BEFORE THE

WORLD TRADE ORGANIZATION

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

WT/DS277

FIRST WRITTEN SUBMISSION OF THE UNITED STATES

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I. INTRODUCTION

1. Canada opens its argument in this case by contrasting the lack of self-sufficiency in lumber in the United States to the abundance of lumber in Canada. It suggests that a harmonious trade relationship would exist but for the complaints of U.S. lumber producers. We respectfully suggest that Canada misses the point. The United States is quite pleased to purchase Canadian lumber, as long as it is traded fairly. When it is not traded fairly and threatens U.S. lumber producers with material injury, the United States is entitled to apply remedies under WTO rules. That is what the United States has done in this case.

2. In this dispute, Canada challenges the determinations of the U.S. International Trade Commission (hereinafter the Commission or ITC) that an industry in the United States producing softwood lumber is threatened with material injury by reason of imports of softwood lumber from Canada found to be subsidized and sold in the United States at less than fair value ("LTFV").[1]

3. The Commission's determinations are based on positive evidence and on an objective examination of all relevant factors and facts. Moreover, as demonstrated in the ITC Report (comprised of the Views of the Commission and separate factual report), the Commission articulated reasoned and adequate explanations demonstrating how the facts as a whole support its determinations and permitting the Panel to adequately discern the rationale for the ITC's findings. Contrary to Canada's claims, the ITC's determinations are consistent with U.S. obligations under the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Antidumping Agreement) and the Agreement on Subsidies and Countervailing Measures (the SCM Agreement). (Hereafter, we refer to the Antidumping Agreement and the SCM Agreement collectively as "the covered Agreements.").

4. A critical issue underlying this proceeding is what is the role of the Panel in reviewing the Commission's determinations for consistency with the covered Agreements. While Canada recites the appropriate standards of review, set forth in Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) and Article 17.6 of the Antidumping Agreement, its arguments seek a very different role for the Panel from the well-established one. In spite of attempts to fashion its arguments in terms of alleged legal or factual errors in the Commission's determinations, Canada's challenges are, at best, nothing more than an effort to have the Panel reweigh the evidence by conducting a de novo review. The standards of review set forth in the DSU and the Antidumping Agreement, as consistently interpreted by the Appellate Body, proscribes such substitution of the Panel's judgment for that of the

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

investigating authority.[2]

5. The Commission found in its present material injury analysis that the volume of imports was already significant. This finding, when coupled with the conclusion that the volume of subject imports was likely to increase thereby resulting in excess supply in the U.S. market, a further decline in price levels, and additional deterioration in the domestic industry's condition, fully justified the Commission's determination that subject imports constitute a threat of material injury to the domestic industry in the United States. In this regard, it is important to recognize that softwood lumber imports from Canada had been subject to the restraining effect of the Softwood Lumber Agreement (SLA) or the pendency of trade remedy action during virtually the entire period of investigation. Moreover, the ITC had found as part of its present injury analysis that subject imports had caused some price effects and available evidence indicated that both Canadian producers and U.S. producers had contributed to the excess supply that resulted in substantial price declines, particularly in 2000. The evidence also showed a deterioration in the condition of the domestic industry, and in particular its financial performance, over the period of investigation, which was largely a result of substantial declines in price. The Commission found that the declines in the industry's performance made it vulnerable to injury.

6. The ITC's subsidiary findings regarding present material injury reflect the facts as a whole; the facts that foreshadow actual injury and support the Commission's determination of the existence of a threat of material injury. The Commission considered all threat factors provided for in the covered Agreements, including Articles 3.2, 3.4, and 3.7 of the Antidumping Agreement and Articles 15.2, 15.4, and 15.7 of the SCM Agreement, that were relevant to these investigations in making its determination. Although Canada argues to the contrary, the ITC appropriately considered all factors relevant to a threat of material injury determination.

7. Consistent with Articles 3.2, 3.4 and 3.7 of the Antidumping Agreement and Articles 15.2, 15.4 and 15.7 of the SCM Agreement, the Commission considered whether there was a likelihood of increased imports and price effects by reason of the subject imports from Canada. The Commission found that there was a likelihood of substantial increases in subject imports based on evidence regarding, *inter alia*, Canadian producers' excess production capacity and projected increases in capacity, capacity utilization and production, the export orientation of Canadian producers to the U.S. market and subject import trends during periods when there were no import restraints, such as the SLA. Furthermore, each of the six subsidiary factors considered by the Commission related directly to threat factors set forth in Article 3.7 of the Antidumping

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[2]*See United States-Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, Appellate Body Report, WT/DS192/AB/R, adopted 5 November 2001, para. 71 and 74 ("*US-Cotton Yarn*"); *Argentina-Safeguard Measures on Imports of Footwear*, Appellate Body Report, WT/DS121/AB/R, adopted 12 January 2000, para. 121, n. 41 ("*Argentina-Footwear*"); *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. 106, n.4 ("*US-Lamb Meat*"); s*ee also Korea-Definitive Safeguard Measure on Imports of Certain Dairy Products*, Panel Report, WT/DS98/R, adopted 12 Jan. 2000, para. 7.30 ("*Korea-Dairy*").

Agreement and Article 15.7 of the SCM Agreement, specifically whether there is a significant rate of increase in imports and sufficient freely disposable production capacity.[3] The Commission addressed the effect of each of these factors in its findings.

8. In response, Canada emphasizes a single factor, demand in the U.S. market, which was only one of six subsidiary factors considered by the Commission in its determination. Canada attempts to persuade the Panel that a purported significant increase in U.S. demand for softwood lumber was imminent and that this anticipated spike in demand would restore the U.S. industry's financial health and insulate it from any further adverse effects from additional subject imports from Canada. The Achilles heel in Canada's argument is that it disregards substantial portions of the investigatory record and, despite the presence of significant contrary evidence, offers little more than conjecture to support its theory that future increases in demand would improve prices. The Commission considered and rejected this theory because it was not supported by the facts.

9. Contrary to Canada's theory, strong demand over the period of investigation not only did not translate into price improvements but did not prevent substantial declines in prices for softwood lumber. Moreover, the evidence demonstrated that supply rather than demand had played the pivotal role in the movement of prices of softwood lumber in the U.S. market, as the excess supply had resulted in price declines through 2000. Canada's argument is an ill-founded effort to have the Panel reweigh the record evidence. Moreover, Canada has not refuted the ITC's finding regarding forecasts for U.S. demand, that the U.S. market would continue to be a very attractive, and necessary, one for Canadian imports (a market that accounts for about 65 percent of Canadian production), 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. Rather, Canada contends, relying again largely on the thin premise of increases in demand so great as to outpace supply increases, that increases in subject import volumes and market penetration would not be injurious.

10. The Commission also considered the likely price effects of subject imports as required by Articles 3.2 and 3.7 of the Antidumping Agreement and Articles 15.2 and 15.7 of the SCM Agreement. Given the Commission's finding of likely significant increases in subject import volumes, and its finding of at least moderate substitutability between subject imports and the domestic like product,[4] the Commission concluded that subject imports were likely to have a significant price depressing effect on domestic prices in the future, and are likely to increase

[3]The six subsidiary factors evaluated by the Commission are: 1) Canadian producers' excess capacity and projected increases in capacity, capacity utilization, and production; 2) the export orientation of Canadian producers to the U.S. market; 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; and 6) forecasts of strong and improving demand in the U.S. market. USITC Report at 40-43.

[4]USITC Report at 43-44. The Commission clearly did not disregard the relevant arguments of parties, particularly regarding substitutability between imported and domestic product, but merely found other evidence on the record to be more persuasive.

demand for further imports. The Commission considered the evidence at the end of the period of investigation, which showed substantial declines in prices in the third and fourth quarters of 2001, to levels as low as 2000. There also was evidence regarding likely excess supply which generally was considered the cause for the substantial price declines in 2000, which led to the deterioration in the condition of the domestic industry. This time, however, the evidence indicated that U.S. producers had curbed their production, but that overproduction "remains a problem in Canada."[5] 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, thereby resulting in a threat of material injury to the U.S. industry.[6]

11. The Commission also considered the nature of the subsidies granted by Canada, consistent with the requirement of Article 15.7(i) of the SCM Agreement. The Commission examined the information presented to it by the U.S. Department of Commerce regarding the 11 programs that it found conferred countervailable subsidies to Canadian producers and exporters of softwood lumber.[7] The Commission took into account that none of the subsidies were of the kind described in Article 3 or 6.1 of the WTO SCM Agreement. While the Commission clearly considered parties' arguments on the nature and effect of the subsidies, it declined to adopt the positions of any of the parties due to the conflicting evidence and economic theories regarding the effects of stumpage fees on lumber output.[8] Canada has provided the Panel with a very 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. Indeed, evidence presented to the Commission during its investigation squarely placed in question the very applicability of Canada's theories regarding the trade effects of the subsidies conferred on Canadian producers and exporters. The ITC made an objective examination of this issue by considering all of the evidence and arguments presented.

12. The Commission also examined other factors identified to it as potentially causing material injury to ensure that it did not attribute injury from any known other factors to the subject imports. Canada misunderstands this Panel's role and the Commission's function with

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[5]*See, e.g.,* Petitioners' Posthearing Brief at 2 and Appendix H, Exh. 2 at 11 ("The U.S. industry was widely criticized in years passed for lumber overproduction . . . . This behavior has been curbed considerably here, but remains a problem in Canada, where Provincial forestry officials must also protect pulp mill employment, which is the lifeblood of many small towns. However, as the Canadian softwood lumber industry ships 65% of its output to the U.S., its general failure to manage production to new order volumes and its capacity growth in its eastern provinces have both undermined prices in recent years." Bank of America, "Wood & Building Products Quarterly," at 11 (Nov. 2001).) (USA-5).

[6]USITC Report at 43-44.

[7]USITC Report at 39.

[8]USITC Report at 39, n.245.

respect to examination of other such factors. The ITC's determinations specifically reflect its consideration of other factors, including domestic supply, nonsubject imports, cyclical demand and housing construction cycles, North American integration, and other product substitutes to ensure that it did not attribute injury from other known causal factors to the subject imports. As the Commission determination reveals, the "other" factors identified by Canada in its First Written Submission either did not constitute a cause of either injury or threatened injury or did not do so at the same time as the subject imports.

13. The Commission's decision to cross-cumulate subsidized and dumped imports of softwood lumber from Canada in its consideration of whether the volume and price effects of subject imports threatened the domestic industry with material injury is also consistent with the covered Agreements. Canada's allegations that the Commission conducted combined antidumping and countervailing duty investigations and cross-cumulated Canadian imports of softwood lumber so as to more likely result in an affirmative determination in this case has no merit. Canada provides no basis to support its contention and fails to acknowledge that the ITC's consistent practice is to cumulate both subsidized and dumped imports from a single country for purposes of the Commission's injury analyses. More significantly, Canada has failed to explain to the Panel why it considers such practice to be inconsistent with obligations under the Antidumping and SCM Agreements, respectively, when Canada itself takes the identical approach in its own trade remedy proceedings, cross-cumulating subsidized and dumped imports.

14. In sum, Canada substantially distorts, primarily through omission, both the evidence that was before the Commission and the nature of its determinations. This failing particularly applies to the ITC present material injury analysis and findings. According to Canada's characterization, the ITC made a negative present material injury finding with no evidence nor subsidiary findings that would support an affirmative injury finding. This simply is not an accurate portrayal of the facts or findings, as briefly reviewed above.

15. Canada's mischaracterizations of the present material injury findings are central to Canada's case because it is dependent on the argument that there could be no threat of injury because there allegedly had been no present injurious effects and the Commission did not identify any imminent and abrupt change in the status quo. Canada's interpretation of the requirements for an affirmative threat determination fail utterly to recognize that threatened injury often comprises an evolution or progression of demonstrable adverse trends in trade that, if not prevented, likely will rise to present material injury. Canada instead contends that a threat determination can only be made on the basis of an abrupt, but clearly foreseeable, change in the status quo, *i.e.*, an event. However, the Appellate Body has consistently recognized that a determination on the existence of threat of injury must be based on projections extrapolating from existing data.[9] In so doing, it has affirmed that the existence of a threat of injury may be a

[9]*See US-Cotton Yarn*, AB Report, para. 77; *US-Lamb Meat*, AB Report, para. 136; *see also 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,

product of a continuation of adverse trade trends.

16. Finally, Canada seeks to have the Panel impose requirements on the Commission to make findings where the covered Agreements contain no such requirements. The covered Agreements require the Commission to "consider" several factors among other relevant economic factors in its threat analysis. Canada would have the Panel construe the term "consider" to mean "make findings" at least regarding certain issues/factors that Canada alleges are relevant to the Commission's determination. The covered Agreements do not require such findings. Nor have other GATT or WTO dispute settlement proceedings interpreted them as containing such requirements. To the contrary, they have stated that explicit findings regarding the enumerated factors in Article 3.7 of the Antidumping Agreement and Article 15.7 of the SCM Agreement are not necessary. Moreover, Canada fails to recognize that the Agreements state unmistakably that the determinations are to be made on the basis of the totality of the factors considered and that consideration, or any findings, regarding one specific factor is not necessarily dispositive.

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

II. STATEMENT OF THE FACTS

A. Institution and Preliminary Determination

18. In response to a petition filed on April 2, 2001 on behalf of the U.S. softwood lumber industry, the Commission instituted antidumping and countervailing duty investigations regarding imports of softwood lumber from Canada.[10]

19. After conducting a preliminary investigation, the Commission determined on May 16, 2001 that there was a reasonable indication that an industry in the United States was threatened with material injury by reason of imports from Canada of softwood lumber that were alleged to be subsidized by the Government of Canada and sold in the United States at less than fair value

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para. 10.173, n. 5032 ("*US-Steel Safeguards*").

[10]66 Fed. Reg. 18508 (April 9, 2001). (USA-4).

("LTFV").[11] [12] Contrary to Canada's characterization, it is clear from the Views of the Commission that its preliminary affirmative determinations were based on several statutory factors and not only the expiration of the Softwood Lumber Agreement ("SLA").[13]

20. The Department of Commerce ("Commerce") subsequently made affirmative preliminary and final determinations that imports of softwood lumber from Canada were subsidized and sold in the United States at LTFV. Commerce explicitly exempted imports of softwood lumber from the Maritime Provinces from its countervailing duty investigation and thus from its affirmative CVD determination.[14] However, there is no dispute that Commerce's affirmative final antidumping duty determination covered all softwood lumber imports from Canada, including from the Maritime Provinces.[15]

B. Commission's Final Determination

21. On May 16, 2002, the Commission unanimously determined that an industry in the United States was threatened with material injury by reason of imports of softwood lumber from Canada found to be subsidized and sold in the United States at LTFV.[16] On May 22, 2002, Commerce issued antidumping and countervailing duty orders on imports of softwood lumber

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[11]66 Fed. Reg. 28541 (May 23, 2001). (CDA-4).

[12]Under U.S. law, all preliminary antidumping or countervailing duty determinations are made on the basis of "a reasonable indication" of material injury or a threat of material injury. Canada's attempt to diminish the significance of those determinations by its suggestion that the "Commission found **only** that there is a reasonable indication" should be rejected. *See* Canada First Written Submission at para.18, n. 25 (emphasis added).

[13]USITC Pub. 3426 at 16-21 (May 2001)(CDA-5). For example, the Commission indicated that:

> Based on the record in the preliminary phase of these investigations, we find that subject imports from Canada were likely to increase substantially. This conclusion stems from several factors: the export-orientation of Canadian producers to the U.S. market; their projected increases in capacity, capacity utilization, and production; the elimination of the restraining effect of the SLA; and continued strong demand in the U.S. market. We also considered the increased level of imports from non-covered provinces during the pendency of the SLA, as well as the fact that imports of softwood lumber increased during the most recent period in which there were no restraints on their entry into the U.S. market (i.e., between 1994 and 1996).

Id. at 18.

[14]67 Fed. Reg. 15545, 15547 (April 2, 2002) (USA-1 at App. A.) and 66 Fed. Reg. 40228 (Aug. 2, 2001) (amendment to notice of initiation) (USA-1 at App. A). This exemption does not apply to softwood lumber products produced in the Maritime Provinces from Crown timber harvested in any other Province. Id.

[15]67 Fed. Reg. 15539 (April 2, 2002) (USA-1 at App. A).

[16]67 Fed. Reg. 36022 (May 22, 2002). (CDA-2).

from Canada.[17]

22. Canada presents the Panel with selective facts, and highly selective and argumentative statements pertaining to evidence it believes the Commission should have relied on, which it asserts would support a different determination than that reached by the Commission.

23. To support its challenge to the ITC's threat determinations, Canada portrays the ITC's present material injury finding as a negative with no subsidiary findings or evidence to support an affirmative finding. This simply is wrong. While Canada ignores the totality of the facts, the ITC appropriately did not. The ITC found, based on the facts as a whole, that the volume of imports was significant and thus supported an affirmative present material injury finding. However, while the subject imports had resulted in some price effects, the ITC recognized that excess supply of both imported and domestic products had contributed to price declines, particularly in 2000, and thus could not find that subject imports had had significant price effects.[18] The condition of the domestic industry, particularly its financial performance, had declined during the period of investigation as a result of the price declines. While the ITC found the domestic industry vulnerable to injury, it concluded that it could not find that subject imports had impacted the domestic industry, largely because it had not found that there were significant price effects.

24. The facts as a whole support the Commission's determinations that the domestic industry was threatened with material injury by reason of dumped and subsidized imports of softwood lumber from Canada. The United States presents below a summary of the Commission's determinations.

1. Like Product and Domestic Industry

25. In its final determinations, the Commission found a single domestic like product consisting of a continuum of softwood lumber products. The Commission found no clear dividing lines between certain species of softwood lumber (Western Red Cedar and Eastern White Pine) and other softwood lumber, and it found no clear dividing lines between certain remanufactured products (square-end bedframe components and flangestock) and other softwood lumber.[19] Based on the domestic like product determination, the Commission concluded that

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[17]67 Fed. Reg. 36068-36077 (May 22, 2002). (CDA-2).

[18]Canada makes a number of other misstatements regarding price. First, Canada implies that the pricing data showed no evidence of underselling, when the fact is the Commission determined, as agreed to by all parties to the proceeding, that making direct cross-species price comparisons in order to access underselling was inappropriate. Second, while the Commission recognized that excess supply provided by both Canadian and U.S. producers contributed to the decline in prices in 2000, the evidence also demonstrated that the U.S. producers then brought their production in balance with demand but the Canadian producers had not.

[19]USITC Report at 3-15.

there was a single domestic industry, which included all producers of softwood lumber in the United States.[20] [21]

2. Conditions of Competition

26. The Commission found that several conditions of competition pertinent to the softwood lumber industry were relevant to its analysis.[22] In particular, these conditions included the recently expired US/Canada Softwood Lumber Agreement ("SLA"); demand, including factors affecting demand, actual demand data and forecasts; supply conditions; species of lumber and substitutability; prices; and integration of the North American lumber market.

27. **SLA.**[23] The SLA, which remained in effect for five years (from April 1996 to March 2001), restrained imports of softwood lumber from Canada through quota-fee limitations. The Commission recognized the SLA as a significant condition of competition in its injury analysis during the period of investigation, consistent with prior Commission practice.[24] Moreover, the Commission reaffirmed that it did not consider the representations concerning the agreement's purpose[25] made by the domestic producers in side letters to the agreement as per se binding on the Commission's analysis, nor did it find the stated purpose of the SLA as legally binding on the Commission's injury analysis in these investigations.[26]

28. The SLA was in effect from April 1996 through March 2001 and the petitions in these investigations were filed on April 2, 2001. The Commission recognized that softwood lumber imports from Canada have been subject to either the SLA, or the pendency of the petition, during the entire period of these investigations. Under these circumstances (*i.e.*, trade restricting agreement and pendency of the petition), where appropriate the Commission examined public

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[20]USITC Report at 18-19.

[21]After considering the evidence regarding a number of firms that were potentially subject to exclusion as related parties, the Commission found that appropriate circumstances did not exist to exclude any of these firms from the domestic industry. Petitioners and Canadian exporters (CLTA) urged the Commission to consider related parties as a condition of competition rather than as a related parties issue. USITC Report at 16-17, n. 80.

[22]USITC Report at 21-27.

[23]USITC Report at 21-22.

[24]*See, e.g.*, USITC Pub. 3426 at 13, n.59 (CDA-5); Uranium from Kazakhstan, Inv. No. 731-TA-539A (Final), USITC Pub. 3213 at 12-13 (July 1999) (a suspension agreement); Honey from China and Argentina, Inv. No. 701-TA-402 and & 731-TA-892-893 (Final), USITC Pub. 3470 at 17 (Nov. 2001) (suspension agreement with China).

[25]The Commission was not a party to, and played no role in the negotiation of, the SLA.

[26]USITC Pub. 3426 at 13 (May 2001). (CDA-5)

data for periods outside the traditional period of investigation, particularly that pertaining to the earlier time under the SLA as well as prior to the SLA taking effect in 1996 (*i.e.*, a period when Canadian imports were not subject to restrictions or ongoing investigation/litigation) to provide historical perspective for the 1999-2001 period covered by these investigations.[27]

29. **Demand.**[28] The ITC characterized the evidence regarding demand conditions in the future as indicating that demand would remain relatively stable or slightly increase. Canada's assertion that the ITC found the forecasts were for substantial growth or "a" change in circumstances is incorrect.[29]

30. The Commission recognized that while U.S. consumption of softwood lumber had remained relatively stable during the period of investigation, it had increased above the level of the preceding years.[30] Apparent domestic consumption was 13.1 percent higher in 2001 compared with 1995. Even with this increase, apparent domestic consumption of softwood lumber did not keep pace with its primary end use, new residential construction, which increased by 18.3 percent from 1995 to 2001.[31]

31. The Commission found that most producers and importers indicated in response to Commission questionnaires that they believed overall demand would remain relatively stable until the second half of 2002 or the beginning of 2003, and then would begin to increase as the U.S. economy rebounded from recession.[32] Industry forecasts suggested slight growth in U.S. housing starts in 2002 and further increases in 2003.[33] Based on the evidence of record, the

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[27]We note that in five-year review investigations the Commission considers facts regarding the period prior to imposition of an order or suspension agreement so as to consider a period when no trade restraining effects were in place.

[28]USITC Report at 22-24. The issue of demand for softwood lumber is addressed in more detail in Section IV.C2a(i) in response to arguments raised by Canada.

[29]As discussed below, Canada's mischaracterization of the magnitude of demand projections plays a central role in its speculative theory regarding the effects of improvements in U.S. demand on the domestic industry and imports. This theory, however, is not supported by the facts.

[30]USITC Report at Table IV-2.

[31]USITC Report at IV-3 and Table IV-6.

[32]USITC Report at II-3. While U.S. housing starts increased in January and February of 2002 to the highest levels for single-family starts in over 20 years, they then fell by 7.8 percent in March 2002 to the lowest level in two years. Id. at n.10.

[33]Industry analyst RISI forecast U.S. housing starts to increase by 4.3 percent from 1.61 million units in 2001 to 1.68 million units in 2002, and then further increase by 1.8 percent to 1.71 million units in 2003. Petitioners' Posthearing Brief, Vol. II, Appendix H Exhibit 28 at 3 (Table 2) (USA-5); CLTA's Posthearing Brief, Vol. 2, Tab R at 1-3 (USA-6); CLTA's Prehearing Brief, Vol. 3, Tab 1 at 1 and 2 (USA-7).

Commission found that lumber consumption was forecast to either remain flat or increase slightly in 2002, followed by increases in 2003.[34]

32. The Commission found that demand for softwood lumber is derived primarily from demand for construction uses, including new home construction, repairs and remodeling, and commercial construction (respectively accounting for 38 percent, 30 percent, and 14 percent of demand in 2000).[35] The evidence showed that softwood lumber accounts for a fairly small share of the total cost of its primary end-use, house construction.[36]

33. The evidence demonstrated that demand for softwood lumber also is impacted by other factors, such as substitute products and seasonality.[37] The Commission found that while these substitute products had increased in importance over the last few years, they still accounted for a small share of the market traditionally utilizing softwood lumber.[38]

34. **Supply**.[39] The Commission recognized that while the supply of softwood lumber available to the U.S. market declined during the period of investigation after reaching a peak in 1999, both domestic and Canadian producers increased production from 1995 to 2001 through improvements in capacity utilization and/or expansion of production capacity.[40] [41] The Commission acknowledged that apparent domestic consumption exceeded domestic production capabilities and thus that some imports are required in the U.S. market to satisfy demand. Subject imports of softwood lumber from Canada accounted for 33.2 percent of apparent

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[34]CLTA's Posthearing Brief, Vol. 2, Tab R at 1-3 (USA-6); CLTA's Prehearing Brief, Vol. 3, Tab 1 at 1 and 3 (USA-7); Petitioners' Posthearing Brief, Vol. II, Appendix H, Exhibit 28 at 5 (Table 3) (USA-5).

[35]USITC Report at Table I-1. These end use demands for softwood lumber are affected by such factors as the general strength of the overall U.S. economy (measured by the growth of GDP), with residential construction also affected by the level of long-term and home mortgage interest rates. USITC Report at II-4; CLTA's Prehearing Brief, Vol. 2, at 9-10 (USA-7).

[36]USITC Report at II-5 and II-10. Overall U.S. demand for softwood lumber is likely to experience small to moderate changes in response to changes in price. Id. at II-3 and II-10.

[37]Demand for softwood lumber also is somewhat seasonal, with the highest building activity generally occurring between March and September. USITC Report at II-3.

[38]A number of products, such as engineered wood products (EWPs), steel studs for framing, brick and block for exterior uses, and composites and plastic resins for decking and fencing, may substitute for softwood lumber. USITC Report at II-4; Petitioners' Prehearing Brief at 40-44 (USA-8); Petitioners' Posthearing Brief at Appendix A-28 - A-33 (USA-5).

[39]USITC Report at 24-25.

[40]USITC Report at Tables III-6 and III-7.

[41]USITC Report at Tables VII-1 and VII-2.

domestic consumption in 1999, 33.6 percent in 2000, and 34.3 percent in 2001.[42] The Commission also considered whether nonsubject imports were present in the U.S. market during the period of investigation, and found that they never exceeded 3 percent of apparent domestic consumption.[43]

35. **Species and Substitutability**.[44] In the United States, the leading species, or species groups, of softwood lumber produced are southern yellow pine ("SYP"),[45] Douglas fir and hem-fir lumber. In addition, a variety of other lumber species, including ponderosa pine, spruce-pine-fir ("SPF"), western red cedar ("WRC") and redwood are produced.[46] In Canada, SPF is the predominant species of softwood lumber, followed next by hem-fir and Douglas fir lumber, and then by a variety of other lumber species.[47]

36. The parties disagreed regarding the level of substitutability between subject imports and the domestic like product, in particular whether there is species segmentation by application, region of the country, or builder preferences. Canada has implied that the Commission and its staff disagreed on substitutability; they did not. After considering the record, the Commission found on balance that subject imports of softwood lumber from Canada are at least moderately substitutable for domestically-produced softwood lumber.[48]

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[42]USITC Report at Table IV-2.

