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

WT/DS277

Opening Statement of the United States
Second Meeting of the Panel

October 7, 2003

1. Mr. Chairman and members of the Panel, the United States welcomes the opportunity to meet again with the Panel to discuss the issues in this dispute. I will begin our remarks this morning by addressing certain overarching themes that run throughout Canada's argument and are particularly pronounced in its second submission and responses to questions. I then will turn to my colleague, who will respond to particular arguments Canada makes in its recent submissions.

2. At the first panel meeting, we noted Canada's inability to locate in the covered agreements certain obligations that it claims the United States has breached.[1] Canada had articulated what it claimed to be "obligations," but failed to identify their bases in the covered agreements. That trend continues in Canada's subsequent submissions. Two examples illustrate the point.

3. First, Canada asserts an obligation for an investigating authority to explicitly identify a change in circumstances that would cause a threat of injury to ripen into actual injury.[2] However, when pressed to substantiate that obligation, Canada's explanation is less than clear. In particular, it claims that "[i]n the circumstances of this dispute" an "objective examination," as

[1] *See, e.g.*, U.S. Closing Statement, First Panel Meeting, paras. 3-4

[2] *See, e.g.*, Canada Second Written Submission, para. 66.

required by Article 3.1 of the Antidumping Agreement and Article 15.1 of the SCM Agreement "could not be achieved without identifying the change in circumstances from the non-injurious *status quo*."[3] However, it does not go on to explain what it is about this dispute that supports an obligation that might not exist in other disputes.

4. A second example of Canada asserting an obligation without identifying its source is its claim that the ITC was required to explain why it conducted a combined injury analysis.[4] Once again, Canada reverts to "the circumstances of this case" as the supposed basis for the obligation.[5] However, again, it fails to explain how the circumstances of this case give rise to an obligation that does not apply to all cases.

5. The obligations in the WTO agreements necessarily are general obligations. They are not obligations that apply in some cases but not others. Canada's argument that the circumstances of this case give rise to obligations that might not exist in other cases simply has no basis in the WTO agreements.

6. The most striking example of Canada reading into the WTO agreements an obligation that applies to the particular circumstances of this case only, but not necessarily to other cases, is its assertion of breaches of a general obligation to provide a "reasoned and adequate explanation" of certain conclusions. As we observed in our closing statement at the first panel meeting and in our second written submission, Canada appears to rely on "reasoned and adequate explanation"

[3]Canada's Responses to Panel Questions, para. 34.

[4]Canada's Responses to Panel Questions, paras. 48-49.

[5]Canada's Responses to Panel Questions, para. 49.

as a sort of placeholder obligation. Where Canada cannot identify a violation of a specific WTO agreement article, it asserts a "failure to provide a reasoned and adequate explanation." This trend noted at the first panel meeting has continued in Canada's subsequent submissions.[6]

7. "Reasoned and adequate explanation" plays a critical role in Canada's argument. Given its importance in Canada's arguments, one would expect Canada to have clearly defined its basis in WTO agreement text. But Canada has not done so.

8. In its first written submission, Canada stated, "Article 12.2 of the *Anti-dumping Agreement* and Article 22 of the *SCM Agreement* impose upon investigating authorities the obligation to provide a reasoned and adequate explanation for the injury determinations they make."[7] The United States responded to that statement in its closing remarks at the first panel meeting.[8] In its responses to the Panel's questions, Canada abandons its original statement. It now claims that the "reasoned and adequate explanation" obligation flows not from the previously cited provisions, but "from the substantive obligations in Articles 3 and 15 viewed in the light of the standard of review under Article 11 of the *DSU* and Article 17.6(i) of the *Anti-dumping Agreement*."[9] It also makes reference to Article 3.1 of the Antidumping Agreement and Article 15.1 of the SCM Agreement.[10] And, it chides the United States for being "clearly incorrect" in its closing statement for having relied on the assertion Canada made in its first

[6] *See, e.g.*, Canada's Responses to Panel Questions, paras. 9, 55, 64.

[7] Canada First Written Submission, para. 66.

[8] U.S. First Closing Statement, para. 4.

[9] Canada's Responses to Panel Questions, para. 23.

