BEFORE THE

WORLD TRADE ORGANIZATION

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

WT/DS277

ANSWERS OF THE UNITED STATES
TO THE PANEL'S QUESTIONS
IN CONNECTION WITH THE FIRST SUBSTANTIVE MEETING

September 24, 2003

Question 16: *Could the United States please address its understanding of the "special care" requirement in Article 3.8 of the AD Agreement and Article 15.8 of the SCM Agreement? What elements does the United States consider could demonstrate the appropriate special care? Could the United States indicate to the Panel where, in its view, the USITC determination demonstrates the requisite special care?*

1. The covered Agreements do not state what constitutes "special care;" nor has any panel explicitly addressed this provision. The covered Agreements do not support Canada's attempt to interpret "special care" as 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. While a threat analysis is a future-oriented analysis, it cannot be based on allegation, conjecture or remote possibility; rather it must be based on the facts.[1]

2. Article 3.8 of the Antidumping Agreement and Article 15.8 of the SCM Agreement are exhortations to be mindful of the future-oriented nature of a threat analysis as the evidence is reviewed. A threat determination necessarily uses facts from the present and the past to form a conclusion about the future.[2] Projections necessarily are based on extrapolations from existing data.[3] Indeed, Article 3.7 requires that projections be based on facts. Article 3.8 simply reinforces this point by describing the approach to be taken in reviewing the facts.

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[1] Article 3.7 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Antidumping Agreement) and Article 15.7 of the Agreement on Subsidies and Countervailing Measures (the SCM Agreement).

[2] *See 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, para. 136 ("*US-Lamb Meat*"); *United States-Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, Appellate Body Report, WT/DS192/AB/R, adopted 5 November 2001, para. 77, n.50 ("*US-Cotton Yarn*"). Specifically, the Appellate Body in *US-Lamb Meat* stated:

> As facts, by their very nature, pertain to the present and the past, the occurrence of future events can never be definitely proven by facts. There is, therefore, a tension between a future-oriented "threat" analysis, which, ultimately, calls for a degree of "conjecture" about the likelihood of a future event, and the need for a fact-based determination. Unavoidably, this tension must be resolved through the use of facts from the present and the past to justify the conclusion about the future, namely that serious injury is "clearly imminent." Thus, a fact-based evaluation, under Article 4.2(a) of the *Agreement on Safeguards*, must provide the basis for a projection that there is a high degree of likelihood of serious injury to the domestic industry in the very near future.

[3] *See Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup (Mexico-HFCS) from the United States*, Appellate Body Report, WT/DS132/AB/R, adopted 21 November 2001, paras. 83 and 85 ("*Mexico-HFCS"*); *US-Cotton Yarn*, AB Report, para. 77; *US-Lamb Meat*, AB Report, para. 136; *United States-Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R, WT/DS259/R, Panel Report, circulated 11 July 2003, para. 10.173, n. 5032 ("*US-Steel Safeguards*").

3. It is evident in the ITC's Report that the Commission based it threat determination on consideration of all of the facts. The ITC based its prospective analysis on objective facts and rejected assertions and opinions not based on sufficient factual evidence.[4] The Commission's reliance on a thorough factual record and its careful analysis of that record demonstrate its compliance with the special care language in the covered Agreements. Canada, on the other hand, has urged that the ITC should have based its findings on assertions and opinion, which are favorable to Canada's interests, but are not sufficiently supported by the evidence.[5]

4. The special care taken by the ITC is demonstrated in the detailed analysis and extensive documentation – including past and present data – provided to support each finding throughout the ITC's opinion, from its conditions of competition section on pages 21-27 of the ITC Report to the present injury analysis on pages 31-37 of the ITC Report to the threat of injury analysis on pages 37-44 of the ITC Report.

Question 17: *Article 3.8 of the AD Agreement and Article 15.8 of the SCM Agreement provide that:*

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

Could the United States address the implications of the phrase "the application of ... measures" in terms of the timing of the obligations provided for in this provision? Is the United States of the view that the "special care" requirement affects or changes the obligation in Articles 3.1 of the AD Agreement and 15.1 of the SCM Agreement that a determination of injury "shall be based on positive evidence and involve an ***objective examination****...". If so, how?*

5. The "special care" language in Article 3.8 of the Antidumping Agreement and Article 15.8 of the SCM Agreement supplement rather than alter or modify the obligations in Article 3.1 and Article 15.1 of the respective Agreements that a determination of injury "shall be based on positive evidence and involve an objective examination."[6] As discussed in response to question

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[4] *See US-Lamb Meat*, Panel Report, para. 7.129:

> . . . the requirement to base a threat determination on objective facts, and the rejection of "assertions," "opinions" and "conclusions" that are not based on sufficient factual evidence, it is possible to draw at least some inferences on how to conduct a threat analysis. These elements suggest (i) that a threat determination needs to be based on an analysis which takes objective and verifiable data from the recent past . . . as a starting-point so as to avoid basing a determination on *allegation, conjecture, or remote possibility*. . . ..

[5] *See, e.g.*, Canada's First Written Submission, paras. 7, 8, and 120.

[6] The Appellate Body in *Thailand-H-Beams* provided some guidance on the relationship between Article 3.1 of the Antidumping Agreement and consideration of the evidence for factors listed in the threat provision, Article 3.7. The Appellate Body stated:

> 107. . . . An injury determination conducted pursuant to the provisions of Article 3 of the *Anti-Dumping*

16, projections about future events involve extrapolations from existing data. Article 3.8 and Article 15.8 reinforce in the threat context 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 a likelihood to import at injurious levels. Special care refers to the analysis involved in making projections about future events. Moreover, basing the future-oriented determination on facts rather than allegation, conjecture or remote possibility is in accord with the requirement that the investigating authority conduct an "objective examination." In the context of a threat analysis, an objective examination would involve taking "objective and verifiable data from the recent past . . . as a starting-point so as to avoid basing a determination on *allegation, conjecture, or remote possibility*" and evaluating it in an unbiased manner.[7]

6. The Panel's question concerning timing suggests an interpretation of Article 3.8 of the Antidumping Agreement (and Article 15.8 of the SCM Agreement) whereby the provision may pertain to actions taken by a Member after its investigating authority has determined that injury is threatened by dumped (or subsidized) imports. According to that interpretation, the provision presumes an affirmative threat determination and governs what happens afterwards, in light of that determination. Under an alternative interpretation – the one the United States understands Canada to be assuming in this case[8] – ADA Article 3.8 and SCMA Article 15.8 may pertain to the process of making a threat determination itself.

7. The United States is of the view that the Panel need not decide whether either interpretation or both are permissible, because, under either interpretation, Canada's claim must fail. If ADA Article 3.8 and SCMA Article 15.8 pertain to actions taken after an investigating authority makes an affirmative threat determination, then Canada's claim is beyond the terms of reference of this Panel. As the title of this dispute indicates, Canada has asked the Panel to consider the investigation of the U.S. International Trade Commission, not the actions of other U.S. Government agencies following that investigation.[9]

> *Agreement* must be based on the *totality* of that evidence. . . .
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> 108. Contextual support for this interpretation of Article 3.1 can be found in Article 3.7, which states that a threat of material injury must be "based on facts and not merely on allegation, conjecture or remote possibility." This choice of words shows that, as in Article 3.1, which overarches and informs it, it is the *nature* of the evidence that is being addressed in Article 3.7.

Thailand-Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland, Appellate Body Report, WT/DS122/AB/R, adopted April 5, 2001, para. 107-108 *("Thailand - H-Beams*").

[7] *See US-Lamb Meat*, Panel Report, para. 7.129.

[8] *See* Canada First Written Submission, para. 64 ("Thus, when threat of material injury is at issue, the investigating authorities must undertake an especially meticulous examination of all the required elements in Article 3 of the *Antidumping Agreement* and Article 15 of the *SCM Agreement*.").

[9] *See* Canada First Written Submission, para. 169 (Canada basing its claim under ADA Article 3.8 and SCMA Article 15.8 on what it alleges to be "shortcomings of the Commission's determination").

