BEFORE THE

WORLD TRADE ORGANIZATION

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

WT/DS277

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES

August 25, 2003

1. In this dispute, Canada challenges the determinations of the U.S. International Trade Commission ("ITC") that an industry in the United States producing softwood lumber 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 ("LTFV").

2. The ITC's determinations are based on positive evidence and on an objective examination of all relevant factors and facts. Moreover, the ITC articulated reasoned and adequate explanations demonstrating how the facts as a whole support its determinations, permitting the Panel to adequately discern the rationale for the ITC's findings. Contrary to Canada's claims, the ITC's determinations are consistent with U.S. obligations under Article 3 of the Antidumping Agreement and Article 15 of the SCM Agreement. As such, there is also no basis for Canada's claim that the ITC's determinations are inconsistent with Articles 1 and 18.1 of the Antidumping Agreement, Articles 10 and 32.1 of the SCM Agreement, or Article VI:6(a) of the GATT 1994.

3. **Standard of Review**. This dispute is covered by both the standard of review set forth in Article 11 of the DSU and the special standard of review for disputes arising under the Antidumping Agreement, set forth in Article 17.6 of that Agreement. In considering the relationship of Article 17.6 of the Antidumping Agreement to Article 11 of the DSU, the Appellate Body has indicated that these provisions are complementary or supplementary. Canada, however, ignores the Appellate Body's explicit statements that neither of these articles permits, let alone requires, a Panel to conduct a *de novo* review of the evidence or to substitute the Panel's conclusions for those of the competent authority. Instead, Canada repeatedly, whether implicitly or explicitly, requests the Panel to reweigh the evidence and decide the case *de novo* by substituting Canada's view of the evidence for that of the ITC's.

4. **Objective Assessment Is Not *De Novo* Review**. Canada tends to blur the distinction between the functions of a panel and those of an investigating authority. In making an "objective assessment" of the matter, the Appellate Body has stated that a panel is to consider whether the national "authorities had examined all the relevant facts and had provided a reasoned explanation of how the facts supported their determination." The Appellate Body describes the panel's role as one of evaluating a competent authority's acts rather than directly evaluating the underlying facts. The Appellate Body has recognized that it is for the investigating authority to "determine, objectively, and on the basis of positive evidence, the importance to be attached to *each* potentially relevant factor and the weight to be attached to it."

5. **Obligation to Base Determinations on Positive Evidence**. The investigating authority must ensure that its determination of injury is made on the basis of "positive evidence," which involves the facts underpinning and justifying the injury determination, and involves an "objective examination," which is concerned with the investigative process itself. The ITC considered the totality of the evidence and based its determination on "positive evidence"; that is, evidence which is affirmative, objective, verifiable and credible. Moreover, the ITC conducted an "objective examination" in which the "identification, investigation and evaluation of the relevant factors [was] . . . even-handed."

6. **Obligation to Provide Reasoned and Adequate Explanations**. The requirement to provide a reasoned explanation has not been interpreted to impose any specific method for assessing the injury or for explaining the basis for such a determination. The Appellate Body in *EC-Pipe* recognized that the evaluation of a factor does not necessarily require an explicit separate evaluation of that factor if the analysis of the factor is implicit in the analyses of other factors. The guidance essentially is that the investigating authority "must be in a position to demonstrate that it did address the relevant issues." As evident in the Views of the Commission, the ITC considered all relevant arguments raised

by parties and provided adequate explanations. Moreover, the Views of the Commission "contain a persuasive explanation as to how the evaluation of relevant factors led to the determination of injury."

I. The ITC's Determinations Are Consistent with U.S. Obligations Under Article 3 of the Antidumping Agreement and Article 15 of the SCM Agreement

7. A common thread in Canada's claims is its repeated assertions that there could be no threat of material injury because there allegedly were no injurious effects found in the present material injury analysis and that the ITC did not identify any imminent and abrupt change in the status quo. Canada portrays the ITC's present material injury finding as a negative with no subsidiary findings or evidence to support an affirmative finding. This simply is wrong. The ITC found, based on the facts as a whole, that the volume of imports was significant and thus supported an affirmative present material injury finding. However, while the subject imports had resulted in some price effects, the ITC recognized that excess supply of both imported and domestic products had contributed to price declines, particularly in 2000, and thus could not find that subject imports had had significant price effects. The condition of the domestic industry, particularly its financial performance, had declined during the period of investigation as a result of the price declines. The ITC found that the domestic industry was vulnerable to injury. The ITC's subsidiary findings regarding present material injury foreshadow and clearly support the existence of a threat of material injury.