[10] Canada's Responses to Panel Questions, para. 23.

written submission.[11]

9. The confusion in Canada's argument on the source of the asserted "reasoned and adequate explanation" obligation is remarkable in light of the weight Canada attaches to that so-called obligation. Its inability to establish a clearer foundation for the asserted obligation should give a treaty interpreter pause in considering Canada's claims that the ITC violated WTO obligations by supposedly not providing reasoned and adequate explanations for various conclusions.

10. Dispute settlement in the WTO "cannot add to or diminish the rights and obligations provided in the covered agreements."[12] Where, as here, a Member asserts one basis for an obligation in one submission and abandons that basis in favor of a different basis in its next submission, one must question whether the obligation exists at all, and whether that Member is impermissibly seeking to add to the obligations in the covered agreements.

11. An additional overarching observation that we wish to make at this point concerns Canada's argument that certain statements by Canadian producers and exporters of softwood lumber were not appropriately considered by the ITC. For example, Canada claims that the ITC did not take into account Canadian exporters' projections of exports to the United States.[13] Elsewhere, Canada reasons — somewhat circularly — that their economic theory regarding the effects of the subsidy should have given decisive guidance to the ITC.[14]

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[11]Canada's Responses to Panel Questions, para. 23.

[12]DSU, Article 3.2; *see also* Article 19.2.

[13]Canada Second Written Submission, para. 23; Canada's Responses to Panel Questions, para. 45.

[14]Canada's Responses to Panel Questions, paras. 40-41.

12. It cannot possibly be the case that an investigating authority violates WTO obligations simply by discounting self-interested statements by parties to an investigation. Yet, that is the implication of Canada's argument. As my colleague will explain momentarily, certain of the statements by Canadian respondents simply could not be reconciled with other evidence, including other statements by those respondents. That an investigating authority evaluates such evidence relative to other record evidence does not make the investigating authority biased or unobjective. Indeed, inherent in the role of an investigating authority is the requirement to make judgments about the weight to accord to evidence. Therefore, one should review critically Canada's contentions that the ITC gave insufficient credit to, or improperly discounted, certain of respondents' statements.

13. My colleague will now address particular arguments raised in Canada's second submission and responses to questions.

14. The issues in this dispute have been discussed in detail in prior U.S. submissions and the ITC Report. I will not repeat those arguments. Instead, I will highlight certain major legal and factual errors underlying Canada's claims and address specific errors in Canada's second written submission and response to Panel questions.

15. A review of the ITC Report demonstrates that the Commission's determinations reflect the facts as a whole. Those facts are far different from how Canada has portrayed them. Canada omits substantial parts of the ITC's discussion of various issues and arguments, and substantial parts of the record evidence, in presenting its arguments to the Panel.

16. In reviewing the claims made regarding the ITC's determinations, we ask that the Panel

be mindful of the following points:

- First, the legal determination of no present material injury by reason of dumped and subsidized imports does not negate the subsidiary affirmative findings made in the present injury analysis. The ITC's subsidiary findings in its present material 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 simply are not true.
- Second, the Commission conducted an objective examination, as evident in the ITC Report, in which its evaluation of the relevant factors and facts was unbiased and even-handed; Canada, on the other hand, selects for presentation to the Panel only those facts and findings that favor Canada's arguments.
- Third, all of the factors considered by the ITC, whether or not listed in Article 3.7 of the Antidumping Agreement and Article 15.7 of the SCM Agreement, the record evidence, and, most importantly, the likely effects being assessed are interrelated, and should not be considered and analyzed in isolation, as Canada has done.
- Fourth, Canada frequently asserts that the United States failed to meet an alleged "obligation" or "requirement," when no such requirement or obligation exists in the covered agreements. One example is its allegation of an "explicit obligation

in Articles 3.7 and 15.7 to identify" the change in circumstances.[15] Such an "obligation to identify" does not exist in the covered agreements. Consistent with all of the U.S. actual obligations under the covered agreements, the Commission provided a detailed explanation of how the totality of the evidence supported its conclusion, including addressing the facts and likely events demonstrating the progression or change in circumstances.[16]

- Fifth, the theories presented by Canada are not proven facts and are not uncontested, as it asserts. Moreover, in this case, each of the theories presented by Canadian parties, including the demand theory and the economic rent theory, was addressed by the Commission. However, the facts during the period of investigation did not support the effects predicted by the demand theory. Also, the effects alleged by the economic rent theory were cast in doubt by conflicting economic evidence also before the ITC.
- 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[17] and, therefore, its determination is consistent with U.S. obligations under the covered agreements.

