**BEFORE THE**

**WORLD TRADE ORGANIZATION**

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

WT/DS277

**SECOND WRITTEN SUBMISSION OF THE UNITED STATES**

**September 24, 2003**

TABLE OF CONTENTS



List of USA Exhibits (continued)

## I. Overview

1. Canada has failed to demonstrate that the determinations of the U.S. International Trade Commission (hereinafter the Commission or ITC) that an industry in the United States producing softwood lumber is threatened with material injury by reason of imports of softwood lumber from Canada found to be subsidized and sold in the United States at less than fair value ("LTFV")[1] are inconsistent with U.S. obligations under the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Antidumping Agreement) and the Agreement on Subsidies and Countervailing Measures (the SCM Agreement). (Hereafter, we refer to the Antidumping Agreement and the SCM Agreement collectively as "the covered Agreements."). In its first written submission, the United States demonstrated that the Commission's determinations are supported by positive evidence and are based on an objective examination of all relevant factors and facts. Moreover, as evidenced in the ITC Report (comprised of the Views of the Commission and accompanying factual report), the Commission articulated reasoned and adequate explanations demonstrating how the facts as a whole support its determinations and permitting the Panel to adequately discern the rationale for the ITC's findings.

2. The Panel's questions following the first substantive meeting address many of the issues arising in this dispute, and the United States has provided answers to those questions in a document accompanying this submission. The United States does not intend to duplicate its earlier arguments in this second written submission. Instead, this submission will highlight the major legal and factual errors underlying Canada's claims and focus on issues raised by Canada at the first Panel meeting.

3. Throughout its argument, Canada identifies supposed requirements that have no basis in the covered Agreements. Instead, Canada refers to general provisions in the Agreements; those provisions do not support the particular requirements asserted. Canada's misguided approach should fail because its allegations are not based on the text of the Agreements and because the Panel, under DSU Article 19.2, "cannot add to or diminish the rights and obligations provided in the covered agreements."[2] Yet, Canada would have this Panel do precisely that – add to U.S. obligations.

4. Canada's asserted "requirements" involve a number of different issues and take on a variety of diverse forms. For instance, Canada originally sought to have the Panel construe the term "consider" to mean "make findings," at least regarding certain issues/factors that Canada alleges are relevant to the Commission's determination. The covered Agreements do not require

---

[1] Notice of the Commission's determination was published in the Federal Register on May 22, 2002 at 67 Fed. Reg. 36022. (CDA-2). The Commission's determination and a public version of the Views of the Commission and staff report are found in Softwood Lumber from Canada, Inv. Nos. 701-TA-414 and 731-TA- 928 (Final), USITC Pub. 3509 (May 2002). (CDA-1).

[2] Article 19.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU)

such findings.[3] Nor has the Appellate Body or other GATT or WTO dispute settlement panels interpreted them as containing such requirements.[4] [5]

5. Canada conceded at the first Panel Meeting that "consider" as used in the covered Agreements does not require an investigating authority to "make findings." However, invoking "overarching obligations," Canada contends that, although the United States may have "considered" factors, it failed in its obligation to provide "reasoned explanations." Canada does not elaborate on what "reasoned explanations" entail, other than to assert that they entail explanations beyond those made by the Commission and to assert that they must resemble findings.

6. Canada invokes the alleged failure to provide reasoned explanations for many other claims as if it were a catch-all provision encompassing the obligations that Canada posits but for which it is unable to find any other basis in the covered Agreements. The "reasoned explanation" obligation Canada asserts apparently flows from Article 12.2.2 of the Antidumping Agreement and Article 22.5 of the Subsidies Agreement.[6] Those articles, in relevant part, require an investigating authority to state the facts, law, and reasons supporting its determination.[7] The

---

[3] The covered Agreements indicate that the Commission "should consider" several factors among other relevant economic factors in its threat analysis.

[4] To the contrary, they have stated that explicit findings regarding the enumerated factors in Article 3.7 of the Antidumping Agreement and Article 15.7 of the SCM Agreement are not necessary. *See Thailand-Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, Panel Body Report, WT/DS122/R, adopted April 5, 2001, para. 7.161 *("Thailand - H-Beams"*). Moreover, Canada fails to recognize that the Agreements state unmistakably that the determinations are to be made on the basis of the totality of the factors considered and that consideration, or any findings, regarding one specific factor is not necessarily dispositive. *See* Article 3.7 of the Antidumping Agreement and Article 15.7 of the SCM Agreement.

[5] Canada's attempt to distinguish the Appellate Body's recent explanation in *EC-Pipe*, that consideration of a factor does not necessarily require an explicit separate evaluation of that factor if the analysis of the factor is implicit in the analyses of other factors has no basis. Canada's Opening Statement at First Panel Meeting, paras. 26-27. Canada fails to distinguish the particular finding in that dispute from the overarching concept that "[t]he obligation to evaluate all fifteen factors [pursuant to Article 3.4 of the Antidumping Agreement] is distinct from the *manner* in which the evaluation is to be set out in the published documents. . . . that the analysis of a factor is implicit in the analyses of other factors does not necessarily lead to the conclusion that such a factor was not evaluated." *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, Appellate Body Report, WT/DS219/AB/R, circulated 22 July 2003, para. 160-161 *("EC-Pipe"*).

[6] *See* Canada's First Written Submission, para. 66

[7] Article 12.2.2 of the Antidumping Agreement states in relevant part:

> A public notice of conclusion . . . of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty . . . shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures . . . . In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by exporters and importers. . . .

