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

WT/DS277

Oral Statement of the United States
First Meeting of the Panel

September 4, 2003

1. Mr. Chairman and members of the Panel, the United States welcomes this opportunity to discuss Canada's challenge to the U.S. International Trade Commission's threat of material injury determination in its softwood lumber investigation. The Panel has our first submission responding to each of Canada's claims and arguments. In our statement today, we will underscore certain key points.

2. Canada's claim rests on several basic foundations, each of which is demonstrably flawed.

- First, Canada incorrectly assumes that the change in circumstances that would cause a threat of material injury to become actual injury must be a single identifiable event. It ignores the possibility that an evolution of adverse trade trends can cause a threat of injury to ripen into actual injury.

- Second, Canada incorrectly assumes that the ITC's negative present material injury determination negated subsidiary findings made in the course of reaching that determination. Yet, even though its present material injury determination was negative, the ITC plainly made findings along the way that supported its affirmative threat determination.

- Third, Canada incorrectly assumes that consideration of a factor requires an express finding concerning that factor. Yet, the plain meaning of consideration requires nothing of the sort, as the Appellate Body and other panels have consistently found.

3. Taken together, Canada's flawed premises, combined with its selective view of the record, cause its claims to collapse. My colleague will elaborate on each of these points. Before turning to her, I want to speak briefly to the issue of standard of review.

4. Canada correctly identifies the WTO Agreement provisions pertaining to standard of review. Those provisions make clear, and the Appellate Body and prior panels have consistently found, that those provisions preclude *de novo* review by a Panel in trade remedy cases. They make clear the distinction between the role of an investigating authority and the role of a panel. The investigating authority is the finder of fact. The panel's role is to determine whether the authority's establishment of the facts was proper and whether its evaluation of the facts was objective and unbiased. This role for the Panel is entirely consistent with making an "objective assessment" of the matter. The Appellate Body has described that role as evaluating a competent authority's acts rather than directly evaluating the underlying facts. Thus, objective assessment by the Panel is not *de novo* review.

5. While Canada acknowledges the applicable provisions on standard of review, its arguments on the merits would require application of a very different standard of review — that is, a *de novo* standard of review. This is apparent, for example, in Canada's argument regarding the relative weight that should have been attached to demand in the U.S. market compared to other factors affecting the domestic industry. It also is apparent in Canada's argument regarding the significance that the ITC should have attached to factors other than subject imports.

6. We see no need to engage in a lengthy discussion of the appropriate standard of review. We simply wish to underscore the appropriate standard in light of Canada's arguments that would require application of a different standard.

7. At this point, I will turn to my colleague to elaborate on the U.S. arguments.

8. **Overview**. Canada raises numerous claims regarding the ITC's affirmative determinations that the U.S. softwood lumber industry is threatened with material injury by reason of unfairly-traded imports from Canada. However, in so doing, Canada substantially distorts both the evidence that was before the Commission and the nature of its determinations. For example, the majority of Canada's claims rely for support on its erroneous assertion that the ITC made a negative present injury finding with no evidence or subsidiary findings that could support an affirmative finding. This simply is not an accurate portrayal of the facts or the findings. The United States discussed the issues in detail in its first written submission and will provide a brief review in its remarks this morning.

9. In reviewing the ITC's determinations, one should be mindful of the following points:

- First, injury to the domestic industry does not generally occur suddenly, but rather often involves a continuum of injurious effects ascending from a threat of material injury to injury – a concept recognized in the Antidumping and Subsidies Agreements.
- Second, the term "consider" as used in Article 3 of the Antidumping Agreement and Article 15 of the Subsidies Agreement does not mean "make findings." The ITC appropriately considered all factors relevant to a threat analysis consistent with U.S. obligations under the covered Agreements and its findings reflect the facts as a whole.
- Third, the ITC made subsidiary findings in its present material injury analysis that supported an affirmative present injury finding. Specifically, the volume of

imports was significant, imports had some adverse price effects on domestic prices and the condition of the domestic industry had deteriorated, primarily as a result of declining prices, and thus was in a vulnerable state. These findings in the present injury analysis foreshadow injury and clearly support the existence of a threat of material injury. Canada's claims that the ITC found no present injurious effects therefore are untrue.

