

## **ANNEX A**

### **PARTIES' RESPONSES TO QUESTIONS FROM THE FIRST MEETING**

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## ANNEX A-1

### CANADA'S RESPONSES TO QUESTIONS FROM THE PANEL AND THE UNITED STATES - FIRST MEETING

24 September 2003

#### To Canada

**1. Is Canada of the view that the standard of review under Article 11 of the DSU is stricter than that under Article 17.6 of the AD Agreement? If so, could Canada please provide the Panel with specific indications of the effect of that difference, in Canada's view, on the Panel's consideration of the claims in this case.**

**In this context, could Canada please comment on the relevance and effect of the Declaration of Ministers at Marrakech relating to dispute settlement under the AD and SCM Agreements.**

1. Canada is not saying that the standard of review under Article 11 of the *DSU* is stricter than that under Article 17.6 of the *Anti-Dumping Agreement* but rather that Articles 17.6 and 11 complement each other and should be read together. As the Appellate Body stated in *US – Hot-Rolled Steel*,<sup>1</sup> both provisions require that panels make an “objective assessment” of the facts of the matter.

2. In *US – Cotton Yarn*, the Appellate Body clarified that an objective assessment of the matter requires a panel to assess whether the competent authority has evaluated all relevant factors, examined all pertinent facts and provided a reasoned and adequate explanation as to how the facts as a whole support its determination.<sup>2</sup> A panel must also consider whether the competent authority’s explanation addresses fully the nature and complexities of the data and responds to other plausible interpretations of the data.<sup>3</sup> The United States appears to accept these principles and, in particular, to agree that under both the *Anti-Dumping Agreement* and the *SCM Agreement*, the competent authority must provide reasoned and adequate explanations of the nature described above.<sup>4</sup>

3. Canada further notes that the European Communities appears to agree with both parties that the duties of panels under both provisions “do not differ significantly”<sup>5</sup>, but “fails to see, on which legal basis Canada would ask this Panel to determine whether the USITC has considered all the facts, including those that *should have been* before the ITC but were not raised by the interested parties”.<sup>6</sup> Canada would like to clarify that it is not claiming that the Commission should have obtained certain additional information that is not in its administrative record. Canada’s challenge concerns the Commission’s evaluation of the record that was before it.

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<sup>1</sup> *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, Report of the Appellate Body, WT/DS184/AB/R, adopted 23 August 2001, para. 55 (“*US – Hot-Rolled Steel*”).

<sup>2</sup> *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, Report of the Appellate Body, WT/DS192/AB/R, adopted 5 November 2001, para. 74 (“*US – Cotton Yarn*”).

<sup>3</sup> *Ibid.*

<sup>4</sup> First Written Submission of the United States, paras. 67-68.

<sup>5</sup> Third Party Submission of the European Communities, 22 August 2003, para. 16.

<sup>6</sup> *Ibid.*, para. 23. [emphasis in original]

4. Finally, regarding the Declaration of Ministers at Marrakech Relating to Dispute Settlement Under the AD and SCM Agreements, the Appellate Body has ruled that it “does not prescribe a standard of review to be applied”.<sup>7</sup> In any event, Canada’s interpretation of the applicable standard of review for this dispute is compatible with the Ministers’ recognition of the “need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures”.

**2. Is Canada of the view that in a case such as this one, involving a single injury determination with respect to both subsidized and dumped imports, where most of the claims involve identical or almost identical provisions of the AD and SCM Agreements, there might appropriately be different conclusions under the two Agreements?**

5. Yes, there might appropriately be different conclusions under the two Agreements because certain provisions in the *Anti-Dumping Agreement* differ from those in the *SCM Agreement*. For example, Article 15.7(i) of the *SCM Agreement* lists as a factor the “nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom”. There is no similar reference in Article 3.7 of the *Anti-Dumping Agreement*. Article 3.4 of the *Anti-Dumping Agreement* lists as a relevant economic factor “the magnitude of the margin of dumping”. There is no similar reference in Article 15.4 of the *SCM Agreement*. Depending on the facts at issue, textual differences such as these could result in different conclusions under the two Agreements.

**3. Could Canada please address what it considers is required to demonstrate "special care" as provided for in Article 3.8 of the AD Agreement and Article 15.8 of the SCM Agreement. Canada does not appear to make independent arguments with respect to these claims, but rather asserts (Canada's first submission at para 65) that the "failure to take "special care" permeates the entire determination of the [USITC]". Could Canada indicate to the Panel what it would have expected to see in the determination as a demonstration that "special care" had, in fact, been taken? In this context, could Canada give any examples, either from Canadian practice, or any other Member's practice, of the elements of "special care" it would consider appropriate? What elements does Canada consider could demonstrate the appropriate special care?**

6. The “special care” standard found in Articles 3.8 and 15.8 is inextricably linked to the predictive nature of a “threat of injury” determination and provides an important safeguard against the dangers inherent in such an exercise.<sup>8</sup> In this regard, the admonition in Articles 3.7 and 15.7 that a determination of threat of injury “shall be based on facts and not merely on allegation, conjecture or remote possibility”, provides important context for the meaning of the “special care” standard.

7. When **threat of injury is at issue, the investigating authorities must** undertake a particularly careful examination of all the required elements in Article 3 of the *Anti-Dumping Agreement* and Article 15 of the *SCM Agreement*.<sup>9</sup> The Commission’s errors in this dispute are such that they demonstrate that it failed to undertake a review of the nature required by Article 3 of the *Anti-*

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<sup>7</sup> *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, adopted 7 June 2000, para. 49.

<sup>8</sup> The United States recognized this linkage between special care and the predictive nature of threat determination in the “Statement of Administrative Action” in *Message from the President of the United States Transmitting the Uruguay Round Agreements, Texts of Agreements Implementing Bill, Statement of Administrative Action and Required Supporting Statements*, H.R. Doc. No. 103-316, vol. 1 (1994), p. 855 (“SAA”) “[b]ecause of the predictive nature of a threat determination, and to avoid speculation and conjecture, the Commission will continue using special care in making such determinations as provided in the Agreements”. (Exhibit CDA-22)

<sup>9</sup> The examination must reflect the standard of “special care”; as stated at paragraph 64 of Canada’s First Written Submission, “special” means “particularly good; exceptional” and “care” means “serious attention; heed, caution”.

*Dumping Agreement* and Article 15 of the *SCM Agreement* in injury determinations, much less exhibit the special care with which an investigating authority must analyze the threat of injury.

8. What amounts to “special care” will depend on the facts and circumstances of each investigation. It is best illustrated through examples of what does not amount to special care. In this dispute, the Commission concluded that “we find that subject imports from Canada are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices and are likely to increase demand for further imports”<sup>10</sup> despite lacking sufficient evidence regarding current prices from which to draw conclusions regarding current price effect, much less future price effect.<sup>11</sup> This is only one of many examples of the Commission’s failure to exercise special care. Other examples of a lack of special care by the Commission are found in Canada’s answers to Questions #6 and #11 of the Panel.

9. Overall, the Commission was required to provide an objective, reasoned and adequate explanation of how the relevant factors and record evidence supported its affirmative threat determination and why contrary record evidence did not warrant a negative threat determination. The Commission did not do this and could not do this on the basis of the record before it. Arriving at an affirmative threat determination notwithstanding the paucity of analysis and evidence supporting such a determination clearly falls below the standard of “special care” required in a threat case.

**4. Article 3.8 of the AD Agreement and Article 15.8 of the SCM Agreement provide that:**

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

**Could Canada address the implications of the phrase “the application of ... measures” in terms of the timing of the obligations provided for in this provision? Could Canada indicate how, in its view, the “special care” requirement affects or changes the obligation in Articles 3.1 of the AD Agreement and 15.1 of the SCM Agreement that a determination of injury “shall be based on positive evidence and involve an objective examination...”. Is Canada arguing that the “special care” provision means that there is a stricter, higher standard of review is applicable in cases of threat than in cases of present material injury? If so, could Canada point to the legal basis for that argument. Or is Canada arguing that a stricter standard of determination applies in threat cases? If so, what, in Canada's view, does such a stricter standard of determination entail, and how specifically does Canada consider that the USITC's determination shows the lack of special care.**

10. With respect to the timing of the obligations provided for in these provisions, the phrase “the application of... measures” must be interpreted in its context which includes the phrase “shall be considered and decided” and its location within the text of Article 3 of the *Anti-Dumping Agreement* and Article 15 of the *SCM Agreement* - both of which are entitled “Determination of Injury” and contain obligations relating to the examination and determination of injury.<sup>12</sup> The “application of ... measures” is “considered and decided” during the injury investigation and determination phase. Thus,

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<sup>10</sup> Commission Report, p.44. [emphasis added] (Exhibit CDA-1)

<sup>11</sup> First Written Submission of Canada, para. 107-112; see also: *In the Matter of Certain Softwood Lumber Products from Canada: Final Affirmative Threat of Injury Determination*, Decision of the Panel, Case No. USA-CDA-2002-1904-07, September 5, 2003 (Canada-US Free Trade Agreement Chapter 19 Binational Panel Review), available online at <http://www.nafta-sec-alena.org>, pp. 70-73 (“NAFTA Panel Decision”). (Exhibit CDA-23)

<sup>12</sup> Other Articles govern the imposition and application of anti-dumping and countervailing duties (e.g., Articles 7 and 9 of the *Anti-Dumping Agreement* and Articles 17 and 19 of the *SCM Agreement*).

the requirement to take special care applies to this phase, in particular to the making of a threat of injury determination. In this regard, Canada notes the statement of the panel in *Mexico – HFCS* that, “Article 3.8 specifies that special care must be used in deciding cases of threat of material injury”.<sup>13</sup> Canada further notes that the United States, when implementing this obligation, clearly linked it to the determination of threat rather than to the application of measures.<sup>14</sup>

11. With respect to whether the special care requirement affects or changes the obligations in Article 3.1 of the *Anti-Dumping Agreement* and Article 15.1 of the *SCM Agreement* that a determination of injury “shall be based on positive evidence and involve an objective examination...”, Canada notes that Articles 3.1 and 15.1 set out overarching requirements that all injury determinations must meet. However, a threat of injury determination must also meet the “special care” requirement in Articles 3.8 and 15.8. In this dispute, the Commission’s errors are of such a nature that they are inconsistent with the requirements under both the provisions of Articles 3.1 and 15.1 and Articles 3.8 and 15.8.

12. As set out in paragraphs 31-33 of Canada’s First Oral Statement, Canada is not arguing that the “special care” requirement means that a panel must adopt a stricter, higher standard of review for threat analysis than for a present injury analysis. Rather, the special care requirement is imposed upon investigating authorities, and requires them to undertake a particularly careful examination of the required elements of Article 3 of the *Anti-Dumping Agreement* and Article 15 of the *SCM Agreement* as a crucial safeguard against the dangers inherent in the predictive nature of threat determinations. That a stricter standard of determination applies in threat cases is apparent in the fact that in addition to the special care requirement, Articles 3.7 and 15.7 impose further requirements on investigating authorities conducting threat determinations that do not apply to present injury determinations – for example, the requirement to base the threat determination on, *inter alia*, a change in circumstances that is clearly foreseen and imminent. As the Appellate Body noted in *Mexico – HFCS*, this obligation of Article 3.7 (and hence Article 15.7) establishes a “high standard” and that standard is imposed in the first instance on investigating authorities.<sup>15</sup> What amounts to a failure to exercise special care on the facts of this case is also discussed in Canada’s answers to Questions #3, #6 and #11 of the Panel.

**5. In paragraph 31-33 of its oral Statement, Canada states that the "special care" obligation requires "an especially careful examination of the required elements" and that the "standard for determining threat is different, and if anything, higher than that for injury. Could Canada elucidate the basis for this position, in light of the standard for determinations of injury (including threat) in Articles 3.1 of the AD Agreement and 15.1 of the SCM Agreement?**

13. Canada’s reference to “standard” in this context is to the substantive obligation (*i.e.*, the substantive requirements) imposed upon investigating authorities for establishing threat of injury. Additional requirements apply to threat of injury determinations that do not apply to present injury determinations, namely the requirements in Articles 3.7 and 3.8 of the *Anti-Dumping Agreement* and Articles 15.7 and 15.8 of the *SCM Agreement*, as described above. The substantive standard for establishing threat of injury is, in this sense, different and, if anything, higher than the standard for establishing present injury, because investigating authorities must comply with additional substantive obligations. As noted above, the Appellate Body’s statement in *Mexico – HFCS* that Article 3.7

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<sup>13</sup> *Mexico – Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States*, Report of the Panel, WT/DS132/R, adopted 24 February 2000, para. 7.119 (“*Mexico – HFCS Panel Report*”). [emphasis added]

<sup>14</sup> SAA, p. 855. (Exhibit CDA-22)

<sup>15</sup> *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States: Recourse to Article 21.5 of the DSU by the United States*, Report of the Appellate Body, WT/DS132/AB/RW, adopted 21 November 2001, para 100 (“*Mexico – HFCS AB Report*”).

imposes a “high standard” strongly suggests that it has already endorsed this interpretation. The application of the obligations in Articles 3.8 and 15.8 and their relation to Articles 3.1 and 15.1 are discussed in Canada's answers to Questions #3 and #4 of the Panel.

**6. Could Canada discuss whether its claims under Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement are dependent on the Panel's resolution of Canada's claims of violation of Articles 3.2, 3.4, and 3.7 of the AD Agreement and 15.2, 15.4, and 15.7 of the SCM Agreement? If not, could Canada please indicate to the Panel the arguments in support of independent claims of violation?**

14. Canada's claims under Article 3.1 of the *Anti-Dumping Agreement* and Article 15.1 of the *SCM Agreement* are closely related to its claims under Articles 3.2, 3.4, 3.5 and 3.7 of the *Anti-Dumping Agreement* and Articles 15.2, 15.4, 15.5 and 15.7 of the *SCM Agreement*. However, they are not dependent on those claims. On the facts of this dispute, the Commission's investigation and determination give rise to violations of the overarching obligations in Articles 3.1 and 15.1 and, at the same time, the specific obligations in the other Articles that Canada has invoked in its challenge. Given substantive differences in the obligations in Articles 3.1 and 15.1 compared to these other Articles, certain factual scenarios could give rise to violations of Articles 3.1 and 15.1 without violating the provisions of the other Articles. However, Canada is not raising such facts in this dispute. The same facts give rise to violations under the overarching provisions as well as the specific provisions Canada has invoked in this dispute.

15. Articles 3.1 and 15.1 contain substantive and overarching obligations that must be observed by investigating authorities in making injury determinations. These obligations inform the more detailed obligations in the remainder of Articles 3 and 15.<sup>16</sup> As noted by the Appellate Body in *Mexico – HFCS*, “There is . . . a close relationship between the various paragraphs of Article 3 of the *Anti-Dumping Agreement*”.<sup>17</sup> Articles 3.1 and 15.1 provide that an injury determination must be made on the basis of “positive evidence” and involve an “objective examination” of:

- the volume of the dumped or subsidized imports;
- the effect of the dumped or subsidized imports on prices in the domestic market for the like products; and
- the consequent impact of these imports on domestic producers of such products

16. In a threat context, Articles 3.1 and 15.1 require an objective examination of the likely “volume”, “price effect” and “impact” of the subject imports. Articles 3.2, 3.4, 3.5, and 3.7 of the *Anti-Dumping Agreement* and Articles 15.2, 15.4, 15.5 and 15.7 of the *SCM Agreement* expand on these requirements as well as enumerate factors related to the investigating authority's examination of these issues.<sup>18</sup> Thus, the examination that an investigating authority must undertake under these provisions must also be “objective” and based on positive evidence. If it is not, there will be a violation of overarching obligation in Articles 3.1 and 15.1.

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<sup>16</sup> *US – Hot-Rolled Steel*, para. 192.

<sup>17</sup> *Mexico – HFCS AB Report*, para. 123.