Commission has done so here. The articles do not provide for the very specific obligations that Canada attempts to read into them.[8]

7. Nevertheless, Canada repeatedly asserts that the United States failed to meet an alleged "requirement" or "obligation" on the basis that it did not provide a reasoned explanation. Examples include: 1) its claim that the ITC was required to "identify" a changed circumstance;[9] 2) its claim that the ITC was obligated to explain its decision to cross-cumulate;[10] 3) its claim that the ITC was required to explain its finding that the competing evidence on economic rent theories was inconclusive;[11] and 4) its claim that the ITC was required to provide certainty regarding future events, such as projections of future market shares or whether future imports would outstrip demand.

8. "Reasoned explanation" is not the only basis Canada cites for asserted obligations that have no foundation in the covered Agreements. Another basis Canada cites is Article 3.1 of the Antidumping Agreement and Article 15.1 of the SCM Agreement. These overarching provisions "require[] an investigating authority to ensure that its threat determination is based on 'positive evidence' and involves an 'objective examination.'" Canada relies on these overarching provisions in making its argument that the ITC was required to consider Articles 3.2 and 3.4 and Articles 15.2 and 15.4 of the covered Agreements for a second time, *i.e.*, in the context of its threat analysis.[12] However, the overarching provisions support no such contention. Indeed, nothing in the covered Agreements requires an investigating authority to treat its present injury and threat of injury analyses as two separate undertakings with one having no bearing on the other. It is evident in the ITC Report that the Commission appropriately considered the relevant factors in Articles 3.2, 3.4 and 3.7 of the Antidumping Agreement and Articles 15.2, 15.4 and 15.7 of the SCM Agreement and based its determinations on positive evidence regarding those factors.

9. Canada's asserted requirement that certain of these factors be considered a second time in the context of a threat analysis in order to be based on positive evidence has no basis in the

---

The information relevant to an injury determination is described in Article 12.2.1(iv) as "considerations relevant to the injury determination as set out in Article 3." Article 22.5 of the SCM Agreement contains a similar provision.

[8] The requirement to provide a reasoned explanation has not been interpreted to impose any specific method for assessing the injury or for explaining the basis for such a determination. The Appellate Body in *EC-Pipe* recognized that the evaluation of a factor does not necessarily require an explicit separate evaluation of that factor if the analysis of the factor is implicit in the analyses of other factors. *See EC-Pipe*, AB Report, paras. 160-161. The guidance essentially is that the investigating authority "must be in a position to demonstrate that it did address the relevant issues." *See Korea-Definitive Safeguard Measure on Imports of Certain Dairy Products*, Panel Report, WT/DS98/R, adopted 12 Jan. 2000, para. 7.31 ("*Korea-Dairy*").

[9] *See* Canada's Opening Statement at First Panel Meeting, paras. 35 and 45.

[10] *See* Canada's Opening Statement at First Panel Meeting, para. 122.

[11] *See* Canada's Opening Statement at First Panel Meeting, para. 53.

[12] *See* Canada's Opening Statement at First Panel Meeting, paras. 23 and 96-99.

covered Agreements. Nor has the Appellate Body or any Panel found such a requirement.[13] Moreover, where the factors in Articles 3.2 and 3.4 of the Antidumping Agreement and Articles 15.2 and 15.4 of the SCM Agreement have already been considered once, it is not clear what Canada contemplates would be involved in a second analysis. Nor does it explain how an additional analysis of those factors is reconciled with the obligations set forth in Article 3.7 and Article 15.7 of the covered Agreements. In fact, even Canada's own practice does not involve the additional analysis it claims the ITC was required to undertake.[14]

10. Finally, Canada urges this Panel to find that the "special care" language in Article 3.8 of the Antidumping Agreement and Article 15.8 of the SCM Agreement requires a higher standard of review for threat cases than for present injury cases.[15] Specifically, Canada alleges that "the standard for determining threat is different, and if anything higher, than that for injury."[16] Canada bases this alleged higher standard on its view that "in addition to considering all of the factors that are required in an injury analysis, an investigating authority must meet at least three additional requirements for threat – first, the requirement to identify a foreseen and imminent change in circumstances; second, the requirement to consider the factors set out in Articles 3.7 and 15.7; and third, the requirement to take 'special care' as outlined in Articles 3.8 and 15.8."[17]

11. While Canada conceded at the first Panel meeting that the standard for determining threat was not higher than that for injury, it still improperly asserts a requirement to "identify a change in circumstances," discussed in detail below, and a vague concept of what constitutes special care. Canada contends that the ITC's "failure to take such 'special care' permeates the Commission's entire determination."[18] Yet, Canada's only explanation as to what this elusive special care obligation involves is that it "requires them [investigating authorities] to undertake an especially careful examination of the required elements of Article 3 of the *Anti-dumping Agreement* and Article 15 of the *SCM Agreement* as a crucial safeguard against the dangers inherent in the predictive nature of threat determinations."[19]

---

[13] *Accord Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, Panel Report, WT/DS132/R, adopted 21 November 2001, para. 7.132 ("Mexico-*HFCS*").

[14] *See, e.g., The Dumping of Leather Footwear with Metal Toe Caps, Originating in or Exported from the People's Republic of China, Excluding Waterproof Footwear Subject to the Finding Made by the Canadian International Trade Tribunal in Inquiry No. NQ-2000-004*, Inquiry No. 2001-003 at 11-20 (CITT, Dec. 27, 2001) (Exhibit USA-26).

[15] Canada's recitation of the correct standard of review for the Panel, *i.e.*, that its role is not to conduct a *de novo* review, belies its repeated suggestions throughout this proceeding that the Panel do just that. Canada presents its version of the facts and urges the Panel to adopt it ignoring the totality of the facts on which the ITC made its determinations.

[16] Canada's Opening Statement at First Panel Meeting, para. 33.

[17] Canada's Opening Statement at First Panel Meeting, para. 33.

