BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

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

Recourse to Article 21.5 of the DSU by Canada

(AB-2006-1)

APPELLEE SUBMISSION OF THE UNITED STATES OF AMERICA

February 7, 2006

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SERVICE LIST

APPELLANT

H.E. Mr. Don Stephenson, Permanent Mission of Canada

THIRD PARTIES

H.E. Mr. Carlo Trojan, Permanent Delegation of the European Commission
H.E. Mr. Sun Zhenyu, Permanent Mission of the People's Republic of China

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Table of Reports Cited

Short Title	Full Title and Citation
Article 21.5 Panel Report	Panel Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada: Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/RW, circulated 15 November 2005
Original Panel Report	Panel Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/R, adopted 26 April 2004
Argentina – Footwear	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000
Argentina – Poultry	Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003
EC – Bed Linen (Article 21.5)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India: Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003
EC – Hormones	Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998
EC – Pipe	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003
EC – Poultry	Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998
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US – Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005

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US – DRAMS	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted July 20, 2005
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001
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US – Lumber (AD)	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004
US – Lumber (CVD) (Article 21.5)	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada: Recourse to Article 21.5 of the DSU by Canada* WT/DS257/AB/RW, adopted 20 December 2005
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US – Wheat Gluten	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. In this appeal, Canada seeks to reverse the Panel's assessment of the facts in its review of the U.S. measure to comply with the recommendations and rulings of the Dispute Settlement Body ("DSB"). As the Panel itself recognized at the outset of its report, as compared with the original dispute involving the determination by the U.S. International Trade Commission ("ITC") of the existence of a threat of material injury to the U.S. softwood lumber industry, "there [were] no new issues of legal interpretation raised [in the present dispute]."[1]

2. The fundamental question before the Panel was whether, in the U.S. measure taken to comply (known for the section of the statute pursuant to which it was undertaken as the "Section 129 Determination"[2]), the ITC "evaluated the facts in an unbiased and objective manner, and whether the conclusions reached, in light of the explanations given, were such as could have been reached by an unbiased and objective decision maker based on the facts."[3] Indeed, that is how Canada itself characterized the question before the Panel.[4] In answering that question affirmatively, the Panel made "an objective assessment of the matter before it," as it was required to do under Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"). Moreover, the Panel's report "set out the findings of fact, the applicability of relevant provisions and the basic rationale behind [the] findings and

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[1] Panel Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada: Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/RW, para. 7.14 (circulated Nov. 15, 2005) ("Article 21.5 Panel Report").

[2] United States International Trade Commission, *Section 129 Determination: Views of the Commission in Softwood Lumber from Canada* (Nov. 24, 2004) ("Section 129 Determination") (Exhibit US-1).

[3] Article 21.5 Panel Report, para. 7.19.

[4] *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada: Recourse to Article 21.5 of the DSU by Canada*, WT/DS277, First Written Submission of Canada, para. 10 (Mar. 30, 2005) ("Canada First Written Submission (21.5)").

recommendations that it [made]," as required by Article 12.7 of the DSU. As the ITC's conclusions were entirely consistent with Articles 3.5 and 3.7 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") and Article 15.5 and 15.7 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), the Panel made no legal error in upholding them. Accordingly, the Appellate Body should reject in its entirety Canada's request that the Panel's findings be reversed.

3. Notwithstanding the fact-intensive nature of the Panel's review pursuant to Article 21.5 of the DSU of the ITC's threat determination, Canada frames its challenge to the Panel's findings as a challenge based on issues of law covered in the panel report and legal interpretations developed by the panel. Of course, it must do so to bring its challenge within the scope of appellate review defined in Article 17.6 of the DSU. Thus, Canada's principal assertion is that, contrary to DSU Article 11, the Panel failed to perform an objective assessment of the matter before it. That is a serious allegation – one which, in the Appellate Body's words, "goes to the very core of the integrity of the WTO dispute settlement process itself,"[5] and which, in this case, is demonstrably false.

4. At the outset, it is important to recall that, while "the question whether a panel has made an 'objective assessment' of the facts is a *legal* one," the Appellate Body has:

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[5] Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, para. 133 (adopted Jul. 23, 1998) ("*EC – Poultry*"); *see also* Appellate Body Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, para. 163 (adopted Feb. 17, 1999) ("*Korea – Alcoholic Beverages*").

> [T]aken care to emphasize that a panel's appreciation of the evidence falls, in principle, 'within the *scope of the panel's discretion as the trier of facts*'. . . . In assessing the panel's appreciation of the evidence, we cannot base a finding of inconsistency under Article 11 simply on the conclusion that we might have reached a different factual finding from the one the panel reached. Rather, we must be satisfied that the panel has exceeded the bounds of its discretion, as the trier of facts, in its appreciation of the evidence. As is clear from previous appeals, we will not interfere lightly with the panel's exercise of its discretion.[6]

5. In this appeal, Canada in effect is asking the Appellate Body to replace the Panel as "the trier of fact." Rejecting the possibility that different decision makers might view the facts differently – as the Appellate Body recognized in *US – Wheat Gluten*, and as the Panel recognized in the present dispute[7] – Canada insists that the only conclusion that could have been

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[6] Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, para. 151 (adopted Jan. 19, 2001) (internal citations omitted) ("*US – Wheat Gluten*"). It should be noted that, in this context, the Appellate Body's use of the term "trier of fact" evidently was not describing the panel's relationship to the competent authorities; rather, it was describing the panel's relationship to the Appellate Body. In other words, its use of the term "trier of fact" was not a departure from the well-established proposition that it is the competent authority that establishes and evaluates the facts in a safeguard investigation (or, for that matter, in an antidumping or countervailing duty investigation), and it is the panel that reviews the authority's establishment and evaluation of the facts under the applicable standard of review (rather than making *de novo* findings). *See id.*, para. 147; *see also* Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, para. 188 (adopted July 20, 2005) ("*US – DRAMS*"); Appellate Body Report, *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*, WT/DS132/AB/RW, para. 84 (adopted Nov. 21, 2001) ("*Mexico – HFCS (Article 21.5)*"); Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, para. 74 (adopted Nov. 5, 2001) ("*US – Cotton Yarn*"); *Argentina – Safeguard Measures on Imports of Footwear*, Appellate Body Report, WT/DS121/AB/R, para. 121 (adopted Jan. 12, 2000) ("*Argentina – Footwear*").

[7] Article 21.5 Panel Report, para. 7.28 ("Merely that alternative conclusions might also be within the range of possible determinations that would satisfy that standard does not demonstrate that the conclusions actually reached are not consistent with the requirements of the AD and SCM Agreements.").

reached by an objective and unbiased decision maker was a conclusion of no threat of injury to the U.S. softwood lumber industry. Indeed, in the original dispute, based on its view that there is only one conceivable outcome, Canada had asked the Panel to suggest that the United States come into compliance with its obligations under the covered agreements by withdrawing its affirmative threat of injury determination and, accordingly, withdrawing the antidumping and countervailing duty orders supported by that determination. The panel declined to make that suggestion.[8]

6. In this appeal, Canada principally argues that the Panel erred because, according to Canada, it did not "interpret and apply" the relevant provisions of the covered agreements; it did not conduct a critical and active analysis of the ITC's conclusions and explanations; and it did not apply adopted findings from the original panel report. Canada then briefly asserts that the Panel erred by failing to articulate a "basic rationale" for its findings. Finally, having laid out what it perceives as the Panel's errors, Canada proceeds to reargue the merits of its claim, in effect urging that the Appellate Body stand in for the Panel and make its own assessment of the ITC's evaluation of the evidence.

7. In this submission, the United States will show that each of Canada's arguments is without merit. At the outset, we will show that Canada's appeal is based on a fundamental mis-characterization of the role of the Panel in this Article 21.5 proceeding. Contrary to Canada's description of how the Panel should have approached its task, the Panel properly appreciated

[8] Panel Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/R, para. 8.8 (adopted Apr. 26, 2004) ("Original Panel Report").

four essential aspects of its role: *first*, that it should not make *de novo* findings but, rather, determine whether the findings the ITC made could have been made by an objective and unbiased decision maker; *second*, that the existence of alternative plausible explanations with respect to any given factor relevant to a determination of threat of injury would not necessarily preclude finding that the ITC's conclusions could have been reached by an objective and unbiased decision maker; *third*, that the ITC's findings had to be evaluated as an integrated whole, rather than piecemeal; and, *fourth*, that, taking account of the findings from its original report, its focus should be on the explanations that the ITC set forth in its Section 129 Determination

8. With respect to this last point, the United States will show that Canada mistakenly faults the Panel for not crediting certain findings from the original panel report. The United States will demonstrate that the reports from other disputes that Canada relies upon for the proposition that the original report tied the Panel's hands with respect to the findings it could make in its Article 21.5 report are entirely inapposite. In one dispute, for example (*EC – Bed Linen (Article 21.5)*), the Appellate Body found that where an aspect of a party's original measure was found to be *not* inconsistent with the covered agreements, the party could rely on that finding in crafting its measure to comply. That outcome has no relevance here, however, where the ITC's original measure was found to be inconsistent with the covered agreements due to the Panel's inability to conclude that it "relied upon and explained relevant evidence in such a way as to lend reasoned support to the determination."[9] Other dispute settlement reports to which Canada refers are

[9] Article 21.5 Panel Report, para. 7.11 n.55 (Panel summarizing basis for conclusion in its original report).

similarly irrelevant. In any event, the Panel did, in fact, refer to its original report when that was appropriate (as, for example, in articulating the applicable standard of review, and in identifying the nature of a threat determination).

9. The United States also will show that in addition to misunderstanding the role of the Panel relative to the role of the ITC, Canada misunderstands the role of the Appellate Body relative to the role of the Panel. In particular, notwithstanding the fact-intensive nature of its challenge, Canada disregards the Appellate Body's oft-repeated affirmation that it "will not interfere lightly with the panel's exercise of its discretion."[10] Thus, it asks the Appellate Body, in effect, to supplant the Panel and to review afresh the ITC's evaluation of the facts, making its own assessment of the weight and significance to be attributed to the diverse aspects of that evaluation.

10. Turning to Canada's particular arguments, the United States will address Canada's contention that the Panel erred in failing to "interpret and apply" relevant provisions of the covered agreements. The United States, first, will show that Canada ignores the interpretation of relevant provisions that the Panel carried out in its original report and adopted by reference in its

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[10] Appellate Body Report, *US – Wheat Gluten*, para. 151; *see also id.*, para. 154 ("We recall that it is not part of our mandate to examine the facts afresh."); Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India: Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, para. 169 (adopted Apr. 24, 2003) ("*EC – Bed Linen (Article 21.5)*") ("as under Article 11 of the DSU, we 'will not interfere lightly with [a] panel's exercise of its discretion' under Article 17.6(i) of the *Anti-Dumping Agreement*"); Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, para. 125 (adopted Aug. 18, 2003) ("*EC – Pipe*") (same); Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, para. 174 (adopted Aug. 31, 2004 ("*US – Lumber (AD)*") (same).

Article 21.5 report. This is the case, in particular, with respect to the standard of care applicable to threat of injury determinations. In the original dispute, the Panel made findings on this subject in the context of Canada's claim that the original determination was inconsistent with the "special care" provisions in Article 3.8 of the AD Agreement and Article 15.8 of the SCM Agreement. It found that the latter provisions simply reinforce the basic requirements with respect to consideration of threat factors set forth in Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement. Nevertheless, in the present dispute, Canada faults the Panel for not holding the United States to a "high standard," the contents of which it never actually defines.

11. Likewise, in the original dispute, the Panel rejected Canada's argument that a determination of threat of injury requires a finding of a single change in circumstances that would cause a threat of injury to become actual injury, thus demonstrating that the threat is clearly foreseen and imminent. Nevertheless, in the present dispute, Canada again urged that view upon the Panel and now urges it upon the Appellate Body.

12. Canada's disregard of legal interpretation issues that were finally resolved in the original dispute is especially surprising, given that elsewhere in its appellant submission Canada faults the Panel for *not* having considered itself constrained by findings in its original report. (As we will show, the Panel properly considered itself not constrained in these other respects in the manner Canada suggests, as the original findings at issue were findings of insufficient explanation on particular points.)

13. Next, still with respect to Canada's argument that the Panel failed to interpret and apply relevant provisions, we will show that Canada mistakenly faults the Panel with holding the ITC to a *lower* standard of care than would apply to a determination involving present material injury. Canada focuses on a statement by the Panel recognizing that the inferences regarding threat that may be drawn from a given set of facts may be broader than the inferences regarding present injury. Canada mis-reads that observation as an articulation of a "lower standard of care."

14. Next, we will address Canada's argument that the Panel failed to interpret and apply Articles 3.7(i) and 3.7 (iii) of the AD Agreement (as well as the corresponding provisions of the SCM Agreement, Articles 15.7(ii) and 15.7(iv), respectively). We will show that this contention amounts to an argument that the provisions at issue actually prescribe particular methodologies for considering threat factors regarding the rate of increase of subject imports and the price depressing or suppressing effect of subject imports. We will show that the Panel properly declined to construe the relevant provisions as prescribing any particular methodology. In doing so, it did not fail to interpret or apply the relevant provisions.

15. We then will turn to Canada's arguments regarding causation. We will show that, as with its arguments regarding the consideration of threat factors, Canada incorrectly assumes that the articles of the covered agreements pertaining to causation (AD Agreement Article 3.5 and SCM Agreement Article 15.5) prescribe specific methodological approaches. In particular, Canada mistakenly asserts that the Panel erred by not finding that the causation provisions required the ITC to undertake a non-attribution analysis with respect to every factor alleged to be injuring the

domestic industry, regardless of whether a factor had been determined to be a "known factor other than the dumped [subsidized] imports" within the meaning of those provisions. Canada compounds its mistake by suggesting that the Panel also erred by not finding that the ITC was required to cumulate the effects of factors other than dumped/subsidized imports (including factors only alleged to be "other known factors") and then undertake a non-attribution analysis with respect to the cumulated effects. In making this last argument, Canada relies on Appellate Body reports that deal with completely unrelated issues, such as cumulation of *dumped* imports for purposes of an injury analysis.

16. After rebutting Canada's assertion that the Panel made interpretive errors in addressing the question of causation and the related question of non-attribution, we will turn to Canada's argument that the Panel failed to discharge its DSU Article 11 obligation to make an objective assessment of the matter before it. We will show, first, that Canada makes this serious allegation (which takes up most of its appellant submission) without any acknowledgment of the relevant standard for determining whether a panel should be found to have breached its obligation under Article 11. We then will address each of the areas in which Canada alleges that the Panel failed to make an objective assessment of the matter before it. Much of our discussion in this part of the submission will relate back to our discussion of the applicable standard of review. Many of Canada's allegations of lack of objective assessment amount to arguments that (1) the Panel should have treated a plausible alternative explanation of the evidence as rendering the ITC's explanation implausible, or (2) the Panel should have considered itself constrained by findings from its original report, even where those findings simply noted a lack of explanation in the

ITC's original threat determination. Of course, neither such argument is a basis for finding that a panel failed to make an objective assessment of the matter before it. Nor are any of the other arguments that Canada advances in connection with its DSU Article 11 claim.

17. Finally, with respect to Canada's DSU Article 12.7 argument, the United States will demonstrate that the Panel did meet – and, in fact, exceeded – the requirement to set out its "basic rationale."[11] In this case, the Panel's basic rationale is manifest from original reasoning set forth in its report, as well as references to its original report, the report of the Appellate Body in *US – DRAMS*, and other Appellate Body and panel reports.

II. BACKGROUND

18. Canada's appellant submission opens with a lengthy factual background section. The sheer length of Canada's recital of the facts as Canada understands them belies the notion that the review it seeks is in fact a review of "issues of law covered in the panel report and legal interpretations developed by the panel,"[12] as opposed to a *de novo* review of factual findings. In any event, Canada mischaracterizes the analysis and findings in both the ITC determinations and the original and Article 21.5 panel reports.

A. Original ITC Determination

19. In its original determination, the ITC concluded that the volume of subject imports during the period of investigation – which accounted for between 33.2 percent and 34.3 percent of the

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[11] Appellate Body Report, *Mexico – HFCS (Article 21.5)*, para. 106; *see also* Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, para. 276 (adopted Mar. 21, 2005) ("*US – Cotton*"); *id.*, para. 277 (finding reasoning to be consistent with Article 12.7, even though it was "brief").

[12] DSU, Art. 17.6.

U.S. market – was already significant, and increased during the period of investigation, notwithstanding the effect of an agreement between the United States and Canada, in place since May 1996, ("Softwood Lumber Agreement" or "SLA") that restrained trade in softwood lumber.[13] Prices of both domestically-produced and imported Canadian softwood lumber fell substantially through the third and fourth quarters of 2000 to their lowest point for the 1999-2001 period. The evidence generally confirmed that the price decline, particularly in 2000, was the result of too much supply in a market with high, but relatively stable, demand. The ITC found that, while the record presented clear evidence that the significant volume of subject imports had *some* price effects, it could not conclude that price effects were yet *significant*, given that the excess supply in the market from both subject imports and domestic production had contributed to the price declines in 2000.[14]

20. The condition of the domestic industry had deteriorated, primarily as a result of substantial declines in prices, and thus was in a vulnerable state; while subject imports had *some*

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[13] On May 29, 1996, the United States and Canada formally entered into the U.S./Canada Softwood Lumber Agreement ("SLA"), which remained in effect for five years, from April 1, 1996 until March 31, 2001. Under the SLA, in exchange for commitments from the United States not to initiate or otherwise take action under several U.S. trade statutes with respect to imports of softwood lumber from Canada, Canada agreed to place softwood lumber on its export control list and to collect a fee on issuance of a permit for export to the United States of softwood lumber first manufactured in the provinces of Ontario, Quebec, British Columbia, or Alberta ("the covered provinces"), for quantities above a negotiated baseline.

[14] Canada incorrectly states that the "USITC also did not attribute any of the decline in domestic prices during the period of investigation to subject *prices*, because it found no evidence of injurious price competition." Canada Appellant Submission, para. 23. This statement is wrong. In the original determination, the ITC found in its present material injury analysis that subject imports had *some* price effects. United States International Trade Commission, *Softwood Lumber from Canada (Inv. Nos. 701-TA- 414 and 731-TA-928 (Final)), Determinations and Views of the Commission*, at 34-35 (USITC Pub. 3509) (May 2002) ("Original Determination").

impact on the domestic industry, the ITC could not conclude that the impact was yet *significant*. A key element to its analysis was the restraining effect of the SLA on the volume of subject imports and thus the impact of subject imports on prices and the condition of the domestic industry. The ITC's subsidiary findings regarding present material injury were not negative and supported the existence of a threat of material injury.

21. The ITC found a threat of material injury in its original investigations due to the imminently foreseeable progression of market factors that were already present: a large and increasing volume of subject imports, the existence of some price effects from those subject imports, and a deteriorating, vulnerable domestic industry already feeling some impact from subject imports.[15] The ITC found that there was a likelihood of substantial increases in subject imports based on six subsidiary factors: 1) Canadian excess capacity and projected increases in capacity, capacity utilization, and production; 2) the export orientation of Canadian producers to the U.S. market; 3) the increase in subject imports over the period of investigation; 4) the effects of expiration of the SLA; 5) subject import trends during periods when there were no import

[15] Canada's contention that the "central question for the USITC in assessing threat of injury" was that it must demonstrate a change from "the non-injurious *status quo*," is based on its repeated mischaracterization that the subsidiary findings in the ITC's present material injury determination were negative. *See* Canada Appellant Submission, para. 25. In making such statements throughout these proceedings, Canada fails to recognize the interrelationship between the existence of a threat and the progression to material injury. We note, however, that the Panel found that "it is clear to us that the finding of no material injury caused by Canadian imports during the period of investigation does not preclude a finding of threat of material injury in the circumstances of this case. The USITC did not find no material injury to the domestic industry during the period of investigation in the sense that the condition of the industry was good, but rather that the poor condition of the domestic industry could not be attributed to the effects of Canadian imports so as to support an affirmative determination and the imposition of measures. Against that background, while it is possible to disagree with the USITC's analysis, we cannot conclude that it is unreasonable." Article 21.5 Panel Report, para. 7.57.

restraints; and 6) forecasts of strong and improving demand in the U.S. market. Each of the six subsidiary factors related directly to threat factors regarding a significant rate of increase in imports and sufficient freely disposable production capacity. The ITC also found that the additional subject imports, which it concluded were likely, would further increase the excess supply in the market, putting further downward pressure on prices, thereby resulting in a threat of material injury to the U.S. industry.