8. The ITC considered **all factors relevant to a threat of material injury determination** provided for in the covered Agreements, including Articles 3.2, 3.4, and 3.7 of the Antidumping Agreement and Articles 15.2, 15.4, and 15.7 of the SCM Agreement. Canada has not met its burden of establishing a *prima facie* case of any violation or inconsistencies with U.S. obligations under the covered Agreements

9. Continuum of an Injurious Condition Ascending from Threat to Injury. Threat of material injury is material injury that has *not* yet occurred, but remains a future event whose actual materialization cannot be assured with absolute certainty but with clear likelihood. Threat of injury, thus, is an anticipation of material injury that must be on the verge of occurring, *i.e.*, clearly foreseen and imminent.

10. The Antidumping Agreement and the SCM Agreement recognize that injury to the domestic industry does not generally occur suddenly, but rather often involves a progression of injurious effects ascending from a threat of material injury, and if not prevented, to present material injury. Therefore, a determination that an industry is threatened with material injury would be warranted when conditions of trade clearly indicate that material injury likely will occur imminently if demonstrable trends in trade adverse to the domestic industry continue, or if clearly foreseeable adverse events occur.

11. Canada reads 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, rather than the clearly foreseeable result of a sequence of events. Canada argues that the ITC should have identified a specific event or change in the status quo in order to justify its threat determination. But this interpretation is not necessitated, if even justified, by the text of the covered Agreements, the negotiating history of the Agreements, or the Appellate Body's analysis in other dispute settlement proceedings involving the threat of injury. Rather, as the Appellate Body in *US-Line Pipe* recognized, generally there is a continuum of an injurious condition of a domestic industry that ascends from a threat of injury up to injury.

12. Future-Oriented Analysis Based on Projections Extrapolating from Existing Data. A threat analysis is a future-oriented analysis, based not on allegation or conjecture but rather on the facts. But facts by definition pertain to the present and past rather than the future. While the occurrence of future events can never be definitely proven by facts, projections necessarily are based on extrapolations from existing data. In *US-Lamb Meat*, the Appellate Body discussed this tension between the future-oriented threat analysis and the need for a fact-based determination, and recognized that ultimately it calls for a degree of "conjecture" about the likelihood that the threat will ascend to injury. While the prospective nature of the analysis will not provide for certainty, the use of facts from the present and the past provides the basis for projections about the future.

13. Meaning of "Special Care". Article 3.8 of the Antidumping Agreement and Article 15.8 of the SCM Agreement provide no discussion regarding what constitutes "special care," nor has any panel explicitly interpreted this provision. Canada's argument notwithstanding, the "special care" provision does not mean 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. In fact, in the safeguards context, the Appellate Body suggested that the distinction between threat of injury and present injury "serves the purpose of setting a *lower threshold* for establishing the *right* to apply a safeguard measure." The same logic would apply to the covered Agreements.

14. Meaning of "Consider". The covered Agreements require the ITC to consider all listed factors. What Canada fails to recognize is that they do not require the ITC to *make findings* on each factor. The term "consider" has been interpreted to mean, "*inter alia*: 'contemplate mentally, especially in order to reach a conclusion;' 'give attention to'; and 'reckon with; take into account.'" Accordingly, the term "consider" has not been read to require an explicit "finding" by the investigating authority. Rather it is sufficient, if it is apparent in the relevant documents in the record, that the ITC has given attention to and taken the factor into account.

15. In *EC-Pipe*, the Appellate Body recognized that consideration of a factor does not necessarily require an explicit separate evaluation of that factor if the analysis of the factor is implicit in the analyses of other factors. In the same manner, the investigating authority is not required to explicitly address every minute detail or specific aspect of every argument that is raised by parties. Canada fails to acknowledge that the ITC clearly considered the relevant evidence and arguments raised by parties but found other evidence to be more persuasive.

