

**UNITED STATES – INVESTIGATION OF THE  
INTERNATIONAL TRADE COMMISSION IN SOFTWOOD  
LUMBER FROM CANADA**

Recourse to Article 21.5 of the DSU by Canada

*Report of the Panel*



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**Annex A** Request for the Establishment of a Panel – Document WT/DS277/8

**TABLE OF CASES CITED IN THIS REPORT**

Short Title	Full Case Title and Citation
<i>Canada – Aircraft (Article 21.5 – Brazil)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft, Recourse by Brazil to Article 21.5 of the DSU</i> , WT/DS70/AB/RW, adopted 4 August 2000, DSR 2000:IX, 4299.
<i>EC – Bed Linen (Article 21.5 – India)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/RW, adopted 24 April 2003.
<i>EC – Tube or Pipe Fittings</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/AB/R, adopted 18 August 2003.
<i>Mexico – Corn Syrup (Article 21.5 – US)</i>	Appellate Body Report, <i>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</i> , WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6675
<i>Thailand – H-Beams</i>	Panel Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/R, adopted 5 April 2001, as modified by Appellate Body Report, WT/DS122/AB/R, DSR 2001:VII, 2741.
<i>US – Cotton Yarn</i>	Appellate Body Report, <i>United States – Transitional Safeguard Measures on Combed Cotton Yarn from Pakistan</i> , WT/DS192/AB/R, adopted 5 November 2005
<i>US – Countervailing Duty Investigation on DRAMS</i>	Appellate Body Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea</i> , WT/DS296/AB/R, adopted 20 July 2005
<i>US – Hot-Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697
<i>US – Lamb Safeguard</i>	Appellate Body Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001

<b>Short Title</b>	<b>Full Case Title and Citation</b>
<i>US – Shrimp (Article 21.5 – Malaysia)</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia</i> , WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6481
<i>US – Softwood Lumber IV (Article 21.5 – Canada)</i>	Panel Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada-Recourse to Article 21.5 by Canada</i> , WT/DS257/RW, circulated 1 August 2005
<i>US – Softwood Lumber VI</i>	Panel Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada</i> , WT/DS277/R, adopted 26 April 2004
<i>US – Steel Safeguards</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , 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, adopted 10 December 2003
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323



## I. INTRODUCTION

1.1 On 14 February 2005, Canada requested the establishment of a panel pursuant to Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter "DSU") concerning the United States' alleged failure to implement the recommendations and rulings of the Dispute Settlement Body (hereinafter "DSB") in the dispute "*United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*".

1.2 At a special meeting on 25 February 2005, the DSB referred this dispute to the original panel, in accordance with Article 21.5 of the DSU, to examine the matter referred to the DSB by Canada in document WT/DS277/8. At that meeting, the parties to the dispute also agreed that the Panel should have standard terms of reference. The terms of reference are, therefore, the following:

"To examine, in the light of the relevant provisions of the covered agreements cited by Canada in document WT/DS277/8, the matter referred to the DSB by Canada in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements".

1.3 On 2 March 2005, the Panel was composed as follows:

Chairman: Mr. Hardeep Singh Puri  
Members: Mr. Paul O'Connor  
Ms. Luz Elena Reyes de la Torre

1.4 China and the European Communities reserved their rights to participate in the Panel proceedings as third parties.

1.5 The Panel met with the parties on 28-29 June 2005. It met with the third parties on 29 June 2005. The Panel issued its interim report to the parties on 29 August 2005.

## II. FACTUAL ASPECTS

2.1 This dispute concerns the parties' disagreement as to the consistency with the *Agreement on Implementation of Article VI of GATT 1994* (hereinafter "AD Agreement") and the *Agreement on Subsidies and Countervailing Measures* (hereinafter "SCM Agreement") of the measure taken by the United States to comply with the recommendation of the DSB arising out of the Panel's report *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*.<sup>1</sup>

2.2 The original dispute concerned the investigation and determination of threat of material injury of the United States International Trade Commission (USITC) in *Softwood Lumber from Canada* and the final definitive anti-dumping and countervailing duties applied following the final determination. In that determination, the USITC had unanimously determined that an industry in the United States was threatened with material injury by reason of imports of softwood lumber from Canada found to be subsidized and sold in the United States at dumped prices, and antidumping and countervailing duty orders on imports of softwood lumber from Canada were subsequently issued.

2.3 In its final determination, the USITC had determined that the domestic softwood lumber industry was not materially injured by reason of subject imports from Canada found to be dumped and

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<sup>1</sup> Panel Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada* ("US – Softwood Lumber VI"), WT/DS277/R, adopted 26 April 2004.

subsidized, but found that there was a threat of material injury by reason of such imports. In making that determination, the USITC found that the domestic industry producing softwood lumber was vulnerable to injury in light of declines in its performance over the period of investigation, particularly its financial performance. The USITC noted that the United States Department of Commerce (USDOC) had determined that there were 11 programs that conferred countervailable subsidies to Canadian producers and exporters of softwood lumber. The USITC found that Canadian dumped and subsidized imports (subject imports) were likely to increase substantially based on a series of factors. The USITC found that there was a moderate degree of substitutability between subject imports and the domestic like product, and that prices of different species affected the prices of other species. Given its finding of likely significant increases in subject import volumes, and its finding of at least moderate substitutability between subject imports and domestic product, the USITC concluded that subject imports were likely to have a significant price depressing effect in the immediate future. The USITC recognized that while inventories generally were not substantial in the softwood lumber industry, Canadian producers' inventories as a share of production had increased and were consistently higher than that reported by US producers during the period of investigation. Finally, the USITC noted that a number of domestic producers had reported actual and potential adverse effects on their development and production efforts, growth, investment, and ability to raise capital due to subject imports from Canada. Thus, the USITC determined that further significant increases in dumped and subsidized imports were imminent, that these imports were likely to exacerbate price pressure on domestic producers, and that material injury to the domestic industry would occur.

2.4 Before the Panel, Canada had alleged violations of various provisions of the AD and SCM Agreements in the USITC's determination of injury. In particular, Canada alleged specific violations of Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement, arguing that the USITC failed to properly consider the particular factors relevant in threat of injury determinations, and violations of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement, arguing that the USITC failed to properly analyze causation and failed to properly apply the "non-attribution" requirement, which specifies that injury caused by other factors must not be attributed to dumped and/or subsidized imports. These claims required the Panel to consider the substance of the USITC's final determination of threat of material injury to determine whether it was consistent with US obligations under the AD and SCM Agreements.

2.5 The Panel found, *inter alia*:

- (a) that the USITC determination was **not consistent** with Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement in that the finding of a likely imminent substantial increase in imports was not one which could have been reached by an objective and unbiased investigating authority in light of the totality of the factors considered and the reasoning in the USITC determination.
- (b) With respect to the allegations of violations of Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement in respect of other aspects of the USITC determination, the Panel concluded that the USITC determination was **not inconsistent** with the asserted provisions.<sup>2</sup>

2.6 In light of these findings, the Panel concluded

- (a) that the USITC determination was **not consistent** with Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement in that the causal analysis was based on a finding which was, itself, not consistent with Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement.

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<sup>2</sup> Panel Report, *US – Softwood Lumber VI*, *supra* note 1, at para. 8.1.

- (b) With respect to the allegations of violations of Article 3.5 of the AD Agreement and Article 15.5 of the AD Agreement in respect of other aspects of the USITC determination, the Panel concluded that it was neither necessary nor appropriate to make findings with respect to these claims.<sup>3</sup>

2.7 Accordingly, the Panel concluded that to the extent the United States had acted inconsistently with the provisions of the AD and SCM Agreements, it had nullified or impaired benefits accruing to Canada under that Agreement, and therefore recommended that the Dispute Settlement Body request the United States to bring its measures into conformity with its obligations under the AD and SCM Agreements.

2.8 Under US law (commonly referred to as "section 129"), if a WTO Panel or Appellate Body report finds that a determination by the USITC is not consistent with US obligations, then, upon request by the USTR, the USITC "shall issue a determination in connection with the particular proceeding that would render the Commission's action...not inconsistent with the findings of the panel".<sup>4</sup> In this case, the USTR made such a request to the USITC on 27 July 2004. The USITC issued its "section 129" determination within the statutory deadline set out in US law, on 24 November 2004. In that determination, the USITC again concluded that there would be a substantial increase in imports, at prices which would adversely affect the vulnerable domestic industry, threatening material injury, and that no other known causes of threatened material injury to the domestic industry. It is that determination which is challenged by Canada in this Article 21.5 dispute.<sup>5</sup>

2.9 In the course of the section 129 proceeding, the USITC reopened the record of the original investigation to gather additional information from public data sources and from questionnaires sent to US and Canadian producers, held a public hearing, and gave parties opportunities to submit written comments. The USITC stated that its task was to "mak[e] a determination that would render its original action not inconsistent with the findings of" the Panel.<sup>6</sup> Therefore, the USITC addressed in its determination only the issues related to the Panel's findings set forth in the request from USTR, and did not address issues that were not in dispute in the original Panel proceeding or which the Panel had found not inconsistent with the United States' obligations under the WTO Agreements.<sup>7</sup>

2.10 In its section 129 determination, the USITC found, based on a significant rate of increase in imports from a significant baseline level, and taking into account increases in imports during periods of no import restraints, that there was a likelihood of substantially increased imports, and concluded that dumped and subsidized imports would increase in the imminent future. Looking at current import trends, the restraining effects of the US-Canada Softwood Lumber Agreement (SLA), excess Canadian capacity and projected increases in capacity, capacity utilization and production, and demand projections, the USITC concluded that imports would increase at a substantial rate in the

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<sup>3</sup> Panel Report, *US – Softwood Lumber VI*, *supra* note 1, at para. 8.2.

