibit US-5).

28. The Commission also considered evidence in the record 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. For example, respondents estimated that increases in prices caused by the SLA added about \$50/mbf to the average price of framing lumber, which translated into increasing the cost of a typical new home by \$1,000.<sup>54</sup> Moreover, the evidence also showed that, prior to the SLA, the price for Eastern SPF lumber in Toronto was about \$20 less (in U.S. dollars) than the price for delivery in the Great Lakes area of the United States. The average difference in 1999, with the SLA in effect, was \$91.<sup>55</sup> Based on this evidence, the Commission found that “the SLA restrained Canada’s exports to the United States, increasing supply in Canada and resulting in a widening gap between U.S. and Canadian prices.”<sup>56</sup>

29. Additional evidence demonstrating the restraining effect of the SLA included the fact that

---

<sup>54</sup>Section 129 Determination at 25, *citing* Letter of National Association of Home Builders (“NAHB”) to the U.S. Trade Representative (“USTR”) at 2-3 and 6 (April 14, 2000) (“The Softwood Lumber Agreement adversely affects the U.S. trade balance. . . . Even though imports from Canada are somewhat lower in terms of physical volume than they would be without trade barriers, the higher prices paid for those imports increases the total cost paid for imported lumber.”) in Petitioners’ Original Posthearing Brief, Vol. II, Exh. 54 at 2-3 and 6; National Lumber and Building Materials Dealers Association (“NLBMDA”)/NAHB’s Original Posthearing Brief at 5 (“ . . . simple common sense suffices to show that when the supply of something is restricted, its price will be higher than if no restriction existed. The supply of lumber from Canada is presently restricted under the SLA; consequently, the price of lumber, and therefore of housing is higher than it otherwise would be.”) (Exhibit US-1).

<sup>55</sup>Section 129 Determination at 25, *citing* Letter of NAHB to USTR at 6 and Figure 1 (comparison is based on Random Lengths pricing data) in Petitioners’ Original Posthearing Brief, Vol. II, Exh. 54 at 6 (Exhibit US-1).

<sup>56</sup>Section 129 Determination at 25 (Exhibit US-1).

increases in subject imports while the SLA was in effect did not keep pace with increases in demand from 1995 to 2001: Subject imports increased by 8.8 percent while apparent U.S. consumption increased by 13.1 percent.<sup>57</sup> In addition, the Commission received anecdotal evidence from importers and Canadian producers of subject merchandise, which supported the conclusion that the SLA had a restraining effect on the volume of subject imports and kept prices in the U.S. market higher than they would have been without the SLA.<sup>58</sup>

30. Canada ignores this positive evidence discussed in the Section 129 Determination and focuses on the Commission's statement in a footnote, which in another context Canada would dismiss as less important, that economic studies provided further support for its finding.<sup>59</sup> In addition to ignoring the other evidence relied on, Canada's focus on the economic studies referred to in a footnote is misplaced for two reasons. First, Canada suggests incorrectly that the

---

<sup>57</sup>USITC Pub. 3509 at Table IV-2 (Exhibit CDA-2).

<sup>58</sup>The Commission considered the responses by 75 U.S. producers of softwood lumber, 8 U.S. importers (5 of which were also Canadian producers) and 29 Canadian producers of softwood lumber to a question in the Commission questionnaires regarding the effects of the expiration of the SLA. The majority of U.S. producers indicated that the SLA had a restraining effect on the volume of imports, and that expiration of the SLA had affected their operations and domestic prices. Section 129 Determination at 26, *citing* USITC Pub. 3509 at Appendix E (Exhibit CDA-2) and CLTA's Original Posthearing Brief, Vol. 1 at 14, n.10 ("The circumstances facing the Canadian industry during and after the SLA were very different: the SLA established a stable, predictable regime for a fixed 5-year period; but after it expired, uncertainty and change have reigned, with changing bonding requirements and expectations about how the case would proceed and end. Given how different the SLA world was from the post-SLA world, it would be a remarkable coincidence if the SLA had the same net effect on the volume and price of Canadian imports as the hodgepodge of post-SLA factors.") (Exhibit US-1).

<sup>59</sup>Canada First Written Submission, para. 62 (discussing Section 129 Determination at 24-25, n. 62).

ITC relied more heavily on one economic study than others.<sup>60</sup> In fact, as is evident from the Section 129 Determination, the Commission placed no more reliance on one study than on any other. It also is evident that the ITC considered its staff economic memorandum and the various economic studies. Canada's implication that one study in particular was the cornerstone of the Commission's finding simply is incorrect.<sup>61</sup> Second, while Canada now criticizes what it claims to be the Commission's undue reliance on one economic study in particular, it provided no comments on that study during the Section 129 proceeding. Although the Commission specifically requested that counsel for Canada comment on all of these economic studies in the Section 129 proceeding, counsel for Canada did not provide any comments in response to that request.<sup>62</sup>

31. 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

---

<sup>60</sup>Canada First Written Submission, para. 65.

<sup>61</sup>See Section 129 Determination at 24-25, n. 62 (Exhibit US-1). In the footnote, the Commission stated, "We note that studies (conducted outside the context of these proceedings) in the original record, that appraise or quantify the magnitude or impact of the SLA, are consistent with our findings that the SLA had constrained subject imports." The Commission cited to three studies, two studies unrelated to these proceedings and one study presented in the Section 129 proceeding. The Commission also cited the staff economic memorandum discussing these studies. Canada focuses only on the one study presented in the Section 129 proceeding, in the Coalition's Prehearing Report at Appendix B ("Economic Impact of the Expiration of the SLA"). Finally, the Commission noted that "Canadian parties provided limited or no comments in this proceeding, or the original investigation, on the studies already in the original record or added in this proceeding, despite a specific request for such comments by the Commission." *Id.*

<sup>62</sup>We recognize that economic consultants to the Canadian Lumber Trade Alliance (CLTA) provided an analytical review of the one economic study presented in the Section 129 proceeding, but neither CLTA nor its economic consultants commented on any of the other studies already in the original record, as requested by the Commission.

went unused.<sup>63</sup> Under the SLA, up to 14.7 billion board feet of softwood lumber could be exported to the United States each year from the covered provinces without being subject to a fee. After the 14.7 billion board feet quota filled, additional exports were subject to a fee of US\$50 per thousand board feet until total annual exports reached 15.35 billion board feet. A fee of US\$100 per thousand board feet applied to annual exports that exceeded 15.35 billion board feet.<sup>64</sup>

32. In the Section 129 Determination, the Commission recognized that in 2001, Canadian exporters did not use all of the available \$50 fee quota.<sup>65</sup> Canada misleadingly implies that this means that subject imports declined in the last year of the SLA. They did not.<sup>66</sup> 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. Exports under \$100 fee quotas ranged from 68.3 mmbf in 2000-2001 to 476.9 mmbf in 1996-1997.<sup>67</sup> Canadian producers also shipped significant quantities of “bonus” exports each year.

---

<sup>63</sup>See Canada First Written Submission, paras. 63-64.

<sup>64</sup>The SLA was structured such that the volume of imports subject to the different quotas was spread out temporally (over the course of each year) and geographically (over each of the covered provinces).

<sup>65</sup>Section 129 Determination at 23-24, n. 58 (Exhibit US-1).

<sup>66</sup>USITC Pub. 3509 at Table C-1 (Exhibit CDA-2).

<sup>67</sup>Exports under \$100 fee quotas were: 476.9 mmbf in 1996-1997; 137.6 mmbf in 1997-1998; 186.0 mmbf in 1998-1999; 329.5 mmbf in 1999-2000; and 68.3 mmbf in 2000-2001. Petitioners’ Original Prehearing Brief at Exh. 62 (Exhibit US-9).

(For example, they shipped 297.5 mmbf in 2000-2001).<sup>68</sup> Canada claims that the lower use of the \$50 fee quota in 2000-2001 suggests there would not be significant increases in subject imports after the SLA expired.<sup>69</sup> However, that argument ignores the substantial quantities of imports at \$100 fee quotas and bonus imports in the 2000-2001 period.

33. A final aspect of note in the ITC's discussion of the SLA concerns the alleged redistribution of exports among Canadian provinces after the SLA expired. In the Section 129 Determination, the Commission provided a detailed analysis of this issue in response to the original panel's concern that the ITC had not addressed it in its original determination.<sup>70</sup> The Commission recognized that, during the pendency of the SLA, Canadian shipments from provinces not covered by the SLA to the United States more than doubled.<sup>71</sup> The Commission 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

---

<sup>68</sup>Bonus exports were Canadian exports of softwood lumber that entered the U.S. market without fees and were not subject to the quota limitations pursuant to Article III of the SLA. Bonus exports were: 167.3 mmbf in 1996-1997; 319.8 mmbf in 1997-1998; 38.2 mmbf in 1998-1999; 174.7 mmbf in 1999-2000; and 297.5 mmbf in 2000-2001. Petitioners' Original Prehearing Brief at Exh. 62 (Exhibit US-9).

<sup>69</sup>Canada First Written Submission, para. 63.

<sup>70</sup>Panel Report, para. 7.93

<sup>71</sup>*See, e.g.*, USITC Pub. 3509 at Table IV-3 (Exhibit CDA-2). For example, imports from the Maritime Provinces increased from 931 mmbf in 1996 to 2,130 mmbf in 2000, and were 1,841 mmbf in 2001. Thus, the subject imports from the Maritime Provinces increased by nearly 129 percent from 1996 to 2000, and by nearly 98 percent from 1996 to 2001. *Id.* *See also* USITC Pub. 3509 at Table VII-5 and Petition at Exh. I-B-62 (regarding production increases in Manitoba and Saskatchewan) (Exhibit CDA-2).

than those prior to the SLA.<sup>72</sup> For example, while subject imports from the Maritime Provinces, which had not been covered by the SLA, declined by 289 mmbf from 2000 to 2001, subject imports from the rest of Canada increased by 720 mmbf for the same period.<sup>73</sup> However, subject imports from the Maritime Provinces, even with the decline in 2001, were almost three times the level of imports from the Maritime Provinces in 1995 – *i.e.*, prior to the SLA.<sup>74</sup>

34. The Commission also found that Canadian exporters' theory that expiration of the SLA would simply lead to a redistribution of exports among the provinces failed to take into account the fact that the volume of production is much greater in formerly covered provinces than in non-covered provinces. For example, while the Maritime Provinces accounted for only 7.1 to 8.5 percent of Canadian softwood lumber production for the 1999-2001 period, three of the four formerly covered provinces (British Columbia, Quebec, and Ontario) accounted for more than 80 percent of production during that period.<sup>75</sup> Thus, the Commission found that the record did not support a finding that the effect of the SLA's expiration was merely to bring about a

---

<sup>72</sup>USITC Pub. 3509 at Table IV-3 (Exhibit CDA-2).

<sup>73</sup>USITC Pub. 3509 at Table IV-3 (Exhibit CDA-2).

<sup>74</sup>USITC Pub. 3509 at Table IV-3 (Exhibit CDA-2).

