1. **Overview**. In raising numerous claims regarding the ITC's affirmative threat determinations, Canada substantially distorts both the evidence that was before the ITC 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. In reviewing the ITC's determinations, one should be mindful of the following points:

- First, injury to the 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 Agreement (ADA) and the Subsidies Agreement (SCMA).

- Second, the term "consider" as used in the covered Agreements 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 injury analysis that supported an affirmative present injury finding, *e.g.*, 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 foreshadow present injury and clearly support the existence of a threat. Canada's claims of no present injurious effects are untrue.

- Fourth, the ITC's affirmative threat determinations are based on: 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 injury to an industry, already in a vulnerable state, resulting from the likely increases in imports and price effects.

- Finally, the ITC's determinations are based on positive evidence, and an objective examination of all relevant factors and facts. The ITC provided a reasoned and adequate explanation of its findings and, therefore, its determinations are consistent with U.S. obligations.

2. **Standard of Review**. While Canada acknowledges the applicable provisions on standard of review, its arguments would apply a *de novo* standard of review. However, the covered Agreements, as consistently interpreted by the Appellate Body and prior panels, preclude *de novo* review by a Panel in trade remedy cases. They make clear the distinction between the role of an investigating authority, as the finder of fact, and the role of a panel, as evaluator of an authority's acts rather than directly evaluating the underlying facts. Thus, objective assessment by the Panel is not *de novo* review.

3. **Continuum of an Injurious Condition Ascending from Threat to Injury**. Canada and the United States have fundamental differences in interpretations of what constitutes a threat and its distinction from present injury. The texts of the ADA and the SCMA 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. The covered 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. While the text of the threat provisions provide a clear example of a sequence of events, Canada reads these provisions to require the identification of "an event," that will abruptly change the status quo from a threat to present material injury. Canada argues that the ITC should have identified a specific event. Mischaracterizing the ITC's present material injury determinations and ignoring the underlying

findings, Canada argues that there could be no threat of injury because there allegedly had been no present injurious effects and the ITC did not identify any imminent and abrupt change in the status quo. Canada's argument fails on both the law and the facts.

4. The existence of threat of injury must be based on projections extrapolating from existing data affirming a continuation of adverse trade trends. Accordingly, an authority should consider the past and present evidence regarding the factors listed in Articles 3.2 & 3.4 of the ADA and Articles 15.2 & 15.4 of the SCMA to provide the basis for projections about the future. While Canada speculates about the future, it is evident that the ITC's threat findings are based on consideration of all relevant facts, *i.e.*, the volume of imports, price effects and the consequent impact of continued dumped/subsidized imports on the domestic industry. These projections based on facts provide positive evidence justifying the ITC's determination that the domestic industry was on the verge of injury by reason of the continued dumped/subsidized imports.

5. **"Consider" does not mean "make findings**." The covered Agreements require the ITC to "consider" all listed factors in its threat analysis, but do not require the ITC to *make findings* on each factor; no dispute settlement report has identified such a requirement. 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.

6. **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 ITC's determination of the existence of a threat of material injury. A common thread in Canada's claims is its repeated assertions that there could be no threat because there allegedly were no present injurious effects. 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. Moreover, subject imports 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 restraint was now lifted. The ITC also found that subject imports had caused some adverse price effects, despite Canada's selective quotations of the ITC Report. 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 resulting largely from substantial declines in price, which the ITC found made it vulnerable to injury. The ITC's subsidiary findings regarding present injury were not negative and clearly support the existence of a threat of material injury. These findings, when coupled with the likely increase in imports, a further decline in price levels, and additional deterioration in the domestic industry's condition, fully justified the ITC's threat determination.

7. **ITC's Threat of Material Injury Findings**. The ITC considered all relevant threat factors provided for in the covered Agreements, including Articles 3.2, 3.4, & 3.7 of the ADA and Articles 15.2, 15.4, & 15.7 of the SCMA.

8. **The ITC found that there was a likelihood of substantial increases in subject imports** based on six subsidiary factors: 1) Canadian 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 related directly to threat factors regarding a significant rate of increase in imports and sufficient freely disposable production capacity.

9. **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. Demand was only one of six subsidiary factors considered by the ITC. Canada attempts to persuade the Panel that a purported significant increase in U.S. demand 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 ITC expressly rejected this theory because it was not supported by the facts. 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.

10. **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*. When a 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 available in 2001 as capacity utilization declined to 84 percent from 90 percent in 1999, Canadian producers expected to further increase their ability to supply the U.S. market by increasing capacity utilization 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 export projections were inconsistent with other data.* Given the evidence as a whole, the ITC reasonably discounted Canadian producers' projected export data and assumed 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.