<sup>4</sup> 19 USC. §3538(a)(4).

<sup>5</sup> Similar to the situation during the original dispute, this is one in a series of Canadian challenges, now to the US implementation of the various Panel and Appellate Body reports in the original cases. A WTO Panel recently considered a challenge to the US Department of Commerce's Section 129 determination regarding subsidisation and calculation of the amount of countervailing duties, (*United States – Final Countervailing Duty Determination with respect to Certain Softwood Lumber from Canada - Recourse to Article 21.5 by Canada*, WT/DS257 (circulated 1 August 2005)) and another Panel is now considering the US Department of Commerce's final anti-dumping determination (*United States – Final Dumping Determination on Softwood Lumber from Canada - Recourse to Article 21.5 by Canada*, WT/DS264 (pending before Panel)). However, these disputes do not have any direct bearing on the issues before the Panel in this case, which concerns exclusively the Section 129 determination regarding the injury aspects of the investigations, which is not at issue in the other disputes

<sup>6</sup> Views of the Commission, Exhibit CDA-1, at 4.

<sup>7</sup> *Ibid.*

imminent future beyond historical levels. The USITC concluded that imports were entering the United States at prices that were likely to have a significant depressing or suppressing effect on domestic prices and likely to increase demand for further imports, that imports were therefore likely to adversely impact the US lumber industry in the imminent future. Looking at the question of other factors threatening injury, the USITC concluded that excess supply from the domestic industry, third country imports, importation relative to demand, the integration of the North American softwood lumber industry, substitute products, and domestic production constraints, were not other factors potentially causing injury to the domestic industry, and therefore considered that there was no basis to examine whether any injury could be attributed to them.<sup>8</sup>

### **III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS**

3.1 In its first written submission, Canada requested that the Panel:

(a) find the USITC's Section 129 affirmative threat of injury determination, and the definitive anti-dumping and countervailing duty orders that remain in effect, inconsistent with the United States' obligations under Articles 3.5 and 3.7 of the AD Agreement and Articles 15.5 and 15.7 of the SCM Agreement;

(b) find that the US measures taken to comply are inconsistent with the rulings and recommendations of the DSB; and

(c) recommend that the United States bring its measures into conformity with its WTO obligations, including by revoking the final determination of threat of injury, ceasing to impose anti-dumping and countervailing duties and returning the cash deposits imposed as a result of the United States' actions in this matter.

3.2 In its first written submission, the United States requested that the Panel reject Canada's claims in their entirety.

3.3 In its second written submission, the United States requested that, in the event the Panel were to accept Canada's arguments, it nevertheless decline Canada's requested recommendation.

**[Parties' and Third Parties' Arguments and Annexes deleted from this version.]**

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<sup>8</sup> One Commissioner of the USITC dissented, finding that the domestic industry producing softwood lumber was not threatened with material injury. Views of the Commission, Exhibit CDA-1 at 89.

## VI. INTERIM REVIEW

6.1 In accordance with the timetable for these proceedings, both parties were given the opportunity to submit comments on the interim report, requesting review of precise aspects of the interim report, no later than 5 September 2005. On that date, the United States submitted a request for the Panel to review precise aspects of the interim report, but not requesting a meeting with the Panel on the interim report. In addition, the United States pointed out certain typographical and grammatical errors in the report. On that same date, Canada submitted a letter indicating that it had no comments on the interim report. On 12 September 2005, Canada submitted comments on the United States' request for interim review. We have made typographical and grammatical corrections to the report, including as suggested by the United States at paragraphs 7.12, 7.27, 7.29, 7.33, 7.35, 7.43, 7.61, 7.62, and 7.65. We address below the substantive comments of the parties.

6.2 The United States comments, with respect to the fourth sentence of paragraph 7.18, that the list of factors, based on which the USITC concluded there would be a substantial increase in imports, should be modified to also refer to projected increases in capacity utilization and production. Canada did not comment on this suggestion.

6.3 We have reviewed the determination of the USITC, and in light of the discussion therein<sup>45</sup>, and the lack of objection from Canada, we have made the requested change.

6.4 The United States comments, with respect to the first sentence of paragraph 7.27, that it should be amended to reflect the fact that the USITC's conclusion was based not only on the overall rate of increase over the period of investigation but also on the rate of increase at particular moments during the period of investigation, in view of events occurring at those moments. Canada comments that the USITC never explained its conclusion in these terms, and therefore requests that the Panel not accept the United States' proposed amendment.

6.5 We have reviewed the determination of the USITC, and we recognize that, as suggested by the United States, the USITC did find that the rate of increase in the volume of imports at certain times during the period of investigation was significant.<sup>46</sup> However, the first sentence of paragraph 7.27 refers only to the USITC's finding that the 2.8 percent increase over the period of investigation (1999-2001) was significant, and thus the additional point suggested by the United States is not pertinent to the discussion therein. We have, however, amended the last sentence of paragraph 7.27 to more clearly reflect the fact that the USITC specifically found the rate of increase in the volume of imports after the expiration of the SLA to be significant.

## VII. FINDINGS

7.1 This dispute concerns the parties' disagreement as to the consistency with the *Agreement on Implementation of Article VI of GATT 1994* (hereinafter "AD Agreement") and the *Agreement on Subsidies and Countervailing Measures* (hereinafter "SCM Agreement") of the measure taken by the United States to comply with the recommendation of the DSB arising out of the Panel's report *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*.<sup>47</sup>

7.2 The original dispute concerned the investigation and determination of threat of material injury of the United States International Trade Commission (hereinafter "USITC") in *Softwood Lumber from Canada* and the final definitive anti-dumping and countervailing duties applied following the final

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<sup>45</sup> Views of the Commission, Exhibit CDA-1, at page 40.

<sup>46</sup> *Ibid.* at page 21.

<sup>47</sup> Panel Report, *US – Softwood Lumber VI*, *supra* note 1.

determination. In that determination, the USITC had unanimously determined that an industry in the United States was threatened with material injury by reason of imports of softwood lumber from Canada found to be subsidized and sold in the United States at dumped prices, and antidumping and countervailing duty orders on imports of softwood lumber from Canada were subsequently issued.

7.3 In its final determination, the USITC had determined that the domestic softwood lumber industry was not materially injured by reason of subject imports from Canada found to be dumped and subsidized, but found that there was a threat of material injury by reason of such imports. In making that determination, the USITC found that the domestic industry producing softwood lumber was vulnerable to injury in light of declines in its performance over the period of investigation, particularly its financial performance. The USITC noted that the United States Department of Commerce (hereinafter "USDOC") had determined that there were 11 programs that conferred countervailable subsidies to Canadian producers and exporters of softwood lumber. The USITC found that Canadian dumped and subsidized imports (subject imports) were likely to increase substantially based on a series of factors. The USITC found that there was a moderate degree of substitutability between subject imports and the domestic like product, and that prices of different species affected the prices of other species. Given its finding of likely significant increases in subject import volumes, and its finding of at least moderate substitutability between subject imports and domestic product, the USITC concluded that subject imports were likely to have a significant price depressing effect in the immediate future. The USITC recognized that while inventories generally were not substantial in the softwood lumber industry, Canadian producers' inventories as a share of production had increased and were consistently higher than those reported by US producers during the period of investigation. Finally, the USITC noted that a number of domestic producers had reported actual and potential adverse effects on their development and production efforts, growth, investment, and ability to raise capital due to subject imports from Canada. Thus, the USITC determined that further significant increases in dumped and subsidized imports were imminent, that these imports were likely to exacerbate price pressure on domestic producers, and that material injury to the domestic industry would occur.

7.4 Before the Panel, Canada had alleged violations of various provisions of the AD and SCM Agreements in the USITC's determination of injury. In particular, Canada alleged specific violations of Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement, arguing that the USITC failed to properly consider the particular factors relevant in threat of injury determinations, and violations of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement, arguing that the USITC failed to properly analyze causation and failed to properly apply the "non-attribution" requirement, which specifies that injury caused by other factors must not be attributed to dumped and/or subsidized imports. These claims required the Panel to consider the substance of the USITC's final determination of threat of material injury to determine whether it was consistent with US obligations under the AD and SCM Agreements.

