United States – Investigation of the International Trade Commission in Softwood Lumber from Canada
Recourse to Article 21.5 of the DSU by Canada

WT/DS277

Opening Statement of the United States
Meeting of the Panel

June 28, 2005

1. Good morning, Mr. Chairman and members of the Panel. Thank you for agreeing to serve as panelists in this proceeding and for the opportunity to appear before you today.

2. In this Article 21.5 proceeding, the measure at issue is the measure taken by the U.S. International Trade Commission to comply with the recommendations and rulings of the Dispute Settlement Body in the underlying dispute. Following the adoption of those recommendations and rulings, the ITC undertook a four-month-long process that involved reopening its evidentiary record and revising its analysis to develop a determination consistent with U.S. obligations under the *AD* and *SCM Agreements*. Its new determination (referred to here as the "Section 129 Determination") concluded that an industry in the United States is threatened with material injury by reason of softwood lumber imports from Canada found to be subsidized and sold in the United States at less than fair value. In reaching that conclusion, the ITC took careful account of the findings of the Panel in the underlying dispute. In particular, the ITC recognized that central to those findings was a concern about the explanation provided by the Commission of the evidence it relied upon and its analysis in the original determination. In its Section 129 Determination, the ITC relied on additional evidence from the period of investigation, engaged in analysis of the additional evidence as well as further analysis of the evidence from the original proceeding, and elaborated on and clarified its reasoning.

3. The question now is whether the Section 129 Determination is consistent with the

obligations of the United States under Articles 3.5 and 3.7 of the *AD Agreement* and Articles 15.5 and 15.7 of the *SCM Agreement*. The answer, as we have demonstrated in our written submissions and will reinforce today, is "yes."

4. In examining the question at hand, the Panel is not being asked what conclusions it would have reached had it been the investigating authority. As in the underlying proceeding, the Panel is being asked "whether an unbiased and objective decision maker, taking into account the facts that were before the investigating authority, and in light of the explanations given, could have reached the conclusions that were reached." There does not appear to be any disagreement that this is the appropriate standard of review. Nor does there appear to be any disagreement that it is Canada that bears the burden of proving that the conclusions reached by the ITC could not have been reached by an unbiased and objective decision maker.

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

6. My colleague will now address each of these points.

7. In reviewing the Section 129 Determination, it is important to bear in mind that the original panel did not compel the ITC to make a negative threat of injury determination.

Appropriately, it did not take a position on what the ITC should or should not determine. Rather, it made a finding about the relationship between the combination of the evidence and reasoning relied upon by the ITC – as explained in the ITC's original determination – on the one hand, and the conclusion the ITC reached, on the other.[1] In fact, the original panel expressly declined Canada's request that it go further and suggest a particular form of implementation.[2] Yet, Canada persists in maintaining that "only a negative determination would be consistent with the Panel's findings and logic and the underlying evidence."[3]

8. In view of the original panel's findings, the ITC reconsidered its analysis and articulated more reasoned and detailed explanations for issues material to its determination, thus making its decisional path reasonably discernable. Moreover, in order to better address issues raised by the original panel report regarding the imminent future, the Commission reopened the record to gather additional information (from public data sources and from questionnaires sent to domestic producers and Canadian producers). The new information was used to supplement the information gathered in the original investigations.[4]

9. Paradoxically, Canada questions the ITC's collection of additional information even as it

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[1]*See, e.g.*, Panel Report, para. 7.89 (import increases); para. 7.92 (export-orientation); para. 7.93 (the effects of the expiration of the SLA); para. 7.94 (import trends during periods when the SLA was not in effect); para. 7.95 (forecasts for demand in the U.S. market and market share); and paras. 7.136 and 7.137 (non-attribution analysis).

[2]Panel Report, para. 8.8 ("In this case, we see no particular need to suggest a means of implementation, and therefore decline to do so.").

[3]Canada Second Written Submission, para. 16.

