

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

Recourse to Article 21.5 of the DSU by Canada

(WT/DS277)

**FIRST WRITTEN SUBMISSION OF THE
UNITED STATES**

April 29, 2005

I. Introduction

1. At issue in this proceeding is the measure taken by the United States to comply with the recommendations and rulings adopted by the Dispute Settlement Body (“DSB”) in the underlying dispute concerning the investigation of the U.S. International Trade Commission (“ITC” or “Commission”) in *Softwood Lumber from Canada*.¹ To comply with those recommendations and rulings, the United States followed the procedure set out in domestic law, in particular, section 129 of the Uruguay Round Agreements Act (“URAA”). That procedure resulted in a new determination by the ITC, issued on November 24, 2004 (“Section 129 Determination”).² The new determination was implemented as a matter of domestic law on December 20, 2004, through an amendment by the U.S. Department of Commerce (“Commerce”) to the antidumping and countervailing duty orders on softwood lumber from Canada to reflect the new determination.

2. The recommendations and rulings implemented in the Section 129 Determination relate to the Commission’s determination that an industry in the United States 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”). The Commission’s Section 129 Determination fully implements the recommendations and rulings of the DSB and is consistent with the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (“AD Agreement”) and the *WTO Agreement on Subsidies and Countervailing Measures* (“SCM Agreement”). The Panel should find, therefore, that Canada’s claims are

¹Panel Report, WT/DS277/R, adopted April 26, 2004 (“Panel Report”).

²*Section 129 Determination: Views of the Commission in Softwood Lumber from Canada*, November 24, 2004 (“Section 129 Determination”) (Exhibit US-1).

unfounded, and reject them in their entirety.

II. Procedural History

3. At issue in the underlying dispute was the Commission's original determination of May 16, 2002, in which it was found 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.³ The Panel Report in the underlying dispute found that action by the Commission in connection with its *Softwood Lumber* investigation was not in conformity with the obligations of the United States under the AD and SCM Agreements. Following the DSB's adoption of the Panel Report on April 26, 2004, the United States undertook to come into compliance with its obligations under the covered agreements.

4. On July 27, 2004, the U.S. Trade Representative ("USTR") transmitted a request to the ITC "to issue a determination . . . that would render the Commission's action in connection with [its *Softwood Lumber* investigation] . . . not inconsistent with the findings of the dispute settlement panel."⁴

5. After receiving the request from the USTR, the Commission issued a notice of institution in the *Federal Register* on August 5, 2004 and a notice of scheduling in the *Federal Register* on

³67 Fed. Reg. 36022 (May 22, 2002); *Softwood Lumber from Canada*, Inv. Nos. 701-TA-414 and 731-TA-928, USITC Pub. 3509 (May 2002). (Exhibit CDA-2). The procedural history of the original ITC determination is described in the Panel Report at paras. 7.2 - 7.5.

⁴Letter from Ambassador Robert B. Zoellick to the Honorable Stephen Koplan, dated July 27, 2004. (Exhibit US-2).

August 26, 2004.⁵ In these notices, the Commission established procedures for conducting the Section 129 proceeding, including reopening the record to gather additional information (from public data sources and from questionnaires sent to domestic producers and Canadian producers) to be used to supplement the information gathered in the original investigations.⁶ The Commission sought such additional information primarily to provide it with a more complete data series for the period closest to the Commission's original determination, and thereby to assist it in considering and addressing issues raised by the Panel Report regarding the imminent future.⁷ Additional data from questionnaire responses were limited, because the majority of Canadian producers either expressly refused to answer, or simply did not respond to, requests in the Section 129 proceeding for additional data.⁸ The Commission held a public hearing and

⁵69 Fed. Reg. 47461 (August 5, 2004) (Exhibit US-3) and 69 Fed. Reg. 52525-52526 (August 26, 2004) (Exhibit US-4).

⁶These procedures are contemplated in U.S. law. *See* Statement of Administrative Action to the Uruguay Round Agreements Act of 1994, H.R. Rep. No. 103-316, Vol. I at 1024 ("This 120-day limit will provide the ITC sufficient time to gather additional information if necessary for it to decide on appropriate implementing action.").

