

***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)

**OPENING STATEMENT OF THE UNITED STATES OF AMERICA
AT THE ORAL HEARING OF THE APPELLATE BODY**

February 24, 2006

1. Good morning, Mr. Chairman and members of the Division. My delegation and I have the honor of representing the United States at today's oral hearing.
2. The United States filed a written submission in this appeal responding in detail to Canada's arguments as laid out in its appellant submission. We will, therefore, keep our statement brief, using this opportunity to highlight and elaborate on key points from our written submission.
3. Canada's appeal is based on several flawed assumptions about what the panel found and about what the covered agreements require.
 - 1. Original Panel Report Focused on Absence of Explanation**
4. Canada first assumes, incorrectly, that the International Trade Commission's original determination was found to be inconsistent with the covered agreements due to a lack of evidence. Based on that incorrect assumption, Canada argues that in the absence of new evidence, an unbiased and objective decision maker could not have made an affirmative threat of injury finding in the section 129 determination. However, the original panel report's main problem with the original ITC determination was not a lack of evidence but a lack of explanation supporting the ITC's conclusions. The basis for the panel's finding with respect to the original

measure's inconsistency with Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement is set out at paragraphs 7.89 to 7.96 of the original report. There, the panel made repeated reference to matters that the original determination "did not explain," "did not discuss," or "did not address." In its Article 21.5 report, the panel confirmed that its original findings were based not on the presence or absence of evidence, but on "whether the USITC's determination relied upon and explained relevant evidence in such a way as to lend reasoned support to the determination."¹

5. The Article 21.5 Panel found that in its section 129 determination, the ITC provided the explanation found lacking in its original determination. The ITC made its reasoning clearer and provided more detailed explanation, addressing all of the concerns expressed by the panel.

2. Existence of Plausible Alternative Views of the Evidence Did Not Negate ITC's Evaluation

6. A second flawed assumption by Canada is that there was only one way to view the evidence that was before the ITC and that any departure from that approach must amount to a lack of objective assessment. In the panel proceeding, Canada took the position (which it continues to take here) that any given piece of evidence necessarily leads to a single conclusion. For example, Canada contends that an increase in prices in the first quarter of 2002 necessarily should have supported a negative threat determination.² Frequently, Canada's position that a

¹Panel 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. 7.11 n.55 (circulated Nov. 15, 2005) ("Article 21.5 Panel Report").

²See Canada Appellant Submission, paras. 116-18; First Written Submission of Canada, para. 101 (Mar. 30, 2005); see also EC Third Participant Submission, para. 24.

given piece of evidence can support only one conclusion is the result of analyzing individual pieces of evidence in isolation, without regard to context. This was what we referred to in the panel proceeding as a “snapshot” approach to the evidence.³

7. By contrast, the ITC consistently took a more comprehensive approach to the evidence. Rather than draw inferences from any given piece of evidence standing on its own, the ITC evaluated it in light of the context of all of the facts relevant to its investigation. So, for example, in evaluating the increase in lumber prices in the first quarter of 2002, the ITC considered how prices in that quarter related to prices at other times during the period of investigation. This analysis revealed that, notwithstanding improvements, prices in the first quarter of 2002 still were near their lowest level during the period of investigation. That is, they were not much higher than they had been in the second half of 2000, when imports were affecting the financial performance of the U.S. industry.

8. Additionally, the ITC evaluated evidence of increases in prices in the first quarter of 2002 in light of the factors contributing to those increases. It found that price increases during that quarter were largely due to increases in consumption – an improvement that was not likely to be sustained in light of the sharp decline in housing starts in March 2002 from their record high in February 2002.⁴

9. In reviewing the ITC’s section 129 determination, the panel properly asked itself whether the ITC’s evaluation of the evidence was an evaluation that could have been made by an

³See, e.g., Second Written Submission of the United States, paras. 10, 68 (May 17, 2005).

⁴See Section 129 Determination at 43-45.

objective and unbiased decision maker. In answering that question, the panel took into account the alternative evaluation of the evidence that Canada posited. In a number of cases, it found that alternative evaluation to be plausible.

10. Canada assumes, again, incorrectly, that two different views of the evidence cannot both be plausible. If an alternative is found to be plausible then, in Canada's view, it must cause the originally proposed evaluation to become implausible. This view of the panel's duty to make an objective assessment is contrary to the applicable standard of review.