II. The ITC's Consideration of All Factors and Facts Relevant to the Threat of Material Injury Analysis in this Case and Its Findings Are Consistent with U.S. Obligations Under the Covered Agreements

16. The ITC found that there was a likelihood of substantial increases in subject imports based on evidence regarding, *inter alia*, Canadian producers' excess production capacity and projected increases in capacity, capacity utilization and production, the export orientation of Canadian producers to the U.S. market and subject import trends during periods when there were no import restraints, such as the SLA. Furthermore, each of the six subsidiary factors considered by the ITC related directly to threat factors set forth in Article 3.7 of the Antidumping Agreement and Article 15.7 of the SCM Agreement, specifically whether there is a significant rate of increase in imports and sufficient freely disposable production capacity. The ITC addressed the effect of each of these factors in its findings. The ITC determined that these increases in imports were likely to exacerbate price pressure on domestic producers, and that material injury to the domestic industry would occur. Moreover, the ITC found that the domestic industry was vulnerable to injury in light of declines in its performance over the period of investigation, particularly its financial performance.

17. **The ITC's Finding of Likely Substantial Increases in Subject Imports:** a) Demand in U.S. Market – Forecasts and Possible Effects Supports ITC's Determinations. Canada emphasizes a single factor, demand in the U.S. market, which was only one of six subsidiary factors considered by the ITC in its determinations. Canada attempts to persuade the Panel that a purported significant increase in U.S. demand for softwood lumber was imminent and that this anticipated spike in demand would restore the U.S. industry's financial health and insulate it from any further adverse effects from additional subject imports from Canada. The Achilles heel in Canada's argument is that it disregards substantial portions of the investigatory record and, despite the presence of significant contrary evidence, offers little more than conjecture to support its theory that future increases in demand would improve prices. The ITC considered and rejected this theory because it was not supported by the facts.

18. Contrary to Canada's theory, strong demand over the period of investigation not only did not translate into price improvements but did not prevent substantial declines in prices for softwood lumber. Moreover, the evidence demonstrated that supply rather than demand had played the pivotal role in the movement of prices of softwood lumber in the U.S. market, as the excess supply had resulted in price declines through 2000. Canada has not refuted the fact that even with strong demand during the period of investigation, prices declined and the condition of the domestic industry deteriorated – effects opposite to those Canada speculates should occur in the future. Nevertheless, Canada argues that the ITC should have agreed to this optimistic theory about what effects growth in demand would have on industry performance and prices.

19. Moreover, Canada has not refuted the ITC's finding regarding forecasts for U.S. demand, that the U.S. market would continue to be a very attractive and necessary one for its imports (a market that accounts for about 65 percent of Canadian production), that subject imports would continue to play an important role in the U.S. market, and even that there would likely be increases in such imports. Rather, Canada contends, relying again largely on the thin premise of increases in demand, so great as to outpace supply increases, that increases in subject import volumes and market penetration would not be injurious.

20. b) Canadian Producers' Excess Capacity and Projected Increases in Capacity, Capacity Utilization, and Production Supports ITC's Determinations. The ITC found that the evidence demonstrated that Canadian producers had excess capacity, and increases in capacity and production were projected in 2002 and 2003. In addition, Canadian producers, which rely on sales in the U.S. market for about two-thirds of their sales, had incentives to produce more softwood lumber and export it to the U.S. market. In light of those facts, the ITC reasonably found that excess capacity and further projected increases in Canadian production would likely result in substantial increases of subject imports.

21. *The Canadian producers rely on sales in the U.S. market for about two-thirds of their production*. The significance of Canada's export-orientation is clear. When a single market accounts for two-thirds of a country's production, the exporting industry's success, and probably survival, is tied to the importing market. Canada's argument ignores the ITC's affirmative finding in its present injury analysis that the volume of imports from Canada, equal to one-third of U.S. apparent consumption, was significant. The evidence demonstrated that the U.S. market had been very important to Canadian producers and was expected to continue to be.

22. *The Canadian producers had excess capacity*. Canadian producers' capacity utilization had peaked in 1999 at 90 percent, and then declined to 84 percent in 2001. This contrasted with the relatively stable level for Canadian capacity utilization in the three years prior to the period of

investigation, while operating under the SLA. *The Canadian producers projected increases in capacity and production, and improvements in capacity utilization in 2002 and 2003*. The evidence showed that there had been a steady increase in Canadian producers' capacity from 1995 to 1999, with a more gradual increase from 1999 to 2001. Thus, despite the excess capacity already available in 2001 as capacity utilization declined to 84 percent, the evidence demonstrated that Canadian producers expected to further increase their ability to supply the U.S. softwood lumber market. In particular, capacity utilization was projected to increase to 90 percent in 2003, as capacity also was projected to increase.

