

**BEFORE THE
WORLD TRADE ORGANIZATION**

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

WT/DS277

**ANSWERS OF THE UNITED STATES
TO THE PANEL'S QUESTIONS
IN CONNECTION WITH THE SECOND SUBSTANTIVE MEETING**

October 17, 2003

Question 1: *The United States appears to argue that there is no obligation for an investigating authority to explicitly identify a change of circumstances that would cause a threat of injury to ripen into actual material injury. Would the US disagree with the proposition that a reviewing panel must be able to determine, from the investigating authorities determination, what the investigating authority considered constituted the clearly foreseen and imminent change in circumstances which would create a situation in which dumping would cause injury?*

1. The United States would agree that a reviewing panel should be able to discern from the investigating authority's determination the clearly foreseen and imminent change in circumstances which would create a situation in which the dumped and subsidized imports would cause injury. The ITC's determinations in this case enable the Panel to do just that. The Commission provided a detailed explanation of how the totality of the evidence supported its conclusion, *i.e.*, that there will be in the near future substantially increased importation of softwood lumber from Canada at dumped and subsidized prices which would cause injury. In doing so, the ITC addressed the facts and likely events demonstrating the progression or change in circumstances which would create a situation in which the dumped and subsidized imports would cause injury. We refer the Panel to paragraph 18 of the U.S. second written submission for a demonstration of the progression or change in circumstances.¹ The Commission's decisional path is reasonably discernible, and its determinations are consistent with all of the U.S. obligations under the covered agreements.

2. Canada has alleged that there is an "explicit obligation in Articles 3.7 and 15.7 to identify" a change in circumstance that would cause a threat to ripen into actual injury.² While the text provides a clear example of the change in circumstances as a sequence or accretion of events, it contains no requirement to explicitly "identify" a change in circumstances.³ In its closing statement at the second panel meeting, Canada seems to retreat from its assertion of a requirement to "explicitly identify" by now equating "identify" with a "demonstration" of a change in circumstance. Canada, however, questions "[i]f there is any difference between 'identify' and 'demonstrate', [and states that] it is not apparent to Canada."⁴ But, there is a clear difference between "explicitly identifying" a change in circumstance and addressing the facts and likely events demonstrating the progression or change in circumstances which would create a situation in which the dumped and subsidized imports would cause injury. The Commission provided a detailed analysis which demonstrates the progression or change in circumstances, and as such, its determinations are consistent with all U.S. obligations under the covered agreements.

¹ See U.S. Second Written Submission, para. 18.

² See Canada Second Written Submission, para. 4; Canada's Response to Panel Question 9, para. 34; Canada's Opening Statement at the First Panel Meeting, paras. 35 and 45.

³ Article 3.7 of the Antidumping Agreement and Article 15.7 of the SCM Agreement state that "[t]he change in circumstances which would create a situation in which the dumping [subsidy] would cause injury must be clearly foreseen and imminent." The Antidumping Agreement provides as an example of the change in circumstances "that there is convincing reason to believe that there will be, in the near future, substantially increased importation of the product at dumped [or subsidized] prices." Article 3.7 and n. 10 of the Antidumping Agreement.

⁴ Canada's Closing Statement at Second Panel Meeting, para. 3.

Question 2: *The United States observed, at paragraph 17 of its second oral statement, that "Canada's claims that the ITC found no present injurious effects" are erroneous. Is the Panel to understand from this that the United States asserts that the USITC found that there was some degree of injury to the domestic industry during the period of investigation but that such injury was not material? Or is the Panel to understand that the USITC found that there was no causal link between the subject imports and injurious effects to the industry? Or is the Panel to understand that the USITC found that other factors caused the injurious effects? If not, could the US please explain the basis of the negative determination in the present material injury context in light of the "injurious effects" found in the analysis?*

3. In short, the ITC's subsidiary findings regarding present material injury recognized some adverse injurious effects to the domestic industry from subject imports, which clearly support the ITC's determination of the existence of a threat of material injury. As discussed below, the ITC found a causal link between the subject imports and injury to the domestic industry, but also found in its present injury analysis that an other factor contributed to the injury to the domestic industry. In particular, the Commission found that the excess supply, which resulted in substantial declines in prices in 2000 and declines in the financial performance of the domestic industry, was not only provided by subject imports but also by domestic production.