<sup>18</sup> In the context of the relationship between Articles 3.1 and 3.4 of the *Anti-Dumping Agreement*, the panel in *Mexico – HFCS Panel Report*, stated that “Article 3.1 requires that a determination of ‘injury’, which includes threat of material injury, involve an examination of the impact of imports, while Article 3.4 sets forth factors relevant to that examination”, para. 7.127.

17. With respect to the failure of the Commission to base its determination of threat of injury on “positive evidence”, the evidence on the Commission’s record does not support an affirmative threat finding. For example, there is no positive evidence:

- of “a significant rate of increase of [dumped or subsidized] imports” given that first, the evidence showed only a 2.8 percent increase over the Commission’s period of investigation and second, that the Commission concluded, in light of its finding that subject imports had not had a significant price effect and the small increase in their market share, that subject imports did not have a significant impact on the domestic industry<sup>19</sup>, and then made a finding of no present injury;
- of “sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped [subsidized] exports to the importing Member’s market, taking into account the availability of other export markets to absorb any additional exports” given the projections of the Canadian exporters showing that exports to the United States were expected to increase only slightly in absolute terms from the non-injurious levels of 2001 and to decrease as a percentage of total Canadian exports<sup>20</sup>; and
- that “imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices and would likely increase demand for further imports” given that the Commission was unable to draw conclusions regarding the current effect of current prices of subject imports during the period of investigation.

18. With respect to the Commission’s failure to conduct an objective examination, a key issue in this dispute is whether the Commission provided a reasoned and adequate explanation of how the relevant facts supported its affirmative threat of injury determination.

19. This interpretation of the requirement for an “objective examination” finds support in the meaning of “objective assessment” under Article 11 of the DSU. An “objective assessment” has been interpreted by the Appellate Body to mean:

[P]anel must examine whether the competent authority has evaluated all relevant factors; they must assess whether the competent authority has examined all the pertinent facts and assessed whether an adequate explanation has been provided as to how those facts support the determination; and they must also consider whether the competent authority’s explanation addresses fully the nature and complexities of the data and responds to other plausible interpretations of the data.<sup>21</sup>

20. As discussed in Canada’s First Written Submission and First Oral Statement, the Commission did not provide such explanations in this dispute.

**7. Could Canada discuss whether its claims under Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement are dependent on the Panel’s resolution of Canada’s claims of violation of Articles 3.2, 3.4, and 3.7 of the AD Agreement and 15.2, 15.4, and 15.7 of the SCM Agreement? If not, could Canada please indicate to the Panel the arguments in support of independent claims of violation?**

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<sup>19</sup> Commission Report, p. 36. (Exhibit CDA-1)

<sup>20</sup> *Ibid.*, Table VII-2

<sup>21</sup> *US – Cotton Yarn*, para. 74.

21. Canada wishes to make two distinct but related points to clarify the relationship between Canada's claims under Article 12.2.2 of the *Anti-Dumping Agreement* and Article 22.5 of the *SCM Agreement* and the rest of Canada's claims under these Agreements.

22. First, Canada's claims with respect to Articles 12.2.2 and Article 22.5 are best understood as procedural claims, in the sense that these Articles set out specific obligations regarding the content of the public notice or separate report regarding an affirmative determination, *i.e.*, in the context of this case, what must be in the Commission's Report or reasons. These requirements include providing, in sufficient detail, all relevant information on the matters of fact and law as well as the reasons that have led to the imposition of final measures, including reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers. Canada's point is that the Report in question here simply does not contain what it is required to contain under Articles 12.2.2 and 22.5. Canada's claims under the other provisions are substantive in nature and address how the Commission's determination itself falls short of the obligations set out in Articles 3 and 15 of the *Anti-Dumping Agreement* and *SCM Agreement*, respectively.

23. Canada's second point is that Articles 12.2.2 and 22.5 do not require an investigating authority to provide a "reasoned and adequate explanation" of its decision. Rather, as discussed above and in Canada's previous submissions, this obligation flows 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*. Furthermore, Article 3.1 of the *Anti-Dumping Agreement* and Article 15.1 of the *SCM Agreement* also place related requirements on investigating authorities, for example, the need to base an injury determination on an "objective examination". Therefore, the US assertion, in its closing statement at the first meeting of the Panel, that the "'reasoned explanation' obligation Canada has identified apparently flows from certain provisions in Article 12.2 of the Anti-Dumping Agreement and Article 22.5 of the Subsidies Agreement", is clearly incorrect.<sup>22</sup>

24. Finally, as a practical matter, Canada recognizes that it would be unusual for an injury determination to either satisfy the obligations in Articles 3 and 15 but not Articles 12.2.2 and 22.5, or *vice versa*. However, this possibility does not arise here since the Commission's determination fails under all these provisions.

**8. Is it Canada's view that all of the Article 3.4/Article 15.4 factors must be considered a second time in the context of a determination of threat of material injury? If so, what would Canada argue such consideration must entail? How would Canada reconcile such a requirement with the views of the Panel in *Mexico – Corn Syrup*? Could Canada indicate to the Panel where in the text of the Agreements it finds an obligation for such a second consideration of these factors?**

25. In the context of a determination of threat of injury under the provisions of the *Anti-Dumping Agreement* and the *SCM Agreement*, the required analysis of the "relevant economic factors and indices having a bearing on the state of the industry" as set out in Articles 3.4 and 15.4 cannot be limited to the impact of the dumped or subsidized imports on the domestic industry in the past or the present. In order to evaluate the likely impact of further dumped/subsidized imports on the domestic industry, the competent authority must undertake an analysis of how any of the relevant factors listed in Article 3.4 and Article 15.4 will change in the future. The task is to examine threat not as conjecture or speculation, and therefore also not as simple extrapolation, in taking into account relevant factors that could have a bearing on the state of the domestic industry in the future. Thus, in the context of a threat of injury determination, an evaluation of the impact of the projected increased subject imports in relation to the relevant factors in Articles 3.4 and 15.4 is required. It is not a

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<sup>22</sup> US Closing Statement at First Panel Meeting, para. 4.

"second" examination of the Articles 3.4 and 15.4 factors in the sense that examination of them in the threat context duplicates the examination in the current injury context. Examination of the Article 3.4 and 15.4 factors in the threat of injury analysis is the first time that the investigating authority examines them in this predictive context.

26. Canada is not suggesting that the examination of these factors in the two contexts are unrelated. To the contrary, the threat analysis must take into account, and be consistent with, the current injury analysis. That means, for example, that the Commission must find a change in circumstances from the conditions prevailing during the period of investigation so that the non-injurious *status quo* would change and injury from dumping or subsidy would occur.

27. In the absence of an evaluation of the relevant economic factors in the future, it is impossible for the competent authorities to determine whether likely increased dumped/subsidized imports would adversely affect the domestic industry in such a manner as to cause injury. In other words, that imports are likely to increase does not necessarily mean that they will account for an increased market share, have an adverse effect on domestic production, sales and output, or adversely affect the profits of domestic producers, etc. in such a way that injury would occur. It is only through an examination of the likely impact of the dumped imports on the domestic industry concerned in the future that a reasoned determination that injury would likely occur can be made.

28. This interpretation of Articles 3.4 and 15.4 in the context of threat of injury flows from the views of the panel in *Mexico – HFCS*. For example, at paragraph 7.141 of its report the panel stated the following:

Merely that dumped imports will increase, and will have adverse price effects, does not, *ipso facto*, lead to the conclusion that the domestic industry will be injured – if the industry is in very good condition, or if there are other factors at play, dumped imports may not threaten injury. Such a conclusion thus requires the investigating authority to analyze, based on the information before it, the likely impact of further dumped imports on the domestic industry. SECOFI concluded that imports were likely to increase, based on the increases during the period of investigation, and the available capacity of the exporting producers, but there is no meaningful analysis, based on facts, concerning the likely impact of further dumped imports on the domestic industry in the final determination, e.g., whether such increased imports are likely to account for an increased share of the growing Mexican market, have an effect on production or sales of sugar, or affect the profits of the domestic producers, etc. in such a manner as to constitute material injury.<sup>23</sup>

29. Similarly, in this dispute, there is no meaningful analysis, based on facts, concerning the likely impact of further dumped imports on the domestic industry in the final determination of the Commission. The Commission's failure to assess the impact of the subject imports on the domestic industry in the future, constitutes a violation by the United States of its obligations in Articles 3.4 and 15.4.

**9. Is Canada of the view that Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement require the identification of a specific event or turning-point in time as a "change in circumstances" in order to justify an affirmative determination of threat of material injury? If so, could Canada please comment on the import of the footnote to this provision, which sets out as an example "that there is convincing reason to believe that there will be, in the near future, substantially increased importation of the product at dumped prices." In addition, could Canada comment on the view that the "change in circumstances" could be understood to encompass**

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<sup>23</sup> *Mexico – HFCS Panel Report*, paras. 7.141 [emphasis added].

**developments in the situation of the industry, and/or the dumped or subsidized imports, which lead to the conclusion that injury which has not yet occurred can be predicted to occur imminently, and need not refer to any specific event. Canada argues at paragraph 9 of its oral statement that 'to establish threat, some imminent and foreseeable change from the non-injurious present must be identified' but that "a" specific change need not be shown. Could Canada expand on this assertion – what might constitute the relevant change if not an event, and how must it be shown? Could Canada indicate what is the legal basis for its assertion that the change in circumstances must be explicitly identified?**

30. Article 3.7 of the *Anti-Dumping Agreement* and Article 15.7 of the *SCM Agreement* require that in order to justify an affirmative determination of threat of injury, an investigating authority identify “[t]he change in circumstances which would create a situation in which the dumping [subsidy] would cause injury”. This interpretation is confirmed by the following statement of the Appellate Body in *Mexico – HFCS*:

We note that Article 3.7 of the *Anti-Dumping Agreement* provides that a determination of a threat of injury must be based on a change in circumstances that must be ‘clearly foreseen and imminent’.<sup>24</sup>

31. The change in circumstances need not be explicitly identified in the determination as “a specific event or turning point”, but some “clearly foreseen and imminent” change must be identified that would “create a situation in which the dumping [subsidy] would cause injury”. As observed by the European Communities<sup>25</sup>, the phrase at issue does not require a determination of the precise moment in time when the change occurs, but rather an analysis of the factors that would create a change in circumstances.

32. The factors listed in Article 3.7 of the *Anti-Dumping Agreement* and Article 15.7 of the *SCM Agreement* provide the context in which an investigating authority should analyse whether such a clearly foreseen and imminent change in circumstances can be identified. Footnote 10 to the *Anti-Dumping Agreement* provides an example of such a change – *i.e.*, that there is a convincing reason to believe that there will be, in the near future, substantially increased importation of the product at dumped prices. We note, however, that the example in footnote 10 of substantially increased importation is not, in itself, a sufficient basis for a finding of threat of injury. The investigating authority still has to conduct proper causation and non-attribution analyses in order to determine whether the change in circumstances would create a situation in which the dumping (subsidy) would cause injury.

33. With respect to a change in circumstances encompassing developments in the situation of the domestic industry, we note again that the change in circumstances contemplated by Articles 3.7 and 15.7 has to create a situation in which the dumping [subsidy] would cause injury. Therefore, a deterioration of the condition of the domestic industry to the point where the industry would be injured cannot amount to the required change in circumstances if the deterioration is not caused by the dumping [subsidy].

34. The legal obligation to explicitly identify the “change in circumstances” arises from the above-noted language of Articles 3.7 and 15.7 in the light of the applicable standard of review as well as from the requirement to undertake an objective examination under Articles 3.1 and 15.1. In the circumstances of this dispute, such an examination could not be achieved without identifying the change in circumstances from the non-injurious *status quo*.

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<sup>24</sup> *Mexico – HFCS AB Report*, para. 100.

<sup>25</sup> Third Party Submission of the European Communities, 22 August 2003, para. 41.

**10. Are the elements identified in the bullet points at paragraph 23 of its oral statement those Canada considers necessary for a threat determination?**

35. The elements identified in the bullet points at paragraph 23 of Canada's First Oral Statement are those contained in Articles 3.1 and 15.1 and reflect the overarching requirements to be met by determinations of injury – whether based on a finding of current injury or threat of injury. As stated above in response to Question #6, these Articles require that injury determinations be based on positive evidence and an objective examination of the volume, price effect and impact of subject imports. In the threat context, due to its inherently predictive nature, the likely volume, price effect and impact of subject imports form the focus of the relevant examination. These elements contained in Articles 3.1 and 15.1 are expanded upon by the requirements set out in subsequent provisions in Articles 3 and 15.<sup>26</sup> In other words, they are necessary, but not exclusive, elements for a threat determination.

**11. Canada argues at paragraph 153 of its first submission that the USITC "failed to examine and evaluate all evidence before it relevant to the demonstration of the necessary causal relationship". Could Canada indicate what it would have expected to find in an adequate determination regarding causal relationship?**

36. The causal relationship between the subject dumped and subsidized imports and the threatened injury is an essential requirement of Article 3.7 of the *Anti-Dumping Agreement* and Article 15.7 of the *SCM Agreement*, which require an investigating authority to identify “the change in circumstances which would create a situation in which the dumping [subsidy] would cause injury” [emphasis added]. As elaborated upon in Articles 3.5 and 15.5 of those Agreements, the “demonstration of a causal relationship between the dumped [subsidized] imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities”. In addition, the authorities “shall also examine any known factors other than the dumped [subsidized] 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 [subsidized] imports”. To ensure compliance with this non-attribution requirement, investigating authorities must separate and distinguish the effects of the other known factors from those attributed to the subject imports. Finally, the Commission had to provide a reasoned and adequate explanation of how the relevant facts pertaining to these causation issues supported its affirmative threat determination. To be “adequate”, the Commission's affirmative threat determination and its causation finding had to comply with all of these requirements. It did not do so.

37. The Commission's investigation and determination falls short of the applicable requirements for several reasons:

- It failed to take into account its own finding that the United States was not self-sufficient in lumber and that a significant volume of imports was needed to fulfil demand.<sup>27</sup> This finding, together with the Commission's prediction of strong and

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<sup>26</sup> As discussed at paragraphs 58-59 of Canada's First Written Submission, the Appellate Body has recognized that these obligations inform the more detailed obligations in succeeding paragraphs, including Articles 3.2, 3.4, 3.5, 3.7 and 3.8 of the *Anti-dumping Agreement* and Articles 15.2, 15.4, 15.5, 15.7 and 15.8 of the *SCM Agreement*.

<sup>27</sup> The Commission recognized that “[a]pparent domestic consumption exceeds domestic production capabilities. As a result some imports are required in the US market to satisfy demand.” (Commission Report, pp. 24-25). (Exhibit CDA-1) What is meant by “some” can be ascertained by examining the data appended to the Commission Report. Even assuming that US producers could operate their mills at 100 percent capacity on a sustained basis and that they could obtain the necessary timber supply to feed that capacity (both unrealistic assumptions), for 2001 the total US production capacity of 40.0 billion board feet (Table III-6, Commission Report, p. III-11 (Exhibit CDA-1)) falls almost 14 billion board feet short of total apparent consumption of

improving demand in the US market, suggests that any increase in Canadian imports would continue serving demand that the US industry could not meet, indicating an absence of the necessary causal relationship.