[4]*See* Section 129 Determination at 7-8. (Exhibit US-1).

insists that the original ITC determination suffered from a lack of evidentiary support.[5] Equally paradoxically, the majority of Canadian producers either expressly refused to answer, or simply did not respond to, requests in the Section 129 proceeding for additional data.[6] It is difficult for us to see how a party can complain that a determination lacks evidentiary support at the same time that its own constituents have openly obstructed efforts to more fully develop the record. In any event, notwithstanding this obstruction, the ITC's reopening of the record did yield additional evidence which was taken into account in the Section 129 Determination. The Commission also gathered information at a public hearing and from the written comments submitted by parties to the proceeding.

10. The additional information that the ITC collected in its Section 129 proceeding, coupled with the additional analysis it undertook and the further explanation it articulated, resulted in a new determination, which is consistent with U.S. obligations under the covered agreements. Before examining the highlights of that new determination, I want to briefly address a number of overarching themes in Canada's portrayal of the new determination as inconsistent with U.S. obligations.

Overarching Themes in Canada's Arguments

11. **First**, in both of its written submissions, Canada makes a point of cataloguing what it calls "unacknowledged or unexplained shifts" in the ITC's conclusions from the original

[5] *See, e.g.*, Canada First Written Submission, paras. 18, 29, and 30; Canada Second Written Submission, paras. 12, 13, and 16.

[6] *See* Section 129 Report at 6 and 41. (Exhibit US-5).

determination to the Section 129 Determination.[7] In fact, examples that Canada highlights do not amount to shifts in conclusions at all. What Canada has done is mischaracterize the ITC's analysis in the original determination, the Section 129 Determination, or both and then assert the existence of a "shift." A good illustration of this is Canada's assertion with respect to the ITC's findings on demand forecasts in the U.S. market. Canada states that there was a shift from a finding that demand would be "strong and improving" to a finding that demand would be essentially unchanged. In fact, the ITC's findings on demand forecasts did not change at all from the original determination to the Section 129 Determination. In both determinations, the Commission found that demand for softwood lumber is forecast to remain relatively unchanged or increase slightly in 2002, followed by increases in 2003 as the U.S. economy rebounds from recession.[8]

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

[7]Canada First Written Submission, para. 6; Canada Second Written Submission, para. 17.

[8]*Compare* USITC Pub. 3509 at 40 (Exhibit CDA-2), *with* Section 129 Determination at 77 (Exhibit US-1).

production levels. It also ignores the 14.6 percent increase in subject imports in the first quarter of 2002.

13. **Third**, Canada ignores the significance of the absolute size of baseline volume, whether of imports or production. Instead, Canada repeatedly focuses on incremental percentage increases or decreases in volume. In doing so, Canada overlooks the crucial starting point – the volume that existed prior to those incremental increases or decreases.[9] It is logically impossible to draw a meaningful conclusion from a given percentage increase or decrease in volume without taking into account the starting point.

14. **Fourth**, Canada frequently compares a percentage increase or decrease in one number – say, U.S. production – with a percentage increase or decrease in another number – say, Canadian production – even though the two numbers may not be comparable, because each may be associated with a different baseline. Moreover, a comparison that involves only a snapshot focus on one incremental change can be misleading if not placed in the perspective of the entirety of the evidence. More meaningful are comparisons between percentage changes where the changes are occurring over a common baseline – such as a comparison of the share that producers in each of two countries have in the market of an importing country, where the baseline for each is the market of the importing country. For example, a comparison of U.S. market share shows subject imports with a 34.7 percent share of this market, with non-subject imports never exceeding 3 percent of apparent U.S. consumption.[10]

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[9]Section 129 Determination at 21, n. 49 (Exhibit US-1).

[10]Section 129 Staff Report at Table C-1B. (Exhibit US-5); USITC Pub. 3509 at Table C-1 (Exhibit CDA-2).

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

16. Moreover, this is not the only instance of Canada urging a piece-meal assessment of the evidence, disregarding the way different evidence fits together. For example, Canada suggests considering the volume of subject imports in the abstract rather than more meaningfully in the context of the expiration of the SLA and the increase in imports during periods of no trade restraints. In rejecting this approach to analyzing the evidence in the underlying dispute, the original panel recognized that the threat factors "are thoroughly intertwined with" the present injury factors and that the determination of threat must be based on the "totality of the factors considered."[11] The same principle applies to the present review.