8. If, on the other hand, the provisions at issue pertain to the process of making a threat determination, Canada's claim must fail, because Canada has failed to make a prima facie showing of any violation. In arguing that the United States violated ADA Article 3.8 and SCMA Article 15.8, Canada simply reiterates its allegations of other violations of the covered agreements.[10] Canada has indicated in vague terms that a failure to take "special care" involves whether cautiousness of approach is exemplified. Yet, Canada fails to demonstrate an absence of cautiousness. Accordingly, under this interpretation of ADA Article 3.8 and SCMA Article 15.8, Canada's claim must fail.

9. Because Canada's claim must fail under either interpretation of the relevant provisions, the Panel should refrain from deciding which interpretation is permissible or whether both are permissible. If the Panel nevertheless chooses to decide this interpretative question, the United States would draw to the Panel's attention certain contextual elements. While the words "the application of . . . measures" might suggest the first interpretation above (*i.e.*, that the provisions pertain after a threat determination has been made), on the other hand, the inclusion of the paragraph in Article 3 and Article 15 may provide support for the second interpretation (*i.e.*, that the provisions pertain to how a threat determination is made).

Question 18: *Could the United States clarify its view regarding consideration of the Article 3.4/Article 15.4 factors in the context of a determination of threat of material injury? Specifically, could the United States address whether it is necessary to consider the likely impact of dumped and/or subsidized imports on the condition of the industry in the future, with reference to the Article 3.4/Article 15.4 factors, in the context of a determination of threat of material injury? If so, what would the United States envision argue such consideration must entail?*

10. In making a threat of material injury determination, the investigating authority should consider the evidence regarding the factors listed in Article 3.7 of the Antidumping Agreement and Article 15.7 of the SCM Agreement, as well as the present and past evidence regarding the factors listed in Articles 3.2 and 3.4 of the Antidumping Agreement and Articles 15.2 and 15.4 of the SCM Agreement. Consideration of these factors establishes a background against which the investigating authority can evaluate whether dumped and subsidized imports will likely increase substantially, likely will have price effects, and consequently will affect the industry's condition in such a manner that material injury would occur in the absence of protective action.

11. Where the investigating authority has considered the Article 3.4 and Article 15.4 factors one time, it need not consider them a second time. Canada's contention that there is a requirement that the factors in Article 3.4 of Antidumping Agreement and Article 15.4 of the SCM Agreement be considered a second time in the context of a threat analysis has no basis in

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[10] *See* Canada First Written Submission, para. 168 (Canada basing its claim under ADA Article 3.8 and SCMA Article 15.8 on allegations "as discussed above with respect to the violations of Article 3 of the *Anti-dumping Agreement* and Article 15 fo the *SCM Agreement*").

the covered Agreements. Neither the Appellate Body nor any Panel has found such a requirement. Moreover, it is not clear what Canada contemplates would be involved in such a second analysis of the Article 3.4 and Article 15.4 factors that would not involve speculation and conjecture. Significantly, Canada has failed to explain why it considers a second analysis of these factors required under the covered Agreements, when Canada itself does not conduct such an additional analysis in its own trade remedy proceedings.[11] Canada's argument seems to be tied to its overarching failure to recognize that threat of injury generally involves a continuation of adverse conditions, and thus the threat and present material injury analyses necessarily are intertwined rather than entirely separate.

12. The Panel in *Mexico-HFCS* specifically recognized that consideration of the factors relating to the impact of imports on the domestic industry "establish a background against which the investigating authority can evaluate whether imminent further dumped imports will affect the industry's condition in such a manner that material injury would occur in the absence of protective action, as required by Article 3.7."[12] The *Mexico-HFCS* panel did not find that two separate analyses of Article 3.4 factors were required. It was concerned that those factors did not appear to have been considered at all.[13] Moreover, as discussed in the U.S. first written submission, two very important facts distinguish this case from *Mexico-HFCS*: first, it is

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[11] *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) (USA-26).

[12] *Mexico-HFCS*, Panel Report, para. 7.132. The Panel stated:

> With respect to the question of threat of material injury, we believe an investigating authority cannot come to a reasoned conclusion, based on an unbiased and objective evaluation of the facts, without taking into account the Article 3.4 factors relating to the impact of imports on the domestic industry. These factors all relate to an evaluation of the general condition and operations of the domestic industry. . . . Consideration of these factors is, in our view, necessary in order to establish a background against which the investigating authority can evaluate whether imminent further dumped imports will affect the industry's condition in such a manner that material injury would occur in the absence of protective action, as required by Article 3.7.

[13] The Panel in *Mexico-HFCS*, Panel Report, para. 7.140 (emphasis added), states:

> The final determination reflects no meaningful analysis of a number of the Article 3.4 factors: the Mexican sugar industry's profits, output, productivity, utilization of capacity, employment, wages, growth, or ability to raise capital. Moreover, there is no analysis of the condition of the Mexican sugar industry during the period of investigation, or projected for the near future. It is therefore not possible, by reading the final determination, to understand the overall condition of the domestic industry with respect to the Article 3.4 factors. Yet without an understanding of the condition of the industry, it is not possible, in our view, for SECOFI to have come to a reasoned conclusion, based on an objective evaluation of the facts, concerning the likely impact of dumped imports. Such a conclusion must, in our view, reflect the projected impact of further imports on the particular domestic industry, in light of its condition. In order to conclude that there is a threat of material injury to a domestic industry that is apparently not currently injured, despite the effects of dumped imports during the period of investigation, it is necessary to have an understanding of the current condition of the industry as background.

possible, by reading the Commission'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*.

13. It is evident in the Views of the Commission that the ITC properly conducted a "meaningful evaluation" of all of the relevant factors listed in Article 3.4 of Antidumping Agreement and Article 15.4 of the SCM Agreement and that its findings are supported by positive evidence. Canada fails to recognize that a finding of vulnerability by its nature is a finding about the future, *i.e.*, an assessment of industry's susceptibility to future injury.[14] In brief, the ITC's evaluation of the evidence regarding relevant factors resulted in findings 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. Consideration of these factors constituted 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.

Question 19: *Could the United States elucidate the basis for the conclusion that the likely increase in imports would be "substantial"? What percentage or volume of increase would be necessary in order to support that conclusion, and could the United States indicate where in the USITC determination or report such a projected increase can be found or derived?*

14. The Commission's consideration in the context of its threat of injury analysis of likely substantial increases in subject imports begins with subject import volumes both in absolute terms and relative to consumption already at significant levels. The Commission found that the volume of subject imports from Canada increased by 2.8 percent from 1999 to 2001.[15] As a share of apparent domestic consumption, subject imports from Canada increased from 33.2 percent in 1999 to 34.3 percent in 2001.[16] Conversely, subject imports by value declined by 16 percent.[17] The evidence shows increases even with the restraining effect of the SLA in place, and substantial increases during periods without trade restraints.

15. Of course, a threat analysis looks at whether these imports, which in this case already were at injurious levels, are likely to be injurious in the imminent future. The evidence demonstrates that subject imports will continue to enter the U.S. market at this significant level

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[14] The ordinary meaning of the term "vulnerable" is "able to be wounded;" or "liable to damage or harm." *The New Shorter Oxford English Dictionary*, 1993 (Oxford: Clarendon Press, p. 3605) (USA-21).

[15] The volume of imports of softwood lumber from Canada increased from 17,983 mmbf in 1999 to 18,483 mmbf in 2001. USITC Report at Tables IV-1 and C-1.

[16] ITC Report at Table IV-2 and C-1.

[17] 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.

and are projected to increase. Canada acknowledges that imports at this level would continue and even increase,[18] and that Canada is "a much smaller market with abundant timber resources."[19]

16. The Commission based its conclusion of likely substantial increases in subject imports on six subsidiary findings:[20] 1) Canadian producers' excess capacity and projected increases in capacity, capacity utilization, and production;[21] 2) the export orientation of Canadian producers to the U.S. market;[22] 3) the increase in subject imports over the period of investigation; 4) the effects of expiration of the SLA; 5) subject import trends during periods when there were no import restraints;[23] and 6) forecasts of strong and improving demand in the U.S. market.[24]

17. The second part of this question suggests that there is an absolute amount or percentage change in import volumes that would necessarily be "substantial" in all or most cases. Determination of threat of injury is by its nature industry specific and dependent on the particular industry's circumstances. As part of this analysis, the covered Agreements direct the investigating authority to consider whether the evidence indicates the likelihood of substantially increased imports but does not direct the investigating authority to find that imports will increase

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[18] Canada First Written Submission, para. 7.

