1. Canada consistently fails to locate in the covered agreements certain obligations that it claims the United States has breached. Two examples illustrate the point. First, Canada asserts an obligation to explicitly identify a change in circumstances that would cause a threat of injury to ripen into actual injury. It claims that "[i]n the circumstances of this dispute" an "objective examination," as required by Article 3.1 of the Antidumping Agreement and Article 15.1 of the SCM Agreement "could not be achieved without identifying the change in circumstances from the non-injurious *status quo*." However, it does not explain what about this dispute supports an obligation that might not exist in other disputes. Second, Canada claims that the ITC was required to explain why it conducted a combined injury analysis. Once again, Canada reverts to "the circumstances of this case" as the supposed basis for the obligation, but fails to explain how the circumstances of this dispute give rise to an obligation that does not apply to all disputes.

2. The most striking example of Canada reading into the WTO agreements an obligation that applies to the particular circumstances of this dispute only, but not necessarily to other disputes, is its assertion of breaches of a general obligation to provide a "reasoned and adequate explanation" of certain conclusions. Canada appears to rely on "reasoned and adequate explanation" as a sort of placeholder obligation. Given the importance of "reasoned and adequate explanation" in its argument, one would expect Canada to have clearly defined its basis, but it has not done so.

3. An additional general observation concerns Canada's argument that certain statements by Canadian lumber producers and exporters were not appropriately considered by the ITC. For example, Canada claims that the ITC did not take into account exporters' projections of exports to the United States. Elsewhere, Canada reasons, somewhat circularly, that its economic theory regarding the effects of the subsidy should have given decisive guidance to the ITC. It cannot possibly be the case that an investigating authority violates WTO obligations simply by discounting self-interested statements by parties to an investigation.

4. In considering this dispute, it should be borne in mind that: First, the legal determination of no present material injury by reason of dumped and subsidized imports does not negate the subsidiary affirmative findings made in the present injury analysis. Second, the ITC conducted an objective examination, as evident in the ITC Report, in which its evaluation of the relevant factors and facts was unbiased and even-handed; Canada, on the other hand, focuses on only those facts and findings that favor its arguments. Third, all of the factors considered by the ITC, whether or not listed in Articles 3.7 and 15.7 of the covered agreements at issue, the record evidence, and the likely effects being assessed are interrelated, and should not be considered and analyzed in isolation. Fourth, Canada frequently asserts that the United States failed to meet an alleged obligation, when no such obligation exists. Fifth, the theories presented by Canada, including the demand theory and the economic rent theory, are not proven facts and are not uncontested, as it asserts. Finally, the ITC's determinations are based on positive evidence, and an objective examination of all relevant factors and facts.

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

of imports were significant, imports had some adverse effects on domestic prices, and the condition of the domestic industry had deteriorated, primarily as a result of declining prices, and thus was in a vulnerable state. These findings foreshadow injury and clearly support the existence of a threat of material injury. Canada erroneously argues that if the current circumstances taken together do not support a legal conclusion of present injury, they must be wholly disregarded in addressing threat.

6. Canada simply ignores the existence of any evidence from the present injury analysis showing that the U.S. industry was on the verge of injury by reason of subject imports. For example, the ITC found that the volume and market share of subject imports, accounting for 34 percent of the U.S. market, were already significant and thus supported an affirmative present material injury finding. Canada, however, erroneously describes this as a finding that such imports were not injurious and thus dismisses its importance in the context of the threat of injury analysis. Its claims rest largely on this error. For example, while Canada observes that the ITC recognized that the 34 percent market share held by Canadian imports was relatively stable, it omits that the ITC recognized that it had been higher prior to the imposition of the restraining effect of the Softwood Lumber Agreement (SLA). The relatively stable market share during the SLA period does not negate the finding that the market share was significant. Rather, it is an indicator of the SLA's restraining effect and supports an affirmative threat of injury finding.