<sup>75</sup>USITC Pub. 3509 at Tables VII-5 and VII-7 (Exhibit CDA-2). The Commission found that, based on revised Canadian production data, the Maritime Provinces accounted for only between 6.4 and 6.9 percent of Canadian production for the 1999-2001 period, whereas three of the four formerly covered provinces (British Columbia, Quebec, and Ontario) accounted for between 81.8 and 83.1 percent for the 1999-2001 period. Calculated from Section 129 Report at Tables VII-5. and VII-7 (Exhibit US-5). The fourth province covered by the SLA was Alberta; production data for Alberta is included with the data for the other non-covered Prairie Provinces (Manitoba and Saskatchewan), which accounted for about 11 percent of Canadian production based on both the original and revised Canadian production data. *Id.*

redistribution in favor of covered provinces.<sup>76</sup>

**b. During Periods With No Import Restraints, There Were Substantial Increases in Subject Imports.**

35. To place subject imports in context in the Section 129 Determination, the Commission 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). Specifically, the Commission analyzed import trends for a period immediately preceding the SLA (1994-1996) and for the period from the expiration of the SLA through the first quarter of 2002. Canada's arguments focus primarily on the limited April-August 2001 period immediately after expiration of the SLA and not the entire period after the SLA examined by the Commission.<sup>77</sup>

36. The Commission found that subject imports increased substantially for the entire period between expiration of the SLA and the end of the period of investigation and between 1994 and 1996 (*i.e.*, prior to the SLA's entry into force). Without restraints in place, subject imports increased from an already high level; increases stopped when the SLA entered into force in 1996; and substantial increases in imports occurred when the SLA expired. Substantial evidence clearly showed that import volumes were substantially higher during periods when subject imports were not subject to the restraining effects of the SLA. The Commission found that this behavior was highly probative of how subject imports have entered the U.S. market and would enter the U.S. market in the imminent future, absent trade restraints.

37. The Commission conducted a thorough evaluation of all of the evidence and provided a

---

<sup>76</sup>Section 129 Determination at 26-27 (Exhibit US-1).

<sup>77</sup>Canada First Written Submission, paras. 72-78.

detailed explanation that addressed each issue raised by the original panel. The evidence demonstrated that during the period following expiration of the SLA (April 2001)<sup>78</sup> 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).<sup>79</sup> The Commission 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 U.S. market in the April-December 2001 period at a rate 4.9 percent higher than in the comparable 2000 period.<sup>80</sup> 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.<sup>81</sup>

38. Canada alleges that the Commission's analysis of these significant increases in the first quarter of 2002 ignores "the role that timing played." Specifically, Canada faults the ITC for not

---

<sup>78</sup>The SLA expired on March 31, 2001; thus, over the period of investigation, the SLA was in effect for 1999, 2000, and the first quarter of 2001.

<sup>79</sup>Official monthly import statistics (Exhibit US-8). Total subject imports of softwood lumber by volume for the period of April to August 2001 were 11.3 percent higher than the comparable April-August period in 2000, 9.2 percent higher than April-August 1999, and 12.3 percent higher than April-August 1998. *Id.*

<sup>80</sup>This 4.9 percent increase in subject imports must be placed in the perspective; the volume of subject imports already held a substantial and increasing share of the U.S. market, and increased at the significant rate of 2.8 percent from 1999 to 2001. USITC Pub. 3509 at Table C-1 (Exhibit CDA-2) and Official import statistics (Exhibit US-8).

<sup>81</sup>Section 129 Report at Table C-1B (Exhibit US-5).

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.<sup>82</sup> 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. Subject imports were subject to these requirements through the entire first quarter of 2002. Thus, the alleged existence of a “gap” following December 2001 does not explain the increase in import volume in the first quarter 2002.

39. 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.<sup>83</sup>

40. To address the concerns of the original panel, the Commission evaluated these increases in subject imports in the context of existing market conditions. The Commission found that during the periods being compared, 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.<sup>84</sup> For example, while apparent U.S. consumption for first quarter 2002 increased

---

<sup>82</sup>Canada First Written Submission, para. 79.

<sup>83</sup>Section 129 Report at Table C-1B (Exhibit US-5).

<sup>84</sup>Section 129 Determination at 29 (Exhibit US-1).

compared with first quarter 2001, it was at a substantially lower rate, 9.7 percent, than the 14.6 percent increase in subject imports.<sup>85</sup> Moreover, subject imports were 6.2 percent higher in the first quarter of 2002 compared with the first quarter of 2000, while apparent U.S. consumption declined by 2.3 percent for first quarter 2002 compared with first quarter 2000.<sup>86</sup> In short, these numbers are not consistent with the suggestion that increased imports in the first quarter of 2002 as compared with other periods were simply attributable to different market conditions, such as increased consumption.

41. Another concern of the original panel was that the Commission 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.”<sup>87</sup> That is, in the panel’s view, the Commission had not responded to the contention that increased imports during this period reflected exporters taking advantage of what they expected might be a relatively brief period with no trade restraints. In its Section 129 Determination, the Commission 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.<sup>88</sup> As discussed above, subject imports increased after expiration of the SLA and continued to substantially increase, even after bonding requirements associated with the preliminary CVD findings and the preliminary

---

<sup>85</sup>Section 129 Report at Table C-1B (129) (Exhibit US-5).

<sup>86</sup>Section 129 Report at Table C-1B (129) (Exhibit US-5).

<sup>87</sup>Panel Report, para. 7.94.

<sup>88</sup>Section 129 Determination at 29. (Exhibit US-1).

antidumping findings were imposed. Thus, the Commission found that the evidence did not support a theory that a shift in timing accounted for the higher level of imports immediately after the SLA expired; rather, the Commission found that it indicated a change in import behavior.

42. Canada's focus on monthly subject import data for the April-August 2001 period<sup>89</sup> does nothing to undermine the Commission's finding that the increases in subject imports after expiration of the SLA are not the result of a "shift in timing." First, contrary to Canada's allegations, the Commission considered and evaluated the monthly subject import volumes. In the Section 129 Determination, the Commission stated 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."<sup>90</sup> These increases in the already significant volume were not the result of increases in demand, which was relatively flat (0.4 percent) in 2001.<sup>91</sup> 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 – subject imports continued to increase substantially after the imposition of the bond requirements.<sup>92</sup>

---

<sup>89</sup>Canada First Written Submission, paras. 76-77.

<sup>90</sup>Section 129 Determination at 28, n. 75. Monthly subject import volumes also were higher in each month between September 2001 and March 2002 than the comparable month in the preceding year, with the exception of September and November, by a range of 0.3 percent in October 2001 to 29.8 percent in March 2002. Official import statistics (Exhibit US-8).

<sup>91</sup>USITC Pub. 3509 at Table C-1 (Exhibit CDA-2).

<sup>92</sup>Section 129 Report at Table C-1B (Exhibit US-5) and Official import statistics (Exhibit US-8).

43. The Commission found that the import trends during the most recent period in which there were no trade restraints were highly indicative of whether imports were likely to substantially increase in the imminent future. The fact that subject imports increased substantially after expiration of the SLA and continued to increase confirmed its conclusion that subject imports threatened material injury to the domestic industry.

44. The Commission 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 Commission found that the evidence demonstrated that during the seven quarters between August 1994 and April 1996, with no restraints in effect, subject import market share increased from 32.6 percent in the third quarter 1994 to 37.4 percent in first quarter 1996.<sup>93</sup> During the first full year under the SLA (1997), subject imports declined to a U.S. market share of 34.3 percent, and remained within a range from 33.2 percent to 34.6 percent during the SLA period.<sup>94</sup>

45. In response to the original panel's concerns,<sup>95</sup> the Commission considered subject import trends for the pre-SLA period in the context of prevailing market conditions. The evidence in the record for 1995 to 1996 showed that subject import volume rose at a rate higher than increases in U.S. apparent consumption.<sup>96 97</sup> The additional evidence in the Section 129

---

<sup>93</sup>Petitioners' Original Prehearing Brief at Exh. 65 (Exhibit US-9).

<sup>94</sup>USITC Pub. 3509 at Table IV-2 (Exhibit CDA-2).

<sup>95</sup>Panel Report, para. 7.94.

<sup>96</sup>Subject imports increased by 4.8 percent from 1995 to 1996, exceeding the U.S. apparent consumption increase of 4.0 percent and the U.S. production increase of 3.2 percent.

proceeding demonstrated that while subject imports increased substantially by 1,700 mmbf, or 10.6 percent, from 1994 to 1996, and increased their market share from 32.6 percent in third quarter 1994 to 37.4 percent in first quarter 1996, apparent U.S. consumption increased by only 1,241 mmbf, or 2.5 percent.<sup>98</sup> Moreover, from 1994 to 1995, when apparent U.S. consumption declined by 707 mmbf, or 1.5 percent, and U.S. production declined by 1,875 mmbf, or 5.6 percent, subject imports, which at the time were free of import restraints, increased by 890 mmbf, or 5.5 percent.<sup>99</sup>

46. The Commission found that the data on market conditions during 1994-1996 provided further support for its finding that the lack of import restraints after expiration of the SLA led to increases in subject imports and thus threatened material injury to the U.S. industry. The Commission found that the evidence demonstrating substantial increases in subject imports when not subject to import restraints supported its finding that subject imports were likely to increase substantially in the imminent future, exacerbating the adverse impact of already significant

---

USITC Pub. 3509 at Table IV-2.

<sup>97</sup>Canada argues that the Commission should have considered market conditions other than apparent consumption, such as “whether increasing imports had any injurious effect on the U.S. industry during that time [*i.e.*, 1994 to 1996].” Canada First Written Submission, para. 80 and n.91. That argument has no basis. The factors cited by Canada may be relevant to a determination of whether imports in the 1994-1996 were causing material injury to the domestic industry. But, that was not the reason the Commission examined imports during that period. Subject imports in this earlier period were considered for an indication of importing behavior when not subject to import restraints.

<sup>98</sup>Section 129 Report at Table 3 (Exhibit US-5) and Petitioners’ Original Prehearing Brief at Exh. 65 (Exhibit US-9).

<sup>99</sup>Section 129 Report at Table 3 (Exhibit US-5).

subject import volumes.

**c. Importation Relative to Demand.**

47. Regarding the issue of importation relative to demand, the panel report found that the Commission 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 U.S. market, and that the Commission did not discuss market share at all in the context of its original threat of material injury determination.<sup>100</sup> In its Section 129 Determination, the Commission considered and provided analysis of this issue. Specifically, the Commission 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.<sup>101</sup>

48. First, the Commission found that evidence in 2001 showed that the increase in subject imports outstripped demand; imports of softwood lumber from Canada increased by 2.4 percent from 2000 to 2001 and U.S. apparent consumption increased by only 0.2 percent for the same period.<sup>102</sup> 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,<sup>103</sup> while apparent U.S. consumption for all of 2001 was only 0.2 percent higher than it

---

<sup>100</sup>Panel Report, para. 7.95.

<sup>101</sup>Section 129 Determination at 17 and 75-80. (Exhibit US-1).

<sup>102</sup>Section 129 Determination at 75-77 (Exhibit US-1); USITC Pub. 3509 at Table C-1 (Exhibit CDA-2).

