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

Closing Statement of the United States
Meeting of the Panel

June 29, 2005

Mr. Chairman, members of the Panel:

1. In Canada's presentation yesterday, two themes were featured prominently. First, Canada selectively stresses the importance of certain evidence from the end of the period of investigation to the virtual exclusion of evidence from earlier parts of that period. Second, Canada asserts that a threat analysis must take account of and be consistent with the ITC's finding of a non-injurious status quo. In our closing remarks, we will address these two themes. We then will respond to certain of Canada's particular arguments from yesterday's presentation.

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

3. Canada's answer, apparently, is that, at least with respect to some aspects of its analysis, the investigating authority should look primarily to the very recent past – perhaps only to the

most recent quarter – in evaluating whether the industry faces a threat of injury. Canada would heavily discount earlier events. To make a projection about whether injury will occur in the future, the investigating authority need only to identify what is happening today, according to Canada, without regard to how that evidence fits within the context of what happened yesterday.

4. The United States does not disagree that, as a general proposition, recent events are relevant to the determination of threat. However, the United States does differ with Canada in two critical respects. First, in the U.S. view, the focus on data from the end of the period of investigation must be comprehensive, rather than selective. That is, in taking account of evidence from the end of the period of investigation, the investigating authority should take account of evidence on all relevant factors, not just isolated factors. Second, in the U.S. view, evidence from the end of the period of investigation must be examined in context. It would not be appropriate for an investigating authority to examine evidence from the latter part of the period of investigation without regard to evidence from the earlier part of the period. In both of these respects, Canada's argument is seriously flawed.

5. We want to call attention to this issue of the selectivity of Canada's focus, because it came up in a number of points that Canada raised in its statement yesterday. For example, with respect to price effects, Canada argued that prices in 1999 and 2000 had "at best . . . limited relevance to a threat determination being made in May 2002." (Oral Statement, para. 43.) Similarly, in discussing the vulnerability of the domestic industry, Canada stated that "evidence from 2001 and 2002 has to be more probative than evidence from 1999 and 2000." (Oral Statement, para. 46.) Again, when it comes to rates of change in relative production by U.S. and

Canadian producers, Canada dismisses the absolute volumes evidence from earlier in the period of investigation, as well as market conditions. Instead, Canada emphasizes a snapshot of the rates of change at the very end of the period examined. (Oral Statement, para. 53). What is striking about these statements is the selectivity of Canada's focus on only certain evidence from the latter part of the period of investigation. Canada is content to focus on the more recent months when it comes to price effects, vulnerability, and rates of change in production, presumably because evaluating the data in these periods in the abstract favors a negative threat finding. However, when it comes to import volumes and market share, Canada takes quite a different view.

6. When it comes to import volumes and market share, Canada actually would discount the latter part of the period of investigation. First, it would dismiss import trends in the period from April to August 2001 as aberrational. In Canada's view, imports during that period simply represent exporters timing their exports to occur after the expiration of one restraint and prior to the anticipated imposition of a new restraint. Canada also discounts these increases in imports on the basis that demand for the April to August 2001 period was 6.2 percent higher than the same period in the prior year, neglecting the fact that subject imports were actually 11.3 percent higher. When it is pointed out that the trend in increased imports is evident even when the period examined extends beyond imposition of the new restraint in August 2001– that is, through the end of 2001 – Canada responds that market share was lower for that period in 2001 than for the corresponding period in 2000. However, Canada does not place the comparison in context. That is, it fails to note that the second half of 2000 was when the U.S. market was oversupplied

by subject imports, which resulted in price declines and serious deterioration in the condition of the domestic industry. Taking account of that context would explain why the market share was higher in 2000 and weaken the relevance of that comparison. When the period examined is broadened to include the first quarter of 2002, Canada objects on the grounds that the first quarter 2002 amounts to an aberrational "gap period," given the expiration of provisional countervailing duties.

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

8. In short, in Canada's view, an objective and unbiased investigating authority would have focused its threat analysis on the end of the period of investigation when it comes to price trends, industry vulnerability, and changes in rate of production, but would discount information from this period when it comes to import volumes and market share. Canada tries to explain away that latter category of information – an entire year's worth of data – as not indicative of exporter conduct relevant to a threat analysis. We fail to see how it is objective and unbiased for an

investigating authority to arbitrarily focus on one part of the period of investigation for some purposes but then to disregard that part of the period of investigation for other purposes.

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

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

11. I would like to turn now to the second prominent theme in Canada's presentation – consistency between the ITC's present injury findings and its threat findings. We have emphasized that in evaluating the question of threat to the domestic industry it is crucial to focus

on the starting point – what we refer to as the baseline. We have pointed to the fact that Canada's challenge addresses incremental changes in particular factors usually without regard to the base over which those changes are occurring. Canada states that it focuses on incremental changes because the starting point is a status quo found to be non-injurious.