7. Regarding present price effects, Canada selectively quotes from the ITC Report, omitting the ITC's finding that subject imports had *some* price effects and its reasoning for why such effects were not significant. The ITC found that "the deterioration in the condition of the domestic industry during the period of investigation is largely the result of substantial declines in price." Canada states that "the [ITC] also found that declines in performance had leveled off in 2001." But, it disregards the ITC's prior statement that "[t]he record indicates that prices did increase in the second quarter of 2001, coincident with the filing of the petition, and this price increase abated some of the domestic industry's declining performance indicators."

8. **Threat of Material Injury Analysis – General Issues**. Canada urges the Panel to consider the threat factors listed in Articles 3.7 and 15.7 in isolation from other factors. But all of the factors considered by the ITC, whether listed or not, are interrelated, as are the different pieces of record evidence, and the likely effects being assessed. The text of the covered agreements provides a clear example of the change in circumstances as a sequence or accretion of events and does not include an "obligation to identify" the change in circumstances, as Canada alleges. Consistent with all of the U.S. obligations under the covered agreements, the ITC provided a detailed explanation of how the totality of the evidence supported its conclusion, including addressing the facts and likely events demonstrating the progression or change in circumstances, as set forth in paragraph 18 of the U.S. second written submission.

9. **Specific Issues Regarding Threat of Material Injury Analysis**. The ITC found that there was a likelihood of substantial increases in subject imports based on evidence regarding, *inter alia*, Canadian producers' excess production capacity and projected increases in capacity, capacity utilization and production, the export orientation of Canadian producers to the U.S. market and subject import trends during periods when there were no import restraints. The ITC

determined that these increases in imports were likely to put pressure on already declining prices, and that material injury to the domestic industry would occur. It also found that the domestic industry was vulnerable to injury from likely increases in imports and price pressure in light of declines in performance, particularly financial performance.

10. **Likely Substantial Increases in Subject Imports.** Contrary to Canada's characterization, the ITC found that the volume and market share of subject imports were already significant and had increased even with the restraining effect of the SLA in place. Moreover, subject imports had increased substantially during the periods without import restraints.

11. Capacity. Canada selectively quotes from the ITC's Report to claim that the ITC performed an "inadequate analysis" and offered "no explanation" for its finding that Canadian producers expect to further increase their ability to supply the U.S. market. Yet the ITC provided an explicit explanation (ITC Report, page 40) that Canada simply has ignored. Moreover, the ITC also recognized that "Canadian producers projected . . . capacity utilization increases to 90.4 percent" in 2003 from the low of about 84 percent in 2001. Further, regarding capacity, Canada would require a showing of both sufficient freely disposable capacity and an imminent substantial increase in capacity, even though these factors in the relevant provisions are separated by "or" rather than "and."

12. Export Orientation and Export Projections. The U.S. market has generally accounted for about 65 percent of Canadian softwood lumber production. Yet, Canadian producers' projected increases in exports to the United States accounted for only about 20 percent of their planned increases in production. This aspect of producers' projections, coupled with projected home market shipments that did not correlate to Canadian demand forecasts, reasonably caused the ITC to conclude that projected production increases would likely be distributed among the U.S., Canadian, and other markets in shares similar to those prevailing during the prior five years.

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

14. Substantial Increases in Imports in Periods with No Import Restraints. Canada's arguments regarding the ITC's finding that subject imports increased substantially during periods with no import restraints rely on the omission of significant evidence and findings. In fact, at one point, Canada claims that the 1994-1996 period does not support an "inference" regarding the subject imports. But the ITC did not need to make an inference to determine what occurred when the trade restraint, *i.e.*, the SLA, was imposed, because it relied on and discussed actual data showing a decline in subject imports to 34.3 percent with the SLA in effect from 35.9 percent prior to its imposition. Moreover, Canada's challenge to the ITC's consideration of import data for the 1994-1996 period on the basis that market conditions were not taken into

account is not consistent with its own reliance on data outside the period of investigation. In addition, Canada's claim that the substantial increase in imports during the April-August 2001 period only reflects "a shift in the timing of imports" fails to respond to the simple fact that imports did increase. For example, subject imports increased by 11.3 percent for the April-August 2001 period compared with the same period in 2000, and by 4.9 percent for the April-December 2001 period compared with 2000. The fact that imports increased after expiration of the SLA and have continued to increase does not support Canada's argument that a shift in timing accounted for the higher level of imports after the SLA expired.