11. Article 17.6 of the AD Agreement, which Canada agreed was applicable to the panel's review of the section 129 determination, expressly recognizes that the same facts may give rise to different conclusions and that the plausibility of one conclusion need not undermine the plausibility of any other. Thus, a panel may not overturn an investigating authority's evaluation where that evaluation was unbiased and objective, "even though the panel might have reached a different conclusion." Although the standard of review is expressed somewhat differently in Article 11 of the DSU, the Appellate Body has recognized that under that standard, too, the plausibility of one evaluation of the facts does not necessarily negate the plausibility of another evaluation. Thus, where a panel finds an investigating authority's evaluation of the evidence on an administrative record to be unbiased and objective, the possibility that the panel itself might have made a different evaluation had it been in the authority's place is not a basis for finding the authority's evaluation to be inconsistent with the covered agreements.⁵

12. The United States appreciates that the standard to be applied by a panel when assessing

⁵Appellate Body Report, *US - DRAMS*, para. 187; Appellate Body Report, *US - Cotton Yarn*, para. 74; Appellate Body Report, *US - Lamb Meat*, para. 106.

an investigating authority's evaluation of the evidence was discussed in some detail in the Appellate Body's recent report in *US - DRAMS*. In setting out the analytical framework that it would use in assessing the section 129 determination, the panel emphasized the importance of "seek[ing] to review the agency's decision on its own terms," just as the Appellate Body had done in *US - DRAMS*.⁶

13. Canada does not expressly fault the panel for assessing the ITC's evaluation of the evidence by reviewing the section 129 determination on the ITC's own terms. It does not go so far as to say that doing so amounted to a failure of objective assessment. Yet, that basic view underpins Canada's appellant submission. Often, this position is expressed in the assertion that the panel should have focused on a particular piece of evidence in isolation, without regard to context.

14. As noted earlier, that was Canada's assertion with respect to the improvements in the price of lumber in the first quarter of 2002. Canada took a similar, "snapshot" approach, for example, to changes in the volume of subject and non-subject imports and to changes in production. In each of these cases, it focused on incremental percentage changes without regard to the baseline against which those changes occurred. Likewise, Canada considered volume changes in the abstract, without reference to relevant context, such as expiration of the Softwood Lumber Agreement and import trends in periods without trade restraints.

15. In short, Canada's position that particular pieces of evidence compelled particular conclusions is based on an approach to the evidence different from that actually taken by the

⁶Article 21.5 Panel Report, para. 7.20 (quoting Appellate Body Report, *US – DRAMS*, para. 151 (internal citation omitted)).

ITC. As such, it simply ignores the relevant standard of review and should be rejected.

3. Original Report’s Findings of Insufficient Explanation by ITC Did Not Limit Findings Panel Could Make in Compliance Review

16. A third flawed assumption underlying Canada’s appeal is that certain findings by the panel in its original report constrained the findings it could make in its Article 21.5 report. The problem with this argument, as we discussed in our appellee submission, is that it simply disregards the nature of the original findings that allegedly have a constraining effect. In general, where the original report found the ITC determination to be lacking, it was due to an absence of adequate explanation of the ITC’s reasoning. The original panel did not find that, based on the evidence before it, the ITC *could not* conclude, for example, that subject imports likely would increase substantially. Rather, it found that there was a lack of “rational explanation . . . based on the evidence cited” for that conclusion.⁷ Understandably, therefore, the panel looked to the combination of evidence, reasoning, and explanation in the section 129 determination to decide whether the findings there supported the ITC’s conclusions and were objective and unbiased.

17. Canada’s view, however, is that the panel was wrong to have focused on the combination of evidence, reasoning, and explanation in the section 129 determination. Rather, Canada asserts that the original panel report finally resolved factual issues concerning export projections, the relevance of a period prior to the period of investigation in which lumber imports were not subject to trade restraints, the impact of the SLA, and U.S. demand projections.

⁷Panel Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/R, para. 7.89 (adopted Apr. 26, 2004) (“Original Panel Report”).

18. The proposition that these issues had been finally resolved is based on a fundamental mis-reading of the original panel report. This dispute is not at all like the disputes cited by Canada, in which a panel made a legal interpretation in its original report that the disputing parties could rely upon as a settled matter when it came to the compliance phase of the dispute.⁸ The original report in this dispute found a lack of explanation for certain propositions. It did not find those propositions to be incapable of being supported by the evidence.

4. Canada Ignores Issues of Legal Interpretation Settled in the Original Dispute

19. Conversely, in other respects, Canada simply ignores legal interpretations the panel made in its original report that it then treated as settled in conducting its analysis in the Article 21.5 proceeding. Its fourth flawed assumption, therefore, is that these questions were still open questions by the time of the Article 21.5 proceeding.