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[15] *See* Canada Second Written Submission, para. 4; Canada's Responses to Panel's Question 9, para. 34; Canada's Opening Statement at the First Panel Meeting, paras. 35 and 45.

[16] *See* U.S. Second Written Submission, para. 18.

[17] The United States addressed Canada's repeated reliance on allegations of a reasoned and adequate explanation in its second written submission and does not duplicate that discussion here. *See* U.S. Second Written Submission, paras. 6-8.

17. **Legal Determination of No Present Material Injury Does Not Negate Subsidiary Affirmative Findings**. The ITC made subsidiary findings in its present material injury analysis that supported an affirmative present injury finding. Specifically, the volume and market share of imports was significant, imports had some adverse 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 erroneous.

18. Canada wants to conduct the threat of injury analysis from a clean slate, as if there had been no present injury analysis. It ignores relevant aspects of the Commission's injury analysis. Inherent in its repeated assertions that there allegedly were no present injurious effects is a conclusion that a legal determination of no present material injury negates any affirmative subsidiary facts or findings of adverse or injurious circumstances already existing or evolving. Canada's view is that if the current circumstances taken together do not support a legal conclusion of present injury, they must be wholly disregarded in addressing threat. Canada's underlying premise simply is wrong.

19. Canada contends that it has not argued that "a negative present injury determination necessarily precludes an affirmative threat finding."[18] According to Canada, it is just the findings and the record evidence in these investigations that "left the Commission without a non-

[18]Canada Second Written Submission, para. 13.

conjectural basis for arriving at its affirmative threat determination."[19] But, Canada's assertion of a "non-injurious *status quo*" rests squarely on the fact that it has dismissed or omitted any affirmative subsidiary facts or findings; that is, Canada would have the Panel simply ignore the existence of any evidence from the present injury analysis showing that the U.S. industry was on the verge of injury by reason of subject imports.

20. For example, the ITC found, based on the facts as a whole, that the volume and market share of subject imports accounting for 34 percent of the U.S. market, was already significant and thus supported an affirmative present material injury finding.[20] Canada, however, mischaracterizes this finding. Canada erroneously describes it as a finding that such imports were not injurious and thus dismisses its importance in the context of the threat of injury analysis.[21] While a finding that the volume of imports is significant may not "by itself"[22] be sufficient to support an affirmative present injury finding, this affirmative present subsidiary finding is an integral factor in making an affirmative present material injury determination. It cannot be dismissed, as Canada urges, as an isolated finding by the Commission lacking broader implications.

21. Moreover, Canada's claims, in large part, rest on its dismissal of the Commission's finding that imports were already at a significant level and supported an affirmative present

[19]Canada Second Written Submission, para. 13.

[20]ITC Report at 32 ("Nonetheless, this large volume of subject imports both in absolute terms and relative to consumption in the United States is significant.").

[21]*See, e.g.*, Canada Second Written Submission, paras. 2, 5, 20.

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

injury determination if combined with significant price and impact effects. Canada's characterization of the volume of imports as a negative finding lays the foundation for its challenge to the threat finding; there could be no threat without an abrupt change in circumstances from the non-injurious status quo. Thus, Canada often repeats its faulty characterization of imports as "non-injurious" and uses it as the foundation for many of its challenges to the threat determination. Because its arguments, particularly regarding the likely substantial increases in imports as well as likely price effects, are based on a flawed premise, they must fail.

22. One example of the problem with Canada's incorrect portrayal of the finding regarding the present level of imports relates to repeated claims involving U.S. market share. In contrast to Canada's characterization, the Commission found that the 34 percent market share held by Canadian imports was significant in the present injury analysis.[23] While the ITC also recognized that the market share was relatively stable at this significant level during the period of investigation, Canada omits that the Commission recognized that it had been higher prior to the imposition of the restraining effect of the Softwood Lumber Agreement (SLA).[24] Thus, the ITC found the SLA, which expired, had kept market share relatively stable. As discussed in the ITC Report,[25] subject imports held a U.S. market share of 35.7 percent in 1995, the year prior to the SLA, and 35.9 percent in 1996, the year the SLA was imposed (on May 29, 1996). During the

[23]ITC Report at 32.