[43]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; as a share of apparent domestic consumption, nonsubject imports increased from 1.7 percent in 1999 to 2.6 percent in 2001. Nonsubject imports accounted for 6.9 percent of total U.S. imports of softwood lumber in 2001. USITC Report at II-7, n.23 and Tables IV-1 and C-1.

[44]USITC Report at 25-26.

[45]The evidence indicates that approximately one-half of domestically-produced southern yellow pine is pressure-treated. Petitioners' Posthearing Brief at 4, n.22 (USA-5); Petitioners' Final Comments at 11 (USA-9).

[46]In the United States, the leading species, or species groups, of softwood lumber produced are SYP (45.2 percent in 2000), Douglas fir (22.7 percent) and hem-fir (12.5 percent) lumber. USITC Report at Table III-11.

[47]In Canada, SPF is the predominant species of softwood lumber (84.6 percent in 2001), followed next by hem-fir (6.6 percent) and Douglas fir (3.7 percent) lumber, and then by a variety of other lumber species. USITC Report at Table VII-6.

[48]*See* USITC Report at II-5-8, and II-10. The Commission recognized, consistent with prior investigations, that Canadian softwood lumber and the domestic like product generally are interchangeable, notwithstanding differences in species and preferences. *See, e.g.*, Softwood Lumber from Canada, Inv. No. 701-TA-312 (Final), USITC Pub. 2530 at 28-29, and 34 ("Softwood Lumber III") (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).

37. Moreover, in spite of the arguments by parties opposing the investigations, the evidence demonstrated that subject imports and domestic species were used in the same applications.[49] 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.[50] 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.[51] This was demonstrated in evidence provided by builders and purchasers at the Commission's hearing.[52]

38. **Prices**.[53] Softwood lumber prices, which can fluctuate considerably, depend on a number of factors, including seasonal demand patterns, access to timber supplies, weather, the strength of competition among various lumber species within a particular region, and expected future market conditions.[54] With a large number of suppliers and purchasers, and a multiplicity of daily transactions, the record indicated that prices respond quickly to changing conditions and that individual producers generally are price-takers in this highly competitive market.

39. The Commission recognized that softwood lumber prices vary depending on grades and dimensions, and may differ by the species and applications involved, with better grades and wider dimensions usually commanding higher prices than lower grades and narrower dimensions.[55] Parties disagreed about the extent to which preferences transcend differences in prices among the species. However, the evidence in these investigations demonstrated that prices

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[49]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. USITC Report at II-6, II-8, and Table II-5; Petitioners' Prehearing Brief, Vol. II at Exhibit 85 (USA-5).

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

[51]USITC Report at II-7-8, V-2 - V-4.

[52]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); USITC 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).

[53]USITC Report at 26-27.

[54]USITC Report at V-3 and V-4.

[55]USITC Report at V-3 and V-4.

of different species had an effect on other species' prices.[56] The effect of the price and availability of one species on another is evident in the reports in industry publications.[57] In response to Commission questionnaires, price and availability were cited second most frequently after quality as among the top three factors in purchasing decisions.[58] Moreover, a majority of purchasers reported that U.S. softwood lumber and Canadian softwood lumber are generally used in the same applications.[59]

40. **Integration of North American Lumber Market**.[60] Finally, the Commission recognized that U.S. and Canadian producers had invested considerably in mills across the border from their parent operations and that there had been substantial and increasing integration in the North American lumber market.[61] As discussed in more detail in its related parties analysis, the Commission noted that U.S. producers import or purchase a sizable volume of subject imports.[62]

3. ITC Finding on Material Injury By Reason of Subject Imports

41. The Commission determined that the domestic softwood lumber industry was not materially injured by reason of subject imports from Canada found to be sold at LTFV and to be subsidized, but found that the evidence demonstrated the existence of a threat of material injury by reason of such imports.

42. **Volume of the Subject Imports**.[63] The Commission found that the large volume of

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[56]*See, e.g.*, Petitioners' Posthearing Brief at Appendix C-5 and Appendix D-3 (USA-5); Petitioners' Prehearing Brief at Appendix C (USA-8).

[57]*See, e.g.*, Random Lengths ("Prices took the biggest hits in Canadian SPF, and producers of Western species had to follow suit to stay competitive." Lumber Market Report at 4, Oct. 19, 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; "Western and Eastern S-P-F were the leaders, pulling other dry species along." at 4, Feb. 2, 2001; "In the South, truss and manufactured home builders substituted the narrows of Southern Pine for Spruce." at 4, Aug. 17, 2001); Wickes ("Pine mills experienced mixed results as some S-P-F truss buyers continued to switch to SYP and, except for 2x4 and 2x8, the pace of sales slowed from last week." Aug. 27, 2001; "Wide widths were in the highest demand especially in hem-fir where buyers looked for S-P-F substitutes." Dec. 17, 2001). Petitioners' Prehearing Brief at Appendix C (USA-8).

[58]USITC Report at Table II-3.

[59]USITC Report at II-6.

[60]USITC Report at 27.

[61]USITC Report at III-6.

[62]USITC Report at IV-2.

[63]USITC Report at 32.

subject imports both in absolute terms and relative to consumption in the United States was significant, and thus supported an affirmative present material injury finding if combined with evidence of significant price and impact effects. Subject imports held at least a one-third share in the U.S. market throughout the period of investigation. The Commission also found that the volume of imports of softwood lumber from Canada increased during the period of investigation, while their total value declined.[64] The volume of subject imports by quantity was 2.8 percent higher in 2001 compared with 1999. The value of subject imports declined by 16 percent from 1999 to 2001. The market share of imports of softwood lumber from Canada increased from 33.2 percent in 1999 to 34.3 percent in 2001.[65]

43. **Price Effects of the Subject Imports**.[66] In evaluating the price effects of the subject imports, the Commission found that there was at least a moderate degree of substitutability between subject imports of softwood lumber from Canada and the domestic like product. Specifically, the record indicated that prices of a particular species would affect the prices of other species, particularly those that are used in the same or similar applications.

44. Nevertheless, because of the nature of this market, the Commission recognized that direct price comparisons between domestic products and subject imports were problematic, whether based on questionnaire[67] or public data.[68] Although prices of one species affect those of others, the Commission noted that absolute price levels differ, making direct cross-species comparisons inappropriate for purposes of its underselling analysis.[69] Thus, the Commission concluded that it could not determine, based on this record, whether there has been significant underselling by

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[64]USITC Report at 32. The volume of imports of softwood lumber from Canada increased from 17,983 mmbf in 1999 to 18,483 mmbf in 2001. The value of subject imports decreased from $7.1 billion in 1999 to $6.0 billion in 2001. USITC Report at Tables IV-1 and C-1.

[65]USITC Report at Tables IV-2 and C-1. While relatively small in volume, the evidence showed that nonsubject imports also increased market share during the period of investigation from 1.7 percent in 1999 to 2.6 percent in 2001. Consequently, the market share of domestic producers declined from 65.0 percent in 1999 to 63.1 percent in 2001. Id.

[66]USITC Report at 32-35.

[67]USITC Report at 33.

[68]USITC Report at V-11 - V-12 and Tables V-3 - V-5.

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

subject imports.[70]

45. The Commission found, however, that both the questionnaire and public data on the record permitted it to analyze price trends.[71] In evaluating Random Lengths data, the Commission found that prices of both the domestically-produced and imported Canadian softwood lumber products increased through the second or third quarters of 1999, before falling substantially through the third and fourth quarters of 2000 to their lowest point for the 1999-2001 period.[72] Prices during the first quarter of 2001 rose somewhat or remained near their levels in the fourth quarter of 2000, then significantly increased in mid-2001 before declining again in the third and fourth quarters of 2001.[73]

46. The Commission recognized, and public sources generally confirmed,[74] that the price declines, particularly in 2000, were the result of too much supply in a market with high, but relatively stable, demand. Despite near record consumption of softwood lumber,[75] prices generally fell through 2000. The evidence indicated that both subject imports and the domestic producers contributed to the excess supply, and thus the declining prices.[76] The Commission concluded that subject imports had *some* effect on prices for the domestic like product during the period of investigation, in particular due to their large share of the market. However, particularly in light of relatively stable market share maintained by subject imports over the period of

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[70]The Commission noted that most domestic producers responding to the Commission's questionnaires were unable to document lost sales or lost revenue allegations, and the Commission was unable to confirm any of the nineteen lost sales or twenty-three lost revenue allegations contained in the petitions. USITC Report at V-13 - V-14, and Tables V-6 and V-7.

[71]In particular, the pricing information for softwood lumber published in Random Lengths, the source the industry most cited throughout this investigation as a pricing guide, was useful for this purpose. USITC Report at V-4-5.

[72]For example, the price of SYP fell 32.9 percent, from a peak of $434/mbf in the third quarter 1999 to a low of $291/mbf in the fourth quarter 2000. The price of WSPF (a product mostly imported from Canada) fell 39.3 percent, from a peak of $336/mbf in the second quarter 1999 to $204/mbf in the fourth quarter 2000. USITC Report at Tables V-1 and V-2.

[73]USITC Report at V-11, Tables C-1, V-1 and V-2, and Figures V-3 - V-5. *See also* Petitioners' Posthearing Brief, Appendix G at Chart 13 (USA-5).

[74]*See, e.g.*, Random Lengths, at 2 (Mar. 31, 2000); RISI Lumber Commentary, at 1 and 10 (June 2000); Forest Products Monthly (December 2000). CLTA's Posthearing Brief, Vol. 2, Tab A at 7-10 (USA-6).

[75]USITC Report at Tables C-1 and IV-6.

[76]The Commission referred to the evidence in the record and also provided numerous examples in notes 212, 214 and 217 of the Views of the Commission. (USA-1). *See also, e.g.*, CLTA's Prehearing Brief, Vol. 3, Exh. 28 at 19 and 20 (USA-7); CLTA's Posthearing Brief, Vol. 2, Tab A at 11 (USA-6); Hearing Transcript at 126 (USA-11) ("We had so much lumber because we were geared up, and 200[0] came. . . ."); Petitioners' Posthearing Brief at 2 and Appendix H, Exh. 2 at 11 (USA-5).

investigation, the Commission concluded from this record that the subject imports had not had a *significant* price effect during the period of investigation.

47. **Impact of the Subject Imports on the Domestic Industry**.[77] In examining the impact of the subject imports on the domestic industry, the Commission found that the record indicated deterioration in the domestic industry's overall condition, and in particular in its financial performance, over the period of investigation.[78] The Commission noted that the record reflected the fact that many performance indicators declined significantly from 1999 to 2000, and then declined slightly or stabilized from 2000 to 2001. Subject import volume and market share, however, increased by a greater amount in 2001 than in 2000. The Commission found that the deterioration in the condition of the domestic industry during the period of investigation is largely the result of substantial declines in price. In light of its finding that subject imports had not had a significant price effect, and in light of the small increase in their market share, the Commission concluded that subject imports did not have a significant impact on the domestic industry.

4. Threat of Material Injury by Reason of Subject Imports

48. The Commission determined that the domestic softwood lumber industry was threatened with material injury by reason of subject imports of softwood lumber from Canada that are subsidized and sold at less than fair value.[79]

49. As an initial matter, the Commission found that the domestic industry producing softwood lumber was vulnerable to injury in light of declines in its performance over the period of investigation, particularly its financial performance.[80] In considering the evidence regarding production factors, the Commission found that it demonstrated declines in domestic production, slight declines in capacity utilization and that domestic production capacity was fairly stable during the period of investigation, following a small but steady increase between 1995 and 1999.[81] The evidence showed that domestic producers' U.S. shipments declined by quantity and

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[77]USITC Report at 36-37. The Commission considered the "magnitude of the dumping margin" in an antidumping proceeding as part of its consideration of the impact of imports. Id. at 36, n.220. Letter to Chairman Koplan from Commerce Deputy Assistant Secretary Bernard T. Carreau regarding Correction of Ministerial Errors in the final determination of sales at less than fair value and attached memorandum, at 18, dated April 25, 2002 (USA-13).

[78]USITC Report at Tables IV-1 and C-1.

[79]USITC Report at 37-44.

[80]USITC Report at 37-38.

[81]USITC Report at Tables III-6 and C-1 (public data). The Commission considered both public data and domestic producers' questionnaire responses (covering approximately 63 percent of domestic production).

value, and that their share of apparent domestic consumption also decreased from 1999 to 2001.[82] The end-of-period inventories reported by the domestic industry fluctuated between years, but increased overall by 6.2 percent from 1999 to 2001.[83] The domestic industry's production workers, hours worked, and wages paid declined from 1999 to 2001, while productivity and hourly wages improved, and unit labor costs declined during the period of investigation.[84]

50. With respect to the domestic industry's financial performance, the Commission found that the record in these investigations also generally showed declines during the period of investigation, with a dramatic drop from 1999 to 2000 as prices declined.[85] The domestic industry's unit net sales value decreased from 1999 to 2001 with the largest decrease occurring from 1999 to 2000.[86] While unit cost of goods sold declined throughout the period of investigation,[87] unit net sales value fell by a greater amount, and the ratio of operating income to net sales fell from 14.3 percent in 1999 to 1.3 percent in 2001.[88] Total operating income declined from 1999 to 2001, and over $1 billion of that decline occurred in one year, from 1999 to 2000.[89] Net income as a share of net sales and total net income followed similar trends.[90] The domestic industry's capital expenditures fluctuated between years but decreased overall from 1999 to 2001.[91]

51. The Commission also recognized that between 1999 and 2001, the number of domestic mills decreased from 795 to 779, down from 816 in 1995.[92] The Commission acknowledged that the parties disagreed about the reasons for the decline in the number of U.S. mills, but found that the record reflected that at least some of the mill closures were due to conditions in the U.S.

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[82]USITC Report at Tables III-13, IV-2, and C-1 (public data).

[83]USITC Report at Tables III-16 and C-1.

[84]USITC Report at Table III-19 and C-1.

[85]USITC Report at 38-39.

[86]USITC Report at Tables VI-1 and C-1. The domestic industry's unit net sales value decreased from $416.48 in 1999 to $362.05 in 2000, and decreased again to $344.46 in 2001. Id.

[87]Unit cost of goods sold decreased from $342.39 in 1999 to $339.79 in 2000 and decreased again to $324.69 in 2001. USITC Report at Tables VI-I and C-1.

[88]USITC Report at Tables VI-1 and C-1.

[89]USITC Report at Tables VI-1 and C-1.

[90]USITC Report at Tables VI-1 and C-1.

[91]USITC Report at Table VI-11.

[92]USITC Report at Table III-2.

market.[93]

52. **Countervailable subsidies**. The Commission considered the "nature of the subsidy" in its threat of material injury analysis in the countervailing duty investigation, pursuant to U.S. statutory laws.[94] The Commission noted in its final countervailing duty determination that Commerce determined there were 11 programs that conferred countervailable subsidies to Canadian producers and exporters of softwood lumber,[95] including: the Provincial Stumpage programs in the Provinces of Quebec, British Columbia, Ontario, Alberta, Manitoba, and Saskatchewan; two programs administered by the Government of Canada;[96] two programs administered by the Province of British Columbia;[97] and one program administered by the Province of Quebec.[98] [99]

53. **Subject Import Volume/Canadian Capacity**.[100] The Commission found that subject imports were likely to increase substantially based on several factors: Canadian producers' excess capacity and projected increases in capacity, capacity utilization, and production; the export orientation of Canadian producers to the U.S. market; the increase in subject imports over the period of investigation; the effects of expiration of the SLA; subject import trends during periods when there were no import restraints; and forecasts of strong and improving demand in the U.S. market.

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[93]USITC Report at 39 and Tables II-3 and Appendix G; Petitioners' Prehearing Brief at 61-62, 87-89, and Exh. 38 (USA-8); Petitioners' Posthearing Brief at Appendix A-1 - A-5 and Appendix H, Exh. 3 (USA-5); CLTA's Posthearing Brief at Vol. 2, Tab D, Attachment 1, and Vol. 3 (USA-6).

[94]19 U.S.C. §§ 1677(7)(E)(i) and 1677(7)(F)(i)(I).

[95]As discussed in more detail below, the Commission considered CLTA's argument regarding the stumpage subsidy, but found that the economic theory presented by CLTA was not clearly applicable in this market. USITC Report at 39, n.245.

[96]The subsidies include: Non-Payable Grants and Conditionally Repayable Contributions from the Department of Western Economic Diversification; and Federal Economic Development Initiative in Northern Ontario (FedNor).

[97]The subsidies include: Grants provided from Forest Renewal B.C.; and Job Protection Commission.

[98]Private Forest Development Program.

[99]USITC Report at 39. Issues and Decision Memorandum from Bernard T. Carreau to Faryar Shirzad (Mar. 21, 2002) (appended to final Commerce CVD determination) (USA-2); *see also* 67 Fed. Reg. 15545, 15548 (April 2, 2002) (USA-1 at App. A); Letter to Chairman Koplan from Commerce Deputy Assistant Secretary Bernard T. Carreau regarding Correction of Ministerial Errors in the final countervailing duty determination and attached memorandum, dated April 25, 2002 (USA-3) The Commission also noted that none of the subsidies identified by Commerce are subsidies described in Article 3 or 6.1 of the SCM Agreement. USITC Report at 39, n.249.

[100]USITC Report at 40-43.

54. **Price**.[101] The Commission found that for purposes of its analysis of the likely price effects of subject imports from Canada in these investigations, there was a moderate degree of substitutability between subject imports of softwood lumber from Canada and the domestic like product, and that prices of different species affected the prices of other species.[102] During the period of investigation, prices for softwood lumber declined substantially, particularly in 2000, due to excess supply in a price sensitive U.S. market with relatively stable demand.[103]

55. Prices for softwood lumber increased in mid-2001, at a time of considerable uncertainty in the market due to the expiration of the SLA and the filing of the petitions at issue in this case.[104] Prices, however, began to decline in the third quarter of 2001 and fell substantially in the fourth quarter of 2001 to levels as low as those in 2000 while demand, considered on a seasonal basis, remained relatively stable. The Commission recognized that strong demand over the period of investigation (demand remained relatively stable at historically high levels) did not prevent substantial declines in prices for softwood lumber. The Commission found that demand for softwood lumber was forecast to remain relatively stable or increase slightly in 2002, followed by increases in 2003.[105]

56. The Commission recognized that subject imports maintained a significant share of the U.S. market, accounting for at least one-third of apparent consumption in each year during the period of investigation. This substantial volume of subject imports had had some effect on prices, but the record did not lead the Commission to find significant *present* price effects. However, the Commission concluded that the additional subject imports would increase the excess supply in the market, putting further downward pressure on prices. Given the Commission's finding of likely significant increases in subject import volumes, and its finding of at least moderate substitutability between subject imports and domestic product, the Commission concluded that subject imports were likely to have a significant price depressing effect in the immediate future. Therefore, the Commission found that subject imports from Canada were entering at prices that were likely to have a significant depressing or suppressing effect on

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[101]USITC Report at 43-44.

[102]*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; "Western and Eastern S-P-F were the leaders, pulling other dry species along." at 4, Feb. 2, 2001). Petitioners' Prehearing Brief at 13 and Appendix C (USA-8).

[103]USITC Report at Tables V-1 and V-2, and Figures V-3 - V-5.

[104]*See, e.g.*, Petitioners' Posthearing Brief at Appendix B-18 - B-19, and Appendix H, Exh. 7 (USA-5).

[105]USITC Report at II-4; CLTA's Posthearing Brief, Vol. 2, Tab R at 1-3 (USA-6); Petitioners' Posthearing Brief, Vol. II, Appendix H, Exhibit 28 at 3 (Table 2) and 5 (Table 3) (USA-5).

domestic prices, and were likely to increase demand for further imports.

57. **Other Factors**. The Commission recognized that while inventories generally were not substantial in the softwood lumber industry, Canadian producers' inventories as a share of production had increased and were consistently higher than that reported by U.S. producers during the period of investigation.[106] Finally, the Commission noted that a number of domestic producers had reported actual and potential adverse effects on their development and production efforts, growth, investment, and ability to raise capital due to subject imports of softwood lumber from Canada.[107]

58. **Conclusion**. Based on the record in these investigations, the Commission determined that further significant increases in dumped and subsidized imports were imminent, that these imports were likely to exacerbate price pressure on domestic producers, and that material injury to the domestic industry would occur. 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.[108]

III. STANDARD OF REVIEW

59. This dispute is covered by both the standard of review set forth in Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU")[109] and the special standard of review for disputes arising under the Antidumping Agreement, set forth in Article 17.6 of that Agreement.

60. Canada correctly recognizes that, in considering the relationship of Article 17.6 of the Antidumping Agreement to Article 11 of the DSU, the Appellate Body has indicated that these provisions are complementary or supplementary.[110] Canada, however, ignores the Appellate Body's explicit statements that neither of these articles permits, let alone requires, a Panel to conduct a *de novo* review of the evidence or to substitute the Panel's conclusions for those of the

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[106]USITC Report at 44 and Tables III-16 and VII-2.

[107]USITC Report at Appendix G.

[108]USITC Report at 44.

[109]*United States-Imposition of Countervailing Duties on Certain Hot-rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, Appellate Body Report, WT/DS138/AB/T, adopted 7 June 2000, para. 51 ("*US-Lead and Bismuth Steel*").

[110]*See* Canada First Written Submission, para. 57.

competent authority.[111] Instead, Canada repeatedly, whether implicitly or explicitly, requests the Panel to reweigh the evidence and decide the case *de novo*. Canada invites the Panel to displace the Commission's evidentiary judgment and substitute Canada's view of the evidence for that of the Commission. The Appellate Body, however, has consistently recognized that the applicable provisions proscribe such review by the Panel.[112]

A. Article 11 of the DSU and Article 17.6 of the Antidumping Agreement

61. Article 11 of the DSU provides that ". . . a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements. . . ."

62. Article 17.6 of the Antidumping Agreement provides that

> (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
>
> (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

B. Objective Assessment Is Not *De Novo* Review

63. The Appellate Body has explained that when a panel makes an "objective assessment" it is not to conduct a *de novo* review of the underlying information nor substitute its analysis for that of the national investigating authority. Article 17.6(i) of the Antidumping Agreement provides explicit guidance to the Panel that it is not to substitute its analysis for that of the ITC if

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[111] *See European Communities Measures Concerning Meat and Meat Products (Hormones)*, Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, para. 117 ("*EC-Hormones*"); *US-Cotton Yarn*, AB Report, para. 74; *see also United States - Measures affecting Import of Softwood Lumber from Canada* ("*Softwood Lumber*), SCM/162, BISD40S/358, adopted 27-28 October 1993, para. 335 ("[T]he Panel was not to conduct a *de novo* review of the evidence relied upon by the United States authorities or otherwise to substitute its judgment as to the sufficiency of the particular evidence considered by the United States authorities.").

[112] *See US-Cotton Yarn*, AB Report, paras. 71 and 74; *Argentina-Safeguard Measures on Imports of Footwear*, Appellate Body Report, WT/DS121/AB/R, adopted 12 January 2000, para. 121, n. 41 ("*Argentina-Footwear*"); *US-Lamb Meat*, AB Report, para. 106, n. 41; s*ee also Korea-Dairy*, Panel Report, para. 7.30.

the ITC's establishment of the facts was proper and its evaluation of the facts was unbiased and objective. Similarly, the Appellate Body has also explained that, under Article 11 of the DSU, a panel's role is not to substitute its analysis for that of the investigating authority.[113] Notwithstanding these well-established propositions, Canada improperly urges the Panel to engage in what effectively would be a *de novo* review of the underlying facts in the ITC's investigation.

64. Canada attempts to find support in the Appellate Body's statement in *US-Hot-Rolled Steel* that an assessment of the facts "in our view, clearly necessitates an active review or examination of the pertinent facts."[114] However, far from supporting the concept that the role of the panel is to conduct a *de novo* review or to substitute its analysis for that of the competent authority, the statement from *US-Hot-Rolled Steel* is simply another way of stating that the role of the panel is not to simply accept, or to totally defer to, the conclusions of the national authorities.

65. In *EC-Hormones*, the Appellate Body observed that it was not appropriate for a panel to engage in either *de novo* review or total deference to competent authorities. It stated:

> So far as fact-finding by panels is concerned, their activities are always constrained by the mandate of Article 11 of the DSU: the applicable standard is neither *de novo* review as such, nor "total deference", but rather the "objective assessment of the facts". Many panels have in the past refused to undertake *de novo* review, wisely, since under current practice and systems, they are in any case poorly suited to engage in such a review. On the other hand, "total deference to the findings of the national authorities", it has been well said, "could not ensure an 'objective assessment' as foreseen by Article 11 of the DSU".[115]

66. In making an "objective assessment" of the matter, the Appellate Body has stated that a panel is to consider whether the national "authorities had examined all the relevant facts and had provided a reasoned explanation of how the facts supported their determination."[116]

67. More specifically, with respect to disputes involving a determination made by a domestic

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[113] *See US-Cotton Yarn*, AB Report, para. 74; *US-Lamb Meat*, AB Report, para. 106.

[114] *United States-Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan*, Appellate Body Report, WT/DS184/AB/R, adopted 23 August 2001, para. 55 ("*US-Hot-Rolled Steel*").

[115] *EC-Hormones*, AB Report, para. 117 (footnotes omitted); *see also US-Cotton Yarn*, AB Report, para. 69, n.42 ("We wish to emphasize that, although panels are not entitled to conduct a *de novo* review of the evidence, nor to *substitute* their own conclusions for those of the competent authorities, this does *not* mean that panels must simply *accept* the conclusions of the competent authorities."), *citing to US-Lamb Meat*, AB Report, para. 106.

[116] *Argentine-Footwear*, AB Report, para. 121; *see also US-Lamb Meat*, AB Report, paras. 102-108.

authority based upon an administrative record, the Appellate Body, in *US-Cotton Yarn*, summarized:

> [P]anels must examine whether the competent authority has evaluated all relevant factors; they must assess whether the competent authority has examined all the pertinent facts and assessed whether an adequate explanation has been provided as to how those facts support the determination; and they must also consider whether the competent authority's explanation addresses fully the nature and complexities of the data and responds to other plausible interpretations of the data. **However, panels must not conduct a *de novo* review of the evidence nor substitute their judgement for that of the competent authority.**[117]

68. This statement describes the approach to review of an administrative record under the Agreement on Textiles and Clothing. The United States does not disagree that this type of approach should also be applied to the Antidumping Agreement and the SCM Agreement. However, the United States underscores the importance of reading the entire explanation, not just selected portions. Canada, in quoting from *US-Cotton Yarn*, omits the last sentence, in which the Appellate Body recalled that panel's must not engage in *de novo* review or substitute their judgment for that of the investigating authority.[118] Canada also fails to acknowledge that the Appellate Body describes the panel's role as one of evaluating a competent authority's acts rather than directly evaluating the underlying facts.