[18] Canada's Opening Statement at First Panel Meeting, para. 30.

[19] Canada's Opening Statement at First Panel Meeting, para. 31.

12. Contrary to Canada's attempt to establish a special review standard for either the Panel or the investigating authority, the United States understands the "special care" language to be a recognition that projections about the future must be based on present and past facts. Projections about future events involve extrapolations from existing data, which reinforces the requirement in Article 3.1 and Article 15.1 to base determinations on positive evidence. For example, a threat of injury determination must be based on positive evidence tending to show an intention to import at injurious levels. Special care is the recognition that these are projections about future events, and such projections must be based on past and present facts. Moreover, basing the future-oriented determination on facts rather than allegation, conjecture or remote possibility is in accord with the requirements that the investigating authority conduct an "objective examination."

## II. Article 3.7 of the Antidumping Agreement and Article 15.7 of the SCM Agreement

### A. Continuum of an Injurious Condition Ascending from Threat to Injury

13. There are some fundamental differences in interpretation by Canada and the United States of what constitutes a threat of material injury and how it differs from present material injury. The Antidumping Agreement and the SCM Agreement recognize that injury to the domestic industry need not, and frequently does not, occur suddenly, but rather often involves a progression of injurious effects ascending from a threat of material injury, and if not prevented, to present material injury. Therefore, a determination that an industry is threatened with material injury would be warranted when conditions of trade clearly indicate that material injury likely will occur imminently if demonstrable trends in trade adverse to the domestic industry continue, or if clearly foreseeable adverse events occur. Threat of injury is an anticipation of material injury that must be on the verge of occurring, *i.e.*, clearly foreseen and imminent.

14. Canada fails to recognize that threat of injury generally involves an accretion of adverse conditions and thus that the threat and present material injury analyses necessarily are intertwined rather than entirely separate. Thus, in its opening statement at the first Panel meeting, Canada stated that it does not envision threat as a continuation of adverse conditions but rather "something must change for a threat to be found; otherwise, the circumstances of no material injury would continue."[20]

15. Canada posits that the ITC had an "obligation to identify" the change in circumstances and that the "United States did not comply with the explicit obligation in Articles 3.7 and 15.7 to identify a clearly foreseen and imminent change in circumstances, that would transform

---

[20] Canada's Opening Statement at First Panel Meeting, para. 37 states in relevant part:

> A threat of injury determination normally is made only when an investigating authority has made a negative material injury determination. If the subject dumped or subsidized imports did not cause injury during the period under investigation, something must change for a threat to be found; otherwise, the circumstances of no material injury would continue.

conditions so as to cause injury to the domestic industry."[21] Thus, Canada reads the threat provision as requiring the investigating authority to "identify a change in circumstance," *i.e.*, "an event," that will abruptly change the status quo from a threat of material injury to present material injury.[22] Canada ignores the possibility that injury may be the clearly foreseeable result of a sequence of events. Even as Canada attempts to dispute that its argument requires "an 'abrupt' change in circumstance," Canada reinforces that that is its position. It states: "Canada's argument is simply that some imminent and foreseeable change from the non-injurious present must be identified."[23]

16. Moreover, Canada's alleged "explicit obligation in Articles 3.7 and 15.7 to identify" the change in circumstance does not exist in the text of the covered Agreements. Yet Canada repeatedly states that the ITC failed to comply with this nonexistent "obligation to identify."[24] Article 3.7 and Article 15.7 of the covered Agreements state that "[t]he change in circumstances which would create a situation in which the dumping [subsidy] would cause injury must be clearly foreseen and imminent."[25] The Antidumping Agreement provides as an example of the change in circumstances "that there is convincing reason to believe that there will be, in the near future, substantially increased importation of the product at dumped [or subsidized] prices."[26]

17. While the text provides a clear example of the change in circumstances as a sequence or accretion of events, it contains no requirement to explicitly "identify" a change in circumstances, as Canada alleges. Consistent with all of its actual obligations under the covered Agreements, including Articles 3.7 and 15.7, the Commission provided a detailed explanation of how the totality of the evidence supported its conclusion that there will be in the near future substantially increased importation of softwood lumber from Canada at dumped and subsidized prices. In doing so, the ITC addressed the likely events and facts that were clearly foreseen for dumped and subsidized imports in the imminent future which would affect the U.S. market and would cause injury to the U.S. industry to occur.

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

1) subject import volumes already at significant levels in both absolute terms and relative to consumption, which supported an affirmative present material injury

---

[21] Canada's Opening Statement at First Panel Meeting, paras. 35 and 45.

[22] The language in the covered Agreements does not use the singular form "circumstance," but rather uses the plural form "circumstances."

[23] Canada's Opening Statement at First Panel Meeting, para. 36.

[24] *See* Canada's Opening Statement at First Panel Meeting, paras. 35, 36, 41, and 45.

[25] Article 3.7 of the Antidumping Agreement and Article 15.7 of the SCM Agreement.

[26] Article 3.7 and n. 10 of the Antidumping Agreement.

finding;[27]

2) increases of 2.8 percent in the significant volume of subject imports from 1999 to 2001, even with the restraining effect of the Softwood Lumber Agreement (SLA) in place;

3) conversely, declines of 16 percent in subject imports by value from 1999 to 2001;[28]

4) expiration of the trade restraining SLA;

5) substantial increases in import volumes ranging from 9.2 percent to 12.3 percent during the April-August 2001 period without trade restraints compared to the same period in the previous three years with trade restraints in place;

6) increases in imports stopped when preliminary countervailing duties were imposed in August 2001;

7) a similar pattern of increases in subject imports during the 1994-1996 period prior to the adoption of the SLA, which stopped when the SLA was imposed;

8) no dispute that subject imports will continue to enter the U.S. market at this significant level and are projected to increase.[29]

9) Canadian producers had excess production capacity already available in 2001 as capacity utilization declined to 84 percent from 90 percent in 1999;[30]

10) excess Canadian capacity in 2001 had increased to 5,343 mmbf, which was equivalent to 10 percent of U.S. apparent consumption;[31]

---

[27] The volume of imports of softwood lumber from Canada increased from 17,983 mmbf in 1999 to 18,483 mmbf in 2001. ITC Report at Tables IV-1 and C-1. As a share of apparent domestic consumption, subject imports from Canada increased from 33.2 percent in 1999 to 34.3 percent in 2001. *Id*. at Tables IV-2 and C-1.