4. In conducting a present material injury analysis, the investigating authority is required to consider the evidence and factors regarding the volume of imports, the price effects of imports and their impact on the state of the domestic industry. This analysis generally follows an order: first, consideration of whether the volume or market share of imports is significant; second, consideration of whether the price effects of imports (*i.e.*, either through price undercutting or price suppression or depression) are significant; and third, consideration of whether subject imports have had an adverse impact on the domestic industry by evaluating all relevant economic factors and indices having a bearing on the state of the domestic industry and examining whether there is a causal relationship between the dumped and subsidized imports and injury to the domestic industry.

5. In this case, the ITC found, based on the facts as a whole, that the volume and market share of subject imports, accounting for 34 percent of the U.S. market, were already significant. This volume finding supported an affirmative present material injury finding, if combined with significant price and impact effects.⁵ While a finding that the volume of imports was significant was not by itself sufficient to support an affirmative present injury finding in these investigations, this volume finding is an integral factor in making an affirmative present material injury determination.⁶

6. The Commission considered the evidence regarding price trends and found that prices

⁵ ITC Report at 32 ("Nonetheless, this large volume of subject imports both in absolute terms and relative to consumption in the United States is significant.").

⁶ The simple fact is, imports accounting for a large share of the market generally will be able to affect prices in the market, and thus impact the condition of the domestic industry.

declined “substantially through the third and fourth quarters of 2000 to their lowest point in the 1999-2001 period.”⁷ The Commission found that the substantial volume of subject imports had *some* effect on prices for the domestic like product during the period of investigation, albeit not significant effects. There was a particular fact that played a critical role in the Commission’s conclusion of no significant *present* price effects: the excess supply in 2000 that resulted in price declines was due to both subject imports in addition to domestic production. The evidence showed that the declines in prices resulting from that excess supply had substantially affected the domestic industry’s financial performance. The Commission 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 from both Canadian exports and domestic product, and Canadian export market share had been relatively stable.

7. The Commission’s finding that subject imports had *some* price effects and its reasoning for why such effects were not significant is set forth in the last three sentences of the Views of the Commission (ITC Report at page 35). The Commission stated as follows:

The evidence indicates that both subject imports and the domestic producers contributed to the excess supply, and thus the declining prices. We conclude that subject imports had *some* effect on prices for the domestic like product during the period of investigation, in particular due to their large share of the market. However, particularly in light of relatively stable market share maintained by subject imports over the period of investigation, we cannot conclude from this record that the subject imports had a *significant* price effect during the period of investigation.⁸

8. The Commission assessed the condition of the domestic industry and found that it “is vulnerable to injury in light of declines in its performance over the period of investigation, particularly its financial performance.”⁹ In brief, the record reflects that many performance indicators declined significantly from 1999 to 2000, and then declined slightly or stabilized from 2000 to 2001.¹⁰ With respect to the domestic industry’s financial performance in particular, the evidence also generally shows declines during the period of investigation, with a dramatic drop from 1999 to 2000, as prices declined.¹¹ The Commission found that “the deterioration in the condition of the domestic industry during the period of investigation is largely the result of substantial declines in price.”¹²

9. In making its negative present material injury finding, the Commission summarized the impact of the subject imports on the domestic industry as follows: “In light of our finding that subject imports have not had a significant price effect, and the small increase in their market

⁷ ITC Report at 34.

⁸ ITC Report at 35.

⁹ ITC Report at 37.

¹⁰ See ITC Report at 37-38.

¹¹ See ITC Report at 38-39.