B. Original Panel Report

22. The Panel in the dispute over the ITC's original threat of injury determination found that "the USITC did not violate Articles 3.7 and 15.7 of the AD and SCM Agreements by failing to properly consider the factors listed therein."[16] However, it also found that "in light of the totality of the factors considered and the reasoning in the USITC's determination, we cannot conclude that the finding of a likely imminent substantial increase in imports is one which could have been reached by an objective and unbiased investigating authority."[17] The Panel made clear that its findings were based on its view that there was "no rational explanation in the USITC determination, based on the evidence cited, for the conclusion that there would be a substantial increase in imports imminently."[18] The Panel repeated its concern regarding insufficient

[16] Original Panel Report, para. 7.87.
[17] Original Panel Report, para. 7.96.
[18] Original Panel Report, para. 7.89; *see also id.* ("In reaching this decision we have kept in mind that we may not substitute our judgment for that of the USITC, but must nonetheless carry out a detailed and searching analysis of the evidence relied upon and the reasoning and explanations given.").

explanation for the factors considered by the ITC in its original threat of material injury determination.[19]

23. In its version of the factual background to this dispute, Canada mischaracterizes as finally resolved by the original panel the question of what inferences an objective and unbiased decision maker could draw regarding certain intermediate factual issues leading to the determination of threat of injury (*e.g.*, export projections, imports trends during the 1994-1996 period, the impact of expiration of the SLA, and the U.S. demand projections).[20] As discussed below, Canada relies on its mistaken assumption that these matters were finally resolved in the original dispute as a basis for its challenge to the Panel's findings in its Article 21.5 report. It is clear from the original panel report, however – as the Panel itself recalled in its Article 21.5 report[21] – that the original panel's conclusions were based on an essential finding of insufficient explanation, rather than a finding that the evidence itself was incapable of supporting an objective and unbiased determination of threat of material injury.

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

[20] Canada Appellant Submission, paras. 31-36.

[21] Article 21.5 Panel Report, para. 7.11 n.55 ("Canada argues that the Panel originally found a lack of evidence supporting the USITC's determination, and inconsistencies between the determination with respect to material injury and threat of material injury. However, *our original conclusions concerning lack of evidence did not refer to whether evidence existed on a particular point, but rather whether the USITC's determination relied upon and explained relevant evidence in such a way as to lend reasoned support to the determination*. Indeed, under the applicable standard of review, we can imagine finding a *lack* of evidence to support a determination, in an absolute sense, only in the most extreme cases, such as where the record contains gaps in evidence, or the evidence contradicts the conclusions drawn, with no reasonable explanation." (emphasis added)).

C. Section 129 Determination

24. Following the DSB's adoption of the original panel report, the United States came into compliance with its obligations under the covered agreements through a new proceeding by the ITC (known as the "section 129 proceeding"). The ITC established procedures for conducting that proceeding, including reopening the record to gather additional information (from public data sources and from questionnaires sent to domestic producers and Canadian producers) to be used to supplement the information gathered in the original investigations.[22] The ITC sought such additional information primarily to provide it with a more complete data series for the period closest to the ITC's original determination, and thereby to assist it in considering and addressing issues raised by the original panel report regarding the imminent future.[23] Additional data from questionnaire responses were limited, because the majority of Canadian producers either expressly refused to answer, or simply did not respond to, requests in the section 129 proceeding for additional data.[24] The ITC held a public hearing and provided parties to the

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[22] The ITC issued a notice of institution in the *Federal Register* on August 5, 2004, and a notice of scheduling in the *Federal Register* on August 26, 2004. 69 Fed. Reg. 47461 (August 5, 2004) (Exhibit US-3) and 69 Fed. Reg. 52525-52526 (August 26, 2004) (Exhibit US-4).

[23] *See* Section 129 Determination, at 7-8 (Exhibit US-1). In the original investigation, the ITC collected data from questionnaires for the period of January 1999-December 2001 and considered information from public data sources primarily for the period of 1995 to 2001. In the Section 129 proceeding, the ITC sought specific additional data from questionnaires and public sources for periods in 2002 prior to the original determination.

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

proceeding three opportunities to submit written comments in the form of pre-hearing briefs, post-hearing briefs, and final comments.

25. After conducting its analysis, the ITC, on November 24, 2004, issued the Section 129 Determination, which found that "an industry in the United States is threatened with material injury by reason of imports of softwood lumber from Canada found to be subsidized and sold in the United States at less than fair value."[25]

26. The ITC's analysis of material injury and threat of material injury in this Section 129 Determination addressed all of the concerns expressed by the original panel. The original panel report recognized that subject imports already were at significant levels in terms of absolute volume and in terms of market share, but questioned whether the ITC had relied on a significant rate of increase during the period of investigation as support for its conclusion that subject imports would increase substantially in the future.[26] The original panel report also found that the ITC had not addressed why the expiration of the SLA would result in a further substantial increase in imports, rather than a reallocation of imports from Canadian provinces not covered by the SLA to previously covered provinces, or merely a shift in timing of imports to avoid duties associated with new antidumping and countervailing duty petitions.[27]

1. Likelihood of Substantially Increased Imports

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e.g., Letter to Marilyn Abbott from Elliot J. Feldman of Baker & Hostetler, counsel for Tembec, dated Sept. 17, 2004 (Exhibit US-6). Notwithstanding the deliberate refusal of full cooperation by Canadian parties, the ITC obtained sufficient public and questionnaire data to make findings necessary to implement the DSB's recommendations and rulings.

[25] Section 129 Determination, at 2, 85 (Exhibit US-1).

[26] Original Panel Report, paras. 7.89, 7.90.

[27] Original Panel Report, paras. 7.93, 7.94.

27. In the Section 129 Determination, the ITC evaluated the significance of the volume of subject imports and increases in imports in context, which included taking into account the significant restraining effect of the SLA and the impact that the expiration of that agreement would have on the market for softwood lumber, and analyzing import trends before and during the period of investigation, specifically in the context of the prevailing market conditions.[28]

28. The ITC's analysis began with the simple fact that subject import volumes already were at significant levels during the investigative period – accounting for between 33.2 percent and 34.7 percent of the U.S. market. In the Section 129 Determination, the ITC also found that the 2.8 percent rate of increase from 1999 to 2001 "is a significant rate of increase when the baseline volume is already so significant."[29] Moreover, the ITC recognized that this 2.8 percent increase occurred even with the restraining effect of the SLA in place and even though apparent U.S. consumption had declined slightly, by 0.4 percent.

29. Even more telling, there was an even greater increase in subject imports at the end of the period of investigation, when such imports were no longer subject to the SLA, including when they were not yet subject to preliminary antidumping or countervailing duties. There is a pattern of substantially increasing subject imports at the end of the period of investigation, increases of 2.4 percent from 2000 to 2001, 4.9 percent from April to December 2001, and 14.6 percent when the first quarter 2002 is compared to the first quarter of 2001. The ITC found "these import

[28] Section 129 Determination, at 20-31 (Exhibit US-1).
[29] Section 129 Determination, at 21 (Exhibit US-1).

trends during the most recent period in which there were no trade restraints to be highly indicative of whether imports are likely to substantially increase in the imminent future."[30]

30. The 14.6 percent increase in first quarter 2002 compared to first quarter 2001 occurred while apparent U.S. consumption increased by only 9.7 percent. Accordingly, market share was higher at 34.7 percent in first quarter 2002 compared with 33.2 percent in first quarter 2001. The ITC considered Canada's theory that "opposite commercial incentives" existed in these two quarters, but found that subject imports still were 6.2 percent higher in the first quarter of 2002 compared with the first quarter of 2000, while apparent U.S. consumption declined between those two quarters by 2.3 percent.

31. Thus, the record evidence indicated that there was a significant rate of increase of imports during the period examined, especially considering that the baseline volume was significant and that there was an even greater increase during periods with no import restraints in place. The record also indicated that imports increased after bonding requirements associated with preliminary countervailing duties were imposed, thereby dispelling the theory that a shift in timing accounted for the higher level of imports immediately following the expiration of the SLA. Based on this analysis and evidence, the ITC found there to be a likelihood of substantially increased imports.

2. Demand Relative to Importation

32. The original panel also found that the ITC had not made any findings in its original determination that imports from Canada would increase more than demand, thereby garnering an

[30] Section 129 Determination, at 30 (Exhibit US-1).

increased share of the U.S. market, and that the ITC had not discussed market share at all in the context of its original threat of material injury determination.[31] In its Section 129 Determination, the ITC found that there was no basis in the record evidence to conclude that likely substantial increases in subject imports would be outpaced by increases in demand.[32]

33. First, the ITC found that the 2.8 percent increase in subject imports significantly outstripped the 0.4 percent decline in demand from 1999 to 2001. Second, the evidence in the section 129 proceeding demonstrated that while apparent U.S. consumption for first quarter 2002 increased compared with first quarter 2001, it was at a substantially lower rate – 9.7 percent – than the 14.6 percent increase in subject imports. Thus, the actual increases in subject imports during the period of investigation substantially outstripped demand. Similarly, actual data show that subject imports after expiration of the SLA have increased at a significantly higher rate than any forecasts for increases in demand for softwood lumber for 2002 and 2003.[33]

3. Available Excess Canadian Capacity

34. The original panel found that available excess Canadian capacity, and the ITC's findings on the Canadian industry's export orientation, did not support the conclusion that excess capacity would be exported to the United States beyond the "historical" level.[34] In its Section 129 Determination, the ITC analyzed capacity and found that Canadian producers had sufficient excess capacity, and projected increases in capacity and production in 2002 and 2003, to

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[31] Original Panel Report, para. 7.95.
[32] Section 129 Determination, at 17 and 75-80. (Exhibit US-1).
[33] Section 129 Determination, at 76. (Exhibit US-1).
[34] Original Panel Report, paras. 7.91, 7.92.

substantially increase exports to the United States.[35] Even more telling was the fact that Canadian producers expected to further increase their ability to supply the U.S. softwood lumber market, projecting increases in production of 8.9 percent from 2001 to 2003 and increases in their capacity utilization to 90 percent in 2003 (from 84 percent in 2001). These increases were projected at the same time that demand in the U.S. market was forecast to remain relatively unchanged or increase only slightly.

35. Canadian production is tied to the U.S. market. The U.S. market accounts for about 60-65 percent of Canadian production and shipments, whereas in 2001, other export markets accounted for only 8 percent of Canadian production, and the Canadian home market accounted for only about 24 percent of production.

36. The record in the section 129 proceeding provided further support for the ITC's finding: In the first quarter of 2002, as apparent Canadian consumption declined by 23 percent compared with the first quarter of 2001, Canadian producers shifted sales from the home market to the U.S. market. In the first quarter of 2002, Canadian exports to the U.S. market accounted for 63.8 percent of Canadian production compared with 54.2 percent for the first quarter of 2001 and 55.8 percent for the first quarter of 2000. Given the positive record evidence on the export orientation of Canadian lumber producers, the ITC discounted Canadian producers' self-interested projections that additional production would be exported to the United States at a rate of 20 percent of production – well below historical levels of about 60 percent.

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[35] Section 129 Determination, at 31-40 (Exhibit US-1). Canada had substantial capacity to produce softwood lumber, equal to about 60 percent of U.S. consumption. Excess Canadian capacity in 2001 had increased to 5,343 mmbf, which was equivalent to 10 percent of U.S. apparent consumption, as capacity utilization declined to 84 percent from 90 percent in 1999.

37. The evidence on the record, particularly with regard to current subject import trends, the restraining effect of the SLA, excess Canadian capacity and projected increases in capacity, capacity utilization and production, and demand projections supported the ITC's conclusion in its Section 129 Determination that imports will increase at a substantial rate in the imminent future.

4. Likely Price Effects

38. The ITC found that the substantial and increasing volume of subject imports at significantly declining prices during the period of investigation adversely affected prices for the domestic product.[36] The substantial price declines in 2000 led to the deterioration in the condition of the domestic industry. Prices again were weak toward the end of the period of investigation, with prices in the third and fourth quarters of 2001 and the first quarter of 2002 at levels as low as they had been in 2000. While prices increased in the first quarter of 2002, as consumption temporarily increased, they were still at levels as low as those reported in the second half of 2000, when subject imports were having an impact on financial performance of the domestic industry. Specifically, while the composite price for the first quarter of 2002 – at $318 – was higher than for the first quarter of 2001 – at $284 – it was substantially lower than $384, which was the composite price in the first quarters of 1999 and 2000, respectively.

5. Likely Impact of Subject Imports

39. The condition of the domestic industry, and in particular its financial performance, deteriorated and remained weak over the period of investigation, as a result of the substantial

[36] Section 129 Determination, at 46, 53-54 (Exhibit US-1).

decline in prices.[37] Subject imports were increasing substantially after expiration of the SLA and at the end of the period examined, while subject imports were entering at prices at their lowest levels during the period of investigation. The ITC found that the declines in the industry's performance, particularly its financial performance, made it vulnerable to future injury.

40. The ITC considered the improvements in the industry's financial performance in the first quarter of 2002, and found that when these data were placed in perspective, they did not undermine the ITC's finding that the domestic industry was vulnerable to the likely substantial increases in subject imports at low prices. The ITC found that the financial data for a single quarter were not necessarily an accurate indicator of the industry's performance for the entire year. Moreover, the improvement in the domestic industry's financial performance in the first quarter of 2002 resulted from increases in prices, as consumption temporarily increased. The evidence of sharp declines in U.S. housing starts in March 2002 demonstrated that this increase in consumption was not likely to be sustained.

6. Causal Relationship and Analysis of Other "Known" Factors

41. Finally, the original panel report expressed concern with the discussion, or more precisely what it saw as an inadequate treatment, of other factors potentially causing injury in the context of the ITC's threat analysis in the original determination.[38]

42. The ITC demonstrated a causal relationship between the likely substantial increases in subject imports and likely price effects and their consequent threat to the already vulnerable domestic industry in the imminent future. In the Section 129 Determination, the ITC integrated

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[37] Section 129 Determination, at 55-63. (Exhibit US-1).
[38] Original Panel Report, paras. 7.134 - 7.136.

its causation discussion into its analysis of the threat factors, particularly its analysis of the likely volume and likely price effects of subject imports on the already vulnerable domestic industry.[39]

43. The ITC also properly examined evidence of factors alleged to be other factors injuring the domestic industry to determine whether any of these could be considered "known factors" other than the dumped and subsidized imports, to ensure that it did not improperly attribute injury from other causal factors to the subject imports. In its Section 129 Determination, the ITC provided a detailed and reasoned analysis of six other factors alleged to be causing injury to the domestic industry.[40] The ITC found that the evidence did not demonstrate that any of these factors was an other known factor.

D. Article 21.5 Panel Report

44. On November 15, 2005, the Panel established pursuant to DSU Article 21.5 circulated its report. The Panel concluded that the ITC's Section 129 Determination was not inconsistent with Articles 3.5 and 3.7 of the AD Agreement or Articles 15.5 and 15.7 of the SCM Agreement. The Panel therefore considered that the United States had implemented the DSB recommendations and rulings and had brought its measure into conformity with its obligations under the AD and SCM Agreements.[41]

45. We will discuss particular findings in the Panel's Article 21.5 report as they are relevant to arguments set forth in this submission.

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[39] The ITC's analysis of the threat factors subsumes the causal link question. In this sense, its analysis would be best characterized as a unitary analysis, whereby the ITC considers whether a domestic industry is being threatened with material injury "by reason of" subject imports as a single question.

[40] Section 129 Determination, at 68-85 (Exhibit US-1).

[41] Article 21.5 Panel Report, paras. 8.1 - 8.3.

E. Extraneous Evidence Improperly Submitted by Canada Regarding NAFTA Dispute

46. Finally, in its appellant submission, Canada calls to the Appellate Body's attention the existence of "parallel proceedings under U.S. domestic law"[42] and introduces an exhibit (CDA-AB-1) consisting of the decision of an extraordinary challenge committee convened pursuant to the North American Free Trade Agreement ("NAFTA"). This separate and distinct proceeding has no relevance whatsoever to the question before the Appellate Body. It concerns a different ITC determination from the one presently under review (the original determination rather than the Section 129 Determination);[43] it involves a different body of substantive law (U.S. domestic law rather than the AD Agreement and SCM Agreement); and, with respect to the extraordinary challenge committee decision, it involves review of a panel proceeding under a very different standard from the one applicable in the present appeal (the "extraordinary challenge" standard set forth in the NAFTA, which considers whether legal errors "threaten[ ] the integrity" of the NAFTA panel review process, rather than the appellate standard set forth in the DSU).[44]

47. In at least one previous WTO dispute (*Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*), a panel has expressly declined to have recourse to the findings of a non-

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[42] *See* Canada Appellant Submission, paras. 55-59.

[43] The Section 129 Determination is based on a different evidentiary record and analysis than that in the original determination that was the subject of NAFTA proceedings. The ITC's Section 129 Determination has not been the subject of any review or decision under the NAFTA.

[44] Canada refers the Appellate Body to the findings in the first NAFTA Panel decision as allegedly persuasive with respect to this WTO proceeding without any acknowledgment of the differences in the evidence, analysis, and law. *See* Canada Appellant Submission, nn. 80, 137, 149, 194, 196, 210.

WTO dispute settlement body enforcing a non-WTO agreement.[45] Just as that panel found the non-WTO proceeding to be irrelevant to the matter before it, so should the Appellate Body in this dispute find the separate and distinct NAFTA proceeding (including Exhibit CDA-AB-1) to be irrelevant.

48. Even if it were relevant (which it is not), Exhibit CDA-AB-1 should not be considered, as it amounts to new evidence that was not before the Panel and is, therefore, beyond the scope of appellate review. As the Appellate Body explained in *US – Offset Act* in rejecting appellant's reference to documents that were not part of the panel record in that dispute, "We have no authority to consider new facts on appeal . . . [and the referenced documents] constitute new evidence. Consequently, by virtue of Article 17.6 of the DSU, we are precluded from taking those documents into account in deciding this appeal."[46] Likewise, in rejecting Canada's attempt to introduce new evidence on appeal in *US – Lumber (AD)*, the Appellate Body explained that "the materials at issue constituted new factual evidence and, therefore, pursuant to Article 17.6 of the DSU, fell outside the scope of the appeal."[47] Just as Canada's submission of new evidence was rejected there, so should it be here.

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[45] Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, para. 7.41 (adopted May 19, 2003) (rejecting argument by Argentina that panel was bound by findings of tribunal convened under Mercosur trade agreement); *id.*, n.64 ("In particular, it is not clear to us that a rule applicable between only several WTO Members would constitute a relevant rule of international law applicable in the relations between the 'parties'.").

[46] Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, para. 222 (adopted Jan. 27, 2003) (*"US – Offset Act*").

[47] Appellate Body Report, *US – Lumber (AD)*, para. 9.

III. ARGUMENT

A. Canada Makes No Distinctions Among the Different Roles of the ITC, the Panel, and the Appellate Body

49. Canada's appellant submission is devoid of any recognition of the distinct roles of the ITC, Panel, and Appellate Body. We discuss those distinctions here, before turning to Canada's particular arguments.

1. The Role of the Panel is Distinct From the Role of the ITC

50. The Appellate Body has consistently recognized the distinct roles played by an investigating authority making a determination in an antidumping or countervailing duty proceeding and a dispute settlement panel reviewing that determination.[48] It is the investigating authority that is responsible for establishing the facts, evaluating the facts, and drawing conclusions in light of its evaluation. Thus, "Article 3.7 [of the AD Agreement] explicitly recognizes that it is the *investigating authorities* who make a determination of threat of material injury."[49] Article 15.7 of the SCM Agreement is no different in this regard.

51. In reviewing an investigating authority's determination, the role of a WTO panel is not to find the facts, weigh the evidence, or substitute its judgment for that of the investigating authority (*i.e.*, it is not to engage in *de novo* review), but rather, it is to apply the applicable

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[48] *See, e.g.*, Appellate Body Report, *US – DRAMS*, para. 188; Appellate Body Report, *Mexico – HFCS (Article 21.5)*, para. 83; Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, para. 55 (adopted Aug. 23, 2001) ("*US – Hot-Rolled Steel*").