[19] Canada's Opening Statement at First Panel Meeting (Sept. 4, 2003) at para. 4.

[20] Each of these findings is discussed in detail in the ITC Report at 40-43 and in the U.S. First Written Submission at paras. 117-184. Each of the six subsidiary factors considered and discussed by the Commission related directly to threat factors regarding a significant rate of increase in imports and sufficient freely disposable production capacity set forth in the covered Agreements.

[21] The Canadian producers had excess capacity and projected increases in capacity and production, and improvements in capacity utilization in 2002 and 2003. Thus, despite the excess capacity already available in 2001 as capacity utilization declined to 84 percent from 90 percent in 1999, the evidence demonstrated that Canadian producers expected to further increase their ability to supply the U.S. softwood lumber market. In particular, capacity utilization was projected to increase to 90 percent in 2003, as capacity also was projected to increase.

[22] Canadian producers rely on sales in the U.S. market for about two-thirds of their production, which means that their success, and probably survival, is tied to the importing market. Moreover, Canadian producers had incentives such as mandatory cut requirements to produce more softwood lumber and export it to the U.S. market. Canada has offered no positive evidence to refute the ITC's reasonable conclusion, discounting export projections, that production increases would be distributed according to historic proportions. The fact is, the U.S. market had been very important to Canadian producers and was expected to continue to be.

[23] The facts demonstrate that without restraints imports have increased. Increases stopped when the SLA was imposed; substantial increases (ranging from 9.2 percent to 12.3 percent) in imports occurred when the SLA expired; and increases in imports stopped when preliminary CVD duties were imposed. This evidence provides a clear indicator of how subject imports have entered, and would enter, the U.S. market in the imminent future if not subject to trade restraints and supports the ITC's finding of likely substantial increases in subject imports. Canada offers nothing but speculation about other reasons why imports were not restrained during those periods.

[24] Canada has not refuted the ITC's findings regarding forecasts for U.S. demand, *i.e.*, that the U.S. market would continue to be a very attractive, and necessary, one for Canadian imports (a market that consumes about 65 percent of Canadian production); that subject imports would continue to play an important role in the U.S. market; and even that there would likely be increases in such imports.

by a certain amount or to project the increase level.[25] The Appellate Body has recognized that ultimately a threat analysis calls for projections about the likelihood that the threat will ascend to injury and as such can never be definitely proven.[26] As the Appellate Body in *Mexico-HFCS* recognized

> the "establishment" of facts by investigating authorities includes both affirmative findings of events that took place during the period of investigation as well as assumptions relating to such events made by those authorities in the course of their analyses. In determining the existence of a *threat* of material injury, the **investigating authorities will necessarily have to make assumptions relating to the "occurrence of future events" since such *future* events "can never be definitively proven by facts.**" Notwithstanding this intrinsic uncertainty, a "proper establishment" of facts in a determination of threat of material injury must be based on events that, although they have not yet occurred, must be "clearly foreseen and imminent", in accordance with Article 3.7 of the *Anti-Dumping Agreement*.[27]

In *Mexico-HFCS* and other disputes, the Appellate Body has recognized that a threat of injury determination does not require projecting by a certain amount levels of increases or absolute volume in order to make a finding of a likelihood of substantially increased imports.

Questions 20, 21, and 22:

20. The United States asserts that "an evolution of adverse trade trends can cause a threat of injury to ripen into actual injury". Would the United States agree that there must be some identification of that evolution, in terms of "change in circumstances" under Article 3.7/Article 15.7, in an investigating authority's determination? Could the United States indicate where, in its determination, the USITC addressed the question of "change in circumstances"?

21. Could the United States indicate whether the USITC considered that there was a likelihood of substantially increased importation as a "change in circumstances"?

22. Could the United States indicate whether the USITC considered that the projected attribution of oversupply to Canadian lumber as a "change in circumstances"?

18. Since questions 20, 21, and 22 all involve the "change in circumstances" issue, we have responded to them together to avoid duplication in our responses.

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[25] *See, e.g.*, *US-Lamb Meat*, AB Report, para. 125.

[26] *See US-Lamb Meat*, AB Report, para. 136; *see also Mexico-HFCS*, AB Report, paras. 85; *US-Cotton Yarn*, AB Report, para. 77; *US-Steel Safeguards*, Panel Report, para. 10.173, n. 5032.

[27] *Mexico-HFCS*, AB Report, para. 85 (emphasis added).

19. The Antidumping Agreement and the SCM Agreement recognize that injury to a 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 progress, 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.

20. Article 3.7 of the Antidumping Agreement and Article 15.7 of the SCM Agreement provide in relevant part: "A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent." 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."[28]

21. While the text provides a clear example in which the change in circumstances is a sequence of projected events, it sets no requirement to explicitly "identify" that change in circumstances, as Canada alleges.[29] Nor has any WTO or GATT dispute settlement panel interpreted the Agreements to require such explicit "identification." Nor does the negotiating history of the Agreements support such an interpretation.[30]

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[28] Article 3.7 and n. 10 of the Antidumping Agreement. The text of the covered Agreements also uses the plural "circumstances" which reinforces that it contemplates a sequence of projected events rather than "a" single event.

[29] Canada repeatedly alleges that the ITC failed to comply with this nonexistent "obligation to identify." *See* Canada's Opening Statement at First Panel Meeting, paras. 35, 36, 41, and 45.

[30] The GATT Committee on Anti-dumping Practices adopted "Recommendation concerning Determination of Threat of Material Injury" on 21 October 1985, which provided the same example of the change in circumstances now included in note 10 of the WTO Antidumping Agreement. Moreover, the recommendation provided the following further clarification on the change in circumstances and the progression from threat to injury:

> 3. The change in circumstances of which [GATT] Article 3.6 speaks may also occur during an anti-dumping investigation. Even where the basis for the initiation of an anti-dumping investigation was sufficient evidence of threat of material injury (as well as dumping and causal link), actual material injury may have occurred by the end of the investigation, when the final determination concerning injury is made.
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> 4. On the other hand the change in circumstances during an anti-dumping investigation may also lead to a situation of neither threat of injury nor material injury.
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> 5. It is important to domestic producers that anti-dumping procedures and anti-dumping relief be available in cases where dumping and threat of material injury are present but before injury has actually materialized, as Article VI of the General Agreement recognizes. However, as the Anti-Dumping Code provides, anti-

22. 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 material injury to the U.S. industry to occur.

23. The United States has provided a detailed accounting of the facts and likely events demonstrating the progression or change in circumstances which would create a situation in which the dumped and subsidized imports would cause material injury in its second submission at paragraph 18. This progression of injurious effects was addressed by the Commission throughout its analysis.[31] Briefly, the facts demonstrating a progression of injurious effects justifying the Commission's determination that subject imports constitute a threat of material injury to the domestic industry in the United States include: the volume of subject imports already was significant; subject imports had increased during the period of investigation even with the restraining effect of the Softwood Lumber Agreement (SLA); imports had some adverse price effects on domestic prices; and the condition of the domestic industry had deteriorated, primarily as a result of substantial declines in prices, and thus was in a vulnerable state. These findings in the present injury analysis foreshadow injury and clearly support the existence of a threat of material injury. The ITC's affirmative threat determination is based on the following evidence: 1) six factors showing 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.; 2) likely price pressure resulting from the excess supply in the U.S. market caused by these increases in imports, particularly with evidence that prices declined substantially at the end of the period of investigation; and 3) the consequent threat of material injury to a domestic industry, which already was in a vulnerable state, resulting from the likely increases in imports and price effects. For the foregoing reasons, the Commission determined that an industry in the United States was threatened with material injury by reason of imports of softwood lumber from Canada that are subsidized by the Government of Canada and sold in the United States at less than fair value.

24. Specifically, in response to Panel question 21, we note that the ITC considered the

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> dumping relief based on the threat of injury must be confined to those cases where the conditions of trade clearly indicate that material injury will occur imminently if demonstrable trends in trade adverse to domestic industry continue, or if clearly foreseeable adverse events occur.
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> GATT Doc. No. ADP/25, BISD 32/182-183.