¹² ITC Report at 36.

share, we conclude that subject imports did not have a significant impact on the domestic industry," *i.e.*, they had not caused material injury.¹³

10. Moreover, there also was evidence in the record considered by the Commission in its analysis that foreshadowed the existence of threat of material injury. While the ITC recognized that the market share of subject imports was relatively stable at the significant 34 percent level during the period of investigation, the Commission recognized that it had been higher prior to the imposition of the restraining effect of the Softwood Lumber Agreement (SLA).¹⁴ Thus, the ITC found that the SLA, which expired, had kept market share relatively stable. As discussed in the ITC Report,¹⁵ subject imports held a U.S. market share of 35.7 percent in 1995, the year prior to the SLA, and 35.9 percent in 1996, the year the SLA was imposed (on May 29, 1996). During the first full year under the SLA (1997), subject imports declined to a U.S. market share of 34.3 percent, the same market share held in 2001, with a range from 33.2 percent to 34.6 percent during the SLA period.¹⁶ Thus, the relatively stable market share during the SLA period does not negate the finding that the market share was significant. Rather it is an indicator of the SLA's restraining effect and supports an affirmative threat of injury finding.

11. Furthermore, there also was evidence at the end of the period of investigation which foreshadowed the existence of a threat of material injury. The ITC found that "[p]rices during the first quarter of 2001 rose somewhat or remained near their levels in the fourth quarter of 2000, then significantly increased in mid-2001 before declining again in the third and fourth quarters of 2001."¹⁷ Prices in the third and fourth quarters of 2001 had declined to levels as low as 2000. Subject imports also increased in the third quarter until the preliminary duties were imposed in August 2001.¹⁸ There also was evidence regarding excess supply which generally was considered the cause for the substantial price declines in 2000. This time, however, the evidence indicated that U.S. producers had curbed their production, but that overproduction remained a problem in Canada. Therefore, the Commission reasonably found that the additional subject imports, which it concluded were likely, would further increase the excess supply in the market, putting further downward pressure on prices.¹⁹ Such evidence supports the ITC's findings of the existence of a threat of material injury.

Question 3: *The Panel understands the United States to be arguing that the situation of the US lumber market in the imminent future is expected to be much like the situation during the period*

¹³ ITC Report at 36.

¹⁴ ITC Report at 32 ("Imports of softwood lumber from Canada held a substantial share of the domestic market with fluctuations within a range of 2.7 percentage points over the last seven years, and subject imports' 2001 market share (34.3 percent) was lower than that in 1995 prior to the SLA (35.7 percent).").

¹⁵ ITC Report at 32 and 41-42; *see also* ITC Report at Table IV-2.

¹⁶ ITC Report at Table IV-2.

¹⁷ ITC Report at 34.

¹⁸ Official import statistics (USA-25).

¹⁹ ITC Report at 43-44.

of investigation – strong, and even improving demand, significant level of subject imports, and increases in those imports, continuing oversupply in the market, and consequent negative price effects. However, the Panel understands the United States to contend that, unlike during the period of investigation, domestic producers will not contribute to the oversupply in the imminent future, and therefore the negative price effects will be attributable to oversupply of Canadian lumber. Is the Panel's understanding of the theory of the United States correct? Could the United States please indicate where in the determination this theory for the future is set forth? Could the United States please indicate the evidence, other than or in addition to the Bank of America analyst's report quoted at footnote 217 of the USITC determination, that supports the view that unlike during the period of investigation, domestic producers will not contribute to the oversupply in the imminent future?

12. While the situation of the U.S. lumber market in the imminent future is expected to have some similarities to the situation during the period of investigation, there are differences in addition to the oversupply issue referenced by the Panel. In particular, the restraining effect of the Softwood Lumber Agreement (SLA) would no longer be in place. As discussed above, the ITC found that the SLA, which expired, had kept market share relatively stable. While the ITC had found that the volume and market share of subject imports were already significant and had increased even with the restraining effect of the SLA in place, the Commission also found that subject imports had increased substantially during periods without import restraints. For example, during the April-August 2001 period, which was free from import restraints, subject imports had increased by 11.3 percent compared to the same period in 2000.²⁰ Moreover, the increases in imports under the SLA occurred in spite of some of these imports being subject to \$50 and \$100 fees. The Commission recognized that the significant quantities of imports subject to \$100 fees under the SLA indicated that “in the absence of the SLA they [Canadian producers] would have shipped more, given the near prohibitive level of the \$100 fee.”²¹ The Commission discussed its analysis regarding these factors on pages 40-43 of the ITC Report.