[49] Appellate Body Report, *Mexico – HFCS (Article 21.5)*, para. 83.

standard of review in assessing whether the investigating authority has established and evaluated the facts consistently with its obligations under the covered agreements.[50]

52. In the original dispute over the ITC's softwood lumber threat of injury determination, the Panel considered the applicable standard of review to include a combination of DSU Article 11 and AD Agreement Article 17.6. It considered both provisions to be relevant, given that the ITC determination supported both an antidumping duty order and a countervailing duty order.[51] The Panel summarized the AD Agreement Article 17.6 standard as follows:

> Under the Article 17.6 standard, with respect to claims involving questions of fact, Panels have concluded that whether the measures at issue are consistent with relevant provisions of the AD Agreement depends on whether the investigating authority properly established the facts, and evaluated the facts in an unbiased and objective manner. This latter has been defined as assessing whether an unbiased and objective decision maker, taking into account the facts that were before the investigating authority, and in light of the explanations given, could have reached the conclusions that were reached. A panel's task is not to carry out a *de novo* review of the information and evidence on the record of the underlying investigation. Nor may a panel substitute its judgment for that of the investigating authorities, even though the Panel might have arrived at a different determination were it considering the record evidence for itself.[52]

53. The Panel then described the DSU Article 11 standard as "similar[ ]."[53] The Panel also took note of Canada's acknowledgment that the two standards complement one another, and that the *Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or the Agreement on Subsidies and Countervailing Measures* ("Declaration of Ministers") "recognized the need for consistent

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[50] *See, e.g.*, Appellate Body Report, *US – DRAMS*, paras. 186 - 188.
[51] Original Panel Report, paras. 7.11 - 7.20.
[52] Original Panel Report, para. 7.15.
[53] Original Panel Report, para. 7.17.

resolution of disputes arising from anti-dumping and countervailing duty measures."[54] In light of these acknowledgments, the Panel concluded that "[it did] not consider that it is either necessary or appropriate to conduct separate analyses of the USITC determination under the two Agreements,"[55] and that the Panel "should seek to avoid inconsistent conclusions."[56]

54. In its Article 21.5 report, the Panel incorporated the foregoing articulation of the applicable standard, setting it out in an extended quotation.[57] It noted, correctly, that "[t]he parties have no disagreement regarding the applicability of this standard of review in this dispute."[58]

55. In its appeal, Canada makes no mention of the Panel's articulation of the applicable standard of review or of its agreement with that standard. Only in a footnote does Canada even mention the applicability of Article 17.6 of the AD Agreement.[59] It makes no mention of its prior acknowledgment of the complementary relationship between AD Agreement Article 17.6 and DSU Article 11 or its acknowledgment (in view of the Declaration of Ministers) that there should be consistency in the resolution of disputes involving antidumping measures and disputes involving countervailing duty measures. In Canada's view, only DSU Article 11 is relevant to

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[54] Original Panel Report, para. 7.14.
[55] Original Panel Report, para. 7.17.
[56] Original Panel Report, para. 7.18.
[57] Article 21.5 Panel Report, para. 7.15.
[58] Article 21.5 Panel Report, para. 7.15; *see also United States – Investigation of the International Trade Commission in Softwood Lumber from Canada: Recourse to Article 21.5 of the DSU by Canada*, WT/DS277, Second Written Submission of Canada, paras. 5-6 (May 17, 2005).
[59] Canada Appellant Submission, para. 60 n.60.

determining whether the Panel assessed the ITC's Section 129 Determination consistently with the Panel's obligations under the covered agreements.

56. We call attention to Canada's disregard of the Panel's articulation of the applicable standard of review for two reasons. First, by downplaying the relevance of AD Agreement Article 17.6 to the Panel's review of the ITC's Section 129 Determination, Canada obscures the point that "a panel [may not] substitute its judgment for that of the investigating authorities, even though the Panel might have arrived at a different determination were it considering the record evidence for itself."[60] This is not to suggest that under DSU Article 11 a panel *may* substitute its judgment for that of the investigating authorities.[61] However, this point is made explicit in AD Agreement Article 17.6 and is an essential aspect of panel reviews to which that provision applies. In accepting the Panel's articulation of the applicable standard of review, Canada accepted that if the Panel found the ITC's establishment of the facts to be proper and its evaluation to be unbiased and objective, it could not overturn that evaluation, "even though the panel might have reached a different conclusion."[62] Notwithstanding its acceptance of this aspect of the applicable standard of review, Canada repeatedly faults the Panel for upholding the ITC's evaluation of the facts despite the existence of plausible alternative interpretations of the facts.[63]

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[60] Original Panel Report, para. 7.15.

[61] *See, e.g.*, Appellate Body Report, *US – DRAMS*, para. 187 ("A panel may not reject an agency's conclusions simply because the panel would have arrived at a different outcome if it were making the determination itself.").

[62] AD Agreement, Art. 17.6(i).

[63] *See, e.g.*, Canada Appellant Submission, paras. 10, 103, 105 - 109.

57. Second, Canada's disregard of the Panel's articulation of the applicable standard of review is strangely at odds with Canada's critique of the Panel for making insufficient reference to its original report.[64] Contrary to Canada's assertion, the Panel did in fact make reference to its original report where that was appropriate, as was the case in articulating the relevant standard of review.

2. The Role of the Panel Included Assessing the ITC's Evaluation of the Evidence as a Whole, Rather Than Piecemeal

58. The ITC's threat determination was the result of its evaluation of the evidence it had collected as that evidence related to the several "threat factors" listed in Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement, as well as other relevant factors. Both of the foregoing provisions emphasize that no single threat factor "by itself can necessarily give decisive guidance." Rather, a threat determination must be based on "the totality of the factors considered." Consistent with that requirement, the ITC based its threat determination on the totality of the factors considered.[65]

59. Just as the ITC was required to base its conclusion on the totality of the factors considered, so the Panel, in assessing the ITC's evaluation of the facts, was to look at that evaluation as a whole rather than piecemeal. This point was underscored in the Appellate Body's recent report in *US – DRAMS*.[66]

a. Appellate Body report in *US – DRAMS*

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[64] Canada Appellant Submission, paras. 162 - 194.
[65] Section 129 Determination, at 13 (Exhibit US-1).
[66] *See* Appellate Body Report, *US – DRAMS*, paras. 150-51.

60. In its Article 21.5 report, the Panel described the Appellate Body's findings in *US – DRAMS* as "highly relevant to our task in this dispute."[67] In laying out the analytical framework that it would use in assessing the ITC's evaluation of the evidence, the Panel quoted from the *US – DRAMS* report noting, in particular, the Appellate Body's statement that:

> '[I]n order to examine the evidence in the light of the investigating authority's methodology, a panel's analysis usually should seek to review the agency's decision on its own terms, in particular, by identifying the inference drawn by the agency from the evidence, and then by considering whether the evidence could sustain that inference. Where a panel examines whether a piece of evidence could directly lead to an ultimate conclusion—rather than support an intermediate inference that the agency sought to draw from that particular piece of evidence—the panel risks constructing a case different from that put forward by the investigating authority.'[68]

61. The Panel's express reliance on the Appellate Body report in *US – DRAMS* – a "highly relevant" aspect of the Panel's analytical framework that Canada simply ignores in its appellant submission – helps to show that the manner in which the Panel assessed the ITC's evaluation of the evidence was entirely consistent with the Panel's obligation of "objective assessment" under DSU Article 11 and did not amount to an "abdication" of its responsibilities, as Canada contends.[69]

b. The Panel appropriately reviewed the ITC determination on its own terms

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[67] Article 21.5 Panel Report, para. 7.22. Although in the Panel proceeding Canada acknowledged the relevance of the *US – DRAMS* report to the present dispute, in its appellant submission Canada simply ignores the Panel's reliance on that report as a "highly relevant" part of its analytical framework.

[68] Article 21.5 Panel Report, para. 7.20 (quoting Appellate Body Report, *US – DRAMS*, para. 151 (internal citation omitted)).

[69] Canada Appellant Submission, para. 108.

62. Throughout its appellant submission, Canada accuses the Panel of an "abdication" of its responsibilities. A typical example is paragraph 108, in which Canada criticizes the Panel's treatment of the intermediate inference drawn by the ITC concerning the effects of the SLA. The Panel set out an extensive discussion of this issue, beginning at paragraph 7.29 of its report. It concluded, at paragraph 7.35, that the ITC's analysis of the effects of the SLA was not unreasonable. It is clear from the Panel's discussion that it "review[ed] the agency's decision on its own terms," just as the Appellate Body in *US – DRAMS* indicated it should.[70]

63. This is evident, for example, in the Panel's emphasis that the ITC "considered that evidence [of import trends] *in the light of the significant volume of imports during the period of investigation*." The Panel then went on to state that:

> The USITC's section 129 determination explains why it determined that the SLA had restrained imports, rather than resulting in mere shifts in the source and timing of imports, and why it concluded that the expiry of the SLA, in the absence of anti-dumping and countervailing measures, would result in a substantial increase in imports, *in the context of the already large baseline volume*.[71]

64. By acknowledging the relationship between the ITC's evaluation of the effects of the SLA and "the context of the already large baseline volume [of softwood lumber imports]," the Panel was "examin[ing] the evidence in the light of the investigating authority's methodology." This is precisely how the Appellate Body report in *US – DRAMS* suggested a panel should carry out its responsibility of "objective assessment" under DSU Article 11.

65. Canada had urged a very different evaluation of the evidence concerning the increases in subject imports and the effects of the SLA, one that, in particular, put much *less* emphasis on

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[70] Appellate Body Report, *US – DRAMS*, para. 151.
[71] Article 21.5 Panel Report, para. 7.35 (emphases added).

"the context of the already large baseline volume."[72] The Panel recognized that Canada offered "a plausible alternative line of reasoning," but found that this fact alone would not justify rejection of the ITC's determination under the applicable standard of review.[73] In other words, the plausibility of Canada's alternative line of reasoning did not render the ITC's line of reasoning implausible, such that the conclusions to which it led could not have been reached by an objective and unbiased decision maker.

66. It is important to underscore this last point because Canada seems to operate under the misguided understanding that critical review of an investigating authority's explanation with respect to a given piece of evidence requires rejection of that explanation if the reviewer identifies a plausible alternative explanation.[74] However, that is not what critical review requires. Although critical review requires consideration of the explanation at hand in the light of plausible alternative explanations, it is not the case that the identification of a plausible alternative explanation will cause the explanation under review to become implausible. There is nothing inherently illogical about two different plausible explanations of the same evidence co-existing. Thus, as the Appellate Body discussed in *US – Lamb Meat*, to conclude that an explanation is "not reasoned," it is not sufficient that an alternative explanation is merely found

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[72] *See* Canada First Written Submission (21.5), paras. 54-59, 60-67, 69-77.

[73] Article 21.5 Panel Report, para. 7.35.

[74] *See, e.g.*, Canada Appellant Submission, para. 103 (criticizing Panel for upholding ITC evaluation of evidence "even in the face of what the Panel acknowledged were 'plausible alternative explanations'").

to be "plausible." Rather, the explanation under review must "not seem adequate in the light of that alternative explanation."[75]

67. In the present dispute, the Panel did not fail to consider the ITC's explanations of the evidence in the light of plausible alternative explanations. It simply found, as it was permitted to do, that the plausible alternative explanations did not undermine the ITC's explanations so as to compel a finding that the latter explanations were "not reasoned."

68. Turning back to paragraph 7.35 of the report under review, the Panel went on to state:

> [W]hile it may be possible to debate each aspect of the USITC determination, and come to different conclusions depending on the starting point and focus of each line of argument and analysis, our obligation is to consider whether the USITC's reasoning and conclusion as set forth in its determination were those of an objective decision maker in light of the facts, and not whether every possible argument is resolved in favour of that determination.[76]

69. It is this last statement that appears to be at the core of Canada's charge, at paragraph 108 of its appellant submission, that the Panel "abdicat[ed]" its responsibility under DSU Article 11. Yet, in reality, the statement is nothing more than a summary of the applicable standard of review as described by the Appellate Body in *US – DRAMS*. Contrary to Canada's assertion, the Panel did not say that "it was not required to *examine* each and every aspect of the USITC's conclusions."[77] It said that "it may be possible to *debate* each aspect of the USITC determination, and come to different conclusions depending on the starting point and focus of

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[75] Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, para. 106 (adopted May 16, 2001) ("*US – Lamb Meat*").

[76] Article 21.5 Panel Report, para. 7.35.

[77] Canada Appellant Submission, para. 108 (emphasis added).

each line of argument and analysis."[78] In other words, different decision makers looking at the same body of evidence may draw different inferences depending on the manner in which they evaluate the evidence (*i.e.*, "the starting point and focus of each line of argument and analysis" that they apply to the evidence).

70. Far from an abdication of its responsibility, the Panel's statement was an unremarkable recognition of the nature of its role under the applicable standard of review. The Panel was required to "review the agency's decision on its own terms."[79] In this particular instance, that meant reviewing whether an objective and unbiased decision maker could have drawn the inferences that the ITC drew about the effects of the SLA if that decision maker were to evaluate the relevant evidence in the context in which the ITC considered it, which included, in particular, "the context of the already large baseline volume."[80] The Panel in essence recognized that there might be other ways of evaluating evidence of the effects of the SLA but that, as the Appellate Body observed, "having accepted an investigating authority's approach, a panel normally should examine the probative value of a piece of evidence in a similar manner to that followed by the investigating authority."[81]

71. Moreover, the Panel's recognition that it was under no obligation to consider "whether every possible argument is resolved in favour of [the ITC's] determination" is entirely consistent with the Appellate Body's discussion in *US – DRAMS*. The question for a panel reviewing an investigating authority's determination is not whether each individual piece of evidence or each

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[78] Article 21.5 Panel Report, para. 7.35 (emphasis added).
[79] Appellate Body Report, *US – DRAMS*, para. 151.
[80] Article 21.5 Panel Report, para. 7.35.
[81] Appellate Body Report, *US – DRAMS*, para. 150.

individual factor "on its own" supports the ultimate determination reached by the investigating authority. The question is whether an objective and unbiased decision maker considering the "evidence in its totality" could have reached the determination that the authority reached.[82]

c. The Panel appropriately referred to ITC findings that were objective and unbiased as "not unreasonable"

72. One final observation that should be made about the relevance of the Appellate Body report in *US – DRAMS* to the Panel's analytical framework in this dispute concerns the phrase "not unreasonable," which the Panel used from time to time as a summation of its assessment of particular intermediate inferences that the ITC drew. Canada asserts that the Panel's use of this phrase "represents an abdication of its review function," and it faults the Panel for having applied a "standard" other than "the standard set forth in Article 11."[83]

73. In fact, as is manifest from context, the Panel's use of the phrase "not unreasonable" does not have nearly the significance that Canada ascribes to it. The Panel did not purport to apply a "'not unreasonable' standard." Rather, it used the phrase as a shorthand to express its conclusion, following the "objective assessment" required by DSU Article 11, that particular inferences that the ITC had drawn with respect to particular threat factors were the result of unbiased and objective evaluation.

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[82] Appellate Body Report, *US – DRAMS*, para. 150; *see also id.*, para. 157 ("[W]hen an investigating authority relies on the totality of circumstantial evidence, this imposes upon a panel the obligation to consider, in the context of the *totality* of the evidence, how the *interaction* of certain pieces of evidence may justify certain inferences that could not have been justified by a review of the individual pieces of evidence in isolation.").

[83] Canada Appellant Submission, para. 104.

74. As for the genesis of the phrase "not unreasonable," it must be recalled that the Appellate Body report in *US – DRAMS* held a "highly relevant" place in the Panel's analytical framework.[84] In that report, the Appellate Body made a number of observations about the role of a Panel when reviewing the determination of an investigating authority. It then stated:

> These general principles reflect the fact that a panel examining a subsidy determination should bear in mind its role as *reviewer* of agency action, rather than as initial *trier of fact*. Thus, a panel examining the evidentiary basis for a subsidy determination should, on the basis of the record evidence before the panel, inquire whether the evidence and explanation relied on by the investigating authority *reasonably* supports its conclusions. In the context of reviewing individual pieces of evidence, for example, a panel should focus on issues such as the accuracy of a piece of evidence, or whether that piece of evidence may *reasonably* be relied on in support of the particular inference drawn by the investigating authority.[85]

In fact, in delineating the various places in its report where the Panel used the phrase "not unreasonable," Canada began by referring to paragraphs 7.19-7.22,[86] a portion of the report in which the Panel was not even discussing the ITC determination *per se*, but was discussing the Appellate Body report in *US – DRAMS*.

75. In short, the Panel's use of the phrase "not unreasonable" was not the invented "standard" that Canada makes it out to be. Rather, it was a summation of the Panel's assessment, upon application of DSU Article 11, of particular intermediate inferences that the

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[84] Article 21.5 Panel Report, para. 7.22.

[85] Appellate Body Report, *US –DRAMS*, para. 188 (emphases added); *see also id.*, para. 154 ("In other words, a piece of evidence that may initially appear to be of little or no probative value, when viewed in isolation, could, when placed beside another piece of evidence of the same nature, form part of an overall picture that gives rise to a *reasonable* inference of entrustment or direction." (emphasis added)); *id.*, para. 156 (panel should have considered whether it was "reasonable" for agency to draw a conclusion in light of certain facts).

[86] Canada Appellant Submission, para. 68 n.67.

ITC drew in the course of reaching its ultimate determination of threat of material injury. As we will demonstrate in section III.D, below, the Panel's use of the phrase "not unreasonable" was consistently made in the context of the very sort of analysis that DSU Article 11 requires.

3. The Panel Properly Understood the Relevance of Its Original Report to the Task of Reviewing the Section 129 Determination

76. A third aspect of the Panel's role in this dispute that should be emphasized concerns the relevance of the original report to the findings the Panel made in its Article 21.5 review. The principal basis for the Panel's having found the ITC's original determination to be inconsistent with the covered agreements was a lack of sufficient explanation of relevant evidence "as to lend reasoned support to the determination."[87] Consequently, in its Article 21.5 review, the Panel observed that "what is most important for our analysis is the reasoning and explanation of the USITC in its section 129 determination."[88]

77. Notwithstanding the clear link that the Panel established between the findings in its original report and the focus of its Article 21.5 review, Canada argues that the Panel erred in "fail[ing] to assess the Section 129 Determination with reference to the adopted findings of its original report."[89] Canada argues that the Panel could not have made the findings that it did had it properly considered itself bound by findings from its original report. It makes this argument, in particular, concerning factual findings on export projections, imports trends during the 1994-1996 period, the impact of expiration of the SLA, and U.S. demand projections.[90]

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[87] Article 21.5 Panel Report, para. 7.11 n.55.
[88] Article 21.5 Panel Report, para. 7.12.
[89] *See* Canada Appellant Submission, para. 171.
[90] *See* Canada Appellant Submission, paras. 172-194.

78. Leaving aside Canada's enunciation of the obligation of a compliance panel with respect to its original report, Canada's argument fails for the simple reason that the original report did not contain findings that could possibly constrain the Panel in the way Canada argues. This is because, as just noted, the relevant findings from the original report were findings regarding insufficient explanation. Addressing those findings in the Section 129 Determination, the ITC provided explanation that had been absent from its original determination. It made clearer the reasoning that led it to draw particular inferences about the evidence before it, which inferences then supported its ultimate determination of threat of injury. Thus, in reviewing the Section 129 Determination, the Panel was examining information that had not even been included in the original determination, let alone included in a way that made it the subject of panel findings that might have constrained an Article 21.5 proceeding. For this reason alone, Canada's arguments that the Panel erred in not following the findings of the original report should be rejected.

79. Furthermore, Canada also overstates and mischaracterizes previous Appellate Body explanations of the impact of original reports on the analysis to be undertaken by Article 21.5 panels. Canada also incorrectly states the relevance of these explanations.

80. Canada refers, in particular, to reports from three prior disputes. Canada first refers to the Appellate Body report in *EC – Bed Linen (Article 21.5)*. It quotes the Appellate Body's statement that "'an unappealed finding included in a panel report that is adopted by the DSB must be treated as a final resolution to a dispute between the parties in respect of the particular

claim and the specific component of a measure that is the subject of that claim.'"[91] Canada completely ignores, however, the context in which that statement was made.

81. *EC –Bed Linen (Article 21.5)* involved an Article 21.5 proceeding in which India had complained that in taking a measure to comply with the DSB recommendations and rulings, the EC had failed to comply with Article 3.5 of the AD Agreement. Specifically, India claimed that the EC had failed to "ensure that injuries caused by 'other factors' was not attributed to the dumped imports."[92] India had made an identical claim in the original proceeding. The panel in that proceeding found that India had failed to make a *prima facie* case on this issue, and India did not appeal that finding.[93] In its measure taken to comply, the EC did not change (as compared with the original measure) that aspect pertaining to the consideration of other factors.[94]

82. As the Appellate Body summarized, what was at issue in *EC – Bed Linen (Article 21.5)* was "the *same* claim against an *unchanged* component of the implementation measure that was part of the original measure that was not found to be inconsistent with WTO obligations."[95] In other words, under these circumstances, the EC was entitled to rely on the finding from the original panel report that India had failed to show any WTO inconsistency in the EC's treatment of "other factors." In crafting its measure taken to comply, the EC did not have to assume that it

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[91] Canada Appellant Submission, para. 163 (quoting Appellate Body Report, *EC – Bed Linen (Article 21.5)*, para. 93).

[92] Appellate Body Report, *EC – Bed Linen (Article 21.5)*, para. 71.

[93] Appellate Body Report, *EC – Bed Linen (Article 21.5)*, para. 71.

[94] Appellate Body Report, *EC – Bed Linen (Article 21.5)*, para. 80.