23. *There was evidence of incentives to produce more softwood lumber and export it to the U.S. market*. The ITC found there was evidence that mandatory cut requirements stimulated increased production even when demand was low and thus increased the incentive to export more softwood lumber to the U.S. market. The ITC found that imports with the annual allowable cut ("AAC") requirements in place were at significant levels in its present injury analysis. It is disingenuous for Canada not to acknowledge that one of the provinces with AAC requirements is British Columbia, which accounts for almost 50 percent of Canadian softwood lumber production and 50 percent of imports to the U.S. market.

24. *Canadian producers' export projections*. The ITC found that more weight should be given to actual data showing excess Canadian capacity, declines in home market shipments, and declines in exports to other markets, as well as projected increases in production than to the export projections, which were inconsistent with the other data. While Canadian producers projected that exports to the U.S. market would increase slightly in 2002 and 2003, these projected increases in exports to the United States accounted for only about 20 percent of the planned increases in production. The U.S. market accounted for 68 percent of the Canadian softwood lumber production in 2001. It was reasonable, given the evidence as a whole, for the ITC to discount the Canadian producers' projected export data and assume that projected increases in production would likely be distributed between the U.S. market, home market, and other non-U.S. export markets in shares similar to those prevailing during the last five years. Canada has offered no positive evidence to refute the ITC's reasonable position that production increases would be distributed according to historic proportions. In this case, the evidence demonstrated that the U.S. market had been very important to Canadian producers and was expected to continue to be.

25. c) Likely Increases in Subject Imports Supports ITC's Determinations. In evaluating whether there was a likelihood of substantially increased imports of softwood lumber from Canada, the ITC considered, *inter alia*, evidence regarding the increase in imports over the period of investigation, the effects of expiration of the SLA, and subject import trends during periods when imports were not subject to restraints. The ITC found that the evidence demonstrated that the volume of subject imports was already significant and had increased even with the restraining effect of the SLA in place, and that subject imports had increased substantially during periods without export restraints as well. Canada is simply incorrect in contending that the ITC found such levels of import penetration were insufficient, much less "non-injurious," in its present material injury finding. Moreover, contrary to Canada's charges, the ITC did not find that the 2.8 percent increase in the volume of imports during the period of investigation was insignificant. It expressly found the volume of imports significant and would be injurious if combined with evidence of significant price and impact effects.

26. In this case, the threat analysis begins with subject import volumes already at significant levels. The evidence demonstrates that subject imports will continue to enter the U.S. market at this significant level and are projected to increase. Canada acknowledges that imports at this level would continue and even increase; its argument principally is whether the increases would be substantial.

27. *Restraining effects of the SLA.* Canada ignores the evidence supporting the ITC's finding that trade during most of the period of investigation was affected by the SLA. Canada claims that imports after the SLA increased by only 0.4 percent, but its comparison of import data for April-December 2001 to April-December 2000 ignores the imposition of other trade restraining measures, *i.e.*, preliminary countervailing duties, in August 2001. Thus, Canada's argument is predicated on a false notion – that trade during the identified period was free of trade incumberances. In contrast, when the period with no formal trade restraining measures is considered, the evidence shows that subject imports increased by 11.3 percent for the April-August 2001 period compared with the same 2000 period. The facts are, there is a distinction in the level of imports depending on whether restraints are in place and the import volumes are substantially higher during periods when they are not subject to restraining measures.

28. *Trends in subject imports during periods when such imports were not subject to some type of formal or informal restraint.* Subject imports during these non-restraint periods increased substantially. The ITC considered import trends during the period prior to the adoption of the SLA, between 1994 and 1996. During the seven quarters, between August 1994, when the appeals for the 1991-1992 cases were terminated and imports of softwood lumber from Canada were not subject to any trade restraining measure, until the SLA took effect in April 1996, subject imports' market share increased from 32.6 percent in 3rd quarter 1994 to 37.4 percent in 1st quarter 1996. With the SLA in effect, the market share for softwood lumber from Canada declined to 34.3 percent in 1997 and remained fairly stable within a range of 2.7 percentage points. The ITC appropriately considered these trends and did not rely solely on this evidence to support its affirmative threat determination. Moreover, the evidence for the earlier period was consistent with the evidence for the more recent restraint-free period (April-August 2001), which showed that imports substantially increased.