[31] *See* ITC Report at pages 31-44.

evidence regarding the six findings demonstrating the likelihood of substantially increased importation as elements of the progression of circumstances, *i.e.*, the change in circumstances, which would create a situation in which the dumping and subsidies would cause injury. In response to Panel question 22, we note that the ITC considered that the likely substantial increases in subject imports would result in excess supply to the U.S. market. 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."[32] 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 prices, and as such were elements of the progression, *i.e.*, the change in circumstances, which would create a situation in which the dumped and subsidized imports would cause injury to the U.S. industry.

Question 23: *Could the United States point to the specific passages in the USITC determination and report that, in its view, demonstrate the "consideration" of each of the relevant factors in its decision, as distinct from the recitation of facts?*

25. The ITC's consideration of the relevant factors that it relied on in making its determinations are set forth on pages 21-27 and 31-44 of the ITC Report.[33] It is evident in the ITC Report that the Commission appropriately considered the relevant factors and did not provide a mere recitation of facts, as Canada has asserted. In addressing whether an investigating authority had considered factors, the Panel in *Thailand-H-Beam* explained that when investigating authorities put figures into context, they went beyond a mere recitation of trends in the abstract.[34] The following excerpt from the Views of the Commission regarding excess Canadian production capacity is illustrative of the ITC's consideration of relevant factors and demonstrates that the ITC did not merely recite facts. The ITC stated:

> Canadian producers' capacity increased from 32,100 mmbf in 1999 to 32,800 mmbf in 2001, following a steady increase from 1995 to 1999.[35] Canadian production capacity in

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[32] *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).

[33] Specifically, the ITC considered and addressed the volume of imports and likely substantial increases in imports on pages 31 and 40-43 of the ITC Report, price effects and likely price effects on pages 32-35 and 43-44, nature of the subsidies on page 39, other threat factors on page 44, the vulnerable condition of the domestic industry on pages 36-39, and possible other causal factors on pages 21-27.

[34] *Thailand H-Beams*, Panel Report, para. 7.170 ("the authorities did consider the 'significance' of the increase in imports. We note in particular in this regard that the authorities went beyond a mere recitation of trends in the abstract and put the import figures into context. For example, the statement that 'imports from Poland increased continuously' indicates that the increase had persisted over some period.").

[35] ITC Report at Table VII-1. Canadian producers' questionnaire responses (covering nearly 80 percent of production in Canada) followed similar trends with production declining from 22,452 in 1999 to 21,770 mmbf in 2001. Reported capacity in Canada was 24,871 mmbf in 1999 and 25,804 mmbf in 2001, and reported capacity

2001 was 10.4 percent higher than in 1995. Canadian production declined from 29,041 mmbf in 1999 to 27,457 mmbf in 2001.[36] Nevertheless, Canadian production in 2001 was 5.2 percent higher than that of 1995; Canadian capacity utilization peaked in 1999 at 90.5 percent, and was 88.9 percent in 2000 and decreased again to 83.7 percent in 2001.[37] In the three years prior to the period of investigation, also while under the SLA, Canadian capacity utilization had been at a relatively stable level ranging from 87.3 percent to 87.7 percent. In 2001, excess Canadian capacity was 5,343 mmbf, 10 percent of U.S. apparent consumption.[38] Furthermore, in their questionnaire responses, Canadian producers projected additional capacity increases, improvements in capacity utilization, and additional production in 2002 and 2003.[39] Thus, despite the excess capacity already available in 2001 as capacity utilization declined to 83.7 percent,[40] Canadian producers expect to further increase their ability to supply the U.S. softwood lumber markets.[41] [42]

Question 24: *Would the United States agree that, in order to make an affirmative determination of threat of material injury, it is necessary to undertake an assessment of the condition of the domestic industry in light of the impact of future dumped or subsidized imports? Could the United States indicate where, in its determination, the USITC discussed the projected impact of future imports on the domestic industry?*

26. The Commission assessed the condition of the domestic industry and found that it "is vulnerable to injury in light of declines in its performance over the period of investigation, particularly its financial performance."[43] The Commission's analysis of the vulnerable condition of the domestic industry is on pages 37-39 of the ITC Report. In brief, the record reflects that many performance indicators declined significantly from 1999 to 2000, and then declined slightly or stabilized from 2000 to 2001.[44] 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.[45]

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utilization was 90.3 percent in 1999, 88.8 percent in 2000, and 84.4 percent in 2001. ITC Report at Table VII-2.

[36] ITC Report at Table VII-1.

[37] ITC Report at Table VII-1.

[38] ITC Report at Tables VII-1 and C-1.

[39] ITC Report at Table VII-2. Canadian producers projected capacity increases to 26,206 mmbf, production increases to 23,698 mmbf, and capacity utilization increases to 90.4 percent in 2003. *Id.*

[40] The reported capacity utilization in questionnaire responses was similar at 84.4 percent. ITC Report at Table VII-2.

[41] ITC Report at Table VII-2.

[42] ITC Report at 40.

[43] ITC Report at 37.

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

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

27. Moreover, the ITC considered the consequent impact of the likely substantial increases in imports and likely price effects. The evidence demonstrates that 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 prices. Prices at the end of the period of investigation in the third and fourth quarters of 2001 had substantially declined to levels as low as they had been in 2000. 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."[46] 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. Moreover, the additional subject imports, which it concluded were likely, would further increase the excess supply in the market, putting further downward pressure on prices, thereby adversely impacting the U.S. industry. The Commission's assessment of the impact of future imports on the domestic industry is primarily on pages 43 and 44 of the ITC Report.

28. Where the investigating authority has considered the Article 3.4 and Article 15.4 factors once, it is not required to undertake a separate, second evaluation, as part of an entirely distinct threat analysis. This does not mean that additional analysis appropriate for assessing whether further dumped and subsidized exports would have a consequent adverse impact on the domestic industry may not be required depending on the facts. For example, in a case where the domestic industry is healthy and profitable during the period of investigation, it may be appropriate to provide a more detailed discussion of how its condition would likely be affected by further imminent dumped and subsidized imports. Such discussion would show how the condition would deteriorate and material injury would occur. On the other hand, in a case, as the one before this Panel, where the domestic industry is already in a vulnerable state and where the condition has deteriorated significantly during the period of investigation, resulting primarily from declines in prices caused by excess supply, the focus is on the likely substantial increases in imports and likely effects of declining prices rather than whether the condition of the industry is deteriorating.

Question 25: *Could the United States indicate where in its determination the USITC concluded that the elements asserted by Canada to be "known factors other than the dumped imports which at the same time are injuring the domestic industry" were not, in fact, such known factors injuring the domestic industry?*

29. In assessing the conditions of competition pertinent to the softwood lumber industry, the Commission considered and assessed whether other factors were potentially causing injury to the

[46] *See, e.g.,* ITC Report at 35, n. 217.

domestic industry. This assessment is primarily on pages 21-27 of the ITC Report. For a more detailed discussion of this issue, please see the United States's response to question 26.

Question 26: *At paragraph 29 of its oral statement, the United States argues that the USITC specifically considered other factors potentially causing injury, referring to domestic supply, nonsubject imports, cyclical demand and housing construction cycles, North American integration, and other product substitutes. Is it the United States' argument that these factors were* ***not*** *other known causal factors or were did not constitute a cause of injury at the same time as the subject imports? Could the United States indicate where in the USITC's determination such a conclusion is to be found? Could the United States indicate whether the USITC addressed these other factors in the context of its analysis of causation with respect to threat of material injury? Could the United States indicate where that discussion is to be found?*

30. The ITC considered all of these factors allegedly causing injury to the domestic industry. The ITC found that the alleged other factors – nonsubject imports, cyclical demand and housing construction cycles, North American integration and other product substitutes – are not other known causal factors. The Commission considered and assessed these alleged other factors on pages 21-27 of the ITC Report. While the ITC did not explicitly state that these alleged other factors are not known other factors, it is clear from the analysis that none of them rise to the level of "other known factors injuring the domestic industry".[47] For example, the ITC's conclusion that the evidence did not support finding that substitute products are other causal factors is apparent in the Commission's finding that "While these substitute products have increased in importance over the last few years, they still account for a small share of the market traditionally utilizing softwood lumber."[48] Furthermore, in making this statement the Commission relied on evidence provided by Canadian exporters and stated that "[f]or example, while EWPs are perceived to have a fairly significant share of the market for structural framing applications, CLTA [*i.e.*, exporters' coalition] estimated that EWPs accounted for only 5 percent of the U.S. market."[49] The Commission considered alleged other factors in a manner similar to other substitute products and found each not to be an other known factor causing injury to the domestic industry.