[95] Appellate Body Report, *EC – Bed Linen (Article 21.5)*, para. 89.

would be "subject to a second challenge of the measure found not to be inconsistent with WTO obligations."[96]

83. Thus, contrary to Canada's portrayal, the Appellate Body report in *EC – Bed Linen (Article 21.5)* does not stand for the sweeping proposition that, as a general matter, the findings in a panel's original report limit the findings the panel is entitled to make in its Article 21.5 report. In the present dispute, Canada has *not* argued that the Panel should have been constrained by virtue of the existence of "the *same* claim against an *unchanged* component of the implementation measure that was part of the original measure that was not found to be inconsistent with WTO obligations."[97] Accordingly, the report in *EC – Bed Linen (Article 21.5)* is not relevant here.

84. Canada also asserts, again incorrectly, that a statement from the Appellate Body report in *Mexico – HFCS (Article 21.5)* "is directly on point."[98] In that dispute, the Appellate Body did not say that, in an Article 21.5 proceeding, reference to the panel's original report was *required*. Rather, it said that *if* a panel were to make such a reference, it would not come as a surprise; it "would be expected."[99]

85. It is notable, in view of Canada's DSU Article 12.7 claim (discussed in section III.E, below), that the Appellate Body made the latter statement in the context of discussing what DSU Article 12.7 requires. In fact, the statement that Canada quotes is preceded by the Appellate Body's observation that Article 12.7 does not require panels "to expound at length on the reasons

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[96] Appellate Body Report, *EC – Bed Linen (Article 21.5)*, para. 96.
[97] Appellate Body Report, *EC – Bed Linen (Article 21.5)*, para. 89.
[98] Canada Appellant Submission, para. 164.
[99] Appellate Body Report, *Mexico – HFCS (Article 21.5)*, para. 109.

for their findings and recommendations."[100] In some cases, the "basic rationale" of a panel could be discernible from the panel's reference to its original report.

86. Moreover, to the extent that the Appellate Body in *Mexico – HFCS (Article 21.5)* found that the original panel report in that dispute constrained the Article 21.5 proceeding, it was in a respect that is not at all relevant here. The *Mexico – HFCS* dispute concerned a determination by Mexico's antidumping investigating authority that a Mexican industry was threatened with material injury by reason of dumped imports of high fructose corn syrup. In the original dispute, the panel found Mexico's determination of threat to be inconsistent with Article 3.7 of the AD Agreement because, among other things, the authority had not examined the impact of "an alleged agreement between Mexican sugar millers and soft-drink bottlers to restrain the bottlers' use of HFCS."[101] In its measure taken to comply, the Mexican authority again did not examine the impact of the alleged agreement, and in the Article 21.5 proceeding, the panel found this aspect of the measure to be inconsistent with Article 3.7 of the AD Agreement. On appeal, Mexico argued that this finding amounted to legal error by the panel.

87. The Appellate Body found, however, that "Mexico seems to seek to have us revisit the original panel report."[102] The Appellate Body rejected this aspect of Mexico's appeal, finding that Mexico could not use an Article 21.5 proceeding to reopen an aspect of its original measure that had been found to be inconsistent with WTO obligations in a panel report adopted by the DSB.[103] Unlike *Mexico – HFCS (Article 21.5)*, the present dispute is not one in which the party

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[100] Appellate Body Report, *Mexico – HFCS (Article 21.5)*, para. 109.
[101] Appellate Body Report, *Mexico – HFCS (Article 21.5)*, para. 15.
[102] Appellate Body Report, *Mexico – HFCS (Article 21.5)*, para. 78.
[103] Appellate Body Report, *Mexico – HFCS (Article 21.5)*, para. 79.

whose measure is under review is seeking to use the Article 21.5 proceeding to challenge a finding of the original panel.

88. Finally, Canada seeks support from the recent Appellate Body report in *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada (Recourse by Canada to Article 21.5 of the DSU)*.[104] As with its discussion of the other reports, however, Canada quotes from this report without any reference to context.[105] At issue in the appeal in *US – Lumber (CVD) (Article 21.5)* was the scope of what should be considered the "measure taken to comply" that was under review by an Article 21.5 panel. In particular, the United States argued that in that dispute involving a countervailing duty measure, the panel had erred in finding a first assessment review to be within its jurisdiction, when the initial dispute had involved the results of an original investigation, and the measure identified by the United States as the measure taken to comply was a redetermination in that same investigation (*i.e.*, did not include the first assessment review). In the segment of the Appellate Body report quoted by Canada, the Appellate Body simply recognized that in determining the scope of measures taken to comply, it was appropriate to make reference to the recommendations and rulings in the original report adopted by the DSB.[106] That statement does not support the sweeping proposition for which Canada quotes it.

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[104] Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada (Recourse by Canada to Article 21.5 of the DSU)*, WT/DS257/AB/RW (adopted Dec. 20, 2005) ("*US – Lumber (CVD) (Article 21.5)*").

[105] Canada Appellant Submission, para. 165.

[106] Appellate Body Report, *US – Lumber (CVD) (Article 21.5)*, para. 68.

89. In sum, Canada's argument that the Panel erred by "fail[ing] to assess the Section 129 Determination with reference to the adopted findings of its original report"[107] is without foundation. The original panel's core findings of insufficient explanation were not such as could bind the Article 21.5 Panel in the way Canada suggests they should have. Moreover, the Appellate Body reports that Canada cites to support its position do not do so, as they address circumstances readily distinguishable from those at issue here. The Panel correctly understood the relevance of its original report to its Article 21.5 review. In view of the findings in its original report, it focused on the explanations that the ITC provided in its Section 129 Determination. As we will show in section III.D, below, in reviewing the ITC's explanations, the Panel carried out its responsibility consistently with the covered agreements.

4. The Role of the Appellate Body is Distinct From the Role of the Panel

90. Before leaving the subject of standard of review, we note the distinction between the role of the Appellate Body and the role of the Panel, a distinction that Canada obscures in its appellant submission. Just as the Panel's role with respect to the ITC was not to engage in a *de novo* review, but rather, to assess whether the ITC's own evaluation of the facts was unbiased and objective, so it is well settled that the Appellate Body's role with respect to the Panel is not to second-guess the Panel's "appreciation of the evidence," but rather, to assess whether the Panel made an objective assessment of the matter before it.[108]

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[107] Canada Appellant Submission, para. 171.

[108] Appellate Body Report, *US – Wheat Gluten*, para. 151; *see also* Appellate Body Report, *EC – Bed Linen (Article 21.5)*, para. 169 ("as under Article 11 of the DSU, we 'will not interfere lightly with [a] panel's exercise of its discretion' under Article 17.6(i) of the *Anti-Dumping Agreement*"); Appellate Body Report, *EC – Pipe*, para. 125 (same); Appellate Body Report, *US – Lumber (AD)*, para. 174 (same); Appellate Body Report, *United States – Definitive*

B. Canada's Allegation That the Panel Made Errors of Legal Interpretation (1) Ignores Analysis From the Original Report That the Panel Relied Upon in Its Article 21.5 Report, (2) Mischaracterizes the Panel's Discussion of the Nature of a Threat Determination, and (3) Mistakenly Assumes That the Covered Agreements Prescribe Methodologies for the Consideration of Threat Factors

91. Canada charges the Panel with erring in its legal interpretation of the AD Agreement and the SCM Agreement with respect to the nature of a threat determination and the requirements that must be met in making a threat determination.[109] Specifically, Canada alleges that the Panel erred in failing to interpret Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement consistently with the high standard that those agreements impose on an investigating authority in making a threat determination;[110] that the Panel failed to "engage in any interpretation of the specific obligations under Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement;"[111] and that the Panel failed to interpret any of the threat factors

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Safeguard Measures on Imports of Certain Steel Products, WT/DS248/AB/R - WT/DS249/AB/R - WT/DS251/AB/R - WT/DS252/AB/R - WT/DS253/AB/R - WT/DS254/AB/R - WT/DS258/AB/R - WT/DS259/AB/R, para. 497 (adopted Dec. 10, 2003) ("*US - Steel Safeguards*"); Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, para. 141 (adopted Mar. 19, 1999); Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, paras. 132-33 (adopted Feb. 13, 1998) ("*EC – Hormones*"); Appellate Body Report, *EC – Poultry*, para. 133; Appellate Body Report, *Korea – Alcoholic Beverages*, para. 163.

[109] Canada also alleges that the Panel erred by "fail[ing] to apply the law to the facts." Canada Appellant Submission, para. 77. While making an objective assessment of the ITC's application of the law to the facts is an appropriate role for the Panel, it is the task of the investigating authority and not the Panel (or the Appellate Body) to engage in fact-finding and "apply the law to the facts." The crux of Canada's challenge to the ITC's section 129 determination is that it sought to have the Panel, and now the Appellate Body, conduct a *de novo* review of the record by making its own findings of fact.

[110] Canada Appellant Submission, paras. 78, 208, 209, 213, 220.

[111] Canada Appellant Submission, para. 77.

enumerated in Article 3.7 and Article 15.7.[112] In addition, Canada alleges that the Panel erred by not interpreting the covered agreements to require the ITC to undertake its evaluation of the evidence in accordance with specific methodologies (*e.g.*, regarding the likely import and price analyses, and the causation and non-attribution analyses), even though there is no basis for such obligations in the covered agreements.[113]

92. Canada ignores that key interpretive issues were addressed in the original panel report, that the DSB adopted that report, and that the United States reasonably relied on the definitive resolution of those issues in that report as it crafted its measure taken to comply.[114] It was in view of the foregoing that the Panel properly observed that "there are no new issues of legal interpretation raised."[115]

93. Canada also misunderstands the Panel's statements regarding the nature of a threat determination, which are set out in the portion of the Article 21.5 report in which the Panel is laying out its analytical framework. Specifically, Canada mistakenly reads the Panel's recognition of the future-oriented nature of a threat determination as an expression of the view

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[112] Canada Appellant Submission, para. 82.

[113] *See, e.g.*, Canada Appellant Submission, paras. 82, 88, 89, 93, 209-216.

[114] As discussed in section III.A.3, above, a defending party may reasonably rely on findings in an adopted panel report, and a complaining party may not use the Article 21.5 process to reargue matters conclusively resolved in the original report. *See* Appellate Body Report, *EC – Bed Linen (Article 21.5)*, para. 93. Ironically, whereas Canada believes that the Panel should have considered its hands tied with respect to matters in which the original report simply sought more explanation from the ITC (*see* Canada Appellant Submission, paras. 163, 221, 222), Canada apparently believes that the Panel should *not* have considered its hands tied at all with respect to matters of legal interpretation on which the United States necessarily relied in crafting its measure taken to comply.

[115] Article 21.5 Panel Report, para. 7.14.

that a "lower standard of care" applies in cases involving threat as compared with cases involving present injury.

94. Canada also wrongly assumes that relevant provisions of the covered agreements prescribe particular methodologies for an investigating authority to follow in its consideration of threat factors. It charges the Panel with failing to interpret the relevant provisions because it (correctly) did not construe those provisions that way.

1. The Original Panel Resolved Key Interpretive Questions Regarding Threat Provisions

a. "High standard" applicable to threat determinations

95. In the original dispute, Canada argued on the basis of the "special care" provision in Article 3.8 of the AD Agreement and Article 15.8 of the SCM Agreement that "there is a stricter, higher standard of review for threat analysis than for present material injury analysis in the context of the covered Agreements."[116] In response to questions, Canada clarified that it was not arguing that the Panel must apply a different standard of review in disputes involving threat of material injury, but rather, that the special care provisions imposed a stricter standard of determination in threat cases, requiring a "particularly careful examination of the required elements."[117]

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[116] Original Panel Report, para. 7.31; *see also United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277, First Written Submission of Canada, paras. 63-65 (Jul. 18, 2003) ("Canada First Submission (Original Dispute)").

[117] Original Panel Report, para. 7.32 (citing Canada's Responses to Questions from the [original] Panel and the United States – First Meeting, question 4).

96. While finding that the "special care" provision obligated an investigating authority "to act with an enhanced degree of attention," the original panel pointed out that Canada "has made no arguments as to what it considers might constitute the special care required by the Agreements in threat cases."[118] The Panel indicated that in its view the "special care" obligation in Articles 3.8 and 15.8 reinforce the fundamental obligations of Articles 3.7 and 15.7 "that investigating authorities shall base a determination of threat of material injury on facts and not allegation, conjecture or remote possibility."[119]

b. Change in circumstance required to show threat

97. In conjunction with its "higher standard" argument, Canada also maintained in the original proceeding, as it does now, that Articles 3.7 and 15.7 require the identification of "a" change in circumstance to provide the certainty that the threat is clearly foreseen and imminent.[120] The original panel noted the arguments of the United States, in accord with the Appellate Body reports in *US – Lamb Meat* and *Mexico – HFCS (Article 21.5)*, "that threat of material injury is material injury that has not yet occurred, but remains a future event whose

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[118] Original Panel Report, para. 7.34.

[119] Original Panel Report, para. 7.33.

[120] *See* Original Panel Report, paras. 4.11, 7.45, 7.46; Canada First Submission (Original Dispute), paras. 80-82; Canada Appellant Submission, paras. 72, 75 ("in light of the high standard applicable to threat determinations, as to what 'change in circumstance' from the period of investigation was 'clearly foreseen and imminent,' such that subject imports that had not caused material injury in the recent past threatened to do so in the imminent future"), 76.

Canada has read the threat provision to require the investigating authority to identify "*a*" change in circumstances, *i.e.*, "an event," that will abruptly change the status quo from a threat of material injury to present material injury. The language in the covered Agreements does not use the singular form "circumstance," but rather uses the plural form "circumstances."

actual materialization cannot be assured with absolute certainty,"[121] and "that based on the facts regarding the present and past situation of the domestic industry, an investigating authority can make reasonable projections about the future, namely whether material injury is 'clearly foreseen and imminent.'"[122] Indicating that it did not disagree, in principle, with the United States' view,[123] the original panel found that "while the change in circumstances must be clearly foreseen and imminent, the text does not clearly require the identification of a single event as the relevant change in circumstances."[124]

98. Of course, Canada did not appeal the original panel's findings. Nor did Canada contend before the Article 21.5 Panel that a higher standard and "a" change in circumstance were required for the ITC to make a threat determination. However, in this appeal, Canada recycles its arguments from the original panel proceeding, insisting that the Panel should have found the

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[121] Original Panel Report, para. 7.47. *See* Appellate Body Report, *US – Lamb Meat*, para. 125 ("*threat* of serious injury" is concerned with "serious injury" which has *not* yet occurred, but remains a future event whose actual materialization cannot, in fact, be assured with certainty"); *see also* Appellate Body Report, *Mexico – HFCS (Article 21.5)*, para. 85.

[122] Original Panel Report, para. 7.50. *See* Appellate Body Report, *US – Lamb Meat*, para. 136; Appellate Body Report, *Mexico – HFCS (Article 21.5)*, para. 85.

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

[124] Original Panel Report, para. 7.55.

ITC to be bound by both a "higher standard" and a requirement to identify "a" change in circumstance in order to make a determination of threat.[125]

99. In sum, the Panel's original report resolved the key interpretive questions of (a) what the ITC was required to do pursuant to the obligation of "special care," and (b) the change in circumstance that the ITC was required to find in order to establish the existence of a threat of material injury. The United States reasonably relied on the resolution of those key interpretive questions as it crafted its measure taken to comply, and, in reviewing that measure pursuant to DSU Article 21.5, the Panel reasonably treated those questions as resolved (thus supporting its finding of "no new issues of legal interpretation raised"[126]).

2. In Recognizing the Future-Oriented Nature of a Threat Determination, the Panel Did not Find a "Lower Standard of Care" Applicable to Threat Determinations Than to Present Injury Determinations

100. Canada argues that the Panel erred by holding the ITC to a "lower standard of care" because the ITC's determination concerned threat of injury rather than present injury.[127] As discussed in section III.B.1.a, above, the question of applicable standard of care was resolved in

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[125] Canada also contends that "imposing definitive measures on the basis of threat of injury should therefore be reserved for 'limited circumstances.'" Canada Appellant Submission, para. 74. Canada relies on a mischaracterization of the Committee on Anti-dumping Practices, "Recommendation concerning Determination of Threat of Material Injury," adopted by the Committee on October 21, 1985, GATT Doc. No. ADP/25, BISD 32/182-183. (Exhibit CDA-12). It ignores the last sentence of paragraph 1 of that document, which states, "Nevertheless Article VI:1 recognizes that dumping is to be condemned if it threatens material injury to an established industry in the territory of a contracting party." *Id*. at 182, para. 1; *see* Canada Appellant Submission, para. 74; Canada First Written Submission (Original Dispute), para. 48.

[126] Article 21.5 Panel Report, para. 7.14.

[127] Canada Appellant Submission, para. 79-80.

the original dispute and was not argued by Canada before the Panel in the Article 21.5 proceeding.

101. In fact, the Panel did not find a "lower standard of care" applicable to the ITC's Section 129 Determination because it involved threat of injury rather than present injury. Canada's basis for asserting that it did is the Panel's observation that "[t]he possible range of reasonable predictions of the future that may be drawn based on the observed events of the period of investigation may be broader than the range of reasonable conclusions concerning the present that might be drawn based on those same facts."[128] This observation does not imply a "lower standard of care."

102. Moreover, as is plain from the context of the report, the Panel's observation on which Canada bases its argument follows directly from relevant portions of the Appellate Body reports in *US – Lamb Meat* and *Mexico – HFCS (Article 21.5)*. Canada, however, focuses only on the following statement in the Appellate Body report in *Mexico – HFCS (Article 21.5)* : "We note that Article 3.7 of the *Anti-Dumping Agreement* provides that a determination of a threat of material injury must be based on a change in circumstances that must be 'clearly foreseen and imminent'. Bearing in mind this high standard set by Article 3.7 . . . we see no reason to question the Panel's finding . . . ."[129]

103. Canada does not acknowledge that the latter reference to a "high standard" corresponds to the requirement that a threat be "clearly foreseen and imminent." Canada also does not acknowledge that in the very same report, the Appellate Body observed (just as the Panel did

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[128] Article 21.5 Panel Report, para. 7.13.
[129] Appellate Body Report, *Mexico – HFCS (Article 21.5)*, para. 100.

here) that "*future* events 'can never be definitely proven by the facts.'"[130] And, while Canada repeatedly charges the Panel with failing to hold the ITC to the "high standard" applicable in threat cases, it never states what that "high standard" entails, beyond what was discussed by the Panel in its original report.

104. A threat analysis is a future-oriented analysis, based not on allegation or conjecture but rather on the facts.[131] But facts, by definition, pertain to the present and past rather than the future. The Appellate Body has recognized that a threat analysis calls for projections, based on extrapolations from existing data, about the likelihood that the threat will ascend to injury. Because a threat analysis calls for projections, a determination that injury will occur absent some protective action can never be definitely proven.[132] The Appellate Body in *Mexico – HFCS (Article 21.5)* recognized this in stating:

> In our view, the 'establishment' of facts by investigating authorities includes both affirmative findings of events that took place during the period of investigation as well as 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*.[133]

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[130] Appellate Body Report, *Mexico – HFCS (Article 21.5)*, para. 85 (quoting Appellate Body Report, *US – Lamb Meat*, para. 136).

[131] AD Agreement, Art. 3.7, SCM Agreement, Art. 15.7.

[132] *See* Appellate Body Report, *US – Lamb Meat*, para. 136; *see also* Appellate Body Report, *Mexico – HFCS (Article 21.5)*, paras. 83, 85; Appellate Body Report, *US – Cotton Yarn*, para. 77 n.50.

[133] Appellate Body Report, *Mexico – HFCS (Article 21.5)*, para. 85 (emphasis added).

105. The Panel in the present dispute quoted this passage and then provided a summation of the predictive nature of threat determinations. As noted above, it is based on that summation that Canada contends that the Panel set forth a "lower standard" for threat. It did not.

106. The Appellate Body discussed a similar issue – the tension between the future-oriented nature of a threat analysis and the need for a fact-based determination – in its report in *US – Lamb Meat*. There, the Appellate Body recognized that determining the likelihood that a threat will ascend to injury ultimately calls for a degree of "conjecture." Specifically, it 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.[134]

107. In sum, contrary to Canada's mischaracterizations, the Panel's discussion of the future-oriented nature of a threat determination was in accord with Appellate Body reports discussing the very same issue. Accordingly, Canada's argument that the Panel erred in the understanding of the nature of a threat determination that it incorporated into its analytical framework is without basis.

3. The Covered Agreements Do not Prescribe Particular Methodologies for the Consideration of Threat Factors

[134] Appellate Body Report, *US – Lamb Meat*, para. 136. *See also* Appellate Body Report, *US – Cotton Yarn*, para. 77 n.50.