- It failed to take into account the likely market share of Canadian imports in the future. In its present injury analysis, the stable market share held by Canadian imports was pivotal to its findings that subject imports did not have a significant price effect and did not have a significant impact on the domestic industry.<sup>28</sup> The necessary causal relationship for threat of injury could not be ascertained without reference to this crucial factor. Without a finding of a significant increase in subject import market share in the future, the Commission could not conclude that an increase in subject imports would have a significant impact on pricing and therefore a significant impact on the domestic industry.
- It failed to take into account the implications of its finding that the subject imports were “at least moderately substitutable” with the like domestic product.<sup>29</sup> Inherent in this finding is the realization that competition between subject imports and the like domestic product was attenuated to some extent. Even if substitutability is high for some products, it is limited for others, and products for which substitutability is only moderate constitute a significant portion of subject imports and US production. As a result, the Commission should have considered whether the projected increase in subject imports would occur in those types of lumber for which substitutability is more limited and competition is therefore attenuated. For example, what portion of the Commission’s projected increase in subject imports would serve end uses for which US species such as Southern Yellow Pine are not well suited, or would supply demand that US producers could not meet or could meet only to a limited extent? The Commission did not even consider this important causal question.
- It failed to address the significance of its own acknowledgement that there had been “substantial and increasing integration in the North American lumber market”.<sup>30</sup> This increasing integration is likely to affect the impact of the subject imports on the domestic industry in the future and, therefore, whether or not the necessary causal relationship exists.
- It failed to take into account its finding that US domestic producers were responsible for purchasing or importing a “sizeable volume” of the subject imports.<sup>31</sup> Did this mean that US producers needed to fill out their product lines with products they could

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softwood lumber in the US market (53.9 billion board feet: Table IV-2, Commission Report, p. IV-4 (Exhibit CDA-1)). This means that under these unrealistic assumptions, the US industry could supply only 74 per cent of US demand. At 92 percent capacity utilization, the highest utilization achieved over the seven-year period shown in Table III-6, the shortfall is just over 17 billion board feet and at the average capacity utilization over the seven-year period (88.7 per cent), the shortfall is well over 18 billion board feet.

<sup>28</sup> Commission Report, pp. 35-36. (Exhibit CDA-1)

<sup>29</sup> The finding of at least moderate substitutability is grounded in part in the conclusions of the Commission Staff that “[f]or a given end use, softwood lumber of different species or from different regions is generally interchangeable. However, for some uses, a specific species is frequently preferred because of its particular characteristics...” [emphasis added] and “a relatively high degree of substitution between domestic softwood lumber and subject imports from Canada for a given species and/or a particular set of preferred lumber characteristics. However, differences in physical characteristics among available species in each country, as well as customer preferences for particular species, may limit overall substitutability” [emphasis added], Commission Report, pp. I-15 and II-5. (Exhibit CDA-1)

<sup>30</sup> Commission Report, p. 27. (Exhibit CDA-1)

<sup>31</sup> *Ibid.*

not produce themselves in order to meet US consumer demand? Did the fact that US producers were selling a sizeable volume of these imports in their own domestic market reduce the price threat of Canadian imports in that market? These important questions regarding the existence of the necessary causal relationship, which the Commission itself acknowledged to be “pertinent” and “relevant” to its analysis, were not even considered, let alone explained.

38. With respect to non-attribution, the Commission fails to even acknowledge the requirement to separate and distinguish the effects of other factors, such as the role of the US domestic industry, from the effects of the subject imports. Pursuant to the Appellate Body’s statements in *US– Hot-Rolled Steel*, the absence of such an analysis means that in this case, the Commission had no rational basis to conclude that softwood lumber from Canada is threatening to cause injury to the US domestic industry.<sup>32</sup> Furthermore, the examination the Commission failed to conduct should have, at the very least, included:

- An examination of the contribution of the US industry to any future injury. The Commission acknowledged the US industry’s own contribution to the oversupply that led to the price declines during the period of investigation.<sup>33</sup> What was the likely response of the US industry to the Commission’s projected increase in demand? Clearly, an analysis of the likely response was relevant to ascertaining the cause of any threatened injury in the future – just as it was critical to the Commission’s analysis of current injury.
- Other factors that also should have been examined include: the future role of non-subject imports, changes in patterns of consumption, the growth of engineered wood products, constraints on domestic production and timber supplies in the US, and the cyclical nature of the softwood lumber industry.
- Once examined, moreover, the effects of those other known factors should have been separated and distinguished from those attributed to subject imports.

39. What would Canada have expected to find in an adequate determination regarding causal relationship? At the very least, the foregoing deficiencies ought to have been addressed.

**12. At paragraph 52 of its oral statement, Canada argues that "the subsidies at issue did not and would not have injurious trade effects". Is Canada of the view that in the absence of a finding that the nature of the subsidies is such that they will have injurious trade effects, an affirmative determination of threat of material injury is precluded in a countervailing duty investigation?**

40. No, Canada is not saying this. Canada recognizes that Articles 3.7 and 15.7 both state that no one of the enumerated factors can necessarily give decisive guidance. However, this does not mean that a factor cannot give decisive guidance in the circumstances of a particular case. Where an investigating authority concludes that a subsidy would have no effect on trade this conclusion can be central to a finding that the domestic industry in question was not threatened by injury and thus there would be no basis for the application of countervailing duties.

41. This analysis applies in this case because of the nature of the stumpage subsidy at issue. Standing timber, like other inputs that are *in situ* natural resources, exists within a rent market and as the Nordhaus study showed by applying standard principles of Ricardian rent theory, the amount of

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<sup>32</sup> *US – Hot-Rolled Steel*, pp. 222-223.

<sup>33</sup> Commission Report, n217.

the fee or charge for the input, unless they are outside the normal range, has no impact on marginal cost, price or quantity of the downstream product that the input goes into. Here, the economic rent for standing timber is derived from the demand for lumber, and the output of lumber is not determined by stumpage charges in the normal range. No matter how low the stumpage charge is – as long as it is positive and in this case it is agreed that charges were positive – then the quantity of logs produced will be no greater, and their prices will be no lower, than they would be in a competitive market. In such circumstances, there will be no trade effect from the subsidy in question.

42. Thus, an objective examination of the evidence regarding the nature of the subsidy and its likely trade effects should have led the Commission to conclude that the stumpage charges levied by Canadian provinces would not lead to an increase in imports beyond the non-injurious level observed in the period of investigation. As such, the Commission's finding that imports were likely to increase substantially and cause injury could not be based on positive evidence or an objective examination and, therefore, should have led the Commission to make a negative threat of injury determination.

**13. In its oral statement, Canada states that the Agreements "require" a likelihood of substantially increase dumped and subsidised exports (paragraph 62) and that the USITC "did not find the requisite imminent, substantial increase" in capacity. Is Canada of the view that in the absence of affirmative findings or conclusions on these factors, an affirmative determination of threat of material injury is precluded?**

43. Article 3.7(ii) and 15.7(iii) require that when an investigating authority considers "sufficiently freely disposable, or an imminent, substantial increase in, capacity of the exporter", it do so in the context of whether this capacity indicates a likelihood of substantially increased dumped [subsidized] exports. That is what Canada meant when it referred, at paragraph 62 of its First Oral Statement, to "the likelihood of substantially increased dumped and subsidized exports to the United States that the Agreements require".

44. To find that an imminent, substantial increase in capacity indicated a likelihood of substantially increased imports, the Commission would have had to first find an imminent, substantial increase in capacity. But the Commission did not and could not on the basis of the evidence on the record find that "requisite" imminent, substantial increase in capacity. Indeed, the data on the record indicated either a slight decline in capacity over the 2002-2003 period or a slight increase of less than one percent annually.<sup>34</sup>

45. With respect to disposable capacity, the United States did not address whether the Canadian producers' disposable capacity indicated substantially increased exports. In fact, the evidence on the record indicated that the projections of Canadian producers were for only a slight increase in exports.

46. Therefore, the Commission could not rely on Articles 3.7(ii) and 15.7(iii) to support its finding of a likely substantial increase in imports.

47. The fact that an investigating authority cannot rely on Articles 3.7(ii) and 15.7(iii) is not, in itself, fatal to an investigating authority's threat of injury finding. In the present case, what is fatal to the Commission's threat of injury finding is that it is not supported by any of the factors enumerated in Articles 3.7 and 15.7 and the Commission's analysis of the other factors it cites in support of its finding was similarly flawed.

**14. The Panel understands that Canada is not arguing that a combined analysis of injury caused by dumped and subsidized imports is *per se* inconsistent with the cited Agreements. As Canada is not challenging combined analysis *per se*, could Canada please explain in detail what**

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<sup>34</sup>

First Written Submission of Canada, para. 103.

violation is being alleged in this regard? Is Canada referring to the violations it has otherwise asserted, in which case it would appear that this claim is dependent on the Panel's findings on those other claims? Is Canada of the view that, in the event the Panel finds a violation of any other provision of the relevant Agreements, the injury determination as a whole should be deemed inconsistent with both the AD and SCM Agreements? At paragraph 122 of its oral statement, Canada asserts that the USITC failed to explain why it was appropriate to conduct a combined analysis in this case. Could Canada indicate to the Panel where in the Agreements it finds an obligation to provide such an explanation? Could Canada address, in this context, the relevance of the discussion in the USITC determination (Exhibit USA-1) at pages 29-31?

48. As Canada explained in its First Written Submission, the obligation the United States failed to fulfil in cross-cumulating was the requirement to satisfy the specific requirements of each of the Agreements at issue. The violations that flow from this claim are consequential to the finding of violations under the specific requirements of the *Anti-Dumping Agreement* and separately under the *SCM Agreement*. Although most of the threat factors identified in Articles 3 and 15 are the same in subsidy and dumping cases, the requirement in Article 15.7(i) of the *SCM Agreement* that an investigating authority consider the nature of the subsidy and its likely trade effects (addressed in the answers to Questions 12 and 15) has no counterpart in Article 3. If the Panel finds a violation of any of the common provisions in Articles 3 and 15, the injury determination as a whole should be found to be inconsistent with both the *Anti-Dumping* and *SCM Agreements*, and the Panel should recommend that the United States bring itself into conformity with its WTO obligations.

49. Canada has also submitted that the United States has failed to provide a reasoned and adequate explanation of why it conducted a combined injury analysis in the circumstances of this case. As Canada has explained in response to Question #1 above and in its previous submissions, the obligation to provide a reasoned and adequate explanation flows from the substantive obligations of Articles 3 and 15 when viewed in the light of the standard of review under Articles 11 of the *DSU* and 17.6(i) of the *Anti-Dumping Agreement*. In the circumstances of this case, *i.e.*, the incomplete overlap between dumped and subsidized exports and the fact that the nature of the subsidy involved and the lack of trade effects from this subsidy was a central issue in the investigation, the Commission should have provided a reasoned and adequate explanation of its decision to conduct a combined analysis of both dumped and subsidized imports. The Commission did not provide such an explanation.

50. The discussion at pages 29-31 of the Commission's Report addresses two US law arguments that Canada advanced before the Commission as to why the Commission is precluded from cross-cumulating subsidized and dumped imports from the same country under US law. Canada notes that in the NAFTA proceeding, the Commission acknowledged that the reason it gave for cross-cumulating, *i.e.*, that it was mandated to do so under US law – was incorrect and that in fact it had discretion to decide whether to cross-cumulate or not. The NAFTA Panel accordingly held that the Commission's decision to cross-cumulate was contrary to law and ordered the Commission to reconsider its decision and provide a "reasoned conclusion" on the issue.<sup>35</sup> In this case, Canada has advanced different arguments based on the United States' obligations under the WTO Agreements it has cited.

**15. Could Canada please address why it considers that the USITC acted inconsistently in declining to rely on the Nordhaus study, with particular reference to the information set out in Exhibit USA-5 at pages D-22-27?**

51. The nature and trade effects of a subsidy is a factor listed in paragraph (i) of Article 15.7 of the *SCM Agreement* that should be considered in threat of injury determinations (in this regard see Canada's answers to Questions 12 and 35). That this factor was relevant to the Commission's

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<sup>35</sup> NAFTA Panel Decision, pp. 40-41. (Exhibit CDA-23)

determination is confirmed by the considerable argument and evidence on this point that was presented to the Commission during its investigation and by the Commission's failed attempt to address this factor in its Final Determination.

52. The Commission's treatment of this factor is inconsistent with the *SCM Agreement* because the Commission failed to examine all pertinent facts related to this factor and to provide a reasoned and adequate explanation as to how those facts supported its determination. In particular, the Commission failed to address fully the nature and complexities of the data related to this factor and to respond to the interpretations of this evidence advanced by the Canadian parties. Since one interpretation, that the subsidies at issue had no trade effects, detracted from an affirmative threat of injury finding from subsidized imports, it was particularly important that the Commission adequately evaluate and examine this factor. It did not do so.

53. The Commission's limited discussion of the Nordhaus study did not satisfy these requirements because the Commission (a) mischaracterized the economic principles underlying the study, and (b) incorrectly stated that the record evidence it cited conflicted with Dr. Nordhaus' analysis when that evidence was either irrelevant or actually supported his analysis.

54. Each of the three statements that the Commission used to justify its assertion that "the economic theory presented by CLTA is not clearly applicable in this market" is not only conclusory and superficial but incorrect:

- The Commission's entire discussion is based on the premise that "Ricardian rent theory relies on the assumption of fixed supply." As explained in Exhibit CDA-25, the Nordhaus study did not assume a fixed supply of harvestable timber. Consistent with economic theory, the Nordhaus study recognized that stumpage charges outside the normal range may affect timber supply, and demonstrated that stumpage charges in the normal range do not affect such supply, as the Canadian parties expressly explained to the Commission.
- The Commission's proposition that "lumber supply is not necessarily fixed" was not disputed. That lumber supply varies is irrelevant to Dr. Nordhaus' study, which addressed whether timber supply was affected by Canadian stumpage charges. In any event, as explained in Exhibit CDA-25, neither of the two pieces of record evidence cited by the Commission contradicts Dr. Nordhaus' analysis of timber supply.
- The Commission stated that "the record also contains several other studies that have reached different conclusions regarding the effects of stumpage fees on output". As explained in Exhibit CDA-25, none of the four studies discussed in the cited page of Exhibit USA-5 undermines the analysis in the Nordhaus study that stumpage charges in the normal range do not affect the supply of logs or lumber.

55. Given the implications of the position that the subsidies did not have any trade effects for the Commission's threat of injury finding, its failure to provide a reasoned and adequate explanation for rejecting the arguments of the Canadian exporters falls far short of the above-noted requirements and of the requirement to take "special care" under Articles 3.8 and 15.8. The Commission's finding that the record contained conflicting evidence about the nature and trade effects of the subsidy should have been the beginning, not the end, of the Commission's analysis.

**To both parties**

**33. Could the parties please address the distinctions they see, if any, between "finding", "evaluation" and "consideration" in the context of analysis of factors in a determination under Article 3 of the AD Agreement and/or Article 15 of the SCM Agreement.**

56. Canada's position is that there is a distinction between a "finding", on the one hand, and "evaluation" and "consideration", on the other. In the context of an investigation involving a determination of threat of injury pursuant to Article 3.7 of the *Anti-Dumping Agreement* and 15.7 of the *SCM Agreement*, an investigating authority is required to make a finding on whether "further [dumped or subsidized] exports are imminent and that, unless protective action is taken, material injury would occur".

57. As stated at paragraph 24 of Canada's First Oral Statement at the first substantive meeting of the Panel, Article 3.7 of the *Anti-Dumping Agreement* and 15.7 of the *SCM Agreement* provide that an investigating authority should "consider" certain factors. The term "consider" requires that it must be apparent in the relevant documents in the record that the investigating authority has given attention to and taken into account the factors required to be considered. This requires an examination of factors that goes beyond a mere recitation of factors in the abstract without putting the facts into context<sup>36</sup>, but does not necessarily require an explicit "finding" or determination by the investigating authorities on each relevant factor. However, Articles 3.7 and 15.7 require that the "totality of the factors considered must lead to the conclusion that further [dumped or subsidized] exports are imminent and that, unless protective action is taken, material injury would occur".