[24]ITC Report at 32 ("Imports of softwood lumber from Canada held a substantial share of the domestic market with fluctuations within a range of 2.7 percentage points over the last seven years, and subject imports' 2001 market share (34.3 percent) was lower than that in 1995 prior to the SLA (35.7 percent).").

[25]ITC Report at 32 and 41-42; *see also* ITC Report at Table IV-2.

first full year under the SLA (1997), subject imports declined to a U.S. market share of 34.3 percent, the same market share held in 2001, with a range from 33.2 percent to 34.6 percent during the SLA period.[26] Contrary to Canada's claims, the relatively stable market share during the SLA period does not negate the finding that the market share was significant. Rather it is an indicator of the SLA's restraining effect and supports an affirmative threat of injury finding.

23. Canada's reliance on selective facts extends to its discussion of the Commission's findings of present price effects.[27] In particular, Canada selectively quotes from page 35 of the ITC Report, omitting the Commission's finding that subject imports had *some* price effects and its reasoning for why such effects were not significant. The Commission's present price effects finding is clear from the last three sentences of this section of the opinion read in their entirety. The Commission stated as follows:

> The evidence indicates that both subject imports and the domestic producers contributed to the excess supply, and thus the declining prices. We conclude that subject imports had *some* effect on prices for the domestic like product during the period of investigation, in 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 investigation, we cannot conclude from this record that the subject imports had a *significant* price effect during the period of investigation.[28]

24. 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."[29] Prices declined "substantially through the third and fourth quarters of 2000 to their lowest point in the

[26]ITC Report at Table IV-2.

[27]Canada Second Written Submission, para. 14.

[28]ITC Report at 35.

[29]ITC Report at 36.

1999-2001 period."[30] The ITC also indicated, "[p]rices 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."[31] Canada informs the Panel that "the Commission also found that declines in performance had levelled off in 2001."[32] But, Canada omits the context. Prior to the statement Canada quoted, the ITC stated, "The record indicates that prices did increase in the second quarter of 2001, coincident with the filing of the petition, and this price increase abated some of the domestic industry's declining performance indicators."[33]

25. It is clear that the ITC's subsidiary findings regarding present material injury recognized some adverse effects from subject imports and clearly support the existence of a threat of material injury.

26. **Threat of Material Injury Analysis – General Issues**. Canada divides the factors considered by the ITC in its threat analysis into two categories, listed factors and non-listed factors. Canada urges the Panel to consider the threat factors listed in Article 3.7 of the Antidumping Agreement and Article 15.7 of the SCM Agreement in isolation from other factors the ITC considered. It suggests that other factors and facts that the ITC found were related to the listed factors are distinct and should be considered separately. But all of the factors considered by the ITC, whether listed or not, are interrelated. Also interrelated are the different pieces of

[30]ITC Report at 34.

[31]ITC Report at 34.

[32]Canada Second Written Submission, para. 14.

[33]ITC Report at 37, n.223.

record evidence, and, most importantly, the likely effects being assessed. These elements should not be considered and analyzed as isolated fragments, as Canada has done. Implicit in Canada's approach, of course, is that non-listed factors, or facts related to those factors, should be given less weight than those factors listed in the covered agreements. Canada, however, fails to recognize that the covered agreements provide that relevant factors in addition to those listed should be considered.[34] The fact that the ITC considered additional factors and provided appropriate explanations demonstrates a reasoned analysis by the ITC and is not a mere recitation of facts.

27. Canada frequently asserts that the United States failed to meet an alleged "obligation" or "requirement" that has no basis in the covered agreements. One example is its allegation of an "explicit obligation in Articles 3.7 and 15.7 to identify" the change in circumstances that would cause a threat to ripen into actual injury.[35] The text provides a clear example of the change in circumstances as a sequence or accretion of events. But, an "obligation to identify" does not exist in the text of the covered agreements. Consistent with all of the U.S. actual obligations under the covered agreements, the ITC provided a detailed explanation of how the totality of the evidence supported its conclusion. In doing so, the ITC addressed the facts and likely events demonstrating the progression or change in circumstances which would create a situation in which the dumped and subsidized imports would cause injury. We refer the Panel to paragraph

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

[35] *See* Canada Second Written Submission, para. 4; Canada's Response to Panel Question 9, para. 34; Canada's Opening Statement at the First Panel Meeting, paras. 35 and 45.