<sup>103</sup>Official import statistics (Exhibit US-8).

had been in 2000.<sup>104</sup> The evidence in the Section 129 proceeding demonstrates that while apparent U.S. 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.<sup>105</sup> Moreover, subject imports were 6.2 percent higher in the first quarter of 2002 compared with the first quarter of 2000, while apparent U.S. consumption declined by 2.3 percent for first quarter 2002 compared with first quarter 2000.<sup>106</sup> Thus, the Commission found that the actual increases in subject imports during the period of investigation substantially outstripped demand; similarly, the 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.<sup>107</sup>

49. The Commission found that the evidence dispelled any claims that projected substantial growth in demand for softwood lumber in the imminent future.<sup>108</sup> Canada incorrectly asserts that the ITC made the opposite finding in the original determination.<sup>109</sup> In fact, the ITC never made a finding that the evidence demonstrated that “demand would improve substantially in the 18 months after its vote in mid-2002.” That is Canada’s mischaracterization of the ITC’s finding.<sup>110</sup> Canada points out that, in the Section 129 Determination, the Commission found that

---

<sup>104</sup>USITC Report 3509 at Table C-1 (Exhibit CDA-2).

<sup>105</sup>Section 129 Report at Table C-1B (129) (Exhibit US-5).

<sup>106</sup>Section 129 Report at Table C-1B (129) (Exhibit US-5).

<sup>107</sup>Section 129 Determination at 76-77 (Exhibit US-1).

<sup>108</sup>Section 129 Determination at 77 (Exhibit US-1).

<sup>109</sup>Canada First Written Submission, paras. 6, and 87-93.

<sup>110</sup>Canada First Written Submission, para. 6.

“[f]orecasts expected it [demand] to be relatively unchanged until the second half of 2002, and then begin to increase in 2003 as the U.S. economy rebounded from a recession.”<sup>111</sup> That finding is almost identical to the ITC findings in its threat analysis 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 U.S. economy rebounds from recession.”<sup>112</sup>

50. In both its original determination and its Section 129 Determination, the Commission found that demand was high by historical standards, but relatively stable or flat during the period of investigation.<sup>113</sup> Forecasts of softwood lumber demand on the record indicated little change or a slight increase in 2002, and then an increase in 2003 as the U.S. economy rebounds from recession. Most producers and importers, in response to Commission questionnaires, indicated that they believed overall demand would remain relatively unchanged until the second half of 2002 or the beginning of 2003, and then would begin to increase as the U.S. economy rebounded from recession.<sup>114</sup>

51. The Commission found that the demand forecasts for softwood lumber from industry analysts were somewhat mixed. Whereas Canada focuses on the demand forecasts for softwood

---

<sup>111</sup>Canada First Written Submission, para. 88 *quoting* Section 129 Determination at 17.

<sup>112</sup>USITC Pub. 3509 at 42 (Exhibit CDA-2).

<sup>113</sup>USITC Pub. 3509 at Table C-1 (Exhibit CDA-2); Section 129 Report at Table C-1B (Exhibit US-5). The evidence shows that during the period of investigation, apparent domestic consumption fluctuated between years and declined slightly by 0.4 percent from 1999 to 2001. However, apparent domestic consumption increased every year between 1995 and 1999, for an overall increase of 13.5 percent. USITC Pub. 3509 at Table IV-2.

<sup>114</sup>USITC Pub. 3509 at II-3-4 (Exhibit CDA-2).

lumber in isolation, the Commission considered those forecasts together with forecasts for softwood lumber's primary end-use, U.S. housing. Canada acknowledges that forecasts for U.S. housing starts should correlate to forecasts for softwood lumber demand,<sup>115</sup> as they did during the period examined. But, the evidence demonstrated that the forecasts for softwood lumber demand did not consistently correlate, either in magnitude or direction, with forecasts for U.S. housing starts for the same periods.<sup>116</sup> The Commission found that data for 1995 to 2001 showed that, in fact, U.S. housing starts substantially outpaced softwood lumber demand.<sup>117</sup>

52. To place the demand forecasts in perspective, the Commission considered the forecasts for U.S. housing starts to determine if there was a correlation in magnitude and direction with the demand forecasts for softwood lumber. For example, RISI projected demand for lumber to increase by 1 percent<sup>118</sup> and demand for housing starts to increase by 4.3 percent for the 2001-2002 period.<sup>119</sup> However, for the 2002-2003 period, it projected that lumber demand would

---

<sup>115</sup>Canada First Written Submission, para. 91.

<sup>116</sup>In an attempt to place these mixed demand forecasts for softwood lumber in perspective, the Commission considered data regarding the primary end-use – new residential construction – which accounted for about 38 percent of demand for softwood lumber in 2000. USITC Pub. 3509 at Table I-1 (Exhibit CDA-2).

<sup>117</sup>From 1995 to 2001, U.S. housing starts increased by 18.3 percent while increases in apparent domestic consumption for softwood lumber were 13.1 percent. USITC Pub. 3509 at IV-3 and Table IV-6 (Exhibit CDA-2). Housing starts reached a peak in 1999 at 1.66 million units, declining to 1.59 million units in 2000 and remaining relatively flat at 1.60 million units in 2001. Housing starts were 23.0 percent higher in 1999 and 18.3 percent higher in 2001 compared with housing starts in 1995. *Id.*

<sup>118</sup>Section 129 Report at F-4 (Table 2) (Exhibit US-5).

<sup>119</sup>Section 129 Report at F-5 (Table 4) (Exhibit US-5).

increase at a greater rate than demand for housing starts – 4 percent growth for lumber demand and 1.8 percent growth for housing starts. Industry analyst Clear Vision forecast that demand for softwood lumber for the 2001-2002 period would increase by 3.7 percent,<sup>120</sup> while its forecast for U.S. housing start growth for the same period was 3 percent.<sup>121</sup> But, another industry analyst report, from the Bank of America, projected a slight decline in demand for lumber in 2002 and increases below the 2 percent range in 2003.<sup>122</sup> In sum, forecasts of U.S. demand for softwood lumber in 2002 included a forecast for a slight decline (Bank of America), a 1 percent increase (RISI), and a 3.7 percent increase (Clear Vision).<sup>123</sup> While data from the period of investigation showed lumber demand outpaced substantially by housing starts, the Commission 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.<sup>124</sup>

53. The Commission also found that the sharp decline in housing starts in March 2002

---

<sup>120</sup>Section 129 Report at F-6 (Table 5) (Exhibit US-5).

<sup>121</sup>Section 129 Report at F-6 (Table 6) (Exhibit US-5).

<sup>122</sup>Bank of America, “Wood & Building Products Quarterly,” at 12 (Nov. 2001) (Bank of America projected “U.S. consumption [for lumber] to decline by a little less than 1% next year [2002] . . . . consumption growth should remain below the 2% range in those two years [2003 and 2004]”) in Petitioners’ Original Posthearing Brief at 2 and Appendix H, Exh. 2 at 11 (Exhibit CDA-34).

<sup>123</sup>Subject imports after the expiration of the SLA, on the other hand, were higher by 11.3 percent in April-August 2001, 4.9 percent in April-December 2001, and 14.6 percent in the first quarter of 2002 than the comparable period in the prior year.

<sup>124</sup>Section 129 Determination at 76 (Exhibit US-1).

showed that the improvements in demand during the mild winter of 2001-2002 were not sustainable.<sup>125</sup> This evidence, together with the mixed evidence regarding demand and housing start forecasts, and questionnaire responses, amply supported the Commission's finding that demand could be expected to remain relatively unchanged or flat in 2002 and then begin to increase in 2003, as the U.S. economy was expected to rebound from recession. It was not disputed that U.S. demand for softwood lumber would remain at a high absolute level and would continue to make the U.S. market a very attractive and necessary one for Canadian producers (as the U.S. market has consistently accounted for about 60- 65 percent of Canadian production). Nevertheless, as the Commission concluded, the evidence did not support a finding that there would be substantial growth in demand that would eclipse the likely substantial increases in subject imports.

**2. 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 Beyond Historical Levels.**

54. On the issue of available excess Canadian capacity, the panel report found that the Commission'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.<sup>126</sup> In its Section 129 Determination, the Commission analyzed capacity and

---

<sup>125</sup>USITC Pub. 3509 at II-3-4, n.10 (Exhibit CDA-2). The most recent actual data showed that, while U.S. housing starts increased in January and February of 2002 to the highest levels for single-family home starts in over 20 years, they then fell by 10.2 percent in March 2002. Section 129 Report at Table 2 (Exhibit US-5).

<sup>126</sup>Panel Report, paras. 7.91 and 7.92.

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 beyond the historical level.<sup>127</sup>

55. Canadian producers already had substantially increased capacity, had substantial excess production capacity, and planned to substantially increase production and improve capacity utilization from 2001 to 2003. The record indicated clearly that Canada has substantial capacity to produce softwood lumber, equal to about 60 percent of U.S. consumption.<sup>128</sup> Excess Canadian capacity in 2001 had increased to 5,343 mmbf, which was equivalent to 10 percent of U.S. apparent consumption,<sup>129</sup> as capacity utilization declined to 84 percent from 90 percent in 1999.<sup>130</sup> Even more telling was the fact that Canadian producers expected to further increase their ability to supply the U.S. softwood lumber market, projecting increases in production of 8.9 percent from 2001 to 2003 and increases in their capacity utilization to 90 percent in 2003 (from 84 percent in 2001).<sup>131</sup> These increases were projected at the same time that demand in the U.S.

---

<sup>127</sup>Section 129 Determination at 31-40. (Exhibit US-1).

<sup>128</sup>USITC Pub. 3509 at Tables IV-2, VII-1 and VII-7 (Exhibit CDA-2).

<sup>129</sup>USITC Pub. 3509 at Tables VII-1 and C-1 (Exhibit CDA-2). The evidence in the original record showed that this increase in excess capacity could not be attributed to declines in home market shipments from 1999 to 2001, since increases in imports to the U.S. market for that period were nearly equal to the declines in home market shipments. *Id.* at Table VII-2. Based on questionnaire responses, home market shipments declined by 663 mmbf from 1999 to 2001 while shipments to the U.S. market increased by 525 mmbf from 1999 to 2001. *Id.*

<sup>130</sup>USITC Pub. 3509 at Tables VII-1 (publicly available data series) and VII-2 (questionnaire response data series) (Exhibit CDA-2).

<sup>131</sup>USITC Pub. 3509 at Tables VII-1 and VII-2 (Exhibit CDA-2).

market was forecast to remain relatively unchanged or increase only slightly.<sup>132</sup>

56. Canada's claim focuses on the incremental increase in production capacity.<sup>133</sup> In doing so, Canada ignores the fact that Canadian producers already possessed substantial and increasing excess capacity, equivalent to 10 percent of apparent U.S. consumption in 2001, and increases in production were projected for 2002 and 2003. As discussed below, substantial evidence on the record supported a finding that substantial and increasing Canadian exports to the United States were likely, while there was a lack of evidence to demonstrate that a shift to other markets could absorb the very significant volume of Canada's exports to the United States.