108. Neither Articles 3.5 and 3.7 of the AD Agreement nor Articles 15.5 and 15.7 of the SCM Agreement require an investigating authority to use a particular methodology in objectively examining evidence and making a determination based on positive evidence. Nevertheless, Canada alleges that the Panel erred in not construing those provisions to require the ITC to employ certain methodologies (*e.g.*, regarding the likely import and price analyses, and the causation and non-attribution analyses).[135] We address in this section Canada's argument that the Panel erred in not construing Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement (*i.e.*, the provisions on consideration of threat factors) to impose particular methodological requirements. We will discuss in section III.C, Canada's argument that the Panel erred in not construing Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement (*i.e.*, the provisions on causation) to impose particular methodological requirements for the analysis of causation and non-attribution.

109. Canada argues that the Panel failed to "interpret and apply" the threat provisions, specifically Articles 3.7(iii)/15.7(iv) (regarding likely price effects), and Articles 3.7(i)/15.7(ii) (regarding the significant rate of increase in subject imports).[136] However, there was no failure of interpretation and application on the Panel's part. Rather, in both instances, Canada argued unsuccessfully that the Panel should have faulted the ITC for not using a particular method of analysis in its consideration of the evidence, even though the relevant threat provisions contained no such requirement.

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[135] *See, e.g.*, Canada Appellant Submission, paras. 82, 88, 89, 93, 209-216.
[136] Canada Appellant Submission, paras. 87, 88, 89, 93, 209-216.

110. Moreover, Canada argues that by not imposing particular methodologies on the way the ITC considered evidence of threat, the Panel allowed the ITC "unfettered discretion" to "pick and choose whatever methodology [it] see[s] fit."[137] However, Canada ignores the fact that the ITC was constrained by the obligation to support its conclusions with positive evidence and objective examination.[138] That is precisely what the Panel looked for in reviewing the Section 129 Determination.[139] On this basis, the Panel properly found the ITC's determination of the existence of threat of injury to be consistent with the relevant provisions of the covered agreements.

a. Interpretation of requirements of Articles 3.7(i)/15.7(ii)

111. Canada contends that the Panel failed to "interpret" Article 3.7(i) of the AD Agreement and Article 15.7(ii) of the SCM Agreement in its review of the ITC's finding that there had been

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[137] Canada Appellant Submission, para. 89.

[138] *See* Appellate Body Report, *EC – Bed Linen (Article 21.5)*, para. 113, which states:

> Although paragraphs 1 and 2 of Article 3 do not set out a *specific* methodology that investigating authorities are required to follow when calculating the volume of 'dumped imports', this does not mean that paragraphs 1 and 2 of Article 3 confer unfettered discretion on investigating authorities to pick and choose whatever methodology they see fit for determining the volume and effects of the dumped imports. Paragraphs 1 and 2 of Article 3 require investigating authorities to make a determination of injury on the basis of 'positive evidence' and to ensure that the injury determination results from an 'objective examination' of the volume of dumped imports, the effects of the dumped imports on prices, and, ultimately, the state of the domestic industry. Thus, whatever methodology investigating authorities choose for determining the volume of dumped imports, if that methodology fails to ensure that a determination of injury is made on the basis of 'positive evidence' and involves an 'objective examination' of dumped imports . . . it is not consistent with paragraphs 1 and 2 of Article 3.

[139] *See, e.g.*, Article 21.5 Panel Report, para. 7.28.

a significant rate of increase in subject imports.[140] Canada would have had the Panel impose Canada's preferred methodology (*i.e.*, to consider whether the rate of increase was significant on the basis of the year-on-year rate of increase) as the only permissible means of analysis. It mistakenly portrays the Panel's refusal to do so as a failure of interpretation.

112. Contrary to Canada's allegation, the Panel did interpret the threat provisions and found that "[n]othing in Articles 3.7, 15.7, or any other provisions of the AD and SCM Agreements, establishes methodological requirements for the investigating authorities' consideration of the factors set out in those Articles, or sets out standards for determining the significance of the various factors."[141] At the same time, the Panel recognized that Article 3.1 of the AD Agreement (corresponding to Article 15.1 of the SCM Agreement) sets out requirements for the investigating authorities to "consider the relevant factors, and make a determination based on an objective examination of positive evidence concerning relevant factors," and that "[o]n review, a panel must consider whether the determination made is one that could be reached by an unbiased and objective investigating authority on the basis of the facts before it and in light of the explanations given."[142]

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[140] Canada Appellant Submission, paras. 93-95.

[141] Article 21.5 Panel Report, para. 7.28. Article 3.7(i) states:

> In making a determination regarding the existence of a threat of material injury, the authorities should consider, *inter alia*, such factors as:
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> (i) a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation.

[142] Article 21.5 Panel Report, para. 7.28. The Panel also recognized that "[m]erely that alternative conclusions might also be within the range of possible determinations that would satisfy that standard does not demonstrate that the conclusions actually reached are not consistent with the requirements of the AD and SCM Agreements." *Id.*

113. As Article 3.7(i)/15.7(ii) imposed no requirement on the ITC to consider the rate of increase of dumped/subsidized imports according to any particular methodology, the question for the Panel was whether the ITC's consideration of that factor amounted to unbiased and objective evaluation. In answering that question, the Panel found:

> [T]he conclusion that a 2.8 percent increase in imports was significant is not unreasonable, in light of the totality of the factors considered by the USITC, including the significant baseline volume from which that increase occurred, the restraining effect of the SLA, increases in those imports during periods when they were not subject to restraints, and the slight decline in US consumption.[143]

114. The Panel also recognized that Canada had urged an alternative way of evaluating the evidence on rate of increase. It expressly acknowledged that looking at the evidence from the point of view of a year-on-year rate of increase might lead to a conclusion different from the one

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In recognizing that the ITC considered the question that the Panel had raised in its original report – *i.e.*, whether the rate of increase in imports during the period of investigation was significant and a factor supporting the affirmative determination of threat of material injury – the Panel stated:

> We can find no error in the mere fact that the USITC made a 'new' determination in this regard – indeed, that is precisely what is expected in the context of implementing a panel's report – that the investigating authority will make a new determination. What is important at this juncture is whether the new determination is consistent with the United States' obligations under the asserted provisions of the AD and SCM Agreements.

Id., para. 7.26.

[143] Article 21.5 Panel Report, para. 7.27. While the ITC conducted a thorough and multifaceted analysis of the volume of subject imports, Canada focused on a single simple average by year for the 1999-2001 period (1.4 percent), which masks the pattern of significant increases in subject imports toward the end of the period examined – increases of 2.4 percent from 2000 to 2001 (as contrasted to 0.4 percent for 1999-2000), 4.9 percent when the April to December 2001 period is compared to the corresponding period in 2000, and 14.6 percent when the first quarter of 2002 is compared to the first quarter of 2001. Section 129 Determination, at 20-22 and 28-29.

reached by the ITC.[144] While there may well be situations in which an alternative way of evaluating the evidence undermines the conclusion that the way actually used by an investigating authority is objective and unbiased, the Panel correctly observed that this need not always be the case and that it was not the case here.[145]

115. In sum, contrary to Canada's allegation, the Panel interpreted Article 3.7(i)/15.7(ii). It correctly concluded that the provision does not prescribe any particular methodology for considering evidence of the rate of increase of dumped/subsidized imports. It then considered whether the manner in which the ITC evaluated evidence of that factor was objective and unbiased, taking into account the alternative manner of evaluating the evidence that Canada proposed. Accordingly, there is no basis for finding that the Panel failed to discharge its obligation under the covered agreements in considering this aspect of the Section 129 Determination.

b. Interpretation of requirements of Articles 3.7(iii)/15.7(iv)

116. Canada also contends that the Panel failed to interpret Articles 3.7(iii) of the AD Agreement and 15.7(iv) of the SCM Agreement in its review of the ITC's finding that subject imports are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices.[146] Canada would have had the Panel impose Canada's preferred

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[144] Article 21.5 Panel Report, para. 7.28.

[145] Article 21.5 Panel Report, para. 7.28 ("[A]n alternative view of the evidence, focussing on the annual increase and stressing the relatively small percentage change, might support a different conclusion, but this alone does not demonstrate that the USITC's analysis and determination are inconsistent with the US obligations under the AD and SCM Agreements.").

[146] Canada Appellant Submission, paras. 84-92, 209-216.

methodology (*i.e.*, a comparison between import prices and domestic prices, such as evidence of price underselling) as the only permissible means of analysis.

117. According to Canada, "Article 3.7(iii) and Article 15.7(iv) require a *comparison* between the price levels or trends at which 'imports are entering' and the price levels or trends for the domestic product."[147] Canada contends generally that only if subject import "prices are lower than prices for the comparable domestic product, or trends in those prices otherwise adversely affect prices for the domestic product (*e.g.*, by falling faster, or rising slower, than domestic prices)," can there be a threat of price depression or suppression.[148] Canada further argues, as it did before the Panel, that this type of direct comparative analysis is "required by Article 3.7(iii) and Article 15.7(iv)."[149]

118. In making this argument, Canada mischaracterizes the requirements set forth in Article 3.7(iii) and Article 15.7(iv). Those provisions require the investigating authority, in making a determination regarding the existence of a threat of material injury, to consider "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."[150] They do not specify the type of evidence or analysis necessary to support a finding with respect to this factor. For instance, they do not identify price underselling as a necessary consideration or finding in the context of a threat analysis. Conversely, the covered agreements *do* require consideration of both price

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[147] Canada Appellant Submission, paras. 86, 211.
[148] Canada Appellant Submission, paras. 86, 212.
[149] Canada Appellant Submission, para. 88.
[150] AD Agreement, Art. 3.7(iii); SCM Agreement, Article 15.7(iv).

underselling (undercutting) and price depression or suppression in a present material injury analysis.[151]

119. Moreover, contrary to Canada's assertion that import prices "would have to be lower than prices for the domestic product in order to conclude that import prices threaten imminent price depression or price suppression,"[152] price depression or suppression may occur whether or not there is price underselling. A price suppression or depression analysis considers trends for import and domestic prices to determine certain correlations between them. The pricing trend data are not necessarily limited to a size/grade or model. Using this trends analysis and other evidence, the ITC determines whether imports have prevented increases in prices for domestic products that otherwise would have occurred (suppression) or whether imports have exerted downward pressure on domestic prices (depression). Canada offers theories as to how import prices could be low or declining without involving price suppression or depression. It refers to possible explanations such as reductions in demand, declines in the price of inputs, and technological innovations. However, it points to no evidence from the ITC's section 129 proceeding or the Panel proceeding to show that these theoretical explanations have any relevance to the case at hand.[153]

120. Canada also ignores the fact that, during the section 129 proceeding, "[a]ll parties to the investigations agreed that making direct cross-species price comparisons in order to assess

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[151] *See* AD Agreement, Art. 3.2; SCM Agreement, Art. 15.2.
[152] Canada Appellant Submission, para. 212 n.219.
[153] *See* Canada Appellant Submission, para. 214.

underselling was inappropriate."[154] The ITC found that, although the differences in species for much of the imported and domestic softwood lumber limit the meaningfulness of any direct price comparisons, the evidence indicates competition across species, such that prices of a particular species will affect the prices of other species, particularly those that are used in the same or similar applications. The ITC also concluded that imported and U.S. softwood lumber were interchangeable and substitutable.[155]

121. The ITC relied on published U.S. and Canadian lumber price series, evidence of substitutability of U.S. and Canadian lumber, and evidence of cross-species price effects to determine that subject imports were entering at prices that were likely to have a significant depressing or suppressing effect on domestic prices.[156] Canada has not shown that any of the types of evidence that it has suggested as more informative would have undermined the ITC's likely price effects findings.

122. Contrary to Canada's claim, the Panel interpreted the threat provisions and found:

> [T]here is nothing in the AD or SCM Agreements that establishes methodological requirements for an investigating authority's consideration of the factors relevant to a determination of material injury or threat of material injury. There is certainly nothing that would require a focus on one aspect of the information . . . so long as the ultimate conclusion is one that could be reached by an unbiased and

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[154] Section 129 Determination, at 47 (citing Original Hearing Transcript at 93, 269-273; Dealers/Builders' Original Posthearing Brief, at 12-14) (Exhibit US-1).

In conducting a price underselling analysis, the ITC attempts to make 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. When, as in this case, products are interchangeable and substitutable but different species, direct price comparisons of prices may not be appropriate.

[155] Section 129 Determination, at 47-53 (Exhibit US-1).

[156] Section 129 Determination, at 41-54 (Exhibit US-1).

> objective investigating authority in light of the facts before it and explanations given.[157]

123. The Panel recognized that "Canada's arguments stress aspects of the evidence other than those relied on by the USITC, such as the fact that underselling could not be substantiated, or price comparisons over different time periods," while also recognizing that "the USITC's analysis integrates the pricing information into the context of the condition of the industry, the volume and trend of imports, and the effects of the SLA."[158] The Panel found that "[Canada's] arguments, while presenting reasoned alternative conclusions, do not persuade us that the USITC's determination regarding price effects, taken as a whole and on its own terms, is insufficiently reasoned or not based on positive evidence."[159] The Panel also recognized that the ITC addressed the alternative arguments presented by the parties to the section 129 proceeding.[160]

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[157] Article 21.5 Panel Report, para. 7.50.

[158] Article 21.5 Panel Report, para. 7.50. The ITC's price trends analysis included a finding that the price of SYP fell 32.9 percent, from a peak of $434/mbf in the third quarter 1999 to a low of $291/mbf in the fourth quarter 2000. The price of WSPF (a product mostly imported from Canada) fell 39.3 percent, from a peak of $336/mbf in the second quarter 1999 to $204/mbf in the fourth quarter 2000. Section 129 Determination, at n.117 (Exhibit US-1). The ITC also considered trends in average unit values for imports and domestic shipments, which confirmed declining price trends. For example, the average unit value of imports of softwood lumber from Canada, based on official U.S. Department of Commerce statistics, decreased from $395.72 in 1999 to $347.89 in 2000 and $323.57 in 2001; the average unit value essentially remained at the 2001 level in the first quarter of 2002, $324.94. Original Determination, at Table C-1, and Section 129 Report, at Table IV-2B (Exhibit US-5). Similarly, the average unit value of U.S. shipments of softwood lumber decreased from $416.13 in 1999 to $361.07 in 2000, and $347.86 in 2001 according to questionnaire responses. *Id*. The average unit value of softwood lumber was lower at $338.45 in first quarter 2002 according to questionnaire responses in the Section 129 proceeding. Section 129 Report, at Table C-1B; Section 129 Determination, at n.129.

[159] Article 21.5 Panel Report, para. 7.50.

[160] Article 21.5 Panel Report, para. 7.51.

124. In assessing the ITC's price findings, the Article 21.5 panel reasoned:

> While it is true, as Canada argues, that prices were increasing at the end of the period of investigation, it is also true, as the United States argues, that prices were as low as they had been earlier in the period, at a time when the financial condition of the domestic industry was poor. Moreover, the USITC had found prices at those levels were the cause of the poor condition of the industry, but that US lumber sales had contributed to the price effects. Thus, if that aspect were to change (as the USITC found to be the case, as discussed below), a finding of threat of material injury would not be unreasonable or unsupported by the evidence considered. While we might (or might not) have reached the same conclusions were we making the decision in the first instance based on the evidence before the USITC, we are, of course, precluded from conducting a *de novo* review. We cannot conclude that the USITC acted unreasonably in finding that increased imports at such price levels posed a threat of injury to the US industry, when viewed, as the USITC did, against the background of the circumstances of the industry during the period of investigation.[161]

125. In sum, contrary to Canada's allegation, the Panel interpreted Articles 3.7(iii)/15.7(iv). It correctly concluded that the provision does not prescribe any particular methodology for considering evidence of price suppression or depression. It then considered whether the manner in which the ITC evaluated evidence of that factor was objective and unbiased, taking into account the alternative manner of evaluating the evidence that Canada proposed. Accordingly, there is no basis for finding that the Panel failed to discharge its obligation under the covered agreements in considering this aspect of the section 129 determination.

C. The Panel Properly Found That the ITC's Threat Analysis was Consistent With AD Agreement Article 3.5 and SCM Agreement Article 15.5

126. Canada contends that the Panel committed legal error by finding that the ITC's causation and non-attribution analyses were consistent with Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement. Canada faults the Panel both for finding the methodology

[161] Article 21.5 Panel Report, para. 7.52.

employed by the ITC to be consistent with these provisions and for finding the ITC's application of that methodology to the evidence before it to be consistent with them. In this section, we address Canada's challenge to the Panel's conclusion with respect to the methodology itself. In section III.D, we address Canada's challenge to the Panel's findings that positive evidence supported the ITC's determination and that the determination was one that could have been reached by an unbiased and objective investigating authority.

1. The Requirement to Establish a Causal Relationship Between Dumped/Subsidized Imports and Threat of Material Injury

127. The covered agreements require that the investigating authority determine that subject imports cause material injury or threaten material injury to the domestic industry. Under Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement, an investigating authority first must demonstrate a causal relationship between the dumped and subsidized imports and, as relevant here, the threat of injury to the domestic industry. Article 3.5 states in relevant part:

> It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities.

A similar provision in Article 15.5 of the SCM Agreement applies to subsidized imports.[162]

128. In the Section 129 Determination, the ITC integrated its causation discussion into its analysis of the threat factors, particularly its analysis of the likely volume and likely price effects

[162] In that provision, the words "as set forth in paragraphs 2 and 4" are contained in a footnote, rather than in the main text of the provision. It is otherwise identical to Article 3.5 of the AD Agreement.

of subject imports on the already vulnerable domestic industry.[163] Rather than address the ITC's integrated analysis, Canada ignores the ITC's discussion of the condition and vulnerability of the domestic industry[164] and focuses its allegations regarding the consistency of the ITC's causation analysis and findings on a separate section of the Section 129 Determination that merely reviewed the factors involved in those findings.[165] Canada's arguments attempt to sidestep the core of the ITC's causation analysis.

129. Neither Article 3.5 of the AD Agreement nor Article 15.5 of the SCM Agreement requires the investigating authority to use any particular methodology in examining the causal relationship between dumped or subsidized imports and injury. In recognizing that the covered agreements do not prescribe a particular methodology, the Appellate Body in *EC – Pipe* stated that "provided that an investigating authority does not attribute the injuries of other causal factors to dumped imports, it is free to choose the methodology it will use in examining the 'causal relationship' between dumped imports and injury."[166] Stated another way by the

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[163] The ITC's analysis of the threat factors subsumes the causal link question. In this sense, its analysis would be best characterized as a unitary analysis, whereby the ITC considers whether a domestic industry is being threatened with material injury "by reason of" subject imports as a single question.

[164] Section 129 Determination, at 55-63.

[165] Section 129 Determination, at 66-67.

[166] Appellate Body Report, *EC – Pipe*, para. 189 ("We underscored in *US – Hot-Rolled Steel*, however, that the *Anti-Dumping Agreement* does not prescribe the *methodology* by which an investigating authority must avoid attributing the injuries of other causal factors to dumped imports. . . . Thus, provided that an investigating authority does not attribute the injuries of other causal factors to dumped imports, it is free to choose the methodology it will use in examining the 'causal relationship' between dumped imports and injury.") (citing Appellate Body Report, *US – Hot-Rolled Steel*, para. 224).

Appellate Body in *US – Hot-Rolled Steel*, "[W]hat the Agreement requires is simply that the obligations in Article 3.5 be respected when a determination of injury is made."[167]

130. In making its determination, the ITC also examines, in accordance with Articles 3.5 and 15.5, any alleged factors other than the dumped and subsidized imports that might be injuring the domestic industry to ensure that it does not improperly attribute injury from other causal factors to the subject imports. Article 3.5 of the AD Agreement states in relevant part:

> The authorities shall also examine any known factors other than the dumped imports, which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports.

The same provision in Article 15.5 of the SCM Agreement applies to subsidized imports.[168]

131. In short, the ITC's approach first asks whether an alleged other factor is an "other known factor" and, only if the first question is answered affirmatively, undertakes a further analysis consistent with Articles 3.5 and 15.5 to ensure that any injury from an other known factor is not attributed to subject imports.

2. Canada Mistakenly Assumes That the ITC Was Required to Perform a Non-attribution Analysis of Factors not Found to be "Other Known Factors" Injuring the Domestic Industry

132. Canada's argument that the Panel erred in upholding the ITC's non-attribution analysis is based on its incorrect contention that, in this case, other known factors did in fact exist.[169] Under

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[167] Appellate Body Report, *US – Hot-Rolled Steel*, para. 224.

[168] The Appellate Body in *EC – Pipe* explained that "[t]his obligates investigating authorities in their causality determinations not to attribute to dumped imports the injurious effects of other causal factors, so as to ensure that dumped imports are, in fact, 'causing injury' to the domestic industry." Appellate Body Report, *EC – Pipe*, para. 188.

[169] Canada Appellant Submission, paras. 146-147, 158-160, 242.