18 of the U.S. second written submission for a demonstration of the progression or change in circumstances.

28. **Specific Issues Regarding the Threat of Material Injury Analysis**. The ITC found that there was a likelihood of substantial increases in subject imports based on evidence regarding, *inter alia*, Canadian producers' excess production capacity and projected increases in capacity, capacity utilization and production, the export orientation of Canadian producers to the U.S. market and subject import trends during periods when there were no import restraints, such as the SLA. Furthermore, each of the six subsidiary factors considered by the ITC relates directly to threat factors as set forth in Article 3.7 of the Antidumping Agreement and Article 15.7 of the SCM Agreement. Specifically, they relate to whether there is a significant rate of increase in imports and sufficient freely disposable production capacity. The ITC determined that these increases in imports were likely to put pressure on already declining prices, and that material injury to the domestic industry would occur.[36] Moreover, the ITC found that the domestic industry was vulnerable to injury from likely increases in imports and price pressure in light of the declines in its performance over the period of investigation, particularly financial performance.[37]

29. The United States discussed the issues regarding its threat of material injury determinations in detail in its first and second written submissions and in response to the Panel's questions. The United States will now turn to addressing certain inaccuracies,

[36]ITC Report at 40-44.

[37]ITC Report at 37-39.

mischaracterizations, and omissions made by Canada in its second written submission and response to Panel questions.

30. **Likely Substantial Increases in Subject Imports.** As already discussed, many of Canada's claims rest on its faulty premise that the Commission found no injurious effects in its present material injury analysis. Of course, it is evident in the ITC Report that this is not true. The ITC found that the volume and market share of subject imports were already significant and had increased even with the restraining effect of the SLA in place. Moreover, subject imports had increased substantially during periods without import restraints. Canada is simply incorrect in contending that the ITC found such levels of import penetration were not significant, much less "non-injurious," in its present material injury findings. Thus, any claims made on this basis should fail.

31. Capacity. Canada selectively quotes from the ITC's Report to claim that the ITC performed an "inadequate analysis" and offered "no explanation" for its finding that Canadian producers expect to further increase their ability to supply the U.S. market.[38] Yet the Commission provided an explicit explanation that Canada simply has ignored. On page 40 of the ITC Report, after finding that Canadian capacity utilization had declined from 90.5 percent in 1999 to 83.7 percent in 2001 and recognizing that capacity utilization had been relatively stable at about 87 percent in the three years under the SLA prior to the period of investigation, the Commission stated:

[38]Canada Second Written Submission, para. 22.

> In 2001, excess Canadian capacity was 5,343 mmbf, 10 percent of U.S. apparent consumption. Furthermore, in their questionnaire responses, Canadian producers projected additional capacity increases, improvements in capacity utilization, and additional production in 2002 and 2003. Thus, despite the excess capacity already available in 2001 as capacity utilization declined to 83.7 percent, Canadian producers expect to further increase their ability to supply the U.S. softwood lumber markets.[39]

Moreover, the Commission also recognized that "Canadian producers projected . . . capacity utilization increases to 90.4 percent" in 2003 from the low of about 84 percent in 2001.[40] The Commission reasonably relied on Canadian producers' projections when such projections were consistent with other record evidence.

32. In discussing the issue of capacity, Canada would impose a requirement that is not in the agreements. Specifically, it would substitute the conjunctive "and" for the disjunctive "or" in Article 3.7(ii) of the Antidumping Agreement and Article 15.7(iii) of the Subsidies Agreement. That text refers in relevant part to: "sufficient freely disposable, **or** an imminent, substantial increase in, capacity of the exporter. . . ."[41] Canada would require a showing of both sufficient freely disposable capacity and an imminent substantial increase in capacity.