[28] The value of subject imports decreased from $7.1 billion in 1999 to $6.0 billion in 2001. ITC Report at Tables IV-1 and C-1.

[29] Canada acknowledges that imports at this level would continue and even increase, and that Canada is "a much smaller market with abundant timber resources." Canada First Written Submission, para. 7; Canada's Opening Statement at First Panel Meeting, para. 4.

[30] ITC Report at Tables VII-1 and VII-2.

[31] ITC Report at 40 and Tables VII-1 and C-1. The evidence 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

11) Canadian producers expected to further increase their ability to supply the U.S. softwood lumber market, projecting to increase their capacity utilization to 90 percent in 2003 (from 84 percent in 1999), as they also projected to increase their production capacity;[32]

12) Canadian producers, which rely on sales in the U.S. market for about two-thirds of their production, had incentives such as mandatory cut requirements to produce more softwood lumber and export it to the U.S. market;

13) since the U.S. market had been very important to Canadian producers and was expected to continue to be so, it was reasonable for the ITC to conclude, with no positive evidence offered to the contrary,[33] that Canadian production increases would be distributed among markets, including the United States, according to historic proportions;

14) forecasts for U.S. demand, *i.e.*, that it would remain relatively unchanged or increase slightly in 2002, followed by increases in 2003 as the U.S. economy rebounds from recession, ensured that the U.S. market (a market that consumes about 65 percent of Canadian production) would continue to be a very attractive, and necessary, one for Canadian exports and thus that subject imports would continue to play an important role in the U.S. market;

15) many domestic industry performance indicators declined significantly from 1999 to 2000, and then declined slightly or stabilized from 2000 to 2001;[34]

16) with respect to the domestic industry's financial performance in particular, the evidence also generally shows declines during the period of investigation, with a dramatic drop from 1999 to 2000, as prices declined;[35]

17) the domestic industry "is vulnerable to injury in light of declines in its performance over the period of investigation, particularly its financial performance."[36]

---

the U.S. market increased by 525 mmbf from 1999 to 2001. *Id*.

[32] ITC Report at VII-2.

[33] Canada has offered no positive evidence to refute the ITC's reasonable position that production increases would be distributed according to historic proportions; that is, no positive evidence, such as a new supplier contract, that shows a large share of the increased production was to shift to markets other than the U.S. market, which generally accounted for about 65 percent of production.

[34] *See* ITC Report at 37-38.

[35] *See* ITC Report at 38-39.

[36] ITC Report at 37.

18) excess supply played a pivotal role in the decline of softwood lumber prices in the U.S. market through 2000, which led to the deterioration in the condition of the domestic industry;

19) both subject imports and domestic producers contributed to the excess supply in the U.S. market, which resulted in substantial price declines in 2000 and led to the deterioration in the condition of the domestic industry;

20) U.S. producers had curbed their production after excesses in supply in 2000,[37] but overproduction remained a problem in Canada;[38]

21) Canada acknowledges that it is a "much smaller market with abundant timber resources"[39] and, as noted above, its producers projected to increase capacity and production in 2002 and 2003;

22) during the period of investigation, the substantial volume of subject imports had *some* adverse effects on prices for the domestic product;

23) subject imported and domestic softwood lumber were at least moderately substitutable and are used in the same applications;

24) prices of a particular species affect the prices of other species; and

25) prices for softwood lumber in the U.S. market declined substantially at the end of the period of investigation (third and fourth quarters of 2001).

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

---

[37] The evidence demonstrated that 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. ITC Report at Tables III-6, III-7 and C-1. Domestic capacity utilization was 87.4 percent in 2001. With the exception of a peak in 1999 at 92 percent, it had consistently held this level for the 1995-2001. *Id.* In contrast, 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. *Id.* at Tables VII-1 (public data). 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.* In spite of this decline in capacity utilization rates, Canadian producers projected slight increases in capacity, increases in production, and a return of its capacity utilization to 90.4 percent in 2003. *Id.* at Table VII-2. On the other hand, domestic production of softwood lumber had declined by 4.4 percent from 1999 to 2001. *Id.* at Tables III-6 and C-1 (public data).

[38] *See, e.g.,* ITC Report at 35, n. 217 *citing* Petitioners' Posthearing Brief at 2 and Appendix H, Exh. 2 at 11 (Bank of America, "Wood & Building Products Quarterly," at 11 (Nov. 2001)). (USA-5).

[39] Canada's Opening Statement at First Panel Meeting, para. 4.

injury to the U.S. industry.