69. In its first written submission, Canada tends to blur the distinction between the functions of a panel and the functions of an investigating authority. For example, Canada relies on the statement of the panel in *Egypt-Definitive Anti-dumping Measures on Steel Rebar from Turkey* that *in that case* it was necessary to undertake "*a detailed review of the evidence*" submitted to the investigating authority.[119] Canada ignores the panel's qualification that such a review was necessary "*in light of the facts of [that] case*," incorrectly suggesting the existence of a rule of general applicability.[120]

70. While Canada selectively quotes from the Appellate Body Reports for *US-Hot-Rolled Steel* and *Thailand-Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, and the Panel Report for *Korea-Dairy*, Canada ignores the Appellate Body's clear statement in *US-Hot-Rolled Steel* regarding the distinction between the

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[117] *US-Cotton Yarn*, AB Report, para. 74 (emphasis added).

[118] Canada First Written Submission, para. 47.

[119] Canada First Written Submission, para. 56, *quoting Egypt-Definitive Anti-dumping Measures on Steel Rebar from Turkey*, Panel Report, WT/DS211/R, adopted 1 Oct. 2002, para. 7.14 *("Egypt-Rebar").*

[120] *Egypt-Rebar*, Panel Report, paras. 7.8 - 7.14.

respective roles of the panel and the investigating authority,[121] and the fact that panels must not substitute their evaluation of facts for the investigating authority's evaluation.[122]

71. The Appellate Body has recognized that it is for the investigating authority to "determine, objectively, and on the basis of positive evidence, the importance to be attached to *each* potentially relevant factor and the weight to be attached to it."[123]

72. In short, panels may not conduct their own *de novo* evaluation of the facts if the investigating authority's establishment of the facts is proper and if its evaluation of the facts is unbiased and objective.

IV. ARGUMENT

A. Canada Bears the Burden of Proving Its Claim

73. It is well-established that the complaining party in a WTO dispute bears the burden of proof. This means, as an initial matter, that Canada, as the complainant, bears the burden of

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[121] *See US-Hot-Rolled Steel*, AB Report, para. 55.

[122] *See also Korea-Dairy*, Panel Report, para. 7.30 ("we do not see our review as a substitute for the proceedings conducted by national investigating authorities. Rather, we consider that the Panel's function is to assess objectively the review conducted by the national investigating authority. . . .). Canada refers to the definitions of "establishment" and "proper" in *Thailand - H-Beams*, without indicating that the Appellate Body discussed these definitions in the context of whether an injury determination must be based only upon evidence disclosed to the parties to the investigation. *See* Canada First Written Submission, para. 55 *and 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. 116 *("Thailand - H-Beams*"). Canada, however, ignores the Appellate Body's explicit statement that: "[t]he aim of Article 17.6(i) is to prevent a panel from 'second-guessing' a determination of a national authority when the establishment of the facts is proper and the evaluation of those facts is unbiased and objective." *Thailand - H-Beams*, AB Report, para. 117.

[123] *US-Hot-Rolled Steel*, AB Report, para. 197 ("Instead, Articles 3.1 and 3.4 indicate that the investigating authorities must determine, objectively, and on the basis of positive evidence, the importance to be attached to *each* potentially relevant factor and the weight to be attached to it. In every investigation, this determination turns on the "bearing" that the relevant factors have "on the state of the [domestic] industry.""). *See also*, *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. 160-162 *("EC-Pipe*") (since Articles 3.1 and 3.4 do not regulate the manner in which the results of the analysis of each injury factor are to be set out in the published documents, it is for investigating authorities to determine manner); *European Communities – Antidumping Duties on Imports of Cotton-Type Bed Linen from India*, Appellate Body Report, WT/DS141/AB/R, adopted March 12, 2001, para. 177 ("*EC-Bed Linen*") ("In our view, the Panel assessed and weighed the evidence submitted by both parties, and ultimately concluded that the European Communities had information on all relevant economic factors listed in Article 3.4. It is not "an error, let alone an egregious error," for the Panel to have declined to accord to the evidence the weight that India sought to have accorded to it.").

coming forward with evidence and argument that establish a *prima facie* case of a violation.[124] It also means that, if the balance of evidence is inconclusive with respect to a particular claim, Canada must be found to have failed to establish that claim.[125]

74. For the reasons discussed below, Canada has failed to meet its burden to establish a *prima facie* case.

B. The Obligation to Base Determinations on Positive Evidence and to Provide Reasoned and Adequate Explanations

1. Positive Evidence and Objective Examination

75. Article 3.1 of the Antidumping Agreement and Article 15.1 of the SCM Agreement provide that an injury determination:

> . . . shall be based on positive evidence and involve an objective examination of both (a) the volume of dumped (subsidized) imports and the effects of the dumped (subsidized) imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

76. The Appellate Body stated in *Thailand - H-Beams*, and reaffirmed in *US-Hot-Rolled Steel*, *EC-Bed Linen*, and *EC-Pipe*, that "Article 3.1 is an overarching provision that sets forth a Member's fundamental, substantive obligation in this respect . . . [and] informs the more detailed obligations" in the remainder of Article 3.[126]

77. Thus, the investigating authority must ensure that its determination of injury is made on the basis of "positive evidence" and involves an "objective examination." While "positive

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[124] *United States-Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, Appellate Body Report, WT/DS33/AB/R, adopted 23 May 1997, pp.12-17 ("*US-Wool Shirts*")("a party claiming a violation of a provision of the *WTO Agreement* by another Member must assert and prove its claim . . . it, therefore, was up to India to put forward evidence and legal argument sufficient to demonstrate that the . . . action by the United States was inconsistent with the obligations assumed. . . ." p. 16); *EC-Hormones*, AB Report, paras. 97-109 ("the Panel should have begun the analysis of each legal provision by examining whether the United States and Canada had presented evidence and legal arguments sufficient to demonstrate that the EC measures were inconsistent with the obligations assumed by the European Communities. . . ." para. 109); *Korea-Dairy*, Panel Report, para. 7.24 ("As a matter of law the burden of proof rests with the European Communities, as complainant, and does not shift during the panel process. As a matter of process before the Panel, the European Communities will submit its arguments and evidence and Korea will respond to rebut the EC claims.").

[125] *See, e.g.*, *India-Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, Panel Report, WT/DS90/R, adopted 22 September 1999, para. 5.120.

[126] *Thailand - H-Beams*, AB Report, para. 106; *see also EC-Pipe*, AB Report, para. 112; *EC-Bed Linen*, AB Report, paras. 110-111; *US-Hot-Rolled Steel*, AB Report, para. 192.

evidence" involves the facts underpinning and justifying the injury determination, "objective examination" is concerned with the investigative process itself.[127]

78. The Appellate Body has interpreted "positive evidence" as follows:

> The term "positive evidence" relates, in our view, to the *quality* of the evidence that authorities may rely upon in making a determination. The word "positive" means, to us, that the evidence must be of an *affirmative, objective and verifiable* character, and that it must be *credible*.[128]

79. The Appellate Body also has interpreted "objective examination" in the context of the investigative process as follows:

> The word "examination" relates, in our view, to the way in which the evidence is gathered, inquired into and, subsequently, evaluated; that is, it relates to the conduct of the investigation generally. The word "objective", which qualifies the word "examination", indicates essentially that the "examination" process must conform to the dictates of the basic principles of good faith and fundamental fairness.[129]

80. The requirement to conduct an "objective examination" has been summarized as follows:

> In short, an "objective examination" requires that the domestic industry, and the effects of dumped imports, be investigated in an *unbiased* manner, *without favouring the interests of any interested party*, or group of interested parties, in the investigation. The duty of the investigating authorities to conduct an "objective examination" recognizes that the determination will be influenced by the objectivity, or any lack thereof, of the investigative process.[130]

81. It is clear from the ITC Report that the Commission considered the totality of the evidence and based its determination on "positive evidence"; that is, evidence which is affirmative, objective, verifiable and credible.[131] Moreover, the ITC conducted an "objective

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[127]*See EC-Bed Linen*, AB Report, para. 114; *US-Hot-Rolled Steel*, AB Report, para. 193.

[128]*EC-Bed Linen*, AB Report, para. 114, *quoting US-Hot-Rolled Steel*, AB Report, para. 192.

[129]*EC-Bed Linen*, AB Report, para. 114, *quoting US-Hot-Rolled Steel*, AB Report, para. 193.

[130]*EC-Bed Linen*, AB Report, para. 114, *quoting US-Hot-Rolled Steel*, AB Report, para. 193.

[131]In commenting on the investigating authorities' evaluation of the relevant factors, the Appellate Body in *US-Hot-Rolled Steel* stated that:

> However, the investigating authorities' evaluation of the relevant factors must respect the fundamental

examination" in which the "identification, investigation and evaluation of the relevant factors [was] . . . even-handed." Canada's allegation that the ITC conducted its investigation in such a way that it was more likely to determine that the domestic industry is injured has absolutely no basis in fact.

2. Reasoned and Adequate Explanation

82. Article 12.2.2 of the Antidumping Agreement states in relevant part:

> A public notice of conclusion . . . of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty . . . shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures . . . . In particular, the notice or report shall contain the information described in subparagraph 2.1,[132] as well as the reasons for the acceptance or rejection of relevant arguments or claims made by exporters and importers. . . .

Article 22.5 of the SCM Agreement contains a similar provision.

83. Thus, the investigating authority's notice or separate report shall contain "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures . . . as well as the reasons for the acceptance or rejection of relevant arguments or claims made by exporters or importers."[133] While the covered Agreements provide no further elaboration on what constitutes a reasoned explanation of the relevant facts and arguments that led to the determination, other WTO dispute settlement proceedings have provided some guidance.

84. The underlying rationale for requiring an investigating authority to set forth its explanations in a published notice and/or report is to provide transparency and thus the reasoning

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> obligation, in Article 3.1, of those authorities to conduct an "objective examination." If an examination is to be "objective," the identification, investigation and evaluation of the relevant factors must be even-handed. Thus, the investigating authorities are not entitled to conduct their investigation in such a way that it becomes more likely that, as a result of the fact-finding or evaluation process, they will determine that the domestic industry is injured.

US-Hot-Rolled Steel, AB Report, para. 196.

[132]The information relevant to an injury determination is described in Article 12.2.1(iv) as "considerations relevant to the injury determination as set out in Article 3."

[133]If the report, as in the case of the ITC Report, contains narrative views and separate data tables, both must be considered in evaluating whether the report has satisfied the obligations.

that led to its conclusions.[134] The availability of explanations makes it possible for those involved to understand the results and makes it possible for a Panel to review an authority's findings and determine whether it complied with specific requirements.[135]

85. The requirement to provide a reasoned explanation, however, has not been interpreted to impose any specific method for assessing the injury or for explaining the basis for such a determination. The guidance essentially is that the investigating authority "must be in a position to demonstrate that it did address the relevant issues."[136]

86. The Appellate Body in *EC-Pipe* recognized that the obligation to evaluate listed factors "is distinct from the *manner* in which the evaluation is to be set out in the published documents."[137] Moreover, the Appellate Body recognized that evaluation of a factor does not necessarily require an explicit separate evaluation of that factor if the analysis of the factor is implicit in the analyses of other factors. Thus, the Appellate Body has essentially recognized that an explicit explanation on every factor or argument is not necessary to be deemed an evaluation

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[134]*See Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, Panel Report, WT/DS132/R, adopted 21 November 2001, n. 592 ("Mexico-*HFCS"*).

[135]*EC-Bed Linen*, Panel Report, para. 6.163.

[136]*Korea-Dairy*, Panel Report, para. 7.31 (Panel indicated that requirement to provide reasoned explanation should not be interpreted to impose "any specific method either for collecting data or for considering and weighing all the relevant economic factors upon which the importing Member will decide whether there is need for a safeguard restraint. [Importing Member] remains free to choose an appropriate method of assessing [injury]. . ., but it must be in a position to demonstrate that it did address the relevant issues.")

[137]*EC-Pipe*, AB Report, paras. 160-162 state:

> 160 . . . The obligation to evaluate all fifteen factors is distinct from the *manner* in which the evaluation is to be set out in the published documents. As the European Communities contends, that the analysis of a factor is implicit in the analyses of other factors does not necessarily lead to the conclusion that such a factor was not evaluated.
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> 161. Accordingly, because Articles 3.1 and 3.4 do not regulate the *manner* in which the results of the analysis of each injury factor are to be set out in the published documents, we share the Panel's conclusion that it is not required that in every anti-dumping investigation a separate record be made of the evaluation of each of the injury factors listed in Article. 3.4. Whether a panel conducting an assessment of an anti-dumping measure is able to find in the record sufficient and credible evidence to satisfy itself that a factor has been evaluated, even though a separate record of the evaluation of that factor has not been made, will depend on the particular facts of each case. Having said this, we believe that, under the particular facts of this case, it was reasonable for the Panel to have concluded that the European Communities addressed and evaluated the factor "growth."
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> 162. Having regard to the nature of the factor "growth", we believe that an evaluation of that factor necessarily entails an analysis of certain other factors listed in Article 3.4. Consequently, the evaluation of those factors could cover also the evaluation of the factor "growth."

where the investigating authority's decisional path is reasonably discernible.

87. Canada asserts that the ITC did not address alternative arguments of the parties. It points to the Appellate Body's statement that:

> [a] panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some *alternative explanation* of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation.[138]

First, many of the alternative arguments that Canada alleges were not considered, in fact, were addressed by the ITC, as evident in its opinion. Canada has disregarded that the Appellate Body's reasoning requires the existence of an alternative explanation that is "plausible" *and* an explanation by the investigating authority that is inadequate in light of that alternative view. As the party asserting the affirmative of a claim, Canada bears the burden of proof to demonstrate that its particular alternative explanations are both "plausible" and that the ITC explanation is inadequate.[139] As we show below, Canada's submission fails to satisfy these requirements.

88. As evident in the Views of the Commission, the ITC considered all relevant arguments raised by parties and provided adequate explanations. Moreover, the Views of the Commission "contain a persuasive explanation as to how the evaluation of relevant factors led to the determination of injury."[140]

C. The ITC's Determinations of Threat of Material Injury Are Consistent with U.S. Obligations Under Article 3 of the Antidumping Agreement and Article 15 of the SCM Agreement

89. The Antidumping Agreement and the SCM Agreement recognize that trade measures may be justified if dumped and/or subsidized imports materially injure or threaten material injury to a domestic industry. Injury to the domestic industry does not generally occur suddenly, but rather often involves a progression of injurious effects ascending from a threat of material injury, and if not prevented, to present material injury. Therefore, a determination that an industry is threatened with material injury would be warranted when conditions of trade clearly indicate that material injury likely will occur imminently if demonstrable trends in trade adverse to the domestic industry continue, or if clearly foreseeable adverse events occur. A determination on the existence of threat is a fact-based, future-oriented finding that must be based on projections

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[138] *US – Lamb Meat*, AB Report, para. 106.

[139] *US – Wool Shirts*, AB Report, p. 17.

[140] *Egypt-Rebar*, Panel Report, para. 7.46, *quoting Thailand - H-Beams*, Panel Report, para. 7.236.

extrapolating from existing data.[141] Thus, the determination of whether there will be changes in circumstances in which the dumped and/or subsidized imports likely would cause injury, *i.e.*, threat of material injury is imminent, is made starting with the status quo.

90. As discussed below, Canada bases it claims on an interpretation of the threat provision that seems to require an abrupt change in the status quo, *i.e.*, **a** change in circumstance, rather than the clearly foreseeable result of a sequence of events. Canada argues that the ITC should have identified a specific event or change in the status quo in order to justify its threat determination. Canada's interpretation of the requirements for an affirmative threat determination fail to recognize that threat often comprises an evolution or progression of demonstrable adverse trends in trade that, if not prevented, likely will rise to present material injury. The Appellate Body has repeatedly recognized that a determination on the existence of threat must be based on projections extrapolated from existing data, *i.e.*, projections derived from existing data regarding the likely continuation or progression of trends in trade adverse to the domestic industry.[142]

91. In order to support this theory of an abrupt change, Canada provides a very distorted portrayal of the Commission's present material injury findings as well as its findings regarding demand conditions. According to Canada, the ITC's negative present material injury finding contained no evidence or subsidiary findings showing any adverse effects from the subject imports. This simply is not an accurate portrayal of the facts or the Commission's findings.

92. The ITC's subsidiary findings regarding present material injury reflect the facts as a whole. These facts foreshadow a finding of material injury and show the existence of threat of material injury. In brief, the ITC found that the volume of imports was significant and supported a finding that the domestic industry was presently materially injured by reason of the subject imports if combined with significant price and impact effects. In fact, the volume of subject imports was significant and increasing in spite of the restraining effect of the SLA or the pendency of the investigations. Moreover, while the ITC found that subject imports had caused some price effects, the ITC recognized that the evidence indicated that both Canadian producers and U.S. producers had contributed to the excess supply that had resulted in substantial price declines, particularly in 2000. The evidence showed a deterioration in the condition of the domestic industry, and in particular its financial performance, over the period of investigation, which was largely a result of substantial declines in price. However, largely because subject imports had had some but not significant price effects during the period of investigation, the ITC concluded that subject imports did not have a significant impact on the domestic industry. On the other hand, the declines in the industry's performance, particularly financial performance

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[141]*See US-Cotton Yarn*, AB Report, para. 77; *US-Lamb Meat*, AB Report, para. 136; *US-Steel Safeguards*, Panel Report, para. 10.173, n. 5032.

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

made it vulnerable to injury.

93. The facts as a whole, as reflected in the ITC's subsidiary findings on present material injury, support the ITC's determination of the existence of a threat of material injury by reason of softwood lumber imports from Canada.

94. The Commission considered **all factors relevant to a threat of material injury determination** provided for in the covered Agreements. The ITC appropriately evaluated all factors relevant to these threat of material injury determinations, pursuant to Articles 3.2, 3.4, and 3.7 of the Antidumping Agreement and Articles 15.2, 15.4, and 15.7 of the SCM Agreement. As evident in the discussion below, Canada clearly has not met its burden of establishing a *prima facie* case of any violation or inconsistencies with U.S. obligations under the covered Agreements.

1. In General

95. Article 3.7 of the Antidumping Agreement provides as follows:

> 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.[143] In making a determination regarding the existence of a threat of material injury, the authorities should consider, *inter alia*, such factors as:
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> (i) a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation;
>
> (ii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;
>
> (iii) 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; and
>
> (iv) inventories of the product being investigated.

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[143]Footnote 10 of the Antidumping Agreement provides the following example of what would constitute the change in circumstances:

> One example, though not an exclusive one, is that there is convincing reason to believe that there will be, in the near future, substantially increased importation of the product at dumped prices.

> No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur.

96. Article 15.7 of the SCM Agreement mirrors this wording, with the exception of the addition of a fifth listed factor for authorities to consider, involving "the nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom."[144]

a. Continuum of an Injurious Condition Ascending from Threat to Injury

97. 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 likelihood.[145] Threat of injury, thus, is an anticipation of material injury that must be on the verge of occurring, *i.e.*, clearly foreseen and imminent.

98. The Antidumping and SCM Agreements allow Members to take appropriate measures when either present material injury or a threat of material injury have been found. The text of the Agreements thus recognizes that a Member need not wait until material injury actually has occurred before taking remedial action. Moreover, the inclusion of the threat provision is a recognition that injury to a domestic industry need not suddenly occur but indeed may frequently result from a progression of trade conditions adverse to the industry. This is clearly evident in the text of the threat provisions in the Antidumping Agreement and SCM Agreement, which speak of "[t]he change in circumstances which would create a situation" and provides as an example "that there is convincing reason to believe that there will be, in the near future, substantially increased importation of the product at dumped [subsidized] prices."[146]

99. Canada reads the threat provision to require the investigating authority to identify "**a**" change in circumstances, *i.e.*, "an event," that will abruptly change the status quo from a threat of

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[144]Article 15.7(i) of the SCM Agreement.

[145]*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.

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

material injury to present material injury.[147] But this interpretation is not necessitated, if even justified, by the text of the covered Agreements, the negotiating history of the Agreements,[148] or the Appellate Body's analysis in other dispute settlement proceedings involving the term threat of injury.[149] [150]

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[147]Canada First Written Submission, paras. 6 and 76. Canada has relied on the use of the word "a" to describe "change in circumstances" in the Panel Report for *Egypt-Rebar* to allege that a specific event must be identified. The *Egypt-Rebar* report does not support Canada's position. First, the issue in *Egypt-Rebar* was not the merits of a threat analysis, but rather whether notification by the investigating authority of its change from conducting a threat to a present injury analysis was required so that parties were afforded due process. Second, the Panel only marginally discussed what constituted a threat analysis. Moreover, Canada ignores the detailed discussions directly addressing the threat analysis, which recognize the continuous progression of injurious effects from threat to injury in other GATT and WTO Appellate Body and Panel proceedings, many of which Canada refers to for support on other points.

[148]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-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.

GATT Doc. No. ADP/25, BISD 32/182-183.

Reference to negotiating history is appropriate here to confirm the plain meaning of the text. *Vienna Convention on the Law of Treaties*, Article 32.

[149]Nor is it consistent with the facts in this case. As noted above, Canada has misconstrued the ITC's present material injury subsidiary findings to imply that none of the underlying facts could support an affirmative threat determination

[150]We note that some of the analysis has been in proceedings involving the Safeguards Agreement. Although such analysis provides some guidance regarding the distinctions between threat and present injury, these Agreements have different purposes and requirements. The United States believes that the language of the covered Agreements are paramount. Guidance from another Agreement can never replace or supercede required reliance on the language of the covered Agreement. *Contra US-Hot-Rolled Steel*, AB Report, paras. 216-236.

100. The Appellate Body in *US-Line Pipe* provided an useful discussion on the reality of how injury often occurs to a domestic industry:

> In the sequence of events facing a domestic industry, it is fair to assume that, often there is a continuous progression of injurious effects eventually rising and culminating in what can be determined to be "serious injury". Serious injury does not generally occur suddenly. Present serious injury is often preceded in time by an injury that threatens clearly and imminently to become serious injury, as we indicated in *US-Lamb*. Serious injury is, in other words, often the realization of a threat of serious injury. . . . the precise point where a "threat of serious injury" becomes "serious injury" may sometimes be difficult to discern. But, clearly, "the serious injury" is something *beyond* a "threat of serious injury."[151]

101. Rather than requiring that injury result from an abrupt change in a circumstance, the Appellate Body has recognized generally that there is a continuum of an injurious condition of a domestic industry that ascends from a threat of injury up to injury. The Appellate Body in *US-Line Pipe* clarified that:

> In terms of the rising continuum of an injurious condition of a domestic industry that ascends from a "threat of serious injury" up to "serious injury", we see "serious injury" – because it is something *beyond* a "threat" – as necessarily *including* the concept of a "threat" and *exceeding*" the presence of a "threat" . . . .[152]

b. Future-Oriented Analysis Based on Projections Extrapolating from Existing Data

102. A determination of threat involves a prospective analysis of a present situation with respect to the volume, and price effects of the dumped and/or subsidized imports and their consequent impact on the domestic industry. As the GATT Panel in *Korea-Resins* recognized:

> . . . a proper examination of whether a threat of material injury was caused by dumped imports necessitated a *prospective* analysis of a present situation with a view to determining whether a "change in circumstances" was "clearly foreseen and imminent". . . .[such] determination . . . required an analysis of *relevant future developments with regard to the volume, and price effects of the dumped imports*

[151] *United States –Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, Appellate Body Report, WT/DS202/AB/R, para. 168 ("*US-Line Pipe*").

[152] *US-Line Pipe*, AB Report, para. 170.

and their consequent impact on the domestic industry.[153]

The prospective analysis referred to by the *Korea-Resins* panel concerned the industry's current condition as well as future trends in import volumes and prices.

103. A threat analysis is a future-oriented analysis, based not on allegation or conjecture but rather on the facts.[154] [155] But facts by definition pertain to the present and past rather than the future. While the occurrence of future events can never be definitely proven by facts, projections necessarily are based on extrapolations from existing data.[156]

104. In *US-Lamb Meat*, the Appellate Body discussed this tension between the future-oriented threat analysis and the need for a fact-based determination. The Appellate Body recognized that ultimately it calls for a degree of "conjecture" about the likelihood that the threat will ascend to injury. Specifically, the Appellate Body 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.[157]

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[153]*Korea–Anti-Dumping Duties on Imports of Polyacetal Resins from the United States*, Panel Report, ADP/92, para. 271 ("*Korea Resins*"), *quoted in US-Lamb Meat*, Panel Report, para. 7.134.

[154]*See US-Lamb Meat*, AB Report, para. 125 (". . . any determination of a threat of serious injury 'shall be based on facts and not merely on allegation, conjecture or *remote possibility*.' (emphasis added). To us, the word 'clearly' relates also to the *factual* demonstration of the existence of the 'threat.'").

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

[156]*See Mexico-HFCS*, AB Report, paras. 83 and 85; *US-Cotton Yarn*, AB Report, para. 77; *US-Lamb Meat*, AB Report, para. 136; *US-Steel Safeguards*, Panel Report, para. 10.173, n. 5032.

[157]*US-Lamb Meat*, AB Report, para. 136. Footnote 86 at the end of the quoted paragraph adds: "We observe that the projections made must relate to the overall state of the domestic industry, and not simply to certain relevant factors." *See also US-Cotton Yarn*, AB Report, para. 77, n.50; *see also 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

105. While the prospective nature of the analysis will not provide for certainty, the use of facts from the present and the past provides the basis for projections about the future, namely whether material injury is "clearly foreseen and imminent." A projection based on the past and present facts permits an assessment of whether there is a high degree of likelihood of injury in the very near future.

106. Thus, in a threat analysis, 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.

107. 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."[158]

108. It is evident in the ITC's Report that the Commission considered all of the facts from the present and past, specifically regarding the volume of imports, price effects and the consequent impact of continued dumped and subsidized imports on the domestic industry, in its threat analysis.[159] In brief, the ITC's evaluation of the evidence regarding relevant factors, pursuant to Articles 3.2 and 3.4 of the Antidumping Agreement and Articles 15.2 and 15.4 of the SCM Agreement, resulted in subsidiary findings that the volume of imports was significant, there were some price effects, and that the condition of the domestic industry had deteriorated primarily as a result of declining prices and that the industry was in a vulnerable state. Moreover, projections based on the present and past facts, provide 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.