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

13. Now, this goes to the question of the relevance of baselines. Starting from the erroneous assumption that the volume of subject imports during the period of investigation is irrelevant because that volume was found to be non-injurious, Canada contends that it would have been

appropriate for the ITC to make an affirmative threat finding only if the evidence showed that subject imports would increase in the future at a rate greater than their rate during the period of investigation. According to this logic, if the rate of increase is expected to be equal to or less than the rate of increase during the period of investigation, then there is no threat to the domestic industry. However, because the premise is incorrect, the rest of this line of reasoning necessarily falls apart. Not to mention, that this logic is refuted by the facts. Subject imports after expiration of the SLA increased at rates higher than when subject imports were subject to the restraints of the SLA – increases of 2.4 percent from 2000 to 2001 (as contrasted to 0.4 percent for 1999-2000), 4.9 percent from April to December 2001, and 14.6 percent when the first quarter of 2002 is compared to the first quarter of 2001.

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

15. Mr. Chairman, we turn now to some of the more troubling particular assertions that Canada made in yesterday's presentation.

16. Canada makes the point that in the first quarter of 2002, Canadian production was actually decreasing while U.S. production was increasing. But Canada fails to put this observation in context. The changes in production levels occurred while demand in Canada declined by 23 percent and demand in the United States increased by 9.7 percent. Indeed, even as Canadian producers made some adjustments to production during this period, Canada's exports to the United States increased by 14.6 percent. Thus, the changes in production on which Canada relies were not necessarily probative of import behavior.

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

18. Canada argues that the first quarter of 2002 must be viewed as a "gap period" for purposes of considering import data, because provisional countervailing duties had expired at the end of December 2001. It dismisses the significance of the continuation of preliminary antidumping duties after December 2001, which generally account for about a third of all duties imposed. Its argument that the first quarter of 2002 should be considered a "gap period" notwithstanding the continuation of provisional antidumping duties should be rejected, because

of its selective disregard of inconvenient evidence. There is a pattern of increasing imports for a whole year after the expiration of the SLA. Canada tries to dismiss evidence of increases during particular intervals as timing shifts. But, it stretches logic to dismiss a consistent pattern over an entire year as something other than a change in import behavior, demonstrating an ability of the Canadian industry to supply the U.S. market with increasing volumes.

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

20. Canada argues that the ITC's negative "but for" finding means that imports would not have increased to injurious levels in the 12 months after the SLA expired even absent preliminary antidumping and countervailing duties. That is not a correct inference to draw from the negative "but for" finding. That finding does <u>not</u> mean that subject import volumes were at non-injurious levels. Rather, it means that other factors – in particular, oversupply by the US industry – precluded a finding of present injury.

21. With respect to demand forecasts, Canada faults the ITC for relying on one analysis – the Bank of America report – over others – RISI and Clear Vision. That assertion has no basis. It is evident on pages 77 to 80 of the Section 129 Determination that the ITC did not disregard the

RISI and Clear Vision demand forecasts in lieu of the Bank of America forecast. Nor did the ITC ignore questionnaire responses. The ITC considered the demand forecasts in conjunction with the forecasts for the primary end-use of softwood lumber, U.S. housing starts. The evidence showed a correlation between the actual data for lumber demand and housing starts during the period of investigation. But, the forecasts, particularly the more optimistic ones, did not have a similar correlation between demand for softwood lumber and U.S. housing starts.

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

23. The ITC found that the simple increase in the still extremely small volume of non-subject imports, which never exceeded 3 percent of the market and were not restrained, was not a basis for finding that such fairly traded imports were causing injury to the domestic industry. In its

analysis, the ITC pointed out that non-subject imports were higher-valued and from a wide variety of other countries, and as such did not act as a collective entity. Moreover, contrary to Canada's assertion in its oral statement yesterday, the Appellate Body report in *EC-Pipe* did not indicate that a collective analysis was required or even the norm.

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

25. For all of the reasons we have set forth in our written submissions and at this Panel meeting, the Panel should reject Canada's challenge and find the Section 129 Determination to be consistent with the covered agreements. We note that Canada urges not only that the Panel reach the opposite result but that it go further and recommend particular actions by way of implementation. For reasons the Panel discussed in the original report, such a recommendation – or "suggestion" – would be inappropriate. The radical suggestions that Canada proposes, including a retroactive remedy in the form of returning cash deposits imposed under the antidumping and countervailing duty orders supported by the Section 129 Determination, have no basis in the WTO Agreement and, therefore should be rejected. In any event, we expect that

there will be no need even to reach that issue, in light of the fact that the Section 129 Determination is consistent with U.S. obligations under the covered agreements.

26. We wish to thank the Panel for your attention during this meeting. We look forward to receiving your written questions in the coming days.