57. Canadian production is tied to the U.S. market, which continues to be the most important market for Canadian producers.<sup>134</sup> The U.S. market accounts for 60-65 percent of Canadian production and shipments,<sup>135</sup> 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.<sup>136</sup> Therefore, the Commission recognized that there were limited other markets to

---

<sup>132</sup>Section 129 Determination at 17 (Exhibit US-1).

<sup>133</sup>Canada First Written Submission, paras. 83-84. The Commission, however, did not make its finding based on "an imminent, substantial increase in, capacity" but rather made its finding based on "sufficient freely disposable . . . capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports." Article 3.7(ii) of the Antidumping Agreement and Article 15.7(iii) of the SCM Agreement.

<sup>134</sup>Section 129 Determination at 36-38. (Exhibit US-1).

<sup>135</sup>USITC Pub. 3509 at Table VII-7 (Exhibit CDA-2) and Section 129 Report at Table VII-7 (Exhibit US-5).

<sup>136</sup>Calculated from USITC Pub. 3509 at Table VII-7 (Exhibit CDA-2); *see also* Section 129 Report at Table VII-7 (Exhibit US-5).

absorb the projected increase in production of Canadian softwood lumber.<sup>137</sup> Moreover, Canadian softwood lumber production is projected to increase,<sup>138</sup> and the U.S. market would be the most likely target for that additional production, given its historical role as the principal market for Canadian softwood lumber production.

58. The record in the Section 129 proceeding provided further support for the Commission'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 U.S. market.<sup>139</sup> In the first quarter of 2002, Canadian exports to the U.S. 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.<sup>140</sup>

59. Given the positive record evidence on the export orientation of Canadian lumber producers, the Commission discounted Canadian producers' self-interested projections that additional production would be exported to the United States at below historical levels.<sup>141</sup> Canadian producers' export projections implausibly posited that the U.S. market would suddenly no longer account for at least 60 percent of additional Canadian production, consistent with

---

<sup>137</sup>Section 129 Determination at 37. (Exhibit US-1).

<sup>138</sup>Canadian producers themselves projected their production would increase from 2001 to 2003 by 8.9 percent, or 1,928 mmbf between 2001 and 2003. USITC Pub. 3509 at Table VII-2 (Exhibit CDA-2).

<sup>139</sup>Section 129 Report at Table VII-7B (Exhibit US-5).

<sup>140</sup>Section 129 Report at Table VII-7B (Exhibit US-5).

<sup>141</sup>Section 129 Determination at 39-40. (Exhibit US-1).

historical levels, but rather that only 20 percent of additional Canadian production would be exported to the United States.<sup>142</sup> The Canadian producers projected that export shipments to the U.S. market would increase, but only by 3 percent, while exports to non-U.S. markets would increase by 21 percent, and shipments to the home market would increase by 13 percent from 2001 to 2003.<sup>143</sup> Thus, the Canadian home market and non-U.S. markets were predicted to receive substantially higher shares of projected production increases, shares wholly inconsistent with historical trends and with the evidence for the first quarter of 2002.

60. Significantly, the Commission 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 Commission found that the record suggested that imports into the U.S. market would increase beyond historical levels.<sup>144</sup>

61. Moreover, even though Canadian demand had declined by almost 20 percent from 2000 to 2001 and was not forecast to return imminently to 2000 levels, the Canadian producers projected that home market shipments would somehow increase beyond 2000 levels.<sup>145</sup> The evidence in the first quarter of 2002 demonstrated that when Canadian consumption declined by

---

<sup>142</sup>USITC Pub. 3509 at Table VII-7 (Exhibit CDA-2).

<sup>143</sup>USITC Pub. 3509 at Table VII-2 (Exhibit CDA-2).

<sup>144</sup>Section 129 Determination at 40. (Exhibit US-1).

<sup>145</sup>USITC Pub. 3509 at Tables VII-2 and VII-7 (Exhibit CDA-2).

23 percent, shipments shifted to the U.S. market and not to other markets.<sup>146</sup> Given the evidence from all sources pointing to significant and increasing exports to the U.S. market, and the lack of substantial evidence of a marked shift in shipment patterns, the Commission concluded that projected increases in production would likely be distributed among the U.S. market, Canadian home market, and non-U.S. export markets in shares similar to those prevailing during the prior seven years.<sup>147</sup>

62. The Commission 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).<sup>148</sup> Canada's claim that this "vindicates the projections of the Canadian producers" is misplaced.<sup>149</sup> The fact is, the Commission discounted export projections that showed that only 20 percent of the projected additional production would be exported to the U.S. 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

---

<sup>146</sup>Section 129 Report at Tables VII-7B and C-1B (Exhibit US-5). When Canadian apparent consumption declined by 23.2 percent from first quarter 2001 to first quarter 2002, exports to the U.S. market increased by 14.6 percent and exports to other markets declined by 21.6 percent; the share of Canadian production to the home market also declined by 23.3 percent from the first quarter of 2001 to the first quarter of 2002. *Id.*

<sup>147</sup>USITC Pub. 3509 at Table VII-7 (Exhibit CDA-2) and Section 129 Report at Table VII-7 (Exhibit US-5).

<sup>148</sup>Section 129 Report at Table VII-7 (Exhibit US-5).

<sup>149</sup>Canada First Written Submission, para. 84.

the 20 percent projected by Canadian producers.

**B. Likely Adverse Price Effects**

63. The Commission 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 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, 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 U.S. industry in the imminent future.<sup>150</sup>

64. In the Section 129 Determination, the Commission first examined price trends for softwood lumber during the period of investigation<sup>151</sup> and then evaluated “whether imports are entering at prices that will likely have a significant depressing or suppressing effect on domestic prices and would likely increase demand for further imports.”<sup>152</sup>

**1. Prices Declined During the Period of Investigation.**

65. The evidence demonstrated that prices for softwood lumber declined substantially during the period of investigation, particularly in 2000.<sup>153</sup> Notably, prices of both domestically-

---

<sup>150</sup>Section 129 Determination at 66-67 (Exhibit US-1).

<sup>151</sup>See Article 3.2 of the Antidumping Agreement and Article 15.2 of the SCM Agreement.

<sup>152</sup>See Article 3.7(iii) of the Antidumping Agreement and Article 15.7(iv) of the SCM Agreement.

<sup>153</sup>USITC Pub. 3509 at Tables IV-2, V-1, and V-2, and Figures V-3 - V-5 (Exhibit CDA-2).

produced and imported Canadian softwood lumber fell substantially through July - September and October - December 2000, despite near record consumption, to their lowest point for the period of investigation.<sup>154</sup> The evidence demonstrated that this decline was a result of excess supply in the price sensitive U.S. market, to which both subject imports and domestic product contributed.

66. 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,<sup>155</sup> 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>156</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>157</sup> The Commission found that the price increase in the first quarter of 2002 was

---

<sup>154</sup>For example, the price of SYP fell 32.9 percent, from a peak of \$434/mbf in the third quarter 1999 to a low of \$291/mbf in the fourth quarter 2000. The price of WSPF (a product mostly imported from Canada) fell 39.3 percent, from a peak of \$336/mbf in the second quarter 1999 to \$204/mbf in the fourth quarter 2000. USITC Pub. 3509 at Tables V-1, V-2 and C-1 (Exhibit CDA-2).

<sup>155</sup>The Commission found there was considerable evidence regarding the effects this uncertainty was having on prices for softwood lumber. Section 129 Determination at 43-44, n. 122 (Exhibit US-1).

<sup>156</sup>USITC Pub. 3509 at V-11, Tables V-1 and V-2, and Figures V-3 - V-5 (Exhibit CDA-2). These price declines occurred while demand, considered on a seasonal basis, remained relatively stable at historically very high levels.

<sup>157</sup>Section 129 Determination at 44 (Exhibit US-1).

largely due to an increase in consumption<sup>158</sup>— 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.<sup>159</sup> Further, the Commission found that record U.S. housing starts throughout the period of investigation clearly did not guarantee higher prices in the U.S. market, given price competition and excess supply.

**2. Imports were Entering at Prices Likely to Have a Significant  
Depressing or Suppressing Effect on Domestic Prices.**

67. Based on substantial positive evidence, the Commission found that the substantial and increasing volume of subject imports at significantly declining prices during the period of investigation adversely affected prices for the domestic product.<sup>160</sup> The Commission recognized that the 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.<sup>161</sup> Thus, while the evidence supported a finding that subject imports had *some* adverse price effect, the Commission 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 Commission 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)

---

<sup>158</sup>While apparent U.S. consumption was 9.7 percent higher in the first quarter of 2002 compared with the first quarter of 2001, it was 2.3 percent lower compared with the first quarter of 2000. Section 129 Report at Table C-1B (Exhibit US-5).

<sup>159</sup>Section 129 Report at Tables 1 and 2 (Exhibit US-5).

<sup>160</sup>Section 129 Determination at 46, 53-54 (Exhibit US-1).

<sup>161</sup>Section 129 Determination at 42-43, nn.118, 120, and 121 (Exhibit US-1).

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, as discussed above, the Commission found that 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 U.S. market.<sup>162</sup>

68. Canada's discussion of the pricing data in the Section 129 Determination focuses on the first quarter 2002 data.<sup>163</sup> As in other aspects of its argument, Canada's focus on a single quarter's data amounts to a snapshot approach, and should be contrasted to the Commission's analysis, which puts that quarter's data into context, in light of the totality of the evidence. Additionally, in discussing data from the first quarter of 2002, Canada mischaracterizes the Commission's analysis.

69. In evaluating the quarterly composite pricing data,<sup>164</sup> the Commission found that the data showed that the composite price<sup>165</sup> per mbf for January - March 2002 period – \$318 – was lower than the composite price per mbf for July - September 2001 period – \$322 – and

---

<sup>162</sup>See Section III.A.1 of the Section 129 Determination (Exhibit US-1).

<sup>163</sup>See Canada First Written Submission, para. 101.

<sup>164</sup>Exhibit 1 of the Commission's Section 129 Determination provides a table with all of the quarterly composite pricing data. Section 129 Determination at Exhibit 1 (Exhibit US-1).

<sup>165</sup>Composite price refers to the framing lumber indexes, which include prices of softwood lumber encompassing four grades, two dimensions, and six species (kiln-dried fir/larch, hem fir, ESPF, SYP, WSPF, and green Douglas fir) published by *Random Lengths*.

substantially lower than for April - June 2001 period – \$364.<sup>166</sup> The Commission recognized that seasonality generally affects quarterly price comparisons. For example, prices for the October - December period in 1999, 2000, and 2001 were lower than those for the January - March period in 2000, 2001, and 2002, respectively.<sup>167</sup> Moreover, it evaluated prices for the first quarter of 2002 in light of prices for the first quarter in each of the prior years in the period of investigation. 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.<sup>168</sup>

70. Canada focuses on the comparison between first quarters 2002 and 2001.<sup>169</sup> 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.<sup>170</sup> The Commission's analysis, on the other hand, also

---

<sup>166</sup>Section 129 Report at Tables V-1 and V-2 (Exhibit US-5).

<sup>167</sup>The composite prices for the fourth quarter in 1999 (\$375), 2000 (\$277), and 2001 (\$279) were lower than those for the first quarter in 2000 (\$384), 2001 (\$284), and 2002 (\$318), respectively. Section 129 Determination at Exhibit 1 (Exhibit US-1) and Section 129 Report at Tables V-1 and V-2 (Exhibit US-5).