7.5 The Panel found, *inter alia*:

- (a) that the USITC determination was **not consistent** with Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement in that the finding of a likely imminent substantial increase in imports was not one which could have been reached by an objective and unbiased investigating authority in light of the totality of the factors considered and the reasoning in the USITC determination.
- (b) With respect to the allegations of violations of Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement in respect of other aspects of the USITC

determination, the Panel concluded that the USITC determination was **not inconsistent** with the asserted provisions.<sup>48</sup>

7.6 In light of these findings, the Panel concluded

- (a) that the USITC determination was **not consistent** with Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement in that the causal analysis was based on a finding which was, itself, not consistent with Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement.
- (b) With respect to the allegations of violations of Article 3.5 of the AD Agreement and Article 15.5 of the AD Agreement in respect of other aspects of the USITC determination, the Panel concluded that it was neither necessary nor appropriate to make findings with respect to these claims.<sup>49</sup>

7.7 Accordingly, the Panel concluded that to the extent the United States had acted inconsistently with the provisions of the AD and SCM Agreements, it had nullified or impaired benefits accruing to Canada under those Agreements, and therefore recommended that the Dispute Settlement Body request the United States to bring its measures into conformity with its obligations under the AD and SCM Agreements.<sup>50</sup>

7.8 Under US law (commonly referred to as "section 129"), if a WTO Panel or Appellate Body report finds that a determination by the USITC is not consistent with US obligations, then, upon request by the USTR, the USITC "shall issue a determination in connection with the particular proceeding that would render the Commission's action...not inconsistent with the findings of the panel".<sup>51</sup> In this case, the USTR made such a request to the USITC on 27 July 2004. The USITC issued its "section 129" determination within the statutory deadline set out in US law, on 24 November 2004. In that determination, the USITC again concluded that there would be a substantial increase in imports, at prices which would adversely affect the vulnerable domestic industry, threatening material injury, and that there were no other known factors which threatened material injury to the domestic industry.

7.9 In the course of the section 129 proceeding, the USITC reopened the record of the original investigation to gather additional information from public data sources and from questionnaires sent to US and Canadian producers, held a public hearing, and gave parties opportunities to submit written comments. The USITC stated that its task was to "mak[e] a determination that would render its original action not inconsistent with the findings of" the Panel.<sup>52</sup> Therefore, the USITC addressed in its determination only the issues related to the Panel's findings set forth in the request from the USTR, and did not address issues that were not in dispute in the original Panel proceeding which the Panel had found not inconsistent with the United States' obligations under the WTO Agreements, or which it did not otherwise consider necessary to address.<sup>53</sup>

7.10 In its section 129 determination, the USITC found, based on a significant rate of increase in imports from a significant baseline volume level, and taking into account increases in imports during periods of no import restraints, that there was a likelihood of substantially increased imports, and concluded that dumped and subsidized imports would increase in the imminent future. Looking at current import trends, the restraining effects of the US-Canada Softwood Lumber Agreement (SLA),

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<sup>48</sup> Panel Report, *US – Softwood Lumber VI*, *supra* note 1, at para. 8.1.

<sup>49</sup> Panel Report, *US – Softwood Lumber VI*, *supra* note 1, at para. 8.2.

<sup>50</sup> Panel Report, *US – Softwood Lumber VI*, *supra* note 1, at para. 8.3.

<sup>51</sup> 19 USC. §3538(a)(4).

<sup>52</sup> Views of the Commission, Exhibit CDA-1, at 4.

<sup>53</sup> *Ibid.*

excess Canadian capacity and projected increases in capacity, capacity utilization and production, and demand projections, the USITC concluded that imports would increase at a substantial rate in the imminent future beyond historical levels. The USITC concluded that imports were entering the United States at prices that were likely to have a significant depressing or suppressing effect on domestic prices and likely to increase demand for further imports, and that imports were therefore likely to adversely impact the US lumber industry in the imminent future. Looking at the question of other factors potentially threatening injury, the USITC concluded that excess supply from the domestic industry, third country imports, importation relative to demand, the integration of the North American softwood lumber industry, substitute products, and domestic production constraints, were not other factors potentially causing injury to the domestic industry, and therefore considered that there was no basis to examine whether any injury could be attributed to them.<sup>54</sup>

7.11 The claims put forward by Canada in this case challenge the USITC's section 129 determination, and specifically its consideration of the evidence underlying its determination of threat of material injury, its determination of causal link, and its analysis of "other causes" of threat of injury. Canada has not challenged any of the procedural aspects of the section 129 process, including the reopening of the record and the receipt of additional evidence, although it does dispute the significance of that evidence. In addition, Canada has not challenged the principle underlying the USITC's section 129 determination, that in order to "bring its measure into conformity" with the United States' obligations, it suffices for the USITC to "fill the gaps" identified by the Panel in its original decision, and provide additional explanation and evidence in support of its conclusions, so as to render its determination not inconsistent with the United States' obligations under the relevant Agreements.<sup>55</sup> Of course, whether the United States has adequately done so in this case is the matter in dispute before us.

7.12 The role of a Panel in an Article 21.5 proceeding is to evaluate the challenged measure to determine its consistency with the defending Member's obligations under the relevant WTO Agreements. Thus, the Panel is not limited by its original analysis and decision – rather, it is to consider, with a fresh eye, the new determination before it, and evaluate it in light of the claims and arguments of the parties in the Article 21.5 proceeding. While it is true that “a panel acting pursuant to Article 21.5 of the DSU would be expected to refer to the initial panel report, particularly in cases where the implementing measure is closely related to the original measure, and where the claims made in the proceeding under Article 21.5 closely resemble the claims made in the initial panel proceedings”,<sup>56</sup> in a case involving a new determination in the same case, it is clear that the facts are likely to be very similar to the original. Thus, what is most important for our analysis is the reasoning and explanation of the USITC in its section 129 determination. Consequently, our findings concerning the original determination have little if any persuasive effect in our review of the determination now before us. In this regard we note that Canada argues in a number of instances that the USITC's section 129 determination fails to address certain questions raised by the Panel in its

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<sup>54</sup> One Commissioner of the USITC dissented, finding that the domestic industry producing softwood lumber was not threatened with material injury. Views of the Commission, Exhibit CDA-1 at 89.

<sup>55</sup> Canada does assert that this is not a case in which such "gap filling" can suffice to yield a determination consistent with the United States' obligations. Canada's answer to the Panel's question 1 at para. 1. 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.

<sup>56</sup> 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 ("Mexico – Corn Syrup (Article 21.5 – US))*, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6675, at para. 109.

original determination.<sup>57</sup> While we cannot preclude the possibility that a Member might implement a DSB recommendation by specifically answering points raised by a panel (or the Appellate Body) in the relevant decisions, this is by no means required by the DSU. Nor is it the only means by which implementation may be achieved. In this case, the USITC has provided a determination in the section 129 proceeding which purports to re-examine the evidence, and additional evidence, and address those aspects of its original decision we found to be insufficient in light of the obligations of the AD and SCM Agreements. We must review that determination on its own merits, as a whole. Whether the USITC addressed particular questions we raised may be relevant in our review, but is not necessarily determinative.

7.13 We must also keep in mind the nature of the determination we are reviewing. The USITC's determination in the section 129 proceeding was that dumped and subsidized imports of softwood lumber from Canada threatened material injury to the US industry. In this regard, we note the comments of the Appellate Body on the nature of the determination to be made by an investigating authority in a case involving threat of material injury:

"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".<sup>63</sup> 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*.<sup>64</sup>

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<sup>63</sup> Appellate Body Report, *United States – Lamb Safeguard*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, para 136.

<sup>64</sup> As we noted in *United States – Hot-Rolled Steel*:

Article 17.6(i) ... defines when *investigating authorities* can be considered to have acted inconsistently with the *Anti-Dumping Agreement* in the course of their "establishment" and "evaluation" of the relevant facts. In other words, Article 17.6(i) sets forth the appropriate standard to be applied by *panels* in examining the WTO-consistency of the *investigating authorities'* establishment and evaluation of the facts under other provisions of the *Anti-Dumping Agreement*. (original emphasis)

Appellate Body Report, *supra*, footnote 59, para. 56.<sup>58</sup>

The 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. That is to say, while a determination of threat of material injury must be based on the facts, and not merely on allegation, conjecture, or remote possibility, predictions based on the observed facts may be less susceptible to

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<sup>57</sup> E.g., Canada's answers to the Panel's question 1 at para. 3, Canada's first written submission at paras. 70 and 93.

<sup>58</sup> Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, *supra* note 56, at para. 85.

being found, on review by a panel, to be outside the range of conclusions that might be reached by an unbiased and objective decision maker on the basis of the facts and in light of the explanations given.

7.14 In this case, there is no dispute as to the measure at issue, or as to the propriety of the claims raised by Canada. In addition, there are no new issues of legal interpretation raised. Thus, the principal task for us is to evaluate the USITC determination, applying the familiar concepts regarding standard of review and burden of proof, and reach a conclusion as to the consistency of the section 129 determination with US obligations under the asserted provisions of Articles 3.5 and 3.7 of the AD Agreement and Articles 15.5 and 15.7 of the SCM Agreement.