19. Canada would start the threat of injury analysis with a clean slate. It dismisses any evidence from the present injury analysis showing that the U.S. industry was on the verge of injury by reason of subject imports. Canada contends that it has not argued that the "Commission's negative current injury finding 'precluded' a finding of threat."[40] According to Canada, its argument is that "the evidence before the Commission did not provide any non-conjectural basis for finding a clearly foreseeable and imminent change in circumstances that would upset the non-injurious *status quo*."[41]

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

21. Moreover, Canada's claims of a "non-injurious *status quo*" rest on its dismissal or avoidance of affirmative subsidiary facts or findings. The ITC found, based on the facts as a whole, that the volume of imports was already significant and thus supported an affirmative present material injury finding.[42] While a finding that the volume of imports is significant may not "by itself"[43] be sufficient to support an affirmative present injury finding, this affirmative subsidiary finding is an integral factor in making an affirmative present material injury determination and can not be dismissed, as Canada urges, as an isolated finding by the Commission lacking broader implications. Moreover, Canada urges the Panel to disregard the Commission's present price effects findings by denying that certain findings exist and simply ignoring them when it selectively quotes from the ITC's Report.[44] Canada's selective quote from page 35 of the ITC Report excludes the previous sentences, including the beginning of the ITC's conclusion regarding price effects in the previous sentence. The two sentences immediately before the one quoted by Canada state:

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

---

[40] Canada's Opening Statement at First Panel Meeting, para. 39.

[41] Canada's Opening Statement at First Panel Meeting, para. 39.

[42] ITC Report at 32.

[43] Canada's Opening Statement at First Panel Meeting, para. 42.

[44] Canada's Opening Statement at First Panel Meeting, para. 44.

particular due to their large share of the market.[45]

22. It is clear that the ITC's subsidiary findings regarding present material injury, while not sufficient to support a legal conclusion of present injury, recognized some adverse effects from subject imports and clearly support the existence of a threat of material injury.

### B. Specific Issues Regarding the Threat of Material Injury Analysis

23. Canada urges the Panel to consider the threat factors listed in Article 3.7 of the Antidumping Agreement and Article 15.7 of the SCM Agreement in isolation. It suggests that other factors and facts that the ITC found were related to the listed factors are distinct and should be considered separately. But all of the factors considered by the ITC, whether listed or not in Article 3.7 and Article 15.7, the record evidence, and, most importantly, the likely effects being assessed are interrelated and should not be considered and analyzed as isolated fragments, as Canada has done. Implicit in Canada's approach, of course, is that the non-listed factors or facts should be given less weight than those listed in the covered Agreements. Canada, however, fails to recognize that the covered Agreements provide that relevant factors other than those listed should be considered.[46] The fact that the ITC considered other factors and provided appropriate explanations demonstrates a reasoned analysis by the ITC and is not a mere recitation of facts. Moreover, it shows that the ITC's determination is supported by the record evidence.

24. The United States discussed these issues in detail in its first written submission and in response to the Panel's questions, and does not intend to repeat the discussions of the issues here. Instead, the United States responds to certain inaccuracies and mischaracterizations made by Canada at the first Panel meeting.

25. **The ITC's Finding of Likely Substantial Increases in Subject Imports.** The ITC found that there was a likelihood of substantial increases in subject imports based on evidence regarding, *inter alia*, Canadian producers' excess production capacity and projected increases in capacity, capacity utilization and production, the export orientation of Canadian producers to the U.S. market and subject import trends during periods when there were no import restraints, such as the SLA. Furthermore, each of the six subsidiary factors considered by the ITC relate directly to threat factors set forth in Article 3.7 of the Antidumping Agreement and Article 15.7 of the

---

[45] ITC Report at 35.

[46] *See Mexico-HFCS*, Panel Report, para. 7.124:

> Article 3.7 sets forth several factors which must be considered, **among others**, in making a determination regarding the existence of threat of injury. Article 3.7 then concludes: "No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur." **This language, in our view, recognizes that factors other than those set out in Article 3.7 itself will necessarily be relevant to the determination.** (emphasis added)

SCM Agreement. Specifically, they relate to whether there is a significant rate of increase in imports and sufficient freely disposable production capacity. The ITC determined that these increases in imports were likely to put pressure on already declining prices, and that material injury to the domestic industry would occur. Moreover, the ITC found that the domestic industry was vulnerable to injury in light of declines in its performance over the period of investigation, particularly its financial performance.

26. The ITC found that the evidence demonstrated that the volume of subject imports was already significant and had increased even with the restraining effect of the SLA in place, and that subject imports had increased substantially during periods without export restraints as well. Canada is simply incorrect in contending that the ITC found such levels of import penetration were not significant, much less "non-injurious," in its present material injury finding. Moreover, contrary to Canada's assertion, the ITC did not find that the 2.8 percent increase in the volume of imports during the period of investigation was "only a small increase."[47] It expressly found that the volume of imports was significant[48] and would be injurious if combined with evidence of significant price effects and impact effects. Moreover, it recognized that the subject imports had increased despite being subject to the restraining effect of the SLA for most of the period of investigation.[49]

27. Canada's claims that the Commission ignored the projections made by Canadian producers simply is inaccurate.[50] Rather the ITC considered that data but concluded that Canadian producers' export projections were inconsistent with other data. The ITC found that more weight should be given to actual data showing excess Canadian capacity, declines in home market shipments, and declines in exports to other markets, as well as projected increases in production, than to the export projections, which were inconsistent with the other data. While Canadian producers projected that exports to the U.S. market would increase slightly in 2002 and 2003, these projected increases in exports to the United States accounted for only about 20 percent of the planned increases in production. The U.S. market accounted for 68 percent of the Canadian softwood lumber production in 2001. It was reasonable, given the evidence as a whole, for the ITC to discount the Canadian producers' projected export data and conclude that projected increases in production would likely be distributed among the U.S. market, Canadian home market, and other non-U.S. export markets in shares similar to those prevailing during the prior five years. Canada has offered no positive evidence to refute the ITC's reasonable position that production increases would be distributed according to historic proportions; that is, no positive evidence, such as a new supplier contract, that shows a large share of the increased

---

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

[48] ITC Report at 32.

[49] ITC Report at 22 and 41.