⁷*See* Section 129 Determination at 7-8. (Exhibit US-1). In the original investigation, the Commission collected data from questionnaires for the period of January 1999-December 2001 and considered information from public data sources primarily for the period of 1995 to 2001. In the Section 129 proceeding, the Commission sought specific additional data from questionnaires and public sources for periods in 2002 prior to the original determination. In the original investigation, the Commission closed its record on April 25, 2002, voted on May 2, 2002, and issued its determination on May 16, 2002. *Id.*

⁸In the original investigation, 27 Canadian producers, accounting for 79 percent of production in Canada in 2001, provided requested information; only six of those Canadian producers responded to the Commission's supplemental questionnaire, accounting for 20 percent of production in Canada for the January-March 2002 period. Section 129 Report at 6 and 41. (Exhibit US-5). Counsel for at least two Canadian parties informed the Commission by letters that they would not respond to the supplemental questionnaires, and counsel for four other

provided parties to the proceeding three opportunities to submit written comments in the form of prehearing briefs, posthearing briefs, and final comments.

6. After conducting its analysis, the Commission, on November 24, 2004, issued the Section 129 Determination, which found that “an industry in the United States 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.”⁹ On December 20, 2004, Commerce, at the direction of the USTR, amended the antidumping and countervailing duty orders on softwood lumber from Canada to reflect the new ITC determination. Accordingly, the United States had come into compliance with its obligations under the AD and SCM Agreements, and so informed the DSB on January 25, 2005.

III. The Commission Issued a New Determination Consistent with the AD and SCM Agreements and the DSB’s Recommendations and Rulings

7. As discussed in detail in the Section 129 Determination, the Commission responded to the DSB’s recommendations and rulings by gathering additional information, conducting a thorough analysis, and providing detailed and reasoned explanations for its findings. On the

Canadian parties as well as four Canadian producers informed Commission staff directly that they would not respond to supplemental questionnaires; other Canadian parties simply did not respond. *See, e.g.*, Letter to Marilyn Abbott from Elliot J. Feldman of Baker & Hostetler, counsel for Tembec, dated Sept. 17, 2004. (Exhibit US-6). In accordance with Article 6.1.1 of the AD Agreement and Article 12.1.1 of the SCM Agreement, Canadian producers were provided more than 37 days to respond to these limited three-page supplemental questionnaires. *See also* AD Agreement, Article 6.8 and Annex II, paragraph 1; SCM Agreement, Article 12.7. Notwithstanding the lack of full cooperation, the ITC obtained sufficient public and questionnaire data to make findings necessary to implement the DSB’s recommendations and rulings.

⁹Section 129 Determination at 2 and 85 (Exhibit US-1).

basis of its analysis of the record evidence, the Commission made a new determination that an industry in the United States is threatened with material injury by reason of imports of softwood lumber from Canada found to be subsidized and dumped in the United States.¹⁰ The Commission's new determination is based on positive evidence and an objective and unbiased evaluation of the facts.

A. Standard of Review and Burden of Proof

8. In this Article 21.5 proceeding, the measure at issue is the Commission's Section 129 Determination, which was taken to comply with the recommendations and rulings of the DSB. The Appellate Body has recognized that "Article 21.5 proceedings involve, in principle, not the original measure, but rather a new and different measure which was not before the original panel" and that "the task of the Article 21.5 Panel" is to determine whether the new measure is consistent with the covered agreements.¹¹

9. While "a panel acting pursuant to Article 21.5 of the DSU would be expected to refer to

¹⁰The record evidence in the Commission's Section 129 proceeding incorporated the record in the Commission's original *Softwood Lumber* investigations, the Panel Report, additional information gathered in this Section 129 proceeding, and comments received in response to the Commission's notice published in the *Federal Register* on August 26, 2004. In addition, the Commission adopted from the original Commission report its prior views and findings in their entirety regarding domestic like product, domestic industry and related parties, use of publicly available information, conditions of competition, cross-cumulation, Maritime Provinces, effects of subsidies or dumping, and consideration of the nature of the subsidy and its likely trade effects. See USITC Pub. 3509 at 3-13, 16-27, 27-29, 30-31, and 39. (Exhibit CDA-2). The findings by the Commission in each of these portions of its original views were either not challenged or were found by the original panel to be not inconsistent with U.S. obligations under the covered agreements.