31. Moreover, the ITC found that the evidence demonstrates that domestic supply would not

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[47] The Panel in *Thailand-H-Beams* recognized that the absence of an explicit finding in the final determination regarding the significance of the volume of imports and price effects would not make them inconsistent with the requirements of the appropriate provisions if consideration is apparent from the relevant documents in the record. *Thailand-H-Beams*, Panel Report, paras. 7.161, 7.170-7.171, and 7.179-7.180.

[48] ITC Report at 24 and n.145, and II-4.

[49] ITC Report at II-4 and n.15. Moreover, Petitioners maintained that it was only in residential housing floor applications, which make up less than 6.5 percent of softwood lumber consumption, that substitute products hold anything more than a minimal share. Petitioners' Prehearing Brief at 40-44 (USA-8); Petitioners' Posthearing Brief at Appendix A-28 - A-33 (USA-5).

be a known causal factor in the imminent future, as it had been in the 1999-2000 period,[50] when likely substantial increases in subject imports with likely price depressing effects would cause injury to the domestic industry. The Commission considered domestic supply on pages 24-25, 34-35, 37-38, and 43-44 of the ITC Report. Specifically, the ITC examined constraints on domestic producers' ability to meet demand and took into consideration domestic producers' past contribution to oversupply conditions. The evidence cited by the ITC indicated that the domestic producers had curbed their production, but that "overproduction remains a problem in Canada." Thus, while domestic overproduction had contributed to adverse price effects in 2000, the evidence demonstrated that it was no longer contributing to excess supply, while Canadian imports continued to oversupply. Moreover, 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.[51] 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 from 1995-2001.[52] 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.[53] As discussed above, in spite of this decline in capacity utilization rates, Canadian producers projected slight increases in capacity, increases in production, and a return of capacity utilization to 90.4 percent in 2003.[54] On the other hand, domestic production of softwood lumber had declined by 4.4 percent from 1999 to 2001.[55] These facts concerning domestic supply reinforce the ITC's affirmative threat determinations.

32. It is important to understand that consideration and explanation of a factor in any section of the ITC Report does not limit its application to that section of the report. The report must be

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[50] The Commission had found in its present material injury analysis that excess domestic supply was an other known factor that contributed in conjunction with excess import supply to the decline in prices and the injury to the domestic industry, particularly in the 1999-2000 period.

[51] ITC Report at Table III-6 and C-1 (public data). Domestic producers based on public data reported production capacity of 39,800 mmbf in 1999, 40,100 mmbf in 2000, and 40040 mmbf in 2001. *Id*. Domestic producers' questionnaire responses reported production capacity of 22,847 mmbf in 1999, 24,233 mmbf in 2000, and 24,709 mmbf in 2001, although the industry coverage is not necessarily comparable to the public data. *Id*. at Table III-7 and C-1.

[52] ITC 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.

[53] ITC 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.

[54] ITC Report at Table VII-2.

[55] ITC Report at Tables III-6 and C-1 (public data).

viewed as a whole, with analysis conducted in any particular section potentially having a bearing on analysis in other sections. Moreover, if it is evident that an alleged other factor is not a known other factor at all and respondents offer no positive evidence, only speculative theories about the future, duplicative analyses of the same alleged other factors would serve no purpose. One example where evidence demonstrates that an alleged other factor is not a "known" other factor is nonsubject imports. The Commission found that "[w]hile nonsubject imports were present in the U.S. market during the period of investigation, they never exceeded 3 percent of apparent domestic consumption."[56] The Commission recognized that the volume of nonsubject imports (from Brazil, Chile, New Zealand, Germany, Sweden, Austria, and other countries) increased from 937 mmbf in 1999 to 1,378 mmbf in 2001, and that as share of apparent domestic consumption, nonsubject imports increased from 1.7 percent in 1999 to 2.6 percent in 2001.[57] 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, this comparison must be placed in perspective: subject imports are responsible for an enormous volume of imports during the period of investigation, accounting for 33.2 percent to 34.3 percent of U.S. apparent consumption in the 1999-2001 period,[58] compared with nonsubject imports, which "never exceeded 3 percent of apparent domestic consumption."[59] Moreover, subject imports were subject to import restraints for most of the period of investigation; nonsubject imports were not restrained.

33. Canada's speculative theories have failed to explain how an imminent increase in such a small total volume of nonsubject imports relative to apparent consumption and Canada's substantial share of apparent consumption, might rise to the level of causing injury to the domestic industry. This conclusion is particularly apt when Canada acknowledges that its exports to the U.S. market will continue at, and even increase above, the significant level of imports during the period of investigation. Moreover, nonsubject imports were not even alleged to increase, let alone to significant levels, unless trade remedies were imposed against Canadian imports.[60] The Commission appropriately considered nonsubject imports and found them not to be an other known factor causing injury to the domestic industry.

Question 27: *In paragraph 94 of its first written submission, Canada asserts that the USITC's discussion of certain evidence presented by Canadian parties during the investigation contains*

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[56] ITC Report at 25.

[57] USITC Report at 25 n.152.

[58] USITC Report at 32.

[59] USITC Report at 25.

[60] The ITC Report reported that: "Some importers 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." ITC Report at II-3. The evidence also shows the share of U.S. imports held in 2001 by the following European countries: Germany, 1.0 percent; Sweden, 0.8 percent, Austria, 0.5 percent. All nonsubject imports accounted for 6.9 percent of the overall quantity of softwood lumber imports into the U.S. market in 2001. *Id.* at II-7, n. 23.

"fundamental errors". Could the United States respond specifically to this argument?

34. Canada's claim of "fundamental error" in paragraph 94 of its first written submission is based on the erroneous premise that the Canadian producers' economic theory was the only "information" before the ITC and that this theory was uncontested and proven fact. But Canada has provided the Panel with a one-sided analysis of this issue and ignored the conflicting evidence presented to the Commission regarding the applicability of the economic models and their alleged effects. The domestic producers presented the ITC with arguments, economic analysis and economic studies to refute the economic theory provided by Canadian parties. Indeed, evidence presented to the ITC during its investigation squarely placed in question whether the Ricardian rent theory was applicable to the timber and lumber markets, whether the theory's underlying premise regarding supply was correct, and whether the results regarding the effects of the stumpage fees on output were very different. In any event, theory is not fact. While analytically useful in appropriate contexts, it is still distinguishable from hard statistical information.

35. One issue on which the Commission had conflicting evidence from the parties was whether the lumber/timber market is a "rent" market, that is a market in which the quantity supplied does not vary with price over a relevant range. As the context of the ITC's discussion, and the sources referenced, make clear, the Commission's use of the term "fixed supply" refers to the lack of variation in the quantity supplied, not to any assumption that timber supply is somehow exogenously fixed.[61] The fact is the Canadian parties used a similar shorthand formulation (*i.e.*, characterizing factors as "fixed") in their own submissions.[62] As for the Commission's use of the term "lumber supply" rather than "timber supply," it may have been more precise to use the term "lumber and timber supply," since the discussion involved the raw material of timber for the subject product, lumber. The cited materials clearly relate to the raw material for lumber, *i.e.*, the elasticity of timber supply.

36. The Commission's consideration and discussion of the economic theories presented by the parties is not undermined by alleged "fundamental errors." Canada's allegations should be rejected when it is clear, as it is here, that although the ITC's terminology might have been more precise, the Commission appropriately understood and considered the conflicting evidence regarding the economic theories that had been presented to it.

37. Moreover, the ITC found that, despite all the evidence of record, the uncertainties regarding these competing economic theories provided by the parties were such as to preclude reasoned and adequate conclusions. Therefore, the ITC appropriately considered the parties'

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[61] ITC Report at 39, n. 245. *See also* Hearing Transcript at 41-45 (testimony of landowner that quantity supplied was reduced when price fell); Petitioners' Posthearing Brief at Appendix D-24 (nominal annual allowable cut in Canadian provinces do not effectively constrain supply).