[50] *See* ITC Report at 41, n. 258.

production was to shift to markets other than the U.S. market, which generally accounted for about 65 percent of Canadian production.

28. **Likely Price Effects**. Given its finding of likely significant increases in subject import volumes, its finding of at least moderate substitutability, its finding that prices of a particular species affect the prices of other species, and its finding that the substantial volume of subject imports presently had *some* adverse effects on prices for the domestic product, the Commission concluded that subject imports were likely to have a significant price-depressing effect on domestic prices in the immediate future, and likely to increase demand for further imports. Canada ignores the evidence at the end of the period of investigation showing substantial declines in prices in the third and fourth quarters of 2001. Evidence regarding likely excess supply, which generally caused the substantial price declines in 2000 that led to the deterioration in the condition of the domestic industry, indicated that U.S. producers had curbed their production, but that overproduction "remains a problem in Canada."[51] Therefore, the Commission reasonably found that the additional subject imports, which it concluded were likely, would further increase the excess supply in the market, putting further downward pressure on declining prices, thereby resulting in a threat of material injury to the U.S. industry by reason of subject imports.

29. While Canada characterizes this analysis as addressing "the impact of its predicted increases in future volumes on future prices" and claims this analysis is "opposite of what Article 3.7 and 15.7 require,"[52] it is not clear what analysis Canada would consider appropriate for considering the likely price effects in a threat analysis.

30. **Inventories**. Canada acknowledges that the Commission considered the evidence regarding inventories. That is all the Commission is required to do. In fact, unlike other threat factors (such as capacity), the covered Agreements do not even provide a context, e.g., relative to likely increases in imports, for which the investigating authority is to consider inventories.

31. Moreover, Canada recognizes that "there is no indication in the Commission's analysis that it relied on the level of inventories to reach its conclusion of threat of injury."[53] Nevertheless, resorting to the general "reasoned explanation" obligation, Canada makes an argument that would be relevant only if the ITC had made a finding on this factor. Specifically, Canada states: "Canada has shown that the Commission did not explain how its observation supported the Commission's determination and that the Commission ignored the Canadian producers' projections that their inventories would remain virtually unchanged over the 2002-

---

[51] *See, e.g.,* ITC Report at 35, n. 217 *citing* Petitioners' Posthearing Brief at 2 and Appendix H, Exh. 2 at 11 (Bank of America, "Wood & Building Products Quarterly," at 11 (Nov. 2001)). (USA-5).

[52] Canada's Opening Statement at First Panel Meeting, para. 67.

[53] Canada's Opening Statement at First Panel Meeting, para. 75.

2003 period, and therefore not lead to a substantial increase in exports to the United States."[54]

32. It is evident that the Commission appropriately considered this listed threat factor as it is required to do, but did not make a finding on that factor.

33. **Nature of the subsidies**. The Commission also considered the nature of the subsidies granted by Canada, consistent with the requirement of Article 15.7(i) of the Subsidies Agreement, and took into account that none of the subsidies were of the kind described in Articles 3 or 6.1 of the Subsidies Agreement.[55] The Commission clearly considered parties' arguments on the nature and trade effects of the subsidies. However, it declined to adopt the positions of any of the parties' due to the conflicting evidence and economic theories specifically regarding the effects of stumpage fees on lumber output.[56]

34. As discussed above, the relevant provisions of the covered Agreements state that the ITC "should consider" the nature of the subsidies, but do not require it to make a finding. In spite of its concession that "consider" does not mean "make a finding," Canada's argument essentially is that unless the ITC made a finding its determination would be in violation of the SCM Agreement. In its opening statement during the first Panel meeting, Canada stated that it "does not argue that the Commission was required to make a finding if the evidence did not permit one, but we do contend that the Commission had to consider this factor and provide a reasoned and adequate explanation for any finding of inconclusiveness, just as it would have had to explain any other finding."[57] In spite of Canada's contradictory claims, the Commission is not required to make a finding, particularly when, as discussed below, the conflicting record evidence did not provide "a sufficient factual basis to allow [the ITC] to draw reasoned and adequate conclusions."[58]

35. Further, Canada has provided the Panel with a one-sided analysis of this issue, and ignored the conflicting evidence presented to the Commission. Canada would have the Panel

---

[54] Canada's Opening Statement at First Panel Meeting, para. 73.

[55] ITC Report at 39 (USA-1).

[56] ITC Report at 39, n. 245 (USA-1).

[57] Canada's Opening Statement at the First Panel Meeting, para. 53. Canada's conclusion of this section also seems to contradict this statement, stating: "It could not avoid the issue merely because it thought that the evidence was conflicting. . . ." *Id*. at para. 55.

[58] *United States-Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, Appellate Body Report, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, paras. 130-131 ("*US-Lamb Meat*"):

> (130) . . . The words "factors of an objective and quantifiable nature" imply, therefore, an evaluation of objective *data* which enables the measurement and quantification of these factors.
>
> (131) . . . means that competent authorities must have a *sufficient* factual basis to allow them to draw reasoned and adequate conclusions concerning the situation of the "domestic industry."

believe that the Canadian producers' economic theory was the only information before the ITC and that this theory was uncontested and equivalent to proven fact. Neither assertion is true. Indeed, evidence presented to the Commission during its investigation squarely placed in question the very applicability of Canada's economic theories and the alleged trade effects of the subsidies. The ITC made an objective examination, considering all of the evidence and arguments presented.