- Fourth, the ITC's affirmative threat determination is based on the following evidence: 1) six subsidiary factors showing a likelihood of substantial increases in subject imports; 2) likely price pressure resulting from these increases in imports, particularly with evidence that prices declined substantially at the end of the period of investigation; and 3) the consequent threat of material injury to a domestic industry, which already was in a vulnerable state, resulting from the likely increases in imports and price effects.
- Finally, the Commission's determinations are based on positive evidence, and an objective examination of all relevant factors and facts. The Commission provided a reasoned and adequate explanation of its findings and, therefore, its determination is consistent with U.S. obligations under the covered Agreements.

10. **Continuum of an Injurious Condition Ascending from Threat to Injury**. There are some fundamental differences in interpretations by Canada and the United States of what constitutes a threat and its distinction from present injury. The texts of the Antidumping and Subsidies Agreements show that 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.[1] The Antidumping and Subsidies Agreements, by inclusion of the threat provision, recognize that injury to the domestic industry need not suddenly occur, but rather often involves a continuum of an injurious condition that may ascend from threat to present material injury. This is clearly evident in the text of the threat provisions in the Antidumping and Subsidies Agreements. The Agreements speak of "[t]he change in circumstances which would create a situation" and provide 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 [or subsidized] prices."[2]

11. While the text provides a clear example of a sequence of events, Canada reads the threat provision to require the investigating authority to identify "an event," that will abruptly change the status quo from a threat of material injury to present material injury. Canada argues that the ITC should have identified a specific event or change in the status quo in order to justify its threat determination.

12. On this basis, Canada relies on its mischaracterization of the ITC's present material injury determinations and ignores the underlying findings to argue 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 argument fails on both the law and the facts. First, as already discussed, threat of injury often comprises an evolution or progression of adverse trends in conditions, as present in this case, that, if not prevented, likely

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[1] *See also 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. 125 ("*US-Lamb Meat*").

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

will rise to present material injury. Second, Canada has the facts and findings wrong. The ITC found that the volume of imports was significant and thus supported an affirmative present injury determination. The facts and findings foreshadowed present material injury and clearly supported the existence of a threat.

13. The consistent recognition in other WTO and GATT dispute settlement reports that a determination of the existence of threat of injury must be based on projections extrapolating from existing data[3] affirm that a threat of injury may be a product of a continuation of adverse trade trends. This is evident in the fact that, in a threat analysis, an investigating authority should consider the past and present 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 Subsidies Agreement to provide the basis for projections about the future.[4]

14. While Canada speculates about the future, it is evident in the ITC Report that the Commission's threat findings are based on consideration of all relevant 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.[5] These projections based on 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

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[3] *See United States-Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, Appellate Body Report, WT/DS192/AB/R, adopted 5 November 2001, para. 77 ("*US-Cotton Yarn*"); *US-Lamb Meat*, Appellate Body 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, para. 10.173, n. 5032 ("*US-Steel Safeguards*").

[4] *See Mexico-Antidumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, Panel Report, WT/DS132/R , adopted 21 November 2001, para. 158 ("*Mexico-HFCS*").

[5] *Mexico-HFCS*, Panel Report, para. 7.126.

subsidized softwood lumber imports from Canada.

15. **Consider does not mean make findings**. The covered Agreements require the Commission to "consider" all listed factors in its threat analysis. Canada fails to recognize that the Agreements do not require the ITC to *make findings* on each factor and no GATT or WTO dispute settlement report has identified such a requirement for investigating authorities.[6] Rather, it is sufficient, if it is apparent in the relevant documents in the record, that the ITC has given attention to and taken each factor into account. Canada also 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.

16. **ITC's Present Injury Findings**. The ITC's subsidiary findings regarding present material injury reflect the facts as a whole; the facts foreshadow actual injury and support the Commission's determination of the existence of a threat of material injury.

17. As already noted, 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. Inherent in Canada's argument is a conclusion that a legal determination of no present material injury negates any affirmative subsidiary facts or findings. Canada's underlying premise regarding the facts, findings, and law simply is wrong. The ITC found, based on the facts as a whole, that the volume of imports was already significant and thus supported an affirmative present material injury finding. This finding, when coupled with the

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[6] *See European Communities - Antidumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, Appellate Body Report, WT/DS219/AB/R, circulated 22 July 2003, paras. 160-162 ("*EC-Pipe*").

likely increase in imports, 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 U.S. industry. Moreover, 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 the investigation, and that that restraint was now lifted.

18. In its present injury analysis, the ITC also found that subject imports had caused some adverse price effects. The ITC made this finding despite Canada's claims this morning. Canada's selective quote fails to include the ITC's conclusion in the previous sentence. However, the ITC recognized that excess supply of both imported and domestic products had contributed to price declines, particularly in 2000. The condition of the domestic industry, particularly its financial performance, had declined during 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. It is clear that the ITC's subsidiary findings regarding present material injury were not negative and clearly support the existence of a threat of material injury.