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starting-point so as to avoid basing a determination on *allegation, conjecture, or remote possibility*. . . ..

[158]*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.

[159]*Mexico-HFCS*, Panel Report, para. 7.126 ("it is precisely this latter question – whether the 'consequent impact' of continued dumped imports is likely to be material injury to the domestic industry – which must be answered in a threat of material injury analysis.").

c. Meaning of "Special Care"

109. Finally, regarding the direction to investigating authorities to make threat determinations "with special care," Article 3.8 of the Antidumping Agreement and Article 15.8 of the SCM Agreement state:

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

No further discussion is provided in the covered Agreements regarding what constitutes "special care." Nor has any panel explicitly interpreted this provision.

110. Canada's argument notwithstanding, the "special care" provision does not mean that there is a stricter, higher standard of review for threat analysis than for present material injury analysis in the context of the covered Agreements. In fact, in the safeguards context, the Appellate Body suggested that the distinction between threat of injury and present injury "serves the purpose of setting a *lower threshold* for establishing the *right* to apply a safeguard measure."[160] The same logic would apply to the covered Agreements.

d. Meaning of "Consider"

111. At the core of Canada's arguments is the repeated assertion that the Commission failed to perform certain functions, even though such functions are not required by the covered Agreements. The most frequent such assertion concerns the term "consider."

112. The covered Agreements require the Commission to consider all listed factors. What Canada fails to recognize is that they do not require the Commission to *make findings* on each factor. Rather it sufficient, if it is apparent in the relevant documents in the record, that the Commission has given attention to and taken the factor into account.

113. Canada relies on the definition of "consider" set forth in the *Thailand - H-Beams* Panel Report. However, it omits that Panel's conclusion that: "**We therefore do not read the textual**

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[160] *US-Line Pipe*, AB Report, para. 169:

> In our view, defining "threat of serious injury" separately from "serious injury" serves the purpose of setting a *lower threshold* for establishing the *right* to apply a safeguard measure. . . . this was done . . . so that an importing Member may act sooner to take preventive action when increase imports pose a "threat" of "serious injury" to a domestic industry, but have not yet caused "serious injury." And since a "threat" of "serious injury" is defined as "serious injury" that is "clearly imminent", it logically follows, to us, that "serious injury" is a condition that is above that *lower threshold* of a "threat." A "serious injury" is *beyond* a "threat," and, therefore, is *above* the threshold of a "threat" that is required to establish a right to apply a safeguard measure.

term 'consider' in Article 3.2 to require an explicit 'finding' or 'determination' by the investigating authorities. . . ."[161]

114. In its recent report in *EC-Pipe*, the Appellate Body has stated that an obligation to evaluate all fifteen factors, pursuant to Article 3.4 of the Antidumping Agreement, is distinct from the manner in which the evaluation is to be set out in the published document.[162] In fact, it recognized that consideration of a factor does not necessarily require an explicit separate evaluation of that factor if the analysis of the factor is implicit in the analyses of other factors.[163] What is important, the Appellate Body explained, is that the investigating authority's decisional path be reasonably discernible, not that there be an explicit explanation or finding for each factor to be considered.

115. Moreover, the Appellate Body's analysis in *EC-Pipe* seems to follow from the recognition in the covered Agreements that consideration, or any findings, regarding one specific factor can not necessarily give decisive guidance, but that a determination must be based on the "totality" of the threat factors.[164]

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[161] *Thailand - H-Beams*, Panel Report, para. 7.161 (emphasis added). While this case 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).

[162] 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.

[163] *EC-Pipe*, AB Report, paras. 160-161.

[164] Specifically, the last sentence of Article 3.7 of the Antidumping Agreement and Article 15.7 of the SCM Agreement states: " 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."

116. In the same manner, the investigating authority is not required to explicitly address every minute detail or specific aspect of every argument that is raised by parties. Canada fails to acknowledge that the Commission clearly considered the relevant evidence and arguments raised by parties but found other evidence to be more persuasive. These arguments have little to do with whether the Commission's findings are reasonable and supported by positive evidence, or whether the ITC addressed alternative arguments.

2. The ITC's Consideration of All Factors and Facts Relevant to the Threat of Material Injury Analysis in this Case and Its Findings Are Consistent with U.S. Obligations Under the Covered Agreements

117. In analyzing the facts of these investigations and making its findings, the Commission properly considered all record evidence and the relevant factors for a threat of material injury analysis in antidumping and countervailing duty investigations. The Commission's determinations of a threat of material injury by reason of subject imports of softwood lumber from Canada are based on positive evidence and are consistent with U.S. obligations under the covered Agreements.

118. The Commission found that subject imports are likely to increase substantially based on consideration of the following facts: 1) Canadian producers' excess capacity and projected increases in capacity, capacity utilization, and production; 2) the export orientation of Canadian producers to the U.S. market; 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; and 6) forecasts of strong and improving demand in the U.S. market. The Commission determined that these increases in imports were likely to exacerbate price pressure on domestic producers, and that material injury to the domestic industry would occur. Moreover, the Commission found that the domestic industry was vulnerable to injury in light of declines in its performance over the period of investigation, particularly its financial performance. 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.

119. Canada attempts to divert the Panel's focus in a number of ways, including: 1) challenging whether the Commission actually formally made appropriate findings – the Commission did, 2) presenting to the Panel as fact its speculative theories regarding the possible effects of demand projections that the Commission considered and rejected because the facts did not support them, and 3) alleging that the ITC's threat findings are unsupported by positive evidence because of its finding of negative present material injury.[165]

[165]Canada asserts that the ITC found that subject imports were not at injurious levels in its negative present analysis. This is wrong. The Commission found the volume of subject imports was significant in its present injury analysis and supported an affirmative determination if combined with significant price and impact effects. Canada also misstates that the ITC did not find price effects in its present analysis. This also is wrong. The ITC found that

120. Lastly, Canada alleges either that certain matters were not considered by the Commission, even when such evidence is clearly referred to in the Commission's opinion, or that the Commission relied on erroneous data, even when it was data supported by exporters in the underlying investigation. Canada's arguments are simply an ill-founded effort to have the Panel reweigh the record evidence in its favor. But it is the investigating authority that weighs the evidence as a whole and makes the determination. And in spite of Canada's allegations, it is clear that the Commission considered the evidence, in an even-handed, objective manner and made its findings.[166]

121. Finally, a common thread in Canada's claims is its repeated assertions that there could be no threat of material injury because there allegedly were no injurious effects found in the present material injury analysis. This simply is wrong. While Canada ignores the totality of the facts and urges the Panel to do the same, the ITC appropriately did not. The ITC found, based on the facts as a whole, that the volume of imports was significant and thus completely supported an affirmative material injury finding if combined with significant price and impact effects. However, while the subject imports had resulted in some price effects, the ITC recognized that excess supply of both imported and domestic products had contributed to price declines, particularly in 2000, and thus could not find that subject imports had had significant present price effects. The condition of the domestic industry, particularly its financial performance, had declined during the period of investigation as a result of the price declines. While the ITC found the domestic industry vulnerable to injury, it concluded that it could not find that subject imports had impacted the domestic industry, largely because it had not found that there were significant price effects from imports alone. It is clear that ITC's subsidiary findings regarding present material injury foreshadow and clearly support the existence of a threat of material injury.

a. The Commission's Finding of Likely Substantial Increases in Subject Imports is Based on Positive Evidence

122. In analyzing the facts of these investigations and making its findings, the Commission properly considered all record evidence and the relevant factors for a threat of material injury analysis in antidumping and countervailing duty investigations.

123. Two of the factors listed in the covered Agreements for consideration in a threat of material injury analysis focus on the likelihood of substantially increased subject imports. These factors are as follows:

> (i) a significant rate of increase of dumped [subsidized] imports into the domestic market indicating the likelihood of substantially increased importation;

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subject imports had some price effects, but recognized that oversupply by both imported and domestic product had contributed to the price declines, and thus could not find that subject imports had had significant price effects.

[166] *US-Hot-Rolled Steel*, AB Report, para. 196.

> (ii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped [subsidized] exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports.[167]

124. In its analysis and findings regarding a likely substantial increase in subject imports, the Commission considered evidence relating to both of these factors. Specifically, the Commission found that subject imports are likely to increase substantially based on consideration of the following facts: 1) Canadian producers' excess capacity and projected increases in capacity, capacity utilization, and production; 2) the export orientation of Canadian producers to the U.S. market; 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; and 6) forecasts of strong and improving demand in the U.S. market.[168]

125. While Canada implies that the ITC's consideration of factors and facts related to the two listed factors should be given less weight and challenges them on the merits, Canada does not argue that any of the factors are not relevant. Canada, moreover, fails to recognize that the covered Agreements provide that relevant factors other than those listed should be considered.[169] The fact that the ITC considered other factors and provided appropriate explanations demonstrates a reasoned analysis by the ITC and is not a mere recitation of facts. Moreover, it shows that the ITC's determination is supported by the record evidence.

126. The covered Agreements direct the investigating authority to consider whether the evidence indicates the likelihood of substantially increased imports but, recognizing that this is a future event whose actual materialization cannot be assured with certainty, does not direct the investigating authority to find that imports will increase.[170] The Appellate Body has recognized, as discussed above, that a threat analysis involves projections extrapolating from existing data

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[167]Article 3.7 of the Antidumping Agreement; these same factors are found in subparagraphs (ii) and (iii) in Article 15.7 of the SCM Agreement.

[168]USITC Report at 40-43.

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

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

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

and as such can never be definitely proven by facts.[171] Despite the foregoing, Canada argues with respect to the likelihood of substantially increased imports that there is a requirement to provide a greater degree of certainty and quantification than either of the covered Agreements requires.

127. The ITC found in its present injury analysis that the volume of imports was already significant and thus completely supported an affirmative material injury finding if it had been combined with significant price and impact effects. Moreover, the ITC's subsidiary findings regarding present material injury foreshadow and clearly support the existence of a threat of material injury. In fact, in repeating its contention about noninjurious levels in the present injury finding, Canada ignores the fact that Canadian production capacity is not a factor considered in a present analysis and mistakenly alleges that the ITC could not find that Canadian "sufficient freely disposable" production capacity indicated the likelihood of substantially increased exports because the ITC had found them at noninjurious levels in the present case.

128. Contrary to Canada's allegations, the Commission considered the relevant factors for a threat analysis and made a finding of a likely substantial increase in subject imports based on consideration of all the record evidence.

i. *Demand in U.S. Market – Forecasts and Possible Effects Supports ITC's Determination*

129. A key issue underlying Canada's challenge to the Commission's affirmative threat determination is its theory regarding what effects an improvement in demand for softwood lumber in the U.S. market would have on the domestic industry and imports. Canada exaggerates the magnitude of projections for future improvement in demand relative to demand during the period of investigation. Canada attempts to create the impression that demand had dropped or been very low during the period of investigation, or the preceding period, and that an improvement or rebound in 2002 and 2003 would result in demand completely outpacing supply. In Canada's view strong and improving demand would typically cause prices and other indicators of industry performance to improve, not worsen, *i.e.*, making threat of injury less, not more, likely.[172]

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

> In our view, 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 definitely proven by facts**." Notwithstanding this intrinsic uncertainty, a "proper establishment" of the 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.* (emphasis added).

[172] Canada's First Written Submission, paras. 7, 8 and 120.

130. First, the actual data and forecasts for demand of softwood lumber in the United States do not fit Canada's scenario. Second, the ITC expressly rejected this theory when presented by Canadian exporters' (CLTA) because the facts did not support it.[173] The Commission found that strong demand had not translated into price and other industry performance improvements; in fact, the opposite had occurred. Nonetheless, Canada presents the same projections to the Panel, alleging that the Commission did not consider it. Moreover, Canada incredibly fails to address the Commission's express finding that the facts did not support Canada's theory. Rather, Canada's argument, which is central to its challenge, rests on asserting that the evidence regarding demand forecasts could only result in findings that supported a negative determination. Canada, simply stated, is seeking to have this Panel reweigh the evidence in its favor.

131. Canada's argument is premised on a simplistic supply/demand economic theory that if demand increases and supply stays constant or increases more slowly, prices will rise. Canada needs to show substantial increases in demand to make this theory plausible and so has portrayed demand as low during the period of investigation while alleging substantial growth in the near term.

132. But the facts do not fit the theory. Demand for softwood lumber in the United States remained at record high levels during the period of investigation. The evidence demonstrated that demand increased every year between 1995 and 1999, for an overall increase of 13.5 percent, and then remained relatively flat or stable at that high level from 1999 to 2001 (declined slightly by 0.4 percent from 1999-2001).[174] Thus, demand was 13.1 percent higher in 2001 than it had been in 1995, and more importantly remained at record high levels during the period of investigation. The Commission appropriately characterized the demand during the period of investigation, which was at record high levels, as strong and relatively stable. Thus, the actual data portray a different picture regarding demand during the period of investigation than the one Canada has painted for the Panel.

133. Regarding forecasts for demand, the Commission found that they showed continued strong demand, with increases as the U.S. economy rebounds from recession, which would mean

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[173]USITC Report at 42, n. 271. The Commission stated:

> CLTA argued that the domestic industry's financial performance will improve as lumber consumption increases in 2002 and 2003. CLTA's Prehearing Brief at 46-47. However, demand was at record levels in 1999 and remained relatively level in 2000 and 2001, while prices for softwood lumber declined substantially and the industry's condition worsened considerably.

Id.

[174]USITC Report at Table IV-2. The evidence showed that during the period of investigation, apparent domestic consumption fluctuated and declined slightly (by 0.4 percent) from 54,095 mmbf in 1999 to 53,894 mmbf in 2001. However, apparent domestic consumption increased every year between 1995 and 1999, from 47,641 mmbf in 1995 to a peak of 54,095 mmbf in 1999, an overall increase of 13.5 percent. Id.

that "the United States will continue to be an important market for Canadian producers."[175] It is clear that the Commission did not find the evidence indicated substantial improvements in demand in 2002 or even in 2003; it is only Canada that characterizes it in this manner, as "**a** change in circumstances." The Commission's actual finding regarding demand is as follows:

> 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. Industry forecasts suggest slight growth in U.S. housing starts in 2002 and further increases in 2003. Thus, the United States will continue to be an important market for Canadian producers.[176]

The Commission made these findings after considering the evidence regarding factors affecting demand, including U.S. housing starts, demand during the 1995-2001 period,[177] and demand forecasts.

134. Canada portrays the demand projections as having a high degree of certainty. The demand forecasts, however, are projections that are subject to frequent revisions,[178] were mixed, and were not entirely supported by actual data or forecasts for U.S. housing starts. While Canada relies on the projections, the ITC looked at the most recent actual data regarding factors that affect demand for softwood lumber, such as actual data for U.S. housing starts, which dropped to two-year lows in March 2002, and forecasts for the U.S. housing starts (largest end-use market), which were not in line with demand forecasts, as well as questionnaire responses from the ITC investigation. The mixed evidence did not support a finding that there would be substantial growth in the primary end-use, housing starts, and hence substantial growth in demand for softwood lumber.[179]

135. **Demand Forecasts:** In considering demand forecasts, the Commission found that, in response to Commission questionnaires, most producers and importers indicated that they believed overall demand would remain relatively unchanged until the second half of 2002 or the

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[175]USITC Report at 42.

[176]USITC Report at 42-43, citing USITC Report at II-3-4; CLTA's Posthearing Brief, Vol. 2, Tab R at 1, 2, and 3 (USA-6); Petitioners' Posthearing Brief, Vol. II, Appendix H, Exhibit 28 at 3 (Table 2) and 5 (Table 3) (USA-5).

[177]The Commission considered data for the period of investigation, which was 1999-2001, and for the 1995-1999 period, which included the year prior to the SLA taking effect in 1996.

[178]The evidence in the record included both annual and quarterly forecasts for demand. While the ITC refers to the annual data, Canada focuses on the quarterly data in an attempt to make the forecasted increases seem four times greater than the actual annual forecasts.

[179]The industry forecasts suggested slight growth in U.S. housing starts in 2002 and further increases in 2003. USITC Report at 42.

beginning of 2003, and then would begin to increase as the U.S. economy rebounded from recession.[180] The Commission also considered the demand forecasts from industry analysts – Clear Vision Associates and RISI; these forecasts showed somewhat mixed results, were frequently revised, and were not entirely supported by actual data and forecasts for U.S. housing starts. For example, industry analyst Clear Vision Associates projected that U.S. demand for softwood lumber would increase by 3.7 percent from 2001 to 2002 and then further increase by 4.7 percent from 2002 to 2003.[181] The forecasts prepared by industry analyst RISI projected only an increase of 1 percent in U.S. demand for softwood lumber from 2001 to 2002, followed by a 4 percent increase from 2002 to 2003.[182]

136. **U.S. Housing Starts – 1995-2001:** The Commission also considered data regarding the primary end-use -- new residential construction -- which accounted for about 38 percent of demand for softwood lumber in 2000,[183] to attempt to place these mixed demand forecasts for softwood lumber in perspective. The evidence demonstrated that the increases in apparent domestic consumption for softwood lumber of 13.1 percent from 1995 to 2001 had not kept pace with its primary end use, new residential construction, which had increased by 18.3 percent from 1995 to 2001.[184]

137. **U.S. Housing Forecasts:** The forecasts for U.S. housing starts, however, did not correlate to the forecasts for demand for softwood lumber or to the actual data for 1995 to 2001, where U.S. housing starts (i.e., new residential construction) substantially outpaced softwood lumber demand. For example, while Clear Vision forecasted that demand for softwood lumber from 2001-2002 would increase by 3.7 percent, its forecast for U.S. housing starts for the same period was slightly lower at 3 percent.[185] In contrast, RISI forecasted higher U.S. housing start

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[180]USITC Report at 23 and II-3-4.

[181]Industry analyst Clear Vision Associates forecasted U.S. demand for softwood lumber to increase by 3.7 percent from 53.6 mmbf in 2001 to 55.6 mmbf in 2002, and then further increase by 4.7 percent to 58.2 mmbf in 2003. CLTA's Prehearing Brief, Vol. 3, Tab 1 at 1 and 3 (USA-7); CLTA's Posthearing Brief, Vol. 2, Tab R at 1-3 (USA-6).

[182]Industry analyst RISI forecasted U.S. demand for softwood lumber to increase by 1.0 percent from 53.2 mmbf in 2001 to 53.7 mmbf in 2002, and then further increase by 4.0 percent to 56 mmbf in 2003. Petitioners' Posthearing Brief, Vol. II, Appendix H, Exhibit 28 at 5 (Table 3) USA-5); CLTA's Posthearing Brief, Vol. 2, Tab R at 2 (USA-6).

[183]USITC Report at Table I-1.

[184]USITC Report at 22, IV-3 and Table IV-6. Housing starts reached a peak in 1999 at 1.66 million units, declining to 1.59 million units in 2000 and remaining relatively flat at 1.60 million units in 2001. Housing starts were 23.0 percent higher in 1999 and 18.3 percent higher in 2001 compared with housing starts in 1995. Id.

[185]Industry analyst Clear Vision Associates forecasted U.S. housing starts to increase by 3 percent from 1.6 million units in 2001 to 1.65 million units in 2002, and then further increase by 6 percent to 1.75 million units in 2003. CLTA's Prehearing Brief, Vol. 3, Tab 1 at 1 and 2 (USA-7); CLTA's Posthearing Brief, Vol. 2, Tab R at 1-3

increases for 2001-2002 (4.3 percent) compared with its demand forecasts for softwood lumber (1 percent), but its related forecasts for the 2002-2003 period showed the opposite correlation (1.89 percent for U.S. housing starts compared with 4 percent for softwood lumber demand).[186]

138. **Recent Actual U.S. Housing Data:** Moreover, in examining the most recent actual record data, the Commission found that while U.S. housing starts increased in January and February of 2002 to the highest levels for single-family home starts in over 20 years, they then fell by 7.8 percent in March 2002 to the lowest level in two years.[187] There also was evidence in the record that this decline in housing starts might be a signal that the market was giving back some of the strong gains made during the mild winter of 2001-2002.[188] The Commission concluded that the mixed evidence did not support a finding that there would be substantial growth in the primary end-use, housing starts, and hence substantial growth in demand for softwood lumber.[189]

139. Thus, Canada's arguments are based in part on its characterization of substantial improvements, *i.e.*, "a change in circumstances," projected for softwood lumber demand, which the Commission did not find was warranted by the evidence of record. The Commission considered demand forecasts, but they were mixed, subject to frequent revisions, and not entirely supported by actual data and forecasts for U.S. housing starts. Thus, the Commission reasonably 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."[190]

140. It is clear that the forecasts for continued stable and strong demand supports the Commission's position that the U.S. market would continue to be a very attractive market for Canadian imports.[191] The U.S. market accounts for about 65 percent of Canadian production,

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(USA-6).

[186]Industry analyst RISI forecasted U.S. housing starts to increase by 4.3 percent from 1.61 million units in 2001 to 1.68 million units in 2002, and then further increase by 1.8 percent to 1.71 million units in 2003. Petitioners' Posthearing Brief, Vol. II, Appendix H, Exhibit 28 at 3 (Table 2) (USA-5); CLTA's Posthearing Brief, Vol. 2, Tab R at 1 (USA-6).

[187]USITC Report at 23, n.141 and II-3-4, n.10.

[188]USITC Report at II-3-4, n.10.

[189]The industry forecasts suggested slight growth in U.S. housing starts in 2002 and further increases in 2003. USITC Report at 42.

[190]USITC Report at 42. The Commission made a similar finding in its Conditions of Competition section, stating "lumber consumption is forecast to either remain flat or increase slightly in 2002, followed by increases in 2003." Id. at 23.

[191]USITC Report at 42.

with Canadian imports accounting for about one-third of the U.S. market. Canada has not refuted the finding, that subject imports from Canada would continue to play an important role in the U.S. market, and even that there would likely be increases in such imports. Rather, Canada contends that any such increase in imports would not be injurious, because of its view regarding the alleged effect of demand on prices.

141. In the underlying investigation, the Commission considered and rejected the same premise presented by Canadian exporters (CLTA) that "[s]trong and improving demand typically causes prices and other indicators of industry performance to improve, not worsen."[192] The Commission found that the facts did not support CLTA's theory.[193] While demand remained relatively stable in 2000 and 2001 after reaching record levels in 1999,[194] substantial contemporaneous declines in price occurred,[195] particularly in 2000, which resulted in the deterioration in the condition of the domestic industry.[196]

142. Thus, contrary to CLTA's and Canada's theory, strong demand did not translate into price improvements. In fact, the evidence demonstrated that it had been supply rather than demand that had played a pivotal role in the prices of softwood lumber in the U.S. market, as the excess supply had resulted in price declines through 2000. This supports the ITC's finding that substantial increases in subject imports likely will have price effects.

143. Canada has not refuted the facts that even with strong demand during the period of investigation, prices declined and the condition of the domestic industry deteriorated – effects opposite to those Canada speculates should occur in the future. Nevertheless, Canada argues that

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[192]CLTA's Prehearing Brief at 46-47 (USA-7).

[193]USITC Report at 42, n. 271. The Commission stated:

> CLTA argued that the domestic industry's financial performance will improve as lumber consumption increases in 2002 and 2003. CLTA's Prehearing Brief at 46-47. However, demand was at record levels in 1999 and remained relatively level in 2000 and 2001, while prices for softwood lumber declined substantially and the industry's condition worsened considerably.

Id.

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

[195]For example, the price of SYP fell 32.9 percent, from a peak of $434/mbf in the third quarter 1999 to a low of $291/mbf in the fourth quarter 2000. The price of WSPF (a product mostly imported from Canada) fell 39.3 percent, from a peak of $336/mbf in the second quarter 1999 to $204/mbf in the fourth quarter 2000. USITC Report at Tables V-1 and V-2.

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

the Commission should have agreed to CLTA's optimistic theory about what effects growth in demand would have on industry performance and prices in the face of facts to the contrary. Canada further urges the Panel, in the face of facts to the contrary, that the result it urges is the only possible result.

144. Finally, while Canada's demand projections and theory are central to its challenge to whether there would likely be increases in subject imports, the Commission's finding regarding demand forecasts in the U.S. market is only one of the six subsidiary findings relied upon by the Commission in determining that Canadian imports would be likely to increase.

ii. *Canadian Producers' Excess Capacity and Projected Increases in Capacity, Capacity Utilization, and Production Supports ITC's Determination*

145. The Commission found that the evidence demonstrated that Canadian producers had increasing excess capacity during the period of investigation, expected to further increase their ability to supply the U.S. softwood lumber market, and were likely to increase imports substantially. The ITC properly considered factors relevant to a threat determination in analyzing all record evidence and making its finding. Canada alleges that the Commission improperly considered the factors, ignored certain data, relied on erroneous data or was inconsistent with the present finding of noninjurious behavior. The Panel should reject Canada's attempts to have the Panel reweigh the record evidence in its favor.

146. The Commission considered the totality of the record evidence in making its finding regarding excess Canadian production capacity. In contrast, Canada would have the Panel consider each piece of evidence in isolation. Canada's challenge essentially focuses on whether the evidence supports the Commission's discounting of Canadian producers' projections for their future exports to the U.S. market. We believe it clearly does if all of the evidence is considered. Thus, we turn to look at the facts as a whole.

147. **The Canadian producers rely on sales in the U.S. market for about two-thirds of their production.** The Commission recognized that Canadian producers are predominantly export-oriented toward the U.S. market, with exports to the United States accounting for 68 percent of their production in 2001.[197] Canadian exports to the United States as a share of Canadian production were about 63 percent in 1999 and 2000, but also had ranged from 64.9 to

[197]USITC Report at Table VII-7. According to Canadian producers' questionnaire responses (covering nearly 80 percent of production in Canada), exports to the United States increased from 13,021 mmbf in 1999 to 13,041 mmbf in 2000, and to 13,546 mmbf in 2001, and are projected to increase to 13,660 mmbf in 2002 and 13,954 mmbf in 2003. As a share of total Canadian shipments, reported Canadian exports to the United States were 57.4 percent, 57.4 percent, and 60.9 percent in 1999, 2000, and 2001, respectively, with projections for 2002 and 2003 of 58.8 percent and 58.5 percent, respectively. USITC Report at Table VII-2.