## III. Articles 3.2 and 3.4 of the Antidumping Agreement and Articles 15.2 and 15.4 of the SCM Agreement

36. The ITC considered all of the facts from the present and past, specifically regarding the volume of imports, price effects and the consequent impact of continued dumped and subsidized imports on the domestic industry, in its threat analysis. The ITC's evaluation of the evidence regarding relevant factors, pursuant to Articles 3.2 and 3.4 of the Antidumping Agreement and Articles 15.2 and 15.4 of the SCM Agreement, resulted in findings that the volume of imports was significant, that there were some price effects, that the condition of the domestic industry had deteriorated primarily as a result of declining prices and that the industry was in a vulnerable state. Moreover, projections based on these facts constitute positive evidence justifying the ITC's determination that the domestic industry was on the verge of material injury by reason of the continued dumped and subsidized softwood lumber imports from Canada.

37. Canada's arguments on Articles 3.2 and 3.4 and Articles 15.2 and 15.4 of the covered Agreements are merely variations on its arguments regarding likely substantial increases in imports and likely price effects, and are based on Canada's premise that there could be no threat, because there allegedly were no findings of injurious effects in the present material injury analysis. That premise is demonstrably incorrect. Canada's claims that, having considered these factors once, the ITC was required to consider them a second time in the context of the threat analysis has no basis in the Agreements.[59] Nor has the Appellate Body or any Panel interpreted the covered Agreements in such a manner.

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

[59] *See* U.S. Response to Panel Question 18 for a detailed discussion of this issue.

## IV. Article 3.5 of the Antidumping Agreement and Article 15.5 of the SCM Agreement

### A. The ITC Demonstrated a Causal Relationship Between the Dumped and Subsidized Imports and the Threat of Injury to the Domestic Industry

39. As the United States addressed in its first written submission, Canada's claims under Articles 3.5 and 15.5, respectively, are merely variations on its arguments regarding likely substantial increases in imports and likely price effects, and are based on its premise that there could be no threat of injury, because there allegedly were no findings of any injurious effects in the present material injury analysis. Moreover, Canada fails to acknowledge that the Commission considered and addressed each of these issues, but found the evidence supported findings different from those urged by Canada. The totality of the facts, when examined in an unbiased and objective manner, support the ITC's findings.

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

41. Canada argues with respect to the likelihood of substantially increased imports, particularly in claiming that future Canadian market share must "outstrip" demand, that the investigating authority must identify an absolute amount or percentage change in import volumes that would necessarily be "substantial" in all or most cases. However, determination of a threat of injury is, by its nature, industry specific and dependent on the particular industry's circumstances. As part of the threat analysis, the covered Agreements direct the investigating authority to consider whether the evidence indicates the likelihood of substantially increased imports but, recognizing that this is a future event whose actual materialization cannot be assured with certainty, does not require the investigating authority to find that imports will increase by a certain amount.[60] The Appellate Body has recognized that a threat analysis involves projections extrapolating from existing data and as such can never be definitely proven by facts.[61]

---

[60] *See, e.g.*, *US-Lamb Meat*, AB Report, para. 125 ("'threat of serious injury' . . . is concerned with 'serious injury' which has *not* yet occurred, but remains a future event whose actual materialization cannot, in fact, be assured with certainty. . . .").

[61] *See, e.g., Mexico-HFCS*, AB Report, para. 85:

> In determining the existence of a *threat* of material injury, the **investigating authorities will necessarily have to make assumptions relating to "the occurrence of future events" since such *future* events " can**

42. Canada ignores the Commission's consideration of Canada's theory about the effects of demand which the Commission rejected because it was not supported by the facts. Canada continues to rely on its simplistic theory about the effects that growth in demand would have on U.S. industry performance, imports, and prices, and its optimistic characterizations of the forecasts for future demand. But the Commission, having reviewed the evidence, found that demand was not likely to increase in the manner Canada suggests or to have the effects that Canada posits.

43. The evidence showed that while demand remained relatively stable in 2000 and 2001 at the record levels it reached in 1999,[62] substantial declines in price occurred,[63] particularly in 2000, which resulted in a deterioration in the condition of the domestic industry.[64] Thus, contrary to the Canadian exporters' and now Canada's theory, strong demand did not translate into price improvements. In fact, the evidence demonstrated that it had been excess supply rather than demand that had played a pivotal role in the price declines of softwood lumber in the U.S. market, as the excess supply had resulted in price declines through 2000. This supports the ITC's finding that substantial increases in subject imports likely will have adverse price effects. Canada has not refuted the Commission's factual findings that, even with strong demand during the period of investigation, prices declined and the condition of the domestic industry deteriorated; effects opposite to those Canada speculates should occur in the future.

44. Moreover, the ITC appropriately considered the conditions of competition regarding demand as well as the substitutability between domestic and imported species of softwood lumber, and North American integration.

45. On the issue of substitutability/attenuated competition, Canada has stated incorrectly that the ITC found that "competition was therefore attenuated" and that "products [had] limited substitutability."[65] In making these erroneous assertions, Canada ignores the evidence in the record, the Commission's analysis of that evidence, and the Commission's actual findings. The simple fact is, subject imports and domestic species of softwood lumber are used in the same applications, and compete with each other. Moreover, prices of a particular species will affect

---

**never be definitely proven by facts**." (emphasis added).

[62] Specifically, the Commission found that: "demand was at record levels in 1999 and remained relatively level in 2000 and 2001, while prices for softwood lumber declined substantially and the industry's condition worsened considerably." ITC Report at 42, n.271.

[63] 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. ITC Report at Tables V-1 and V-2.

[64] The evidence demonstrates that many industry performance indicators declined significantly from 1999 to 2000, and declined slightly or stabilized from 2000 to 2001. ITC Report at Tables IV-1 and C-1.

[65] Canada's Opening Statement at First Panel Meeting, para. 108.

the prices of other species.