58. It is also important to note that pursuant to the applicable standard of review under Article 11 of the *DSU* and Article 17.6(i) of the *Anti-Dumping Agreement*, it is the duty of the Panel to assess whether the investigating authority has evaluated all relevant factors, whether it has examined all the pertinent facts, and whether it provided an adequate explanation as to how those facts support its determination.<sup>37</sup> In effect, this standard defines when an investigating authority can be considered to have acted consistently with the *Anti-Dumping Agreement* and the *SCM Agreement* in the course of its "consideration" of the relevant factors under Articles 3.7 and 15.7. In this light, an investigating authority's "consideration" of relevant factors must include an examination or evaluation of such factors.

59. As discussed at paragraph 146 of Canada's First Written Submission, an "evaluation" has been interpreted to mean "a process of analysis and assessment requiring the exercise of judgement on the part of the investigating authority" and "not simply a matter of form". The investigating authority must "assess the role, relevance and relative weight of each factor in the particular investigation". Moreover, an "evaluation" implies the analysis of data through placing it in context in terms of the particular evolution of the data pertaining to each factor individually, as well as in relation to other factors examined. Thus, an investigating authority's findings on whether "further [dumped or subsidized] exports are imminent and that, unless protective action is taken, material injury would occur" must be the result of a proper "consideration" and "evaluation" of relevant factors.

60. It is Canada's position that the Commission's examination of relevant factors under each of the relevant provision in Articles 3 and 15 and, consequently, its determination of threat of injury fall short of these requirements in this dispute. As Canada demonstrates in its rebuttal submission, the totality of the factors that were considered by the Commission could not lead to the conclusion that

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<sup>36</sup> Canada's First Oral Statement, paras. 24-27.

<sup>37</sup> See also: Canada's response to Question 1 of the Panel and the report of the Appellate Body in *US – Cotton Yarn*, para. 74.

further dumped or subsidized exports are imminent and that, unless protective action is taken, injury would occur.

**34. The Panel notes that Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement provide that "In making a determination regarding the existence of a threat of material injury, the authorities should consider, *inter alia*, such factors as:.." (emphasis added). In this context, could the parties comment on the view that consideration of all the listed factors is not mandatory, and that the failure to consider at all, or to adequately consider, one of the listed factors, is not fatal to the determination at issue before a Panel?**

61. While the factors listed in Articles 3.7 and 15.7 are not mandatory in the sense that the Agreements require that all enumerated factors must be considered in each case, the WTO Members clearly thought them to be of such importance to a threat determination that they set them out explicitly.<sup>38</sup> In any event, this issue does not arise in the case before this Panel since the Commission itself thought that the factors were relevant as seen by its attempt to address each of them.

62. Whether a failure to consider at all, or to adequately consider, one of these factors constitutes a violation of Articles 3.7 and 15.7 will depend on the facts of the particular case. Ultimately, an investigating authority must be able to demonstrate that the totality of the factors considered leads to the conclusion that further dumped [subsidized] imports are imminent and that, unless protective action is taken, injury would occur. In the case at issue, the Commission has clearly failed to demonstrate and explain how the factors it did consider led to its conclusion and as a result, failed to comply with the obligations of 3.7 and 15.7.

**35. Could the parties please address what, in their view, is required to demonstrate consideration of the "trade effects" arising from subsidies under Article 15.7(i)? What do the parties consider would be relevant trade effects that should be taken into account?**

63. As the Appellate Body has stated, Article 3.1 and 15.1 are overarching provisions that set out a Member's fundamental substantive obligations in making an injury determination. These provisions require that a determination involve consideration of the volume of imports, the effect of imports on prices and the consequent impact of imports on the domestic producers in question. It follows that consideration of "trade effects" under Article 15.7(i) of the *SCM Agreement* address whether the subsidy in question is affecting volume and prices of the imports at issue.

64. Moreover, in cases where participants have advanced fundamental arguments about the nature of the trade effects of the subsidies involved, and in particular that these subsidies have had no impact on the volume and price of imports, *i.e.*, have no trade effect, an investigating authority must show that it has come to a view on this evidence and provided a reasoned and adequate explanation of what role that view plays in the final decision to which it came.

65. This is particularly true in this case because of the nature of the stumpage subsidy at issue. As discussed in answer to Question #12 and in Canada's previous submissions, standing timber, like other inputs that are in situ natural resources, exists within a rent market and as the Nordhaus study showed applying standard principles of Ricardian rent theory, the amount of the fee or charge for the input, unless they are outside the normal range, has no impact on marginal cost, price or quantity of the downstream product that the input goes into. Here, the economic rent for standing timber is derived from the demand for lumber, and the output of lumber is not determined by stumpage charges in the normal range. No matter how low the stumpage charge is – as long as it is positive and in this

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<sup>38</sup> The importance the United States itself confers upon these factors is reflected in the fact that they are mandatory under US legislation. *Tariff Act of 1930*, Subtitle IV – Countervailing and Anti-Dumping Duties, 19 U.S.C. § 1677(7)(F)(i). (Exhibit CDA-24)

case it is agreed that charges were positive – then the quantity of logs produced will be no greater, and their prices will be no lower, than they would be in a competitive market. In such circumstances, there will be no trade effect from the subsidy in question.

66. Because this evidence represented a powerful demonstration of how stumpage would not lead to an increase in imports beyond the non-injurious level observed in the POI, the Commission should have addressed it, particularly if it was going to make an affirmative determination of threat of injury.

**36. Could the parties please discuss, in detail, their interpretation of the phrase "clearly foreseen and imminent" as used in Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement, with specific reference to what they consider to be the relevant time frames involved? Would the parties discuss, in addition, what precisely they consider should be found to be clearly foreseen and imminent.**

67. As discussed at paragraphs 76-77 of Canada's First Written Submission, the change in circumstances which would create the situation in which the dumping or the subsidy would cause injury must be clearly anticipated and on the brink of happening. The relevant timeframe involved will vary depending on the facts and circumstances of each case but certainly will be in the near term and not in the medium to long term. In this instance, the Commission examined projections for the eighteen months after its vote in May 2002. There was no evidence before the Commission for this period that demonstrated a "change in circumstances" which would create a situation in which the dumping or the subsidy would cause injury. It is that "change in circumstances" that must be clearly foreseen and imminent. Canada addresses what amounts to such a change in circumstances in its response to Question # 9 of the Panel.

### Questions posed by the United States to Canada

1. At paragraph 120 of its 4 September 2003, oral statement, Canada states that “the United States simply does not understand Canada’s argument” regarding combined investigations. Canada then goes on to contend, at paragraph 122, that the United States failed to comply with what Canada refers to as “the specific requirements of the *Anti-Dumping Agreement* and the *SCM Agreement*, as well as Article VI of the GATT 1994.” However, the alleged specific requirements that Canada lists, with the exception of the nature of the subsidies, are not distinct but rather are common to both covered Agreements. In light of this fact, the United States asks that Canada clarify its position on combined investigations.

68. Canada’s response to this question is provided by Canada’s Oral Statement and by our answer to Question #14 of the Panel.

2. At paragraph 25 of its 4 September 2003 oral statement, Canada refers to the discussion of the term “considered” in the *Thailand- H-Beams* panel report. Following the statement quoted by Canada, the panel in that report stated: “We therefore do not read the textual term ‘consider’ in Article 3.2 to require an explicit ‘finding’ or ‘determination’ by the investigating authorities . . .” (*Thailand- H-Beam*, Panel Report, para. 7.161) At the first substantive meeting of the Panel in the present dispute, Canada stated that it agreed with the interpretation of the panel in *Thailand-H-Beams* that the obligation to “consider” does not require an investigating authority to make an explicit “finding.” Please confirm that this is Canada’s position.

69. Yes. This is Canada’s position. However, it must be apparent from the record that the investigating authority has given attention to and taken into account the factors to be considered. The investigating authority must go beyond simply reciting facts. It must put the factors into context. See paragraph 83 of Canada’s First Written Submission and paragraphs 22-29 of Canada’s First Oral Statement.

## ANNEX A-2

### UNITED STATES RESPONSE TO QUESTIONS FROM THE PANEL – FIRST MEETING

24 September 2003

**Q16: Could the United States please address its understanding of the "special care" requirement in Article 3.8 of the AD Agreement and Article 15.8 of the SCM Agreement? What elements does the United States consider could demonstrate the appropriate special care? Could the United States indicate to the Panel where, in its view, the USITC determination demonstrates the requisite special care?**

1. The covered Agreements do not state what constitutes "special care", nor has any panel explicitly addressed this provision. The covered Agreements do not support Canada's attempt to interpret "special care" as a special review standard for either the Panel or the investigating authority. The United States understands the "special care" language to be a recognition that projections about the future must be based on present and past facts. While a threat analysis is a future-oriented analysis, it cannot be based on allegation, conjecture or remote possibility; rather it must be based on the facts.<sup>1</sup>

2. Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement are exhortations to be mindful of the future-oriented nature of a threat analysis as the evidence is reviewed. A threat determination necessarily uses facts from the present and the past to form a conclusion about the future.<sup>2</sup> Projections necessarily are based on extrapolations from existing data.<sup>3</sup>

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<sup>1</sup> Article 3.7 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Anti-Dumping Agreement) and Article 15.7 of the Agreement on Subsidies and Countervailing Measures (the SCM Agreement).

<sup>2</sup> See *United States-Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, Appellate Body Report, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, para. 136 ("US-Lamb Meat"); *United States-Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, Appellate Body Report, WT/DS192/AB/R, adopted 5 November 2001, para. 77, n.50 ("US-Cotton Yarn"). Specifically, the Appellate Body in *US-Lamb Meat* stated:

As facts, by their very nature, pertain to the present and the past, the occurrence of future events can never be definitely proven by facts. There is, therefore, a tension between a future-oriented "threat" analysis, which, ultimately, calls for a degree of "conjecture" about the likelihood of a future event, and the need for a fact-based determination. Unavoidably, this tension must be resolved through the use of facts from the present and the past to justify the conclusion about the future, namely that serious injury is "clearly imminent". Thus, a fact-based evaluation, under Article 4.2(a) of the *Agreement on Safeguards*, must provide the basis for a projection that there is a high degree of likelihood of serious injury to the domestic industry in the very near future.

<sup>3</sup> See *Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup (Mexico - HFCS) from the United States*, Appellate Body Report, WT/DS132/AB/R, adopted 21 November 2001, paras. 83 and 85 ("Mexico - HFCS"); *US - Cotton Yarn*, AB Report, para. 77; *US - Lamb Meat*, AB Report, para. 136; *United States - Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R, WT/DS259/R, Panel Report, circulated 11 July 2003, para. 10.173, n. 5032 ("US - Steel Safeguards").

Indeed, Article 3.7 requires that projections be based on facts . Article 3.8 simply reinforces this point by describing the approach to be taken in reviewing the facts.

3. It is evident in the ITC's Report that the Commission based its threat determination on consideration of all of the facts. The ITC based its prospective analysis on objective facts and rejected assertions and opinions not based on sufficient factual evidence.<sup>4</sup> The Commission's reliance on a thorough factual record and its careful analysis of that record demonstrate its compliance with the special care language in the covered Agreements. Canada, on the other hand, has urged that the ITC should have based its findings on assertions and opinion, which are favourable to Canada's interests, but are not sufficiently supported by the evidence.<sup>5</sup>

4. The special care taken by the ITC is demonstrated in the detailed analysis and extensive documentation – including past and present data – provided to support each finding throughout the ITC's opinion, from its conditions of competition section on pages 21-27 of the ITC Report to the present injury analysis on pages 31-37 of the ITC Report to the threat of injury analysis on pages 37-44 of the ITC Report.

**Q17. Article 3.8 of the AD Agreement and Article 15.8 of the SCM Agreement provide that:**

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

**Could the United States address the implications of the phrase "the application of ... measures" in terms of the timing of the obligations provided for in this provision? Is the United States of the view that the "special care" requirement affects or changes the obligation in Articles 3.1 of the AD Agreement and 15.1 of the SCM Agreement that a determination of injury "shall be based on positive evidence and involve an objective examination ...". If so, how?**

5. The “special care” language in Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement supplement rather than alter or modify the obligations in Article 3.1 and Article 15.1 of the respective Agreements that a determination of injury “shall be based on positive evidence and involve an objective examination”.<sup>6</sup> As discussed in response to question 16, projections about future events involve extrapolations from existing data. Article 3.8 and Article 15.8 reinforce in the threat context the requirement in Article 3.1 and Article 15.1 to base determinations on positive evidence. For example, a threat of injury determination must be based on positive evidence tending to show a likelihood to import at injurious levels. Special care refers to the analysis

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<sup>4</sup> See *US - Lamb Meat*, Panel Report, para. 7.129:

... the requirement to base a threat determination on objective facts, and the rejection of “assertions”, “opinions” and “conclusions” that are not based on sufficient factual evidence, it is possible to draw at least some inferences on how to conduct a threat analysis. These elements suggest (i) that a threat determination needs to be based on an analysis which takes objective and verifiable data from the recent past ... as a starting-point so as to avoid basing a determination on *allegation, conjecture, or remote possibility*. ...

<sup>5</sup> See, e.g., Canada's First Written Submission, paras. 7, 8, and 120.

<sup>6</sup> The Appellate Body in *Thailand - H-Beams* provided some guidance on the relationship between Article 3.1 of the Antidumping Agreement and consideration of the evidence for factors listed in the threat provision, Article 3.7. The Appellate Body stated:

107. ... An injury determination conducted pursuant to the provisions of Article 3 of the *Anti-Dumping Agreement* must be based on the *totality* of that evidence. ...

involved in making projections about future events. Moreover, basing the future-oriented determination on facts rather than allegation, conjecture or remote possibility is in accord with the requirement that the investigating authority conduct an “objective examination.” In the context of a threat analysis, an objective examination would involve taking “objective and verifiable data from the recent past . . . as a starting-point so as to avoid basing a determination on allegation, conjecture, or remote possibility” and evaluating it in an unbiased manner.<sup>7</sup>

6. The Panel’s question concerning timing suggests an interpretation of Article 3.8 of the Anti-Dumping Agreement (and Article 15.8 of the SCM Agreement) whereby the provision may pertain to actions taken by a Member after its investigating authority has determined that injury is threatened by dumped (or subsidized) imports. According to that interpretation, the provision presumes an affirmative threat determination and governs what happens afterwards, in light of that determination. Under an alternative interpretation – the one the United States understands Canada to be assuming in this case<sup>8</sup> – ADA Article 3.8 and SCMA Article 15.8 may pertain to the process of making a threat determination itself.

7. The United States is of the view that the Panel need not decide whether either interpretation or both are permissible, because, under either interpretation, Canada’s claim must fail. If ADA Article 3.8 and SCMA Article 15.8 pertain to actions taken after an investigating authority makes an affirmative threat determination, then Canada’s claim is beyond the terms of reference of this Panel. As the title of this dispute indicates, Canada has asked the Panel to consider the investigation of the US International Trade Commission, not the actions of other US Government agencies following that investigation.<sup>9</sup>

8. If, on the other hand, the provisions at issue pertain to the process of making a threat determination, Canada’s claim must fail, because Canada has failed to make a prima facie showing of any violation. In arguing that the United States violated ADA Article 3.8 and SCMA Article 15.8, Canada simply reiterates its allegations of other violations of the covered agreements.<sup>10</sup> Canada has indicated in vague terms that a failure to take “special care” involves whether cautiousness of approach is exemplified. Yet, Canada fails to demonstrate an absence of cautiousness. Accordingly, under this interpretation of ADA Article 3.8 and SCMA Article 15.8, Canada’s claim must fail.

9. Because Canada’s claim must fail under either interpretation of the relevant provisions, the Panel should refrain from deciding which interpretation is permissible or whether both are permissible. If the Panel nevertheless chooses to decide this interpretative question, the United States would draw to the Panel’s attention certain contextual elements. While the words “the application of . . . measures” might suggest the first interpretation above (i.e., that the provisions pertain after a threat determination has been made), on the other hand, the inclusion of the paragraph in Article 3 and Article 15 may provide support for the second interpretation (i.e., that the provisions pertain to how a threat determination is made).