Canada's view, the ITC should have deemed each factor other than dumped and subsidized imports that was alleged to be injuring the domestic industry to be an "other known factor." It follows, under that view, that the ITC should have done a further analysis of each factor believed by Canada to be an "other known factor." In other words, in Canada's view, (and contrary to the understanding of Article 3.5 explained by the Appellate Body in *EC – Pipe*), the ITC was not permitted to first make a determination whether a given factor was, in fact, an "other known factor."[170]

133. The Appellate Body in *EC – Pipe* found the EC's methodology for evaluating causation to be consistent with the covered agreements. Under that methodology, the first step was the same as that undertaken by the ITC; it involved examining alleged other factors to determine if any of them are other known causal factors.

134. The Appellate Body in *EC – Pipe* equated the identification of an alleged other factor as an "other known factor" with a finding that such a factor "existed." If an alleged other factor was not found to cause injury, it had effectively been found *not* to exist. "As such, there was no 'factor'. . . to 'examine' further pursuant to Article 3.5." Under these circumstances, a factor "was not a 'known factor[ ] other than the dumped imports which at the same time [was] injuring the domestic industry.'"[171]

135. In *US – Steel Safeguards*, the Appellate Body clarified its finding from *EC – Pipe* that only a factor that is alleged to be an other factor and that is found "to exist" – *i.e.*, only an other

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[170] *See* Canada Appellant Submission, paras. 146-147, 158-160, 242.
[171] Appellate Body Report, *EC – Pipe*, paras. 178-179.

"known" factor – must be taken into account in a non-attribution analysis.[172] Canada, however, takes the discussion in *US – Steel Safeguards* out of context and effectively suggests that the Appellate Body in that dispute reached a finding contrary to its finding in *EC – Pipe*.[173] In fact, it did no such thing. This is clear when the discussion in *US – Steel Safeguards* is placed in context, as follows:

> Lastly, it may be useful to refer to our finding in *EC – Tube or Pipe Fittings* in respect of the relevance of factors that 'had effectively been found not to exist'. In that case, the competent authority had found, contrary to the submissions of the exporters, that the difference in costs of production between the imported product and the domestic product was virtually non-existent and thus did not constitute a 'factor other than dumped imports' causing injury to the domestic industry under Article 3.5 of the *Anti-Dumping Agreement*. Consequently, we found that there was no reason for the investigating authority to undertake the analysis of whether the alleged 'other factor' had any *effect* on the domestic industry under Article 3.5 because the alleged 'other factor' 'had effectively been found *not* to exist'. In other words, we did not rule that minimal (or not significant) factors need not be considered by the competent authorities in conducting non-attribution analyses. Rather, we ruled that only factors that have been found to exist need be taken into account in the non-attribution analysis.[174]

136. Moreover, in *US – Steel Safeguards*, as in the original dispute here, the issue was whether the investigating authority had failed to provide a reasoned and adequate explanation to show it had considered the alleged other factors.[175] By contrast, in its Section 129 Determination, the ITC provided a detailed, well-reasoned analysis and explanation of how it considered alleged other factors and determined that "these alleged other factors are not known or causal factors in the context of our threat analysis."[176]

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[172] Appellate Body Report, *US – Steel Safeguards*, para. 491.
[173] Canada Appellant Submission, para. 242.
[174] Appellate Body Report, *US – Steel Safeguards*, para. 491.
[175] Appellate Body Report, *US – Steel Safeguards*, para. 475.
[176] Section 129 Determination, at 68-85 (Exhibit US-1).

137. Based on the evidence in the record, the ITC found that none of these alleged other factors, expressly referred to in the original report of the Panel on the basis of arguments by the parties, constituted "other known factors."[177] Put another way, other "known" factors "had effectively been found *not* to exist."[178] Having made these findings, the ITC had no basis to undertake a further examination to ensure that injury from them was not attributed to subject imports. This approach was consistent with the approach the Appellate Body found to be permissible under the covered agreements in *EC – Pipe*.[179] Accordingly, there is no basis for finding that the Panel failed to discharge its obligations under the covered agreements in considering the causation and non-attribution aspects of the Section 129 Determination.

3. Canada Mistakenly Assumes That the ITC Was Required to Cumulate the Effects of Factors not Found to be "Other Known Factors" Injuring the Domestic Industry and Then Perform a Non-attribution Analysis on Those Factors Collectively

138. Finally, Canada has no basis for its contention that the "Panel erred by failing even to address" whether the ITC should have evaluated whether it attributed to subject imports (1) the collective or cumulative impact of third country imports and domestic supply, and (2) the cumulative impact of third-country imports.[180] First, the Appellate Body should reject these arguments because they are based on Canada's faulty assumption that these alleged other factors had been found to be "other known factors." After carefully evaluating the evidence, the ITC concluded that there was no basis to treat these factors as "other known factors" and thus no

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[177] Section 129 Determination, at 68-85 (Exhibit US-1).
[178] Appellate Body Report, *EC – Pipe*, para. 178 (emphasis in original).
[179] Appellate Body Report, *EC – Pipe*, para. 178.
[180] Canada Appellant Submission, paras. 158-160, 243-244.

basis to conduct further analysis to ensure that injury from these factors was not attributed to subject imports. The Panel reviewed the ITC's evaluation of the evidence under the applicable standard of review and properly found no basis for concluding that that evaluation was biased or not objective.[181]

139. Moreover, contrary to Canada's argument, the Appellate Body reports in *US – Steel Safeguards, EC – Pipe*, and *US – Hot-Rolled Steel* do not support the proposition that a collective analysis of other known factors is required or even the norm.[182] For example, the Appellate Body in *EC – Pipe* stated, "[W]e do not find that an examination of *collective* effects is necessarily required by the non-attribution language of the *Anti-Dumping Agreement,*" but what is required is that an investigating authority "fulfils its obligations not to attribute to dumped imports the injuries caused by other causal factors."[183]

140. Second, Canada's reliance on the cumulation provision of the covered agreements as its basis for asserting that the ITC was required to consider third country non-subject imports on a cumulative basis is entirely unfounded.[184] The cumulation provision applies only "[w]here

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[181] *See* Article 21.5 Panel Report, paras. 7.71 - 7.74.

[182] Appellate Body Report, *US – Steel Safeguards*, para. 490; Appellate Body Report, *EC – Pipe*, para. 192; Appellate Body Report, *US – Hot-Rolled Steel*, para. 228. In fact, Canada's reliance on the Appellate Body report in *US – Hot-Rolled Steel* is misplaced; that report addressed the issue of assessing the injurious effects of dumped imports separately from those of other known causal factors, and not of a collective analysis of the other known factors. Appellate Body Report, *US – Hot-Rolled Steel*, para. 228.

[183] Appellate Body Report, *EC – Pipe*, paras. 191, 192; *see also* Appellate Body Report, *US – Steel Safeguards*, para. 490.

[184] Canada Appellant Submission, para. 158. The ITC considered third country non-subject imports as a group (accounting for 3 percent of U.S. market share) and recognized that "individual country non-subject imports would have been deemed negligible under U.S. law and the WTO Agreements, with no individual country accounting for more than 1.3 percent of total imports while Canadian imports account for about 93 percent of all imports." Section 129

imports of a product from more than one country are simultaneously *subject to anti-dumping investigations [countervailing duty investigations]. . . the volume of imports from each country is not negligible [,] and . . . a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product*."[185] In setting forth the "apparent rationale behind the practice of cumulation," the Appellate Body in *EC – Pipe* stated, "A cumulative analysis logically is premised on a recognition that the domestic industry faces the impact of the 'dumped imports' as a whole and that it may be injured by the total impact of the dumped imports, even though those imports originate from various countries."[186] But, third-country imports are fairly traded and *not* subject to antidumping or countervailing duty investigations. Contrary to Canada's argument, the point made by the Appellate Body in *EC – Pipe* regarding dumped imports is not "equally relevant to an analysis of [non-subject imports and] causation under Article 3.5 of the AD Agreement."[187]

141. Moreover, even accepting, *arguendo*, Canada's premise regarding the possibility of cumulating non-subject imports, Canada has failed to point to any evidence in the ITC record that would have supported a finding that the requisite conditions of competition existed with respect to third-country imports that would have justified their collective consideration. Canada's argument also fails utterly to address the fact that each of the third-country imports

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Determination, at 74.

[185] AD Agreement, Art. 3.3; SCM Agreement, Art. 15.3 (emphasis added).

[186] Appellate Body Report, *EC – Pipe*, para. 116. In quoting from this paragraph, Canada ignores the fact that the Appellate Body was only addressing the impact of "dumped" imports and not fairly traded imports.

[187] Canada Appellant Submission, para. 158 n.166.

would have been considered negligible within the meaning of Article 5.8 of the AD Agreement and 11.9 of the SCM Agreement.

142. In sum, Canada's critique of the Panel's assessment of the causation matter is based on an erroneous characterization of the findings in the Panel's original report (and the flawed suggestion that the Panel in this dispute was constrained by those earlier findings),[188] a mistaken understanding of the obligations imposed by the covered agreements, and an inaccurate portrayal of the analysis conducted and findings made by the ITC in its section 129 determination. In view of these critical flaws, Canada's argument that the Panel erred in its assessment of the ITC's treatment of causation should be rejected.

D. The Panel Made an Objective Assessment of the Matter Before it, as Required by DSU Article 11

143. As discussed in section III.A.4, above, despite making an allegation that the Panel failed to discharge its responsibility under DSU Article 11 the focal points of its appeal, Canada nowhere acknowledges the relevant standard for reviewing such an allegation. Canada simply alleges several errors that it believes the Panel to have made and then concludes that "[i]n committing each of these errors, individually and as a whole, the Panel has failed to meet its obligations under Article 11 of the DSU."[189]

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[188] The original panel report never reached the arguments made by the United States regarding methodology or the merits of the ITC's causation analysis. Instead, the original panel made clear that its overriding concern was with an inadequate explanation that did not permit the Panel to understand the reasoning underlying the decision. Original Panel Report, para. 7.137 ("However, that does not excuse the investigating authority from the necessity of, at the time of its determination, providing an adequate explanation of its analysis such that a Panel can, with confidence, understand the reasoning underlying the decision that was actually made in order to be able to assess its consistency with the relevant provisions of the Agreements.").

[189] Canada Appellant Submission, paras. 60-64.

144. Canada does not go so far as to accuse the Panel of "egregious error[s] that call[ ] into question the [Panel's] good faith."[190] Nor does it allege that the errors it perceives the Panel to have made rise to the level of "deliberate disregard of," "refusal to consider," or "wilful distortion" of the evidence before it.[191] Even if Canada had correctly identified errors on the part of the Panel – which it has not – it still would not have demonstrated that those errors are so egregious as to warrant a finding that the Panel failed in its obligation of objective assessment under DSU Article 11.

145. As we will now show, the Panel's assessment was entirely consistent with its obligation under DSU Article 11. Canada attempts to belittle the Panel's assessment of the ITC's Section 129 Determination by characterizing it as "merely summarizing the arguments of the parties."[192] In portraying the Article 21.5 report in this manner, Canada ignores the Panel's careful, step-by-step analysis of the evidence and argument that was presented to it. Contrary to Canada's assertions, the Panel not only set forth the parties' arguments, but it also addressed each of these arguments as part of its assessment of whether the Section 129 Determination was consistent with the covered agreements.

1. Likely Increase in Subject Imports

146. In charging the Panel with failing to make an objective assessment of the matter before it, Canada focuses, in particular, on the Panel's assessment of the ITC's finding of a likely increase in subject imports and its finding of the requisite causal link between dumped/subsidized imports

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[190] Appellate Body Report, *EC – Hormones*, para. 133.
[191] Appellate Body Report, *EC – Hormones*, para. 133.
[192] Canada Appellant Submission, para. 2.

and threat of injury. We focus in this section on the issue of likely increase in subject imports and, in the next section, on the issue of causal link.

147. In its Section 129 Determination, the ITC concluded that a consistently large volume of subject imports from Canada enters the U.S. market, that subject imports hold a consistently large market share, that subject imports will continue to enter the U.S. market at their already significant and increasing volume, that the increases in the volume and market share of subject imports during the period of investigation were significant, and that subjects imports are likely to increase substantially in the imminent future.[193] In its assessment of the Section 129 Determination, the Panel correctly noted that the ITC based this conclusion on the following five factors:

> 1) [T]he trends during the period of investigation, which it concluded showed a significant rate of increase in imports, 2) the restraining effects of the SLA during the period of investigation and the likely effects of its expiration, 3) import volumes and trends in import volumes during periods of no import restrictions, 4) evidence of excess capacity, projected increases in capacity, capacity utilization and production, and export orientation in Canada, and 5) US demand forecasts.[194]

148. Canada contends that the Panel failed to conduct an objective assessment by (1) not finding that the ITC was required to evaluate the rate of increase of subject imports according to a simple, year-on-year average for the entire period of investigation (*i.e.*, the methodology Canada itself had advocated); (2) not treating as "binding" statements from the Panel's original report regarding intermediate findings by the ITC on the subjects of export projections and subject import trends during the 1994-1996 period; and (3) not taking account of what Canada

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[193] Section 129 Determination, at 20-31.
[194] Article 21.5 Panel Report, para. 7.18; *see also id.*, paras. 7.24 - 7.42.

perceived to be changes in the Section 129 Determination from the ITC's original determination regarding the impact of the SLA and U.S. demand projections.[195]

a. Rate of increase of subject imports

149. With respect to the ITC's evaluation of the rate of increase of subject imports, as we discussed in section III.B.3.a, above, the Panel correctly found that the covered agreements do not prescribe a particular methodology for consideration of the threat factors.[196] Moreover, in light of its review of the ITC's analysis and explanation of the evidence on which it relied,[197] the Panel found:

> Looking at the decision in the section 129 proceeding on this issue, the conclusion that a 2.8 percent increase in imports was significant is not unreasonable, in light of the totality of the factors considered by the USITC, including the significant baseline volume from which that increase occurred, the restraining effect of the SLA, increases in Canadian imports at a significant rate after the expiration of the SLA, increases in those imports during periods when they were not subject to restraints, and the slight decline in US consumption.[198]

150. The Panel recognized that "an alternative view of the evidence, focussing on the annual increase and stressing the relatively small percentage change, might support a different conclusion, but this alone does not demonstrate that the USITC's analysis and determination are inconsistent with the US obligations under the AD and SCM Agreements."[199] In view of the foregoing explanation by the Panel and the applicable standard that the Panel was to apply in its

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[195] Canada Appellant Submission, paras. 93-95, 172-185, 188-194, 218-224.

[196] Article 21.5 Panel Report, para. 7.28; *see also id.*, para. 7.27 ("The fact that the USITC concluded that the rate of increase was significant based on the overall rate of increase over the period of investigation rather than the year-on-year rate of increase is not demonstrably unreasonable, and we see no basis for concluding that the USITC erred in this regard.").

[197] Article 21.5 Panel Report, paras. 7.25, 7.30, 7.33, 7.34, 7.37, 7.38, 7.41.

[198] Article 21.5 Panel Report, para. 7.27.

[199] Article 21.5 Panel Report, para. 7.28.

review of the ITC and that the Appellate Body should apply in its review of the Panel (as discussed in section III.A, above), there is no basis for concluding that the Panel failed in its obligation of objective assessment by not insisting that the ITC should have evaluated rate-of-increase evidence on an average year-on-year basis.

b. The original report's findings of lack of explanation in the original determination did not bind the Panel to make particular findings in its Article 21.5 report concerning the new determination

151. With respect to the issues of export projections, subject import trends during the 1994-1996 period, the impact of the SLA, and U.S. demand projections, Canada's arguments assume incorrectly that the Panel made findings in its original report that constrained what it could find in its Article 21.5 report. It is clear from the original report that the Panel's statements regarding these issues were about the sufficiency of explanation provided by the ITC in its original determination. They were not categorical statements about whether an objective and unbiased evaluation of the evidence could or could not support intermediate findings that in turn could or could not support an ultimate determination of threat of material injury.[200] The Panel confirmed

[200] *See* Original Panel Report, para. 7.92 (export projections); para. 7.93 (effects of the expiration of the SLA); para. 7.94 (import trends during periods when the SLA was not in effect); and para. 7.95 (forecasts for demand in the U.S. market). In each of these parts of its discussion, the Panel did *not* say that the evidence simply "does not support" some intermediate inference. *See, e.g.*, *id.*, para. 7.92 (regarding export-orientation: "Nothing in the USITC determination addresses how the projected increases in exports to the United States supports the finding that imports would increase substantially."); para. 7.93 (regarding the effects of the expiration of the SLA: "The USITC determination simply does not address why the expiration of an agreement during the term of which exports nonetheless increased, would result in an imminent **substantial** increase in imports."); para. 7.94 (regarding import trends during periods when the SLA was not in effect: "While it seems obvious that the expiration of the SLA would result in unrestrained exports, the facts cited by the USITC, in light of the lacunae in the explanations given, do not support the conclusion of an imminent substantial increase in

this reading of its original report in its Article 21.5 report, stating that "our original conclusions concerning lack of evidence did not refer to whether evidence existed on a particular point, but rather whether the USITC's determination relied upon and explained relevant evidence in such a way as to lend reasoned support to the determination."[201] Accordingly, there is no merit to Canada's assertion that the discussion of these factual issues in the Panel's original report constituted a final resolution with respect to the matters in question.

152. There also is no basis for Canada's contention that the Panel failed to conduct an objective assessment by not questioning findings in the Section 129 Determination that Canada believes to be new or changed as compared with the original determination. As discussed in section III.A.3, above, the role of a panel pursuant to DSU Article 21.5 is not to assess the measure taken to comply against the original panel report but, rather, to assess it against the obligations of the covered agreements. Thus the Panel correctly observed, "[W]e must review the section 129 determination on its own term[s]. The fact that the USITC made somewhat different findings, or expressed different conclusions based on different or additional analysis and evidence than in the original determination is simply not dispositive in our decision whether the section 129 determination is inconsistent with the United States obligations under the AD and SCM Agreements."[202]

i. Export projections

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imports."); para. 7.95 (regarding the forecasts for demand in the U.S. market: "The USITC did not make any findings that imports from Canada would increase more than demand, thereby accounting for an increased share of the U.S. market. Indeed, the USITC did not address market share at all in the context of its threat of material injury determination.").

[201] Article 21.5 Panel Report, n. 55.

[202] Article 21.5 Panel Report, para. 7.57; *see also id.*, para. 7.12.

153. Regarding the issue of export projections for Canadian softwood lumber, Canada contends that the Panel failed to conduct an objective assessment because the Panel found that the ITC's explanation for discounting Canadian producers' projections in its Section 129 Determination "provides reasoned support for the USITC's conclusion."[203] Canada bases its argument on a reading of the Panel's original report as having rejected the "USITC's recycled rationale" as unsupported by the evidentiary record.[204] But, the original report faulted the ITC not for failing to provide an objective and unbiased rationale for its finding on this issue, but for providing no rationale at all.[205]

154. The ITC corrected this in its Section 129 Determination. That determination contains detailed analysis and explanation of Canadian producers' capacity, sufficient excess capacity and projected increases in production and capacity in 2002 and 2003, as well as the fact that Canadian production, which is tied to the U.S. market, accounted for 60-65 percent of Canadian production and shipments during the period of investigation.[206] In its Section 129 Determination, the ITC also provided its reasoning for finding that Canadian producers' export projections were inconsistent with the historical export orientation of the Canadian industry (which was about 60-65 percent of production). In particular, it focused on the fact that Canadian producers projected

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[203] Article 21.5 Panel Report, para. 7.42.

[204] Canada Appellant Submission, para. 177.

[205] *See* Original Panel Report, para. 7.92 ("The United States argues that reliance on the historical distribution of exports to the United States and other countries supports the USITC's finding. . . . Nothing in the USITC determination addresses how the projected increases in exports to the United States supports the finding that imports would increase substantially.") What Canada refers to as the "recycled rationale" was not in the ITC's original determination but only in submissions by counsel, and was not rejected by the original panel, as Canada contends.

[206] *See* Article 21.5 Panel Report, para. 7.41 (discussing Section 129 Determination).

that a smaller proportion (only about 20 percent) of their almost 9 percent projected production increases would be exported to the United States in 2002-2003 than the Canadian industry had exported in prior years.[207] The Panel recognized the ITC's "focus[ ] on this evidence of the export orientation of Canadian lumber producers, and discount[ing of] Canadian producers' projections that additional production would be exported to the United States at below historical levels."[208]

155. After reviewing the ITC's analysis and findings on sufficiently available excess capacity in Canada and the likelihood that a substantial portion would enter the U.S. market, the Panel concluded:

> [T]he explanation concerning the available excess capacity in Canada and the likelihood that a substantial portion of projected increases in production would enter the US market, set forth in the section 129 determination provides reasoned support for the USITC's conclusion that there would be a substantial increase in imports in the near future.[209]

156. In sum, consistent with the role of a panel in reviewing an investigating authority's determination under the AD and SCM Agreements, and consistent with its obligations under DSU Article 21.5, the Panel assessed whether the ITC evaluated evidence of export projections in an unbiased and objective manner and whether it provided an adequate explanation as to how

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[207] *See* Section 129 Determination, at 39-40. *See also* Article 21.5 Panel Report, paras. 4.174-4.175 and 4.307-4.308 ("Given the positive record evidence on the export orientation of Canadian lumber producers, the USITC discounted Canadian producers' self-interested projections that additional production would be exported to the United States at 20 percent of production – well below historical levels of about 60 percent.").