¹¹Appellate Body Report, *Canada - Measures Affecting the Export of Civilian Aircraft (Article 21.5 - Brazil)*, WT/DS70/AB/RW, adopted August 4, 2000, paras. 40-41.

the initial panel report,”¹² the panel’s role is not to compare the old measure to the new measure, as Canada repeatedly urges, but rather to review whether the measure taken to comply is consistent with the covered agreements.¹³ In conducting that review, the Panel should apply the same standard of review that the original panel applied in considering the original measure.¹⁴

10. As the original panel observed in the underlying proceeding, given that the ITC’s determination applies in both the antidumping and countervailing duty contexts, the standards set out in both Article 17.6 of the AD Agreement and Article 11 of the DSU are relevant here. In the Panel Report, the original panel stated, “[I]n a case such as this one, involving a single injury determination with respect to both subsidized and dumped imports, and where most of Canada’s claims involve identical or almost identical provisions of the AD and SCM Agreements, we should seek to avoid inconsistent conclusions.”¹⁵ That rationale should guide the Panel’s review in this proceeding too. Similarly, the original panel’s observation that its “task is not to carry out a *de novo* review of the information and evidence on the record of the underlying investigation,” nor to “substitute its judgment for that of the investigating authorities”¹⁶ applies with equal force

¹²Appellate Body Report, *Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States (Article 21.5 – United States)*, WT/DS132/AB/RW, adopted November 21, 2001, para. 109.

¹³Of course, the determination of what is the measure taken to comply can be a complicated one. See Appellate Body Report, *European Communities - Anti-dumping Duties on Imports of Cotton-Type Bed Linen from India (Article 21.5)*, WT/DS141/AB/RW, adopted April 24, 2003, paras. 78-79.

¹⁴See Panel Report, paras. 7.11 to 7.22 (discussing applicable standard of review).

¹⁵Panel Report, para. 7.18.

¹⁶Panel Report, para. 7.15.

to the present proceeding.

11. Canada glosses over these points, relying instead on selected quotations from the Appellate Body reports in *US - Cotton Yarn* and *US - Lamb*.¹⁷ Rather than dwell on the matter, we simply refer the Panel to the report in the underlying proceeding as an accurate statement of the standard that should guide the Panel in its present review.

12. Similarly, the burden of proof in this proceeding, as in the original proceeding, lies with Canada. As the original panel correctly stated, “In this dispute, Canada, which has challenged the consistency of the United States’ measures, thus bears the burden of demonstrating that the measures are not consistent with the relevant provisions of the relevant Agreements.”¹⁸

B. The DSB’s Recommendations and Rulings

13. In considering how to come into compliance with the DSB’s recommendations and rulings, the United States took note of the fact that the original panel focused on the explanation provided by the ITC in support of its determinations in light of the evidence it had before it. For example, the original panel discussed “the necessity of [the investigating authority] . . . providing an adequate explanation of its analysis such that a Panel can, with confidence, understand the reasoning underlying the decision that was actually made in order to be able to assess its consistency with the relevant provisions of the Agreements.”¹⁹

14. Earlier in the Panel Report, the original panel made clear that it based its findings on

¹⁷First Written Submission of Canada, paras. 39-40.

¹⁸Panel Report, para. 7.23.

¹⁹Panel Report, para. 7.136.

what it saw as “no rational explanation in the USITC determination, based on the evidence cited, for the conclusion that there would be a substantial increase in imports imminently.”²⁰ This concern regarding insufficient explanation is repeated in the Report for several of the factors considered by the Commission in its original threat of material injury determination.²¹

15. Given the original panel’s consistent focus on this point, the Commission understood that to comply with the recommendations and rulings it should reconsider its analysis with a view to providing detailed and thorough explanations supporting its determinations. Thus, in the Section 129 Views of the Commission, the ITC articulated more reasoned and detailed explanations for issues material to its determination so that its decisional path may reasonably be discerned by the Panel.

16. By contrast, at the heart of Canada’s argument that the United States has failed to come into compliance is the strong suggestion that, based on the findings in the Panel Report, only a negative determination would be consistent with the covered agreements.^{22 23} Of course, that

²⁰Panel Report, para. 7.89. The Panel Report added, “In reaching this decision we have kept in mind that we may not substitute our judgment for that of the USITC, but must nonetheless carry out a detailed and searching analysis of the evidence relied upon and the reasoning and explanations given.” *Id.* The original panel made clear that it was not basing its findings on explanation from outside the ITC’s determination. *See id.* at para. 7.41 (stating that the original panel’s conclusions “rest on our examination of the USITC’s published determination . . . in determining whether or not the USITC’s determination are consistent with the relevant provisions of the Agreements”).

²¹*See, e.g.*, Panel Report, para. 7.92 (export-orientation); para. 7.93 (the effects of the expiration of the SLA); para. 7.94 (import trends during periods when the SLA was not in effect); para. 7.95 (forecasts for demand in the U.S. market); and para. 7.137 (non-attribution analysis).