46. As discussed in the U.S. first written submission,[66] Canada ignores the analysis conducted by the ITC and its findings based on consideration of the totality of the facts, including the evidence provided by purchasers and home builders, that Canadian softwood lumber and the domestic like product generally are interchangeable; subject imports and domestic species are used in the same applications; regional preferences exist, but do not reflect a lack of substitutability, but instead simply reflect a predisposition toward locally-milled species; there are other products that both countries produce that compete with each other; and evidence demonstrated that prices of different species have an effect on other species' prices, particularly those that are used in the same or similar applications.[67]

47. Canada recognizes that the ITC considered the integration of the North American lumber industry, but criticizes the ITC for not speculating that integrated companies would not harm related companies.[68] Yet, Canada provides no evidence whatsoever to support its supposition that integrated firms will not harm their related parties. Moreover, this integration is not new, which raises the question of why it would have a different effect in the future than during the period of investigation, when, with integration in place, the evidence demonstrated that import volumes were significant, and imports had some adverse price effects.

### B. The ITC Examined Any Known Causal Factors to Ensure Injury Was Not Attributed to Subject Imports

48. The Commission properly examined any known factors other than the dumped and subsidized imports that might be injuring the domestic industry to ensure that it did not improperly attribute injury from other causal factors to the subject imports. The Commission's examination and analysis is evident in the Views of the Commission, and is based on positive evidence. Consistent with Article 3.5 of the Antidumping Agreement and Article 15.5 of the SCM Agreement, the ITC's methodology involves examining other factors to determine if any of them are other "known" causal factors and to ensure that injury from any such causal factors is not attributed to subject imports.[69]

---

[66] U.S. First Written Submission, paras. 269-278.

[67] ITC Report at 25-27 (USA-1).

[68] Canada however ignores the fact that the Commission conducted a detailed analysis of related parties and determined that appropriate circumstances did not exist to exclude any firms from the domestic industry. We note that no Canadian exporters, nor any other party, advocated that any firms be excluded as related parties. Nor does anyone assert that integrated domestic producers are shielded from harm. *See* ITC Report at 16-19.

[69] *EC-Pipe*, AB Report, para. 175:

> Critical to the effective operation of the non-attribution obligation, and indeed, the entire causality analysis, is the requirement of Article 3.5 to "examine any known factors other than the dumped imports which at the same time are injuring the domestic industry", *for it is the "injuries" of those "known factors" that must*

49. When upon examination, the Commission has found a factor not to have injurious effects on the domestic industry, such factor is not an "other known factor" for purposes of Article 3.5 of the Antidumping Agreement or Article 15.5 of the SCM Agreement, and no further consideration or examination of the factor is called for. The Appellate Body has 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.'"[70]

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

51. Canada urges the Panel to find the ITC's methodology in violation of the covered Agreements based on Canada's selective reading of the ITC's statement regarding U.S. case law made in response to parties' arguments in the underlying administrative proceeding. Canada, however, ignores the ITC's reference to the appropriate methodology as stated by the U.S. Court of Appeals for the Federal Circuit: "[T]he Commission need not isolate the injury caused by other factors from injury caused by unfair imports. . . . Rather, the Commission must examine other factors to ensure that it is not attributing injury from other sources to the subject imports."[71] In spite of Canada's claims to the contrary, the ITC's methodology is consistent with U.S. obligations under the covered Agreements.[72]

52. Canada principally alleges that domestic supply is a known causal factor which the ITC

---

*not be attributed to dumped imports.* (emphasis added).

[70] *EC-Pipe*, AB Report, paras. 178-179:

> . . . "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."

[71] ITC Report at 31, n. 195 *quoting Taiwan Semiconductor Industry Ass'n v. USITC*, 266 F.3d 1339, 1345 (Fed. Cir. 2001)(emphasis in original).

[72] *See EC-Pipe*, AB Report, para. 175.

found contributed to injury in its present material injury analysis, but ignored in its threat analysis. However, the ITC examined constraints on domestic producers' ability to meet demand. The ITC also took into consideration domestic producers' past contribution to oversupply conditions. Canada charges that the evidence cited by the ITC indicating that the domestic producers had curbed their production, but that overproduction remains a problem in Canada, could not support the ITC's threat of injury finding merely because of its location in the ITC Report.[73]

53. Canada attempts to challenge the facts regarding domestic production by comparing percentage decreases in production and ignores the absolute levels as well as the evidence regarding domestic and Canadian production capacity utilization.[74] 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 to 2001.[75] In contrast, 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.[76] Moreover, in spite of this decline in capacity utilization rates, Canadian producers projected slight increases in capacity, increases in production, and a return of its capacity utilization to 90.4 percent in 2003.[77]

## V. Conclusion

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

---

[73] Canada's Opening Statement at the First Panel Meeting, para. 117.

[74] Canada's Opening Statement at the First Panel Meeting, para. 118.

[75] USITC Report at Tables III-6 and C-1 (public data). Domestic capacity utilization based on public data was 86.1 percent in 1995, 87.6 percent in 1996, 89.9 percent in 1997, 88.5 percent in 1998, 92.0 percent in 1999, 89.7 percent in 2000 and 87.4 percent in 2001. *Id*. Domestic producers' questionnaire responses reported similar capacity utilization rates: 92.8 percent in 1999, 88.5 percent in 2000, and 86.1 percent in 2001. *Id*. at Tables III-7 and C-1.

[76] USITC Report at Tables VII-1 (public data). 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*. Canadian producers' questionnaire responses reported similar capacity utilization rates: 90.3 percent in 1999, 88.8 percent in 2000, 84.4 percent in 2001 and projections of 88.5 percent in 2002, and 90.4 percent in 2003. *Id*. at Table VII-2.

[77] USITC Report at Table VII-2.

55. For the reasons set forth in this submission and in previous U.S. submissions and statements, the Panel should reject Canada's claim in its entirety.