20. The original panel report addressed a number of questions of interpretation of the covered agreements. For example, 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.”⁹ The panel noted Canada’s failure to specify what this “stricter, higher standard” would have required the ITC to do in its Lumber investigation that it

⁸See U.S. Appellee Submission, paras. 79-88.

⁹Original 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)”).

did not already do.¹⁰ It went on to find that the “special care” obligation in Articles 3.8 and 15.8 reinforces 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.”¹¹

21. Canada did not appeal this finding. Nor did it appeal the panel’s interpretation of the applicable standard of review. Nor did it appeal the panel’s interpretation of the change in circumstances that the ITC was required to find in order to establish the existence of a threat of material injury. Accordingly, the panel’s findings on these questions were adopted by the DSB. When the section 129 determination came before the panel for a compliance review, the panel, not surprisingly, understood these issues to have been settled. It found, therefore, that “there [were] no new issues of legal interpretation raised [in the present dispute].”¹²

22. Nevertheless, in its appeal, Canada continues to approach these issues of legal interpretation underlying the panel’s review as if they had not been settled. Despite the original panel’s finding with respect to the standard of care applicable in threat of injury investigations, Canada asserts on appeal that the Article 21.5 panel erred by not holding the ITC to a “high standard.”¹³ As in the original dispute, Canada still does not specify what was required of the ITC to meet this “high standard.” In effect, Canada ignores the original panel’s discussion of

¹⁰Original Panel Report, para. 7.34.

¹¹Original Panel Report, para. 7.33.

¹²Article 21.5 Panel Report, para. 7.14.

¹³*See, e.g.*, Canada Appellant Submission, paras. 75, 76, 79.

standard of care. Similarly, although the original panel rejected the proposition that the covered agreements required the ITC to identify “a single or specific event” as the “change of circumstances” that would cause threat of injury to become actual injury,¹⁴ Canada continues to argue that the covered agreements required the ITC to identify “a” change in circumstance in order to make a determination of threat.¹⁵

5. Articles of the Covered Agreements on Which Canada Focuses Do Not Prescribe Methodologies for Considering Evidence of Threat

23. Canada’s fifth flawed assumption is that articles of the AD and SCM Agreements pertaining to an investigating authority’s analysis of threat imposed specific methodologies on the ITC. As the panel rejected that assumption, Canada argues that it failed to “interpret and apply” the threat provisions, specifically Articles 3.7(iii)/15.7(iv) (regarding likely price effects), Articles 3.7(i)/15.7(ii) (regarding the significant rate of increase in subject imports), and Articles 3.5/15.5 (regarding causation).¹⁶

24. In fact, the panel did interpret these articles and found, correctly, that they do not prescribe specific methodologies.¹⁷ Articles 3.7 of the AD Agreement and 15.7 of the SCM Agreement set out a non-exhaustive list of factors that “the authorities should consider” “[i]n making a determination regarding the existence of a threat of material injury.” The articles do not instruct the authorities how to approach the consideration of each factor.

¹⁴Original Panel Report, para. 7.57.

¹⁵See, e.g., Canada Appellant Submission, paras. 72, 75.

¹⁶See, e.g., Canada Appellant Submission, paras. 82, 87, 88, 89, 93, 209-216.

¹⁷Article 21.5 Panel Report, para. 7.28; see also *id.*, para. 7.50.

25. Having reached that correct conclusion, the panel then went on to assess whether the ITC's consideration of the threat factors was objective and unbiased, taking into account alternative plausible explanations of the evidence. In other words, the panel did precisely what the covered agreements required it to do.¹⁸ Thus, Canada errs when it contends that the panel failed to interpret and apply the articles on consideration of threat factors.

26. Canada makes a similar, "failure-to-interpret" argument with respect to the articles on causation (Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement). As with the threat articles, Canada's assumption that the causation articles prescribe specific procedures is wrong. In fact, in *EC - Pipe*, the Appellate Body recognized an investigating authority's freedom "to choose the methodology it will use in examining the 'causal relationship' between dumped imports and injury."¹⁹ The panel in the present dispute recognized this too. Having done so, it went on to assess whether the ITC in fact made an objective and unbiased evaluation of the evidence on causation, precisely as the covered agreements required it to do.²⁰

6. Conclusion

27. Mr. Chairman, members of the Division, this concludes our opening statement. The U.S. delegation looks forward to answering your questions. Thank you.

¹⁸Article 21.5 Panel Report, para. 7.28.

¹⁹Appellate Body Report, *EC – Pipe*, para. 189 (citing Appellate Body Report, *US – Hot-Rolled Steel*, para. 224).

²⁰Article 21.5 Panel Report, paras. 7.62-7.74.