²²*See, e.g.*, Canada First Written Submission, para. 4. In the Section 129 proceeding, counsel for Canada explicitly asserted to the Commission that a “negative threat determination in

premise is patently incorrect, as evidenced by the fact that the original panel in the underlying dispute expressly declined Canada's request that it suggest that the United States come into conformity by, *inter alia*, "revoking the final determination of threat of injury."²⁴ As the original panel recognized, its findings did not compel one means of implementation to the

this proceeding is the only determination that is consistent with the record and the WTO Panel Report." Govt. of Canada's Posthearing Brief at 2. (Exhibit US-7).

²³In support of this view, Canada makes repeated references to the decisions and determinations in the proceeding reviewing the ITC's original determination pursuant to the dispute settlement provisions of the North American Free Trade Agreement ("NAFTA"). See Canada First Written Submission, paras. 4, 16 and n. 6, and Exhibits CDA-3, CDA-17, CDA-27, CDA-28, CDA-44, and CDA-45. Those references are inappropriate for a number of reasons. First, the proceeding in the NAFTA is outside the terms of reference of this WTO DSU Article 21.5 Panel. "Article 21.5 proceedings are limited to those 'measures *taken to comply* with the recommendations and rulings' of the DSB." AB Report, *Canada-Aircraft (Article 21.5 - Brazil)*, para. 36. Any determination or decision in the NAFTA proceeding *is not* a measure taken to comply with the recommendations and rulings of the DSB. Second, in issuing its third determination in the NAFTA proceeding, the Commission majority recognized that the NAFTA "Panel's Decision and Order can only be seen as a reversal of the Commission's affirmative determination of threat of material injury, despite the fact that neither the NAFTA nor U.S. law gives the Panel the authority to reverse the Commission's determination in these circumstances" and noted that "[b]ecause the Panel has precluded the Commission from engaging in any analysis of substantive issues, the Commission has not reached and cannot reach any determination regarding whether there is substantial evidence to support this negative determination." See *Views of the Commission in Response to Panel Decision and Order of August 31, 2004*, at 13 and n. 51 (September 10, 2004) (Exhibit CDA-3). That remand determination and the panel's decisions in the NAFTA proceedings are the subject of a pending review by a NAFTA Extraordinary Challenge Committee. See Article 1904.13 and Annex 1904.13 of the North American Free Trade Agreement. Finally, Canada fails to point out that the Commission was erroneously precluded by the NAFTA panel from reopening the record and that, accordingly, the Section 129 Determination is based on a different record than that in the NAFTA proceedings.

²⁴Panel Report, paras. 8.7 to 8.8.

exclusion of any other.²⁵

17. In suggesting that only a negative determination would constitute a measure taken to comply, Canada makes a number of inconsistent and otherwise erroneous arguments. For example, in portraying the Section 129 Determination, Canada inexplicably vacillates between faulting it for being essentially the same as the original determination and faulting it for making findings not contained in the original determination. In a number of cases, Canada simply recycles arguments it made in the original panel proceeding, disregarding the DSB's recommendations and rulings, as well as the additional information gathered in the Section 129 proceeding and the new analysis conducted by the Commission, on which the new determination is based. In fact, Canada even goes so far as to question the ITC's reopening the record to collect additional information in the Section 129 proceeding to address the original panel's concerns, while at the same time contending that the original panel found deficiencies in the evidence relied on by the ITC in the original determination.²⁶ We will discuss each of these flaws in Canada's argument briefly below.

C. Interrelationship Between Material Injury and Threat of Material Injury Analysis

18. Article VI of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), as well as the AD and SCM Agreements, permit a WTO Member to take an appropriate measure where dumped or subsidized imports cause present material injury or threaten material injury to a

²⁵Panel Report, para. 8.8 ("In this case, we see no particular need to suggest a means of implementation, and therefore decline to do so.").

²⁶*See, e.g.*, Canada First Written Submission, paras. 18 and 29.

domestic industry. Accordingly, in its Section 129 proceeding, the Commission examined and made determinations with respect to both present and threatened material injury.

19. In referring to the threat of material injury as a basis for taking appropriate action, the covered agreements recognize that even though material injury to a domestic industry may not yet have occurred (or injury to the industry may not yet be “material”), there may exist a progression or accretion of adverse effects by reason of subject imports such that, in the imminent future, a threat of material injury would become present material injury if protective measures were not taken.²⁷ Threat of material injury is material injury that has not yet occurred, and thus is a future event whose actual materialization cannot be assured with certainty.