7.15 The concepts of standard of review and burden of proof applicable in this dispute are the same as those applied in our original report. In that report, we concluded as follows with respect to the standard of review:

"7.12 Article 11 of the DSU sets forth the appropriate standard of review for panels for all covered agreements, including the SCM Agreement. Article 11 imposes upon panels a comprehensive obligation to make an "objective assessment of the matter", an obligation which embraces all aspects of a panel's examination of the "matter", both factual and legal. Article 17.6 of the AD Agreement sets forth a special standard of review applicable to anti-dumping disputes. It provides, with respect to the evaluation of factual issues:

“(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities’ establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;”

With respect to questions of legal interpretation, Article 17.6 provides:

“(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities’ measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations”.

Thus, together, Article 11 of the DSU and Article 17.6 of the AD Agreement set out the standard of review the Panel is to apply with respect to both the factual and legal aspects of its examination of the claims and arguments raised by the parties in a case under the AD Agreement.<sup>76</sup> . . .

7.15 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.

7.16 Similarly, the Appellate Body has explained that, under Article 11 of the DSU, a panel's role is not to substitute its analysis for that of the investigating authority.<sup>78</sup> The Appellate Body has stated:

"We wish to emphasize that, although panels are not entitled to conduct a *de novo* review of the evidence, nor to *substitute* their own conclusions for those of the competent authorities, this does *not* mean that panels must simply *accept* the conclusions of the competent authorities".<sup>79</sup>

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<sup>76</sup> Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ("US – Hot-Rolled Steel"), WT/DS184/AB/R, adopted 23 August 2001, paras. 54-62.

<sup>78</sup> Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan* ("US – Cotton Yarn"), WT/DS192/AB/R, adopted 5 November 2001, para. 74; Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia* ("US – Lamb"), WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, para. 106.

<sup>79</sup> Appellate Body Report, *US - Cotton Yarn*, para. 69, n.42, citing Appellate Body Report, *US - Lamb*, para. 106.<sup>59</sup>

The parties have no disagreement regarding the applicability of this standard of review in this dispute, although of course, they do contest the outcome.

7.16 With respect to the burden of proof, we noted in our original report that:

"7.23 While the parties have not raised burden of proof as an issue, we have kept in mind the general principles applicable to burden of proof in WTO dispute settlement, which require that a party claiming a violation of a provision of a WTO Agreement by another Member must assert and prove its claim.<sup>86</sup> In this dispute, Canada, which has challenged the consistency of the United States' measures, thus bears the burden of demonstrating that the measures are not consistent with the relevant provisions of the relevant Agreements. It is generally for each party asserting a fact to provide proof thereof.<sup>87</sup> Therefore, it is also for the United States to provide evidence for the facts which it asserts. We note in addition that a *prima facie* case is one which, in the absence of effective refutation by the other party, requires a panel, as a matter of law, to rule in favour of the party presenting the *prima facie* case.

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<sup>86</sup> Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India* ("US – Wool Shirts and Blouses"), WT/DS33/AB/R and Corr. 1, adopted 23 May 1997, DSR 1997:I, 323, p. 337.

<sup>87</sup> *Ibid.*<sup>60</sup>

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<sup>59</sup> Panel Report, *US – Softwood Lumber VI*, *supra* note 1, at paras 7.12, 7.15-7.16.

Again, the parties have no disagreement regarding the applicability of the burden of proof in this dispute.

**A. ALLEGED VIOLATIONS OF ARTICLE 3.7 OF THE AD AGREEMENT AND ARTICLE 15.7 OF THE SCM AGREEMENT**

7.17 These asserted violations are at the heart of Canada's case. Canada argues that the factors relied upon by the USITC do not support its conclusion that there would be a substantial increase in imports, that there would be likely adverse price effects, and that the US industry was "vulnerable". Consequently, in Canada's view, imports could not be found to threaten material injury. Thus, Canada considers that the section 129 determination suffers from essentially the same flaws as were identified by the Panel in its original decision. Canada argues that the USITC's consideration of the evidence, and the weight of the evidence itself, fall short of the minimum necessary to support the determination of threat of material injury.

7.18 The United States asserts that the USITC determined that during the period of investigation, imports were at a significant level, prices had declined, and the condition of the industry had deteriorated and was vulnerable. The USITC, based in part upon evidence newly obtained, but relating to the original period of investigation and the period prior to the original determination, addressed each of the points identified by the Panel in its original decision, carrying out an entirely new analysis of the evidence. The USITC reached additional conclusions on certain factors considered, such as the rate of increase of dumped and subsidized imports, which it found to be significant, and addressed questions raised by the Panel such as the interplay between increases in import volumes and trends in US demand. The USITC's overall conclusion was that, based on 1) the 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, there would be a substantial increase in imports. The USITC also concluded that in light of price trends during the POI, and the degree of substitutability of US and imported Canadian lumber, increased imports would have adverse price effects, and that the US industry was in a vulnerable condition, such that increased imports at the price levels at the end of the period of investigation threatened material injury.

7.19 In evaluating Canada's arguments with respect to the adequacy of the USITC's consideration of each of the factors upon which it relied, under the standard of review we must consider whether the USITC properly established the facts (a matter which is not disputed by Canada), 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. We may not substitute our judgment for that of the USITC, although we are directed to carry out a detailed and searching analysis of the evidence relied upon and the reasoning and explanations given in carrying out our review.

7.20 In this context, we note the recent decision of the Appellate Body in *US – Countervailing Duty Investigation on DRAMS* concerning the proper role of Panels in reviewing decisions of national authorities.<sup>61</sup> In that report, the Appellate Body was addressing a case involving the conclusion of the USDOC that the Government of Korea had "entrusted or directed" certain private bodies to make financial contributions to Hynix, a Korean manufacturer of DRAMS, thereby providing countervailable subsidies within the meaning of Article 1.1(a)(i)(iv) of the SCM Agreement. The

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<sup>60</sup> Panel Report, *US – Softwood Lumber VI*, *supra* note 1, at para. 7.23.

<sup>61</sup> Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea* ("*US – Countervailing Duty Investigation on DRAMS*"), WT/DS296/AB/R, adopted 20 July 2005.

Panel in that case had noted that USDOC had based its finding on the totality of the evidence before it, and determined that it would follow the same approach in its review, an intention approved by the Appellate Body.<sup>62</sup> However, the Appellate Body, while it saw no error, in principle with a panel's review of individual pieces of evidence in such a case, concluded that the Panel had erred by focusing on whether each piece of evidence, in isolation, demonstrated entrustment or direction. The Appellate Body stated that "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".<sup>63</sup> The Appellate Body went on:

"Furthermore, in 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.<sup>278</sup> In so doing, the panel ceases to *review* the agency's determination and embarks on its own *de novo* evaluation of the investigating authority's decision. As we explain below, panels may not conduct a *de novo* review of agency determinations.

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<sup>278</sup> This is not to say that a panel is prohibited from examining whether the agency has given a reasoned and adequate explanation for its determination, in particular, by considering other inferences that could reasonably be drawn from—and explanations that could reasonably be given to—the evidence on record. Indeed, a panel must undertake such an inquiry. ....<sup>64</sup>

7.21 Applying these principles to the case before it, the Appellate Body found that the Panel had failed to examine the evidence in its totality, thus failing to assess the agency's determination. Rather, the Panel's assessment reflected its own views on the question of entrustment or direction, indicating that it had engaged, improperly, in a *de novo* review of the evidence. Consequently, the Appellate Body concluded that the Panel had "essentially "second-guessed" the investigating authority's analysis of the evidence and thus overstepped the bounds of its review".<sup>65</sup>

7.22 Although the Appellate Body was addressing the correct application of the standard of review under Article 11 of the DSU in cases of Panel review of a national agency's determination, we consider its views to be, if anything, even more pertinent to the understanding of the standard of review applicable to determinations of fact by national investigating authorities under Article 17.6 of the AD Agreement, and thus highly relevant to our task in this dispute.

7.23 Turning to Canada's specific allegations of error, we will address each of Canada's assertions individually, but keep in mind that our review must be based on the totality of the evidence relied upon by the USITC, and must respect the approach of the USITC to the analysis.

**(a) likely increase in imports**

7.24 Canada argues that the USITC made a "new" finding that there had been a significant rate of increase in imports, based on no new evidence, which is undermined by the fact that the USITC had

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<sup>62</sup> *Ibid.* at para. 143.

<sup>63</sup> *Ibid.* at para. 150.

<sup>64</sup> *Ibid.* at para. 151 (footnote omitted).

<sup>65</sup> *Ibid.* at para. 189.

found no material injury despite the fact that imports had much the same market share during the period of investigation. Canada considers that in concluding that the 2.8 percent increase in imports over the period of investigation was significant, the USITC reversed the position it had taken in the original determination. Moreover, Canada asserts that the *rate* of increase should be considered on a year to year basis, rather than over the period of investigation as a whole, in which case the rate of increase of imports would be seen to be essentially flat, at 1.4 percent annually, from 1999-2001. Canada also considers that the additional evidence referred to in the section 129 determination, the 14.6 percent increase in import volumes in the first quarter of 2002 as compared with the first quarter of 2001, represented an increase in Canadian market share within the historical pattern, and thus did not support the conclusion that imports will increase beyond historical levels. Moreover, Canada asserts that the comparison with the first quarter of 2002 was inappropriate because provisional countervailing duty measures expired in December 2001, resulting in a "gap" in the application of duties, and thus conditions in the first quarter of 2002 were not "normal". In Canada's view, the comparison of import trends for the first quarter of 2002 with the first quarter of 2001 is particularly unhelpful because opposite commercial incentives existed in the two quarters – Canadian producers had a short-term *incentive* to increase shipments to the United States during the first quarter of 2002 – the "gap" period – before final duties were imposed, while they had a short-term *disincentive* to ship to the United States in the first quarter of 2001 until the SLA expired on March 31.