67.4 percent for the four years preceding the period of investigation.[198]

148. Canada claims that the ITC's consideration of Canada's export-orientation provided no explanation of its significance.[199] But, the significance is very clear. When a single market accounts for two-thirds of a country's production, the exporting industry's success, and probably survival, is tied to the importing market. Canada's challenge rests on its oft repeated contention that this share had been the same during the period of investigation and that the "Commission failed to demonstrate the change that is necessary to upset the noninjurious *status quo*."[200] As discussed above, there is no such requirement to find "a" change in status quo in making a threat determination. Moreover, while the exporting industry's market is an appropriate factor for consideration in a threat analysis, it is generally not a factor considered in a present material injury analysis. However, on the related facts, Canada's argument ignores the ITC's affirmative finding in its present injury analysis that the volume of imports from Canada, equal to one-third of U.S. apparent consumption, were significant. These findings clearly support the existence of threat of material injury.

149. The covered Agreements contemplate that the Commission will consider the importance of export markets in determining threat of material injury. In this case, the evidence demonstrated that the U.S. market had been very important to Canadian producers and was expected to continue to be. On the other hand, other export markets accounted for only 8 to 9 percent of Canadian shipments for the 1999-2001 period.[201] Therefore, there was limited availability of markets (whether other export or home) other than the U.S. market to absorb additional Canadian production of softwood lumber. The Commission reasonably considered the U.S. export-orientation of the Canadian producers in its finding of the likely substantial increases in subject imports in the imminent future.

150. **The Canadian producers had excess capacity**. Canadian producers' capacity utilization had peaked in 1999 at 90 percent, and then declined to 84 percent in 2001.[202] This contrasted with the relatively stable level for Canadian capacity utilization in the three years prior

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[198]USITC Report at Table VII-7.

[199]Canada's First Written Submission, paras. 123 and 124.

[200]Canada's First Written Submission, para. 124.

[201]USITC Report at Table VII-2.

[202]USITC Report at Tables VII-1 (publicly available data series) and VII-2 (questionnaire response data series). Data from Canadian producers' questionnaire responses and from publicly available sources were very similar. Questionnaire responses reported capacity utilization as 90.3 percent in 1999, 88.8 percent in 2000, and 84.4 percent in 2001. Id. at Table VII-2. Data from publicly available sources reported capacity utilization as 90.5 percent in 1999, 88.9 percent in 2000, and 83.7 percent in 2001. Id. at Table VII-1.

to the period of investigation, while operating under the SLA.[203] Thus, in 2001, excess Canadian capacity had increased to 5,343 mmbf, which was equivalent to 10 percent of U.S. apparent consumption.[204] Moreover, the evidence showed that this increase in excess capacity could not be attributed to declines in home market shipments from 1999 to 2001, since increases in imports to the U.S. market for that period were nearly equal to the declines in home market shipments.[205]

151. Canada again rests this claim on the allegation that the ITC had not found such excess capacity injurious in its present analysis. The obvious problems with this claim is that Canadian production capacity is not a factor generally considered in a present analysis, so it was not found by the ITC to be non-injurious. Indeed, had the Commission also found significant price effects and impact, the Commission's significant volume finding would have been sufficient to support an affirmative present material injury finding. Moreover, Canada's allegations regarding imports in 2001 ignore some key facts: 1) the investigation was pending during 2001; 2) the restraining effect of the SLA was in place from January to March of 2001; 3) preliminary measures were in place from August to December of 2001; and 4) during the limited period (April to August 2001) when no restraining measures were in place, although the investigation was still pending, imports increased by 9-12 percent compared with the same period in each of the three preceding years. The Commission considered all of the facts in making its determination and not the selective few that Canada has presented to the Panel.

152. **The Canadian producers projected increases in capacity and production in 2002 and 2003**. The Commission considered the evidence that showed that there had been a steady increase in Canadian producers' capacity from 1995 to 1999, with a more gradual increase from 1999 to 2001.[206] Thus, Canadian production capacity in 2001 was 10.4 percent higher than in 1995.[207] Canadian production increased by 11.3 percent from 1995 to 1999, and then declined from 1999 to 2001; Canadian production in 2001, however, was 5.2 percent higher than it had

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[203]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. USITC Report at Table VII-1.

[204]USITC Report at 40, Tables VII-1 and C-1.

[205]USITC Report at Table VII-2. Based on questionnaire responses, home market shipments declined by 663 mmbf from 1999 to 2001 while shipments to the U.S. market increased by 525 mmbf from 1999 to 2001. Id.

[206]USITC Report at 40, Tables VII-1 and VII-2. Data from publicly available sources showed Canadian producers' capacity increase from 29,700 mmbf in 1995 to 32,100 mmbf in 1999, and increase again to 32,800 mmbf in 2001. USITC Report at Table VII-1. Canadian producers' questionnaire responses (covering nearly 80 percent of production in Canada) followed similar trends with reported production capacity in Canada increasing from 24,871 mmbf in 1999 to 25,804 mmbf in 2001. USITC Report at Table VII-2.

[207]USITC Report at 40 and Table VII-1.

been in 1995.[208]

153. Furthermore, the Commission found that in their questionnaire responses, Canadian producers projected additional capacity increases, improvements in capacity utilization, and additional production in 2002 and 2003.[209] Thus, despite the excess capacity already available in 2001 as capacity utilization declined to 84 percent,[210] the evidence demonstrated to the Commission that Canadian producers expected to further increase their ability to supply the U.S. softwood lumber markets.[211] For example, Canadian producers expected to increase their production by 5.4 percent from 2001 to 2002, and increase production again by 3 percent from 2002 to 2003.[212] Moreover, these planned increases in Canadian production, particularly from 2001 to 2002, were projected while the evidence demonstrated that demand in the U.S. market was forecasted to remain relatively unchanged or increase only slightly for the same period.

154. **There was evidence of incentives to produce more softwood lumber and export it to the U.S. market**. For example, the Commission recognized that many Canadian provinces subject tenure holders (lumber producers) to requirements to harvest at or near their annual allowable cut ("AAC") or be subject to penalties/reductions in future AACs.[213] The Commission found there was evidence that these mandatory cut requirements stimulated increased production even when demand was low and thus increased the incentive to export more softwood lumber to the U.S. market.

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[208]Data from publicly available sources showed Canadian production increase from 26,093 mmbf in 1995 to 29,041 mmbf in 1999, and then decline to 27,457 mmbf in 2001. USITC Report at Table VII-1. Canadian producers' questionnaire responses (covering nearly 80 percent of production in Canada) covered only the 1999-2001 period with production declining from 22,452 in 1999 to 21,770 mmbf in 2001, or by 3 percent. Id. at Table VII-2.

[209]USITC Report at Table VII-2. Canadian producers projected capacity increases from 25,804 mmbf in 2001 to 26,206 mmbf in 2003, production increases from 21,770 mmbf in 2001 to 23,698 mmbf in 2003, and capacity utilization increases from 84.4 percent in 2001 to 90.4 percent in 2003. Id.

[210]USITC Report at Tables VII-1 and VII-2.

[211]USITC Report at Table VII-2.

[212]USITC Report at Table VII-2.

[213]See, e.g., Canadian Forest Act §§ 64 and 66-67 (British Columbia) (tenure holders are required to harvest within 10 percent of their AAC over five years and within 50 percent in any year, or face penalties for undercutting including loss of tenure in later years). Petition at Exh. IV B-3 (USA-14). The evidence also demonstrated that certain provincial governments also may require major forest tenure holders to operate specific timber processing facilities and prohibit or restrict closures and reductions in capacity. Petitioners' Prehearing Brief at 89-92 (USA-8); Petitioners' Posthearing Brief at Appendix B-23 (USA-5). The Commission, however, acknowledged that there was evidence that Quebec, Alberta, New Brunswick, and Nova Scotia did not have minimum cut requirements, and that U.S. timber harvest contracts often required full payment regardless of the amount of timber actually harvested. CLTA's Posthearing Brief at 12 (USA-6).

155. Canada fails to recognize that the ITC did find that imports with the AAC requirements in place were at significant levels in its present injury analysis. Moreover, Canada ignores the fact that for most of the period of investigation imports were subject to the SLA or preliminary measures. With the SLA in effect, fees of $50 or $100 were imposed after specified import levels were reached, which would certainly affect import levels differently than if there had been no such restraint in place. Finally, while only certain provinces have AAC requirements, it is disingenuous for Canada not to acknowledge that one of the ones that does is British Columbia which accounts for almost 50 percent of Canada softwood lumber production and 50 percent of imports to the U.S. market.[214]

156. **Canadian producers' export projections**. The Commission clearly considered Canadian producers' export projections in footnote 258 of the Views of the Commission.[215] The Commission found that more weight should be given to actual data showing excess Canadian capacity, declines in home market shipments, and declines in exports to other markets, as well as projected increases in production than to these export projections, which were inconsistent with the other data.

157. Canadian producers projected increases in production, production capacity and capacity utilization for 2002 and 2003. In particular, capacity utilization was projected to increase from the low of 84 percent in 2001 to 90 percent in 2003, as capacity also was projected to increase.

158. While Canadian producers projected that exports to the U.S. market would increase slightly in 2002 and 2003, these projected increases in exports to the United States accounted for only about one-fifth of the planned increases in production. The U.S. market accounted for 68 percent of the Canadian softwood lumber production. However, projected increases in exports by Canadian producers to the U.S. market accounted for only about 20 percent of the projected increase in production. On the other hand, the home market, which accounted for about 24 percent of production, and non-U.S. export markets, which accounted for about 8-9 percent of Canadian production, were supposed to receive substantially higher shares of projected

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[214]USITC Report at Tables VII-5 and VII-7.

[215]Note 258 in the Views of the Commission states:

> CR/PR at Table VII-7. Canadian exports to the United States as a share of Canadian production were about 63 percent in 1999 and 2000, but also had ranged from 64.9 to 67.4 percent for the four years preceding the period of investigation. Id. According to Canadian producers' questionnaire responses (covering nearly 80 percent of production in Canada), exports to the United States increased from 13,021 mmbf in 1999 to 13,041 mmbf in 2000, and to 13,546 mmbf in 2001, and are projected to increase to 13,660 mmbf in 2002 and 13,954 mmbf in 2003. As a share of total Canadian shipments, reported Canadian exports to the United States were 57.4 percent, 57.4 percent, and 60.9 percent in 1999, 2000, and 2001, respectively, with projections for 2002 and 2003 of 58.8 percent and 58.5 percent, respectively. CR/PR at Table VII-2.

USITC Report at 41, n.258.

production increases.[216] While some forecasts projected Canadian apparent consumption to increase in 2003, Canadian apparent consumption had declined by 19.7 percent from 2000 to 2001.[217] Even though any projected increase in Canadian demand was not forecasted to return it to 2000 levels some how home market shipments were projected to increase beyond 2000 levels.

159. It was reasonable, given the evidence as a whole for the ITC to discount the Canadian producers projected export data and assume that projected increases in production would likely be distributed between the U.S. market, home market, and other non-U.S. export markets in shares similar to those prevailing during the last five years. Canada has offered no positive evidence to refute the ITC's reasonable position that production increases would be distributed according to historic proportions; that is, no positive evidence, such as a new supplier contract, that shows a large share of the increased production was to shift to markets other than the U.S. market.

160. In this case, the evidence demonstrated that the U.S. market had been very important to Canadian producers and was expected to continue to be. Therefore, there was limited availability of markets (whether other export or home) other than the U.S. market to absorb additional Canadian production of softwood lumber. The Commission reasonably considered the U.S. export-orientation of the Canadian producers and discounted the export projection data in its finding of the likely substantial increases in subject imports in the imminent future.

161. Thus, Canadian producers had excess capacity, and increases in capacity and production were projected in 2002 and 2003. In addition, Canadian producers, which rely on sales in the U.S. market for about two-thirds of their sales, had incentives to produce more softwood lumber and export it to the U.S. market. In light of those facts, the Commission reasonably found that excess capacity and further projected increases in Canadian production would likely result in substantial increases of subject imports.

162. The Commission properly considered all record evidence in making its findings. The Commission's finding that excess capacity and projected increases in capacity, capacity utilization, and production indicate a likelihood of substantially increased imports is based on positive evidence, and the Commission's evaluation of that evidence was unbiased and objective and should be affirmed by this Panel.

iii. *Likely Increases in Subject Imports Supports ITC's Determination*

163. In evaluating whether there was a likelihood of substantially increased imports of softwood lumber from Canada, the Commission considered, inter alia, evidence regarding the

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[216]USITC Report at Table VII-2.

[217]USITC Report at Table VII-7.

increase in imports over the period of investigation, the effects of expiration of the SLA, and subject import trends during periods when imports were not subject to restraints. The Commission found that the evidence demonstrated that the volume of subject imports was already significant and had increased even with the restraining effect of the SLA in place, and that subject imports had increased substantially during periods without export restraints as well. The Commission properly considered all record evidence in analyzing the totality of the facts and making its findings. The Commission's finding that there is a likelihood of substantial increases in subject imports is based on positive evidence and is consistent with U.S. obligations under the covered Agreements.

164. As already noted, Canada's claims regarding the volume or market penetration of imports rely on its mischaracterization of the Commission's present injury finding that imports were at noninjurious levels and its flawed premise that there must be of an abrupt change in *status quo*.[218] Canada's arguments misstate the facts, findings and requirements. The Commission made a present injury finding that both the volume and market share of subject imports were significant. The Commission's finding of significant volume of imports was legally sufficient to support a finding of present material injury if combined with significant price and impact effects. Canada incorrectly characterizes the ITC's finding as a finding that the present volume was "noninjurious."

165. In its present injury analysis, the Commission found that the volume of subject imports from Canada increased by 2.8 percent from 1999 to 2001.[219] As a share of apparent domestic consumption, subject imports from Canada increased from 33.2 percent in 1999 to 34.3 percent in 2001.[220] Conversely, subject imports by value declined by 16 percent.[221] The Commission concluded that: "**this large volume of subject imports both in absolute terms and relative to consumption in the United States is significant.**"[222] While the Commission did not make an affirmative determination on the basis of present material injury, it clearly found that subject imports were at levels which were significant and would be injurious if combined with evidence of significant price and impact effects. Canada is simply incorrect in contending that the Commission found such levels of import penetration were insufficient much less "non-injurious" in its present material injury finding.

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[218]As discussed above, neither the covered Agreements nor any other GATT or WTO dispute settlement proceeding has required an identification of "a" change in status quo for a threat finding.

[219]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.

[220]USITC Report at Table IV-2 and C-1.

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

[222]USITC Pub. 3509 at 32.

166. As discussed above, a threat analysis often comprises an evolution or progression of demonstrable trends in trade that, if not prevented, likely will rise to present material injury.[223]

167. In this case, the threat analysis begins with subject import volumes already at significant levels. Of course, a threat analysis looks at whether these imports are likely to be injurious in the imminent future. The evidence as already discussed above demonstrates that subject imports will continue to enter the U.S. market at this significant level and are projected to increase. Canada acknowledges that imports at this level would continue and even increase; its argument principally is whether the increases would be substantial.[224] The Commission's finding is based on positive evidence that there is a likely continuation of subject imports at significant levels as well as a likely progression of substantial increases in those imports.

168. It also is important to place these underlying investigations in the appropriate context when analyzing the facts and relevant factors. The Commission appropriately considered the restraining effects of the SLA[225] on imports and trends in subject imports during periods when such imports were not subject to some type of restraint. Canada attempts to have the Panel ignore this important condition of competition, or implies that if considered it should be given less weight. The ITC, however, appropriately considered the totality of the evidence, including the effects on trade of the SLA, in making its findings.

169. In contrast to a typical original antidumping or countervailing duty investigation, these investigations involved consideration of evidence regarding imports during a period of investigation when such imports were subject to a trade restraining agreement. Thus, the examination of import data confined to a typical three year period of investigation would not necessarily provide a complete and accurate basis for projections of what the future events likely would be without any trade restraints.[226] The ITC therefore, in addition to considering import data for a typical period of investigation, also took into account in its analysis other evidence including trends in subject imports during periods when they were not subject to any trade restraints.

170. As discussed in more detail below, subject imports during these non-restraint periods increased substantially. Canada claims that imports after the SLA increased by only 0.4

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

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

[225]The SLA set a limit for imports on a fee-free basis and two levels of quotas for imports above the fee-free level.

[226] In this way, there are similarities in the analysis with that required in a five-year review where an order is in effect and the investigating authority considers the future effects if the order is removed.

percent,[227] but its comparison of import data for April-December 2001 to April-December 2000 ignores the fact that other trade restraining measures, *i.e.*, preliminary countervailing duties, were imposed in August 2001. Thus, Canada's argument is predicated on a false notion – that trade during the identified period was free of trade encumbrances. In contrast, when the period with no formal trade restraining measures is considered, the evidence shows that subject imports increased by 11.3 percent for the April-August 2001 period compared with the April-August 2000 period.[228] This evidence clearly shows that there is a distinction in the level of imports depending on whether restraints are in place and that the import volumes are substantially higher during periods when they are not subject to restraining measures.

171. **Restraining effects of the SLA**. The evidence demonstrates that each year during the pendency of the SLA, Canadian producers used their fee-free quota, substantially all of their $50 fee quota in every year except 2000-2001,[229] and in each year, including 2000-2001,[230] exported significant quantities of softwood lumber with $100 fees.[231] Canadian producers also shipped significant quantities of bonus exports each year. For example, in 2000-2001, while $50 fee imports were 207.3 million board feet and $100 fee imports were 68.3 million board feet, bonus exports were 297.5 million board feet.[232] The Commission found that this evidence indicated that, in the absence of the SLA, they would have shipped more, given the near prohibitive level of the $100 fee. In fact, even as demand leveled off during the period of investigation and prices declined substantially, subject imports continued to enter the U.S. market in quantities above the fee-free quota, incurring additional fees of $50 to $100 per mbf.

172. Contrary to Canada's charges, the Commission did not find that the 2.8 percent increase in the volume of imports during the period of investigation was insignificant. It expressly found the volume of imports significant. Moreover, Canada ignores or discounts the evidence supporting the Commission's finding that trade during most of the period of investigation was

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[227]Canada's First Written Submission, para. 129.

[228]Official import statistics. (USA-25).

[229]The Commission misstated in its opinion that "all" of the $50 fee quota was used in 2000-2001. The Commission clearly considered the correct data in its finding, as demonstrated by its citation. Moreover, the fact is, since $100 fee imports entered in the 2000-2001 period, some importers had used all of their $50 fee quota in that period. As discussed above, the SLA was structured to disperse the volume of subject imports over the course of each year and by Province. Thus, there is no doubt that the Commission's finding would have been the same if the word "all" had not been used for the 2000-2001 period.

[230]Canadian producers used 89 percent in 1996-1997, 83 percent in 1997-1998, and during the period of investigation used 95 percent in 1998-1999, 92 percent in 1999-2000, and 31.4 percent in 2000-2001. Petitioners' Prehearing Brief at Exh. 62 (USA-8).

[231]*See, e.g.*, USITC Report at Table IV-3 and Petitioners' Prehearing Brief at Exh. 62 USA-8).

[232]Petitioners' Prehearing Brief at Exh. 62 (USA-8).

affected by the SLA. The fact is, the increases in subject imports occurred in spite of incurring $50-100 fees on imports over the specified levels.

173. Moreover, the Commission considered additional evidence that the SLA had restrained the volume of subject imports from Canada at least to some extent. First, increases in subject imports had not kept pace with increases in demand. Subject imports increased by 8.8 percent and market share remained relatively constant while apparent U.S. consumption increased by 13.1 percent from 1995 to 2001. Second, the Commission found that the anecdotal information reported to the Commission by importers of subject merchandise and Canadian producers regarding the effects of the SLA also supported a conclusion that it had some restraining effect on the volume of subject imports.[233] The Commission properly considered all record evidence in making its finding.

174. **Trends in subject imports during periods when such imports were not subject to some type of formal or informal restraint.** The Commission also reasonably considered evidence demonstrating that imports of softwood lumber from Canada increased during periods in which there were no restraints on their entry into the U.S. market, i.e., prior to the adoption of the SLA between 1994 and 1996,[234] and the period immediately after the SLA expired but before suspension of liquidation in these investigations.

175. First, the Commission considered import trends during the period prior to the adoption of the SLA, between 1994 and 1996. The evidence demonstrated that subject imports from Canada held a 27.5 percent share of the U.S. softwood lumber market in 1991 when the Memorandum of Understanding (MOU) regarding softwood lumber from Canada that had been in effect since December 30, 1986 expired.[235] During the ensuing CVD investigation before the Commission, and the appeals of the affirmative determination before the U.S.-Canada Free Trade Agreement ("CFTA") panels, the subject import market share continued to increase.[236] In August 1994, the appeals were terminated and imports of softwood lumber from Canada were not subject to any trade restraining measure until the SLA took effect in April 1996.[237] During this period the evidence showed that subject import market share increased from 27.5 percent in 1991 to 35.9

[233]USITC Report at Appendix E.

[234]See, e.g., Petitioners' Prehearing Brief at Exh. 65 (USA-8) and Petition at Exh. I-B-18 (USA-14).

[235]USITC Report at I-8; and Softwood Lumber III, USITC Pub. 2530 at Table 2.

[236]USITC Report at I-7 - I-8; and Petition at Exh. I-B-18 (USA-14).

[237]USITC Report at I-7 - I-8.

percent in 1996.[238] With the SLA in effect, the market share for softwood lumber from Canada declined to 34.3 percent in 1997 and remained fairly stable within a range of 2.7 percentage points.

176. Canada's charge that consideration of these trends is contrary to an alleged Commission practice[239] ignores some key distinctions between the facts in this case and the two Commission determinations to which it refers.[240] In both of the cases cited, the Commission was responding to requests from a party to conduct an analysis for longer than the three-year period of investigation and did not involve conducting an investigation with a trade restraining measure in place for most of the period of investigation. The fact is, in five-year review investigations which also involve considering data for periods of time with a trade restraining measure in place (*i.e.*, an order or suspension agreement), U.S. law directs the ITC to consider evidence regarding the period prior to imposition of the duties or agreement. The rationale is that this period provides information and guidance regarding trade when restraints were not in place.

177. The ITC appropriately considered import trends during the restraint-free 1994-1996 period and certainly did not rely solely on this evidence to support its affirmative threat determination. Moreover, the evidence for the earlier period was consistent with the evidence for the more recent restraint-free period (April-August 2001) which showed that imports substantially increased without restraints.

178. In fact, the evidence showed that subject imports increased during the period immediately after the SLA expired (April 2001) and before suspension of liquidation (August 2001). Subject imports of softwood lumber by volume for the period of April to August 2001 were higher than the comparable April-August period in each of the preceding three years (1998-2000) by a range of 9.2 percent to 12.3 percent.[241] This evidence provides a clear indicator of how subject imports

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[238]USITC Report at Table IV-2 and Softwood Lumber III, USITC Pub. 2530 at Table 2. The evidence also shows that during the seven quarters between August 1994 and April 1996, subject imports market share increased from 32.6 percent in 3rd quarter 1994 to 37.4 percent in 1st quarter 1996. Petitioners' Prehearing Brief at Exh. 65 (USA-8).

[239]Far from Commission practice, these are probably the only two Commission cases that include such a statement.

[240]Canada also selectively challenges the ITC's consideration of data for more than the three-year period of investigation (1999-2001). While Canada challenges the ITC's consideration of import data for the 1994-1996 period, it does not mention the ITC consideration throughout its analysis of evidence for the longer 1996-2001 period.

[241]Official monthly import statistics (USA-25). Total subject imports of softwood lumber by volume for the period of April to August 2001 were 11.3 percent higher than the comparable April-August period in 2000, 9.2 percent higher than April-August 1999, and 12.3 percent higher than April-August 1998. The evidence also shows that the subject imports by volume for the period between April and August 2001 was higher in each month than the comparable month in 2000, with exception of June, by a range of 7.5 percent to 25.6 percent. Id.

have entered, and would enter, the U.S. market in the imminent future if not subject to trade restraints. The Commission reasonably relied on this positive evidence to support its finding of likely substantial increases in subject imports.

179. Canada's claim that the ITC should have considered if this increase was due to a shift in timing resulting from the pending imposition of duties ignores the simple fact that imports would be entering the U.S. market without restraints in substantially increased amounts. Canada continues to focus on the magnitude of increases in an effort to divert the Panel's attention from the underlying fact that imports already are, and would continue to be, at injurious levels.

180. In another effort to discredit the ITC's analysis, Canada attempts to portray the ITC's finding as inconsistent with its negative finding on the misunderstood "but for" provision in U.S. law that must be considered in affirmative threat determinations.[242] Canada essentially argues that if the ITC did not find the increase in imports in the five month period without restraints (April-August 2001) sufficient to justify an earlier effective date for the imposition of duties, it could not support an affirmative threat determination.[243] Canada's argument fails for a number of reasons. First, the ITC found that the volume of imports supported a present material injury finding; thus, there would have been no need to change its determination from threat to present if it had been based only on this factor. Second, Canada is suggesting that the ITC should have based its entire present material injury determination on one factor based on only five months of data. However, as the Appellate Body in *US-Lamb Meat* explained in the safeguards context, the data for the entire period of investigation must be assessed in making a threat of injury determination.[244]

181. Canada attempts to discredit the Commission's consideration of subject import trends when imports were not subject to restraints. Canada fails to refute the simple facts that, without restraints imports have increased: increases stopped when the SLA was imposed; substantial increases in imports occurred when the SLA expired; and increases in imports stopped when preliminary duties were imposed. Canada offers nothing but speculation about other reasons why imports were not restrained during those periods.

182. **Increases in shipments from non-covered provinces**. The Commission also recognized that during the pendency of the SLA, Canadian shipments from non-covered provinces to the

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[242]Pursuant to U.S. statutory law (19 U.S.C. §§ 1671d(b)(4)(B) and 1673d(b)(4)(B)), the Commission did "not find that material injury by reason of subject merchandise that is subsidized and sold at less than fair value would have been found but for any suspension of liquidation of entries of such merchandise." USITC Report at 44, n. 279.

[243]Canada First Written Submission, para. 134. This argument seems to suggest that an affirmative threat finding would never be appropriate.

[244]*US-Lamb Meat*, AB Report, para. 138 (competent authorities "cannot rely exclusively on data from the most recent past, but must assess that data in the context of the data for the entire investigative period.").