The Section 129 Determination is Consistent With U.S. Obligations Under the Covered Agreements.

17. *Likelihood of Substantially Increased Imports.* The Panel Report recognized that subject imports already were at significant levels in terms of absolute volume and in terms of market share, but questioned whether the Commission relied on a significant rate of increase during the

[11]Panel Report, para. 7.60.

period of investigation as support for its conclusion that subject imports would increase substantially in the future.[12] The Panel Report also found that the Commission did not address why the expiration of the Softwood Lumber Agreement ("SLA") would result in a further substantial increase in imports, rather than a reallocation of imports from non-covered to previously covered provinces or merely a shift in timing of imports to avoid duties associated with new antidumping and countervailing duty petitions.[13]

18. In the Section 129 Determination, the ITC evaluated the significance of the volume of subject imports and increases in imports in context, which included taking into account the significant restraining effect of the SLA[14] and the impact that the expiration of that agreement would have on the market for softwood lumber, and analyzing import trends before and during the period of investigation, specifically in the context of the prevailing market conditions.

19. *Volume of Imports Already Significant and Likely to Increase Substantially in the Imminent Future*. The Commission's analysis began with the simple fact that subject import volumes already were at significant levels during the investigative period – accounting for between 33.2 percent and 34.7 percent of the U.S. market. In the Section 129 Determination, the Commission also found that the 2.8 percent rate of increase from 1999 to 2001 "is a significant rate of increase when the baseline volume is already so significant."[15] Moreover, the ITC

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[12]Panel Report, paras. 7.89 and 7.90.

[13]Panel Report, paras. 7.93 and 7.94.

[14]Section 129 Determination at 20-31. (Exhibit US-1).

[15]Section 129 Determination at 21 (Exhibit US-1).

recognized that this 2.8 percent increase occurred even with the restraining effect of the SLA in place and even though apparent U.S. consumption had declined slightly, by 0.4 percent. Canada focuses on the percentage without regard to the enormous size of the baseline, the SLA's restraining effects, and the relatively flat demand for softwood lumber.

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

21. The 14.6 percent increase in first quarter 2002 compared to first quarter 2001 occurred while apparent U.S. consumption increased by only 9.7 percent. Accordingly, market share was higher at 34.7 percent in first quarter 2002 compared with 33.2 percent in first quarter 2001. Canada's theory that "opposite commercial incentives" existed in these two quarters misses the point that subject imports still were 6.2 percent higher in the first quarter of 2002 compared with the first quarter of 2000, while apparent U.S. consumption declined between those two quarters by 2.3 percent.

22. *The SLA had a Restraining Effect on Subject Imports.* To place subject imports in the appropriate context, the ITC considered the restraining effects of the SLA on subject imports. In particular, in the Section 129 Determination, the ITC considered evidence demonstrating that the constraints on the volume of subject imports resulted in higher prices for such imports and higher costs for construction than in the absence of the SLA. For example, respondents

estimated that increases in prices caused by the SLA added about $50 per mbf to the average price of framing lumber, which translated into increasing the cost of a typical new home by $1,000.[16] In addition, the ITC compared prices in Toronto, Canada to those in the U.S. Great Lakes region and found that "the SLA restrained Canada's exports to the United States, increasing supply in Canada and resulting in a widening gap between U.S. and Canadian prices."[17]

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

24. The redistribution theory – that is, the theory that termination of the SLA simply would cause Canadian exports to shift from provinces not covered by the SLA to provinces that were covered – also is not supported by the facts. When the expiration of the SLA left no restraint on imports from any of the Canadian provinces, imports from the formerly covered provinces increased, but imports continued at near SLA levels from the non-covered provinces as well, resulting in an overall increase in subject imports.[18]

25. *During Periods of No Import Restraints, There Were Substantial Increases in Subject*

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[16]Section 129 Determination at 25. (Exhibit US-1).

[17]Section 129 Determination at 25. (Exhibit US-1).

[18]Section 129 Determination at 26-27. (Exhibit US-1).