29. Subject imports increased during the period immediately after the SLA expired (April 2001) and before suspension of liquidation (August 2001). Subject imports by volume for the period of April to August 2001 were higher than the comparable April-August period in each of the preceding three years (1998-2000) by a range of 9.2 percent to 12.3 percent. This evidence provides a clear indicator of how subject imports have entered, and would enter, the U.S. market in the imminent future if not subject to trade restraints, and supports the ITC's finding of likely substantial increases in subject imports.

30. Canada's claim that the ITC should have considered if this increase was due to a shift in timing resulting from the pending imposition of duties ignores the simple fact that imports would be entering the U.S. market without restraints in substantially increased amounts, and continues to focus on the magnitude of increases rather than the underlying fact that imports already are, and would continue to be, at injurious levels. Canada's attempts to portray the ITC's finding as inconsistent with its negative finding on the misunderstood "but for" provision in U.S. law that must be considered in affirmative threat determinations also fails for a number of reasons. First, the ITC found that the volume of imports supported a present material injury finding; there would have been no need to change its determination from threat to present if it had been based only on this factor. Second, Canada is suggesting that the ITC should have based its entire present material injury determination on one factor based on only five months of data. However, as the Appellate Body in *US-Lamb Meat* explained in the safeguards context, the data for the entire period of investigation must be assessed in making a threat of injury determination.

31. Canada fails to refute the simple facts that, without restraints, imports have increased; increases stopped when the SLA was imposed; substantial increases in imports occurred when the SLA expired; and increases in imports stopped when preliminary duties were imposed. Canada offers

nothing but speculation about other reasons why imports were not restrained during those periods.

32. **The ITC's Finding of Likely Price Effects by Subject Imports.** At the heart of Canada's arguments regarding the ITC finding of likely price effects is its disagreement with the finding of a likely substantial increase in subject imports. Canada again mischaracterizes the evidence and findings in the ITC's present material injury analysis.

33. In evaluating the present price effects of the subject imports, the ITC **found that the substantial volume of subject imports had *some* adverse effect on prices** for the domestic like product during the period of investigation, albeit not significant effects. The ITC concluded that while subject imports had adversely affected prices of domestic products, it could not find significant price effects because the price declines were due to excess supply in 2000 by both Canadian exports and domestic product. While the evidence again showed substantial declines in prices in the third and fourth quarters of 2001, to levels as low as 2000, the evidence regarding supply, which generally was considered the cause for the substantial price declines in 2000, indicated that U.S. producers had curbed their production, but that overproduction "remains a problem in Canada." Therefore, the ITC reasonably found that the additional subject imports, which it concluded were likely, would further increase the excess supply in the market, putting further downward pressure on prices. Moreover, the evidence demonstrated that pressure would come from excess Canadian supply rather than a combination of import and domestic supply.

34. Canada would have the Panel preclude findings of likely price effects in a threat analysis because present price effects were not found. This view simply has no basis in the covered Agreements, particularly when, as here, prices declined at the end of the period of investigation. The ITC's explanation regarding likely price effects builds, in particular, on its explanation in its present price effects discussion, among others.

35. **The ITC's Consideration of the Nature of the Countervailable Subsidies**. The ITC also considered the nature of the subsidies granted by Canada, consistent with the requirement of Article 15.7(i) of the SCM Agreement. The ITC examined the information presented to it by the U.S. Department of Commerce regarding the 11 programs that it found conferred countervailable subsidies to Canadian producers and exporters of softwood lumber. The ITC took into account that none of the subsidies were of the kind described in Article 3 or 6.1 of the SCM Agreement.

36. At the center of Canada's claim is a misperception that the SCM Agreement requires the ITC to make a finding concerning the nature of the subsidies and their likely trade effects. However, the plain language of the Agreement requires the ITC to consider this factor but not to make a finding.