[208] Article 21.5 Panel Report, para. 7.41.

[209] Article 21.5 Panel Report, para. 7.42.

the evidence supported its findings. Accordingly, the Appellate Body should decline Canada's suggestion that the Panel failed to make an objective assessment of this matter.

ii. Subject import trends during periods of no import restraints

157. We turn next to the issue of subject import trends during periods of no import restraints. As the Panel recognized, the ITC evaluated these trends "to establish the context for evaluating the significance of changes in Canadian imports."[210] The ITC considered such import trends before the imposition of the SLA (1994-1996), during the period between the expiration of the SLA and the imposition of preliminary countervailing duties (April - August 2001), and for periods after expiration of the SLA (April - December 2001 and January - March 2002).[211] Canada focuses only on the consideration of import trends for the period before the imposition of the SLA (1994-1996) and contends that the Panel "was bound by its own prior finding to reject the USITC's recycled reliance on 1994-1996 import trends."[212]

158. In the original determination, the ITC did not discuss the increase in subject imports during the 1994-1996 period in the context of market conditions at the time. Consequently, the Panel stated in its original report that "[t]here is no discussion in the USITC's determination that would suggest that market conditions during the period before the imposition of the SLA . . .

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[210] Article 21.5 Panel Report, para. 7.33.

[211] *See* Article 21.5 Panel Report, paras. 7.33-7.34; *see also id*., paras. 4.108, 4.164-4.168, 4.298-4.301; Section 129 Determination, at 28-31. The ITC found that "[s]ubject imports increased substantially after the SLA expired and between 1994 and 1996 prior to its adoption; this behavior is highly probative of how subject imports have entered the U.S. market, and would enter the U.S. market in the imminent future, when not subject to trade restraints." *Id*. at 28.

[212] Canada Appellant Submission, para. 185.

would be sufficiently similar to predicted market conditions, so as to warrant the conclusion that imports would increase substantially."[213]

159. The ITC corrected this in its Section 129 Determination. In particular, it placed the increases in subject imports during the 1994-1996 period (before entry into force of the SLA) in the context of the trends for U.S. demand and U.S. production.[214] Accordingly, the Panel observed that in the Section 129 Determination, "the USITC also considered the pattern of increases in imports, which was at a rate higher than increases in US consumption during 1994-1996, immediately prior to the adoption of the SLA, and which increases ceased when the SLA entered into force."[215] As was the case with export projections, the Panel assessed whether the ITC evaluated evidence of import trends during periods of no restraint in an unbiased and objective manner and whether it provided an adequate explanation as to how the evidence

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[213] Original Panel Report, para. 7.94.

[214] In the Section 129 Determination, the ITC stated:

> We also consider subject import trends for the pre-SLA period in the context of concurrent market conditions. The evidence in the original record for 1995 to 1996 shows that subject import volume rose at a rate higher than increases in U.S. apparent consumption. The additional evidence in this Section 129 proceeding demonstrates that while subject imports increased substantially by 1,700 mmbf, or 10.6 percent, from 1994 to 1996, and increased their market share from 32.6 percent in third quarter 1994 to 37.4 percent in first quarter 1996, apparent U.S. consumption increased by only 1,241 mmbf, or 2.5 percent. Moreover, from 1994 to 1995, when apparent U.S. consumption declined by 707 mmbf, or 1.5 percent, and U.S. production declined by 1,875 mmbf, or 5.6 percent, subject imports which at the time were free of import restraints, increased by 890 mmbf, or 5.5 percent. Therefore, the data on market conditions during 1994-1996 provide further support to our finding that the lack of import restraints after expiration of the SLA led to increases in subject imports and thus threaten material injury to the U.S. industry.

Section 129 Determination, at 30-31.

[215] Article 21.5 Panel Report, para. 7.34.

supported its findings. Accordingly, the Appellate Body should decline Canada's suggestion that the Panel failed to make an objective assessment of this matter.

iii. Restraining effect of the SLA

160. Canada also contends that the Panel erred in its assessment of the ITC's evaluation of evidence on the restraining effect of the SLA. Specifically, it charges the Panel with failing to critique what Canada perceives to have been a change in the ITC's finding on this issue.[216] It also charges the Panel with failing to objectively assess the adequacy of the ITC's explanation of its conclusion on this issue.[217]

161. Canada's argument is based on two incorrect assumptions: first, that the ITC's findings in the Section 129 Determination concerning the restraining effects of the SLA were different from its findings in the original determination, and, second, that the ITC had found, in its *present* injury analysis, that the volume of imports did not support an affirmative determination.[218] In its original report, the Panel found that "the USITC determination simply does not address why the expiration of an agreement during the term of which exports nonetheless increased, would result in an imminent substantial increase in exports."[219] The ITC corrected this in its Section 129 Determination.[220] The ITC considered evidence demonstrating that the constraints on the volume of subject imports resulted in higher prices for such imports and higher costs for construction than in the absence of the SLA, and that imports while the SLA was in effect did

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[216] Canada Appellant Submission, paras. 188-189.
[217] Canada Appellant Submission, paras. 190-192.
[218] *See* Article 21.5 Panel Report, para. 7.30.
[219] Original Panel Report, para. 7.93.
[220] Section 129 Determination, at 23-28.

not keep pace with increases in demand. The evidence did not demonstrate that the SLA had merely resulted in a shift in imports.[221]

162. After reviewing the ITC's analysis and findings on import trends during periods of no import restraints and the related issue of the restraining effects of the SLA, the Panel concluded:

> Again, it is clear that the USITC re-examined the evidence concerning import trends, and considered that evidence in the light of the significant volume of imports during the period of investigation. We cannot conclude that the USITC's analysis of changes in demand and the effects of the SLA and provisional measures put in place as a result of this investigation is unreasonable. The USITC's section 129 determination explains why it determined that the SLA had restrained imports, rather than resulting in mere shifts in the source and timing of imports, and why it concluded that the expiry of the SLA, in the absence of anti-dumping and countervailing measures, would result in a substantial increase in imports, in the context of the already large baseline volume.[222]

163. Canada takes issue with the Panel's next statement, that "[w]hile Canada's arguments demonstrate that there is a plausible alternative line of reasoning that could be followed, under the standard of review applicable in this case, this is not sufficient for us to find a violation."[223] However, as we discussed in section III.A.1, above, the existence of a plausible alternative line of reasoning does not automatically render implausible the line of reasoning that is under review. The Panel's obligation was to consider the ITC's explanation of the evidence on the restraining effects of the SLA (or any other issue, for that matter) in view of plausible alternative explanations, but not to necessarily reject the ITC's explanation just because another explanation was found to be plausible. The question for the Panel was whether the ITC's explanation

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[221] *See* Article 21.5 Panel Report, para. 7.30.
[222] Article 21.5 Panel Report, para. 7.35.
[223] Article 21.5 Panel Report, para. 7.35.

"seem[ed] adequate in the light of that alternative explanation."[224] Reviewing the ITC's evaluation under the applicable standard, the Panel found that the ITC's explanation did indeed "seem adequate."[225]

164. In sum, the Panel assessed whether the ITC evaluated evidence of the restraining effects of the SLA in an unbiased and objective manner and whether it provided an adequate explanation as to how the evidence supported its findings. Accordingly, the Appellate Body should decline Canada's suggestion that the Panel failed to make an objective assessment of this matter.

iv. U.S. demand projections

165. Finally, Canada faults the Panel for its assessment of the ITC's evaluation of U.S. demand projections.[226] As with the other issues discussed in this section, Canada ignores that the concern the Panel expressed in its original report was a concern about the absence of a finding, rather than the quality of a finding actually made – in this case, the absence of any finding that imports from Canada would increase more than demand, thereby accounting for an increased share of the U.S. market, and the absence of any discussion of market share.[227]

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[224] Appellate Body Report, *US – Lamb Meat*, para. 106.

[225] Article 21.5 Panel Report, para. 7.35.

[226] Canada Appellant Submission, paras. 193-194. Contrary to Canada's claims, the ITC did not change its characterization of U.S. demand projections. The Panel recognized that "United States asserts that the USITC's determination, that there would not be substantial growth in demand for softwood lumber in the imminent future, is almost identical to the finding in the original determination." Article 21.5 Panel Report, para. 7.37.

[227] Original Panel Report, para. 7.95.

166. The ITC corrected this in its Section 129 Determination.[228] Accordingly, the Panel recognized that in that determination "the USITC found that there was no basis in the record evidence to conclude that likely substantial increases in imports would be outpaced by increases in demand."[229] After reviewing the ITC's analysis and findings on U.S. demand projections and increases in subject imports,[230] the Panel concluded:

> The USITC's section 129 determination provides a not unreasonable explanation for its conclusion that imports would not merely satisfy increasing demand in the US market in line with historical trends, but would increase more than demand. We have looked at the underlying information on demand relied upon by the USITC and cannot conclude that an objective and unbiased investigation authority could not find that it supported the conclusion reached by the USITC.[231]

167. In sum, the Panel assessed whether the ITC evaluated evidence of U.S. demand projections in an unbiased and objective manner and whether it provided an adequate explanation as to how the evidence supported its findings. Accordingly, the Appellate Body should decline Canada's suggestion that the Panel failed to make an objective assessment of this matter.

2. Causal Relationship and Non-Attribution

168. On the issues of causal relationship and non-attribution, Canada makes many of the same arguments that it made to the Panel. Indeed, Canada previously had made many of these arguments to the ITC, in the section 129 proceeding. Thus, the Panel stated:

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[228] Section 129 Determination, at 20-22, 75-80.

[229] Article 21.5 Panel Report, para. 7.38.

[230] Article 21.5 Panel Report, paras. 7.36-7.38; *see also id.*, paras. 4.169-4.171, 4.302-4.303.

[231] Article 21.5 Panel Report, para. 7.39.

> The USITC did not just make conclusions based on the facts before it, but did in fact address the arguments of the parties concerning the interpretation of that evidence. We note that many of the arguments presented by Canada in this proceeding, not only with respect to the pricing information, but in other aspects, are largely similar to arguments that were presented to, and rejected by, the USITC. While this does not, of course, necessarily mean that we will find the USITC's determination to be consistent with the AD and SCM Agreements, it does indicate to us that the USITC did in fact make its determinations after having considered possible alternatives, and explaining why, nonetheless, it reached the conclusions it did.[232]

a. Causal relationship

169. Canada argues that the Panel did not conduct an objective assessment of the ITC's vulnerability and causal relationship finding. It bases this argument on the view that under an objective and unbiased evaluation of the evidence, the ITC would have made certain findings – at least findings with respect to price, condition of the domestic industry, and changes in production, but not with respect to subject imports or market share – based only on data from the most recent period (perhaps only the most recent quarter). According to Canada, the Panel should have found a "duty" on the part of the ITC "to give particular attention to those [most recent] data."[233]

i. Reports from safeguards disputes do not support Canada's position

170. Canada relies for this argument on statements by the Appellate Body in reports on disputes involving the *Agreement on Safeguards*[234] regarding the "'relative importance, within

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[232] Article 21.5 Panel Report, para. 7.51.

[233] Canada Appellant Submission, para. 122 n.124.

[234] Canada's exclusive reliance on reports from Safeguards Agreement disputes ignores the difference between requirements for imposing safeguard measures and requirements for imposing antidumping and countervailing duty measures. Articles 2.1and 4.2(a) of the Safeguards Agreement, and Article XIX:1(a) of the GATT 1994 have been construed by the

the period of investigation, of the data from the end of the period, as compared with the data from the beginning of the period.'"[235] Canada also had relied on these statements in its argument to the Panel. Acknowledging Canada's argument, the Panel stated that "the AB has observed that '[t]he likely state of the domestic industry in the very near future can best be gauged from data from the most recent past . . . in principle, within the period of investigation as a whole, evidence from the most recent past will provide the strongest indication of the likely future state of the domestic industry.'"[236] But the Panel then proceeded to note:

> The Appellate Body went on to add, however, that such information from the end of the period of investigation is not to be considered in isolation from data from the entire period of investigation. 'The real significance of the short-term trends in the most recent data, evident at the end of the period of investigation, may only emerge when those short-term trends are assessed in the light of the longer-term trends in the data for the whole period of investigation.'[237]

171. Thus, in contrast to Canada's suggestion that data for the most recent period should be evaluated *on its own*, the Panel correctly recognized that recent short-term data should be placed

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Appellate Body such that "the phrase 'is being imported' implies that the increases in imports must have been sudden and recent," and that the term "such increased quantities" requires that "the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause serious injury." Appellate Body Report, *Argentina – Footwear*, paras. 130-131. Canada's arguments regarding "most recent data" rely exclusively on statements from Appellate Body reports in *US – Steel Safeguards, US – Lamb Meat, Argentina – Footwear,* and *US – Wheat Gluten*.

[235] Canada Appellant Submission, n. 110 (quoting, Appellate Body Report, *US – Lamb Meat*, para. 137).

[236] Article 21.5 Panel Report, para. 7.50 n.85 (quoting, Appellate Body Report, *US – Lamb Meat*, para. 137).

[237] Article 21.5 Panel Report, para. 7.50 n.85 (quoting, Appellate Body Report, *US – Lamb Meat*, para. 138).

in the context of the whole period of investigation.[238] Applying this principle to the matter before it, the Panel stated:

> It seems clear in this case that the USITC did in fact consider the most recent data, but did not focus exclusively on that data in isolation, but against the background of the information concerning the period of investigation as a whole. In that context, and in light of the explanations given by the USITC, we cannot find that its conclusions were not those of an unbiased and objective investigating authority.[239]

172. Pressing its argument on the relevance of recent data looked at on its own (rather than in the context of the investigative period as a whole), Canada refers to the Appellate Body report in *Argentina – Footwear* (another dispute under the *Safeguards Agreement*).[240] It relies, in particular, on a statement from that report regarding the relationship between movements in imports and movements in injury factors. Based on this statement, Canada contends that a causal link requires that the most recent data show an increase in imports coinciding with a decline in industry performance, and that the Panel in the present dispute erred in failing to critique the ITC for not explaining the relationship between the movements in factors for the most recent period.[241]

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[238] *See* Article 21.5 Panel Report, para. 7.50 ("There is certainly nothing that would require a focus on one aspect of the information, such as the most recent data, so long as the ultimate conclusion is one that could be reached by an unbiased and objective investigating authority in light of the facts before it and explanations given.").

[239] Article 21.5 Panel Report, para. 7.50 n.85.

[240] Canada Appellant Submission, paras. 114-115 ("As the Appellate Body has recognized, 'it is the *relationship* between the *movements* in imports (volume and market share) and the *movements* in injury factors that must be central to a causation analysis and determination.'" (quoting Appellate Body Report, *Argentina – Footwear*, para. 144)).

[241] Canada Appellant Submission, paras. 114-115. Canada attempts to portray the condition of the U.S. softwood lumber industry in this proceeding as similar to the condition of the Mexican industry in *Mexico – HFCS (Article 21.5)*. This analogy is misplaced. In *Mexico – HFCS*, the Mexican industry's performance indicators had improved throughout the period of

173. As the Panel recognized, however, the ITC explicitly discussed the relationship between movements in all factors, not just selected ones, for the most recent period and placed these recent movements in the context of the period of investigation.[242] The ITC found that the evidence demonstrated that the coexistence of substantial increases in subject imports, rising prices, and some improvement in financial performance for the most recent period resulted from temporary increases in consumption.[243] The evidence of sharp declines in U.S. housing starts in March 2002 indicated that this increase in consumption was not likely to be sustained.[244] Moreover, specific analysis by the ITC of each factor showed that subject imports increased at a substantially higher rate than U.S. apparent consumption[245] and that while increases in prices generated some improvement in the domestic industry's financial performance, prices in the first quarter of 2002 were at levels as low as they had been in 2000.

ii. Canada repeats its argument that the ITC should have taken a "snapshot" approach to first quarter 2002 data

investigation, and, despite continued improvements in its profitability, the investigating authority projected the industry's performance would suddenly decline significantly with projected steep operating losses. *See* Panel Report, *Mexico – HFCS (Article 21.5)*, paras 6.24-6.37. By contrast, in the Section 129 Determination, the ITC found that the domestic industry's performance had declined significantly from 1999 to 2000 and remained weak, with a slight increase in performance for the first quarter of 2002 due to a temporary increase in consumption. *See* Section 129 Determination, at 55-63.

[242] Article 21.5 Panel Report, 7.47-7.50, 7.52, 7.54-7.57, 7.59-7.62.

[243] Section 129 Determination, at 21-22, 44, 62-63, 67.

[244] Section 129 Determination, at 79-80.

[245] Subject imports in the first quarter of 2002 were 14.6 percent higher compared to the first quarter of 2001 while U.S. apparent consumption increased by only 9.7 percent.

174. Canada also made the same argument to the Panel that it now makes to the Appellate Body, urging a snapshot approach to the pricing data for the first quarter of 2002. In reviewing the ITC's analysis of the pricing data, the Panel stated:

> In support of its conclusion the USITC observed that prices were weak toward the end of the period of investigation, with prices in the third and fourth quarters of 2001 at levels as low as they had been in 2000. While prices increased in the first quarter of 2002, as consumption temporarily increased, they were still at the low levels reported in 2000, a time when imports were affecting the financial performance of the domestic industry. The USITC found that the likely substantial increases in subject imports would result in excess supply in the US market, putting further downward pressure on prices.[246]

175. In the Section 129 Determination, the ITC specifically addressed the very argument set forth at paragraphs 116 to 118 of Canada's appellant submission, including the table reproduced therein. The ITC found that:

> While prices for softwood lumber increased in mid-2001, at a time of considerable uncertainty in the market due to the expiration of the SLA and the commencement of these investigations, prices began to decline in July-Sept. 2001 and fell substantially in Oct.-Dec. 2001 to levels as low as those in 2000. Even with an improvement in Jan.-March 2002, prices were still near the lowest levels reported during the period of investigation. The price increase in the first quarter of 2002 was largely due to an increase in consumption, but this improvement was not likely to be sustained, in light of the sharp decline in housing starts in March 2002 from the record high reported for February 2002. Further, record U.S. housing starts throughout the period clearly did not guarantee higher prices in the U.S. market, given price competition and excess supply.
>
> Furthermore, quarterly composite pricing data (as set forth in Exhibit 1, attached to this opinion) show that the price for Jan.-March 2002 – $318 – was lower than the price for the July-Sept. 2001 – $322 – and substantially lower than in April-June 2001 – $364. Moreover, we recognize that seasonality generally affects quarterly price comparisons, i.e., prices for Oct.-Dec. in 1999, 2000, and 2001 were lower than those for Jan.-March in 2000, 2001, and 2002, respectively. While the price for Jan.-March 2002 at $318 was higher than in the same quarter

[246] Article 21.5 Panel Report, para. 7.59.

> of 2001 at $284, it was substantially lower than the price of $384 in Jan.-March of both 1999 and 2000. Prices for Jan.-March 2001 had not yet recovered from the low levels of July-Sept. and Oct.-Dec. of 2000 ($294 and $277, respectively) and were subject to considerable uncertainty in the market due to the pending expiration of the SLA.
>
> Thus, the fact that the price for Jan.-March 2002 was higher than Oct.-Dec. 2001 does not undermine our conclusion that imports at the end of the period 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.[247]

iii. Canada repeats its argument on financial performance of the U.S. industry in the most recent period

176. Moreover, the argument that Canada now makes regarding improvements in the financial performance of the U.S. industry in the most recent period repeats the argument it made to the Panel. Again taking note of Canada's argument, the Panel pointed out that the "USITC acknowledged this improvement, but concluded that information for a single quarter was not necessarily indicative of the industry's performance for the entire year, and therefore did not alter its finding of vulnerability."[248]

177. Indeed, in the Section 129 Determination, the ITC had specifically addressed Canada's argument regarding the most recent financial performance data. The ITC stated:

> We recognize that the data collected in this Section 129 proceeding show some improvements in the domestic industry's financial performance in the first quarter of 2002 compared with the first quarter of 2001, but the financial performance was less favorable when compared with the first quarter of 2000. Financial data for a single quarter, moreover, is not necessarily an accurate indicator of the industry's performance for the entire year. For example, for the first quarter of 2000, the domestic industry reported an operating income margin of 9.2 percent, which became a less favorable 1.8 percent when the industry's performance for full year 2000 was reported. Apparent U.S. consumption increased in Jan.-March

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[247] Section 129 Determination, at 43-45 (footnotes omitted).
[248] Article 21.5 Panel Report, para. 7.53.