Nonetheless, the determination of its existence must be based on evidence that is real, and not mere conjecture or supposition.²⁸ Therefore, the threat of material injury and present material

²⁷The GATT Committee on Anti-dumping Practices adopted “Recommendation concerning Determination of Threat of Material Injury” on October 21, 1985, which provided the following further clarification on the progression from threat to injury:

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. (Exhibit CDA-12). Canada, in selectively quoting from this recommendation to imply that threat determinations are discouraged, omits the last sentence of paragraph 1, which states, “Nevertheless Article VI:1 recognizes that dumping is to be condemned if it threatens material injury to an established industry in the territory of a contracting party.” *Id.* at 182, para. 1; *see* Canada First Written Submission, para. 48.

²⁸*Accord* AD Agreement, Article 3.7 and SCM Agreement, Article 15.7; Panel Report, paras. 7.53-7.60. *See* Appellate Body Report, *United States - Safeguard Measures on Imports of*

injury analyses are intertwined, with many of the same factors necessarily being considered in both analyses.

20. The Commission's analysis in its Section 129 Determination includes consideration of all the facts in the record, particularly regarding the volume of subject imports, their effect on prices of the domestic like product, and their consequent impact on the domestic industry.²⁹

Consideration of these facts establishes the background against which the Commission evaluated the threat factors and whether subsidized and dumped imports will imminently affect the industry's condition in such a manner that material injury would occur in the absence of protective action.³⁰

21. Canada, however, ignores the interrelationship between the present injury and threat of injury factors. Canada suggests that, in reviewing the ITC's Section 129 Determination, the Panel should consider only the facts that may involve an incremental change from the industry's

Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia, WT/DS177/AB/R, adopted May 16, 2001, para. 125 ("US-Lamb Meat") ("... '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."). Moreover, while the obligations under different WTO agreements are not identical and may serve different purposes, threat analysis involving the Safeguards Agreement provides some guidance regarding the distinctions between threat and present injury.

²⁹Thus, in its analysis in the Section 129 proceeding, the Commission considered the evidence regarding the factors listed in Articles 3.2 and 3.4 of the AD Agreement and Articles 15.2 and 15.4 of the SCM Agreement. See Panel Report, paras. 7.104 - 7.111.

³⁰See AD Agreement, Article 3.7 and SCM Agreement, Article 15.7 ("No one of these [listed] 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.").

present state, rather than the totality of the facts.³¹ In rejecting Canada's urging of a similar approach in the underlying dispute, the original panel recognized that the threat factors "are thoroughly intertwined with" the present injury factors and that the determination of threat must be based on the "totality of the factors considered."³² The same principle applies to the present review.

D. The Commission Addressed Each of the Panel Report's Findings

22. In its Section 129 Determination, the Commission fully addressed the findings in the Panel Report. Canada's assertions to the contrary³³ simply are incorrect. For example, the Panel Report recognized that subject imports already were at significant levels in terms of absolute volume and in terms of market share, but questioned whether the Commission relied on a significant rate of increase during the period of investigation as support for its conclusion that

³¹See Canada First Written Submission, para. 47 and n. 45. Canada's reliance on the Appellate Body Report in *Mexico- HFCS (Article 21.5 – United States)* at para. 100 to imply a requirement to establish an abrupt change fails to recognize that the Appellate Body's statements were based on the particular facts in that case – the sugar industry had experienced positive performance during the period of the investigation, and yet the investigating authority's determination found that the industry would be threatened with injury.

³²Panel Report, para. 7.60 ("we do not disagree, in principle, with the United States' view that Article 3.7 and Article 15.7 do not require that the investigating authority identify a specific event that will change such that a situation of no injury will become a situation of injury in the future. In this case, the facts that United States points to as demonstrating the 'progression' of circumstances which would create a situation in which injury would occur in the near future are thoroughly intertwined with the USITC's discussion of the present condition of the domestic industry, the present impact of imports, and the facts asserted in support of the conclusion that imports will increase substantially.").