**Q18. Could the United States clarify its view regarding consideration of the Article 3.4/ Article 15.4 factors in the context of a determination of threat of material injury? Specifically,**

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<sup>7</sup> See *US - Lamb Meat*, Panel Report, para. 7.129.

<sup>8</sup> See Canada First Written Submission, para. 64 (“Thus, when threat of material injury is at issue, the investigating authorities must undertake an especially meticulous examination of all the required elements in Article 3 of the *Anti-Dumping Agreement* and Article 15 of the *SCM Agreement*.”).

<sup>9</sup> See Canada First Written Submission, para. 169 (Canada basing its claim under ADA Article 3.8 and SCMA Article 15.8 on what it alleges to be “shortcomings of the Commission’s determination”).

<sup>10</sup> See Canada First Written Submission, para. 168 (Canada basing its claim under ADA Article 3.8 and SCMA Article 15.8 on allegations “as discussed above with respect to the violations of Article 3 of the *Anti-Dumping Agreement* and Article 15 of the *SCM Agreement*”).

**could the United States address whether it is necessary to consider the likely impact of dumped and/or subsidized imports on the condition of the industry in the future, with reference to the Article 3.4/Article 15.4 factors, in the context of a determination of threat of material injury? If so, what would the United States envision argue such consideration must entail?**

10. In making a threat of material injury determination, the investigating authority should consider the evidence regarding the factors listed in Article 3.7 of the Anti-Dumping Agreement and Article 15.7 of the SCM Agreement, as well as the present and past evidence regarding the factors listed in Articles 3.2 and 3.4 of the Anti-Dumping Agreement and Articles 15.2 and 15.4 of the SCM Agreement. Consideration of these factors establishes a background against which the investigating authority can evaluate whether dumped and subsidized imports will likely increase substantially, likely will have price effects, and consequently will affect the industry's condition in such a manner that material injury would occur in the absence of protective action.

11. Where the investigating authority has considered the Article 3.4 and Article 15.4 factors one time, it need not consider them a second time. Canada's contention that there is a requirement that the factors in Article 3.4 of Anti-Dumping Agreement and Article 15.4 of the SCM Agreement be considered a second time in the context of a threat analysis has no basis in the covered Agreements. Neither the Appellate Body nor any Panel has found such a requirement. Moreover, it is not clear what Canada contemplates would be involved in such a second analysis of the Article 3.4 and Article 15.4 factors that would not involve speculation and conjecture. Significantly, Canada has failed to explain why it considers a second analysis of these factors required under the covered Agreements, when Canada itself does not conduct such an additional analysis in its own trade remedy proceedings.<sup>11</sup> Canada's argument seems to be tied to its overarching failure to recognize that threat of injury generally involves a continuation of adverse conditions, and thus the threat and present material injury analyses necessarily are intertwined rather than entirely separate.

12. The Panel in Mexico-HFCS specifically recognized that consideration of the factors relating to the impact of imports on the domestic industry "establish a background against which the investigating authority can evaluate whether imminent further dumped imports will affect the industry's condition in such a manner that material injury would occur in the absence of protective action, as required by Article 3.7".<sup>12</sup> The Mexico-HFCS panel did not find that two separate analyses of Article 3.4 factors were required. It was concerned that those factors did not appear to have been considered at all.<sup>13</sup> Moreover, as discussed in the US first written submission, two very important

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<sup>11</sup> See, e.g., *The Dumping of Leather Footwear with Metal Toe Caps, Originating in or Exported from the People's Republic of China, Excluding Waterproof Footwear Subject to the Finding Made by the Canadian International Trade Tribunal in Inquiry No. NQ-2000-004*, Inquiry No. 2001-003 at 11-20 (CITT, 27 Dec. 2001) (USA-26).

<sup>12</sup> *Mexico-HFCS*, Panel Report, para. 7.132. The Panel stated:

With respect to the question of threat of material injury, we believe an investigating authority cannot come to a reasoned conclusion, based on an unbiased and objective evaluation of the facts, without taking into account the Article 3.4 factors relating to the impact of imports on the domestic industry. These factors all relate to an evaluation of the general condition and operations of the domestic industry. . . . Consideration of these factors is, in our view, necessary in order to establish a background against which the investigating authority can evaluate whether imminent further dumped imports will affect the industry's condition in such a manner that material injury would occur in the absence of protective action, as required by Article 3.7.

<sup>13</sup> The Panel in *Mexico-HFCS*, Panel Report, para. 7.140 (emphasis added), states:

The final determination reflects no meaningful analysis of a number of the Article 3.4 factors: the Mexican sugar industry's profits, output, productivity, utilization of capacity, employment, wages, growth, or ability to raise capital. Moreover, there is no analysis of the condition of the Mexican sugar

facts distinguish this case from Mexico-HFCS: first, it is possible, by reading the Commission's final determination here, where it was not in Mexico-HFCS, to understand the overall condition of the domestic industry with respect to the Article 3.4 factors; and second, in this case, the domestic industry was currently experiencing substantial declines in its condition, particularly its financial performance, which was not the case in Mexico-HFCS.

13. It is evident in the Views of the Commission that the ITC properly conducted a "meaningful evaluation" of all of the relevant factors listed in Article 3.4 of Anti-Dumping Agreement and Article 15.4 of the SCM Agreement and that its findings are supported by positive evidence. Canada fails to recognize that a finding of vulnerability by its nature is a finding about the future, i.e., an assessment of industry's susceptibility to future injury.<sup>14</sup> In brief, the ITC's evaluation of the evidence regarding relevant factors resulted in findings that the condition of the domestic industry had deteriorated primarily as a result of declining prices and that the industry was in a vulnerable state. Consideration of these factors constituted positive evidence justifying the ITC's determination that the domestic industry was on the verge of material injury by reason of the continued dumped and subsidized softwood lumber imports from Canada.

**Q19.** Could the United States elucidate the basis for the conclusion that the likely increase in imports would be "substantial"? What percentage or volume of increase would be necessary in order to support that conclusion, and could the United States indicate where in the USITC determination or report such a projected increase can be found or derived?

14. The Commission's consideration in the context of its threat of injury analysis of likely substantial increases in subject imports begins with subject import volumes both in absolute terms and relative to consumption already at significant levels. The Commission found that the volume of subject imports from Canada increased by 2.8 per cent from 1999 to 2001.<sup>15</sup> As a share of apparent domestic consumption, subject imports from Canada increased from 33.2 per cent in 1999 to 34.3 per cent in 2001.<sup>16</sup> Conversely, subject imports by value declined by 16 per cent.<sup>17</sup> The evidence shows increases even with the restraining effect of the SLA in place, and substantial increases during periods without trade restraints.

15. Of course, a threat analysis looks at whether these imports, which in this case already were at injurious levels, are likely to be injurious in the imminent future. The evidence demonstrates that subject imports will continue to enter the US market at this significant level and are projected to

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industry during the period of investigation, or projected for the near future. It is therefore not possible, by reading the final determination, to understand the overall condition of the domestic industry with respect to the Article 3.4 factors. Yet without an understanding of the condition of the industry, it is not possible, in our view, for SECOFI to have come to a reasoned conclusion, based on an objective evaluation of the facts, concerning the likely impact of dumped imports. Such a conclusion must, in our view, reflect the projected impact of further imports on the particular domestic industry, in light of its condition. In order to conclude that there is a threat of material injury to a domestic industry that is apparently not currently injured, despite the effects of dumped imports during the period of investigation, it is necessary to have an understanding of the current condition of the industry as background.

<sup>14</sup> The ordinary meaning of the term "vulnerable" is "able to be wounded;" or "liable to damage or harm". *The New Shorter Oxford English Dictionary*, 1993 (Oxford: Clarendon Press, p. 3605) (USA-21).

<sup>15</sup> The volume of imports of softwood lumber from Canada increased from 17,983 mmbf in 1999 to 18,483 mmbf in 2001. USITC Report at Tables IV-1 and C-1.

<sup>16</sup> ITC Report at Table IV-2 and C-1.

<sup>17</sup> The value of subject imports decreased from \$7.1 billion in 1999 to \$6.0 billion in 2001. ITC Report at Tables IV-1 and C-1.

increase. Canada acknowledges that imports at this level would continue and even increase<sup>18</sup>, and that Canada is “a much smaller market with abundant timber resources”.<sup>19</sup>

16. The Commission based its conclusion of likely substantial increases in subject imports on six subsidiary findings:<sup>20</sup> (1) Canadian producers’ excess capacity and projected increases in capacity, capacity utilization, and production<sup>21</sup>; (2) the export orientation of Canadian producers to the US market<sup>22</sup>; (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<sup>23</sup>; and (6) forecasts of strong and improving demand in the US market.<sup>24</sup>

17. The second part of this question suggests that there is an absolute amount or percentage change in import volumes that would necessarily be “substantial” in all or most cases. Determination of threat of injury is by its nature industry specific and dependent on the particular industry’s circumstances. As part of this analysis, the covered Agreements direct the investigating authority to consider whether the evidence indicates the likelihood of substantially increased imports but does not direct the investigating authority to find that imports will increase by a certain amount or to project the increase level.<sup>25</sup> The Appellate Body has recognized that ultimately a threat analysis calls for projections about the likelihood that the threat will ascend to injury and as such can never be definitely proven.<sup>26</sup> As the Appellate Body in Mexico-HFCS recognized

the “establishment” of facts by investigating authorities includes both affirmative findings of events that took place during the period of investigation as well as

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<sup>18</sup> Canada First Written Submission, para. 7.

<sup>19</sup> Canada’s Opening Statement at First Panel Meeting (Sept. 4, 2003) at para. 4.

<sup>20</sup> Each of these findings is discussed in detail in the ITC Report at 40-43 and in the US First Written Submission at paras. 117-184. Each of the six subsidiary factors considered and discussed by the Commission related directly to threat factors regarding a significant rate of increase in imports and sufficient freely disposable production capacity set forth in the covered Agreements.

<sup>21</sup> The Canadian producers had excess capacity and projected increases in capacity and production, and improvements in capacity utilization in 2002 and 2003. Thus, despite the excess capacity already available in 2001 as capacity utilization declined to 84 per cent from 90 per cent in 1999, the evidence demonstrated that Canadian producers expected to further increase their ability to supply the US softwood lumber market. In particular, capacity utilization was projected to increase to 90 per cent in 2003, as capacity also was projected to increase.

<sup>22</sup> Canadian producers rely on sales in the US market for about two-thirds of their production, which means that their success, and probably survival, is tied to the importing market. Moreover, Canadian producers had incentives such as mandatory cut requirements to produce more softwood lumber and export it to the US market. Canada has offered no positive evidence to refute the ITC’s reasonable conclusion, discounting export projections, that production increases would be distributed according to historic proportions. The fact is, the US market had been very important to Canadian producers and was expected to continue to be.

<sup>23</sup> The facts demonstrate that without restraints imports have increased. Increases stopped when the SLA was imposed; substantial increases (ranging from 9.2 per cent to 12.3 per cent) 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 US 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.

<sup>24</sup> Canada has not refuted the ITC’s findings regarding forecasts for US demand, *i.e.*, that the US market would continue to be a very attractive, and necessary, one for Canadian imports (a market that consumes about 65 per cent of Canadian production); that subject imports would continue to play an important role in the US market; and even that there would likely be increases in such imports.

<sup>25</sup> See, *e.g.*, *US - Lamb Meat*, AB Report, para. 125.

<sup>26</sup> See *US - Lamb Meat*, AB Report, para. 136; see also *Mexico-HFCS*, AB Report, paras. 85; *US-Cotton Yarn*, AB Report, para. 77; *US-Steel Safeguards*, Panel Report, para. 10.173, n. 5032.

assumptions relating to such events made by those authorities in the course of their analyses. In determining the existence of a *threat* of material injury, the **investigating authorities will necessarily have to make assumptions relating to the “occurrence of future events” since such future events “can never be definitively proven by facts”**. Notwithstanding this intrinsic uncertainty, a “proper establishment” of facts in a determination of threat of material injury must be based on events that, although they have not yet occurred, must be “clearly foreseen and imminent”, in accordance with Article 3.7 of the *Anti-Dumping Agreement*.<sup>27</sup>

In *Mexico - HFCS* and other disputes, the Appellate Body has recognized that a threat of injury determination does not require projecting by a certain amount levels of increases or absolute volume in order to make a finding of a likelihood of substantially increased imports.

**Questions 20, 21, and 22:**

**20. The United States asserts that "an evolution of adverse trade trends can cause a threat of injury to ripen into actual injury". Would the United States agree that there must be some identification of that evolution, in terms of "change in circumstances" under Article 3.7/Article 15.7, in an investigating authority's determination? Could the United States indicate where, in its determination, the USITC addressed the question of "change in circumstances"?**

**21. Could the United States indicate whether the USITC considered that there was a likelihood of substantially increased importation as a "change in circumstances"?**

**22. Could the United States indicate whether the USITC considered that the projected attribution of oversupply to Canadian lumber as a "change in circumstances"?**

18. Since questions 20, 21, and 22 all involve the “change in circumstances” issue, we have responded to them together to avoid duplication in our responses.

19. The Anti-Dumping Agreement and the SCM Agreement recognize that injury to a domestic industry need not, and frequently does not, occur suddenly, but rather often involves a progression of injurious effects ascending from a threat of material injury, and if not prevented, to present material injury. Therefore, a determination that an industry is threatened with material injury would be warranted when conditions of trade clearly indicate that material injury likely will occur imminently if demonstrable trends in trade adverse to the domestic industry progress, or if clearly foreseeable adverse events occur. Threat of injury is an anticipation of material injury that must be on the verge of occurring, i.e., clearly foreseen and imminent.

20. Article 3.7 of the Anti-Dumping Agreement and Article 15.7 of the SCM Agreement provide in relevant part: “A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent”. The Anti-Dumping Agreement provides as an example of the change in circumstances “that there is convincing reason to believe that there will be, in the near future, substantially increased importation of the product at dumped [or subsidized] prices”.<sup>28</sup>

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<sup>27</sup> *Mexico - HFCS*, AB Report, para. 85 (emphasis added).

<sup>28</sup> Article 3.7 and n. 10 of the Anti-Dumping Agreement. The text of the covered Agreements also uses the plural “circumstances” which reinforces that it contemplates a sequence of projected events rather than “a” single event.

21. While the text provides a clear example in which the change in circumstances is a sequence of projected events, it sets no requirement to explicitly “identify” that change in circumstances, as Canada alleges.<sup>29</sup> Nor has any WTO or GATT dispute settlement panel interpreted the Agreements to require such explicit “identification.” Nor does the negotiating history of the Agreements support such an interpretation.<sup>30</sup>

22. Consistent with all of its actual obligations under the covered Agreements, including Articles 3.7 and 15.7, the Commission provided a detailed explanation of how the totality of the evidence supported its conclusion that there will be in the near future substantially increased importation of softwood lumber from Canada at dumped and subsidized prices. In doing so, the ITC addressed the likely events and facts that were clearly foreseen for dumped and subsidized imports in the imminent future which would affect the US market and would cause material injury to the US industry to occur.

23. The United States has provided a detailed accounting of 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 material injury in its second submission at paragraph 18. This progression of injurious effects was addressed by the Commission throughout its analysis.<sup>31</sup> Briefly, the facts demonstrating a progression of injurious effects justifying the Commission’s determination that subject imports constitute a threat of material injury to the domestic industry in the United States include: the volume of subject imports already was significant; subject imports had increased during the period of investigation even with the restraining effect of the Softwood Lumber Agreement (SLA); imports had some adverse price effects on domestic prices; and the condition of the domestic industry had deteriorated, primarily as a result of substantial declines in 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. The ITC’s affirmative threat determination is

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<sup>29</sup> Canada repeatedly alleges that the ITC failed to comply with this nonexistent “obligation to identify.” See Canada’s Opening Statement at First Panel Meeting, paras. 35, 36, 41, and 45.