Imports. To place subject imports in context in its Section 129 Determination, the ITC considered the import trends during periods when such imports were not subject to some type of restraint. During the period following expiration of the SLA (April 2001) and before suspension of liquidation of softwood lumber entries due to the investigation (August 2001), subject import volume was substantially higher as compared with import volumes over the same period in each year from 1998 to 2000. The subject import volume in the April to August 2001 period was higher by a factor ranging from 9.2 percent to 12.3 percent. While the rate of increase in imports slowed when bonding requirements associated with the preliminary countervailing duties were imposed in August 2001, subject imports still entered the U.S. market in the April-December 2001 period at a rate 4.9 percent higher than in the comparable 2000 period. In contrast, subject imports increased by 2.8 percent from 1999 to 2001. The evidence in the Section 129 proceeding demonstrated an even more significant increase of 14.6 percent for the first quarter of 2002 compared with the first quarter of 2001, and a significant increase of 6.2 percent compared with the first quarter of 2000.

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

subject imports.

27. Another concern of the original panel was that the ITC had not addressed claims that the substantial increase in imports during the April to August 2001 period only reflects "a shift in the timing of imports." In its Section 129 Determination, the ITC found that subject imports increased *both* during the April to August 2001 period *and* afterward, a fact that indicates a change in import behavior and is inconsistent with the suggestion that import volumes during the period could be explained as a simple timing shift.

28. Canada's focus on monthly subject import data for the April to August 2001 period does nothing to undermine this finding. First, the ITC found that "monthly subject import volumes were higher in each month between April and August 2001 than the comparable month in 2000, with the exception of June, by a range of 7.5 percent to 25.6 percent." Similarly, monthly import volumes were higher in each month between October 2001 and March 2002 than the corresponding month in the preceding year, with the exception of November. These increases in the already significant volume were not the result of increases in demand, which was relatively flat – at 0.2 percent – in 2000 and 2001. Second, Canada contends that "[i]f the USITC were correct, one would expect to see a steady increase in imports." But, that is exactly what the evidence demonstrates. The Commission found "these import trends during the most recent period in which there were no trade restraints to be highly indicative of whether imports are likely to substantially increase in the imminent future."[19]

29. *Demand relative to importation*. The Panel Report found that the Commission did not

[19]Section 129 Determination at 30. (Exhibit US-1).

make any findings in its original determination that imports from Canada would increase more than demand, thereby garnering an increased share of the U.S. market, and that the Commission did not discuss market share at all in the context of its original threat of material injury determination.[20] In its Section 129 Determination, the Commission found that there was no basis in the record evidence to conclude that likely substantial increases in subject imports would be outpaced by increases in demand.[21]

30. First, the Commission found that the 2.8 percent increase in subject imports significantly outstripped the 0.4 percent decline in demand from 1999 to 2001. Second, the evidence in the Section 129 proceeding demonstrates that while apparent U.S. consumption for first quarter 2002 increased compared with first quarter 2001, it was at a substantially lower rate – 9.7 percent – than the 14.6 percent increase in subject imports. Thus, the actual increases in subject imports during the period of investigation substantially outstripped demand. Similarly, actual data show that subject imports after expiration of the SLA have increased at a significantly higher rate than any forecasts for increases in demand for softwood lumber for 2002 and 2003.[22] I ask you to look at the annual data rather than the quarterly forecasts that Canada provides so as to imply larger increases than the annual forecasts show. The annual forecasts are the more appropriate forecasts to consider. Based on its analysis of the totality of the facts, the Commission found that subject imports would increase their market share in the imminent future.

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[20]Panel Report, para. 7.95.

[21]Section 129 Determination at 17 and 75-80. (Exhibit US-1).

[22]Section 129 Determination at 76. (Exhibit US-1).

31. *Available Excess Canadian Capacity*. The Panel Report found that the Commission's discussion regarding the Canadian industry's export orientation did not support the conclusion that excess capacity would be exported to the United States beyond the "historical" level.[23] In its Section 129 Determination, the Commission analyzed capacity and found that Canadian producers had sufficient excess capacity, and projected increases in production and capacity in 2002 and 2003, to substantially increase exports to the United States.[24]

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

33. Canadian production is tied to the U.S. market, which continues to be the most important

[23]Panel Report, paras. 7.91 and 7.92.