[62] *See e.g.*, CLTA Posthearing Brief, vol. 2, Tab T, at 4 n.11 ("Some goods or productive factors are completely fixed in amount regardless of price.").

arguments and provided a reasoned explanation but found it could not reach a finding on the competing economic theories. As evident in the Views of the Commission, its consideration of the nature of the subsidy threat factor was not a reason that led to its determinations and thus, it neither supported nor detracted from those determinations that the domestic industry was threatened with material injury by reason of the subject imports.

Question 28: *Could the United States please explain the basis for the USITC's conclusion regarding significant price effects in this case, in light of the finding of moderate substitutability of US domestic and imported Canadian lumber?*

38. Given its finding of likely significant increases in subject import volumes, its finding of at least moderate substitutability, its finding that prices of a particular species affect the prices of other species, and its present finding that the substantial volume of subject imports had *some* adverse effects on prices for the domestic product, the Commission concluded that subject imports were likely to have a significant price-depressing effect on domestic prices in the immediate future, and are likely to increase demand for further imports. The evidence at the end of the period of investigation showed substantial declines in prices in the third and fourth quarters of 2001, to levels as low as 2000. Moreover, the evidence regarding supply, which generally was considered the cause for 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." Therefore, the ITC reasonably found that the additional subject imports, which it concluded were likely, would further increase the excess supply in the market, putting further downward pressure on prices. Moreover, the evidence demonstrated that pressure would come from excess Canadian supply rather than a combination of import and domestic supply, thereby resulting in a threat of material injury to the U.S. industry.

39. These findings by the Commission are not affected by the Commission's finding of moderate substitutability between domestic and imported softwood lumber. Despite the differences in many of the imported and domestic species of softwood lumber, the moderate substitutability finding must be considered in the context of the Commission's finding that the evidence demonstrated that prices of a particular species will affect the prices of other species, particularly those that are used in the same or similar applications.[63] As discussed in the U.S.

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[63] *See, e.g.*, Random Lengths ("Competition from Canadian S-P-F prevented ES-LP narrows from rallying from $5 drops early in the week." at 9, Oct. 26, 2001; "Warmer weather, a drop in interest rates, and an abrupt rise in S-P-F prices all got credit for boosting buyer interest in Southern Pine." at 4, Apr. 20, 2001; "As SPF prices climbed and supplies tightened in Canada, more buyers turned to U.S. produced Hem-Fir and ES-LP." at 4, Apr. 13, 2001; "Western and Eastern S-P-F were the leaders, pulling other dry species along." at 4, Feb. 2, 2001); Wickes ("Species switching by many long-term purchasers of S-P-F forced most North of the border to finally return prices to a more realistic level as the need to move wood into the inventory pipeline became evident." Sept. 5, 2001; "Producers in the U.S. secured most of the available business from buyers who had no qualms in switching species to take advantage of the pricing discrepancies. Truss manufacturers started the charge as they switched from S-P-F MSR to alternative #2 grade SYP helping mills in the South post increases across the board." Aug. 21, 2001). Petitioners'

first written submission and the ITC Report, the evidence provided by purchasers and home builders showed that subject imports and domestic species of softwood lumber are used in the same applications and that regional preferences merely reflect availability of species.[64]

40. In particular, the Annual Builders Survey by the National Association of Home Builders Research Center (NAHBRC) provided clear evidence that SPF, SYP, and Douglas fir/hem fir are all used in such same construction applications as lumber joists, light frame exterior walls, roof trusses, and roof rafters.[65] The Commission recognized that while regional preferences existed – species often were used in close proximity to where they are milled – these preferences seemed to reflect in large part availability of species, which is affected by transportation costs.[66] This was demonstrated in evidence provided by builders and purchasers at the Commission's hearing.[67] Thus, these regional preferences do not reflect a lack of substitutability but simply a predisposition toward locally-milled species. As the Commission has recognized in prior investigations, Canadian softwood lumber and the domestic like product generally are interchangeable, notwithstanding differences in species and preferences.[68]

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

Prehearing Brief at 13 and Appendix C (USA-8).

[64] *See* ITC Report at 25-27, 33, and 43; U.S. First Written Submission at paras. 36-37, 203-206, and 269-278. A majority of purchasers (36 of 51) responding to the Commission questionnaire reported that U.S. and Canadian softwood lumber can be used in the same general applications, recognizing that performance characteristics and customer preferences place some limitations on interchangeability among species. ITC Report at II-6, II-8, and Table II-5; Petitioners' Prehearing Brief, Vol. II at Exhibit 85 (USA-5).

[65] Dealers/Builders' Posthearing Brief at Exhibit 3 at 5, 10, and 15 (USA-10).

[66] ITC Report at II-7-8, V-2 - V-4.

[67] Hearing Transcript at 185-190 and 204-209 (USA-11 and USA-23) (Florida: floor joists - SYP, wall/framing - SPF, headers - SYP, trusses - SYP, Id. at 185-190, 204; Texas: floor joists - SYP, wall/framing - SYP, headers - SYP, trusses - SYP, Id. at 205; Indiana and West: floor joists - SPF, wall/framing - SPF, headers - SPF, trusses - SPF, Id. at 205-207; Massachusetts: floor joists - SPF, wall/framing - SPF, headers - SYP, trusses - SYP, Id. at 206); ITC Report at II-8 (*e.g.*, purchasers' comments on species preferences); and Dealers/Builders' Prehearing Brief at Exhs. 2, 3, 4, 6, 8, 9, 11, 13, 14 15, 16, 17, 21, and 23 (USA-12); Petitioners' Posthearing Brief at 5-6 (USA-5).

[68] *See, e.g.*, Softwood Lumber III, USITC Pub. 2530 at 28-29, and 34 (USA-24), *aff'd in part*, In the Matter of Softwood Lumber from Canada, USA-92-1904-02, Decision of the Panel Reviewing the Final Determination of the U.S. International Trade Commission , at 25-28 (July 26, 1993)

42. It is evident that imported and domestic softwood lumber, notwithstanding differences in species, are interchangeable and compete with each other. Thus, the Commission's finding of at least moderate substitutability, in conjunction with the evidence that different species are used in the same applications and the evidence regarding the effect of prices of one species on those of another species, fully supports the Commission's conclusion of likely price effects.

Question 29: *Could the United States explain the basis for the USITC's conclusion regarding significant price effects in this case, in light of the absence of any conclusions regarding underselling?*

43. Article 3.7(iii) of the Antidumping Agreement and Article 15.7 (iv) of the SCM Agreement state that an investigating authority "should consider, *inter alia* . . . whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports." Thus, the listed factors for a threat analysis in the covered Agreements do not include required consideration of underselling. Article 3.2 of the Antidumping Agreement and Article 15.2 of the SCM Agreement, on the other hand, state that an investigating authority "shall consider" whether there has been a significant price under cutting "or" significant price depression or suppression. Articles 3.2 and 15.2 use the disjunctive "or" rather than the conjunctive "and" in setting forth the applicable obligation.[69] This shows a recognition that price depression or suppression may occur whether or not there is price undercutting. Thus, the fact that the Commission determined, as agreed to by all parties to the proceeding,[70] that making direct cross-species price comparisons in order to assess underselling was inappropriate, does not have a bearing on the ITC's conclusion regarding

[69] *See* Article 3.2 of the Antidumping Agreement and Article 15.2 of the SCM Agreement. *See also Thailand-H-Beams*, Panel Report, para. 7.171 (regarding "or" contained in Article 3.2 for consideration of volume of imports, Panel considered it sufficient for authority to consider absolute volume rather than both it and relative.)

[70] The Commission noted that it had encountered similar problems obtaining useful pricing data for assessing underselling in prior Softwood Lumber cases. The parties agreed that, in this industry, accurate price comparisons are difficult to compile. See, e.g., Transcript at 93, 269-273 (USA-11); Dealers/Builders' Posthearing Brief at 12-14 (USA-10).

significant price effects at all and particularly in its threat analysis.[71] [72]

44. As discussed in the U.S. first written submission, the fact that the differences in species of softwood lumber did not lend itself to direct price comparisons did not preclude a price trends analysis to consider whether there was a correlation between the prices that indicated price suppression or depression.[73] First, the Commission found that the evidence indicated that prices of a particular species will affect the prices of other species, particularly those that are used in the same or similar applications, as discussed in response to question 28.[74] Moreover, both the questionnaire and public data on the record permitted an analysis of price trends. In particular, the Commission considered pricing information for softwood lumber published in Random Lengths, which is the source the industry most cited throughout this investigation as a pricing guide.[75] The Commission reasonably found, based on the price trends analysis discussed in its opinion,[76] that subject imports were likely to have a significant depressing effect on domestic prices.