33. Export Orientation and Export Projections. The United States has addressed Canada's argument on export orientation and export projections in its first and second written submissions.[42] We will make only a few additional points at this time. The U.S. market has generally accounted for about 65 percent of Canadian softwood lumber production, 68 percent in

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[39]ITC Report at 40 (footnotes omitted). *See also* ITC Report at Tables VII-1 and VII-2.

[40]ITC Report at 40, n. 254.

[41]Article 3.7(ii) of the Antidumping Agreement and Article 15.7(iii) of the SCM Agreement.

[42]U.S. First Written Submission, paras. 156-161; U.S. Second Written Submission, para. 27.

2001. Canadian producers projected their production would increase from 2001 to 2003 by 8.9 percent.[43] Canadian producers also projected that export shipments to the U.S. market would increase, but only by 3 percent, while exports to non-U.S. markets were projected to increase by 21 percent, and shipments to home markets were projected to increase by 13 percent from 2001 to 2003.[44] Thus, the projected increases in exports to the United States accounted for only about 20 percent of the planned increases in production and not the 65 percent historically sold in the U.S. market. This aspect of producers' projections reasonably caused the ITC to question their validity. Moreover, even though any projected increase in Canadian demand, which had declined by almost 20 percent from 2000 to 2001, was not forecast to return to 2000 levels, somehow home market shipments were projected to increase beyond 2000 levels.[45] This cast producers' projections in further doubt. Canada claims that the ITC has not demonstrated that the "degree of export orientation would substantially increase in the future."[46] But, this issue involves whether the U.S. market would even continue to account for at least 65 percent of production, consistent with historical levels, rather than only the 20 percent in the Canadian producers' export projections.

34. It was reasonable, given the evidence as a whole, for the ITC to discount the Canadian producers' stated expectations regarding export projections and conclude that projected increases in production would likely be distributed among the U.S. market, Canadian home market, and

[43]ITC Report at Table VII-2.

[44]ITC Report at Table VII-2.

[45]ITC Report at Tables VII-2 and VII-7.

[46]Canada Second Written Submission, paras. 31-32.

non-U.S. export markets in shares similar to those prevailing during the prior five years. Canada offers no positive evidence to refute the ITC's reasonable position; that is, no positive evidence, such as a new supplier contract, which would show a large share of increased production was to shift to markets other than the U.S. market, as the projections would require.

35. Restraining Effect of the SLA. The United States addressed the effect of the SLA in detail in its first written submission.[47] Canada's claims regarding the ITC's use of "all" rather than "some" for $50 fee imports in 2000-2001 ignores the significant quantities of exports subject to $100 fees for the period.[48] The fact is, since $100 fee imports entered in the 2000-2001 period, some Canadian producers had used all of their $50 fee quota in that period. Moreover, this does not affect the ITC's conclusion that the significant quantities of imports subject to $100 fees indicated that "in the absence of the SLA they [Canadian producers] would have shipped more, given the near prohibitive level of the $100 fee."[49]

36. Substantial Increases in Imports in Periods with No Import Restraints. Canada's arguments regarding the ITC's finding that subject imports increased substantially during periods with no import restraints relies on the omission of significant evidence and findings made by the ITC. In fact, at one point, Canada claims that the 1994-1996 period does not support an "inference" regarding the subject imports.[50] But the ITC did not need to make an inference to determine what occurred when the trade restraint, *i.e.*, the SLA, was imposed, because it relied

[47]U.S. First Written Submission, paras. 171-173.

[48]Canada Second Written Submission, paras. 34-36.

[49]ITC Report at 41.

[50]Canada Second Written Submission, paras. 37-38.

on actual data; facts that Canada has omitted from its presentation to this Panel. The Commission explicitly discussed these facts in its opinion. The Commission stated:

> The evidence shows that subject import market share increased from 27.5 percent in 1991 to 35.9 percent in 1996.[51] 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.[52]

While Canada relies on the first sentence, it has completely ignored the second sentence and underlying evidence regarding the decline in subject imports to 34.3 percent with the SLA in effect from 35.9 percent prior to its imposition.