13. As the Panel noted, the Commission recognized in its present material injury analysis that domestic overproduction had contributed to adverse price effects in 2000. The Panel is correct in understanding that the ITC found the evidence demonstrated that domestic production was no longer contributing to excess supply, while the continued oversupply by Canadian imports would likely have negative price effects in the imminent future. While the Commission found in its present material injury analysis that both subject imports and domestic production had been the source of the oversupply resulting in the substantial price declines in 2000, it also found that the evidence demonstrated that after 2000, domestic producers had curbed their production, but that overproduction remained a problem in Canada. The Commission cited to this evidence regarding events occurring toward the end of its period of investigation in its present material injury discussion. This evidence regarding supply in the latter part of the period

²⁰ See ITC Report at 42, n. 269. In fact, subject imports increased from the April-December 2001 period by almost 5 percent, even with the bonding requirements imposed resulting from the August 2001 preliminary CVD determination.

²¹ ITC Report at 41.

of investigation clearly foreshadowed the existence of a threat of material injury by reason of the dumped and subsidized imports.

14. In addition to the evidence cited in footnote 217 of the ITC Report,²² the Commission considered domestic supply on pages 24-25, 34-35, 37-38, and 43-44 of the ITC Report and Canadian supply on pages 40-41 of the ITC Report. Specifically, the evidence demonstrated that domestic production capacity was fairly level during the period of investigation, following a small but steady increase between 1995 and 1999, as apparent consumption increased.²³ Domestic capacity utilization was 87.4 percent in 2001. With the exception of a peak in 1999 at 92 percent, it had consistently held this level from 1995 to 2001.²⁴ In contrast, Canadian capacity utilization had declined in 2001 to 83.7 percent, a rate substantially lower than that reported for any other year in the 1995-2001 period.²⁵ In spite of this decline in capacity utilization rates, Canadian producers projected slight increases in capacity, increases of 8.9 percent in production, and a return of capacity utilization to 90.4 percent in 2003.²⁶ These facts concerning domestic and Canadian supply reinforce the ITC's affirmative threat determinations. Moreover, there also was other evidence regarding domestic supply in the record before the Commission. In particular, there was evidence regarding permanent mill closures, *i.e.*, permanent reductions in capacity, in the United States and in Canada that showed a greater reduction in U.S. production than Canadian production.²⁷

²² See U.S. Opening Statement at Second Panel Meeting, para. 47. The Bank of America analysis cited by the ITC indicates that lumber overproduction may continue even after the lumber market has been vastly oversupplied, because it is not exclusively tied to the demand for lumber but rather, may also be tied to demand for by-products, *e.g.*, wood chips for pulp and paper manufacturing.

²³ ITC Report at Table III-6 and C-1 (public data). Domestic producers based on public data reported production capacity of 39,800 mmbf in 1999, 40,100 mmbf in 2000, and 40,040 mmbf in 2001. *Id.* Domestic producers' questionnaire responses reported production capacity of 22,847 mmbf in 1999, 24,233 mmbf in 2000, and 24,709 mmbf in 2001, although the industry coverage is not necessarily comparable to the public data. *Id.* at Table III-7 and C-1.

²⁴ ITC Report at Tables III-6 and C-1 (public data). Domestic capacity utilization based on public data was 86.1 percent in 1995, 87.6 percent in 1996, 89.9 percent in 1997, 88.5 percent in 1998, 92.0 percent in 1999, 89.7 percent in 2000 and 87.4 percent in 2001. *Id.* Domestic producers' questionnaire responses reported similar capacity utilization rates: 92.8 percent in 1999, 88.5 percent in 2000, and 86.1 percent in 2001. *Id.* at Tables III-7 and C-1.