³³See, e.g., Canada First Written Submission, para. 7.

subject imports would increase substantially in the future.³⁴ The Panel Report also found that the Commission did not address why the expiration of the Softwood Lumber Agreement (“SLA”) would result in a further substantial increase in imports, rather than a reallocation of imports from non-covered to previously covered provinces or merely a shift in timing of imports to avoid duties associated with new antidumping and countervailing duty petitions.³⁵

23. In its Section 129 Determination, the Commission addressed these and other findings in the Panel Report. Specifically, the Commission evaluated the significance of the import levels and increases in imports during the period of investigation, taking into account the significant restraining effect of the SLA.³⁶ Moreover, the Commission considered the impact that the expiration of that agreement would have on the market for softwood lumber, analyzing import trends before and during the period of investigation, specifically in the context of the prevailing market conditions. The record evidence in the Section 129 proceeding further indicated that there was a significant rate of increase of imports during the period examined, especially considering that the baseline volume was significant,³⁷ and that there was an even greater increase during periods with no import restraints in place. The record also indicated that imports

³⁴Panel Report, para. 7.90.

³⁵Panel Report, paras. 7.93 and 7.94.

³⁶Section 129 Determination at 20-31. (Exhibit US-1).

³⁷The Commission recognized that even substantial increases in absolute volume from a significant baseline will not result in large percentage increases. This, however, does not mean that such absolute volume increases are not significant. Increases of the same absolute volume over a small baseline will result in substantially higher percentage rates of increase than those same volume increases over a large baseline. Canada ignores the significance of the baseline in discussing the importance of incremental increases in import volume.

increased after bonding requirements associated with preliminary countervailing duties were imposed, thereby dispelling the theory that a shift in timing accounted for the higher level of imports immediately following the expiration of the SLA. Similarly, when the expiration of the SLA left no restraint on imports from any of the Canadian provinces, imports from the formerly covered provinces increased, but imports continued at near SLA levels from the non-covered provinces as well, resulting in an overall increase in subject imports.³⁸

24. The Commission's discussion in its Section 129 Determination of the evidence regarding the import trends after expiration of the SLA illustrates the thorough evaluation undertaken by the Commission to address each issue raised by the original panel. The Commission stated:

During the period between expiration of the SLA (April 2001) and before suspension of liquidation resulting from the investigation (August 2001), subject import volume was substantially higher, by a range of 738 mmbf to 959 mmbf, or by 9.2 percent to 12.3 percent, than the comparable April-August period in each of the preceding three years (1998-2000). While the rate of increase in imports slowed when bonding requirements associated with the preliminary countervailing duties were imposed in August 2001, subject imports entered the U.S. market in the April-December 2001 period at a rate 4.9 percent higher than the comparable 2000 period. The evidence in this proceeding demonstrates an even more significant increase of 14.6 percent for the first quarter of 2002 compared with the first quarter of 2001, and a significant increase of 6.2 percent compared with the first quarter of 2000. During these periods, market conditions other than the expiration of the SLA, such as increases in consumption, do not lessen the impact of these significant increases in subject imports. For example, while apparent U.S. consumption for first quarter 2002 increased compared with first quarter 2001, it was at a substantially lower rate, 9.7 percent, than the 14.6 percent increase in subject imports. Moreover, subject imports were 6.2 percent higher in the first quarter of 2002 compared with the first quarter of 2000, while apparent U.S. consumption declined by 2.3 percent for first quarter 2002 compared with first quarter 2000.

Claims that the substantial increase in imports during the April-August 2001 period only reflects "a shift in the timing of imports" fail to address the simple fact that subject imports increased *both* during this period *and* afterward. Imports increased after

³⁸Section 129 Determination at 26-27. (Exhibit US-1).

expiration of the SLA and have continued to substantially increase, even after bonding requirements associated with the preliminary CVD findings were imposed. Thus, the evidence does not support a theory that a shift in timing accounted for the higher level of imports immediately after the SLA expired; rather, it indicates a change in import behavior.

We find these import trends during the most recent period in which there were no trade restraints to be highly indicative of whether imports are likely to substantially increase in the imminent future. The fact that subject imports increased substantially after expiration of the SLA and have continued to increase affirms our conclusion that subject imports threaten material injury to the domestic industry.³⁹

This discussion is representative of the Commission's thorough analysis of the record and of the totality of the facts that were before it. The Commission's analysis of those facts demonstrates that there is positive evidence to support the Commission's finding of the likelihood of substantially increased imports.

25. Regarding the issue of demand relative to importation, the Panel Report found that the Commission did not make any findings in its original determination that imports from Canada would increase more than demand, thereby garnering an increased share of the U.S. market, and that the Commission did not discuss market share at all in the context of its original threat of material injury determination.⁴⁰ In its Section 129 Determination, the Commission considered and provided analysis of this issue. Specifically, the Commission found that there is no basis in the record evidence to conclude that likely substantial increases in subject imports would be outpaced by increases in demand.⁴¹ Demand was high by historical standards, but relatively

³⁹Section 129 Determination at 28-30 (footnotes omitted). (Exhibit US-1).