37. Moreover, Canada's challenge to the Commission's consideration of import data for the 1994-1996 period on the basis that market conditions were not taken into account is not consistent with its reliance on data outside the period of investigation. The period of investigation in these investigations was 1999-2001. Canada, interestingly, refers to and does not challenge the ITC's consideration throughout its analysis of evidence for the three years prior to the period of investigation, *i.e.*, 1996-1998, on the same basis as its challenge to the 1994-1996 period.

38. Canada's claim that the substantial increase in imports during the April-August 2001 period only reflects "a shift in the timing of imports,"[53] fails to respond to the simple fact that

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[51]ITC Report at 42, n. 268 *citing* ITC 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.

[52]ITC Report at 42.

[53]Canada Second Written Submission, para. 40.

imports increased.[54] The facts also dispel Canada's claims. The SLA expired on March 31, 2001; thus, the SLA was in effect for 1999, 2000, and only the first quarter of 2001. Subject imports increased by 2.4 percent from 2000 to 2001, and by only 0.4 percent from 1999 to 2000.[55] During the April-August 2001 period, which was free of trade restraints other than the pending investigation, subject imports increased by 11.3 percent compared with the same period in 2000.[56] Moreover, for the April-December 2001 period, in which imports were subject to the CVD preliminary finding in August, subject imports increased by 4.9 percent compared with the same period in 2000.[57] The fact that imports increased after expiration of the SLA and have continued to increase, even after bonding requirements associated with the preliminary CVD findings were imposed, does not support Canada's argument that a shift in timing accounted for the higher level of imports after the SLA expired.

39. **Likely Price Effects**. Canada's arguments regarding likely price effects largely ignore the ITC's analysis and findings. For example, Canada has claimed that "[n]owhere in the Commission's discussion of this factor in the Determination is there any reference to a 'price trends' analysis."[58] The facts refute this claim. I draw the Panel's attention to page 43 of the ITC Report, attached to this opening statement. It is evident, beginning with the last sentence of the first paragraph ("During the period of investigation, prices for softwood lumber declined

[54] *See* U.S. First Written Submission, paras. 178-181.

[55] ITC Report at Table C-1.

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

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

[58] Canada's Second Written Submission, para. 26; Canada's Response to Panel Question 3, para. 8.

substantially . . . .") and most of the second paragraph, that the ITC explicitly conducted an analysis of price trends in its threat discussion. Moreover, the Commission found that "[p]rices, 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 . . ."[59] Thus, contrary to Canada's claims, the ITC did analyze price trends in its threat analysis. That analysis showed that prices declined substantially at the end of the period of investigation, supporting a conclusion that imports "are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices."[60]

40. Canada's attempt to show that prices increased after the period of investigation fails to point out that the composite price for the first quarter of 2002 was lower than the composite price for the third quarter of 2001 and substantially lower than that for the second quarter of 2001.[61] Moreover, Canada does not acknowledge that seasonality generally affects comparisons between fourth and first quarter prices.

41. **Causation**. The United States addressed causation in detail in its first and second written submissions and its responses to Panel questions.[62] Canada's claims regarding a causal relationship are merely variations on its arguments regarding likely substantial increases in imports and likely price effects, and are based on its premise that there could be no threat of injury because there allegedly were no injurious effects found in the present material injury

[59]ITC Report at 43.

[60]Canada's Second Written Submission, paras. 26 and 62.

[61]Canada's Second Written Submission, para. 62. *Compare* Exhibit CDA-29 (Q1 2002 RL Framing Lumber Composite – 312) *with* ITC Report at Figure V-3 and Petitioners' Posthearing Brief, App. G at Chart 8 (RL Framing Lumber Composite, Q2 2001 – 364; Q3 2001 – 322).

[62]*See* U.S. First Written Submission, paras. 256-296; U.S. Second Written Submission, paras. 39-53; U.S. Response to Panel question 26.

analysis.

42. The Commission also properly examined any known factors other than 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. When the Commission finds 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. If a factor is not an "other known factor," there is no obligation to further examine it. Canada implies that further consideration or examination is required even if it is found not to be an "other known factor."[63] Canada is wrong.

43. In our second written submission, the United States addressed Canada's argument regarding market share and its reliance on a flawed premise.[64] In its second written submission, Canada indicates that the ITC was required to "assess[] the future market share of subject imports."[65] First, the United States questions where such a requirement exists in the covered agreements. Second, Canada's reference to Article 3.5 of the Antidumping Agreement and Article 15.5 of the SCM Agreement for such a requirement is puzzling. These provisions contain no such requirement, and Canada does not further explain how the assessment of future market share is required by those provisions.