<sup>168</sup>Section 129 Determination at Exhibit 1 (Exhibit US-1) and Section 129 Report at Tables V-1 and V-2 (Exhibit US-5).

<sup>169</sup>Canada First Written Submission, para. 101.

<sup>170</sup>The Commission also found that other evidence, such as average unit values for imports and domestic shipments, confirmed these declining price trends. For example, the average unit value of imports of softwood lumber from Canada, based on official Commerce statistics, decreased from \$395.72 in 1999 to \$347.89 in 2000 and \$323.57 in 2001; the average

compared the composite prices in the first quarter of 2002 to composite prices in the first quarters of 1999 and 2000, respectively, when prices were not low and were not causing serious declines in the financial performance of the domestic industry.

71. The Commission found that when the totality of the evidence was evaluated, the fact that the composite price for January - March 2002 was higher than the composite price for October - December 2001 did not undermine its conclusion that imports at the end of the period were entering at prices that were likely to have a significant depressing or suppressing effect on domestic prices, and were likely to increase demand for further imports.<sup>171</sup>

72. Canada incorrectly asserts that the Commission made a finding of no significant price underselling.<sup>172</sup> Instead, the Commission found that, as agreed to by all parties to the

---

unit value essentially remained at the 2001 level in the first quarter of 2002, \$324.94. USITC Pub. 3509 at Table C-1 (Exhibit CDA-2) and Section 129 Report at Table IV-2B (Exhibit US-5). Similarly, the average unit value of U.S. shipments of softwood lumber decreased from \$416.13 in 1999 to \$361.07 in 2000, and \$347.86 in 2001 according to questionnaire responses. *Id.* The average unit value of softwood lumber was lower at \$338.45 in first quarter 2002 according to questionnaire responses in the Section 129 proceeding. Section 129 Report at Table C-1B (Exhibit US-5).

<sup>171</sup>Without citation, Canada incorrectly characterizes the Commission's analysis as focusing only on "the *direction* in which prices were moving," to assert that when the ITC considered the totality of the evidence its reasoning was flawed. Canada First Written Submission, para. 101. The Commission properly evaluated the totality of evidence in making all of its findings in its Section 129 Determination.

<sup>172</sup>Canada First Written Submission, para. 97. While the covered agreements require consideration of both price underselling and price depression or suppression in a present material injury analysis, price depression or suppression may occur whether or not there is price underselling. Consideration of price underselling is not set forth as a listed factor for a threat of material injury analysis. *See* Article 3.7(iii) of the Antidumping Agreement and Article 15.7(iv) of the SCM Agreement.

investigations, making direct cross-species price comparisons in order to assess underselling<sup>173</sup> was inappropriate.<sup>174</sup> 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.<sup>175</sup>

### **3. Imported and Domestic Softwood Lumber are Interchangeable and Substitutable.**

73. Canada concedes that it is uncontested that subject imports and domestic softwood lumber are interchangeable.<sup>176</sup> 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.”<sup>177</sup>

---

<sup>173</sup>In conducting a price underselling analysis, the Commission makes direct comparisons of prices for a comparable product, *i.e.*, same model, same size and grade of a species of lumber, etc., and calculates a margin of underselling or overselling for the import prices relative to the domestic prices.

<sup>174</sup>The parties agreed that, in this industry, accurate price comparisons are difficult to compile. Section 129 Determination at 47, n. 135, *citing*, Original Hearing Transcript at 93, 269-273; Dealers/Builders’ Original Posthearing Brief at 12-14 (Exhibit US-1). The Commission encountered similar problems obtaining useful pricing data for assessing underselling in prior Softwood Lumber cases.

<sup>175</sup>A price suppression or depression analysis considers trends for import and domestic prices to determine certain correlations between them. The pricing trend data are not necessarily limited to a size/grade or model. Using this trends analysis and other evidence, the Commission determines whether imports have prevented increases in prices for domestic products that otherwise would have occurred (suppression) or whether imports have exerted downward pressure on domestic prices (depression).

<sup>176</sup>Canada First Written Submission, para. 105.

<sup>177</sup>Canada First Written Submission, para. 105.

74. 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 U.S. Southern Yellow Pine (SYP), which accounted for about 45 percent of U.S. production, compete and are substitutable, as confirmed by evidence provided by purchasers and home builders.<sup>178</sup> 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.<sup>179</sup>

75. The Commission recognized that regional preferences exist – species often are used in close proximity to where they are milled. But, it also found that these preferences simply reflected the availability of species in certain areas and prices, which are affected by

---

<sup>178</sup>Section 129 Determination at 49-53 (Exhibit US-1), *citing*, Original Hearing Transcript at 185-190 and 204-209. In response to a direct question from a Commissioner regarding which lumber species – SPF or SYP – is used for four major applications in their region, four lumber purchasers testifying on behalf of the respondents at the Commission’s original hearing stated that SPF and SYP are both used in each of the four major applications – floor joists, wall/framing, headers, and trusses. Specifically, as shown in Exhibit 2 to the Commission’s Section 12 Determination (Exhibit US-1), these home builders and purchasers provided the following break-out by region of the products used for floor joists, wall/framing, headers, and trusses: Florida (Rutenberg): floor joists - SYP, wall/framing - SPF, headers - SYP, trusses - SYP; Texas (Jarvis): floor joists - SYP, wall/framing - SYP, headers - SYP, trusses - SYP; Indiana and Northwest (Hussey): floor joists - SPF, wall/framing - SPF, headers - SPF, trusses - SPF; Massachusetts (Fritz): floor joists - SPF, wall/framing - SPF, headers - SYP, trusses - SYP. *Id.* at 50-52.

<sup>179</sup>In the United States, the leading species, or species groups, of softwood lumber produced are SYP (45.2 percent in 2000), Douglas fir (22.7 percent) and hem-fir (12.5 percent) lumber, as well as a variety of other lumber species, including ponderosa pine, SPF, WRC and redwood. In Canada, SPF is the predominant species of softwood lumber (84.6 percent in 2001), followed next by hem-fir (6.6 percent) and Douglas fir (3.7 percent) lumber, and then by a variety of other lumber species. USITC Pub. 3509 at Tables III-11 and VII-6 (Exhibit CDA-2).

transportation costs.<sup>180</sup> The 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. In fact, Canada's assertion that "purchasers maintain strong species preferences, that do not waver even in the face of lower-priced alternative species" is undermined by the very evidence on which it relies.<sup>181</sup> In response to a question in the Commission's questionnaire regarding how often a firm purchases softwood lumber that is offered at the lowest price, only 8 of 57 responding purchasers indicated they never do so.<sup>182</sup> Moreover, this question did not specify that responses should be limited to comparison of species that are interchangeable and substitutable, such as SPF and SYP. The question was framed in such a way that responses could include comparisons of such products as higher priced western red cedar and lower priced SPF and SYP, which may be used in the same applications but for which preferences for appearance may affect perceptions of commercial substitutability.

76. When all the evidence provided by purchasers and home builders is considered,<sup>183</sup> there is

---

<sup>180</sup>Section 129 Determination at 49-50 (Exhibit US-1), *citing*, Original Hearing Transcript at 185-190 and 204-209; USITC Pub. 3509 at 25-27, II-8 and II-9, V-2, V-3, and V-5; INV-Z-049 (4/19/02) at II-11 and II-12; NLBMDA/NAHB's Original Prehearing Brief at Exhs. 2, 3, 4, 6, 8, 9, 11, 13, 14 15, 16, 17, 21, and 23; Petitioners' Original Posthearing Brief at 5-6.

<sup>181</sup>Canada First Written Submission, para. 106, n.132.

<sup>182</sup>USITC Pub. 3509 at II-7 (Exhibit CDA-2); *see also* Canada First Written Submission, para. 106, n. 132.

<sup>183</sup>The record contained further evidence of substitutability and interchangeability. *See* Section 129 Determination at 52-53, nn. 149, 150 (Exhibit US-1); USITC Pub. 3509 at II-6, II-8, and Table II-5 (Exhibit CDA-2). For example, in Commission questionnaire responses, 32 of 57 purchasers indicated that they have switched between different species of softwood lumber for

substantial evidence that subject imports and domestic species of softwood lumber are used in the same applications and that regional preferences merely reflect availability of species. The evidence clearly demonstrated that virtually all Canadian lumber in the United States was employed for the same end uses for which domestic products compete, and that prices of different species have an effect on other species' prices.<sup>184</sup> Canadian SPF and U.S. SYP are used for many of the same applications, and therefore, these products compete. The Commission therefore found, based on the information in the record (including the evidence provided by purchasers and home builders) that, notwithstanding differences in species, Canadian softwood lumber and the domestic like product are interchangeable and compete with each other.

**C. Impact of the Subject Imports on the Domestic Industry and Vulnerability to Threat of Injury**

77. The Commission found that the evidence demonstrated 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.<sup>185</sup> Subject imports were increasing substantially after expiration of the SLA and at the end of the period examined, while subject imports were entering at prices at their lowest levels during the period of investigation. The Commission found that the declines in the industry's performance, particularly its financial performance,

---

use in the same application, citing availability and price as factors in their substitution decisions and citing most frequently substitution between Douglas fir, hem-fir, and SPF. *Id.* at II-8, *citing* NLBMDA/NAHB's Original Posthearing Brief at Exhibit 3 at 5, 10, and 15.

<sup>184</sup>See Section 129 Determination at 53 (Exhibit US-1) and USITC Pub. 3509 at 27 and n.166 (Exhibit CDA-2).

<sup>185</sup>Section 129 Determination at 55-63. (Exhibit US-1).

made it vulnerable to future injury.

78. The record indicated deterioration in the domestic industry's overall condition, and in particular in its financial performance, over the period of investigation.<sup>186</sup> Many indicators of the industry's performance declined significantly from 1999 to 2000, and then declined slightly or stabilized with relatively weak performance from 2000 to 2001.

79. For example, 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.<sup>187</sup> 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.<sup>188</sup>

80. 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.<sup>189</sup> While unit cost of goods sold declined

---

<sup>186</sup>USITC Pub. 3509 at Tables VI-1 and C-1 (Exhibit CD-2); Section 129 Report at Tables VI-1, VI-1B, C-1, and C-1B (Exhibit US-5).

<sup>187</sup>USITC Pub. 3509 at Table IV-2 (Exhibit CD-2).

<sup>188</sup>Section 129 Report at Table C-1B (Exhibit US-5).

<sup>189</sup>USITC Pub. 3509 at Tables VI-1 and C-1 (Exhibit CD-2). The domestic industry's unit net sales value decreased from \$416.48 in 1999 to \$362.05 in 2000, and decreased again to \$344.46 in 2001. *Id.*

throughout the period of investigation,<sup>190</sup> 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.<sup>191</sup> 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.<sup>192</sup> 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.<sup>193</sup> Total net income declined from \$1.21 billion in 1999 to \$8 million in 2001.<sup>194</sup> These data, considered in their entirety, show a domestic industry whose performance, particularly its financial performance, had deteriorated and remained weak during the period of investigation. Based on this evidence, the Commission found the domestic industry was vulnerable to injury. It is against that backdrop that the likely impact of substantial increases in imports from Canada necessarily had to be evaluated.