19. **ITC's Threat of Material Injury Findings**. 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 Subsidies Agreement, that were relevant to these investigations in making its determinations.

20. **Likelihood of substantial increases in subject imports**. The Commission found that there was a likelihood of substantial increases in subject imports based on six subsidiary factors:

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. Each of the six subsidiary factors considered and discussed by the Commission related directly to threat factors regarding a significant rate of increase in imports and sufficient freely disposable production capacity set forth in the covered Agreements.

21. **Demand in U.S. Market**. Canada emphasizes a single factor in its challenge to whether there would likely be increases in subject imports: demand in the U.S. market. In contrast, demand 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. The flaw in Canada's argument is that it disregards substantial portions of the record. Despite significant contrary evidence, Canada offers little more than conjecture to support its theory that future increases in demand would improve prices. The Commission expressly rejected this theory because it was not supported by the facts.

22. Demand, which was strong and at record levels, during the period of investigation not only failed to translate into price improvements but did not prevent substantial declines in softwood lumber prices. Moreover, supply rather than demand had played the pivotal role in the movement of softwood lumber prices in the U.S. market, as the excess supply had resulted in

price declines through 2000. Canada seeks to have the Panel reweigh the record evidence. But, Canada has not refuted the ITC's findings regarding forecasts for U.S. demand, *i.e.*, that the U.S. market would continue to be a very attractive, and necessary, one for Canadian imports (a market that consumes about 65 percent of Canadian production); that subject imports would continue to play an important role in the U.S. market; and even that there would likely be increases in such imports. Rather, Canada contends that increases in subject import volumes and market penetration would not be injurious on the basis of its discredited demand theory.

23. **Sufficient freely disposable production capacity**. The facts clearly support the ITC's findings that excess capacity and further projected increases in Canadian production would likely result in substantial increases of subject imports:

- *First, Canadian producers rely on sales in the U.S. market for about two-thirds of their production*. The significance of Canada's export-orientation 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. The fact is, the U.S. market had been very important to Canadian producers and was expected to continue to be.
- *Second, the Canadian producers had excess capacity and projected increases in capacity and production, and improvements in capacity utilization in 2002 and 2003*. Thus, despite the excess capacity already available in 2001 as capacity utilization declined to 84 percent from 90 percent in 1999, the evidence demonstrated that Canadian producers expected to further increase their ability to supply the U.S. softwood lumber market. In particular, capacity utilization was projected to increase to 90 percent in 2003, as capacity

also was projected to increase.

- *Third, Canadian producers had incentives such as mandatory cut requirements to produce more softwood lumber and export it to the U.S. market.*
- *Finally, Canadian producers' export projections were inconsistent with other data.* 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 previous five years. Canada has offered no positive evidence to refute the ITC's reasonable conclusion that production increases would be distributed according to historic proportions. 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 so.

24. **The ITC's Finding of Likely Substantial Increases in Subject Imports** also is supported by the evidence regarding: 1) the increase in imports over the period of investigation; 2) the effects of expiration of the SLA; and 3) subject import trends during periods when imports were not subject to restraints. This threat analysis begins with subject import volumes already at significant levels. It shows increases even with the restraining effect of the SLA in place, and substantial increases during periods without trade restraints. There is no dispute that subject imports will continue to enter the U.S. market at this significant level and are projected to increase. Canada's argument principally is whether the increases would be substantial.

25. *Restraining effects of the SLA and substantial increases in subject imports in periods without restraints.* Canada's argument that imports after the SLA increased by only 0.4 percent

is predicated on a false notion – that trade during the identified period was free of trade incumberances. Its comparison of import data for April-December 2001 with April-December 2000 ignores the imposition of other trade-discouraging measures, *i.e.*, the preliminary countervailing duties, in August 2001. The facts show a distinction in the level of imports when restraints are in place and the import volumes are substantially higher during periods when they are not subject to restraints. During the April-August 2001 period immediately after the SLA expired and before suspension of liquidation, subject imports 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. A similar pattern was observed during the 1994-1996 period prior to the adoption of the SLA.

26. The facts demonstrate 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 CVD duties were imposed. This evidence provides a clear indicator of how subject imports have entered, and would enter, the U.S. market in the imminent future if not subject to trade restraints and supports the ITC's finding of likely substantial increases in subject imports. Canada offers nothing but speculation about other reasons why imports were not restrained during those periods.