11. **The ITC's Finding of Likely Substantial Increases in Subject Imports** 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. Canada does not dispute that subject imports will continue to enter the U.S. market at this significant level and are projected to increase, but challenges whether the increases would be substantial. Canada's argument that imports after the SLA increased by only 0.4 percent is predicated on the false notion that trade during the April-December 2001 period was free of trade incumberances. Its comparison of import data ignores the imposition of the preliminary countervailing duties in August 2001. During the April-August 2001 period, however, subject imports ranged from 9.2 to 12.3 percent higher than the comparable April-August period in each of the preceding three years (1998-2000). A similar pattern was observed during the 1994-1996 period prior to the adoption of the SLA. 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.

12. **Likely Price Effects**. 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 ITC 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 indicated that U.S. producers had curbed their production, but that overproduction "remains a problem in Canada." The ITC 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.

13. **Nature of the subsidies**. The ITC examined information on 11 programs that Commerce found conferred countervailable subsidies to Canadian producers and exporters of softwood lumber, and took into account that none of them were export subsidies. While the ITC clearly considered parties' arguments, 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. Canada has provided the Panel with a one-sided analysis of this issue. Canada would have the Panel believe that the Canadian 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 ITC 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.

14. **"Other Known Causal Factors."** The ITC's determinations 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.

15. **Combined Investigations**. The ITC's decision to cross-cumulate subsidized and dumped imports of softwood lumber from Canada is also consistent with the covered

Agreements. Canada provides no basis to support its contention that the combined investigations were conducted to more likely result in an affirmative determination and fails to acknowledge the ITC's consistent cross-cumulation practice. More significantly, Canada has failed to explain why it considers such practice to be inconsistent with obligations under the covered Agreements, given its identical approach to cross-cumulating subject imports in trade remedy proceedings.

16. As demonstrated in the ITC Report, the ITC 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. These determinations are based on positive evidence and are consistent with U.S. obligations.

17. The United States notes that Canada's request that the Panel recommend a particular course of action – that the United States revoke the final determination of threat of injury, cease to impose duties, and return the cash deposits imposed – seeks action not called for under the WTO agreements and is inconsistent with Article 19.1 of the DSU.

Closing Statement

18. Canada continues to seek to have the Panel impose requirements on the ITC that have no basis in the covered Agreements. For example, in numerous instances where Canada finds no specific basis to support a given requirement in the Agreements, it instead reverts to a general obligation to provide a reasoned explanation and argues that the ITC did not provide such an explanation for a given action, *e.g.*, cross-cumulation, consideration of the competing economic theories, and consideration of market share. The "reasoned explanation" obligation apparently flows from Article 12.2 of the ADA and Article 22.5 of the SCMA, which require an investigating authority to state the facts, law, and reasons supporting its determination. The ITC has done so here. These articles are not catch-all provisions encompassing the obligations that Canada posits but for which it is unable to find any other basis in the Agreements.

19. Canada made certain concessions at the first panel meeting, including: 1) "consider" does not mean "make a finding;" 2) special care does not involve a standard of determining threat that is higher than that for injury; and 3) the ITC was not required to make a finding regarding the economic theories concerning the nature of the subsidy if the evidence did not permit one. Canada's concessions should narrow the issues in dispute and reinforce the conclusion that the ITC's determinations did not violate U.S. obligations under the covered Agreements.

20. Finally, we provide a few brief comments clarifying certain issues Canada raised in its oral presentation. **On the issue of cross-cumulation**, Canada listed several alleged specific requirements distinct to each covered Agreement. We note that, with the exception of the nature of the subsidies, these alleged requirements are not distinct but rather common to both Agreements. Thus, none of Canada's claims seem to relate to cross-cumulation. **On the issue of Articles 3.4 of the ADA and 15.4 of the SCMA**, Canada's reliance on the Panel's findings in *Mexico-HFCS* to challenge whether the ITC conducted a "meaningful evaluation" is misplaced. The issue in *Mexico-HFCS* was not the manner in which these factors were evaluated but rather the failure to consider them at all. Unlike *Mexico-HFCS*, it is evident that the ITC conducted a "meaningful evaluation" in this case. **On the issue of substitutability/ attenuated competition**, Canada has misstated that the ITC found that "competition was therefore attenuated" and that "products [had] limited substitutability." The ITC found, based on the evidence in the record, that subject imports and domestic species are used in the same applications, and that prices of a particular species will affect the prices of other species.