Question 30: *At page 40 of the USITC determination (Exhibit USA-1), the USITC states "We find that subject imports are likely to increase substantially based on several factors: ...". Could the United States clarify whether each of the factors listed in the remainder of that sentence was*

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[71] ITC Report at 34-34. The Commission found that because of the nature of this market, direct price comparisons between domestic products and subject imports are highly problematic whether based on questionnaire or public data. While the Commission collected pricing data for six specific softwood lumber products from purchasers, the Commission placed little weight on this information because the reported quantities of softwood lumber involved in the delivered price comparisons are very limited. The Commission concluded that it could not draw any conclusions regarding underselling from the questionnaire data in these investigations.

While there are a number of different sources of public pricing information regarding softwood lumber products (including Random Lengths, Crow's, Madison's, and the Southern Pine Bulletin), these data series do not yield improved comparisons, despite their much broader coverage. Although prices of one species affect those of others, absolute price levels differ, making direct cross-species comparisons inappropriate for purposes of an underselling analysis. Thus, the Commission concluded that it could not determine, based on this record, whether there has been significant underselling by subject imports. ITC Report at V-3 - V-5.

[72] 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.

[73] *See* U.S. First Written Submission, paras. 201-202 and 241. A price suppression or depression analysis considers trends for import and domestic prices to determine certain specific correlations between them. The pricing trend data is 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 in the market have exerted downward pressure on domestic prices (depression).

[74] ITC Report at 26-27, 32-35, and 43.

[75] ITC Report at V-4-5. Random Lengths, Inc. collects weekly price data from suppliers and purchasers and calculates weighted-average prices based on such factors as the size of the transaction and the quality of the lumber. Random Lengths publishes these data in its weekly and annual publications. Id.

[76] ITC Report at 32-35 and 43.

considered to support the conclusion set out, or whether the listed factors are those which were considered, and that some of them supported the finding of likely increased imports while others did not?

45. The Commission found that subject imports are likely to increase substantially based on evidence regarding each of the six factors listed on page 40, and discussed in detail on pages 40-43, of the ITC Report. The ITC found that each of the six factors supported its conclusion.

Question 31: *Could the United States please indicate the facts that form the basis for the USITC's conclusion that there would be an imminent substantial increase in imports?*

46. The United States refers the Panel to its response to question 19, the substance of which also responds to question 31.

Question 32: *The Panel understands that Canada is not arguing that a combined analysis of injury caused by dumped and subsidized imports is per se inconsistent with the cited Agreements. Could the United States comment on the view that, in the event the Panel finds a violation of any other provision of the relevant Agreements, the injury determination as a whole should be deemed inconsistent with both the AD and SCM Agreements?*

47. The ITC's determinations are consistent with all U.S. obligations under both covered Agreements. With the exception of consideration of the record evidence regarding the "nature of the subsidies" factor pursuant to Article 15.7(i) of the SCM Agreement, the ITC's analysis of injury by reason of dumped and subsidized imports involved factors, evidence, analysis, and findings common to both Agreements. Thus, if the Panel were to find a violation, it necessarily would involve a provision (with the one noted exception) common to both the Antidumping Agreement and the SCM Agreement. Canada's attempts to raise the same claims it has made regarding specific provisions under Article 3 of the Antidumping Agreement and Article 15 of the SCM Agreement as a separate alleged violation on the basis of a combined investigation or cross-cumulation violation should be rejected. As Canada concedes, none of its claims relate to cross-cumulation or combined investigations at all, but rather are attempts to establish duplicative violations based on the same claims. Its arguments under the heading of "Combined Investigations" are simply restatements of its arguments concerning particular provisions of the covered Agreements. The Panel should reject these combined investigation arguments for the same reasons it should reject the particular arguments, as discussed in this and other U.S. submissions.

Question 33: *Could the parties please address the distinctions they see, if any, between "finding", "evaluation" and "consideration" in the context of analysis of factors in a determination under Article 3 of the AD Agreement and/or Article 15 of the SCM Agreement.*

48. There is a clear distinction between "finding," on the one hand, and both "evaluation" and "consideration," on the other, in the context of analyzing factors in making a determination under

Article 3 of the Antidumping Agreement and Article 15 of the SCM Agreement. Simply, "finding" involves a conclusion whereas "evaluation" and "consideration" involve the process of assessment and do not require that a finding be made at all. Any distinction between "evaluation" and "consideration" is less clear and seems to have more to do with the provision in which the term is used than with a marked difference in the meaning of the term in the abstract.[77]

49. The term "consider" is used in Articles 3.2 and 3.7 of the Antidumping Agreement and Articles 15.2 and 15.7 of the SCM Agreement regarding the analysis of listed factors involving the volume and price effects of dumped and subsidized imports, and the existence of a threat of material injury. The term "evaluation" is used in Article 3.4 and Article 15.4 of the covered Agreements regarding the examination of the impact of the dumped and subsidized imports on the domestic industry. The covered Agreements require the Commission to consider or evaluate the listed factors. They do not require the Commission to *make findings* on each factor.

50. As discussed in paras. 111-116 of the U.S. first written submission, the term "consider" has been interpreted to mean, "*inter alia*: 'contemplate mentally, especially in order to reach a conclusion;' 'give attention to'; and 'reckon with; take into account.'"[78] Accordingly, the term "consider" has not been read to require an explicit "finding" by the investigating authority.[79] Rather it is sufficient, if it is apparent in the relevant documents in the record, that the ITC has given attention to and taken the factor into account.

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[77] In a review of dispute settlement reports, it seems that the terms are used interchangeably when the term "evaluation" has been interpreted, but that reference to "evaluation" is less frequent, if at all, when the term "consideration" has been interpreted.

[78] *Thailand - H-Beams*, Panel Report, para. 7.161. While this dispute involves an analysis of the term "shall consider" pursuant to Article 3.2 of the Antidumping Agreement, the conclusion that "consider" does not mean "make a finding" would equally apply to the less stringent term "should consider", contained in Article 3.7 of the Antidumping Agreement and Article 15.7 of the SCM Agreement. The Panel in *Thailand - H-Beams* stated:

> We examine the nature of the obligation in Article 3.2. We note that the text of Article 3.2 requires that the investigating authorities "consider whether there has been a significant increase in dumped imports." The *Concise Oxford Dictionary* defines **"consider" as, *inter alia*: "contemplate mentally, especially in order to reach a conclusion;" "give attention to"; and "reckon with; take into account." We therefore do not read the textual term "consider" in Article 3.2 to require an explicit "finding" or "determination" by the investigating authorities** as to whether the increase in dumped imports is "significant." While it would certainly be preferable for a Member explicitly to characterize whether any increase in imports as "significant," and to give a reasoned explanation of that characterization, we believe that the word "significant" does not necessarily need to appear in the text of the relevant document in order for the requirements of this provision to be fulfilled. Nevertheless, we consider that it **must be apparent in the relevant documents in the record that the investigating authorities have given attention to and taken into account** whether there has been a significant increase in dumped imports, in absolute or relative terms.

Id. (emphasis added).

[79] *See Thailand - H-Beams*, Panel Report, para. 7.161.

51. While Canada conceded that "consider" does not mean "make a finding" during the first Panel meeting, its characterization of what constitutes consideration in conjunction with its concept of an adequate and reasoned explanation is not noticeably different from making a finding.

52. The term "evaluation" of evidence has been interpreted to mean "the act of analysis, judgement, or assessment."[80] Particularly, in the context of Article 3.4, it has been stated that "for an investigating authority to 'evaluate' evidence concerning a given factor in the sense of Article 3.4, it must not only gather data, but it must analyze and interpret those data."[81]

53. In its recent report in *EC-Pipe*, the Appellate Body stated that an obligation to evaluate all fifteen economic 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 document.[82] In fact, it recognized that an authority's evaluation of a factor may be implicit in the analyses of other factors.[83] What is important, the Appellate Body explained, is that the investigating authority's decisional path be reasonably discernible, not that there be a discussion of each factor.