7.25 The United States asserts that Canada's arguments concerning the volume of and increases in imports ignore the significance of the baseline volume of imports, make inappropriate comparisons of percentage changes in numbers having different baselines, and ignore the interrelationships between the factors considered by the USITC. The United States notes that the Panel had recognized the USITC's finding that the volume and market share of imports during the period of investigation were already at significant levels, and that this context is critical to understanding the analysis of import trends. The United States stresses the fact that imports held a consistently large and increasing share of the US market during the period of investigation, accounting for between 33.2 percent to 34.7 percent of the US market for softwood lumber in the period examined. The USITC found that the rate of increase in the volume of subject imports from 1999 to 2001 was 2.8 percent and concluded that this was a significant rate "when the baseline volume is already so significant"<sup>66</sup> The USITC also observed that this increase had occurred during a period when imports from Canada were subject to restraints under the SLA, and despite a slight decline in US apparent consumption. In the US view, Canada's focus on the percentage increase, without reference to the context of the large baseline simply fails to appreciate the USITC's analysis. Similarly, the United States maintains that Canada's arguments concerning the increases in imports at the end of the period of investigation miss the point that subject imports were 6.2 percent higher in the first quarter of 2002 compared with the first quarter of 2000, while apparent US consumption had declined by 2.3 percent.<sup>67</sup>

7.26 It is clear that the USITC considered the question that the Panel had raised in its original determination, 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. 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.

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. Moreover, we do not consider that, as argued by Canada, the USITC was required to explain

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<sup>66</sup> Views of the Commission, Exhibit CDA-1, at page 21.

<sup>67</sup> Views of the Commission, Exhibit CDA-1, at page 53.

this conclusion as a "departure" from its previous conclusions on the issue, as argued by Canada.<sup>68</sup> In our original decision, we observed that the "USITC did not rely on a significant rate of increase during the period of investigation in support of its conclusion that subject imports would increase substantially in the future"<sup>69</sup> That is, we found that the USITC had made no conclusion on this issue, and consequently there is no prior conclusion from which it needed to explain its "departure" in the section 129 determination – even assuming such an explanation might be needed in the event of a change. 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.

7.28 Clearly, 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. Nothing 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. The requirements set out in Article 3.1, which governs injury determinations generally, are that the investigating authorities consider the relevant factors, and make a determination based on an objective examination of positive evidence concerning relevant factors. On 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. 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.

7.29 Canada also asserts that the USITC reached a "new" finding that the restraining effects on imports of the SLA were significant, despite having originally found only that the SLA had restrained the volume of imports to some extent, and having virtually no new evidence on this issue. Canada argues that the USITC emphasized the fact that imports increased during the period the SLA was in effect, but notes that the USITC found no material injury despite the increase in Canadian market share during the period of investigation. Canada also challenges the USITC's reliance on studies concerning the SLA's effects, which the USITC found consistent with its conclusion that the SLA had constrained imports, noting that the USITC did not categorize these effects as significant, and did not address whether the SLA had any significant restraining effect at the time it expired. In Canada's view, the evidence demonstrated that the effects of the SLA changed over the time it was in effect. Canada also challenges the USITC's reliance on the Stoner study, without recognizing methodological criticisms of that study. Canada also asserts that the USITC did not address evidence relied on by the dissenting Commissioner that indicated the SLA had little influence on prices and that its expiration would not result in significant price or volume changes.

7.30 The United States considers that Canada's arguments concerning the USITC's analysis incorrectly assume that the USITC's findings in the section 129 determination concerning the restraining effects of the SLA were different than in the original determination. In addition, the United States argues that Canada incorrectly assumes that the USITC had found, in its analysis of material injury, that the volume of imports did not support an affirmative determination. The United States maintains that the USITC had always recognized that imports increased even with the SLA in place, and that substantial increases occurred during periods when imports were not subject to restraints. The USITC also considered evidence demonstrating the impact of the SLA on the

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<sup>68</sup> Canada's answer to the Panel's question 2.

<sup>69</sup> Panel Report, *US – Softwood Lumber VI*, *supra* note 1, at para. 7.90.

domestic market, including evidence that the constraints on the volume of imports resulted in higher prices for such imports and higher costs for construction than in the absence of the SLA. Additional evidence demonstrating the restraining effect of the SLA included the fact that increases in subject imports while the SLA was in effect did not keep pace with increases in demand from 1995 to 2001.<sup>70</sup> The United States maintains that Canada incorrectly suggests that the USITC relied principally on only one economic study with respect to the effects of the SLA. The United States notes that there were several studies in evidence. The United States also asserts that Canada mischaracterizes the facts concerning the use of different quotas available under the SLA, which information also supported the USITC's conclusions concerning the restraining effects of the SLA. Finally, the United States argues that the USITC had recognized that during the pendency of the SLA, shipments from provinces outside the SLA's effect had more than doubled, but found that imports from provinces covered by the SLA increased when it expired, while exports from the other provinces continued at levels higher than those reported prior to the SLA. Thus, the United States argues that the evidence did not demonstrate that the SLA had merely resulted in a shift in imports.

7.31 Canada maintains that the USITC failed to analyze whether import trends in the period April – August 2001 represented an accurate gauge of what would happen in the future in the absence of anti-dumping or countervailing duty measures or whether the increase represented nothing more than a shift in timing of exports to take advantage of the window between the expiry of the SLA and the imposition of provisional measures, an analysis Canada considers was necessary in light of the Panel's original report. Canada asserts that the USITC's conclusion rejecting the argument that these increases represented nothing more than a shift in the timing of imports contains several critical deficiencies. First, Canada asserts that the USITC focussed on total imports during this period, rather than examining month-to-month changes, thereby failing to address the question whether the increase in imports represented simply a shift in timing. Second, Canada maintains that the USITC focused exclusively on increases in the absolute volume of subject imports, not market share, and asserts that the change in market share was not significant. Moreover, Canada considers that a comparison of volumes of imports during the period April – August 2001 to levels in prior years would be appropriate only if US consumption had been the same in prior years, which Canada maintains it was not. Canada argues that a consideration of Canadian market share as the basis of comparison shows fluctuations consistent with shifts in timing by exporters. Finally, Canada argues that the USITC's reliance on an increase in imports during the period April – August 2001 to support the conclusion that imports were likely to increase substantially in the near future cannot be reconciled with the USITC's finding that it would not have found material injury even if provisional measures had not been in place as from August 2001.

7.32 With respect to the consideration of import trends in the period 1994 to 1996, Canada argues that the USITC did not analyze whether market conditions in this period before the period of investigation were sufficiently similar to predicted market conditions to warrant the conclusion that imports would increase substantially. Canada asserts that the USITC looked only at apparent US consumption in this regard, but did not analyze why imports were increasing. Nor did it analyze why imports also increased in the immediately preceding 1991 – 1994 period, a period during which import restraints were in effect. Nor did the USITC even collect the data necessary to analyze whether increasing imports had any injurious effect on the US industry during that time, even though it would be impossible to draw inferences about the future effect of increasing imports without knowing what impact they had had in earlier periods. Consequently, in Canada's view, the USITC failed to respond to the deficiencies identified by the Panel in its original determination concerning the USITC's analysis of the trend in import volumes.

7.33 The United States stresses that the USITC considered import trends during periods of no import restraints in order to establish the context for evaluating the significance of changes in Canadian imports. The USITC had found that, during the period between the expiration of the SLA

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<sup>70</sup> Views of the Commission, Exhibit CDA-1, at page 26.

and the imposition of preliminary countervailing duties (April – August 2001), imports were substantially higher than in the same period of each of the preceding three years, 1998-2000.<sup>71</sup> While the rate of increase in imports slowed when, as a result of the preliminary affirmative countervailing duty determination, bonding requirements on Canadian imports went into effect, Canadian imports for the period April – December 2001 were still higher than during the same period of 2000.<sup>72</sup> Moreover, the United States points out that the new data addressed in the section 129 proceeding demonstrated a significant increase in the first quarter of 2002 as compared with the first quarters of 2000 and 2001.<sup>73</sup> The United States argues that Canada's focus on the "gap" in application of provisional countervailing duty measures from December to April 2002 fails to recognize that provisional anti-dumping duty measures were still in place during that period. Moreover, the United States disputes Canada's assertion that "opposite commercial incentives" in the first quarters of 2002 and 2001, explain the increase in imports during the first quarter of 2002. The United States notes that there was a significant increase in the first quarter of 2002 as compared with the first quarter of 2000, and maintains that market conditions (other than the presence or absence of the SLA), such as differences in consumption, did not explain the significant increases in subject imports.