⁴⁰Panel Report, para. 7.95.

⁴¹Section 129 Determination at 17 and 75-80. (Exhibit US-1).

stable during the period of investigation. Forecasts expected demand to be relatively unchanged until the second half of 2002, and then begin to increase in 2003 as the U.S. economy rebounded from a recession. Record evidence showed that increases in subject imports significantly outstripped the small increases in demand during the period of investigation. In its evaluation of demand relative to importation during the period examined, the Commission stated:

First, the actual evidence in 2001 shows that the increase in subject imports outstripped demand; imports of softwood lumber from Canada increased by 2.4 percent from 2000 to 2001 and U.S. apparent consumption increased by only 0.2 percent for the same period. Moreover, subject imports after removal of the restraining effect of the SLA were 11.3 percent higher for the April-August 2001 period compared to the same period in 2000, and 4.9 percent for the April-December 2001 period compared to the April-December 2000 period, while apparent U.S. consumption for the entire year was only 0.2 percent. The evidence in this Section 129 proceeding demonstrates that while apparent U.S. consumption for first quarter 2002 increased compared with first quarter 2001, it was at a substantially lower rate, 9.7 percent, than the 14.6 percent increase in subject imports. Moreover, subject imports were 6.2 percent higher in the first quarter of 2002 compared with the first quarter of 2000, while apparent U.S. consumption declined by 2.3 percent for first quarter 2002 compared with first quarter 2000. Thus, the actual increases in subject imports during the period of investigation substantially outstripped demand; similarly, actual data shows that subject imports after expiration of the SLA have increased at a significantly higher rate than any forecasts for increases in demand for softwood lumber for 2002 and 2003.⁴²

Based on its analysis of the totality of the facts, the Commission found that subject imports would increase their market share in the imminent future.

26. On the issue of available excess Canadian capacity, the Panel Report found that the Commission's discussion regarding the Canadian industry's export orientation did not support the conclusion that excess capacity would be exported to the United States beyond the

⁴²Section 129 Determination at 76 (footnotes omitted). (Exhibit US-1).

“historical” level.⁴³ In its Section 129 Determination, the Commission analyzed capacity and found that Canadian producers had sufficient excess capacity, and projected increases in capacity and production in 2002 and 2003, to substantially increase exports to the United States beyond the already significant historical level.⁴⁴ The record indicated that Canadian production is tied to the U.S. market, which continues to be the most important market for Canadian producers.⁴⁵ The U.S. market accounts for about two-thirds of Canadian production and shipments, whereas in 2001, other export markets accounted for only 8 percent of Canadian production, and the Canadian home market accounted for only about 24 percent of production. Therefore, the Commission recognized that there are limited other markets to absorb the projected increase in production of Canadian softwood lumber.⁴⁶

27. The record in the Section 129 proceeding provided further support for the Commission’s finding: in first quarter 2002, as apparent Canadian consumption declined, Canadian producers shifted sales from the home market to the U.S. market. Given the positive record evidence on the export orientation of Canadian lumber producers, the Commission discounted Canadian producers’ projections that additional production would be exported to the United States at below historical levels.⁴⁷ Significantly, the Commission found that the record was devoid of

⁴³Panel Report, paras. 7.91 and 7.92.

⁴⁴Section 129 Determination at 31-40. (Exhibit US-1).

⁴⁵Section 129 Determination at 36-38. (Exhibit US-1).

⁴⁶Section 129 Determination at 37. (Exhibit US-1).

⁴⁷Section 129 Determination at 39-40. (Exhibit US-1).

evidence, such as new supplier contracts or evidence of increased demand in or sales to another country, that would indicate that increased production was likely to deviate substantially from past shipment patterns. Indeed, the Commission found that the record suggested that imports into the U.S. market would increase beyond historical levels.⁴⁸

28. The Commission also evaluated, in its Section 129 Determination, the effects of the likely substantial increases in subject imports on prices and the condition of the domestic industry. The Commission found that, during the period of investigation, the substantial and increasing volume of subject imports had *some* adverse effects on prices for the domestic product. Moreover, there was evidence that the SLA had an effect on prices in the U.S. market.⁴⁹ The evidence further demonstrated that the condition of the domestic industry, and in particular its financial performance, deteriorated over the period of investigation, largely as a result of the substantial decline in prices.⁵⁰ The declines in the industry's performance, particularly its financial performance, made it vulnerable to future injury. Thus, the Commission found that the price trend evidence, particularly the fact that prices reached their lowest levels as imports increased significantly after expiration of the SLA, provided positive evidence that subject imports were entering at prices that were likely to have a significant depressing or suppressing effect on domestic prices, and thereby were likely to adversely impact the U.S. industry in the

⁴⁸Section 129 Determination at 40. (Exhibit US-1).