37. While the ITC clearly considered parties' arguments on the nature and effect of the subsidies, it declined to adopt the positions of any of the parties due to the conflicting evidence and economic theories regarding the effects of stumpage fees on lumber output. Canada has provided the Panel with a one-sided analysis of this issue, and ignored the conflicting evidence presented to the ITC regarding the applicability of the economic models and their alleged effects. Canada would have the Panel believe that the Canadian producers' economic theory was the only information before the ITC on this issue and that this theory was a proven fact. Neither assertion is true. The domestic producers presented the ITC with arguments, economic analysis and economic studies to refute the economic theory provided by Canadian parties. Indeed, evidence presented to the ITC during its investigation squarely placed in question whether the Ricardian rent theory was applicable to the timber and lumber markets, whether the underlying premise to the theory regarding fixed supply was correct, and whether the results regarding the effects of the stumpage fees on output were very different. The ITC

made an objective examination of this issue by considering all of the evidence and arguments presented.

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

39. **The ITC's Consideration of the Threat Inventory Factor**. The ITC has given attention to and taken the inventory factor into account. The ITC is not required to make findings on each factor, but instead is only directed to consider the "totality" of the threat factors in making a determination. The ITC's determination is reasonably based on numerous factors, including consideration of the inventories of the subject product.

III. ITC's Determinations are Consistent with U.S. Obligations Under Articles 3.2 and 3.4 of the Antidumping Agreement and Articles 15.2 and 15.4 of the SCM Agreement

40. In a threat analysis, the investigating authority should consider the evidence regarding the factors listed in Article 3.7 of the Antidumping Agreement and Article 15.7 of the SCM Agreement, as well as the present and past evidence regarding the factors listed in Articles 3.2 and 3.4 of the Antidumping Agreement and Articles 15.2 and 15.4 of the SCM Agreement.

41. **ITC Properly Considered Volume and Price Effects of Subject Imports**. The ITC considered all of the facts from the present and past, specifically regarding the volume of imports, price effects and the consequent impact of continued dumped and subsidized imports on the domestic industry, in its threat analysis. The ITC's evaluation of the evidence regarding relevant factors, pursuant to Articles 3.2 and 3.4 of the Antidumping Agreement and Articles 15.2 and 15.4 of the SCM Agreement, resulted in subsidiary findings that the volume of imports was significant, that there were some price effects, that the condition of the domestic industry had deteriorated primarily as a result of declining prices and that the industry was in a vulnerable state. Moreover, projections based on the facts provide positive evidence justifying the ITC's determination that the domestic industry was on the verge of material injury by reason of the continued dumped and subsidized softwood lumber imports from Canada.

42. Canada's arguments are merely variations of the same arguments already raised regarding likely substantial increases in imports and likely price effects, and are based on Canada's premise that there could be no threat because there allegedly were no findings of injurious effects in the present material injury analysis. That premise is demonstrably incorrect.

43. **ITC Properly Considered the Impact of Subject Imports on the Domestic Industry**. The ITC also properly conducted a "meaningful evaluation" of the relevant factors listed in Article 3.4 of the Antidumping Agreement and Article 15.4 of the SCM Agreement, and reasonably concluded that the deterioration in the performance of the domestic industry, particularly its financial performance, made it vulnerable to injury. Canada fails to recognize that a finding of vulnerability by its nature is a finding about the future, *i.e.*, a future assessment of the industry's susceptibility to injury.

44. Canada's reliance on the panel's findings in *Mexico-HFCS* to challenge whether the ITC

conducted a "meaningful evaluation" of these factors is misplaced. The issue in *HFCS* was not the manner in which these factors were evaluated but that they did not appear to be considered at all. Two very important differences distinguish this case from *HFCS*: first, it is possible, by reading the ITC's final determination here, where it was not in *HFCS*, to understand the overall condition of the domestic industry with respect to the Article 3.4 factors; and second, in this case, the domestic industry was currently experiencing substantial declines in its condition, particularly its financial performance, which was not the case in *HFCS*.

IV. The ITC's Determinations are Consistent with U.S. Obligations Under Article 3.5 of the Antidumping Agreement and Article 15.5 of the SCM Agreement

45. **The ITC Demonstrated a Causal Relationship Between the Dumped and Subsidized Imports and the Threat of Injury to the Domestic Industry.** Canada's claims under Article 3.5 and 15.5, respectively, are merely variations of the same arguments already raised regarding likely substantial increases in imports and likely price effects, and are based on its premise that there could be no threat because there allegedly were no injury findings in the present material injury analysis. The totality of the facts when examined in an unbiased and objective manner support the ITC's findings.