²⁵ ITC Report at Tables VII-1 (public data). Canadian capacity utilization based on public data was 87.8 percent in 1995, 87.7 percent in 1996, 87.4 percent in 1997, 87.3 percent in 1998, 90.5 percent in 1999, 88.9 percent in 2000 and 83.7 percent in 2001. *Id.* Canadian producers' questionnaire responses reported similar capacity utilization rates: 90.3 percent in 1999, 88.8 percent in 2000, 84.4 percent in 2001, and projections of 88.5 percent in 2002 and 90.4 percent in 2003. *Id.* at Table VII-2.

²⁶ ITC Report at Table VII-2. The U.S. market is very important to Canadian producers. Canadian producers rely on sales in the U.S. market for about 65 percent of their production and have incentives such as mandatory cut requirements to produce more softwood lumber and export it to the U.S. market.

²⁷ The parties disagreed about the reasons for the decline in the number of U.S. mills, but the Commission found that the record reflected that at least some of the mill closures were due to conditions in the U.S. market. ITC Report at 39 and n. 244. This evidence showed that during the period of investigation, the permanent closure of U.S. mills accounted for a greater reduction in U.S. production than the reduction in Canadian production from the permanent closure of the Canadian mills and that more U.S. mills than Canadian mills permanently closed from

Question 4: *The United States asserted in its answer to the Panel's question 26, and in its second oral statement, that it was "important to understand that consideration and explanation of a factor in any section of the ITC Report does not limit its application to that section of the Report". Accepting that position for purposes of argument, could the US explain how a reviewing Panel is to understand the future impact of factors in the threat context if the analysis of those factors is only made in the context of a present injury analysis, with reference to historical data for the period of investigation? Is there not an obligation to explain the impact of those factors in the context of the analysis of threat of material injury in order for the Panel to be able to review the determination? Is it the view of the United States that an investigating authority need never consider the Article 3.4/Article 15.4 factors in a predictive context, that is, with respect to the impact of imports in the future on those, or other relevant factors?*

15. The evaluation of whether dumped and subsidized imports have adversely impacted the domestic industry may involve: first, an evaluation of all relevant economic factors and indices having a bearing on the state of the domestic industry to determine the condition of the industry; and, second, an examination of whether the volume and price effects of the dumped and subsidized imports have impacted and caused injury to the domestic industry.

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

17. In this case, the Commission assessed the condition of the domestic industry and found that it "is vulnerable to injury in light of declines in its performance over the period of investigation, particularly its financial performance."²⁸ In brief, the record reflects that many performance indicators declined significantly from 1999 to 2000, and then declined slightly or

August 2000 to December 2001. See, e.g., *Random Lengths* data compiled in Petitioners' Prehearing Brief at Exhibits 38 and 54; CLTA's Posthearing Brief, Vol. 3 at Tables D and F; Spelter Mill Report, 2001; ITC Report at Table III-2.

²⁸ ITC Report at 37. The Commission's analysis of the vulnerable condition of the domestic industry is on pages 36-39 of the ITC Report.

stabilized from 2000 to 2001.²⁹ With respect to the domestic industry's financial performance in particular, the evidence also generally shows declines during the period of investigation, with a dramatic drop from 1999 to 2000, as prices declined.³⁰

18. Moreover, the ITC considered the consequent impact of the likely substantial increases in imports and likely price effects.³¹ The evidence demonstrates that subject imports already at significant levels will continue to enter the U.S. market at significant levels and are projected to increase substantially. The Commission found that the additional subject imports would increase the excess supply in the market, putting further downward pressure on prices. Prices at the end of the period of investigation, in the third and fourth quarters of 2001, had substantially declined to levels as low as they had been in 2000. Evidence regarding likely excess supply, which generally caused the substantial price declines in 2000 that led to the deterioration in the condition of the domestic industry, indicated that U.S. producers had curbed their production, but that overproduction remains a problem in Canada. The Commission reasonably found that subject imports were likely to increase substantially and were entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices, are likely to increase demand for further imports, and thereby adversely impact the U.S. industry. The ITC's findings support the existence of a threat of material injury caused by subject imports.

²⁹ See ITC Report at 37-38.

³⁰ See ITC Report at 38-39.

³¹ The Commission's assessment of the impact of future imports on the domestic industry is primarily on pages 43 and 44 of the ITC Report.