44. Substitutability. Canada's arguments regarding the substitutability of domestic and

[63] *See* Canada's Response to Panel Question 11, para. 38.

[64] U.S. Second Written Submission, para. 41.

[65] Canada Second Written Submission, para. 47.

imported softwood lumber also have been addressed in detail in the U.S. first and second written submissions.[66] The simple fact is, subject imports and domestic species of softwood lumber are used in the same applications, and compete with each other. Moreover, prices of a particular species will affect the prices of other species.

45. Canada provides the Panel with a single quote from the preliminary investigation[67] and ignores the analysis conducted by the ITC and its findings based on consideration of the totality of the facts, including the evidence provided by purchasers and home builders that Canadian softwood lumber and the domestic like product generally are interchangeable and that subject imports and domestic species are used in the same applications.[68] We have attached pages 25-27 of the ITC Report. There, the ITC discussed the facts that Canada now ignores.

46. We have one final point on this issue. Canada's claims regarding attenuated competition center on whether Canadian SPF, which accounts for about 85 percent of its production, and U.S. Southern Yellow Pine (SYP), which accounts for about 45 percent of U.S. production, are interchangeable and compete. Canada provides the Panel a single quote from an employee of Home Depot, a large U.S. retailer. However, another employee of Home Depot from Texas had testified on behalf of Canadian exporters at the Commission's hearing in the underlying investigations. He and three other lumber purchasers provided responses to a question from one of the Commissioners regarding which lumber species – SPF or SYP – is used for four

[66]U.S. First Written Submission, paras. 269-278.; U.S. Second Written Submission, paras. 45-46.

[67]Canada Second Written Submission, para. 49.

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

applications in their region. Their responses are summarized in Exhibit USA-23, which is attached to this statement. As is made clear in the table in Exhibit USA-23, both SPF and SYP are used for each of the four applications, with regional preferences reflecting availability and a predisposition for locally-milled species, but not a lack of substitutability. Moreover, there are other products, such as Douglas fir and hem-fir, that both countries produce that compete with each other, and compete with SPF and SYP. In addition, there was significantly more evidence in the record demonstrating the interchangeability of the species, some of which is confidential at the request of parties submitting it on behalf of Canadian exporters.

47. Domestic Supply. The United States has addressed the domestic supply issue in detail in its first and second written submissions.[69] Canada has made two charges regarding the evidence cited by the ITC indicating that domestic producers have curbed their production, but that overproduction remains a problem in Canada. First, Canada argues that, based on the location of this finding in the ITC Report, it could not support the ITC's threat of injury finding.[70] Second, Canada alleges that this "excerpt therefore referred only to '*overproduction in order to secure wood chips for pulp and paper manufacturing*' and not to overproduction in the lumber industry generally."[71] But, the motivation for lumber overproduction does not eliminate or lessen the central problem – lumber is being overproduced. Moreover, it actually is more problematic, because it indicates that the production of lumber is not tied exclusively to the demand for

[69]U.S. First Written Submission, paras. 267, 288-290; U.S. Second Written Submission, paras. 53-53; U.S. Response to Panel Question 26, para. 31.

[70]Canada Second Written Submission, para. 54.

[71]Canada Second Written Submission, para. 55 (emphasis in original).

lumber. Thus the overproduction would continue even after the lumber market has been vastly oversupplied.

48. Finally, we note that Canada has renewed its request for a suggestion by the Panel as to how the United States should come into compliance with its WTO obligations.[72] We fully addressed that request in our statement at the first panel meeting.[73] As we stated then, no suggestion is necessary, given that the ITC's determination is in conformity with WTO obligations. However, even if the Panel were to disagree, Canada's request for a suggestion goes beyond anything contemplated by the WTO agreements and should be rejected.

49. 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 written submissions have adequately and clearly presented our views on these issues to the Panel. We welcome any questions the Panel may have.

[72]Canada Second Written Submission, para. 72.

[73]*See* U.S. First Oral Statement, paras. 32-34.