46. Demand and self-sufficiency. The ITC, not surprisingly since subject imports from Canada have accounted for about one-third of U.S. consumption for more than seven years, recognized that the United States was not self-sufficient in the production of lumber. Canada's argument, however, implies that, if demand increases substantially, the U.S. industry will not be capable of increasing supply, because its capacity is fully utilized. Not only is this argument incorrect, it also is inconsistent with Canada's own argument regarding attribution to dumped and subsidized imports of injury caused by other known factors. In that context, Canada assumes that the U.S. industry has the capability to contribute to excess supply in the future and would be the cause of injury. The facts do not support either theory. The ITC appropriately considered the conditions of competition regarding demand and the U.S. industry's ability to supply the U.S. market.

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

48. North American integration. Canada recognizes that the ITC considered the integration of the North American lumber industry, but criticizes the ITC for not speculating that integrated companies would not harm related companies. Yet, Canada provides no evidence whatsoever to support its supposition that integrated firms will not harm their related parties. Moreover, this integration is not new. This raises the question of why would it have a different effect in the future than during the period of investigation, when, with integration in place, the evidence demonstrated that import volumes were significant, and imports had some adverse price effects.

49. **The ITC Examined Any Known Causal Factors to Ensure Injury Was Not Attributed to Subject Imports**. Neither Article 3.5 of the Antidumping Agreement nor Article 15.5 of the SCM

Agreement provides any particular methodology that authorities must use in examining other known causal factors. The Appellate Body in *EC-Pipe* indicated that, "provided that an investigating authority does not attribute the injurious effects 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."

50. Canada principally alleges that domestic supply is a known causal factor which the ITC found contributed to injury in its present material injury analysis, but ignored in its threat analysis. The ITC examined constraints on domestic producers' ability to meet demand. The ITC also took into consideration domestic producers' past contribution to oversupply conditions. Canada ignores, however, the evidence cited by the ITC indicating that the domestic producers had curbed their production, but that "overproduction remains a problem in Canada." Thus, while domestic overproduction had contributed to adverse price effects in 2000, the evidence demonstrated that it was no longer contributing to excess supply while Canadian imports continued to oversupply. Canada also omits the fact that domestic production capacity was fairly level during the period of investigation, a time when apparent consumption was increasing. These facts concerning domestic supply reinforce the ITC's affirmative determinations.

51. The ITC considered parties arguments' regarding three other alleged causal factors – nonsubject imports, other substitutes, and cyclical demand and housing construction cycles – that Canada refers to in footnotes to its first submission. However, upon examination of the record evidence regarding these issues, it is clear that none of them rise to the level of "other known factors injuring the domestic industry".

V. The ITC's Combined Investigations are Consistent with U.S. Obligations Under Covered Agreements

52. The ITC's decision to cross-cumulate subsidized and dumped imports of softwood lumber from Canada in its consideration of whether the volume and price effects of subject imports threatened the domestic industry with material injury is consistent with U.S. obligations under the Antidumping Agreement and the SCM Agreement. The fact that neither Agreement speaks to the issue of cross-cumulation does not mean that such an analysis is precluded or inconsistent with either Agreement. The purpose of the covered Agreements is to provide a remedy against unfair trade practices causing injury to a domestic industry. To deny a remedy where the cumulative effect of dumped and subsidized imports is injury to the domestic industry would frustrate the purpose of these Agreements.

53. Finally, Canada's allegations that the ITC conducted combined investigations and cross-cumulated Canadian imports of softwood lumber so as to more likely result in an affirmative determination in this case has no merit. Canada provides no basis to support this allegation and fails to acknowledge that the ITC's consistent practice is to cumulate both subsidized and dumped imports from a single country for purposes of the ITC's injury analyses. More significantly, Canada has failed to explain to the Panel why it considers such practice to be inconsistent with obligations under the Antidumping and SCM Agreements, when Canada itself takes the identical approach in its own trade remedy proceedings, cross-cumulating subsidized and dumped imports.