<sup>30</sup> The GATT Committee on Anti-Dumping Practices adopted “Recommendation concerning Determination of Threat of Material Injury” on 21 October 1985, which provided the same example of the change in circumstances now included in note 10 of the WTO Anti-Dumping Agreement. Moreover, the recommendation provided the following further clarification on the change in circumstances and the progression from threat to injury:

3. The change in circumstances of which [GATT] Article 3.6 speaks may also occur during an anti-dumping investigation. Even where the basis for the initiation of an anti-dumping investigation was sufficient evidence of threat of material injury (as well as dumping and causal link), actual material injury may have occurred by the end of the investigation, when the final determination concerning injury is made.

4. On the other hand the change in circumstances during an anti-dumping investigation may also lead to a situation of neither threat of injury nor material injury.

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.

<sup>31</sup> See ITC Report at pages 31-44.

based on the following evidence: (1) six factors showing 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 US market and subject import trends during periods when there were no import restraints, such as the SLA.; (2) likely price pressure resulting from the excess supply in the US market caused by these increases in imports, particularly with evidence that prices declined substantially at the end of the period of investigation; and 3) the consequent threat of material injury to a domestic industry, which already was in a vulnerable state, resulting from the likely increases in imports and price effects. For the foregoing reasons, the Commission determined that an industry in the United States was threatened with material injury by reason of imports of softwood lumber from Canada that are subsidized by the Government of Canada and sold in the United States at less than fair value.

24. Specifically, in response to Panel question 21, we note that the ITC considered the evidence regarding the six findings demonstrating the likelihood of substantially increased importation as elements of the progression of circumstances, i.e., the change in circumstances, which would create a situation in which the dumping and subsidies would cause injury. In response to Panel question 22, we note that the ITC considered that the likely substantial increases in subject imports would result in excess supply to the US market. Evidence regarding likely excess supply, which generally caused the substantial price declines in 2000 that led to the deterioration in the condition of the domestic industry, indicated that US producers had curbed their production, but that overproduction "remains a problem in Canada".<sup>32</sup> Therefore, the Commission reasonably found that the additional subject imports, which it concluded were likely, would further increase the excess supply in the market, putting further downward pressure on prices, and as such were elements of the progression, i.e., the change in circumstances, which would create a situation in which the dumped and subsidized imports would cause injury to the US industry.

**Q23: Could the United States point to the specific passages in the USITC determination and report that, in its view, demonstrate the "consideration" of each of the relevant factors in its decision, as distinct from the recitation of facts?**

25. The ITC's consideration of the relevant factors that it relied on in making its determinations are set forth on pages 21-27 and 31-44 of the ITC Report.<sup>33</sup> It is evident in the ITC Report that the Commission appropriately considered the relevant factors and did not provide a mere recitation of facts, as Canada has asserted. In addressing whether an investigating authority had considered factors, the Panel in Thailand-H-Beam explained that when investigating authorities put figures into context, they went beyond a mere recitation of trends in the abstract.<sup>34</sup> The following excerpt from the Views of the Commission regarding excess Canadian production capacity is illustrative of the ITC's consideration of relevant factors and demonstrates that the ITC did not merely recite facts. The ITC stated:

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<sup>32</sup> See, e.g., ITC Report at 35, n. 217 citing Petitioners' Posthearing Brief at 2 and Appendix H, Exh. 2 at 11 (Bank of America, "Wood & Building Products Quarterly," at 11 (Nov. 2001)). (USA-5).

<sup>33</sup> Specifically, the ITC considered and addressed the volume of imports and likely substantial increases in imports on pages 31 and 40-43 of the ITC Report, price effects and likely price effects on pages 32-35 and 43-44, nature of the subsidies on page 39, other threat factors on page 44, the vulnerable condition of the domestic industry on pages 36-39, and possible other causal factors on pages 21-27.

<sup>34</sup> *Thailand - H-Beams*, Panel Report, para. 7.170 ("the authorities did consider the 'significance' of the increase in imports. We note in particular in this regard that the authorities went beyond a mere recitation of trends in the abstract and put the import figures into context. For example, the statement that 'imports from Poland increased continuously' indicates that the increase had persisted over some period.").

Canadian producers' capacity increased from 32,100 mmbf in 1999 to 32,800 mmbf in 2001, following a steady increase from 1995 to 1999.<sup>35</sup> Canadian production capacity in 2001 was 10.4 per cent higher than in 1995. Canadian production declined from 29,041 mmbf in 1999 to 27,457 mmbf in 2001.<sup>36</sup> Nevertheless, Canadian production in 2001 was 5.2 per cent higher than that of 1995; Canadian capacity utilization peaked in 1999 at 90.5 per cent, and was 88.9 per cent in 2000 and decreased again to 83.7 per cent in 2001.<sup>37</sup> In the three years prior to the period of investigation, also while under the SLA, Canadian capacity utilization had been at a relatively stable level ranging from 87.3 per cent to 87.7 per cent. In 2001, excess Canadian capacity was 5,343 mmbf, 10 per cent of US apparent consumption.<sup>38</sup> Furthermore, in their questionnaire responses, Canadian producers projected additional capacity increases, improvements in capacity utilization, and additional production in 2002 and 2003.<sup>39</sup> Thus, despite the excess capacity already available in 2001 as capacity utilization declined to 83.7 per cent<sup>40</sup>, Canadian producers expect to further increase their ability to supply the US softwood lumber markets<sup>41, 42</sup>,

**Q24: Would the United States agree that, in order to make an affirmative determination of threat of material injury, it is necessary to undertake an assessment of the condition of the domestic industry in light of the impact of future dumped or subsidized imports? Could the United States indicate where, in its determination, the USITC discussed the projected impact of future imports on the domestic industry?**

26. The Commission assessed the condition of the domestic industry and found that it "is vulnerable to injury in light of declines in its performance over the period of investigation, particularly its financial performance".<sup>43</sup> The Commission's analysis of the vulnerable condition of the domestic industry is on pages 37-39 of the ITC Report. In brief, the record reflects that many performance indicators declined significantly from 1999 to 2000, and then declined slightly or stabilized from 2000 to 2001.<sup>44</sup> With respect to the domestic industry's financial performance in particular, the evidence also generally shows declines during the period of investigation, with a dramatic drop from 1999 to 2000, as prices declined.<sup>45</sup>

27. Moreover, the ITC considered the consequent impact of the likely substantial increases in imports and likely price effects. The evidence demonstrates that subject imports already at significant levels will continue to enter the US market at significant levels and are projected to increase

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<sup>35</sup> ITC Report at Table VII-1. Canadian producers' questionnaire responses (covering nearly 80 per cent of production in Canada) followed similar trends with production declining from 22,452 in 1999 to 21,770 mmbf in 2001. Reported capacity in Canada was 24,871 mmbf in 1999 and 25,804 mmbf in 2001, and reported capacity utilization was 90.3 per cent in 1999, 88.8 per cent in 2000, and 84.4 per cent in 2001. ITC Report at Table VII-2.

<sup>36</sup> ITC Report at Table VII-1.

<sup>37</sup> ITC Report at Table VII-1.

<sup>38</sup> ITC Report at Table VII-1.

<sup>39</sup> ITC Report at Table VII-2. Canadian producers projected capacity increases to 26,206 mmbf, production increases to 23,698 mmbf, and capacity utilization increases to 90.4 per cent in 2003. *Id.*

<sup>40</sup> The reported capacity utilization in questionnaire responses was similar at 84.4 per cent. ITC Report at Table VII-2.

<sup>41</sup> The reported capacity utilization in questionnaire responses was similar at 84.4 per cent. ITC Report at Table VII-2.

<sup>42</sup> ITC Report at 40.

<sup>43</sup> ITC Report at 37.

<sup>44</sup> See ITC Report at 37-38.

<sup>45</sup> See ITC Report at 37-38.

substantially. The Commission found that the additional subject imports would increase the excess supply in the market, putting further downward pressure on prices. Prices at the end of the period of investigation in the third and fourth quarters of 2001 had substantially declined to levels as low as they had been in 2000. Evidence regarding likely excess supply, which generally caused the substantial price declines in 2000 that led to the deterioration in the condition of the domestic industry, indicated that US producers had curbed their production, but that overproduction "remains a problem in Canada".<sup>46</sup> The Commission reasonably found that subject imports were likely to increase substantially and were entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices, and are likely to increase demand for further imports. Moreover, 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 adversely impacting the US industry. The Commission's assessment of the impact of future imports on the domestic industry is primarily on pages 43 and 44 of the ITC Report.

28. Where the investigating authority has considered the Article 3.4 and Article 15.4 factors once, it is not required to undertake a separate, second evaluation, as part of an entirely distinct threat analysis. This does not mean that additional analysis appropriate for assessing whether further dumped and subsidized exports would have a consequent adverse impact on the domestic industry may not be required depending on the facts. For example, in a case where the domestic industry is healthy and profitable during the period of investigation, it may be appropriate to provide a more detailed discussion of how its condition would likely be affected by further imminent dumped and subsidized imports. Such discussion would show how the condition would deteriorate and material injury would occur. On the other hand, in a case, as the one before this Panel, where the domestic industry is already in a vulnerable state and where the condition has deteriorated significantly during the period of investigation, resulting primarily from declines in prices caused by excess supply, the focus is on the likely substantial increases in imports and likely effects of declining prices rather than whether the condition of the industry is deteriorating.

**Q25: Could the United States indicate where in its determination the USITC concluded that the elements asserted by Canada to be "known factors other than the dumped imports which at the same time are injuring the domestic industry" were not, in fact, such known factors injuring the domestic industry?**

29. In assessing the conditions of competition pertinent to the softwood lumber industry, the Commission considered and assessed whether other factors were potentially causing injury to the domestic industry. This assessment is primarily on pages 21-27 of the ITC Report. For a more detailed discussion of this issue, please see the United States's response to question 26.

**Q26: At paragraph 29 of its oral statement, the United States argues that the USITC specifically considered other factors potentially causing injury, referring to domestic supply, nonsubject imports, cyclical demand and housing construction cycles, North American integration, and other product substitutes. Is it the United States' argument that these factors were not other known causal factors or were did not constitute a cause of injury at the same time as the subject imports? Could the United States indicate where in the USITC's determination such a conclusion is to be found? Could the United States indicate whether the USITC addressed these other factors in the context of its analysis of causation with respect to threat of material injury? Could the United States indicate where that discussion is to be found?**

30. The ITC considered all of these factors allegedly causing injury to the domestic industry. The ITC found that the alleged other factors – nonsubject imports, cyclical demand and housing

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<sup>46</sup> See, e.g., ITC Report at 35, n. 217.

construction cycles, North American integration and other product substitutes – are not other known causal factors. The Commission considered and assessed these alleged other factors on pages 21-27 of the ITC Report. While the ITC did not explicitly state that these alleged other factors are not known other factors, it is clear from the analysis that none of them rise to the level of “other known factors injuring the domestic industry”.<sup>47</sup> For example, the ITC’s conclusion that the evidence did not support finding that substitute products are other causal factors is apparent in the Commission’s finding that “While these substitute products have increased in importance over the last few years, they still account for a small share of the market traditionally utilizing softwood lumber”.<sup>48</sup> Furthermore, in making this statement the Commission relied on evidence provided by Canadian exporters and stated that “[f]or example, while EWPs are perceived to have a fairly significant share of the market for structural framing applications, CLTA [i.e., exporters’ coalition] estimated that EWPs accounted for only 5 per cent of the US market”.<sup>49</sup> The Commission considered alleged other factors in a manner similar to other substitute products and found each not to be an other known factor causing injury to the domestic industry.

31. Moreover, the ITC found that the evidence demonstrates that domestic supply would not be a known causal factor in the imminent future, as it had been in the 1999-2000 period<sup>50</sup>, when likely substantial increases in subject imports with likely price depressing effects would cause injury to the domestic industry. The Commission considered domestic supply on pages 24-25, 34-35, 37-38, and 43-44 of the ITC Report. Specifically, the ITC examined constraints on domestic producers’ ability to meet demand and took into consideration domestic producers’ past contribution to oversupply conditions. The evidence cited by the ITC indicated that the domestic producers had curbed their production, but that “overproduction remains a problem in Canada.” Thus, while domestic overproduction had contributed to adverse price effects in 2000, the evidence demonstrated that it was no longer contributing to excess supply, while Canadian imports continued to oversupply. Moreover, the evidence demonstrated that domestic production capacity was fairly level during the period of investigation, following a small but steady increase between 1995 and 1999, as apparent consumption increased.<sup>51</sup> Domestic capacity utilization was 87.4 per cent in 2001. With the exception of a peak in 1999 at 92 per cent, it had consistently held this level from 1995-2001.<sup>52</sup> In contrast, Canadian capacity utilization had declined in 2001 to 83.7 per cent, a rate substantially lower than that reported

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<sup>47</sup> The Panel in *Thailand - H-Beams* recognized that the absence of an explicit finding in the final determination regarding the significance of the volume of imports and price effects would not make them inconsistent with the requirements of the appropriate provisions if consideration is apparent from the relevant documents in the record. *Thailand - H-Beams*, Panel Report, paras. 7.161, 7.170-7.171, and 7.179-7.180.

<sup>48</sup> ITC Report at 24 and n.145, and II-4.

<sup>49</sup> ITC Report at II-4 and n.15. Moreover, Petitioners maintained that it was only in residential housing floor applications, which make up less than 6.5 per cent of softwood lumber consumption, that substitute products hold anything more than a minimal share. Petitioners’ Prehearing Brief at 40-44 (USA-8); Petitioners’ Posthearing Brief at Appendix A-28 - A-33 (USA-5).

<sup>50</sup> The Commission had found in its present material injury analysis that excess domestic supply was an other known factor that contributed in conjunction with excess import supply to the decline in prices and the injury to the domestic industry, particularly in the 1999-2000 period.

<sup>51</sup> ITC Report at Table III-6 and C-1 (public data). Domestic producers based on public data reported production capacity of 39,800 mmbf in 1999, 40,100 mmbf in 2000, and 40,040 mmbf in 2001. *Id.* Domestic producers’ questionnaire responses reported production capacity of 22,847 mmbf in 1999, 24,233 mmbf in 2000, and 24,709 mmbf in 2001, although the industry coverage is not necessarily comparable to the public data. *Id.* at Table III-7 and C-1.

<sup>52</sup> ITC Report at Tables III-6 and C-1 (public data). Domestic capacity utilization based on public data was 86.1 per cent in 1995, 87.6 per cent in 1996, 89.9 per cent in 1997, 88.5 per cent in 1998, 92.0 per cent in 1999, 89.7 per cent in 2000 and 87.4 per cent in 2001. *Id.* Domestic producers’ questionnaire responses reported similar capacity utilization rates: 92.8 per cent in 1999, 88.5 per cent in 2000, and 86.1 per cent in 2001. *Id.* at Tables III-7 and C-1.

for any other year in the 1995-2001 period.<sup>53</sup> As discussed above, in spite of this decline in capacity utilization rates, Canadian producers projected slight increases in capacity, increases in production, and a return of capacity utilization to 90.4 per cent in 2003.<sup>54</sup> On the other hand, domestic production of softwood lumber had declined by 4.4 per cent from 1999 to 2001.<sup>55</sup> These facts concerning domestic supply reinforce the ITC's affirmative threat determinations.