United States more than doubled.[245] Canadian exporters' contentions in the underlying investigation that such import volumes would be "redistributed" to previously SLA-covered provinces with the expiration of the SLA is speculative and fails to take into account that now there is no restraint on imports from any of the provinces. In fact, the record shows that, with the expiration of the SLA, imports continued from non-covered provinces unabated and thus were not "redistributed" to the formerly covered provinces.[246] For example, while imports from the Maritime Provinces declined by 289 mmbf from 2000 to 2001, other Canadian imports increased by 720 mmbf for the same period.[247] Moreover, imports from the Maritime Provinces, even with the decline in 2001, were almost three times the amount imported prior to the SLA in 1995.[248] Canadian exporters' theory about redistribution also failed to take into account the vast difference in volume of production and consequent exports to the U.S. market from former SLA covered provinces and non-covered provinces; for example, the Maritime Provinces accounted for only between 7.1 and 8.5 percent of Canadian softwood lumber production for the 1999-2001 period.[249]

183. Canada fails to refute that the Commission's finding of a likelihood of substantially increased imports was based on consideration of several factors, including: Canadian producers' excess capacity and projected increases in capacity, capacity utilization, and production; the export orientation of Canadian producers to the U.S. market; the increase in subject imports over the period of investigation; the effects of expiration of the SLA; subject import trends during periods when there were no import restraints; and forecasts of strong and improving demand in the U.S. market.[250]

184. The Commission properly considered all record evidence in analyzing the facts and making its findings. The Commission's finding that there is a likelihood of substantial increases in subject imports is based on positive evidence. The Panel should reject Canada's repeated attempts to have the Panel reweigh the record evidence in its favor.

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[245]*See, e.g.*, USITC Report at Table IV-3. For example, imports from the Maritime Provinces increased from 931 mmbf in 1996 to 2,130 mmbf in 2000, before declining to 1,841 mmbf in 2001. Thus, the subject imports from the Maritime Provinces increased by 129 percent from 1996 to 2000, and by 98 percent from 1996 to 2001. Id. See also USITC Report at Table VII-5 and Petition at Exh. I-B-62 (regarding production increases in Manitoba and Saskatchewan) (USA-14).

[246]USITC Report at Table IV-3.

[247]USITC Report at Table IV-3.

[248]USITC Report at Table IV-3.

[249]USITC Report at Table VII-7.

[250]USITC Report at 40-43.

b. The Commission's Finding of Likely Price Effects by Subject Imports Based on Positive Evidence

185. The Commission's finding that subject imports of softwood lumber from Canada are likely to have a significant price depressing or suppressing effect on domestic prices and are likely to increase demand for further imports is supported by positive evidence and is consistent with U.S. obligations under the covered Agreements. In analyzing the facts of these investigations and making its findings, the Commission properly considered all record evidence and the relevant factors for a threat of material injury analysis in antidumping and countervailing duty investigations.

186. In considering the likely price effects of subject imports, including their likelihood to increase demand for further imports, the Commission found that additional subject imports would increase the excess supply in the market, putting further downward pressure on prices. Thus, given the Commission's finding of likely significant increases in subject import volumes, and its finding of at least moderate substitutability between subject imports and domestic product, the Commission concluded that subject imports were likely to have a significant price depressing or suppressing effect on domestic prices in the imminent future, and are likely to increase demand for further imports.

187. The Commission considered all record evidence. Canada, however, invites the Panel to displace the Commission's establishment of the facts and substitute Canada's view of the evidence. Moreover, it is clear that the Commission did not disregard the arguments of Canadian exporters but merely found other evidence on the record to be more persuasive. The Commission's finding of likely price effects is supported by positive evidence and should be affirmed by the Panel.

188. In making its determination, the Commission considered the factor that focuses on the likely price effects listed in the covered Agreements for consideration in a threat of material injury analysis:

> (iii) 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.[251]

189. The following review of the Commission's analysis regarding present and likely price effects demonstrates that its analysis was objective, its explanations are reasonable and adequate, and its determination is supported by positive evidence. In evaluating the evidence in these investigations, the Commission considered price trends for softwood lumber. The evidence

[251]Article 3.7(iii) of the Antidumping Agreement. This same provision is factor (iv) in Article 15.7 of the SCM Agreement.

showed that during the period of investigation, prices for softwood lumber declined substantially, particularly in 2000, due to excess supply in the price sensitive U.S. market with relatively stable demand.[252] In particular, the Commission noted that Random Lengths data indicated that prices of both the domestically-produced and imported Canadian softwood lumber products increased through the second or third quarters of 1999, before falling substantially through the third and fourth quarters of 2000 to their lowest point for the 1999-2001 period.[253]

190. The Commission observed, and public sources generally confirmed,[254] that the price declines in 2000 were the result of too much supply in a market with high, but relatively stable, demand.[255] [256] Thus, despite near record consumption of softwood lumber,[257] prices generally fell through 2000. The Commission acknowledged that there was evidence indicating that both subject imports and the domestic producers contributed to the excess supply,[258] and thus the

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[252]USITC Report at Tables V-1 and V-2, and Figures V-3 - V-5.

[253]For example, the price of SYP fell 32.9 percent, from a peak of $434/mbf in the third quarter 1999 to a low of $291/mbf in the fourth quarter 2000. The price of WSPF (a product mostly imported from Canada) fell 39.3 percent, from a peak of $336/mbf in the second quarter 1999 to $204/mbf in the fourth quarter 2000. USITC Report at Tables V-1 and V-2.

[254]See, e.g., Random Lengths, at 2 (Mar. 31, 2000) ("The lumber bulls see the decline {in the Random Lengths Framing Lumber Composite Price to $375} as a buying opportunity. But the bears, while acknowledging that demand remains high, contend that there is just too much lumber chasing the available volume of orders. . . . recently released production data showing that mills in the Western U.S. made 12.5% more lumber through the first two months of 2000 than during a similar period of 1999. . . . And while no 2000 production figures are yet available from Canada, there is no indication that production there is slackening." (emphasis in original)); RISI Lumber Commentary, at 1 and 10 (June 2000) ("In the area of domestic supply. . . U.S. lumber production over the first four months of the year was up 6% and Canadian production in January-February (the only available data) was up 4% over year-earlier levels. With demand and supply moving in opposite directions, lumber inventories ballooned and prices tested cost floors for the industry."); Forest Products Monthly (December 2000) ("The lumber market's current malaise came from the supply side – too much production, both in the U.S. and in Canada – or at least too slow a reaction to the downturn in demand."). CLTA's Posthearing Brief, Vol. 2, Tab A at 7-10 (USA-6).

[255]USITC Report at 34. The Commission also recognized that while quarterly price fluctuations for domestically produced and subject imports of softwood lumber products also reflected in part cyclical and seasonal factors in U.S. demand and supply for softwood lumber, these factors could not alone account for the magnitude of the price decline. Id. at 34, n.213, citing, USITC Report at V-11.

[256]Petitioners' Posthearing Brief, at 1-2, 11-13, and Appendix B-1 - B-11 (USA-5); Petitioners' Final Comments at 3-6 (USA-9); CLTA's Prehearing Brief, Vol. 1 at 26-30, and Vol. 3, Exh. 28 at 16-22 (USA-7); CLTA's Posthearing Brief, Vol. 1 at 4-6, and Vol. 2 at Tab A (USA-6); Hearing Transcript at 125, 168, 258, and 328 (USA-11).

[257]USITC Report at Tables C-1.

[258]The Commission referred to the evidence in the record and also provided numerous examples in notes 212, 214 and 217 of the Views of the Commission. (USA-1). For instances, the Commission provided the following examples of the evidence in footnote 217: See also, e.g., CLTA's Prehearing Brief, Vol. 3, Exh. 28 at 19 and 20

declining prices.

191. The evidence also showed that prices for softwood lumber increased in mid-2001, at a time of considerable uncertainty in the market due to the expiration of the SLA and the filing of these petitions. The Commission found there was considerable evidence regarding the effects this uncertainty was having on prices for softwood lumber. For example, Random Lengths reported that "Uncertainty surrounding Monday's likely announcement that the U.S. will conduct [antidumping and countervailing] duty investigations prompted Canadian mills to limit offerings and price aggressively as a way of protecting themselves against potential duties. This funneled more business to U.S. producers, who could price their wood and quote without having to worry about duties."[259]

192. The Commission considered the specific price trend evidence showing that, while prices increased in mid-2001 as the SLA expired and the investigations were commenced, prices began to decline in the third quarter of 2001 and fell substantially in the fourth quarter of 2001 to levels as low as those in 2000.[260] Demand, however, considered on a seasonal basis, remained relatively stable. Therefore, the price trend evidence showed that U.S. prices for softwood lumber were at their lowest levels at the end of the period of investigation, with relatively stable

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(USA-7) ("However, despite strong demand, lumber prices declined due to an excess supply. Lumber production in both the Southern and Western United States during the first quarter of 2000 increased by over 5% compared to the same period in 1999." Plum Creek Timber Company, Inc. 2nd Quarter 2000 Quarterly Report; "Lumber prices deteriorated further during the third quarter due to a demand-supply imbalance. . . . North American lumber production during the first half of 2000 was 3% above production for the same period in the prior period and was at a ten-year record high. At the same time lumber demand was weakening, with housing starts 3% lower than the prior year." Plum Creek Timber Company, Inc. 3rd Quarter 2000 Quarterly Report.); CLTA's Posthearing Brief, Vol. 2, Tab A at 11 (USA-6) ("To supply growing new housing and record remodeling markets over the past several years, the industry ramped up production only to see both markets fall as a result of several interest rate increases by the Federal Reserve. The resulting oversupply has led to near-record low pricing for most lumber and panel products." Louisiana Pacific 2000 Annual Report.); Hearing Transcript at 126 (USA-11) ("We had so much lumber because we were geared up, and 200[0] came. . . ."); Petitioners' Posthearing Brief at 2 and Appendix H, Exh. 2 at 11 (USA-5) ("The U.S. industry was widely criticized in years passed for lumber overproduction . . . . This behavior has been curbed considerably here, but remains a problem in Canada, where Provincial forestry officials must also protect pulp mill employment, which is the lifeblood of many small towns. However, as the Canadian softwood lumber industry ships 65% of its output to the U.S., its general failure to manage production to new order volumes and its capacity growth in its eastern provinces have both undermined prices in recent years." Bank of America, "Wood & Building Products Quarterly," at 11 (Nov. 2001).).

[259]Random Lengths at 4, Apr. 20, 2001; see also Random Lengths at 4, June 1, 2001 ("Canadian mills reiterated that they would continue to restrict shipments due to the anti-dumping case and the potential for retroactive duties. However, in this week's nervous climate, this stance backfired as many buyers figured that restricted shipments translated into growing inventories at Canadian mills.") in Petitioners' Posthearing Brief at Appendix B-18 - B-19, and Appendix H, Exh. 7 (USA-5).

[260]USITC Report at V-11, Tables V-1 and V-2, and Figures V-3 - V-5. These trends are consistent with information reported in other public sources and questionnaire responses. The product-specific pricing data collected through questionnaires indicated similar trends for both domestic products and subject imports.

demand. Other evidence such as average unit values for imports and domestic shipments also showed declining trends. For example, the average unit value of imports of softwood lumber from Canada, based on official Commerce statistics, decreased from $395.72 in 1999 to $347.89 in 2000 and $323.57 in 2001.[261] Similarly, the average unit value of U.S. shipments of softwood lumber decreased from $416.13 in 1999 to $361.07 in 2000, and $347.86 in 2001 according to questionnaire responses.[262]

193. As discussed above, the Commission appropriately rejected Canadian exporters' argument, presented now to the Panel, that future increases in demand will improve prices. The evidence does not support their theory. The fact is strong demand over the period of investigation (demand remained relatively stable at historically high levels) did not prevent substantial declines in prices for softwood lumber.[263] The Commission found that the strong demand would ensure that the U.S. market continued to be an important market for Canadian producers. However, contrary to Canada's theory, strong demand did not translate into price improvements. In fact, the evidence demonstrated that it had been supply rather than demand that had played a pivotal role in the prices of softwood lumber in the U.S. market, as the excess supply had resulted in price declines through 2000.

194. The Commission recognized that subject imports maintained a significant share of the U.S. market, accounting for at least one-third of apparent consumption in each year during the period of investigation. As discussed above, the Commission found that subject imports were likely to increase substantially. Therefore, the Commission reasonably found that the additional subject imports would increase the excess supply in the market, putting further downward pressure on prices.[264]

195. At the heart of Canada's arguments regarding the Commission finding of likely price effects is its disagreement with the finding of a likely substantial increase in subject imports. Canada again mischaracterizes the evidence and findings in the ITC's present material injury analysis. As discussed above, Canada fails to recognize that a threat analysis often comprises an evolution or progression of demonstrable trends in trade that, if not prevented, likely will rise to present material injury. The Appellate Body has repeatedly recognized that a determination on the existence of threat must be based on projections extrapolating from existing data, *i.e.*, projections derived from existing data regarding the likely continuation or progression of trends

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[261]USITC Report at Table C-1.

[262]USITC Report at Table C-1.

[263]Demand for softwood lumber was forecasted to remain relatively unchanged or increase slightly in 2002, followed by increases in 2003. USITC Report at 43, citing, USITC Report at II-3-4; CLTA's Posthearing Brief, Vol. 2, Tab R at 1-3 (USA-6); Petitioners' Posthearing Brief, Vol. II, Appendix H, Exhibit 28 at 3 (Table 2) and 5 (Table 3) (USA-5).

[264]USITC Report at 43-44.

in trade adverse to the domestic industry.[265]

196. While Canada ignores much of the evidence, the Commission appropriately considered the totality of the facts in making its finding. In its present injury analysis, the Commission **found that the substantial volume of subject imports had *some* effect on prices** for the domestic like product during the period of investigation, albeit not significant effects. Moreover, Canada fails to recognize that there was a fact that played a critical role in the Commission's conclusion of no significant *present* price effects: the **excess supply in 2000** that resulted in price declines was due to **both subject imports in addition to domestic production**. The evidence showed that the declines in prices resulting from that excess supply had substantially affected the domestic industry's financial performance. The Commission concluded that while subject imports had adversely affected prices of domestic products, it could not find significant price effects because the price declines were due to excess supply in 2000 by both Canadian exports and domestic product.

197. The Commission considered the evidence at the end of the period of investigation which again showed substantial declines in prices in the third and fourth quarters of 2001, to levels as low as 2000. Subject imports also increased in the third quarter until the preliminary duties were imposed in August 2001.[266] There also was evidence regarding supply which generally was considered the cause for the substantial price declines in 2000. This time, however, the evidence indicated that U.S. producers had curbed their production, but that overproduction "remains a problem in Canada."[267] 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.[268] Moreover, the evidence demonstrated that that pressure would come not from excess supply from both subject import and domestic product, but from excess Canadian supply.

198. Canada would have the Panel preclude findings of likely price effects in a threat analysis because present price effects were not found. This view simply has no basis in the covered

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

[266]Official import statistics (USA-25).

[267]*See, e.g.,* Petitioners' Posthearing Brief at 2 and Appendix H, Exh. 2 at 11 (USA-5) ("The U.S. industry was widely criticized in years passed for lumber overproduction . . . . This behavior has been curbed considerably here, but remains a problem in Canada, where Provincial forestry officials must also protect pulp mill employment, which is the lifeblood of many small towns. However, as the Canadian softwood lumber industry ships 65% of its output to the U.S., its general failure to manage production to new order volumes and its capacity growth in its eastern provinces have both undermined prices in recent years." Bank of America, "Wood & Building Products Quarterly," at 11 (Nov. 2001).).

[268]USITC Report at 43-44.

Agreements, particularly when, as here, prices declined at the end of the period of investigation.

199. Contrary to Canada's claims, the ITC provided a thorough and appropriate analysis of the price factor and facts, and provided a reasoned explanation of the record evidence demonstrating support for its finding of likely price effects. Canada, however, ignores any explanation that refutes its arguments. Canada, for example, provides the Panel with an excerpt of the ITC's determination and implies that this is the only analysis that is relevant to likely price effects and that it is deficient. The ITC's analysis in the preceding paragraph in the determinations is dismissed by Canada as dealing with the "impact of forecasted volumes of subject imports on prices, not with the impact of current import prices as required by" the covered Agreements.[269] Canada is wrong and had to look no further than the beginning of the first sentence of the paragraph preceding its excerpt for the beginning of the ITC's discussion of "current prices;" the first sentence begins "Prices for softwood lumber increased in mid-2001. . . ."[270]

200. Moreover, the ITC's analysis is not limited to its explanation in any one section of its determination, as Canada implies, but instead should be considered in the context of the whole ITC report. Thus, the ITC's explanation regarding likely price effects builds, in particular, on its explanation in its present price effects discussion, among others.

201. Canada also implies that the pricing data showed no evidence of underselling.[271] The fact is the Commission determined, as agreed to by all parties to the proceeding,[272] that making direct

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[269]Canada First Written Submission, para. 109.

[270]USITC Report at 43. The paragraph in the Views of the Commission preceding the excerpt provided by Canada states:

> Prices for softwood lumber increased in mid-2001, at a time of considerable uncertainty in the market due to the expiration of the SLA and the filing of these petitions. Prices, however, began to decline in the third quarter of 2001 and fell substantially in the fourth quarter of 2001 to levels as low as those in 2000 while demand, considered on a seasonal basis, remained relatively stable. Strong demand over the period of investigation (demand remained relatively stable at historically high levels) did not prevent substantial declines in prices for softwood lumber. Demand for softwood lumber is forecast to remain relatively unchanged or increase slightly in 2002, followed by increases in 2003.

Id. (footnotes omitted).

[271]Canada also implies that an investigating authority is required to consider both significant price undercutting "and" significant price depression or suppression. However, the operative term in the relevant provisions of the covered Agreements is "or" rather than "and." *See* Article 3.2 of the Antidumping Agreement and Article 15.2 of the SCM Agreement.

[272]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).

cross-species price comparisons in order to access underselling was inappropriate.[273] [274]

202. 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.[275] 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.[276] 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

[273]USITC 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. USITC Report at V-3 - V-5.

[274]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.

[275]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).

[276]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' Prehearing Brief at 13 and Appendix C (USA-8).

investigation as a pricing guide.[277] The Commission reasonably found, based on the prices trends analysis discussed above, that subject imports were likely to have a significant price depressing effect on domestic prices.

203. Canadian exporters also made arguments regarding attenuated competition or substitutability between species of softwood lumber. As discussed below in section IV.C.4, the Commission considered these arguments in its determination and found that they were not supported by the evidence provided by purchasers and home builders that subject imports and domestic species of softwood lumber are used in the same applications and that regional preferences merely reflect availability of species. The evidence also demonstrates that prices of different species have an effect on other species' prices.

204. 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.[278] In particular, the evidence in these investigations demonstrated that subject imports and domestic species are used in the same applications.[279] [280]

205. While regional preferences exist – species often were used in close proximity to where they are milled – the Commission found that these preferences simply reflected the availability of species in certain areas, which is affected by transportation costs.[281] [282] Thus, these regional preferences do not reflect a lack of substitutability but simply a predisposition toward locally-milled species.

206. Parties disagreed about the extent to which preferences may transcend differences in

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[277]USITC 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.

[278]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)

[279]USITC Report at II-6 and Table II-5; Petitioners' Prehearing Brief, Vol. II at Exhibit 85 (USA-8).

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

[281]USITC Report at II-7-8, V-2, V-3, and V-5.

[282]Hearing Transcript at 185-190 and 204-209; USITC Report at II-8 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).

prices among the species.[283] However, the evidence in these investigations demonstrated that prices of different species have an effect on other species' prices.[284] In response to Commission questionnaires, price and availability were cited second most frequently after quality as among the top three factors in purchasing decisions.[285]

207. The Commission found that subject imports from Canada were entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices, and are likely to increase demand for further imports. The Commission based this finding on the likely substantial increase in subject imports, and the substitutability between subject imports and domestic product, including the effect of prices for one species on the prices of another species. Canada would have the Panel disregard the substantial record evidence supporting the Commission's views and urge the Panel to choose evidence and adopt their alternative analytic theories which are more favorable to Canada. The Commission's finding of likely price effects is based on positive evidence and should be affirmed.

c. The Commission's Consideration of the Nature of the Countervailable Subsidies Is Based on Positive Evidence and is Consistent with U.S. Obligations under the SCM Agreement

208. The Commission properly considered the nature of the subsidies that had been determined to be countervailable subsidies by the U.S. Department of Commerce. It is evident in the ITC's determination that the Commission examined all the record evidence, including all the submissions by the parties, regarding the subsidy factor in making its determination. The Commission's consideration of the record evidence in relation to this factor is based on positive evidence and is consistent with U.S. obligations under the SCM Agreement.

209. At the center of Canada's claim is a misperception about what the SCM Agreement requires the investigating authority to do regarding all listed threat factors, but particularly the nature of the subsidies factor. In contending that the Commission failed to properly consider this factor, Canada implies that such an evaluation would have required the Commission to make a finding concerning the nature of the subsidies and their likely trade effects. However, the plain

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[283] See, e.g., Petitioners' Prehearing Brief at 38-39 (USA-8); Petitioners' Posthearing Brief at 7-10, Appendix C-2 - C-12, and Appendix D-1 - D-10 (USA-5); Dealers/Builders' Prehearing Brief at 46-49 (USA-12); PAL/Millman's Prehearing Brief at 52-56 (USA-15); CLTA's Prehearing Brief at 17-19 and Appendix A (USA-7); CLTA's Posthearing Brief at 3 (USA-6). Softwood lumber prices generally differ substantially depending on grades and dimensions, and may differ by the species and applications involved, with better grades and wider dimensions usually carrying higher prices than lower grades and narrower dimensions. USITC Report at V-3-4.

[284] See, e.g., Petitioners' Posthearing Brief at Appendix C-5 and Appendix D-3 (USA-5); Petitioners' Prehearing Brief at Appendix C (USA-8). The effect of the price and availability of one species on another is clearly evident in the reports in industry publications.

[285] USITC Report at Table II-3.

language of the Agreement requires the Commission to consider but not to make a finding concerning the nature of the subsidies.

210. Article 15.7 of the SCM Agreements indicates that in making a determination regarding the existence of a threat of material injury the "the authorities should consider, *inter alia*, such factors as:

> (i) nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom;[286]

211. As discussed above, 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.'"[287] Accordingly, the term "consider" has not been read to require an explicit "finding" by the investigating authority. Rather it must be apparent in the relevant documents in the record that the investigating authority has given attention to and taken the factor into account.

212. The Commission considered the "nature of the subsidy" factor in its threat of material injury analysis as evident in the Views of the Commission. The Commission noted that Commerce in its final countervailing duty determination had determined there were 11 programs that conferred countervailable subsidies to Canadian producers and exporters of softwood lumber, including: the Provincial Stumpage programs in the Provinces of Quebec, British Columbia, Ontario, Alberta, Manitoba, and Saskatchewan; two programs administered by the Government of Canada;[288] two programs administered by the Province of British Columbia;[289] and one program administered by the Province of Quebec.[290] [291] In considering this information,

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[286]Article 15.7(i) of the SCM Agreement. There is no similar factor in the Antidumping Agreement.

[287]*See, e.g., Thailand - H-Beams*, Panel Report, para. 7.161 ("We therefore do not read the textual term 'consider' in Article 3.2 to require an explicit 'finding' or 'determination' by the investigating authorities. . . .").

[288]The subsidies include: Non-Payable Grants and Conditionally Repayable Contributions from the Department of Western Economic Diversification; and Federal Economic Development Initiative in Northern Ontario (FedNor).

[289]The subsidies include: Grants provided from Forest Renewal B.C.; and Job Protection Commission.

[290]Private Forest Development Program.

[291]USITC Report at 39 (*referring to* USA-2; 67 Fed. Reg. 15545, 15548 (April 2, 2002) (USA-1 at Appendix A); (USA-16; USA-17). Issues and Decision Memorandum from Bernard T. Carreau to Faryar Shirzad (Mar. 21, 2002) (appended to final Commerce CVD determination) (USA-2); see also 67 Fed. Reg. 15545, 15548 (April 2, 2002); Letter to Chairman Koplan from Commerce Deputy Assistant Secretary Bernard T. Carreau regarding Correction of Ministerial Errors in the final countervailing duty determination and attached memorandum), dated April 25, 2002 (USA-3).

the Commission recognized that none of the subsidies identified by Commerce are subsidies described in Article 3 or 6.1 of the SCM Agreement.[292] Thus, this case did not involve any export subsidies.

213. The Commission's determinations reflect consideration of the information Commerce provided the Commission regarding the subsidies. While Commerce provided the Commission information regarding the nature of the subsidies, Commerce explicitly made no findings regarding the effects of the subsidies and thus provided the ITC no information on the effects to consider.[293]

214. Nevertheless, 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.[294] However, in spite of Canada's claims to the contrary, the Commission is not required to make a finding, particularly when, as discussed below, the conflicting record evidence did not provide "a sufficient factual basis to allow [the ITC] to draw reasoned and adequate conclusions."[295]

215. Canada has presented to the Panel the arguments, economic theories and analysis presented to the Commission by the Canadian parties in the underlying proceeding. Canada's arguments are primarily based on studies prepared by an economist, Dr. William Nordhaus that apply the Ricardian rent theory in the context of Canadian stumpage programs. In essence, Nordhaus' theory contends that the subsidy programs would have no trade effects because they do not increase the production of logs or lumber or lower their prices, or increase the quantity or

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

[293]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. (USA-2). Under U.S. law, application of the covered Agreements 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).

[294]USITC Report at 39.

[295]*US-Lamb Meat*, AB Report, paras. 130-131:

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

lower the prices of lumber exports to the United States.[296]

216. Canada would have the Panel believe that this economic theory and model was the only information before the ITC on this issue and that this theory was a proven fact. Neither is true.

217. The domestic producers presented the ITC with arguments, economic analysis and economic studies to refute the economic theory provided by Canadian parties. While Canada seems to suggest that the Commission should only have considered the economic analysis and theories presented by Canadian parties, the ITC is required to conduct an "objective examination" pursuant to Article 15.1 of the SCM Agreement. An objective examination requires the examination of all evidence and an even-handed evaluation of that evidence.[297]

218. The economic analysis and studies provided by the domestic producers raised questions about whether the Ricardian rent theory was applicable to the timber and lumber markets, whether the underlying premise to the theory regarding fixed supply was correct, and whether the results regarding the effects of the stumpage fees on output were very different. Canada has provided the Panel with copies of the Canadian parties' submissions on this issue. We have included the other evidence in the record below with our Exhibits to this submission.

219. After fully considering all of the record evidence on this issue,[298] the Commission made the following statement in its opinion. The Commission stated,

> [w]e have considered CLTA's argument regarding the stumpage subsidy, but find that the economic theory presented by CLTA is not clearly applicable in this market. Ricardian rent theory relies on the assumption of fixed supply; however, there is evidence on the record in these investigations that lumber supply is not necessarily fixed. See, e.g., Tr. at 41-45 and Petitioners' Posthearing Brief at Appendix D-24. Moreover, the record also contains several other studies that have reached different conclusions regarding the effects of stumpage fees on output. See Petitioners' Prehearing Brief at Appendix D-23.[299]

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[296]Canada's First Written Submission, para. 88.

[297]*US-Hot-Rolled Steel*, AB Report, para. 196.