[24]Section 129 Determination at 31-40. (Exhibit US-1).

market for Canadian producers.[25] The U.S. market accounts for 60 to 65 percent of Canadian production and shipments, whereas in 2001, other export markets accounted for only 8 percent of Canadian production, and the Canadian home market accounted for only about 24 percent of production.

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

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

[25]Section 129 Determination at 36-38. (Exhibit US-1).

beyond this level.

36. *Causal Relationship and Analysis of Other "Known" Factors*. Finally, the Panel Report expressed concern with the discussion, or more precisely what it saw as an inadequate treatment, of other factors potentially causing injury in the context of the Commission's threat analysis in the original determination.[26]

37. In the Section 129 Determination, the Commission properly examined "any known factors" other than the dumped and subsidized imports that might be injuring the domestic industry to ensure that it did not improperly attribute injury from other causal factors to the subject imports. In particular, the ITC's methodology for evaluating causation first asks whether an alleged other factor is an "other known factor" – that is, whether it constitutes more than a tangential or minimal cause of injury or threat. Only if the first question is answered affirmatively would the ITC undertake a further analysis to ensure that any injury from an other known factor is not attributed to subject imports. This approach to causation analysis is entirely consistent with Articles 3.5 and 15.5, as the Appellate Body discussed in its *EC – Pipe* report.

38. In its Section 129 Determination, the Commission provided a detailed and reasoned analysis of six other factors alleged to be causing injury to the domestic industry.[27] The Commission found that the evidence did not demonstrate that any these factors was an other known factor.

39. In challenging the ITC's causation analysis, Canada focuses on three of the factors

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[26]Panel Report, paras. 7.134 - 7.136.

[27]Section 129 Determination at 68-85. (Exhibit US-1).

alleged to have been other known factors. One of these is non-subject imports. Non-subject imports never accounted for more than 3.0 percent of apparent consumption; in contrast, subject imports accounted for at least 34 percent of the U.S. market. Moreover, individual country non-subject imports would have been deemed negligible, with no individual country accounting for more than 1.3 percent of imports, while Canadian imports accounted for about 93 percent of all imports.[28]

40. Its discussion of non-subject imports is another instance in which Canada ignores the significance of the baseline and focuses instead on incremental increases in import volume. Canada's assertions regarding "projected rates of continued increases in third-country imports" are based entirely on its contention that what is relevant is the rate of increase, even when comparing small baselines to large baselines, and not the absolute volumes. However, placed in perspective, subject imports are responsible for an enormous volume of imports (18,483 mmbf in 2001) and account for about 34 percent of U.S. apparent consumption in the 1999-2001 period, compared with higher valued non-subject imports, which never exceeded 1,378 mmbf or 2.6 percent of apparent domestic consumption. Moreover, imports from Canada were subject to import restraints for most of the period of investigation; non-subject imports were not restrained.

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

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[28] *See* Section 129 Determination at 73-75. (Exhibit US-1).

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

Response to Other Canadian Arguments

43. Before concluding, I want to touch briefly on two other aspects of Canada's challenge to the Section 129 Determination.

44. *Likely Price Effects*. With respect to price effects, Canada puts a great deal of emphasis on data from the first quarter of 2002. Canada suggests that a brief improvement in price trends in that quarter is inconsistent with the conclusion that the U.S. industry faced a threat of material injury. There are at least two basic flaws in this logic. First, it suggests that an up-turn in prices, no matter how brief, and regardless of anything that came before it will necessarily preclude a finding that an industry faces a threat of material injury. By that bizarre logic, even a month's worth of improved prices at the end of a period of investigation would compel a negative

finding. Second, Canada's logic ignores the fact that prices in the first quarter of 2002 were still low by historical standards, even if they happened to have turned upward for a brief period.

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

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

47. *Likely Impact of Subject Imports*. Canada's over-emphasis on price trends in the first quarter of 2002 also skews its outlook on the domestic industry's financial performance in that quarter. The condition of the domestic industry, in particular its financial performance, deteriorated and remained weak over the period of investigation, as a result of the substantial declines in prices. Subject imports were increasing substantially after expiration of the SLA and

at the end of the period examined and were entering at prices at their lowest levels.

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

Conclusion

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