> 2002, which resulted in increases in prices that had a favorable effect on the performance of the domestic industry. However, this increase in consumption of softwood lumber was not likely to be sustained, as evident by the sharp decline in U.S. housing starts in March 2002 from the record high reported for February 2002. Thus, the evidence, considered in its entirety, shows a domestic industry whose performance, particularly its financial performance, has deteriorated and remained weak during the period of investigation.[249]

178. It is also important to recognize that the data Canada sets out on operating incomes at paragraph 116 of its appellant submission are based on a subset of the industry – indeed, a subset that is substantially more profitable than the industry as a whole, as indicated in the data submitted in the original investigation. The ITC took account of this difference in its analysis,[250] and it was brought to the Panel's attention as well.[251] For example, the operating income margin reported in the original investigation for the 73 reporting firms was 1.3 percent in 2001. The operating income margin reported in the section 129 proceeding for the subset of 54 reporting firms was 2.2 percent in 2001. Thus, those firms that did not report in the section 129 proceeding accounted for a total of more than a $50 million loss in 2001.

iv. The Panel objectively assessed the ITC's evaluation of evidence on causation and vulnerability

179. After reviewing the ITC's evaluation of the evidence, the Panel concluded with respect to the ITC's findings of the U.S. industry's vulnerability:

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[249] Section 129 Determination, at 62-63.

[250] In the Section 129 Determination, the ITC stated:

> We also note that the domestic producers responding to the questionnaire in this Section 129 proceeding reported more favorable financial performance than the larger reporting group responding to the Commission's questionnaire in the original investigation. *Compare Id*. at Table VI-1 *with* Table D-1.

Section 129 Determination, at n.189.

[251] Article 21.5 Panel Report, para. 4.331.

> [W]e do not consider that the mere fact that the condition of the US industry was improving at the end of the period of investigation precludes a finding that its condition was nonetheless vulnerable. It is clear that the USITC had found the industry to be in poor condition during the period of investigation, a condition which might have supported an affirmative finding of material injury but for the fact that the USITC determined that factors other than Canadian imports contributed to that condition. Information concerning the domestic industry at the end of the period of investigation, while showing improvements, continued to reflect less than robust performance, despite import restraints having been in place. In this context, we cannot conclude that the USITC's finding is unreasonable or not based on positive evidence.[252]

180. Furthermore, regarding the ITC's finding of a causal relationship, the Panel stated:

> As with its arguments concerning the likely increases in imports and price effects of imports, Canada has presented a reasonable alternative interpretation of the evidence in the record, but has failed to demonstrate that the USITC's analysis and determination that the projected increased levels of imports, in light of the prices at the end of the period of investigation and given the vulnerable condition of the domestic industry, threatened material injury to the US industry is not one that could be reached by an objective and unbiased investigating authority. Having found, above, that the USITC's determination concerning likely increased volumes of imports is not inconsistent with the AD and SCM Agreements, it is in that context that we must consider the USITC's causal analysis.[253]

181. Based on it objective assessment of the ITC's evaluation of the evidence, the Panel "conclude[d] that the determination of the USITC with respect to causal link is not inconsistent with the requirements of Articles 3.5 of the AD Agreement and 15.5 of the SCM Agreement."[254] In doing so, the Panel recognized that Canada had "presented a reasoned alternative interpretation of the evidence in the record."[255] The Panel pointed out that "Canada's arguments largely present an alternative, different interpretation of the evidence before the USITC," but

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[252] Article 21.5 Panel Report, para. 7.55.
[253] Article 21.5 Panel Report, para. 7.62.
[254] Article 21.5 Panel Report, para. 7.63.
[255] Article 21.5 Panel Report, para. 7.56; *see also id.*, para. 7.62.

found that "[t]his is not, however, sufficient to demonstrate error in the interpretation on which the USITC actually based its decision, which relied in major part on the background and context of the poor financial performance of the domestic industry caused by low prices, the significant volume and increases of imports, and the substantial portion of apparent US consumption accounted for by those imports, during the period of investigation."[256] The Panel stated that, while it is possible to disagree with the ITC's analysis, Canada had failed to demonstrate that the ITC's determination was not one that could have been reached by an objective and unbiased decision maker.

182. As the Panel properly discharged its responsibility of objective assessment in considering the ITC's evaluation of evidence on causation and vulnerability of the U.S. industry, the Appellate Body should reject Canada's suggestion that the Panel erred in its assessment of this matter.

v. The Panel did not err in its assessment of the alternative explanation suggested by the dissenting Commissioner

183. A final observation to be made on the question of causal relationship concerns the weight that Canada believes the Panel should have given to the views of an individual Commissioner who dissented from the ITC majority's threat determination. As in other parts of its argument, Canada asserts that the dissenter's views constituted a plausible alternative explanation of the evidence (in this case, as it related to the establishment of a causal link between dumped/subsidized imports and threat of injury), which should have caused the Panel to reject

[256] Article 21.5 Panel Report, para. 7.56; *see also id.*, para. 7.62.

the ITC's own explanation as not reasoned.[257] As we have discussed in section III.A.2, above, Canada seems to confuse the concept of reviewing an explanation in light of plausible alternative explanations, on the one hand, and automatically rejecting an explanation upon finding an alternative explanation to be plausible, on the other. Objective assessment requires the former but not the latter.

184. As in other parts of its report, the Panel properly appreciated this point, stating:

> Canada refers in several instances to this Commissioner's views as demonstrating that the evidence supports a different outcome from that reached by the USITC. This may well be true, but is not sufficient to demonstrate error in the USITC's section 129 determination, which is the determination before us on review. We have looked carefully at the dissenting Commissioner's views, which set out different conclusions that were reached by an unbiased and objective investigating authority, based on a different focus in the analysis and the interpretation and explanation of the evidence. This is not, of course, under the applicable standard of review, sufficient to demonstrate that the determination of the USITC is not one which could be reached by an unbiased and objective investigating authority, based on the facts before it and in light of the explanations given.[258]

b. Non-attribution

185. Like Canada's arguments on causal relationship, its arguments on non-attribution to dumped/subsidized imports of injury caused by alleged "other known factors" – in particular, with respect to domestic supply and third-country imports – are actually re-arguments of points Canada advanced before the Panel. Also like its causal relationship arguments, its non-attribution arguments focus only on the most recent data (particularly on rates of change) in isolation and without context based on actual data over the period of investigation. It is evident

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[257] *See* Canada Appellant Submission, paras. 125 - 127.
[258] Article 21.5 Panel Report, para. 7.56 n.89.

from the Article 21.5 report that the Panel objectively assessed ITC's evaluation of the evidence and examined it in the light of Canada's alternative evaluation. However, as in other parts of its analysis, the Panel correctly recognized that the plausibility of Canada's alternative evaluation did not render the ITC's evaluation implausible.

i. Domestic supply

186. The first non-attribution argument that Canada raises concerns the effects that it believes the domestic supply of softwood lumber to have on the domestic industry. Canada focused on the prospect of oversupply by the domestic industry. According to Canada, "the legally relevant question, and the one the USITC itself sought to answer, was whether U.S. producers would respond differently from Canadian producers to market conditions in the imminent future, even though they had responded similarly in the recent past."[259] Canada also contends that the Panel erred in finding no fault with the ITC for basing its findings on whether the domestic industry had brought its production in line with consumption (as not to oversupply the U.S. market) on actual data over the period of investigation.[260]

187. In reviewing the ITC's analysis and findings on this issue, the Panel noted that "the principal basis for the USITC's conclusion that the condition of the industry during the period of investigation could not be attributed to Canadian imports was the fact that US supply contributed to the price declines in the market."[261] The Panel also recognized that in the Section 129 Determination, the ITC relied on evidence regarding U.S. production and capacity to support its

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[259] Canada Appellant Submission, para. 144.
[260] Canada Appellant Submission, paras. 131, 144-145.
[261] Article 21.5 Panel Report, para. 7.73.

finding that U.S. producers had brought their production in line with consumption.[262] The Panel reviewed the ITC's analysis of the evidence and stated:

> [T]he USITC noted that US production capacity was fairly level during the period of investigation, and that while production increased during the first quarter of 2002 as compared with the first quarter of 2001, it did so less than apparent consumption, and was even so lower than it had been in the first quarter of 2000.[263]

188. As the Panel correctly assessed, the ITC found, based on the evidence, that domestic production had not only come in line with consumption but had not kept pace with increases in consumption in the first quarter of 2002.[264] The Panel confirmed that "[i]n the section 129 determination, the USITC explained that, in light of the increased correlation between US production, capacity and demand at the end of the period of investigation, excess supply from US sources was not a potential threat of injury."[265]

189. The Panel understood that the availability of capacity in Canada, likely increased production, and the likelihood that exports will be shipped predominantly to the U.S. market "do not affect the question of whether excess supply from domestic sources potentially threatens the domestic industry;" at the same time, it also understood that "those factors support the

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[262] Article 21.5 Panel Report, paras. 7.61, 7.66.

[263] Article 21.5 Panel Report, para. 7.66; *see also id*., para. 7.61.

[264] *See* Section 129 Determination, at 69-70 (The ITC found that "[p]ublic data indicate that domestic production of softwood lumber steadily declined from a peak of 36,606 mmbf in 1999 to 34,996 mmbf in 2001, a decline of 4.4 percent. The revised U.S. production data collected in this Section 129 proceeding show a similar trend, with a larger decline of 5.5 percent from 36,606 mmbf in 1999 to 34,579 mmbf in 2001. While domestic production in the first quarter of 2002 was 4.9 percent higher than the first quarter of 2001, apparent U.S. consumption was 9.7 percent higher; moreover, domestic production in the first quarter of 2002 was 9.3 percent lower than in the first quarter of 2000.").

[265] Article 21.5 Panel Report, para. 7.73.

conclusion that imports from Canada are likely to increase."[266] Thus, in response to what Canada calls the "legally relevant question," the ITC found, based on its evaluation of the evidence, that U.S. producers would respond differently from Canadian producers to market conditions in the imminent future, and the Panel found that determination to be a determination that an objective and unbiased decision maker could have reached. Accordingly, it observed:

> Canadian producers, however, had excess capacity, and projected increases in production. Moreover, while production data for 2000-2001 showed that both Canadian and US production declined by similar quantities, it also demonstrated that Canadian exports to the US market increased during this period. Thus, the USITC concluded that the likely market for excess Canadian production was the US market, and Canadian exports would continue to oversupply the US market. The United States also notes that Canadian producers projected increases in production of 8.9 percent from 2001 to 2003. When Canadian consumption declined by 23 percent in the first quarter of 2002 compared with the first quarter of 2001, production declined somewhat, but imports to the United States increased, indicating a shift in sales to the US market.[267]

190. In sum, the Panel assessed whether the ITC evaluated evidence of supply of softwood lumber by U.S. producers in an unbiased and objective manner and whether the ITC provided an adequate explanation as to how the evidence supported its findings. Accordingly, the Appellate

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[266] Article 21.5 Panel Report, para. 7.73.

[267] Article 21.5 Panel Report, para. 7.66. *See* Section 129 Determination, at 71-72 (In the Section 129 Determination, the ITC stated: "We recognize that while production data for the 2000-2001 period (public data) show that both Canadian and U.S. production declined by similar quantities, the evidence also demonstrates that Canadian exports to the U.S. market increased for this period. Moreover, Canadian producers projected increases in production of 8.9 percent from 2001 to 2003. The first quarter data provide further confirmation that Canadian producers had increasing excess capacity to use to increase exports to the U.S. market. When Canadian consumption declined by 23 percent in the first quarter of 2002 compared with the first quarter of 2001, Canadian producers apparently made some adjustments to production as Canadian production reportedly was 2.6 percent lower, but primarily shifted sales to the U.S. market since subject imports were 14.6 percent higher for the same comparable periods.").

Body should decline Canada's suggestion that the Panel failed to make an objective assessment of this matter.

ii. Third-country imports

191. The second non-attribution argument that Canada raises concerns the effect that it believes third-country imports to have on the domestic industry. According to Canada, the Panel erred by not "critically examining" Canada's arguments that third-country imports were an alleged "other known factor" injuring the domestic industry.[268] It is clear, however, that the Panel did critically examine Canada's arguments, including its argument that the ITC should have based its analysis on incremental increases in third-country imports. It considered that argument in light of what the ITC in fact did, which was to evaluate incremental increases in the context of the "baseline" volume of third-country imports, recognizing that third-country imports were non-subject imports, and that third-country imports had higher unit values than subject imports.

192. Taking all of the foregoing factors into account, the Panel observed:

> With respect to third country imports, the USITC found that such imports never accounted for more than 3.0 percent of apparent consumption, while Canadian imports accounted for at least 34 percent of the US 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. . . . Canadian imports were enormous in volume and accounted for about 34 percent of US apparent consumption in the 1999-2001 period, while third country imports never exceeded 2.6 percent of US apparent consumption.[269]

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[268] Canada Appellant Submission, paras. 154-157. Regarding Canada's argument on cumulation of third-country imports, *see* section III.C, *supra*.

[269] Article 21.5 Panel Report, para. 7.68.

193. Canada's characterization of what it considers is involved in a "critical assessment" implies that such an assessment could only have concluded that the ITC's findings should have been based entirely on incremental increases in third-country imports and not taken into account the baseline volume of such imports.[270] The Panel did not agree that this was the only objective and unbiased way of evaluating the evidence. After objectively assessing the ITC's findings, it concluded:

> Similarly, the mere fact that the volume of the increase in third country imports was approximately the same as the volume of increase in Canadian imports does not require the conclusion that third country imports potentially threaten injury to the US industry. When considered in the context of the absolute volume of such imports, as compared to the absolute volume of Canadian imports, and in light of the large number of third country suppliers, the fact that these imports were not restrained during the period of investigation and the higher unit values of third country imports, we cannot conclude that the USITC's conclusion, that these imports do not potentially threaten material injury to the US industry, is not one which an unbiased and objective investigating authority could reach.[271]

194. In sum, the Panel assessed whether the ITC evaluated evidence of third-country imports in an unbiased and objective manner and whether it provided an adequate explanation as to how the evidence supported its findings. Accordingly, the Appellate Body should decline Canada's suggestion that the Panel failed to make an objective assessment of this matter.

E. The Report of the Panel Set Out the Basic Rationale Behind Its Findings and Recommendations, as Required by Article 12.7 of the DSU

195. As a seeming afterthought to its core contention that the Panel erred by failing to make an objective assessment of the matter before it, Canada adds the allegation that the Panel failed to

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[270] *See* Canada Appellant Submission, para. 154 ("A critical assessment would have recognized that the entire threat issue involved potential *increases* in volume and market share at the expense of the domestic industry.").

[271] Article 21.5 Panel Report, para. 7.72.

provide the basic rationale for its findings, as required by Article 12.7 of the DSU. Canada gives rather short shrift to this derivative argument, in which it essentially repeats the claims that it made in its DSU Article 11 argument.[272] Thus, for example, in this part of its submission, Canada merely echoes the erroneous assertion from the earlier part of its submission that the Panel "fails to interpret and apply the relevant provisions of the covered agreements."[273] Likewise, Canada's assertion that "[t]he Panel simply summarized the arguments of Canada and the United States" amounts to re-packaging for purposes of an Article 12.7 argument the same flawed premise that Canada advanced as the basis for its Article 11 argument.[274]

196. As we have shown in sections III.B through D, above, the characterizations that form the basis for both Canada's Article 11 argument and its Article 12.7 argument are incorrect. The Panel did interpret and apply the relevant provisions of the covered agreements, and its report evidences that it made an objective assessment of the matter before it. As Canada's Article 12.7 argument rests on the same flawed bases as its Article 11 argument, the former must fail for the same reasons as the latter.

197. Additionally, Canada's Article 12.7 argument suffers from an incomplete understanding of what Article 12.7 requires. In articulating what it understands to be the "basic rationale" requirement of Article 12.7, Canada quotes from the Appellate Body report in *Mexico – HFCS*

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[272] *See* Canada Appellant Submission, paras. 196-204.

[273] Canada Appellant Submission, para. 199. *Compare, e.g., id.*, para. 82 (asserting in context of DSU Article 11 argument that "Panel failed to interpret and apply any of the threat factors").

[274] Canada Appellant Submission, para. 199. *Compare, e.g., id.*, para. 103 (asserting in context of DSU Article 11 argument that "Panel merely summarized the arguments advanced by the United States and Canada").

(Article 21.5).[275] Specifically, it refers to paragraph 108 of that report, but neglects the continuation of the Appellate Body's discussion in paragraph 109. There it was explained that the obligation to provide a basic rationale:

> *[D]oes not, however, necessarily imply that Article 12.7 requires panels to expound at length* on the reasons for their findings and recommendations. We can, for example, envisage cases in which a panel's 'basic rationale' might be found in reasoning that is set out in other documents, such as in previous panel or Appellate Body reports - provided that such reasoning is quoted or, at a minimum, incorporated by reference.[276]

198. Canada's omission is all the more glaring, given its reliance on this very same part of the Appellate Body report to support its argument that the Panel erred by "fail[ing] to assess the Section 129 Determination with reference to the adopted findings of its original report."[277] As we explained in section III.A.3, above, the Appellate Body referred to a panel's original report as an example of one of the "other documents" that a panel might refer to in setting out its basic rationale in an Article 21.5 report. (However, as we also discussed, there is no *requirement* that a panel refer to its original report in setting out its basic rationale.)

199. Canada also neglects the beginning of the discussion of Article 12.7 in the *Mexico – HFCS (Article 21.5)* Appellate Body report. After identifying Mexico's allegation and quoting the text of Article 12.7, the Appellate Body proceeded to consider the ordinary meaning of the term "basic rationale" as used in that article. On the basis of the ordinary meaning of that term, the Appellate Body stated that "Article 12.7 establishes a *minimum* standard for the reasoning

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[275] Canada Appellant Submission para. 198 (quoting Appellate Body Report, *Mexico – HFCS (Article 21.5)*, para. 108).

[276] Appellate Body Report, *Mexico – HFCS (Article 21.5)*, para. 109 (emphasis added).

[277] *See* Canada Appellant Submission, para. 171; *id.*, para. 164.

that panels must provide in support of their findings and recommendations. Panels must set forth explanations and reasons sufficient to disclose the essential, or fundamental, justification for those findings and recommendations."[278]

200. For the reasons discussed in the preceding sections of this submission, the Panel in this dispute unmistakably met – and, indeed, exceeded – the Article 12.7 requirement to set forth a "basic rationale." The Panel's basic rationale is plain from original analysis set forth in the Article 21.5 report itself, as well as from the Panel's incorporation where appropriate of "other documents," including the original report, and its explanation of the relevance of the Appellate Body report in *US – DRAMS* and other panel and Appellate Body reports to which it referred.

201. Finally, we note Canada's rather dramatic assertion that "[i]f this Panel report were to stand, WTO Members would be left without guidance as to the legal requirements for a threat of material injury finding or as to the case they must make when challenging an investigating authority's threat of material injury finding."[279] That assertion is quite extreme, given that the matter that was before the Panel and that is now before the Appellate Body was highly fact-intensive, and given that the relevant provisions of the covered agreements do not prescribe particular methodologies for considering factors in making a threat determination (as discussed in sections III.B.3 and III.C, above). That assertion also is not accurate.

202. Indeed, in at least two notable respects, the Panel report in this dispute may well provide WTO Members with significant "guidance as to the legal requirements for a threat of material

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[278] Appellate Body Report, *Mexico – HFCS (Article 21.5)*, para. 106 (emphasis added); *see also* Appellate Body Report, *US – Cotton*, para. 276; *id.*, para. 277 (finding reasoning to be consistent with Article 12.7, even though it was "brief").

[279] Canada Appellant Submission, para. 202.

injury finding or as to the case they must make when challenging an investigating authority's threat of material injury finding." First, as discussed in section III.A.1, above, the Panel report (incorporating parts of the original report) provides guidance on the issue of the standard under which a panel should review an investigating authority's determination that serves as the basis for both an antidumping duty measure and a countervailing duty measure. Second, as discussed in section III.A.2, above, the Panel report elaborates on, and discusses in the antidumping context, the guidance the Appellate Body provided in its report in *US – DRAMS*.

203. In sum, because its report unmistakably sets forth the Panel's basic rationale, consistent with the obligation under DSU Article 12.7 as explained by the Appellate Body in prior reports, Canada's claim that the Panel erred by failing to meet that obligation should be rejected.

IV. CONCLUSION

204. For the reasons set forth in this submission, the United States requests that the Appellate Body reject Canada's claims of error in their entirety and uphold the Panel's findings and conclusions.