[298]*See, e.g.*, CLTA's Postconference Brief, Vol. I at 30-32, 43-45, Exh. 26, Vol. II at Exh. 1 at II.E, VI (USA-18); CLTA's Prehearing Brief at Vol. I at 50-60, Vol. II at 49-53, Apps. C, D, Vol. III at Exh. 55 (USA-7); CLTA's Posthearing Brief at Vol. I at 11-13, Vol. II at Tab T (USA-6); CLTA's Final Comments at 7-8, 15 (USA-19); Petitioners' Postconference Brief at 44, Exhs. E, 52 (USA-20); Petitioners' Prehearing Brief Vol. I at 108-10, 115-17, Apps. B, C, Vol. II at Exhs. 9, 16 (USA-8); Petitioners' Posthearing Brief at 13-15, D-11 to D-27, Apps. E, F, Exhs. 11, 12, 17, 45, 46, 47, 48, 49, 50 (USA-5).

[299]USITC Report at 39 n.245.

It is clear from this excerpt as well as the context that the Commission did not make any findings based on any of the competing economic theories. Canada fails to acknowledge that the Commission clearly considered the relevant arguments raised by parties but found it could not reach a finding on the competing economic theories.

220. The Commission found that despite all the evidence of record that the uncertainties regarding these competing economic theories provided by the parties were such as to preclude reasoned and adequate conclusions.[300] Therefore, the Commission appropriately considered the parties' arguments and provided a reasoned explanation. As evident in the Views of the Commission, its consideration of this 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.[301]

d. The Commission's Consideration of the Threat Inventory Factor is Based on Positive Evidence and is Consistent with U.S. Obligations under the covered Agreements

221. The Commission properly considered the other threat factor listed in the covered Agreements regarding inventories of subject product in making its affirmative determination that a domestic industry is threatened with material injury by reason of subject imports of softwood lumber from Canada.

222. The covered Agreements indicate that in making a determination regarding the existence of a threat of material injury "the authorities should consider, *inter alia*, such factors as:

(iv) inventories of the product being investigated.[302]

There is no other guidance provided regarding the inventory factor in the covered Agreements or in other dispute settlement proceedings.

223. The Commission considered the evidence regarding inventories of subject product and recognized that "inventories generally are not substantial in the softwood lumber industry."[303]

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[300]The applicability and results of the economic theories utilized for the arguments and proposed effects in this case have been, and undoubtedly will continue to be, debated among scholars for a very long time.

[301]*See, e.g., Thailand-H-Beams*, Panel Report, para. 7.161; *US-Lamb Meat*, AB Report, para. 144 (. . . competent authorities are not required "to show that each listed injury factor is declining", but rather, they must reach a determination in light of the evidence as a whole.").

[302]Article 3.7(iv) of the Antidumping Agreement. This same provision is factor (v) in Article 15.7 of the SCM Agreement.

[303]USITC Report at 44.

However, the Commission found that the evidence showed that Canadian producers' inventories as a share of production had increased, albeit slightly, and were consistently higher than that reported by U.S. producers during the period of investigation.[304] In spite of Canada's contentions, the fact is Canadian producers' inventories, which consistently were about 10 percent of their production compared to 6.4-7 percent for their U.S. counterparts, provide Canadian producers with the added ability to likely increase substantial imports to the U.S. market.

224. Canada acknowledges that the Commission considered the evidence regarding this threat factor. That is all the Commission is required to do. In fact, the covered Agreements do not even provide a context, e.g., relative to likely increases in imports, for which the investigating authority is to consider inventories as it does for other threat factors, such as capacity. Still, Canada mischaracterizes the Commission's words when it is evident that the Commission appropriately considered this listed threat factor as it is required to do.

225. Canada's arguments are based on its misperception that the Commission is required to make findings on each threat factor and the significance to be accorded to each threat factor. As discussed above, Canada fails to recognize that the covered Agreements require the Commission to consider all listed factors but do not require it to make findings on each factor. Rather it must be apparent in the relevant documents in the record that the investigating authority has given attention to and taken the factor into account.[305] As the Appellate Body recognized in *EC-Pipe*, evaluation of a factor does not necessarily require an explicit separate evaluation of that factor if the analysis of the factor is implicit in the analyses of other factors.[306]

226. It is apparent in the ITC determination that the Commission has given attention to and taken the inventory factor into account. The Commission is not required to make findings on each factor, but instead is only directed to consider the "totality" of the threat factors in making a determination.[307] The Commission's determination is reasonably based on numerous factors, including consideration of the inventories of the subject product.

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[304]USITC Report at Tables III-16 and VII-2. Canadian producers' reported inventories as a share of production were 9.6 percent in 1999, 10.6 percent in 2000, and 10.2 percent in 2001, compared to 6.4 percent, 7.0 percent, and 6.6 percent in the same years as reported by U.S. producers. Id.

[305]*See, e.g., Thailand - H-Beams*, Panel Report, para. 7.161 ("We therefore do not read the textual term 'consider' in Article 3.2 to require an explicit 'finding' or 'determination' by the investigating authorities. . . .").

[306]*EC-Pipe*, AB Report, paras. 160-161.

[307]Specifically, the last sentence of both Article 3.7 of the Antidumping Agreement and Article 15.7 of the SCM Agreement states: " 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."

3. The Commission's Determinations are Consistent with U.S. Obligations Under Articles 3.2 and 3.4 of the Antidumping Agreement and Articles 15.2 and 15.4 of the SCM Agreement

227. In a threat of material injury analysis, 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.

228. It is evident in the ITC's Report that the Commission considered all of the facts from the present material injury analysis, specifically regarding volume of imports, price effects and the consequent impact of continued dumped and subsidized imports on the domestic industry.[308] In brief, the ITC's evaluation of the evidence regarding relevant factors, pursuant to Articles 3.2 and 3.4 of the Antidumping Agreement and Articles 15.2 and 15.4 of the SCM Agreement, resulted in subsidiary findings that the volume of imports was significant, there were some price effects by subject imports, that the condition of the domestic industry had deteriorated primarily as a result of declining prices, and that the industry was in a vulnerable state. Moreover, projections based on the present and past facts, provide 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.

229. The Commission conducted a thorough analysis and provided reasoned and adequate explanations for its assessment of the factors set forth in Articles 3.2 and 3.4 of the Antidumping Agreement and Article 15.2 and 15.4 of the SCM Agreement, as apparent in the Views of the Commission. Accordingly, the ITC's determinations are consistent with U.S. obligations under the covered Agreements.

a. ITC Properly Considered Volume and Price Effects of Subject Imports

230. In analyzing the facts of these investigations and making its findings, the Commission properly considered all record evidence and the relevant factors including the volume and price effects pursuant to Article 3.2 of the Antidumping Agreement and Article 15.2 of the SCM Agreement. The Commission's findings in its present injury analysis that the volume of imports was significant and that subject imports had some price effects are based on positive evidence.

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[308]USITC Report at 31-37.

231. Article 3.2 of the Antidumping Agreement states in relevant part regarding consideration of the volume of imports in the investigating authority's present injury analysis that:

> With regard to the volume of the dumped [subsidized] imports, the investigating authorities shall consider whether there has been a significant increase in dumped [subsidized] imports, either in absolute terms or relative to production or consumption in the importing Member. . . . No one or several of these factors can necessarily give decisive guidance.

The same provision in Article 15.2 of the SCM Agreement applies to subsidized imports.

232. The Commission found that the evidence demonstrated that subject import volumes were significant and had increased even with the restraining effect of the SLA during the period of investigation.

233. In its present injury analysis, the Commission found that the large volume of subject imports both in absolute terms and relative to consumption in the United States was significant, and thus supported an affirmative present material injury finding.[309] Subject imports held at least a one-third share in the U.S. market throughout the period of investigation. The Commission also found that the volume of imports of softwood lumber from Canada increased during the period of investigation, while their total value declined.[310] The volume of subject imports by quantity was 2.8 percent higher in 2001 compared with 1999.[311] As a share of apparent domestic consumption, subject imports from Canada increased from 33.2 percent in 1999 to 34.3 percent in 2001.[312] Conversely, subject imports by value declined by 16 percent.[313] While the Commission did not make its affirmative determination on the basis of present material injury, it clearly found that subject import volumes were at levels that were significant and would be injurious if combined with evidence of significant price and impact effects.

234. It also is important to place these underlying investigations in the appropriate context when analyzing the facts and relevant factors. In contrast to a typical original antidumping or

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[309]USITC Report at 32.

[310]USITC Report at 32. The volume of imports of softwood lumber from Canada increased from 17,983 mmbf in 1999 to 18,483 mmbf in 2001. The value of subject imports decreased from $7.1 billion in 1999 to $6.0 billion in 2001. USITC Report at Tables IV-1 and C-1.

[311]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.

[312]USITC Report at Table IV-2 and C-1.

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

countervailing duty investigation, these investigations involved consideration of evidence regarding imports during a period of investigation when such imports were subject to a trade restraining agreement. The Commission appropriately considered the restraining effects of the SLA on imports and trends in subject imports during periods when such imports were not subject to some type of formal or informal restraint. Canada ignores this important condition of competition, or implies that if considered it should be given less weight. The ITC, however, appropriately considered the totality of the evidence, including the SLA's effects on trade, in making its findings.

235. The Commission acknowledged that the increase in the market share held by subject imports was small, but contrary to Canada's characterization, did not consider this increase as minimal.[314] The fact is, this significant volume of subject imports had been subject to the SLA and its trade restraining effects as well as to the pendency of the investigations for most of the period of investigation.

236. Moreover, the evidence showed that subject imports during non-restraint periods increased substantially. When the recent period with no formal trade restraining measures is considered, the evidence shows that subject imports increased by 11.3 percent for the April-August 2001 period compared with the April-August 2000 period.[315] This evidence clearly shows that there is a distinction in the level of imports depending on whether restraints are in place and that the import volumes increase substantially during periods when they are not subject to restraining measures.

237. The Commission properly considered the factor regarding present volume effects in the covered Agreements and its finding of significant volumes of subject imports is based on positive evidence. The Panel should reject Canada's suggestion that it reweigh the record evidence.

238. Article 3.2 of the Antidumping Agreement states in relevant part regarding consideration of the price effects in the present injury analysis that:

> . . . .With regard to the effect of the dumped [subsidized] imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped [subsidized] imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

The same provision in Article 15.2 of the SCM Agreement applies to subsidized imports.

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[314]Canada First Written Submission, para. 138.

[315]Official import statistics (USA-25).

239. In evaluating the present price effects of the subject imports, the Commission **found that the substantial volume of subject imports had *some* adverse effect on prices** for the domestic like product during the period of investigation, albeit not significant effects. The evidence showed that the declines in prices resulting from excess supply had substantially affected the domestic industry's financial performance. However, the Commission concluded that while subject imports had adversely affected prices of domestic products, it could not find significant price effects because the price declines were due to excess supply in 2000 by both Canadian exports and domestic product.

240. The Commission considered the evidence at the end of the period of investigation which again showed substantial declines in prices in the third and fourth quarters of 2001, to levels as low as 2000. There also was evidence regarding supply which generally was considered the cause for the substantial price declines in 2000. This time, however, the evidence indicated that U.S. producers had curbed their production, but that overproduction "remains a problem in Canada."[316] 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.[317] Moreover, the evidence demonstrated that pressure would come from excess Canadian supply rather than a combination of import and domestic supply.

241. Although Canada argues that the Commission was required to consider both whether there was underselling by the subject imports and price depression or suppression, it ignores the text of Articles 3.2 and 15.2 which uses the disjunctive "or" rather than the conjunctive "and" in setting forth the applicable obligation.[318] Canada contends that the pricing data showed no evidence of underselling. The fact is the Commission determined, as agreed to by all parties to the proceeding, that making direct cross-species price comparisons in order to assess underselling was inappropriate.[319] Moreover, as discussed above, the fact that the differences in species of softwood lumber did not lend themselves 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.

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[316]*See, e.g.,* Petitioners' Posthearing Brief at 2 and Appendix H, Exh. 2 at 11 (USA-5) ("The U.S. industry was widely criticized in years passed for lumber overproduction . . . . This behavior has been curbed considerably here, but remains a problem in Canada, where Provincial forestry officials must also protect pulp mill employment, which is the lifeblood of many small towns. However, as the Canadian softwood lumber industry ships 65% of its output to the U.S., its general failure to manage production to new order volumes and its capacity growth in its eastern provinces have both undermined prices in recent years." Bank of America, "Wood & Building Products Quarterly," at 11 (Nov. 2001).).

[317]USITC Report at 43-44.

[318]*See* Article 3.2 of the Antidumping Agreement and Article 15.2 of the SCM Agreement.

[319]USITC Report at 33.

242. Canada's arguments are merely variations of the same arguments already raised regarding likely substantial increases in imports and likely price effects. These arguments are based on Canada's premise that there could be no threat because there allegedly were no findings of injurious effects in the present material injury analysis. That premise is demonstrably incorrect. The Commission properly considered the factors relevant to present volume and price effects under the covered Agreements. Accordingly, the ITC's determinations are consistent with its U.S. obligations under the covered Agreements.

b. ITC Properly Considered the Impact of Subject Imports on the Domestic Industry

243. In analyzing the facts of these investigations and making its findings, the Commission properly considered all record evidence and the relevant factors regarding the impact of subject imports on the domestic industry pursuant to Article 3.4 of the Antidumping Agreement and Article 15.4 of the SCM Agreement. The Commission's findings in its present injury analysis regarding the impact of subject imports on the domestic industry foreshadows and supports it finding of threat of material injury.

244. On consideration of the impact of subject imports in the present injury analysis, Article 3.4 of the Antidumping Agreement states:

> The examination of the impact of the dumped [subsidized] imports on the domestic industry concerned shall include an examination of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

A similar provision in Article 15.4 of the SCM Agreement applies to subsidized imports.

245. 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."[320] Of course, an investigating authority must

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

> With respect to the question of threat of material injury . . . Article 3.4 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

consider all relevant factors in its analysis.[321]

246. The Appellate Body recently has stated that an obligation to evaluate all fifteen factors, pursuant to Article 3.4 of the Antidumping Agreement, is distinct from the manner in which the evaluation is to be set out in the published document. In fact, the Appellate Body in *EC-Pipe* recognized that evaluation of a factor does not necessarily require an explicit separate evaluation of that factor if the analysis of the factor is implicit in the analyses of other factors.[322]

247. It is evident in the ITC Report that the Commission conducted a meaningful evaluation of all relevant factors listed in Article 3.4 of the Antidumping Agreement and Article 15.4 of the SCM Agreement. Canada's claims to the contrary simply have no basis in fact or law.

248. In examining the impact of the subject imports on the domestic industry in its present injury analysis, the Commission considered all relevant economic factors that bear on the state of the industry in the United States.[323] The Commission found that the record indicated deterioration in the domestic industry's overall condition, and in particular in its financial performance, over the period of investigation.[324] The Commission discussed the industry indicators more fully in its threat of material injury analysis, but noted that the record reflected the fact that many performance indicators declined significantly from 1999 to 2000, and then declined slightly or stabilized from 2000 to 2001. Subject import volume and market share, however, increased by a greater amount in 2001 than in 2000. Over the period of investigation demand remained relatively stable, the domestic industry's market share fell only slightly, and subject import market share increased only slightly. The Commission found that the deterioration in the condition of the domestic industry during the period of investigation is

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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.

[321]*Mexico-HFCS*, Panel Report, para. 7.133. The Panel stated:

. . . . Moreover, that analysis could not take into account only factors which support an affirmative determination, but would have to account for all relevant factors, including those which detract from an affirmative determination, and explain why the particular factors considered were deemed relevant.

[322]*EC-Pipe*, AB Report, paras. 160-161.

[323]USITC Report at 36-37. The Commission considered the "magnitude of the dumping margin" in an antidumping proceeding as part of its consideration of the impact of imports, pursuant to 19 U.S.C. § 1677(7)(C)(iii)(V). USITC Report at 36, n.220. The Commission noted that Commerce found a 12.44 percent dumping margin for Abitibi, a 5.96 percent dumping margin for Canfor, a 7.71 percent dumping margin for Slocan, a 10.21 percent dumping margin for Tembec, a 2.18 percent dumping margin for West Fraser, a 12.39 percent dumping margin for Weyerhaeuser, and a 8.43 percent dumping margin for all others. Letter to Chairman Koplan from Commerce Deputy Assistant Secretary Bernard T. Carreau regarding Correction of Ministerial Errors in the final determination of sales at less than fair value and attached memorandum at 18, dated April 25, 2002 (USA-13).

[324]USITC Report at Tables IV-1 and C-1.

largely the result of substantial declines in price.

249. As an initial matter, in its threat of material injury analysis, the Commission found that the domestic industry producing softwood lumber was vulnerable to injury in light of declines in its performance over the period of investigation, particularly its financial performance.[325] The Commission discussed the following evidence in making this finding. The public data indicated that domestic production of softwood lumber steadily declined from a peak level of 36,606 mmbf in 1999 to 34,996 mmbf in 2001, a decline of 4.4 percent.[326] Domestic capacity utilization peaked in 1999 at 92.0 percent, and was 89.7 percent in 2000 and 87.4 percent in 2001.[327] The evidence demonstrated that domestic production capacity was fairly stable during the period of investigation, following a small but steady increase between 1995 and 1999, as apparent consumption increased.[328] Domestic producers' U.S. shipments by quantity declined by 3.2 percent and by value fell by 25.6 percent from 1999 to 2001.[329] Domestic producers' share of apparent domestic consumption decreased from 65.0 percent in 1999 to 64.4 percent in 2000 and to 63.1 percent in 2001.[330] The end-of-period inventories reported by the domestic industry fluctuated between years, but increased overall by 6.2 percent from 1999 to 2001.[331] The domestic industry's production workers, hours worked, and wages paid declined from 1999 to 2001, while productivity and hourly wages improved, and unit labor costs declined during the

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[325]USITC Report at 37-39.

[326]USITC Report at Tables III-6 and C-1 (public data). Domestic producers' questionnaire responses (covering approximately 63 percent of domestic production) indicated an increase of 1.9 percent in production from 21,758 mmbf in 1999 to 22,163 mmbf in 2001, although the industry coverage is not necessarily comparable to the public data. Id. at Tables III-7 and C-1.

[327]USITC Report at Tables III-6 and C-1 (public data). Domestic producers' questionnaire responses reported similar declines in 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.

[328]USITC Report at Table III-6 and C-1 (public data). Domestic producers' questionnaire responses indicated increases in capacity from 22,847 mmbf in 1999 to 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.

[329]USITC Report at Table C-1 (public data). Domestic producers' U.S. shipments steadily decreased from 35,175 mmbf in 1999 to 34,034 mmbf in 2001. Domestic producers' U.S. shipments by value decreased from $13.9 billion in 1999 to $10.4 billion in 2001. Id. According to questionnaire responses, domestic producers' U.S. shipments increased each year of the period of investigation from 21,504 mmbf in 1999 to 22,301 mmbf in 2001, and shipments by value fell from $8.9 billion in 1999 to $7.8 billion in 2001, a decline of 13.3 percent, although the industry coverage was not necessarily comparable to the public data. Id. at Tables III-13 and C-1.

[330]USITC Report at Table IV-2.

[331]USITC Report at Tables III-16 and C-1. The end-of-period inventories reported by the domestic industry rose from 1,382 mmbf in 1999 to 1,467 mmbf in 2001. Inventories as a share of U.S. shipments increased from 6.4 percent in 1999 to 7.1 percent in 2000, and declined to 6.6 percent in 2001. Id.

period of investigation.[332]

250. With respect to the domestic industry's financial performance, the Commission found that the record in these investigations also generally showed declines during the period of investigation, with a dramatic drop from 1999 to 2000 as prices declined.[333] The domestic industry's unit net sales value decreased from 1999 to 2001 with the largest decrease occurring from 1999 to 2000.[334] While unit cost of goods sold declined throughout the period of investigation,[335] unit net sales value fell by a greater amount, and the ratio of operating income to net sales fell from 14.3 percent in 1999 to 1.8 percent in 2000, and 1.3 percent in 2001.[336] Total operating income declined from $1.26 billion in 1999 to $93 million in 2001, and over $1 billion of that decline occurred in one year, from 1999 to 2000.[337] Net income as a share of net sales followed a similar trend, decreasing from 13.7 percent in 1999 to 0.8 percent in 2000 and 0.1 percent in 2001.[338] Total net income declined from $1.21 billion in 1999 to $8 million in 2001.[339] The domestic industry's capital expenditures fluctuated between years but decreased from $327 million in 1999 to $253 million in 2001.[340]

251. The Commission also recognized that between 1999 and 2001, the number of domestic mills decreased from 795 to 779, down from 816 in 1995.[341] The Commission acknowledged that the parties disagreed about the extent to which the decline in the number of U.S. mills was attributable to mergers, permanent closure of older facilities, installation of new equipment, maintenance, or competition with subject imports in the U.S. market, but found that the record

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[332]USITC Report at Table III-19 and C-1.

[333]USITC Report at 38-39.

[334]USITC Report at Tables VI-1 and C-1. The domestic industry's unit net sales value decreased from $416.48 in 1999 to $362.05 in 2000, and decreased again to $344.46 in 2001. Id.

[335]Unit cost of goods sold decreased from $342.39 in 1999 to $339.79 in 2000 and decreased again to $324.69 in 2001. USITC Report at Tables VI-I and C-1.

[336]USITC Report at Tables VI-1 and C-1.

[337]USITC Report at Tables VI-1 and C-1.

[338]USITC Report at Table VI-1.

[339]USITC Report at Tables VI-1 and C-1.

[340]USITC Report at Table VI-11.

[341]USITC Report at Table III-2.

reflected that at least some of the mill closures were due to conditions in the U.S. market.[342]

252. Based on the evidence in the record, the Commission reasonably concluded that the deterioration in the performance of the domestic industry, particularly its financial performance, made it vulnerable to injury.

253. Canada's reliance on the Panel's findings in *Mexico-HFCS* to challenge whether the ITC conducted a "meaningful evaluation" of these factors is misplaced. The issue in *Mexico-HFCS* was not the manner in which these factors were evaluated but that they did not appear to be considered at all.[343] Two very important differences distinguish this case from *Mexico-HFCS*: first, it is 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*.

254. It is evident in the Views of the Commission that the ITC properly conducted a "meaningful evaluation" of the relevant factors 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.*, a future assessment of industry's susceptibility to injury.[344]

255. Finally, Canada's challenge suggests a requirement to quantify future events. The covered Agreements do not contain such a requirement. In fact, the Appellate Body has recognized, as discussed above, that while the occurrence of future events can never be definitely

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[342]USITC Report at 39. USITC Report at Tables II-3 and Appendix G; Petitioners' Prehearing Brief at 61-62, 87-89, and Exh. 38 (USA-8); Petitioners' Posthearing Brief at Appendix A-1 - A-5 and Appendix H, Exh. 3 (USA-5); CLTA's Posthearing Brief at Vol. 2, Tab D, Attachment 1, and Vol. 3 (USA-6).

[343]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.

[344]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.

proven by facts, projections necessarily are based on extrapolations from existing data.[345] It is clear that the ITC properly considered and conducted a "meaningful evaluation" of the factors listed in Article 3.4 of Antidumping Agreement and Article 15.4 of the SCM Agreement. Moreover, the ITC's finding that the domestic industry was vulnerable to injury is based on positive evidence and is consistent with U.S. obligations under the covered Agreements.

4. The Commission's Determinations are Consistent with U.S. Obligations Under Article 3.5 of the Antidumping Agreement and Article 15.5 of the SCM Agreement

256. The Commission's determinations are consistent with U.S. obligations under Article 3.5 of the Antidumping Agreement and Article 15.5 of the SCM Agreement. First, the Commission examined all record evidence and demonstrated in its thorough analysis of all relevant factors that the dumped and subsidized imports threaten to cause injury to the domestic industry. Second, the Commission properly examined any known factors other than the dumped and subsidized imports which are injuring the domestic industry to ensure that it did not attribute injury from other causal factors to the subject imports.

a. The Commission's Demonstration of a Causal Relationship Between the Dumped and Subsidized Imports and the Threat of Injury to the Domestic Industry is Based on Positive Evidence

257. As evident in the Views of the Commission, the ITC demonstrated a causal relationship between the dumped and subsidized imports and the threat of injury to the domestic industry by reason of subject imports.

258. Article 3.5 of the Antidumping Agreement states in relevant part:

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

A similar provision in Article 15.5 of the SCM Agreement applies to subsidized imports.[346]

259. The ITC found, based on the facts as a whole, that the volume of imports was significant

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[345] *See Mexico-HFCS*, AB Report, paras. 83 and 85; *US-Cotton Yarn*, AB Report, para. 77; *US-Lamb Meat*, AB Report, para. 136; *US-Steel Safeguards*, Panel Report, para. 10.173, n. 5032.

[346] The text "as set forth in paragraphs 2 and 4" is contained in a footnote in Article 15.5 of the SCM Agreement rather than in the text of the provision.

and thus completely supported an affirmative material injury finding. The Commission also found that subject imports had resulted in some adverse price effects. However, the ITC recognized that excess supply of both imported and domestic products had contributed to price declines, particularly in 2000, and thus could not find that subject imports had had significant price effects. The condition of the domestic industry, particularly its financial performance, had declined during the period of investigation as a result of the price declines. While the ITC found the domestic industry vulnerable to injury, it concluded that it could not find that subject imports had injured the domestic industry, largely because it had not found that there were significant price effects. The ITC's subsidiary findings regarding present material injury foreshadow and support the existence of a threat of material injury.

260. 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 had substantially declined to levels as low as they had been in 2000. The Commission reasonably found that subject imports were likely to increase substantially and were entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices, and are likely to increase demand for further imports.

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

262. **Demand and self-sufficiency.** Canada relies on an overly simplistic theory about the effects that growth in demand would have on U.S. industry performance and prices, and its optimistic characterizations of the forecasts for future demand. But the Commission, as earlier discussed, found that demand was not likely to increase in the manner Canada suggests or to have the effects that Canada posits.

263. The evidence showed that while demand remained relatively stable in 2000 and 2001 at

the record levels it reached in 1999,[347] substantial declines in price occurred,[348] particularly in 2000, which resulted in the deterioration in the condition of the domestic industry.[349] Thus, contrary to CLTA's and Canada's theory, strong demand did not translate into price improvements. In fact, the evidence demonstrated that it had been supply rather than demand that had played a pivotal role in the prices of softwood lumber in the U.S. market, as the excess supply had resulted in price declines through 2000. This supports the ITC's finding that substantial increases in subject imports likely will have adverse price effects. Canada has not refuted the Commission's factual findings that, even with strong demand during the period of investigation, prices declined and the condition of the domestic industry deteriorated; effects opposite to those Canada speculates should occur in the future.