81. After expiration of the SLA, subject import volumes and market share increased significantly, and prices declined substantially, to levels as low as those in 2000, when the substantial declines in prices had resulted in significant deterioration in the condition of the domestic industry. Over the period of investigation, demand remained relatively stable.

---

<sup>190</sup>Unit cost of goods sold decreased from \$342.39 in 1999 to \$339.79 in 2000 and decreased again to \$324.69 in 2001. USITC Pub. 3509 at Tables VI-I and C-1 (Exhibit CD-2).

<sup>191</sup>USITC Pub. 3509 at Tables VI-1 and C-1 (Exhibit CD-2).

<sup>192</sup>USITC Pub. 3509 at Tables VI-1 and C-1 (Exhibit CD-2).

<sup>193</sup>USITC Pub. 3509 at Table VI-1 (Exhibit CD-2).

<sup>194</sup>USITC Pub. 3509 at Tables VI-1 and C-1 (Exhibit CD-2). The domestic industry's capital expenditures fluctuated between years but decreased from \$327 million in 1999 to \$253 million in 2001. *Id.* at Table VI-11.

Because the Commission found that excess supply from both subject imports and domestic production led to declines in price and deterioration in the domestic industry's condition in 2000, the Commission did not conclude that subject imports had a significant impact resulting in present material injury to the domestic industry.<sup>195</sup> However, in light of this deterioration, the Commission found that the domestic industry producing softwood lumber is vulnerable to injury from the significant increases in subject imports at depressed prices.

82. In discussing the question of the industry's vulnerability, Canada focuses only on the new data collected in the Section 129 proceeding.<sup>196</sup> Canada's snapshot of the first quarter 2002 ignores the totality of the evidence evaluated by the Commission. When the data for the first quarter of 2002 are placed in perspective, they do not undermine the Commission's finding that the domestic industry was vulnerable to the likely substantial increases in subject imports at low prices.

83. The Commission recognized that 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. However, a single quarter's performance did not change the fact that, overall, the industry's performance had deteriorated and remained weak by the end of the period of investigation. For example, the financial performance in the first

---

<sup>195</sup>The record indicated that prices increased in the second quarter of 2001, coincident with the filing of the petition, and this price increase abated some of the domestic industry's declining performance indicators. USITC Pub. 3509 at V-11 (Exhibit CDA-2). For example, the declines in such indicators as operating income and net income displayed during 1999 and 2000 leveled off in 2001. Thus, the Commission found that the record evidence is consistent with finding effects related to the pendency of the investigation and expiration of the SLA.

<sup>196</sup>Canada First Written Submission, para. 108.

quarter of 2002 was less favorable than it had been in the first quarter of 2000.<sup>197</sup>

84. The Commission, moreover, recognized that financial data for a single quarter is 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. However, for the year 2000 taken as a whole, the operating income margin was only 1.8 percent.<sup>198</sup> Similarly, the domestic industry reported a net income margin of 8.0 percent for the first quarter of 2000, which became a less favorable 0.8 percent when the industry's performance for full year 2000 was reported.<sup>199</sup> Apparent U.S. consumption increased in the January - March 2002 period,<sup>200</sup> which resulted in increases in prices, which in turn had a favorable effect on the performance of the domestic industry. However, the Commission found that the evidence demonstrated that this increase in consumption of softwood lumber was not likely to be sustained, as evidenced by the sharp decline in U.S. housing starts in March 2002 from the record high reported for February 2002.<sup>201</sup>

---

<sup>197</sup>Section 129 Report at Table VI-1B (Exhibit US-5).

<sup>198</sup>*Compare* Section 129 Report at Table VI-1 *with* Table VI-1B (Exhibit US-5). The Commission also noted that the domestic producers responding to the questionnaire in this Section 129 proceeding reported more favorable financial performance than the larger reporting group responding to the Commission's questionnaire in the original investigation. *Compare Id.* at Table VI-1 *with* Table D-1.

<sup>199</sup>*Compare* Section 129 Report at Table VI-1 *with* Table VI-1B (Exhibit US-5).

<sup>200</sup>While apparent U.S. consumption was 9.7 percent higher in the first quarter of 2002 compared with the first quarter of 2001, it was 2.3 percent lower compared with the first quarter of 2000. Section 129 Report at Table C-1B (Exhibit US-5).

<sup>201</sup>Section 129 Report at Tables 1 and 2 (Exhibit US-5).

85. Looking at the record evidence in its entirety (rather than a snapshot of a single quarter), the Commission found a domestic industry whose performance, particularly its financial performance, had deteriorated and remained weak during the period of investigation. The Commission found that the domestic industry was vulnerable to injury. This finding, combined with its findings regarding likely substantial increases in the volume of subject imports and their likely price effects, lead the Commission to determine that the domestic softwood lumber industry was threatened with material injury by reason of subject imports of softwood lumber from Canada that were subsidized and sold at less than fair value.

### **III. The Causal Relationship and Alleged Other “Known” Factor Analyses**

86. The Commission’s Section 129 Determination is consistent with U.S. obligations under Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement. First, the Commission examined all record evidence and demonstrated in its thorough analysis of all relevant factors that substantial increases in subject imports were likely to enter at prices that were likely to have a significant depressing or suppressing effect on domestic prices, and thereby were likely to adversely impact the already vulnerable U.S. industry in the imminent future. Second, the Commission provided a thorough and reasoned explanation of its examination of other factors alleged to be other “known factors,” including its determination whether they were, in fact, other “known factors.” It, therefore, ensured that it did not improperly attribute injury from “any know factors” to the subject imports.

87. Canada’s critique of the ITC’s analysis is based on erroneous characterizations of the

original panel's findings,<sup>202</sup> the obligations imposed by the covered agreements, and the analysis conducted and findings made by the Commission in its Section 129 Determination. In fact, Canada chooses to reargue the original determination and mistakenly urges the Panel to focus on that determination<sup>203</sup> rather than the measure taken to comply, *i.e.*, the Section 129 Determination.

**A. U.S. Obligations Under Article 3.5 of the Antidumping Agreement and Article 15.5 of the SCM Agreement**

88. The covered Agreements require that the Commission determine that the domestic industry is materially injured or threatened with material injury by reason of subject imports. Under Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement, the Commission first must demonstrate a causal relationship between the dumped and subsidized imports and the threat of injury to the domestic industry. Article 3.5 of the AD Agreement states in relevant part:

It must be demonstrated that the dumped [subsidized] imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. . . .

---

<sup>202</sup>See Canada First Written Submission, para. 118. The original panel report never reached the arguments made by the United States regarding methodology or the merits of the ITC's causation analysis. Instead, the original panel made clear that its overriding concern was with an inadequate explanation that did not permit the Panel to understand the reasoning underlying the decision. Panel Report, para. 7.137 ("However, that does not excuse the investigating authority from the necessity of, at the time of its determination, providing an adequate explanation of its analysis such that a Panel can, with confidence, understand the reasoning underlying the decision that was actually made in order to be able to assess its consistency with the relevant provisions of the Agreements.").

<sup>203</sup>See, *e.g.*, Canada First Written Submission, paras. 123-125, 127, 136 and nn. 151, 152, 154, 159, 168, and 169.

A similar provision in Article 15.5 of the SCM Agreement applies to subsidized imports.<sup>204</sup>

89. In making its determination, the Commission examines, in accordance with Articles 3.5 and 15.5, “any known factors” other than the dumped and subsidized imports that might be injuring the domestic industry to ensure that it does not improperly attribute injury from other causal factors to the subject imports. Article 3.5 of the AD Agreement states in relevant part:

The authorities shall also examine any known factors other than the dumped imports, which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports.

The same provision in Article 15.5 of the SCM Agreement applies to subsidized imports.<sup>205</sup>

90. Neither Article 3.5 of the AD Agreement nor Article 15.5 of the SCM Agreement requires the Commission 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 [or subsidized] imports.” In recognizing that the covered agreements do not prescribe a particular methodology, the Appellate Body in *EC-Pipe* stated that “provided that an investigating authority does not attribute the injuries of other causal factors to dumped imports, it is free to choose the methodology it will use in examining the ‘causal relationship’ between

---

<sup>204</sup>The text “as set forth in paragraphs 2 and 4” is contained in a footnote in Article 15.5 of the SCM Agreement rather than in the text of the provision.

<sup>205</sup>The Appellate Body in *EC-Pipe* explained that:

This obligates investigating authorities in their causality determinations not to attribute to dumped imports the injurious effects of other causal factors, so as to ensure that dumped imports are, in fact, “causing injury” to the domestic industry.

Appellate Body Report, *European Communities - Antidumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted August 18, 2003, para. 188 (“*EC-Pipe*”).

dumped imports and injury.”<sup>206</sup> Stated another way by the Appellate Body in *US-Hot-Rolled Steel*, “[W]hat the Agreement requires is simply that the obligations in Article 3.5 be respected when a determination of injury is made.”<sup>207</sup>

91. The Appellate Body in *EC-Pipe* found the EC’s methodology for evaluating causation to be consistent with the covered agreements. Under that methodology, the first step involved examining other factors to determine if any of them are other known causal factors. The Appellate Body stated that when, upon examination, a factor is found not to have injurious effects on the domestic industry, such factor is not an “other known factor” for purposes of the covered agreements, and no further consideration or examination of that factor is called for. The Appellate Body stated that when injury has “effectively been found not to exist,” there is no factor to examine further, pursuant to the covered Agreements. That is, such factor is “not a ‘known factor[] other than the dumped imports which at the same time [was] injuring the domestic industry.’”<sup>208</sup> If a factor is not an “other know factor,” no further consideration or

---

<sup>206</sup>AB Report, *EC-Pipe*, para. 189, citing to Appellate Body Report, *United States - Antidumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, para. 224, states:

We underscored in *US-Hot-Rolled Steel*, however, that the *Anti-Dumping Agreement* does not prescribe the *methodology* by which an investigating authority must avoid attributing the injuries of other causal factors to dumped imports. . . . Thus, provided that an investigating authority does not attribute the injuries of other causal factors to dumped imports, it is free to choose the methodology it will use in examining the “causal relationship” between dumped imports and injury.

<sup>207</sup>AB Report, *US-Hot-Rolled Steel*, WT/DS184/AB/R, adopted August 23, 2001, para. 224.

<sup>208</sup>AB Report, *EC-Pipe*, paras. 178-179:

examination of the factor is necessary.

92. In short, an approach 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. Yet, Canada continues to argue that the Commission was required to undertake such further analysis, even if not warranted by the evidence.<sup>209</sup> Under Canada’s methodology, it merely is assumed that each alleged factor other than dumped and subsidized imports necessarily constitutes an “other known factor” – *i.e.*, that it is a more than tangential or minimal cause of injury or threat of injury – and that, accordingly, a further analysis must be done with respect to each such factor. In other words, in Canada’s view, (and contrary to the interpretation by the Appellate Body in *EC - Pipe*), an investigating authority is not permitted to first make a determination whether a given factor is, in fact, an “other known factor.”<sup>210</sup>

---

. . . “the European Communities did examine these factors, and, in light of its findings, did not perceive of them as ‘known’ causal factors.” . . . once the cost of production difference was found by the European Commission to be “minimal”, the factor claimed by Brazil to be “injuring the domestic industry” had effectively been found *not* to exist. As such, there was no “factor” for the European Commission to “examine” further pursuant to Article 3.5.