15. **Likely Price Effects**. Canada's arguments regarding likely price effects largely ignore the ITC's analysis and findings. For example, Canada has claimed that "[n]owhere in the [ITC's] discussion of this factor in the Determination is there any reference to a 'price trends' analysis." The facts refute this claim. The ITC did analyze price trends in its threat analysis (ITC Report, page 43) and found that prices declined substantially at the end of the period of investigation, supporting a conclusion that imports "are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices." Canada's attempt to show that prices increased after the period of investigation fails to point out that the composite price for the first quarter of 2002 was lower than the composite price for the third quarter of 2001 and substantially lower than that for the second quarter of 2001.

16. **Causation**. Canada's claims on causation are variations on its arguments regarding likely substantial increases in imports and likely price effects. When the ITC finds a factor not to have injurious effects on the domestic industry, such factor is not an "other known factor," in which case there is no obligation to further examine it. Canada states that the ITC was required to "assess[] the future market share of subject imports." However, such a requirement does not exist in the covered agreements.

17. Substitutability. Regarding substitutability, subject imports and domestic species of softwood lumber are used in the same applications and compete with each other. Moreover, prices of a particular species will affect the prices of other species. Canada quotes selectively from the ITC's preliminary investigation and ignores the totality of the facts, including the evidence provided by purchasers and home builders that Canadian softwood lumber and the domestic like product generally are interchangeable and are used in the same applications.

18. Canada's claims regarding attenuated competition center on whether Canadian SPF, which accounts for about 85 percent of its production, and U.S. Southern Yellow Pine (SYP), which accounts for about 45 percent of U.S. production, are interchangeable and compete. Canada provides the Panel a single quote from an employee of Home Depot, a large U.S. retailer. However, other evidence, including testimony from another employee of Home Depot from Texas, show both SPF and SYP are used for the same applications, with regional preferences reflecting availability and a predisposition for locally-milled species, but not a lack of substitutability (USA-23). In addition, there are other species, such as Douglas fir and hem-fir, that both countries produce that compete with each other, and with SPF and SYP. There was significantly more evidence in the record demonstrating the interchangeability of the species.

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

20. Finally, Canada's renewed request for a suggestion by the Panel as to how the United States should come into compliance with its WTO obligations goes beyond anything contemplated by the WTO agreements and should be rejected.

21. **Closing Statement.** Canada frequently asserts that the United States relies on *ex post facto* rationalizations. In making these assertions, Canada dismisses and omits explicit statements made by the ITC. One example involves Canada's claims that the ITC did not discuss price trends in its threat of injury analysis. It is clear from the ITC Report (page 43) that the ITC explicitly did conduct a price trends analysis. Contrary to Canada's claims, 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.

22. The ITC properly examined any known factors other than the dumped and subsidized imports that might be injuring the domestic industry. Canada implies that further consideration or examination is required even if an alleged factor is found not to be an "other known factor." When the ITC finds a factor not to have injurious effects on the domestic industry, such factor is not an "other known factor," and there is no obligation to further examine it. One case in which evidence demonstrates that an alleged other factor is not a "known" other factor is non-subject imports. Non-subject imports never accounted for more than 2.6 percent of apparent consumption; subject imports accounted for at least 34 percent of the U.S. market. Moreover, individual country non-subject imports would have been deemed negligible, with no individual country accounting for more than 1.3 percent of imports, while Canadian imports accounted for about 93 percent of all imports.

23. On the issue of substitutability/attenuated competition, Canada fails to address the evidence before the ITC. Subject imports and domestic species of softwood lumber are used in the same applications, and prices of a particular species affect prices of other species. Canada states that "some Canadian imports in high demand in the United States were employed for end uses for which domestic products competed only on a limited basis." But, the facts do not support its claim. Canadian SPF and U.S. Southern Yellow Pine are used for the same applications and, thus, compete. Canada now attempts to rely on a U.S. court case with a very different fact pattern to support its attenuated competition arguments. But, in that court case, about 20 percent of the imports were for a niche product that had no comparable domestic product, *i.e.*, the products were not used in the same applications nor were they interchangeable.