264. Yet in the face of facts to the contrary, Canada continues to urge the Panel that its result is the only one possible. Canada's discussion about whether the U.S. industry is self-sufficient in the production of lumber is an attempt to divert the Panel's attention from the facts regarding the price effects of increases in the volume of subject imports in a market where demand is either static or improving slightly.

265. The ITC recognized that the United States was not self-sufficient in the production of lumber. This finding should come as no surprise since subject imports from Canada have accounted for about one-third of U.S. consumption for more than seven years.

266. Canada's argument, however, implies that, if demand increases substantially, the U.S. industry will not be capable of increasing supply, because its capacity is fully utilized. Not only is this argument incorrect, it also is inconsistent with Canada's own argument regarding attribution to dumped and subsidized imports of injury caused by other known factors. In that context, Canada assumes that the U.S. industry has the capability to contribute to excess supply in the future and would be the cause of injury. The facts do not support either theory.

267. As discussed above, the Commission considered domestic producers' ability to supply demand. 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

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

[348]For example, the price of SYP fell 32.9 percent, from a peak of $434/mbf in the third quarter 1999 to a low of $291/mbf in the fourth quarter 2000. The price of WSPF (a product mostly imported from Canada) fell 39.3 percent, from a peak of $336/mbf in the second quarter 1999 to $204/mbf in the fourth quarter 2000. USITC Report at Tables V-1 and V-2.

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

apparent consumption increased.[350] Domestic capacity utilization was 87.4 percent in 2001. With the exception of a peak in 1999 at 92 percent, it had consistently held this level for the 1995-2001.[351] 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.[352] 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 its capacity utilization to 90.4 percent in 2003.[353] On the other hand, domestic production of softwood lumber had declined by 4.4 percent from 1999 to 2001.[354]

268. The ITC appropriately considered the conditions of competition regarding demand and the U.S. industry's ability to supply the U.S. market and based its findings on positive evidence.

269. **Substitutability/Attenuated Competition**. The Commission appropriately considered the substitutability of subject imports and domestic product and properly took the record evidence into account in making its determinations as evident in its opinion. However, the evidence provided by purchasers and home builders demonstrates, contrary to Canada's allegations, that subject imports and domestic species of softwood lumber are used in the same applications and that regional preferences merely reflect availability of species. The evidence also demonstrates that prices of a particular species will affect the prices of other species, particularly those that are used in the same or similar applications.[355]

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[350]USITC 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.

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

[352]USITC Report at Tables VII-1 (public data). Canadian capacity utilization based on public data was 87.8 percent in 1995, 87.7 percent in 1996, 87.4 percent in 1997, 87.3 percent in 1998, 90.5 percent in 1999, 88.9 percent in 2000 and 83.7 percent in 2001. Id. Canadian producers' questionnaire responses reported similar capacity utilization rates: 90.3 percent in 1999, 88.8 percent in 2000, 84.4 percent in 2001 and projections of 88.5 percent in 2002, and 90.4 percent in 2003. Id. at Table VII-2.

[353]USITC Report at Table VII-2.

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

[355]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

270. Canada states without citation to record evidence that "the record also made clear that attenuation is the greatest between U.S. Southern Yellow Pine and Canadian Spruce-Pine-Fir."[356] Consideration of the totality of the facts reveals that subject imports and domestic species of softwood lumber are used in the same applications and that the prices of one species has an effect on the prices of other species.

271. SPF is the predominant Canadian species of softwood lumber accounting for 84.6 percent of Canadian production in 2001.[357] Conversely, only about 2.7 percent of U.S. production of softwood lumber is of W-SPF.[358] It would seem, based only on a comparison of these two facts, that any increase in Canadian imports of SPF would correspond to a product produced in only small quantities in the United States. However, even Canada does not allege an absence of competition, as such a limited comparison might imply. Indeed, the totality of facts in the record before the Commission indicated that such a finding based only on this isolated piece of evidence was not warranted.

272. There are other products that both countries produce that compete with each other. Canada ignores the analysis conducted by the Commission that refutes Canada's argument. First, there are other species commonly produced by the Canadian and domestic industries – Douglas fir (22.7 percent of U.S. production in 2000 and 3.7 percent of Canadian production in 2001) and hem-fir (12.5 percent of U.S. production in 2000 and 6.6 percent of Canadian production in 2001).[359]

273. Canadian softwood lumber and the domestic like product generally are interchangeable. Moreover, as the Commission has recognized in prior investigations, Canadian softwood lumber

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

[356]Canada's First Written Submission, para. 155.

[357]USITC Report at Table VII-6. In Canada, SPF is the predominant species of softwood lumber (84.6 percent in 2001), followed next by hem-fir (6.6 percent) and Douglas fir (3.7 percent) lumber, and then by a variety of other lumber species. Id.

[358]USITC Report at Table III-11. In the United States, the leading species, or species groups, of softwood lumber produced are SYP (45.2 percent in 2000), Douglas fir (22.7 percent) and hem-fir (12.5 percent) lumber, as well as a variety of other lumber species, including ponderosa pine, SPF, WRC and redwood. Id.

[359]USITC Report at Tables III-11 and VII-6.

and the domestic like product generally are interchangeable, notwithstanding differences in species and preferences.[360] In particular, as discussed above, the evidence in these investigations demonstrated that subject imports and domestic species are used in the same applications.

274. Subject imports and domestic species are used in the same applications. 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.[361]

275. Moreover, the Annual Builders Survey by the National Association of Home Builders Research Center (NAHBRC) provides clear evidence that SPF, SYP, and Douglas fir/hem fir are used in the same construction applications, as lumber joists, light frame exterior walls, roof trusses, and roof rafters.[362]

276. Regional preferences exist, but simply reflect the availability of species in certain areas. While regional preferences exist – species often were used in close proximity to where they are milled – the Commission found that these preferences simply reflected the availability of species in certain areas, which is affected by transportation costs.[363] [364] For example, at the Commission's hearing home builders and purchasers provided the following break-out by region of the products used for floor joists, wall/framing, headers, and trusses: Florida: floor joists - SYP, wall/framing - SPF, headers - SYP, trusses - SYP[365]; Texas: floor joists - SYP, wall/framing - SYP, headers - SYP, trusses - SYP;[366] Indiana and West: floor joists - SPF,

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[360]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)

[361]USITC Report at II-6. In Commission questionnaire responses, 32 of 57 purchasers indicated that they have switched between different species of softwood lumber for use in the same application, citing availability and price as factors in their substitution decisions and citing most frequently substitution between Douglas fir, hem-fir, and SPF. CD 210 at II-12. Purchasers' questionnaire responses indicated that all eight major species groups are used in residential and commercial construction and in construction of prefabricated components, such as joists and trusses. USITC Report at Table II-5; Petitioners' Prehearing Brief Vol. II at Exhibit 85 (USA-8).

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

[363]USITC Report at II-7-8, V-2, V-3, and V-5.

[364]Hearing Transcript at 185-190 and 204-209 USA-11);USITC Report at II-8 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).

[365]Hearing Transcript at 185-190, 204 (USA-11).

[366]Hearing Transcript at 205 (USA-11).

wall/framing - SPF, headers - SPF, trusses - SPF[367]; Massachusetts: floor joists - SPF, wall/framing - SPF, headers - SYP, trusses - SYP.[368] A compilation of these responses is provided as a table in exhibit USA-23. Thus, these regional preferences do not reflect a lack of substitutability but simply a predisposition toward locally-milled species.

277. Evidence demonstrated that prices of different species have an effect on other species' prices. The Commission recognized that softwood lumber prices generally differ substantially depending on grades and dimensions, and may differ by the species and applications involved, with better grades and wider dimensions usually commanding higher prices than lower grades and narrower dimensions.[369] Parties disagreed about the extent to which preferences may transcend differences in prices among the species.[370] However, the evidence in these investigations, particularly reports in industry publications, demonstrated that prices of different species have an effect on other species' prices.[371] In response to Commission questionnaires, price and availability were cited second most frequently after quality as among the top three factors in purchasing decisions.[372]

278. In sum, the facts do not support Canada's theory that the differences in species between subject imports and domestic product attenuates competition in a significant manner. The Commission reasonably found, based on totality of the facts, that subject imports and domestic product generally were interchangeable for similar applications.

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[367]Hearing Transcript at 205-207 (USA-11).

[368]Hearing Transcript at 206 (USA-11).

[369]USITC Report at V-3-4.

[370]See, e.g., Petitioners' Prehearing Brief at 38-39 (USA-8); Petitioners' Posthearing Brief at 7-10, Appendix C-2 - C-12, and Appendix D-1 - D-10 (USA-5); Dealers/Builders' Prehearing Brief at 46-49 (USA-12); PAL/Millman's Prehearing Brief at 52-56 (USA-15); CLTA's Prehearing Brief at 17-19 and Appendix A (USA-7); CLTA's Posthearing Brief at 3 (USA-6).

[371]See, e.g., Petitioners' Posthearing Brief at Appendix C-5 and Appendix D-3 (USA-5); Petitioners' Prehearing Brief at Appendix C (USA-8). The effect of the price and availability of one species on another is clearly evident in the reports in industry publications. See, e.g., Random Lengths ("Prices took the biggest hits in Canadian SPF, and producers of Western species had to follow suit to stay competitive." Lumber Market Report at 4, Oct. 19, 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; "Western and Eastern S-P-F were the leaders, pulling other dry species along." at 4, Feb. 2, 2001; "In the South, truss and manufactured home builders substituted the narrows of Southern Pine for Spruce." at 4, Aug. 17, 2001); Wickes ("Pine mills experienced mixed results as some S-P-F truss buyers continued to switch to SYP and, except for 2x4 and 2x8, the pace of sales slowed from last week." Aug. 27, 2001; "Wide widths were in the highest demand especially in hem-fir where buyers looked for S-P-F substitutes." Dec. 17, 2001). Petitioners' Prehearing Brief at Appendix C (USA-8).

[372]USITC Report at Table II-3.

279. **North American integration**. Canada recognizes that the Commission considered the integration of the North American lumber industry as a condition of competition, but criticizes the Commission for not speculating that integrated companies would not harm related companies. Yet, Canada provides no evidence whatsoever to support its supposition that integrated firms will not harm their related parties. Furthermore, Canada says nothing at all about the impact of the integrated companies' operations on the remainder of the U.S. industry or on the industry as a whole, which is the required focus of the injury analysis.

280. Moreover, this integration is not new. This raises the question of why would it have a different effect in the future than during the period of investigation, when, with integration in place, the evidence demonstrated that import volumes were significant and imports had some adverse price effects. The Commission conducted a detailed analysis of related parties and determined that appropriate circumstances did not exist to exclude any firms from the domestic industry. We note that no Canadian exporters, nor any other party, advocated that any firms be excluded as related parties. Nor does anyone assert that integrated domestic producers are shielded from harm.

281. **"Big Boxes."**[373] Finally, Canada raises in a footnote allegations regarding the Commission's consideration of the "Big Box" argument raised by Canadian exporters in the underlying proceeding. Canada relies on anecdotal evidence provided by the "Big Box" retailers for its allegations about their effect on U.S. consumption patterns and their purchases of imports. These allegations do not undermine the evidence, most of it confidential,[374] presented to the Commission, even by representatives of some of the "Big Boxes," that regional preferences reflect nothing more than the local availability of species.[375]

b. The Commission's Examination of Any Known Causal Factors to Ensure Injury Was Not Attributed to Subject Imports is Based on Positive Evidence

282. The Commission properly examined any known factors other than the dumped and subsidized imports that might be injuring the domestic industry to ensure that it did not improperly attribute injury from other causal factors to the subject imports. The Commission's examination and analysis is evident in the Views of the Commission, and is based on positive evidence. Consistent with Article 3.5 of the Antidumping Agreement and Article 15.5 of the

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[373]Canada uses the term "Big Boxes" for "the large retail stores such as The Home Depot and Lowe's." Canada's First Written Submission, n. 193..

[374]These retailers, many of whom testified on behalf of Canadian exporters at the ITC's hearing, have not waived the confidentiality of statements made in questionnaires or briefs to the Commission, and thus under U.S. law, we may not disclose their statements.

[375]USITC Report at II-8 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).

SCM Agreement, the ITC's methodology involves examining other factors to determine if any of them are other known causal factors and to ensure that injury from any such causal factors is not attributed to subject imports.

283. Article 3.5 of the Antidumping Agreement states in relevant part:

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

The same provision in Article 15.5 of the SCM Agreement applies to subsidized imports. The Appellate Body in *EC-Pipe* recently explained that:

> This obligates investigating authorities in their causality determinations not to attribute to dumped imports the injurious effects of other causal factors, so as to ensure that dumped imports are, in fact, "causing injury" to the domestic industry.[376]

284. The purpose of the non-attribution requirements is to ensure the existence of an unsevered causal link between the dumped and subsidized imports and the injury to the domestic industry. Accordingly, this process ensures that dumped and subsidized imports are causing material injury to the domestic industry and that such injury attributed to imports is not in fact caused by other known causal factors.

285. Neither Article 3.5 of the Antidumping Agreement nor Article 15.5 of the SCM Agreement provides any particular methodology that investigating authorities must use in examining other known causal factors. In recognizing that the covered Agreements do not prescribe a non-attribution methodology, the Appellate Body in *EC-Pipe* indicated that "provided that an investigating authority does not attribute the injuries of other causal factors to dumped imports, it is free to choose the methodology it will use in examining the 'causal relationship' between dumped imports and injury."[377] Or as stated another way by the Appellate Body in *US-Hot-Rolled Steel*, "[W]hat the Agreement requires is simply that the obligations in Article 3.5 be respected when a determination of injury is made."[378]

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[376] *EC-Pipe*, AB Report, para. 188.

[377] *EC-Pipe*, AB Report, para. 189, *citing to US-Hot-Rolled Steel*, AB Report, para. 224, states:

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

[378] *US-Hot-Rolled Steel*, AB Report, para. 224.

286. Thus, investigating authorities have discretion to establish their own methodologies to examine other known causal factors and ensure that any injurious effects caused by those factors are not attributed to the dumped or subsidized imports.[379] The ITC's methodology ensures that the injurious effects of other causal factors are not attributed to subject imports.

287. The ITC methodology involves the examination of other "known" factors to assess whether they may be causing injury to the domestic industry.[380] When upon examination, the Commission has found a factor not to have injurious effects on the domestic industry, such factor is not an "other known factor" for purposes of Article 3.5 of the Antidumping Agreement or Article 15.5 of the SCM Agreement and no further consideration or examination of the factor is called for. The Appellate Body has stated that when injury has "effectively been found not to exist", there is no factor to examine further, pursuant to the covered Agreements. That is, such factor is "not a 'known factor[] other than the dumped imports which at the same time [was] injuring the domestic industry.'"[381]

288. Canada principally alleges that domestic supply is a known causal factor which the ITC found contributed to injury in its present material injury analysis, but ignored in its threat analysis.

289. It is evident in the Views of the Commission, and as discussed in detail above, that the Commission examined constraints on domestic producers' ability to meet demand. The Commission also took into consideration domestic producers' past contribution to oversupply

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[379] *See, e.g., EC-Pipe*, AB Report, paras. 177, 178, and 193 (Appellate Body's description of the EC's methodology, which is similar to that employed by the ITC in this proceeding, found consistent with obligations under the covered Agreements.).

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

> Critical to the effective operation of the non-attribution obligation, and indeed, the entire causality analysis, is the requirement of Article 3.5 to "examine any known factors other than the dumped imports which at the same time are injuring the domestic industry", *for it is the "injuries" of those "known factors" that must not be attributed to dumped imports.* (emphasis added).

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

> . . . "the European Communities did examine these factors, and, in light of its findings, did not perceive of them as 'known' causal factors." . . . once the cost of production difference was found by the European Commission to be "minimal", the factor claimed by Brazil to be "injuring the domestic industry" had effectively been found *not* to exist. As such, there was no "factor" for the European Commission to "examine" further pursuant to Article 3.5.
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> 179. We therefore uphold the Panel's finding, in paragraph 7.362 of the Panel Report, that the difference in cost of production between the Brazilian exporter and the European Communities industry was not a "known factor[] other than the dumped imports which at the same time [was] injuring the domestic industry."

conditions. As the Commission stated in its determinations, "[w]e recognize, and public sources generally confirm, that the price declines, particularly in 2000, were the result of too much supply in a market with high, but relatively stable, demand. Despite near record consumption of softwood lumber, prices generally fell through 2000. The evidence indicates that both subject imports and the domestic producers contributed to the excess supply, and thus the declining prices."[382]

290. Canada ignores, however, the record evidence cited by the Commission in its determinations indicating that the domestic producers had curbed their production, but that "overproduction remains a problem in Canada."[383] Thus, while domestic overproduction had contributed to adverse price effect in 2000, the evidence demonstrated that they were no longer contributing to excess supply while Canadian imports continued to oversupply. Canada also omits the fact that domestic production capacity was fairly level during the period of investigation during a time when apparent consumption was increasing, as discussed above.[384] Contrary to Canada's allegations, these facts concerning domestic supply reinforce, rather than detract from the Commission's affirmative threat of material injury determinations.

291. In footnotes to its first submission, Canada alleges that there are three other causal factors in which the Commission failed to consider the arguments of the parties in the underlying proceeding and failed to ensure that it did not attribute injury from such causal factors to subject imports. It is evident in the Views of the Commission that these issues were considered and parties arguments were addressed. However, upon examination of the record evidence regarding these issues it is clear that none of them rise to the level of "other known factors injuring the domestic industry".

292. Nonsubject Imports. The Commission also addressed the role of nonsubject imports,

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[382]USITC Report at 34-35 (citations omitted). The Commission also found –

> [w]hile the supply of softwood lumber available to the U.S. market declined during the period of investigation after reaching a peak in 1999, both domestic and Canadian producers increased production from 1995 to 2001 through improvements in capacity utilization and/or expansion of production capacity.

USITC Report at 24 (citations omitted).

[383]USITC Report at 35 n.217. *See, e.g.,* Petitioners' Posthearing Brief at 2 and Appendix H, Exh. 2 at 11 (USA-5) ("The U.S. industry was widely criticized in years passed for lumber overproduction . . . . This behavior has been curbed considerably here, but remains a problem in Canada, where Provincial forestry officials must also protect pulp mill employment, which is the lifeblood of many small towns. However, as the Canadian softwood lumber industry ships 65% of its output to the U.S., its general failure to manage production to new order volumes and its capacity growth in its eastern provinces have both undermined prices in recent years." Bank of America, "Wood & Building Products Quarterly," at 11 (Nov. 2001).).

[384]USITC Report at 37-38 and Table 6.

contrary to Canada's allegations.[385] It 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.[386]

293. Canada emphasizes the incremental increase in subject import volume in mmbf between 1999 and 2001 was approximately the same as the increase in nonsubject import volume. That is true. But the Commission could not ignore, although Canada would like the Panel to, the enormous volume of subject imports during the period of investigation, which accounted for 33.2 percent to 34.3 percent of U.S. apparent consumption in the 1999-2001 period,[387] compared with nonsubject imports, which "never exceeded 3 percent of apparent domestic consumption."[388]

294. Canada fails 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 raise to the level of causing injury to the domestic industry. The Commission appropriately considered nonsubject imports and found them not to be an other known factor causing injury to the domestic industry.

295. Other Substitutes. Canada argues that the Commission did not examine the role of engineered wood products and other substitute factors.[389] In its determinations, however, the Commission specifically recognized that –

> [d]emand for softwood lumber also is impacted by other factors. A number of products, such as engineered wood products (EWPs), steel studs for framing, brick and block for exterior uses, and composites and plastic resins for decking and fencing, may substitute for softwood lumber.[390]

Canada's arguments ignore 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

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[385]Canada First Written Submission, n. 209.

[386]USITC Report at 25 n.152.

[387]USITC Report at 32.

[388]USITC Report at 25.

[389]Canada First Written Submission, n. 210.

[390]USITC Report at 24.

traditionally utilizing softwood lumber."[391] The Commission appropriately considered other substitute products and found them not to be an other known factor causing injury to the domestic industry.

296. Cyclical Demand and Housing Construction Cycles It is evident in the Views of the Commission that it examined the cyclical nature of softwood lumber demand, including the fact that the lumber industry is influenced by housing construction cycles, as urged by Canadian exporters.[392] The Commission found the relationship between apparent domestic consumption and housing construction relevant to its analysis,[393] and it noted that apparent domestic consumption of softwood lumber was increasing but did not keep pace with its primary end use – new residential construction – which increased by 18.3 percent from 1995 to 2001.[394] As the Commission found, "[w]hile quarterly price fluctuations for domestically produced and subject imports of softwood lumber products also reflect, in part, cyclical and seasonal factors in U.S. demand and supply for softwood lumber, these factors cannot alone account for the magnitude of the price decline [during the period of investigation]."[395] Contrary to Canada's claims, the ITC considered arguments made by Canadian exporters regarding alleged cyclical demand cycles and found that the evidence did not support finding them to be other known factors causing injury to the domestic industry.

5. The Commission's Combined Investigations are Consistent with U.S. Obligations Under Covered Agreements

297. The Commission appropriately decided to cross-cumulate subsidized and dumped imports of softwood lumber from Canada for its consideration of whether the volume and price

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[391]USITC Report at 24 and n.145, and II-4. For example, while EWPs are perceived to have a fairly significant share of the market for structural framing applications, CLTA estimated that EWPs accounted for only 5 percent of the U.S. market. Id. 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).

[392]Canada First Written Submission, n. 211.

[393]USITC Report at 23 (noting "[d]emand for softwood lumber is derived primarily from demand for construction uses, including new home construction, repairs and remodeling, and commercial construction (respectively accounting for 38 percent, 30 percent, and 14 percent of demand in 2000). These end use demands for softwood lumber are determined by such factors as the general strength of the overall U.S. economy (measured by the growth of GDP), with residential construction also affected by the level of long-term and home mortgage interest rates. During the period of investigation, domestic softwood lumber consumption remained relatively level, and housing starts declined overall but remained at historically high levels despite low mortgage rates and continued increases in real GDP.") (citations omitted).

[394]USITC Report at 22.

[395]USITC Report at 34 n.213.

effects of subject imports threatened the domestic industry with material injury. The Commission's combined investigations are consistent with U.S. obligations under the Antidumping Agreement and the SCM Agreement. Canada's claims to the contrary have no basis.

298. The requirements contained in each of the covered Agreements regarding the determination of injury are virtually identical. The fact that neither Agreement speaks to the issue of cross-cumulation does not mean that such an analysis is precluded or inconsistent with either Agreement, as Canada alleges.

299. Canada's reliance on the "effect of dumping or subsidization" language in Article VI:6 of GATT 1994 to mandate separate investigations fails to recognize the more specific language in each of the covered Agreements regarding the injury analysis. The more specific injury provisions in the covered Agreements clarify that the appropriate focus for an injury assessment is the "effect of dumped imports" and the "effect of subsidized imports" rather than the "effect of dumping or subsidization."[396] Moreover, the Panel in *EC-Bed Linen* clarified that the language "through the effects of dumping" in Article 3.5 of the Antidumping Agreement "did not require that the volume, price, and impact 'effects' to be considered be those of dumping, but rather those of the dumped imports, that is, the 'effects of dumping' were equated . . . with 'the effects of dumped imports.'"[397]

300. The purpose of the covered Agreements is to provide a remedy against unfair trade practices causing injury to a domestic industry. To deny a remedy where the cumulative effect of dumped and subsidized imports is injury to the domestic industry would frustrate the purpose of these Agreements. The "hammering effect" of simultaneous dumped and subsidized imports from a single country is directly implicated, because the domestic industry is being affected by both the dumped and subsidized imports. Indeed, but for the fortuity that the dumped imports came from the same country as the subsidized imports, there would not be an issue in this case as to whether it would be appropriate to cumulate the volume and price effects of the subject imports.

301. The Appellate Body in *EC-Pipe* recognized the Agreements' reach in addressing such "hammering effects" when it indicated that "the role of cumulation [is to] ensur[e] that each of

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[396] *See* Article 3 of the Antidumping Agreement and Article 15 of the SCM Agreement. Generally, the terms "dumped imports" or "subsidized imports" are used in the covered Agreements. Moreover, when the term "effects of dumping" or "effects of subsidies" is used in Articles 3.5 and 15.5 of the respective Agreements, this phrase is explicitly defined as involving volume and price effects of subject imports by reference to paragraphs 2 and 4, either in text or footnote, respectively, *i.e.*, "as set forth in paragraphs 2 and 4."

[397] *EC-Bed Linen*, Panel Report, para. 6.141. The Appellate Body in *EC-Bed Linen* interpreted the "effects of dumping" similarly, as follows: "Article 3.5 . . . requir[es] a demonstration that dumped imports are causing injury to the domestic industry 'through the *effects of dumping*,' which, of course, depends upon there being imports from producers or exporters that *are dumped*." *EC-Bed Linen*, AB Report, para. 112.

the multiple sources of 'dumped imports' that cumulatively contribute to a domestic industry's material injury be subject to anti-dumping duties."[398] While the Appellate Body's conclusion there was made in the context of a product involving dumping by exporters from multiple countries, it seems inconsistent not to apply this same logic to dumped and subsidized imports from the same country.

302. Finally, Canada's allegations that the Commission conducted combined antidumping and countervailing duty investigations and cross-cumulated Canadian imports of softwood lumber so as to more likely result in an affirmative determination in this case has no merit. Canada provides no basis to support this allegation and fails to acknowledge that the ITC's consistent practice is to cumulate both subsidized and dumped imports from a single country for purposes of the Commission's injury analyses. We note that other countries, including Canada, also have a consistent practice of cross-cumulating dumped and subsidized imports in making determinations pursuant to the Antidumping Agreement and the SCM Agreement.[399]

303. The Commission's decision to cross-cumulate subsidized and dumped imports is consistent with U.S. obligations under the covered Agreements.

V. CONCLUSION

304. For the foregoing reasons, the United States respectfully requests that the Panel reject Canada's claims in their entirety.

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[398] *EC-Pipe*, AB Report, para. 117. The Appellate Body in *EC-Pipe* added:

> A cumulative analysis logically is premised on a recognition that the domestic industry faces the impact of the "dumped imports" as a whole and that it may be injured by the total impact of the dumped imports, even though those imports originate from various countries. . . .negotiators appear to have recognized that domestic industry confronted with dumped imports originating from several countries may be injured by the cumulated effects of those imports, and that those effects may not be adequately taken into account in a country-specific analysis of the injurious effects of dumped imports. . . .

Id. at para. 116.

[399] *See, e.g., Certain Grain Corn Originating in or Exported from the United States of America and Imported into Canada for Use or Consumption West of the Manitoba-Ontario Border*, Inquiry No. NQ-2000-005 at 13-14 (CITT, Mar. 7, 2001). (USA-22).