7.34 The United States argues that, in response to the Panel's concern that the USITC had not addressed the argument that the increase in imports during the April-August 2001 period only reflected a shift in the timing of imports, in its section 129 determination, the USITC found that subject imports increased both during the April-August 2001 period and afterward, a fact inconsistent with the suggestion that import volumes during the period could be explained as a timing shift. The United States maintains that Canada's focus on monthly import data for the April-August 2001 period does nothing to undermine this finding. In addition, 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.

7.35 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. While 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. Moreover, we consider that while 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.

7.36 With respect to its consideration of forecasted US demand, Canada asserts that the USITC reversed its position in the section 129 determination from its original view, without a sufficient basis in evidence, which was largely unchanged from the original determination. In Canada's view, the USITC's conclusions regarding demand are not consistent with the evidence which indicated that demand would improve in the 18 months after the USITC's vote in mid-2002.

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<sup>71</sup> Views of the Commission, Exhibit CDA-1, at page 28.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*, at page 29.

7.37 The 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. The United States points out that the USITC found that the demand forecasts for softwood lumber from industry analysts were somewhat mixed, but overall indicate stable demand with some growth. In the US view, while Canada focuses on the demand forecasts for softwood lumber in isolation, the USITC properly considered those forecasts together with forecasts for softwood lumber's primary end-use, US housing starts. The USITC found that the lack of a correlation between some of the forecasts of lumber demand growth and forecasted housing starts and the lack of any agreement among forecasters raised questions about the usefulness of these forecasts. The USITC also found that the sharp decline in housing starts in March 2002 showed that the improvements in demand during the mild winter of 2001-2002 were not sustainable.

7.38 With respect to the issue of importation relative to demand, 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. The United States points out that the USITC found that in 2001, the increase in imports outstripped demand, and that after the SLA expired, imports were 11.3 percent higher for the April-August 2001 period compared to the same period in 2000, and 4.9 percent higher for the April-December 2001 period compared to the April-December 2000 period, while apparent US consumption for all of 2001 was only 0.2 percent higher than it had been in 2000.<sup>74</sup> The United States also notes that new data considered in the section 129 proceeding showed that apparent US consumption for first quarter 2002 increased at a substantially lower rate, 9.7 percent, than the 14.6 percent increase in imports, as compared with first quarter 2001.<sup>75</sup> Moreover, imports were 6.2 percent higher in the first quarter of 2002 compared with the first quarter of 2000, while apparent US consumption declined by 2.3 percent for first quarter 2002 compared with first quarter 2000.<sup>76</sup>

7.39 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.

7.40 With respect to the USITC's consideration of Canadian excess capacity, production, and export orientation, Canada asserts that the USITC continued to rely on "slight" increases in projected capacity in support of its finding that imports would increase substantially in the imminent future, despite Canadian producer projections that were within the range of historical experience. In Canada's view, the USITC's conclusion that Canadian producer projections were inconsistent with other data, and therefore not to be relied upon, was improper in light of new data that was consistent with the projections originally reported by Canadian producers.

7.41 The United States points out that, on the issue of available excess Canadian capacity, the Panel had found that the USITC's discussion regarding 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. In response, in its section 129 determination, the USITC analyzed capacity and concluded that Canadian producers had sufficient excess capacity, and projected increases in production and capacity in 2002 and 2003, to substantially increase exports to the United States. In this regard, the USITC noted that Canada has substantial capacity to produce softwood lumber, equal to about 60 percent of US consumption.<sup>77</sup> Excess Canadian capacity in 2001 had increased to a level equivalent to 10 percent of US apparent consumption, as capacity utilization declined to 84 percent

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<sup>74</sup> *Ibid.*, at page 21.

<sup>75</sup> *Ibid.*, at page 21-22.

<sup>76</sup> *Ibid.*, at footnote 53.

<sup>77</sup> *Ibid.*, at page 32.

from 90 percent in 1999.<sup>78</sup> The USITC found even more telling the fact that Canadian producers projected increases in production and capacity utilization from 2001 to 2003, a period during which demand in the US market was forecast to remain relatively unchanged or increase only slightly. In the United States' view, Canada's arguments focus inappropriately on the incremental increase in production capacity, without putting the information into context. In this regard, the United States notes that Canadian production is tied to the US market, the most important market for Canadian producers, accounting for 60-65 percent of Canadian production and shipments. Data considered in the section 129 investigation showed that in the first quarter 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 US market.<sup>79</sup> The United States maintains that the USITC properly focused on this evidence of the export orientation of Canadian lumber producers, and discounted Canadian producers' projections that additional production would be exported to the United States at below historical levels.

7.42 Once more, the 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.

**(b) likely price effects**

7.43 Canada maintains that the factors relied upon by the USITC do not support its finding of likely adverse price effects. Canada stresses that the focus of an investigating authorities analysis under Article 3.7 (iii) of the AD Agreement and Article 15.7 (iv) of the SCM Agreement is on current prices as a predictor of future price and demand effects.<sup>80</sup> Canada asserts that in the section 129 determination, the USITC relied on likely substantial increases in subject import volumes and the at least "moderate substitutability" between subject imports and domestic product in finding likely adverse price effects, and also noted that prices declined in the second half of 2001 to levels as low as those observed in 2000. While the USITC found that there was some improvement in the first quarter of 2002, it attributed this largely to an increase in consumption, and concluded that the improvement was not likely to last, in light of a decline in housing starts (the primary component of demand for softwood lumber) in March 2002 from a record high in February. The USITC also noted that there had been record housing starts during the period of investigation, but that this did not guarantee higher prices in the US market. The USITC also looked at the price trends, which showed declines in the last two quarters of 2001.

7.44 Canada maintains that the USITC's analysis in the section 129 determination fails to acknowledge the pricing analysis it had undertaken in the original determination, in which no significant underselling had been found, and declines in prices during the period of investigation were attributed to excess supply from both domestic and Canadian sources, and consequently the USITC could not conclude that imports had significant price effects during the period of investigation in the context of its material injury analysis. In the context of its threat analysis, Canada maintains that the USITC had not originally cited declines in prices in support of its finding that imports were entering the US market at prices likely to cause adverse price effects, but in the section 129 determination, the USITC cited the declines in prices in the third and fourth quarter of 2001 as support for the conclusion that imports at the end of the period were entering at prices likely to have a significant depressing or suppressing effect on US domestic prices. In Canada's view, there is no explanation of how the USITC could conclude that the same price trends could result in different conclusions regarding the

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<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*, at page 37.

<sup>80</sup> Article 3.7 (iii) of the AD Agreement and Article 15.7 (iv) of the SCM Agreement provide that an investigating authority should 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."

current effects of prices and the future effects of prices, and these two conclusions cannot be reconciled.

7.45 Canada maintains that the mere fact that prices declined says nothing about "whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices," and more particularly, says nothing about the cause of their decline – i.e., whether Canadian imports caused the observed price declines. Moreover, Canada maintains that the USITC's analysis of price trends is incomplete and inaccurate, because it discounts the fact that prices rose after the fourth quarter of 2001. Canada considers that the fact, cited by the USITC, that 2002 prices were not as high in absolute terms as in prior years or prior quarters, is not important in the context of a threat determination – what was important was the direction of price movements at the end of the period of investigation. Canada asserts that the USITC's finding that imports are likely to have a significant price-depressing effect necessarily is dependent on its finding of likely future substantial increases in import volumes, which finding Canada maintains is unsupported. Canada also asserts that the Panel found, in its original determination, that a substantial increase in imports in *absolute* terms, without a finding of a significant increase in market share, was insufficient to support a finding that subject imports will cause significant price depression or suppression in the future. Therefore, Canada maintains that the USITC's pricing analysis fails to support its finding that subject imports are likely to enter at prices that will have a significant depressing or suppressing effect on prices.

7.46 Canada maintains that, as the USITC found US and Canadian lumber to be "substitutable" but did not amend its prior characterization of "moderate" substitutability, the USITC was required to consider whether, and to what extent, the predicted increase in subject imports would likely involve purchases by US consumers that do not consider Canadian and US lumber to be close substitutes, because the greater the percentage of subject imports that serve these segments of the US market, the lower would be the potential for price suppression. Canada asserts that the USITC failed to undertake such an analysis, focusing instead on evidence that imported and domestic lumber are interchangeable in certain applications, while ignoring evidence that many purchasers do not consider them substitutable to a significant extent.

7.47 The United States observes that the USITC found that the price trend evidence, particularly the fact that prices reached their lowest levels as imports increased significantly after expiration of the SLA, supported the conclusion that imports were entering at prices that were likely to have a significant depressing or suppressing effect on domestic prices, and thereby were likely to adversely impact the US industry in the imminent future. In support of this conclusion, the USITC noted that prices for softwood lumber declined substantially during the period of investigation, particularly in 2000.<sup>81</sup> In mid-2001, at a time of considerable uncertainty in the market due to the expiration of the SLA and the commencement of the original investigations, prices for softwood lumber increased. However, these increases were temporary; prices began to decline in the July - September 2001 period and fell substantially in the October - December 2001 period to levels as low as those in 2000.<sup>82</sup> Even with an improvement in the January - March 2002 period, prices at the end of the period of investigation were still near the lowest levels reported for the period examined.<sup>83</sup> The USITC found that the price increase in the first quarter of 2002 was largely due to an increase in consumption– an improvement that 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, the USITC found that record US housing starts throughout the period of investigation clearly did not guarantee higher prices in the US market, given price competition and excess supply.