179. We therefore uphold the Panel’s finding, in paragraph 7.362 of the Panel Report, that the difference in cost of production between the Brazilian exporter and the European Communities industry was not a “known factor[] other than the dumped imports which at the same time [was] injuring the domestic industry.”

<sup>209</sup>See Canada First Written Submission, paras. 118 and 123; *see also* Posthearing Brief of Government of Canada, Response to Questions at 15-18. (Exhibit US-7).

<sup>210</sup>See Canada First Written Submission, para. 123.

93. In the Section 129 Determination, the Commission's approach to non-attribution (like the approach found to be permissible in *EC - Pipe*) first asked whether a factor alleged to be an other known factor was more than a tangential or minimal cause of injury or threat of injury to the domestic industry. If it had found that such factor was an other known factor (*i.e.*, more than a tangential or minor cause of injury or threat), the Commission would have conducted a further analysis to ensure that it was not attributing the injury from other sources to subject imports.<sup>211</sup> Such known factor, while more than a "tangential or minimal cause," still may not independently fully account for any injury or threat of injury. In fact, the Commission found the evidence to demonstrate that none of the factors alleged to be other known factors were other known factors. Therefore, there was no need for the Commission to undertake a further examination of any of the factors alleged to be other known factors.<sup>212</sup>

---

<sup>211</sup>See AB Report, *EC-Pipe*, para. 188; see also Section 129 Determination at 64-66 (Exhibit US-1). The alleged other factors examined by the Commission were: (1) excess supply from the domestic industry itself; (2) third-country or non-subject imports; (3) increases in importation to meet demand in the U.S. 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. *Id.* at 68-85.

<sup>212</sup>See Canada First Written Submission, para. 123.

**B. Causal Relationship Between Likely Substantial Increases in Subject Imports at Depressed Prices and Threat of Injury to the Domestic Industry in the Imminent Future**

94. The Commission demonstrated a causal relationship between the likely substantial increases in subject imports and likely price effects and their consequent threat to the already vulnerable domestic industry in the imminent future. The Commission 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 U.S. 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 Commission found that the likely substantial increases in subject imports would result in excess supply in the U.S. market, putting further downward pressure on prices.

95. 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, U.S. 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 U.S. market.

Thus, the Commission 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 U.S. industry in the imminent future, unless protective action were taken.<sup>213</sup>

96. In the Section 129 Determination, the Commission 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.<sup>214</sup> Rather than address this integrated analysis, Canada focuses its critique of the ITC's causation findings on a separate section of the Determination that merely reviewed the factors involved in those findings.<sup>215</sup> Moreover, in a glaring mischaracterization of the Commission's Section 129 Determination, Canada incorrectly asserts that "the basis for the conclusion about U.S. producers curbing production is a single reference in a footnote in the section of the Section 129 Determination discussing price declines during the POI."<sup>216</sup> This assertion, which Canada had made in the underlying proceeding with regard to the ITC's original determination, does not apply to the Section 129 Determination. In the new determination, the Commission made a detailed and

---

<sup>213</sup>Section 129 Determination at 66-68 (Exhibit US-1).

<sup>214</sup>The Commission's analysis of the threat factors subsumes the causal link question. In this sense, its analysis would be best characterized as a unitary analysis, whereby the Commission considers whether a domestic industry is being threatened with material injury "by reason of" subject imports as a single question.

<sup>215</sup>See Canada First Written Submission, para. 114.

<sup>216</sup>Canada First Written Submission, para. 115.

thorough separate analysis of whether alleged excess supply by the domestic industry was an other known factor contributing to injury or threat.<sup>217</sup> As discussed in the next section, that analysis, based not on a single piece of evidence but on the totality of the evidence, showed that domestic supply was not an other known factor in the context of the threat analysis.<sup>218</sup>

### **C. Alleged Other “Known” Factors Analysis**

97. In its Section 129 Determination, the Commission provided a detailed and reasoned analysis of the alleged other factors potentially causing injury to the domestic industry. In doing so, the Commission addressed the original panel’s concern that other factors had received inadequate treatment in the Commission’s original determination.<sup>219</sup> The Commission’s analysis began by considering whether such alleged potential 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 were: (1) excess supply from the domestic industry itself; (2) third-country or non-subject imports; (3) increases in importation to meet demand in the U.S. 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

---

<sup>217</sup>Section 129 Determination at 68-73 (Exhibit US-1).

<sup>218</sup>Canada attaches significance to the fact that U.S. production increased in the first quarter of 2002, while Canadian production declined in that quarter. *See* Canada First Written Submission, para. 116. However, the significance of that snapshot view of production levels is diminished when considered in light of the totality of the evidence. Looked at in that light, changes in production levels in the first quarter of 2002 did not cause domestic supply to become an other known factor, as discussed below.

<sup>219</sup>Panel Report, paras. 7.134 - 7.136.

United States.<sup>220</sup>

98. Based on its analysis of the evidence in the Section 129 proceeding, the Commission found that none of the factors alleged to be other known factors was in fact more than a tangential or minimal threat to the domestic industry. In light of that finding, it had no basis to undertake a further examination to ensure that injury from those factors was not attributed to subject imports.

99. In its first written submission in this proceeding, Canada makes arguments regarding only three of the alleged other factors – domestic supply, third-country imports, and integration in the North American market. In particular, Canada acknowledges that two of its claims regarding alleged other factors in the original panel proceeding – constraints on domestic supply and excess domestic supply – could not both be causing injury to the domestic industry.<sup>221</sup> Accordingly, Canada appears to have abandoned its original allegation that constraints on domestic supply are an other causal factor. Canada also has not pursued its original allegation that the growth in importance of EWPs was an other factor. The Commission provided a detailed analysis of the evidence in its Section 129 Determination demonstrating that there is no basis for allegations that EWPs and other substitute products, which were not an other known factor at present, would be

---

<sup>220</sup>Section 129 Determination at 68-85. (Exhibit US-1). In the original panel report, each of these factors was characterized as a potential other known factor. Accordingly, the Commission dealt with each of them in that light in its Section 129 Determination. At the same time, it noted that at least two of these factors – *i.e.*, increases in importation to meet demand and market integration – could be viewed not as factors causing injury but as factors potentially lessening any threat from subject imports. In section II.A.1.c, above, we responded to arguments about importation to meet demand as a possible factor weighing against the conclusion that subject imports threaten injury to the domestic industry.

<sup>221</sup>Canada First Written Submission, para. 126, n. 153.

an other known factor in the imminent future.<sup>222</sup>

### **1. Excess Supply From the Domestic Industry**

100. While the Commission 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 Commission 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 U.S. market. Moreover, the evidence demonstrated that Canadian exports continue to oversupply the U.S. market.

101. 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 U.S. production in the first quarter of 2002 compared with the first quarter of 2001.<sup>223</sup> The Commission's finding, however, is based on an objective evaluation of the totality of the evidence, including U.S. and Canadian production during the entire period of investigation and Canadian producers' projections for increases in 2002 and 2003.

102. The Commission relied on a variety of factors in reaching its conclusion that the U.S.

---

<sup>222</sup>Section 129 Determination at 82-83 (Exhibit US-1).

<sup>223</sup>Canada First Written Submission, paras. 115, 116 and 127.

industry had restrained its overproduction. 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.<sup>224</sup> 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.<sup>225</sup> The revised U.S. production data collected in the Section 129 proceeding showed a similar trend, with a larger decline of 5.5 percent from 36,606 mmbf in 1999 to 34,579 mmbf in 2001.<sup>226</sup> While domestic production in the first quarter of 2002 was 4.9 percent higher than the first quarter of 2001, apparent U.S. 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.<sup>227</sup> 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.<sup>228</sup> Based on revised U.S. production data, domestic capacity utilization was 86.4 percent in 2001.<sup>229</sup>

103. The Commission also reviewed the evidence regarding Canadian production in order to

---

<sup>224</sup>Section 129 Determination at 69 (Exhibit US-1); USITC Pub. 3509 at Table III-6 and C-1 (public data) (Exhibit CDA-2). Apparent U.S. consumption increased by 13.5 percent from 1995 to 1999. *Id.* at Table IV-2.

<sup>225</sup>USITC Pub. 3509 at Tables III-6 and C-1 (public data) (Exhibit CDA-2).

<sup>226</sup>INV-BB-138 at Tables III-6 and IV-2 (Exhibit US-5).

<sup>227</sup>Section 129 Report at Tables III-6B and C-1B (Exhibit US-5).

<sup>228</sup>USITC Pub. 3509 at Tables III-6 and C-1 (public data) (Exhibit CDA-2).

<sup>229</sup>INV-BB-138 at Tables III-6 and IV-2 (Exhibit US-5). Public data for domestic capacity utilization collected in this Section 129 proceeding for first quarter 2000, 2001, and 2002 were 96.1 percent, 83.2 percent and 87.5 percent, respectively. Section 129 Report at Tables III-6B and C-1B (Exhibit US-5).

assess its likely continued ability to oversupply the U.S. market.<sup>230</sup> In contrast to U.S. industry capacity utilization, Canadian capacity utilization had declined in 2001 to 83.7 percent, a rate substantially lower than that reported for any other year in the 1995-2001 period.<sup>231</sup> Thus, in 2001, excess Canadian capacity had increased to 5,343 mmbf, which was equivalent to 10 percent of U.S. apparent consumption.<sup>232</sup> Moreover, in spite of this decline in capacity utilization rates from 90 percent in 1999 to about 84 percent in 2001, Canadian producers projected slight increases in capacity, increases in production of 8.9 percent from 2001 to 2003,<sup>233</sup> and a return of capacity utilization to 90.4 percent in 2003.<sup>234</sup> <sup>235</sup> Thus, the evidence demonstrated that Canadian producers expected to further increase their ability to supply the U.S. softwood lumber market. These increases were projected at the same time that demand in the U.S. market was forecast to remain relatively unchanged or increase only slightly as the economy improved.

104. The Commission recognized that while production data for the 2000-2001 period (public

---

<sup>230</sup>Section 129 Determination at 70-71 (Exhibit US-1).

<sup>231</sup>USITC Pub. 3509 at Tables VII-1 (public data) (Exhibit CDA-2). Canadian capacity utilization, based on public data, was 87.8 percent in 1995, 87.7 percent in 1996, 87.4 percent in 1997, 87.3 percent in 1998, 90.5 percent in 1999, 88.9 percent in 2000 and 83.7 percent in 2001. *Id.*

<sup>232</sup>USITC Pub. 3509 at Tables VII-1 and C-1 (Exhibit CDA-2).

<sup>233</sup>Canadian producers projected production increases from 21,770 mmbf in 2001 to 23,698 mmbf in 2003. USITC Pub. 3509 at Table VII-2 (Exhibit CDA-2).