32. It is important to understand that consideration and explanation of a factor in any section of the ITC Report does not limit its application to that section of the report. The report must be viewed as a whole, with analysis conducted in any particular section potentially having a bearing on analysis in other sections. Moreover, if it is evident that an alleged other factor is not a known other factor at all and respondents offer no positive evidence, only speculative theories about the future, duplicative analyses of the same alleged other factors would serve no purpose. One example where evidence demonstrates that an alleged other factor is not a "known" other factor is nonsubject imports. The Commission found that "[w]hile nonsubject imports were present in the US market during the period of investigation, they never exceeded 3 per cent of apparent domestic consumption".<sup>56</sup> The Commission recognized that the volume of nonsubject imports (from Brazil, Chile, New Zealand, Germany, Sweden, Austria, and other countries) increased from 937 mmbf in 1999 to 1,378 mmbf in 2001, and that as share of apparent domestic consumption, nonsubject imports increased from 1.7 per cent in 1999 to 2.6 per cent in 2001.<sup>57</sup> The incremental increase in subject import volume in mmbf between 1999 and 2001 was approximately the same as the increase in nonsubject import volume. However, this comparison must be placed in perspective: subject imports are responsible for an enormous volume of imports during the period of investigation, accounting for 33.2 per cent to 34.3 per cent of US apparent consumption in the 1999-2001 period<sup>58</sup>, compared with nonsubject imports, which "never exceeded 3 per cent of apparent domestic consumption".<sup>59</sup> Moreover, subject imports were subject to import restraints for most of the period of investigation; nonsubject imports were not restrained.

33. Canada's speculative theories have failed to explain how an imminent increase in such a small total volume of nonsubject imports relative to apparent consumption and Canada's substantial share of apparent consumption, might rise to the level of causing injury to the domestic industry. This conclusion is particularly apt when Canada acknowledges that its exports to the US market will continue at, and even increase above, the significant level of imports during the period of investigation. Moreover, nonsubject imports were not even alleged to increase, let alone to significant levels, unless trade remedies were imposed against Canadian imports.<sup>60</sup> The Commission appropriately considered nonsubject imports and found them not to be an other known factor causing injury to the domestic industry.

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<sup>53</sup> ITC Report at Tables VII-1 (public data). Canadian capacity utilization based on public data was 87.8 per cent in 1995, 87.7 per cent in 1996, 87.4 per cent in 1997, 87.3 per cent in 1998, 90.5 per cent in 1999, 88.9 per cent in 2000 and 83.7 per cent in 2001. *Id.* Canadian producers' questionnaire responses reported similar capacity utilization rates: 90.3 per cent in 1999, 88.8 per cent in 2000, 84.4 per cent in 2001 and projections of 88.5 per cent in 2002, and 90.4 per cent in 2003. *Id.* at Table VII-2.

<sup>54</sup> ITC Report at Table VII-2.

<sup>55</sup> ITC Report at Tables III-6 and C-1 (public data).

<sup>56</sup> ITC Report at 25.

<sup>57</sup> USITC Report at 25 n.152.

<sup>58</sup> USITC Report at 32.

<sup>59</sup> USITC Report at 25.

<sup>60</sup> The ITC Report reported that: "Some importers stated that any restrictions on the supply of Canadian softwood lumber to the US market would result in an increased supply of imports from other sources, particularly European sources, to meet US demand for softwood lumber." ITC Report at II-3. The evidence also shows the share of US imports held in 2001 by the following European countries: Germany, 1.0 per cent; Sweden, 0.8 per cent, Austria, 0.5 per cent. All nonsubject imports accounted for 6.9 per cent of the overall quantity of softwood lumber imports into the US market in 2001. *Id.* at II-7, n. 23.

**Q27. In paragraph 94 of its first written submission, Canada asserts that the USITC's discussion of certain evidence presented by Canadian parties during the investigation contains "fundamental errors". Could the United States respond specifically to this argument?**

34. Canada's claim of "fundamental error" in paragraph 94 of its first written submission is based on the erroneous premise that the Canadian producers' economic theory was the only "information" before the ITC and that this theory was uncontested and proven fact. But Canada has provided the Panel with a one-sided analysis of this issue and ignored the conflicting evidence presented to the Commission regarding the applicability of the economic models and their alleged effects. The domestic producers presented the ITC with arguments, economic analysis and economic studies to refute the economic theory provided by Canadian parties. Indeed, evidence presented to the ITC during its investigation squarely placed in question whether the Ricardian rent theory was applicable to the timber and lumber markets, whether the theory's underlying premise regarding supply was correct, and whether the results regarding the effects of the stumpage fees on output were very different. In any event, theory is not fact. While analytically useful in appropriate contexts, it is still distinguishable from hard statistical information.

35. One issue on which the Commission had conflicting evidence from the parties was whether the lumber/timber market is a "rent" market, that is a market in which the quantity supplied does not vary with price over a relevant range. As the context of the ITC's discussion, and the sources referenced, make clear, the Commission's use of the term "fixed supply" refers to the lack of variation in the quantity supplied, not to any assumption that timber supply is somehow exogenously fixed.<sup>61</sup> The fact is the Canadian parties used a similar shorthand formulation (i.e., characterizing factors as "fixed") in their own submissions.<sup>62</sup> As for the Commission's use of the term "lumber supply" rather than "timber supply," it may have been more precise to use the term "lumber and timber supply," since the discussion involved the raw material of timber for the subject product, lumber. The cited materials clearly relate to the raw material for lumber, i.e., the elasticity of timber supply.

36. The Commission's consideration and discussion of the economic theories presented by the parties is not undermined by alleged "fundamental errors." Canada's allegations should be rejected when it is clear, as it is here, that although the ITC's terminology might have been more precise, the Commission appropriately understood and considered the conflicting evidence regarding the economic theories that had been presented to it.

37. Moreover, the ITC found that, despite all the evidence of record, the uncertainties regarding these competing economic theories provided by the parties were such as to preclude reasoned and adequate conclusions. Therefore, the ITC appropriately considered the parties' arguments and provided a reasoned explanation but found it could not reach a finding on the competing economic theories. As evident in the Views of the Commission, its consideration of the nature of the subsidy threat factor was not a reason that led to its determinations and thus, it neither supported nor detracted from those determinations that the domestic industry was threatened with material injury by reason of the subject imports.

**Q28. Could the United States please explain the basis for the USITC's conclusion regarding significant price effects in this case, in light of the finding of moderate substitutability of US domestic and imported Canadian lumber?**

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<sup>61</sup> ITC Report at 39, n. 245. *See also* Hearing Transcript at 41-45 (testimony of landowner that quantity supplied was reduced when price fell); Petitioners' Posthearing Brief at Appendix D-24 (nominal annual allowable cut in Canadian provinces do not effectively constrain supply).

<sup>62</sup> *See e.g.*, CLTA Posthearing Brief, vol. 2, Tab T, at 4 n.11 ("Some goods or productive factors are completely fixed in amount regardless of price.").

38. Given its finding of likely significant increases in subject import volumes, its finding of at least moderate substitutability, its finding that prices of a particular species affect the prices of other species, and its present finding that the substantial volume of subject imports had some adverse effects on prices for the domestic product, the Commission concluded that subject imports were likely to have a significant price-depressing effect on domestic prices in the immediate future, and are likely to increase demand for further imports. The evidence at the end of the period of investigation showed substantial declines in prices in the third and fourth quarters of 2001, to levels as low as 2000. Moreover, the evidence regarding supply, which generally was considered the cause for the substantial price declines in 2000 that led to the deterioration in the condition of the domestic industry, indicated that US producers had curbed their production, but that overproduction “remains a problem in Canada”. Therefore, 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. Moreover, the evidence demonstrated that pressure would come from excess Canadian supply rather than a combination of import and domestic supply, thereby resulting in a threat of material injury to the US industry.

39. These findings by the Commission are not affected by the Commission’s finding of moderate substitutability between domestic and imported softwood lumber. Despite the differences in many of the imported and domestic species of softwood lumber, the moderate substitutability finding must be considered in the context of the Commission’s finding that the evidence demonstrated that prices of a particular species will affect the prices of other species, particularly those that are used in the same or similar applications.<sup>63</sup> As discussed in the US first written submission and the ITC Report, the evidence provided by purchasers and home builders showed that subject imports and domestic species of softwood lumber are used in the same applications and that regional preferences merely reflect availability of species.<sup>64</sup>

40. In particular, the Annual Builders Survey by the National Association of Home Builders Research Center (NAHBRC) provided clear evidence that SPF, SYP, and Douglas fir/hem fir are all used in such same construction applications as lumber joists, light frame exterior walls, roof trusses, and roof rafters.<sup>65</sup> The Commission recognized that while regional preferences existed – species often were used in close proximity to where they are milled – these preferences seemed to reflect in large part availability of species, which is affected by transportation costs.<sup>66</sup> This was demonstrated in

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<sup>63</sup> See, e.g., Random Lengths (“Competition from Canadian S-P-F prevented ES-LP narrows from rallying from \$5 drops early in the week.” at 9, 26 Oct. 2001; “Warmer weather, a drop in interest rates, and an abrupt rise in S-P-F prices all got credit for boosting buyer interest in Southern Pine.” at 4, 20 Apr. 2001; “As SPF prices climbed and supplies tightened in Canada, more buyers turned to US produced Hem-Fir and ES-LP” at 4, 13 Apr. 2001; “Western and Eastern S-P-F were the leaders, pulling other dry species along.” at 4, 2 Feb. 2001); Wickes (“Species switching by many long-term purchasers of S-P-F forced most North of the border to finally return prices to a more realistic level as the need to move wood into the inventory pipeline became evident.” 5 Sept. 2001; “Producers in the US secured most of the available business from buyers who had no qualms in switching species to take advantage of the pricing discrepancies. Truss manufacturers started the charge as they switched from S-P-F MSR to alternative #2 grade SYP helping mills in the South post increases across the board”. 21 Aug. 2001). Petitioners’ Prehearing Brief at 13 and Appendix C (USA-8).

<sup>64</sup> See ITC Report at 25-27, 33, and 43; US First Written Submission at paras. 36-37, 203-206, and 269-278. A majority of purchasers (36 of 51) responding to the Commission questionnaire reported that US and Canadian softwood lumber can be used in the same general applications, recognizing that performance characteristics and customer preferences place some limitations on interchangeability among species. ITC Report at II-6, II-8, and Table II-5; Petitioners’ Prehearing Brief, Vol. II at Exhibit 85 (USA-5).

<sup>65</sup> Dealers/Builders’ Posthearing Brief at Exhibit 3 at 5, 10, and 15 (USA -10).

<sup>66</sup> ITC Report at II-7-8, V-2 - V-4.

evidence provided by builders and purchasers at the Commission's hearing.<sup>67</sup> Thus, these regional preferences do not reflect a lack of substitutability but simply a predisposition toward locally-milled species. As the Commission has recognized in prior investigations, Canadian softwood lumber and the domestic like product generally are interchangeable, notwithstanding differences in species and preferences.<sup>68</sup>

41. The ITC based its findings on consideration of the totality of the facts, including the evidence provided by purchasers and home builders, that there are other products that both countries produce that compete with each other; Canadian softwood lumber and the domestic like product generally are interchangeable; subject imports and domestic species are used in the same applications; regional preferences exist, but do not reflect a lack of substitutability, but instead simply reflect a predisposition toward locally-milled species; and evidence demonstrated that prices of different species have an effect on other species' prices, particularly those that are used in the same or similar applications.

42. It is evident that imported and domestic softwood lumber, notwithstanding differences in species, are interchangeable and compete with each other. Thus, the Commission's finding of at least moderate substitutability, in conjunction with the evidence that different species are used in the same applications and the evidence regarding the effect of prices of one species on those of another species, fully supports the Commission's conclusion of likely price effects.

**Q29. Could the United States explain the basis for the USITC's conclusion regarding significant price effects in this case, in light of the absence of any conclusions regarding underselling?**

43. Article 3.7(iii) of the Anti-Dumping Agreement and Article 15.7 (iv) of the SCM Agreement state that an investigating authority "should consider, inter alia . . . whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports". Thus, the listed factors for a threat analysis in the covered Agreements do not include required consideration of underselling. Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement, on the other hand, state that an investigating authority "shall consider" whether there has been a significant price under cutting "or" significant price depression or suppression. Articles 3.2 and 15.2 use the disjunctive "or" rather than the conjunctive "and" in setting forth the applicable obligation.<sup>69</sup> This shows a recognition that price depression or suppression may occur whether or not there is price undercutting. Thus, the fact that the Commission determined, as agreed to by all parties to the proceeding<sup>70</sup>, that making direct

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<sup>67</sup> Hearing Transcript at 185-190 and 204-209 (USA-11 and USA-23) (Florida: floor joists - SYP, wall/framing - SPF, headers - SYP, trusses - SYP, *Id.* at 185-190, 204; Texas: floor joists - SYP, wall/framing - SYP, headers - SYP, trusses - SYP, *Id.* at 205; Indiana and West: floor joists - SPF, wall/framing - SPF, headers - SPF, trusses - SPF, *Id.* at 205-207; Massachusetts: floor joists - SPF, wall/framing - SPF, headers - SYP, trusses - SYP, *Id.* at 206); ITC Report at II-8 (e.g., purchasers' comments on species preferences); and Dealers/Builders' Prehearing Brief at Exhs. 2, 3, 4, 6, 8, 9, 11, 13, 14, 15, 16, 17, 21, and 23 (USA-12); Petitioners' Posthearing Brief at 5-6 (USA-5).

<sup>68</sup> See, e.g., Softwood Lumber III, USITC Pub. 2530 at 28-29, and 34 (USA-24), *aff'd in part*, In the Matter of Softwood Lumber from Canada, USA-92-1904-02, Decision of the Panel Reviewing the Final Determination of the US International Trade Commission, at 25-28 (26 July 1993)

<sup>69</sup> See Article 3.2 of the Antidumping Agreement and Article 15.2 of the SCM Agreement. See also *Thailand-H-Beams*, Panel Report, para. 7.171 (regarding "or" contained in Article 3.2 for consideration of volume of imports, Panel considered it sufficient for authority to consider absolute volume rather than both it and relative.)

<sup>70</sup> The Commission noted that it had encountered similar problems obtaining useful pricing data for assessing underselling in prior Softwood Lumber cases. The parties agreed that, in this industry, accurate price

cross-species price comparisons in order to assess underselling was inappropriate, does not have a bearing on the ITC's conclusion regarding significant price effects at all and particularly in its threat analysis.<sup>71 72</sup>

44. As discussed in the US first written submission, the fact that the differences in species of softwood lumber did not lend itself to direct price comparisons did not preclude a price trends analysis to consider whether there was a correlation between the prices that indicated price suppression or depression.<sup>73</sup> First, the Commission found that the evidence indicated that prices of a particular species will affect the prices of other species, particularly those that are used in the same or similar applications, as discussed in response to question 28.<sup>74</sup> Moreover, both the questionnaire and public data on the record permitted an analysis of price trends. In particular, the Commission considered pricing information for softwood lumber published in Random Lengths, which is the source the industry most cited throughout this investigation as a pricing guide.<sup>75</sup> The Commission reasonably found, based on the price trends analysis discussed in its opinion<sup>76</sup>, that subject imports were likely to have a significant depressing effect on domestic prices.

**Q30. At page 40 of the USITC determination (Exhibit USA-1), the USITC states "We find that subject imports are likely to increase substantially based on several factors: ...". Could the United States clarify whether each of the factors listed in the remainder of that sentence was considered to support the conclusion set out, or whether the listed factors are those which were considered, and that some of them supported the finding of likely increased imports while others did not?**

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comparisons are difficult to compile. See, e.g., Transcript at 93, 269-273 (USA-11); Dealers/Builders' Posthearing Brief at 12-14 (USA-10).

<sup>71</sup> ITC Report at 34-34. The Commission found that because of the nature of this market, direct price comparisons between domestic products and subject imports are highly problematic whether based on questionnaire or public data. While the Commission collected pricing data for six specific softwood lumber products from purchasers, the Commission placed little weight on this information because the reported quantities of softwood lumber involved in the delivered price comparisons are very limited. The Commission concluded that it could not draw any conclusions regarding underselling from the questionnaire data in these investigations.