7.48 The United States asserts that, contrary to Canada's argument, the USITC had *not* found that imports had no effect on prices during the period of investigation. Rather, the USITC had concluded,

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<sup>81</sup> Views of the Commission, Exhibit CDA-1, at page 41-42.

<sup>82</sup> *Ibid.*, at page 44.

<sup>83</sup> *Ibid.*

in its material injury analysis that substantial price declines in 2000, and resulting deterioration of the condition of the domestic industry, were due to excess supply from both subject imports and domestic production. Thus, the evidence supported a finding that subject imports had *some* adverse price effect. However, the USITC concluded that during the period of investigation, they had not yet had a *significant* price effect so as to be a substantial cause of material injury to the domestic industry, and that domestic product contributed to the adverse price effects. The United States points out that the USITC also found that the prices at the end of the period of investigation (*i.e.*, July-September and October-December 2001 and January-March 2002) were at levels as low as those in 2000,<sup>84</sup> and that import prices, combined with the imminent significant increase in subject import volume, were likely to have a significant depressing or suppressing effect on domestic prices in the imminent future. Moreover, the USITC had found that the SLA had a significant restraining effect on the volume of subject imports and, had therefore limited the effect of subject imports on prices in the US market.

7.49 The United States considers that Canada's discussion of the pricing data in the section 129 determination focuses on the first quarter 2002 data and mischaracterizes the USITC's analysis. The United States asserts that Canada's focus on the comparison between first quarters 2002 and 2001 ignores the evidence that prices for the January - March 2001 period had not yet recovered from the low levels of the July - September and October - December periods of 2000 and were subject to considerable uncertainty in the market due to the pending expiration of the SLA. Moreover, the United States argues that Canada errs in asserting that the USITC made a finding of no significant price underselling. Rather, the United States maintains that the USITC found that, as agreed to by all parties to the investigations, making direct cross-species price comparisons in order to assess underselling was inappropriate. Thus, although differences in the imported and domestic species of softwood lumber limited the meaningfulness of any direct price comparisons, the evidence indicated competition across species, such that prices of a particular species would affect the prices of other species. The United States points out that the USITC had concluded that imported and US softwood lumber were interchangeable and substitutable, and that moderate substitutability is sufficient in the context of the USITC's determination of likely adverse price effects.

7.50 While we can certainly see the reasoning underlying Canada's arguments, we cannot see that they demonstrate that the USITC's determination was not one that could be reached by an unbiased and objective investigating authority, on the basis of the evidence and the explanations. Canada's arguments stress different aspects of the pricing information, focusing on the most recent trends, while 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. As noted above, there 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, 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.<sup>85</sup> Finally, we note that Canada's arguments stress aspects of the evidence other

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<sup>84</sup> *Ibid.*, at page 46.

<sup>85</sup> We recognize, as argued by Canada, 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." Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia* ("US – Lamb"), WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, at para. 137. 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." *Ibid.* at para. 138. 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

than those relied on by the USITC, such as the fact that underselling could not be substantiated, or price comparisons over different time periods. However, these 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.

7.51 In this regard, we note the statement of the Appellate Body in *US – Countervailing Duty Investigation on DRAMS*:

"[t]he explanation provided by the investigating authority – with respect to its factual findings as well as its ultimate subsidy determination – should also address alternative explanations that could reasonably be drawn from the evidence, as well as the reasons why the agency chose to discount such alternative in coming to its conclusions."<sup>86</sup>

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.

7.52 Taking into account the framework of the USITC's analysis, we cannot find that the determination that imports were entering the US at prices likely to have a depressing or suppressing effect on US prices is inconsistent with the obligations of the AD and SCM Agreements. 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.

**(c) vulnerability of the domestic industry**

7.53 Canada asserts that the USITC's finding that the US industry was vulnerable is unsupported by the factors relied upon. Canada notes that the USITC in both its original and its section 129 determination found that the domestic industry's condition was "deteriorating," despite the fact that new data obtained in its section 129 proceeding for the first quarter of 2002 showed improvement in the US industry's condition, including capacity, production, capacity utilization, shipments, per-unit revenues, operating income, cash flow, employment, wages, productivity, and, most importantly, financial performance. 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,

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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.

<sup>86</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, *supra* note 61, at para. 186.

and therefore did not alter its finding of vulnerability. In Canada's view, this conclusion cannot be reconciled with the USITC's reliance on the decline in housing starts from February to March 2002 in support of its finding that increased consumption was not likely to be sustained. Moreover, Canada asserts that the profitability of the industry had been improving over a longer period, citing the fact that, after reporting negative operating margins for the final three quarters of 2000 and the first quarter of 2001, the domestic industry reported a positive operating margin of 3.7 percent in the final three quarters of 2001. In Canada's view, this indicates that the improvement in the first quarter of 2002 compared to the first quarter of 2001 is a continuation of a trend which undermines any finding that the industry is "vulnerable." Canada also considers it more important to consider whether the US industry's condition was improving or deteriorating following the 9/11 recession, than to consider whether its financial performance was poorer in the first quarter of 2002 than it had been in the first quarter of 2001.

7.54 The United States points out that the USITC found that the condition of the domestic industry, and in particular its financial performance, deteriorated over the period of investigation, as a result of the substantial decline in prices. Imports were increasing substantially after expiry of the SLA and at the end of the period of investigation, and were entering at prices at their lowest levels during the period of investigation. Thus, the USITC found that the industry was vulnerable to future injury. Domestic producers' market share had declined, and the financial performance had dropped dramatically from 1999 to 2000.<sup>87</sup> While the data in the section 129 proceeding showed some improvements in the domestic industry's financial performance in the first quarter of 2002 compared with the first quarter of 2001,<sup>88</sup> the USITC concluded that a single quarter's performance did not change the fact that, overall, the industry's performance had deteriorated and remained weak. The United States argues that these factors clearly support the conclusion that the US industry was vulnerable to injury.

7.55 With respect to the USITC's findings of vulnerability, we 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.

7.56 Overall, it seems clear to us that Canada has presented a reasoned alternative interpretation of the evidence in the record. However, Canada has failed to demonstrate that the USITC's analysis and determination that imports were likely to increase substantially, taken as a whole and considered in light of the approach taken by the USITC in its analysis and determination, is not one that could be reached by an objective and unbiased investigating authority. This is particularly the case because Canada's arguments largely present an alternative, different interpretation of the evidence before the USITC. This 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.<sup>89</sup>

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<sup>87</sup> Views of the Commission, Exhibit CDA-1, at page 60-61.

<sup>88</sup> *Ibid.*, at page 62.

<sup>89</sup> In addition, we note that we find little significance in the fact that one Commissioner dissented from the decision of the USITC. 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

7.57 Moreover, despite Canada's attempts to demonstrate inconsistencies between the findings with respect to present material injury and threat of material injury, 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. Finally, as we noted at the outset, we must review the section 129 determination on its own term. 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. Thus, we conclude that the determination of the USITC with respect to the likely volume and price effects of imports from Canada is not inconsistent with the requirements of Articles 3.7 of the AD Agreement and 15.7 of the SCM Agreement

**B. ALLEGED VIOLATIONS OF ARTICLE 3.5 OF THE AD AGREEMENT AND ARTICLE 15.5 OF THE SCM AGREEMENT**

**(a) The USITC's Analysis of Causal Link**

7.58 Canada asserts that the USITC failed to make an adequate finding with respect to causation in violation of Articles 3.5 and 15.5 of the AD and SCM Agreements. Canada considers that the USITC's finding of causal link rests upon the conclusion that excess supply in the US market would result in price declines, and that excess supply would be from Canadian imports, because US producers had brought their production into line with consumption in the US market. Canada asserts that the USITC relied on a single consultant's report as support for this latter conclusion, which the Panel had previously found insufficient in this regard. In addition, Canada asserts that new data obtained in the section 129 determination showed that US production increased by nearly 5 percent during the first quarter of 2002, while Canadian production declined by over 2 percent. In Canada's view, this evidence refutes the conclusion that US producers had curbed overproduction. Overall, Canada considers that as the USITC's conclusion that imports were likely to increase substantially is unsupported, the USITC's causation analysis is perforce inconsistent with Articles 3.5 of the AD Agreement and 15.5 of the SCM Agreement.

7.59 The United States notes that the USITC found that imports, already at significant and increasing levels even with the restraining effect of the SLA in place, and with significant increases in volume after expiration of the SLA, would continue to enter the US market at significant levels and were projected to further increase substantially. 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.

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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.

7.60 However, the USITC found that, unlike the situation during the period of investigation, when both US and Canadian producers contributed to the excess supply which caused substantial price declines and led to deterioration in the condition of the domestic industry, by the end of 2001, US producers had brought their production into line with consumption. Canadian producers, however, had excess capacity, and projected increased production, with the United States being the likely market for this excess production. This latter condition would result in excess supply in the US market. Thus, the USITC found that subject imports were likely to increase substantially and were entering at prices, particularly at the low levels seen at the end of the period of investigation, that were likely to have a significant depressing or suppressing effect on domestic prices, were likely to increase demand for further imports, and thereby were likely to adversely impact the US industry in the imminent future, unless protective action were taken.