27. **Likely Price Effects**. The Commission also considered the likely price effects of subject imports. Given its finding of likely significant increases in subject import volumes, its finding of at least moderate substitutability, its finding that prices of a particular species affect the prices of other species, and its present finding that the substantial volume of subject imports had *some* adverse effects on prices for the domestic product, the Commission concluded that subject

imports were likely to have a significant price-depressing effect on domestic prices in the immediate future, and are likely to increase demand for further imports. The evidence at the end of the period of investigation showed substantial declines in prices in the third and fourth quarters of 2001. Evidence regarding likely excess supply, which generally caused the substantial price declines in 2000 that led to the deterioration in the condition of the domestic industry, indicated that U.S. producers had curbed their production, but that overproduction "remains a problem in Canada."[7] 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.

28. **Nature of the subsidies**. The Commission also considered the nature of the subsidies granted by Canada, consistent with the requirement of Article 15.7(i) of the Subsidies Agreement. The Commission examined the information presented to it by the U.S. Department of Commerce regarding 11 programs that Commerce found conferred countervailable subsidies to Canadian producers and exporters of softwood lumber,[8] and took into account that none of the subsidies were of the kind described in Articles 3 or 6.1 of the Subsidies Agreement. The Commission clearly considered parties' arguments on the nature and effect of the subsidies. However, it declined to adopt the positions of any of the parties due to the conflicting evidence and economic theories specifically regarding the effects of stumpage fees on lumber output.[9]

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

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

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

Canada has provided the Panel with a one-sided analysis of this issue, and ignored the conflicting evidence presented to the Commission. Canada would have the Panel believe that the Canadian producers' economic theory was the only information before the ITC and that this theory was an uncontested and proven fact. Neither assertion is true. Indeed, evidence presented to the Commission during its investigation squarely placed in question the very applicability of Canada's economic theories and the alleged trade effects of the subsidies. The ITC made an objective examination of this issue by considering all of the evidence and arguments presented.

29. **"Other Known Causal Factors."** The ITC's determinations specifically reflect its consideration of 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. The other factors examined include: domestic supply, nonsubject imports, cyclical demand and housing construction cycles, North American integration, and other product substitutes. The fact is, the alleged "other" factors identified by Canada in its first written submission either were not other known causal factors or did not constitute a cause of injury at the same time as the subject imports.

30. **Combined Investigations**. The Commission's decision to cross-cumulate subsidized and dumped imports of softwood lumber from Canada is also consistent with the covered Agreements. Canada's allegations that the Commission conducted combined antidumping and countervailing duty investigations 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 its 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 Subsidies Agreements, when Canada itself takes the identical approach to cross-cumulating subject imports in its own trade remedy proceedings.

31. 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 making its determinations, demonstrating how the facts as a whole support its determinations, and enabling this Panel to determine the rationale and evidentiary basis for the ITC's findings. 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 Subsidies Agreement. As such, there also is 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 Subsidies Agreement, or Article VI:6(a) of the GATT 1994.

32. Mr. Chairman, before concluding our statement, we wish to make one last point concerning Canada's request for findings and recommendations. Canada asks the Panel to recommend that the United States revoke the final determination of threat of injury, cease to impose antidumping and countervailing duties, and return the cash deposits imposed. The United States notes that Canada's request that the Panel recommend a particular course of action is inconsistent with the DSU.

33. Article 19.1 of the DSU provides: "Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement." This facilitates the goal of

encouraging parties to reach mutually satisfactory solutions. It also recognizes that a Member generally has many options available to it to bring a measure into compliance.

34. Article 19.1 of the DSU also provides: "In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations." Canada apparently is seeking a suggestion rather than a recommendation. In *United States–Hot-Rolled Steel*, the panel explained the differences between a recommendation and a suggestion, and the panel rejected a request by Japan similar to Canada's request in this case.[10] Since the ITC's determinations already conform to the WTO agreements, there is no need for either a recommendation or a suggestion. However, the United States also notes that even under Canada's claims and arguments in this dispute, Canada's request for a suggestion goes beyond anything relevant to implementing a recommendation and instead seeks action nowhere called for under the WTO agreements. Canada's request simply has no basis under the DSU.

35. This concludes our oral presentation. Thank you for your attention. In the interest of time, we have not addressed all aspects of Canada's claims. We believe that our first written submission has adequately and clearly presented our views on these issues to the Panel. We welcome any questions the Panel may have.

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[10] *United States–Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan*, Panel Report, WT/DS184/R, adopted 23 August 2001, paras. 8.5-8.14.