While there are a number of different sources of public pricing information regarding softwood lumber products (including Random Lengths, Crow's, Madison's, and the Southern Pine Bulletin), these data series do not yield improved comparisons, despite their much broader coverage. Although prices of one species affect those of others, absolute price levels differ, making direct cross-species comparisons inappropriate for purposes of an underselling analysis. Thus, the Commission concluded that it could not determine, based on this record, whether there has been significant underselling by subject imports. ITC Report at V-3 - V-5.

<sup>72</sup> In conducting a price underselling analysis, the Commission makes direct comparisons of prices for a comparable product, i.e., same model, same size and grade of a species of lumber, etc., and calculates a margin of underselling or overselling for the import prices relative to the domestic prices.

<sup>73</sup> See US First Written Submission, paras. 201-202 and 241. A price suppression or depression analysis considers trends for import and domestic prices to determine certain specific correlations between them. The pricing trend data is not necessarily limited to a size/grade or model. Using this trends analysis and other evidence, the Commission determines whether imports have prevented increases in prices for domestic products that otherwise would have occurred (suppression) or whether imports in the market have exerted downward pressure on domestic prices (depression).

<sup>74</sup> ITC Report at 26-27, 32-35, and 43.

<sup>75</sup> ITC Report at V4-5. Random Lengths, Inc. collects weekly price data from suppliers and purchasers and calculates weighted-average prices based on such factors as the size of the transaction and the quality of the lumber. Random Lengths publishes these data in its weekly and annual publications. Id.

<sup>76</sup> ITC Report at 32-35 and 43.

45. The Commission found that subject imports are likely to increase substantially based on evidence regarding each of the six factors listed on page 40, and discussed in detail on pages 40-43, of the ITC Report. The ITC found that each of the six factors supported its conclusion.

**Q31. Could the United States please indicate the facts that form the basis for the USITC's conclusion that there would be an imminent substantial increase in imports?**

46. The United States refers the Panel to its response to question 19, the substance of which also responds to question 31.

**Q32. The Panel understands that Canada is not arguing that a combined analysis of injury caused by dumped and subsidized imports is per se inconsistent with the cited Agreements. Could the United States comment on the view that, in the event the Panel finds a violation of any other provision of the relevant Agreements, the injury determination as a whole should be deemed inconsistent with both the AD and SCM Agreements?**

47. The ITC's determinations are consistent with all US obligations under both covered Agreements. With the exception of consideration of the record evidence regarding the "nature of the subsidies" factor pursuant to Article 15.7(i) of the SCM Agreement, the ITC's analysis of injury by reason of dumped and subsidized imports involved factors, evidence, analysis, and findings common to both Agreements. Thus, if the Panel were to find a violation, it necessarily would involve a provision (with the one noted exception) common to both the Anti-Dumping Agreement and the SCM Agreement. Canada's attempts to raise the same claims it has made regarding specific provisions under Article 3 of the Anti-Dumping Agreement and Article 15 of the SCM Agreement as a separate alleged violation on the basis of a combined investigation or cross-cumulation violation should be rejected. As Canada concedes, none of its claims relate to cross-cumulation or combined investigations at all, but rather are attempts to establish duplicative violations based on the same claims. Its arguments under the heading of "Combined Investigations" are simply restatements of its arguments concerning particular provisions of the covered Agreements. The Panel should reject these combined investigation arguments for the same reasons it should reject the particular arguments, as discussed in this and other US submissions.

**Q33. Could the parties please address the distinctions they see, if any, between "finding", "evaluation" and "consideration" in the context of analysis of factors in a determination under Article 3 of the AD Agreement and/or Article 15 of the SCM Agreement.**

48. There is a clear distinction between "finding," on the one hand, and both "evaluation" and "consideration", on the other, in the context of analyzing factors in making a determination under Article 3 of the Anti-Dumping Agreement and Article 15 of the SCM Agreement. Simply, "finding" involves a conclusion whereas "evaluation" and "consideration" involve the process of assessment and do not require that a finding be made at all. Any distinction between "evaluation" and "consideration" is less clear and seems to have more to do with the provision in which the term is used than with a marked difference in the meaning of the term in the abstract.<sup>77</sup>

49. The term "consider" is used in Articles 3.2 and 3.7 of the Anti-Dumping Agreement and Articles 15.2 and 15.7 of the SCM Agreement regarding the analysis of listed factors involving the volume and price effects of dumped and subsidized imports, and the existence of a threat of material injury. The term "evaluation" is used in Article 3.4 and Article 15.4 of the covered Agreements regarding the examination of the impact of the dumped and subsidized imports on the domestic

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<sup>77</sup> In a review of dispute settlement reports, it seems that the terms are used interchangeably when the term "evaluation" has been interpreted, but that reference to "evaluation" is less frequent, if at all, when the term "consideration" has been interpreted.

industry. The covered Agreements require the Commission to consider or evaluate the listed factors. They do not require the Commission to make findings on each factor.

50. As discussed in paras. 111-116 of the US first written submission, the term “consider” has been interpreted to mean, “inter alia: ‘contemplate mentally, especially in order to reach a conclusion;’ ‘give attention to;’ and ‘reckon with; take into account.’”.<sup>78</sup> Accordingly, the term “consider” has not been read to require an explicit “finding” by the investigating authority.<sup>79</sup> Rather it is sufficient, if it is apparent in the relevant documents in the record, that the ITC has given attention to and taken the factor into account.

51. While Canada conceded that “consider” does not mean “make a finding” during the first Panel meeting, its characterization of what constitutes consideration in conjunction with its concept of an adequate and reasoned explanation is not noticeably different from making a finding.

52. The term “evaluation” of evidence has been interpreted to mean “the act of analysis, judgement, or assessment”.<sup>80</sup> Particularly, in the context of Article 3.4, it has been stated that “for an investigating authority to ‘evaluate’ evidence concerning a given factor in the sense of Article 3.4, it must not only gather data, but it must analyze and interpret those data”.<sup>81</sup>

53. In its recent report in EC-Pipe, the Appellate Body stated that an obligation to evaluate all fifteen economic factors, pursuant to Article 3.4 of the Anti-Dumping Agreement, is distinct from the manner in which the evaluation is to be set out in the published document.<sup>82</sup> In fact, it recognized that

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<sup>78</sup> *Thailand - H-Beams*, Panel Report, para. 7.161. While this dispute involves an analysis of the term “shall consider” pursuant to Article 3.2 of the Antidumping Agreement, the conclusion that “consider” does not mean “make a finding” would equally apply to the less stringent term “should consider”, contained in Article 3.7 of the Anti-Dumping Agreement and Article 15.7 of the SCM Agreement. The Panel in *Thailand - H-Beams* stated:

We examine the nature of the obligation in Article 3.2. We note that the text of Article 3.2 requires that the investigating authorities “consider whether there has been a significant increase in dumped imports.” The *Concise Oxford Dictionary* defines “consider” as, *inter alia*: “contemplate mentally, especially in order to reach a conclusion;” “give attention to”; and “reckon with; take into account.” We therefore do not read the textual term “consider” in Article 3.2 to require an explicit “finding” or “determination” by the investigating authorities as to whether the increase in dumped imports is “significant.” While it would certainly be preferable for a Member explicitly to characterize whether any increase in imports as “significant,” and to give a reasoned explanation of that characterization, we believe that the word “significant” does not necessarily need to appear in the text of the relevant document in order for the requirements of this provision to be fulfilled. Nevertheless, we consider that it **must be apparent in the relevant documents in the record that the investigating authorities have given attention to and taken into account** whether there has been a significant increase in dumped imports, in absolute or relative terms.

*Id.* (emphasis added).

<sup>79</sup> See *Thailand - H-Beams*, Panel Report, para. 7.161.

<sup>80</sup> *Egypt - Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, Panel Report, WT/DS211/R, adopted 1 Oct. 2002, para. 7.44 (“*Egypt-Rebar*”).

<sup>81</sup> *Egypt - Rebar*, Panel Report, para. 7.44; see also *Thailand - H-Beams*, Panel Report, paras. 7.236-7.237 (“evaluation of the mandatory factors must be apparent in the documents forming the basis of our review”).

<sup>82</sup> While the language in Article 3.4 of the Anti-Dumping Agreement is “shall evaluate,” this analysis would equally apply to the less restrictive “should consider” pursuant to Article 3.7 of the Anti-Dumping Agreement and Article 15.7 of the SCM Agreement.

an authority's evaluation of a factor may be implicit in the analyses of other factors.<sup>83</sup> What is important, the Appellate Body explained, is that the investigating authority's decisional path be reasonably discernible, not that there be a discussion of each factor.

54. Moreover, the Appellate Body's analysis in EC-Pipe is consistent with the recognition in the covered Agreements that: "No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped [subsidized] exports are imminent and that, unless protective action is taken, material injury would occur".<sup>84</sup>

**Q34. The Panel notes that Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement provide that "In making a determination regarding the existence of a threat of material injury, the authorities should consider, inter alia, such factors as:..." (emphasis added). In this context, could the parties comment on the view that consideration of all the listed factors is not mandatory, and that the failure to consider at all, or to adequately consider, one of the listed factors, is not fatal to the determination at issue before a Panel?**

55. First, it is evident in the ITC Report that the Commission considered all the factors listed in Article 3.7 of the Anti-Dumping Agreement and Article 15.7 of the SCM Agreement. Nonetheless, the text of this threat provision, "should consider, inter alia, such factors", specifically uses the permissive term "should consider" rather than the mandatory term "shall consider". This distinguishes these provisions from Article 3.2 and Article 15.2 of the covered Agreements. Thus, the text of the threat provision could be interpreted as not requiring the consideration of all listed factors. Further, inclusion of the term "*inter alia*", or among others, in this provision appears to recognize that factors other than those listed may be considered, to the extent they are relevant to a particular industry and case. The Commission found it appropriate to do so in this case.

56. Article 3.7 of the Anti-Dumping Agreement and Article 15.7 of the SCM Agreement also conclude with the following language:

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

The threat provision recognizes that not all, and perhaps none, of the listed factors will necessarily be relevant to or dispositive of, the facts and circumstances of each case. Accordingly, if one of the listed factors was not considered at all, or not adequately considered<sup>85</sup>, it would not be fatal to the determination at issue, particularly since it is "the totality of the factors" and not any one in particular that must lead to the conclusion.

**Q35. Could the parties please address what, in their view, is required to demonstrate consideration of the "trade effects" arising from subsidies under Article 15.7(i)? What do the parties consider would be relevant trade effects that should be taken into account?**

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<sup>83</sup> *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, Appellate Body Report, WT/DS219/AB/R, circulated 22 July 2003, para. 160-161 ("*EC-Pipe*").

<sup>84</sup> Article 3.7 of the Anti-Dumping Agreement and Article 15.7 of the SCM Agreement.

<sup>85</sup> As discussed in response to question 33, consideration of a factor has been interpreted in other dispute settlement proceedings to be adequate if its "apparent in the relevant documents in the record that the investigating authorities have given attention to and taken [it] into account. . . ." *Thailand - H-Beams*, Panel Report, para. 7.161.

57. Article 15.7(i) of the SCM Agreement states that an investigating authority should consider: “the nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom”.

58. An interpretative question of this nature should be considered in the context of the facts of a particular case. The Commission considered the “nature of the subsidy and trade effect” factor in its threat of material injury analysis, as evident in the Views of the Commission. Specifically, the Commission examined the information presented to it by the US Department of Commerce regarding 11 programmes that Commerce found conferred countervailable subsidies to Canadian producers and exporters of softwood lumber.<sup>86</sup> While Commerce provided the Commission information regarding the nature of the subsidies, Commerce explicitly made no findings regarding the effects of the subsidies.<sup>87</sup>

59. In considering this information, the Commission recognized that none of the subsidies identified by Commerce are subsidies described in Article 3 or 6.1 of the SCM Agreement.<sup>88</sup> Thus, this case did not involve any export subsidies. However, when export subsidies are involved, the Commission has considered the relevant trade effects that may result from such subsidies.

60. In this case, parties to the underlying proceedings presented the Commission competing economic theories about the nature and effects of the countervailable subsidies. It is evident in the Views of the Commission that the ITC fully considered all of the evidence presented on this issue by the parties.<sup>89</sup> However, it declined to adopt the positions of any of the parties due to the conflicting evidence and economic theories specifically regarding the effects of stumpage fees on lumber output.<sup>90</sup>

61. The Commission consideration in this case of whether there were trade effects likely to arise from the subsidies is consistent with US obligations under Article 15.7(i) of the SCM Agreement.

**Q36. Could the parties please discuss, in detail, their interpretation of the phrase "clearly foreseen and imminent" as used in Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement, with specific reference to what they consider to be the relevant time frames involved? Would the parties discuss, in addition, what precisely they consider should be found to be clearly foreseen and imminent.**

62. Threat of material injury is material injury that has not yet occurred, but remains a future event whose actual materialization cannot, in fact, be assured with absolute certainty but with clear likelihood.<sup>91</sup> The term “imminent,” in the context of a threat of injury analysis under the Safeguards Agreement, has been found to relate “to the moment in time when the ‘threat’ is likely to

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<sup>86</sup> ITC Report at 39 (USA-1).

<sup>87</sup> Canadian exporters had requested that Commerce consider whether Canadian Provincial stumpage charges have trade- or market-distorting effects, but Commerce specifically made no finding regarding the “effects” of the subsidies. Issues and Decision Memorandum from Bernard T. Carreau to Faryar Shirzad (Mar. 21, 2002) (appended to final Commerce CVD determination) (USA-2). Under US law, antidumping and countervailing duty investigations involve a bifurcated system with certain responsibilities assigned to Commerce and others assigned to the ITC. Specifically related to this issue, Commerce investigates whether the government of a country is providing, directly or indirectly, a countervailable subsidy. 19 U.S.C. § 1671(a). Thus, Commerce collects information enabling it to determine the existence of a countervailable subsidy and information needed for it to determine the net countervailable subsidy; the Commission on the other hand has no authority to collect such information or look behind Commerce’s findings. See 19 U.S.C. §§ 1677(5)(A), 1677(5)(B), 1677(5)(E), 1677(5A), 1677(5B), and 1677(6).

<sup>88</sup> USITC Report at 39, n.249.

<sup>89</sup> USITC Report at 39.

<sup>90</sup> ITC Report at 39, n. 245 (USA-1).

<sup>91</sup> *US - Lamb Meat*, AB Report, para. 125:

materialize".<sup>92</sup> Threat of injury, thus, is an anticipation of material injury that must be on the verge of occurring, i.e., clearly foreseen and imminent, which will differ from case to case. The term "clearly foreseen" relates to the "likelihood" that the injury will materialize. While there is a recognition that "future events 'can never be definitively proven by facts,'" projections based on the past and present facts permit an assessment of whether there is a high degree of likelihood of injury in the very near future.<sup>93 94</sup>

63. The relevant time frames for consideration of whether dumped and subsidized imports would cause injury, i.e., would be clearly foreseen and imminent, should be evaluated in light of the facts and circumstances of each industry, product, and marketplace. There is no bright-line test to determine when injury is "imminent", nor does the term necessarily mean "immediate". The "imminent" time frame applicable to a threat of injury analysis will vary from case-to-case. In this case, the Commission found it appropriate to the facts and circumstances of the softwood lumber industry and market to consider evidence for a one-to-two year period in the future in its threat of injury analysis, i.e., 2002 and 2003.

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<sup>92</sup> *US-Lamb Meat*, AB Report, para. 125.

<sup>93</sup> See *Mexico-HFCS*, AB Report, paras. 83 and 85; *US-Lamb Meat*, AB Report, paras. 125 ("To us, the word 'clearly' relates also the *factual* demonstration of the existence of the 'threat.'") and 136.

<sup>94</sup> The GATT Committee on Anti-Dumping Practices adopted "Recommendation concerning Determination of Threat of Material Injury" on 21 October 1985, which provides some further clarification on the phrase "clearly foreseen and imminent."