⁴⁹See Section 129 Determination at 41-54. (Exhibit US-1).

⁵⁰Section 129 Determination at 55-63. (Exhibit US-1).

imminent future.⁵¹

29. Finally, the Panel Report expressed concern with the discussion, or more precisely what it saw as an inadequate treatment, of other factors potentially causing injury in the context of the Commission's threat analysis in the original determination.⁵² In its Section 129 Determination, the Commission provided a detailed and reasoned analysis of such alleged other factors. In particular, it analyzed whether such alleged other factors are other "known factors" within the meaning of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement. The alleged other factors analyzed were: (1) the excess supply from the domestic industry itself; (2) third-country or non-subject imports; (3) increases in importation to meet demand in the U.S. market; (4) integration in the North American market; (5) the growth in importance of engineered wood products ('EWPs'); and (6) constraints on domestic production/insufficient timber supplies in the United States.⁵³

30. 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.⁵⁴ Canada argues (as

⁵¹Section 129 Determination at 66-67 (Exhibit US-1).

⁵²Panel Report, paras. 7.134 - 7.136.

⁵³Section 129 Determination at 68-85. (Exhibit US-1).

⁵⁴Article 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.

it did in the underlying proceeding) that further consideration or examination is required even if an alleged factor is found not to be an “other known factor.”⁵⁵ As is plain from Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement, Canada simply is incorrect.

31. The covered agreements do not require an investigating authority to use any particular methodology in examining the causal relationship between dumped or subsidized imports and injury, provided that it “does not attribute the injuries of other causal factors to dumped imports.”⁵⁶ Moreover, such an analysis is warranted only if an alleged other factor is in fact having, or threatening to have, a causal impact. If the factor is found not to have, or threaten to have, injurious effects on the domestic industry, such a factor is not an “other known factor” for purposes of Article 3.5 of the AD Agreement or Article 15.5 of the SCM Agreement. If a factor

The same provision in Article 15.5 of the SCM Agreement applies to subsidized imports. See Appellate Body Report, *European Communities - Antidumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted August 18, 2003, para. 188 (“*EC-Pipe*”); see also Section 129 Determination at 64-66.

⁵⁵See Canada First Written Submission, para. 123.

⁵⁶Appellate Body Report, *EC-Pipe*, para. 189, citing Appellate Body Report, *United States - Antidumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, 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.

See also Appellate Body Report, *US-Hot-Rolled Steel*, para. 224 (“[W]hat the Agreement requires is simply that the obligations in Article 3.5 be respected when a determination of injury is made.”).

is not an “other known factor,” no further consideration or examination of the factor is called for.⁵⁷

32. Based on its analysis of the evidence in the Section 129 proceeding, the Commission found that the alleged other factors identified by the original panel were not other known factors or causal factors in the context of its threat analysis. In light of that finding, it had no basis to undertake a further examination to ensure that injury from them was not attributed to subject imports in the context of its threat determination.

33. One instance in which the evidence demonstrated that an alleged other factor was not a “known” other factor was nonsubject imports. As in the underlying proceeding, Canada attempts to portray nonsubject imports as other known factors, notwithstanding evidence to the contrary. Non-subject imports never accounted for more than 2.6 percent of apparent consumption; subject imports accounted for at least 34 percent of the U.S. market. Moreover, individual country non-subject imports would have been deemed negligible, with no individual country accounting for more than 1.3 percent of imports, while Canadian imports accounted for about 93 percent of all

⁵⁷Appellate Body Report, *EC-Pipe*, 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.

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.”

imports.⁵⁸ In light of the evidence regarding nonsubject imports, the Commission found them not likely to be an other factor potentially causing injury to the domestic industry in the imminent future. Thus, the Commission found no basis to examine whether any injury could be attributed to nonsubject imports in the imminent future.

IV. Conclusion

34. For the reasons stated above, Canada's claims against the U.S. implementation of the DSB's recommendations and rulings in this dispute are groundless. The United States therefore requests that the Panel reject Canada's claims in their entirety.

⁵⁸See Section 129 Determination at 73-75. (Exhibit US-1).