54. Moreover, the Appellate Body's analysis in *EC-Pipe* is consistent with the recognition in the covered Agreements that: "No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped [subsidized] exports are imminent and that, unless protective action is taken, material injury would occur."[84]

Question 34: *The Panel notes that Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement provide that "In making a determination regarding the existence of a threat of material injury, the authorities* ***should*** *consider, inter alia, such factors as:.." (emphasis added). In this context, could the parties comment on the view that consideration of all the listed factors is not mandatory, and that the failure to consider at all, or to adequately consider, one of the listed factors, is not fatal to the determination at issue before a Panel?*

55. First, it is evident in the ITC Report that the Commission considered all the factors listed in Article 3.7 of the Antidumping Agreement and Article 15.7 of the SCM Agreement. Nonetheless,

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[80] *Egypt-Definitive Anti-dumping Measures on Steel Rebar from Turkey*, Panel Report, WT/DS211/R, adopted 1 Oct. 2002, para. 7.44 *("Egypt-Rebar").*

[81] *Egypt-Rebar*, Panel Report, para. 7.44; *see also Thailand-H-Beams*, Panel Report, paras. 7.236-7.237 ("evaluation of the mandatory factors must be apparent in the documents forming the basis of our review").

[82] While the language in Article 3.4 of the Antidumping Agreement is "shall evaluate," this analysis would equally apply to the less restrictive "should consider" pursuant to Article 3.7 of the Antidumping Agreement and Article 15.7 of the SCM Agreement.

[83] *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*").

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

the text of this threat provision, "should consider, *inter alia*, such factors," specifically uses the permissive term "should consider" rather than the mandatory term "shall consider." This distinguishes these provisions from Article 3.2 and Article 15.2 of the covered Agreements. Thus, the text of the threat provision could be interpreted as not requiring the consideration of all listed factors. Further, inclusion of the term "*inter alia*," or among others, in this provision appears to recognize that factors other than those listed may be considered, to the extent they are relevant to a particular industry and case. The Commission found it appropriate to do so in this case.

56. Article 3.7 of the Antidumping Agreement and Article 15.7 of the SCM Agreement also conclude with the following language:

> 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 (subsidized) exports are imminent and that, unless protective action is taken, material injury will occur.

The threat provision recognizes that not all, and perhaps none, of the listed factors will necessarily be relevant to or dispositive of, the facts and circumstances of each case. Accordingly, if one of the listed factors was not considered at all, or not adequately considered,[85] it would not be fatal to the determination at issue, particularly since it is "the totality of the factors" and not any one in particular that must lead to the conclusion.

Question 35: *Could the parties please address what, in their view, is required to demonstrate consideration of the "trade effects" arising from subsidies under Article 15.7(i)? What do the parties consider would be relevant trade effects that should be taken into account?*

57. Article 15.7(i) of the SCM Agreement states that an investigating authority should consider: "the nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom."

58. An interpretative question of this nature should be considered in the context of the facts of a particular case. The Commission considered the "nature of the subsidy and trade effect" factor in its threat of material injury analysis, as evident in the Views of the Commission. Specifically, the Commission examined the information presented to it by the U.S. Department of Commerce regarding 11 programs that Commerce found conferred countervailable subsidies to Canadian producers and exporters of softwood lumber.[86] While Commerce provided the Commission information regarding the nature of the subsidies, Commerce explicitly made no findings regarding

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[85] As discussed in response to question 33, consideration of a factor has been interpreted in other dispute settlement proceedings to be adequate if its "apparent in the relevant documents in the record that the investigating authorities have given attention to and taken [it] into account. . . ." *Thailand-H-Beams*, Panel Report, para. 7.161.

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

the effects of the subsidies.[87]

59. In considering this information, the Commission recognized that none of the subsidies identified by Commerce are subsidies described in Article 3 or 6.1 of the SCM Agreement.[88] Thus, this case did not involve any export subsidies. However, when export subsidies are involved, the Commission has considered the relevant trade effects that may result from such subsidies.

60. In this case, parties to the underlying proceedings presented the Commission competing economic theories about the nature and effects of the countervailable subsidies. It is evident in the Views of the Commission that the ITC fully considered all of the evidence presented on this issue by the parties.[89] 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.[90]

61. The Commission consideration in this case of whether there were trade effects likely to arise from the subsidies is consistent with U.S. obligations under Article 15.7(i) of the SCM Agreement.

Question 36: *Could the parties please discuss, in detail, their interpretation of the phrase "clearly foreseen and imminent" as used in Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement, with specific reference to what they consider to be the relevant time frames involved? Would the parties discuss, in addition, what precisely they consider should be found to be clearly foreseen and imminent.*

62. Threat of material injury is material injury that has *not* yet occurred, but remains a future event whose actual materialization cannot, in fact, be assured with absolute certainty but with clear

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[87] Canadian exporters had requested that Commerce consider whether Canadian Provincial stumpage charges have trade- or market-distorting effects, but Commerce specifically made no finding regarding the "effects" of the subsidies. Issues and Decision Memorandum from Bernard T. Carreau to Faryar Shirzad (Mar. 21, 2002) (appended to final Commerce CVD determination) (USA-2). Under U.S. law, antidumping and countervailing duty investigations involve a bifurcated system with certain responsibilities assigned to Commerce and others assigned to the ITC. Specifically related to this issue, Commerce investigates whether the government of a country is providing, directly or indirectly, a countervailable subsidy. 19 U.S.C. § 1671(a). Thus, Commerce collects information enabling it to determine the existence of a countervailable subsidy and information needed for it to determine the net countervailable subsidy; the Commission on the other hand has no authority to collect such information or look behind Commerce's findings. *See* 19 U.S.C. §§ 1677(5)(A), 1677(5)(B), 1677(5)(E), 1677(5A), 1677(5B), and 1677(6).

[88] USITC Report at 39, n.249.

[89] USITC Report at 39.

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

likelihood.[91] The term "imminent," in the context of a threat of injury analysis under the Safeguards Agreement, has been found to relate "to the moment in time when the 'threat' is likely to materialize."[92] Threat of injury, thus, is an anticipation of material injury that must be on the verge of occurring, *i.e.*, clearly foreseen and imminent, which will differ from case to case. The term "clearly foreseen" relates to the "likelihood" that the injury will materialize. While there is a recognition that "future events 'can never be definitively proven by facts,'" projections based on the past and present facts permit an assessment of whether there is a high degree of likelihood of injury in the very near future.[93] [94]

63. The relevant time frames for consideration of whether dumped and subsidized imports would cause injury, *i.e.*, would be clearly foreseen and imminent, should be evaluated in light of the facts and circumstances of each industry, product, and marketplace. There is no bright-line test to determine when injury is "imminent," nor does the term necessarily mean "immediate." The "imminent" time frame applicable to a threat of injury analysis will vary from case-to-case. In this case, the Commission found it appropriate to the facts and circumstances of the softwood lumber industry and market to consider evidence for a one-to-two year period in the future in its threat of injury analysis, *i.e.*, 2002 and 2003.

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[91] *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. . . . in order to constitute a "threat", the serious injury must be *"clearly imminent*." The word "imminent" relates to the moment in time when the "threat" is likely to materialize. The use of this word implies that the anticipated "serious injury" must be on the very verge of occurring.

[92] *US-Lamb Meat*, AB Report, para. 125.

[93] *See Mexico-HFCS*, AB Report, paras. 83 and 85; *US-Lamb Meat*, AB Report, paras. 125 ("To us, the word 'clearly' relates also the *factual* demonstration of the existence of the 'threat.'") and 136.

[94] The GATT Committee on Anti-dumping Practices adopted "Recommendation concerning Determination of Threat of Material Injury" on 21 October 1985, which provides some further clarification on the phrase "clearly foreseen and imminent:"

> 7. As any prediction of future injury is based on a forecast of likely effects in the marketplace, an examination of whether future injury is "clearly foreseen" must focus on the reasonableness and reliability of different forecasts.
>
> 8. Moreover no matter how reliable a forecast of future injury might be, the time when that injury will actually materialize may be too remote to merit the taking of anti-dumping action. The determination of whether future injury is "imminent" in this context must depend on the facts and commercial realities in each case.

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