7.61 The United States notes that, in the section 129 determination, the USITC integrated 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. Thus, the United States argues that Canada errs in focusing on the separate section of the section 129 determination that reviewed the factors involved in those findings. Moreover, the United States considers that Canada mischaracterizes the USITC's determination that US producers had brought production in line with consumption, arguing that contrary to Canada's argument, the basis for this conclusion was not a single footnote reference. Rather, the United States points out that the USITC relied on evidence regarding domestic production and capacity. Thus, the United States notes 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.

7.62 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. In this regard, we note that our original finding that the USITC's causation determination was not consistent with Articles 3.5 and 15.5 of the AD and SCM Agreements, respectively, rested on our finding that because of an error in a fundamental element of its analysis, the USITC's entire causal analysis could not be sustained.

"we have found that the USITC's determination is inconsistent with the requirements of Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement in that the conclusion that imports would increase substantially is not one that could have been reached by an unbiased investigating authority based on an objective examination of the evidence concerning relevant factors in the investigation. The entire analysis of the USITC with respect to causation rests upon the likely effect of substantially increased imports in the near future. Having found that a fundamental element of the causal analysis is not consistent with the Agreements, it is clear to us that the causal analysis cannot be consistent with the Agreements."<sup>90</sup>

In this proceeding, by contrast, we have found that the USITC's conclusion that imports would increase substantially is **not** inconsistent with Articles 3.7 and 15.7 of the AD and SCM Agreements. It is in light of that important difference in its underpinnings that we have assessed the USITC's causal analysis in the section 129 determination.

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<sup>90</sup> Panel Report, *US – Softwood Lumber VI*, *supra* note 1, at para. 7.122.

7.63 While it is possible to disagree with the USITC's analysis, we cannot conclude that it is unreasonable. Moreover, as we noted above, we do not consider that a determination can be sustained on review only if every argument and conflict in the evidence is resolved by the investigating authority in favour of the determination made. It is the task of the investigating authority to weigh the evidence and make a reasoned judgement – this implies that there may well be evidence, and arguments, that detract from the conclusions reached. Unless such evidence and arguments demonstrate that an unbiased and objective investigating authority **could not** reach a particular conclusion, we are obliged to sustain the investigating authorities' judgment, even if we would not have reached that conclusion ourselves. Thus, we conclude 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

**(b) The USITC's Consideration of "Other Factors"**

7.64 Canada also argues that the USITC's analysis of "other causes of injury" fails to satisfy the requirements of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement. In its section 129 determination, the USITC concluded that there were no known "other causal factors" relevant to its investigation that could constitute a threat of injury to the domestic industry. Therefore, the USITC concluded that it was not necessary for it to conduct a non-attribution analysis, because there were no known factors threatening material injury to the US industry other than Canadian imports. Canada considers that factors other than Canadian imports had substantial adverse effects on the US domestic industry during the period of investigation, as demonstrated by the USITC's material injury analysis. Canada argues that the USITC had acknowledged that other factors had contributed to the substantial declines in price during the period of investigation. Canada argues that at least three other causal factors were affecting the domestic industry, and the USITC erred in dismissing them as factors potentially threatening material injury.

**(i) US domestic oversupply**

7.65 Canada notes that in its original determination, the USITC had found that Canadian imports were not causing material injury because both US and Canadian lumber contributed to excess supply, precluding a finding that imports had a significant impact on the domestic industry. Canada, relying on its view that the USITC's conclusion that US producers had brought production in line with consumption was in error, argues that the central problem facing the US industry was US overproduction, and that therefore the USITC erred in concluding that it did not threaten injury to the domestic industry.

7.66 The United States considers that Canada mischaracterizes the USITC's determination that US producers had brought production in line with consumption, arguing that that contrary to Canada's argument, the basis for this conclusion was not a single footnote reference. Rather, the United States points out that the USITC also relied on evidence regarding US production and capacity. Thus, the 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. 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.

**(ii) Third country imports**

7.67 Canada considers that the USITC's principal reason for concluding that third country imports were not a factor threatening injury was their small market share. However, in Canada's view, the real issue was the expected rate of increase in their market share at the expense of the domestic industry, and not the absolute level of those imports. Canada notes that the USITC had cited an increase of 1.1 percentage points in Canadian market share from 1999 to 2001 in support of its conclusion that Canadian imports were likely to increase in the future, and argues that third country import market share increased by a similar amount – 0.9 percentage points. Moreover, Canada argues that the rate of increase in third country import market share was higher than for Canadian imports. Canada also argues that the fact that individual third country imports would be considered negligible in the context of a material injury analysis, cited by the USITC, is irrelevant to the question whether those increasing imports, as a whole, were a factor threatening injury to the US industry. Finally, Canada considers that the USITC's conclusion that third country imports were not likely to increase relative to Canadian imports because third country imports had not been subject to import restraints during the period of investigation, as Canadian imports were, fails to recognize that continued increase in third country imports equivalent to the increase in Canadian imports would have an equal effect on the US industry. Canada asserts that even if third country imports merely kept pace with Canadian imports, they would have at least an equal effect on the US industry. Canada argues that nothing in the record indicated that the factors causing the increase in third country imports would change, and that therefore there was no support for the USITC's view that it was speculative to conclude that such imports would continue to increase if no order were imposed. Canada considers that the USITC was obligated to determine whether the factors that caused the large increase during the period of investigation would continue in the imminent future.

7.68 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. The United States asserts that Canada ignores the significance of the baseline in focusing on incremental increases in import volume. Thus, the United States points out that while the USITC recognized that the incremental increase in Canadian import volume between 1999 and 2001 was approximately the same as the increase in third country imports import volume, considered in perspective, 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. Moreover, the USITC noted that the third country imports were higher value than the Canadian imports. The United States considers that Canada errs in focusing on the rate of increase Canadian and third country imports, while ignoring the absolute volumes. The United States also notes that the increases occurred during a period when imports from Canada were subject to restraint, while third country imports were not restrained. In the US view, Canada fails to explain its basis for believing that any significant increase in third country imports would be imminent and how any likely imminent increase in such a small volume of third country imports relative to apparent consumption might rise to the level of having a causal impact on the domestic industry, given the low level of such imports.

**(iii) Cross-Border Integration**

7.69 Canada argues that the view that integrated firms would not harm their related companies is a common-sense proposition recognized by the USITC in other cases, and not speculation, as the USITC characterized it in this case. Moreover, Canada argues that the USITC failed to consider the fact that integration in the North American lumber market was increasing, and the fact that the USITC did not exclude any US companies from the domestic industry as related parties supports the view that integrated firms are unlikely to import Canadian lumber at injurious prices or volumes.

7.70 The United States considers that Canada's argument that increasing integration in the North American lumber industry indicated that integrated firms would not import so as to harm related companies in the US industry is based on facts in a different case, and points out that the USITC found no evidence to support the assertion. The United States argues that the USITC's decision not to exclude from its analysis any domestic producers under the "related parties" provision was because there was no evidence that they were "closely aligned" and likely to be shielded from harm.

7.71 Canada argues that these three factors "indisputably" constitute other factors causing injury, and that therefore, the United States was required to carry out a non-attribution analysis. However, it is not clear to us why this should be the case. While it is clear that these are factors that are at play in the US lumber industry and market, and that they may have had some effects on the industry, that does not necessarily mean that they potentially threaten injury to the domestic industry, and must therefore be the subject of analysis and determinations under the non-attribution provisions of Articles 3.5 and 15.5 of the AD and SCM Agreements. In our view, there is nothing unreasonable in the USITC's conclusion that the mere fact of cross-border integration, even if increasing, does not pose a potential threat of injury to the US lumber industry.

7.72 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.

7.73 Finally, with respect to potential US oversupply, we note 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. In 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. The availability of capacity in Canada, likely increased production, and the likelihood that exports will be predominantly to the US market are not relevant to the question whether the USITC erred in so concluding. While those factors support the conclusion that imports from Canada are likely to increase, they do not affect the question whether excess supply from domestic sources potentially threatens the domestic industry.

7.74 We therefore conclude that the USITC's determination regarding other factors potentially threatening injury to the US industry is not inconsistent with Articles 3.5 and 15.5 of the AD and SCM Agreements, respectively.

## **VIII. CONCLUSIONS AND RECOMMENDATION**

8.1 Based on the foregoing, we conclude that the determination of the USITC in the section 129 proceeding investigation is not inconsistent with the asserted provisions of:

- Article 3.5 of the AD Agreement,
- Article 3.7 of the AD Agreement,
- Article 15.5 of the SCM Agreement, and
- Article 15.7 of the SCM Agreement.

8.2 We therefore consider that the United States has implemented the decision of the Panel, and the DSB, to bring its measure into conformity with its obligations under the AD and SCM Agreements.

8.3 Having found that the United States did not act inconsistently with its obligations under the asserted WTO Agreements, we consider that no recommendation under Article 19.1 of the DSU is necessary, and we make none.

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