<sup>234</sup>USITC Pub. 3509 at Table VII-2 (Exhibit CDA-2).

<sup>235</sup>The revised quarterly data show first quarter 2002 at a lower capacity utilization rate (90 percent) compared with first quarter 2001 (93.1 percent) and first quarter 2000 (97.9 percent). Section 129 Report at Table VII-1B (129) (Exhibit US-5).

data) show that both Canadian and U.S. production declined by similar quantities,<sup>236</sup> the evidence also demonstrated that Canadian exports to the U.S. market increased for this period. Moreover, Canadian producers projected increases in production of 8.9 percent from 2001 to 2003.<sup>237</sup> The first quarter 2002 data provided further confirmation that Canadian producers had increasing excess capacity to use to increase exports to the U.S. market. 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 as Canadian production reportedly was 2.6 percent lower, but primarily shifted sales to the U.S. market since subject imports were 14.6 percent higher in the later of the same comparable periods.<sup>238</sup>

105. Thus, Canadian producers expected to further increase their ability to supply the U.S. softwood lumber market. In addition to the evidence regarding production and exports, evidence from industry analysts also indicated that U.S. production had been curbed at the end of the period of investigation while Canadian imports continued to oversupply the U.S. market.

106. The Commission considered, in the context of its threat of material injury analysis, the evidence regarding excess domestic supply and found it not likely to be an other factor potentially causing injury to the domestic industry in the imminent future. Thus, there was no basis to

---

<sup>236</sup>Section 129 Report at Tables VII-1 and C-1; INV-BB-138 at Table III-6 (Exhibit US-5). Based on revised Canadian production data, Canadian production declined by 1,347 mmbf, or by 4.2 percent, from 2000 to 2001; Canadian production was only 1.2 percent lower in 2001 compared with 1999. Section 129 Report at Tables VII-1. Based on revised U.S. production data, U.S. production declined by 1,386 mmbf, or by 3.9 percent from 2000 to 2001; U.S. production was 5.5 percent lower in 2001 compared with 1999. INV-BB-138 at Table III-6.

<sup>237</sup>USITC Pub. 3509 at Table VII-2 (Exhibit CDA-2).

<sup>238</sup>Section 129 Report at Tables VII-1B and C-1B (Exhibit US-5).

examine whether any injury could be attributed to excess domestic supply in the imminent future.

## **2. Third-Country or Nonsubject Imports**

107. The Commission also found that the evidence demonstrated that nonsubject imports were not a “known” other factor.<sup>239</sup> Canada attempts to portray nonsubject imports as an other known factor, notwithstanding evidence to the contrary. Non-subject imports never accounted for more than 3.0 percent of apparent consumption;<sup>240</sup> in contrast, subject imports accounted for at least 34 percent of the U.S. 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.<sup>241</sup> In light of the evidence regarding nonsubject imports, the Commission found them not likely to be an other factor potentially causing injury to the domestic industry in the imminent future.

108. Canada’s argument focuses on the rate of increase of non-subject imports, without any regard for the enormous difference in the baseline for subject imports and non-subject imports;<sup>242</sup>

---

<sup>239</sup>See Section 129 Determination at 73-75. (Exhibit US-1).

<sup>240</sup>USITC Pub. 3509 at II-7, n.23 and Tables IV-1 and C-1. The additional evidence gathered in this Section 129 proceeding shows non-subject imports accounting for 3.0 percent of the U.S. market in the first quarter of 2002 compared with 2.2 percent and 1.9 percent in the first quarters of 2001 and 2000, respectively. Section 129 Report at Table C-1B.

<sup>241</sup>USITC Pub. 3509 at II-7, n. 23 (“Official statistics from the Department of Commerce reveal that nonsubject imports accounted for 6.9 percent of the overall quantity of softwood lumber imports into the U.S. market in 2001, with Brazil, Chile, and New Zealand accounting for 1.3, 1.1, and 1.0 percent, respectively. Germany, Sweden, and Austria accounted for 1.0, 0.8, and 0.5 percent, respectively, while Lithuania, the Czech Republic, Mexico, and all other countries accounted for the remaining 1.2 percent of 2001 softwood lumber imports.”).

<sup>242</sup>Canada First Written Submission, paras. 130-131.

the level of subject imports was well over a thousand times as large as the level of non-subject imports. As the Commission recognized, 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.<sup>243</sup> Canada ignores the significance of the baseline in discussing the importance of incremental increases in import volume. To argue based only on the rate of increase that non-subject imports would be an other known factor (*i.e.*, more than a “tangential or minor cause”) is speculative at best.

109. Moreover, the Commission 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, the Commission pointed out that this comparison must be placed in perspective: subject imports are responsible for an enormous volume of imports during the period of investigation, ranging from 17,983 mmbf to 18,483 mmbf and accounting for 33.2 percent to 34.3 percent of U.S. apparent consumption in the 1999-2001 period, compared with higher valued nonsubject imports,<sup>244</sup> which never exceeded 1,378 mmbf or 2.6 percent of apparent

---

<sup>243</sup>This is a matter of basic arithmetic. For example, if the baseline under consideration is five units, and over three years there is an increase by five more units for a total of 10 units, the rate of increase is 100 percent. If the baseline, on the other hand, is 100 units, and there is an increase also by 5 units over the three year period for a total of 105 units, the rate of increase is only 5 percent. Subject imports of 105 units that were already found to have a significant impact in the domestic market will continue to have such an impact, despite the small rate of increase, whereas imports of 10 units may still be a very small volume relative to the market and the subject imports, despite having doubled from 5 units.

<sup>244</sup>The Commission noted that the average unit values for non-subject imports were 80 to 90 percent higher than those for subject imports from 1999-2001. Section 129 Determination at 73-74 (Exhibit US-1); USITC Pub. 3509 at Table C-1 (Exhibit CDA-2). The average unit values for non-subject imports ranged from \$623.60 to \$712.22 from 1999 to 2001, whereas the average unit values for subject imports ranged from \$323.57 to \$395.72. *Id.*

domestic consumption.<sup>245</sup>

110. Imports from Canada were subject to import restraints for most of the period of investigation; nonsubject 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.<sup>246</sup> Furthermore, as in other parts of its argument, Canada's statements regarding non-subject imports rely on the assumption that a gap period – *i.e.*, a period in which no preliminary restraints were being imposed on subject imports pursuant to the AD and CVD investigations – began in December 2001. However, subject imports were still subject to preliminary antidumping duties for the entire first quarter of 2002, which duties remained in place until April 2002.

111. Canada fails to explain its basis for believing that any significant increase in nonsubject imports would be imminent and how any likely imminent increase in such a small volume of nonsubject imports relative to apparent consumption might rise to the level of having a causal impact on the domestic industry. Subject imports already were at a significant level during the period of investigation, and even Canada acknowledges that they were expected to continue at, and even increase above, that level. Moreover, it was alleged that increases, and not even significant increases, in nonsubject imports would be likely only if trade remedies were imposed

---

<sup>245</sup>USITC Pub. 3509 at Tables IV-2 and C-1..

<sup>246</sup>Canada First Written Submission, paras. 131 and 133.

against Canadian imports.<sup>247</sup> But, a likely rise in nonsubject imports in response to a trade restraining measure on subject imports is not relevant to a threat inquiry under the covered agreements. What is relevant is what can be expected to happen “unless protective action is taken.”<sup>248</sup>

112. The Commission considered, in the context of its threat of material injury analysis, the evidence regarding nonsubject imports and found them not likely to be an other factor potentially causing injury to the domestic industry in the imminent future. Thus, there was no basis to examine whether any injury could be attributed to nonsubject imports in the imminent future.

### **3. Integration of North American Softwood Lumber Industry**

113. The Commission found that the evidence demonstrated that there was no basis for allegations that the integration of the North American softwood lumber industry was an “other known factor” at present or would be an other known factor in the imminent future, nor that integration would lessen the injurious effect of subject imports. Thus, there was no basis to examine whether any injury could be attributed to such integration in the imminent future.

114. The Commission pointed out that “[n]o evidence whatsoever has been proffered to support speculative assertions that integrated firms will not harm their related companies.”<sup>249</sup> Canada

---

<sup>247</sup>Section 129 Determination at 75, n.222. Importers of softwood lumber stated that “any restrictions on the supply of Canadian softwood lumber to the U.S. market would result in an increased supply of imports from other sources, particularly European sources, to meet U.S. demand for softwood lumber.” USITC Pub. 3509 at II-3 (Exhibit CDA-2). The share of U.S. imports held in 2001 by European countries was only 2.3 percent of total imports. *Id.* at II-7, n. 23.

<sup>248</sup>Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement.

<sup>249</sup>Section 129 Determination at 81.

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).<sup>250</sup>

Without considering any differences in the record evidence, Canada suggests that the finding made in the unrelated case also should have been made here. The Commission properly declined to rely on the evidence in an unrelated case for its findings in this case.

115. 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 ITC found no price effects in its present material injury analysis.<sup>251</sup> In fact, in the present material injury analysis in the Section 129 Determination, the ITC did find that subject import volumes were significant and that subject imports had some adverse price effects.<sup>252</sup>

116. Finally, Canada refers to the ITC’s decision not to exclude from its analysis any domestic producers under the “related parties” provision under U.S. law.<sup>253</sup> 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.”<sup>254</sup> But Canada has it exactly backwards. The Commission explained, “Nor did any party provide evidence that integrated domestic producers

---

<sup>250</sup>Canada First Written Submission, para. 135 and n. 167.

<sup>251</sup>Canada First Written Submission, para. 137.

<sup>252</sup>Section 129 Determination at 46 (Exhibit US-1).

<sup>253</sup>Canada First Written Submission, para. 138.

<sup>254</sup>Canada First Written Submission, para. 138.

are shielded from harm.”<sup>255</sup> In general, subsidiaries are more likely to be shielded from harm, and thus are appropriate for exclusion from the Commission’s definition of the domestic industry under the related party provision, when they are “more closely aligned” with foreign exporters. 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 U.S. industry or on the industry as a whole, which is the required focus of the injury analysis.

117. The Commission appropriately considered, in the context of its threat of material injury analysis, the evidence regarding integration of the North American industry and found it not likely to be an other factor potentially causing injury to the domestic industry in the imminent future, nor that it would lessen the effect of subject imports.

---

<sup>255</sup>See USITC Pub. 3509 at 16-19 (Exhibit CDA-2); Conference Transcript at 108 (CLTA).

#### **IV. Conclusion**

118. For the reasons stated above and in the First Written Submission of the United States, Canada's claims against the U.S. 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.<sup>256</sup>

---

<sup>256</sup>As in the underlying proceeding, Canada asks the Panel to "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." Canada First Written Submission, para. 139. For the reasons set forth in the submissions by the United States in this proceeding, there should be no need for such a recommendation, as the United States has come into compliance with its WTO obligations. However, 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. As recognized there, "the choice of means of implementation is decided, in the first instance, by the Member concerned." Panel Report, para. 8.8; *see also* Panel Report, *United States–Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted August 23, 2001, paras. 8.5-8.14. In any event, Canada's request goes beyond anything relevant to implementing a recommendation and instead seeks action nowhere called for under the WTO agreements.