

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

Report of the Panel

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I. INTRODUCTION

1.1 On 20 December 2002, Canada requested consultations with the United States pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("the DSU"), Article XXII of GATT 1994, Article 17 of the Agreement on Implementation of Article VI of GATT 1994 ("the Anti-Dumping Agreement"), and Article 30 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement") concerning, *inter alia*, the United States International Trade Commission's (USITC) investigation and final determination in Softwood Lumber from Canada.¹ The United States and Canada consulted on 22 January 2003, but failed to settle the dispute.

1.2 On 3 April 2003, Canada requested the Dispute Settlement Body ("the DSB") to establish a panel pursuant to Articles 4 and 6 of the DSU, Article XXIII of the GATT 1994, Article 17 of the Anti-Dumping Agreement and Article 30 of the SCM Agreement.²

1.3 At its meeting on 7 May 2003, the DSB established a panel in accordance with Article 6 of the DSU to examine the matter referred to the DSB by Canada in document WT/DS277/2. 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 documents WT/DS277/2, 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."

1.4 On 12 June 2003, Canada requested the Director-General to determine the composition of the panel, pursuant to paragraph 7 of Article 8 of the DSU. On 19 June 2003, the Director-General composed the Panel as follows:³

Chairman: H.E. Mr. Hardeep Singh Puri

Panellists: Mr. Paul O'Connor

Ms. Luz Elena Reyes de la Torre

1.5 The European Communities, Japan and Korea reserved their rights to participate in the panel proceedings as third parties.

1.6 The Panel met with the parties on 4-5 September 2003 and on 7 October 2003. It met with the third parties on 5 September 2003.

II. FACTUAL ASPECTS

2.1 This dispute concerns the investigation and determination of the USITC in Softwood Lumber from Canada and the final definitive anti-dumping and countervailing duties applied following the final determination.

2.2 In this case, the USITC instituted preliminary anti-dumping and countervailing duty investigations in response to a petition filed on 2 April 2001 on behalf of the US softwood lumber industry. In the preliminary phase, the USITC determined, on 16 May 2001, that there was a reasonable indication that an industry in the United States was threatened with material injury by

¹ WT/DS277/1.

² WT/DS277/2.

³ WT/DS277/3.

reason of imports from Canada of softwood lumber that were alleged to be subsidized by the Government of Canada and sold in the United States at less than fair value (“LTFV”).⁴

2.3 Subsequent to United States Department of Commerce's ("USDOC") affirmative preliminary determination that imports of softwood lumber from Canada were subsidized and sold in the United States at dumped prices, the USITC instituted the final phase of its investigations.

2.4 On 16 May 2002, the USITC 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 LTFV.⁵ On 22 May 2002, the USDOC issued antidumping and countervailing duty orders on imports of softwood lumber from Canada found by the USDOC to be subsidized and sold in the United States at LTFV.⁶

2.5 In its final determination, the USITC found a single domestic like product consisting of softwood lumber products. Based on the domestic like product determination, the USITC concluded that there was a single domestic industry, which included all producers of softwood lumber in the United States. The USITC found that several conditions of competition pertinent to the softwood lumber industry were relevant to its analysis.⁷ In particular, these conditions included the recently expired United States/Canada Softwood Lumber Agreement (“SLA”); demand, including factors affecting demand, actual demand data and forecasts; supply conditions; species of lumber and substitutability; prices; and integration of the North American lumber market. The USITC determined that the domestic softwood lumber industry was not materially injured by reason of subject imports from Canada found to be sold at LTFV and to be subsidized, but found that there was a threat of material injury by reason of such imports.

2.6 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 USDOC had determined that there were 11 programmes that conferred countervailable subsidies to Canadian producers and exporters of softwood lumber, including: the Provincial Stumpage programmes in the Provinces of Quebec, British Columbia, Ontario, Alberta, Manitoba, and Saskatchewan; two programmes administered by the Government of Canada; two programmes administered by the Province of British Columbia; and one programme administered by the Province of Quebec. The USITC found that subject imports were likely to increase substantially based on: Canadian producers’ excess capacity and projected increases in capacity, capacity utilization, and production; the export orientation of Canadian producers to the US market; the increase in subject imports over the period of investigation; the effects of expiration of the SLA; subject import trends during periods when there were no import restraints; and forecasts of strong and improving demand in the US market. The USITC found that there was a moderate degree of substitutability between subject imports of softwood lumber from Canada 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

⁴ 66 Fed. Reg. 28541 (23 May 2001). (CDA-4).

⁵ 67 Fed. Reg. 36022 (22 May 2002). (CDA-2) and the USITC Report in Softwood Lumber from Canada, Investigations Nos. 701-TA-414 and 731-TA-928 (Final), Publication 3509, (May 2002).

⁶ 67 Fed. Reg. 36068-36077 (22 May 2002). (CDA-2).

⁷ USITC Report at 21-27 (Exhibit CDA-1).

and production efforts, growth, investment, and ability to raise capital due to subject imports of softwood lumber from Canada.

2.7 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.

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. CANADA

3.1 Canada requests the Panel to find that the investigation and final determination of threat of material injury by the USITC in Softwood Lumber from Canada and the definitive anti-dumping and countervailing duties imposed as a result violate Articles 1, 3.1, 3.2, 3.4, 3.5, 3.7, 3.8, 12 and 18.1 of the *Anti-Dumping Agreement* and 10, 15.1, 15.2, 15.4, 15.5, 15.7, 22 and 32.1 of the *SCM Agreement* and Article VI:6 (a) of GATT 1994.

3.2 Canada requests that the panel recommend that the United States bring its measures into conformity with its WTO obligations, including by revoking the final determination of threat of material injury, ceasing to impose anti-dumping and countervailing duties and returning the cash deposits collected as a result of the United States' actions in Softwood Lumber from Canada.

B. UNITED STATES

3.3 The United States requests the panel to reject Canada's claims in their entirety.

[Parties' arguments in Sections IV and V and Annexes deleted from this version.]

VI. INTERIM REVIEW

6.1 On 19 December 2003, we transmitted the interim report in this dispute to the parties. Both parties submitted written requests for the review of precise aspects of the interim report. Each party also subsequently submitted written comments on the other party's comments. Neither party requested an interim review meeting.

6.2 We have made certain necessary technical revisions and corrections to our report, some based on comments by the parties and others based on our own review of the report. We address below those of the parties' comments that concerned more than merely technical or typographical corrections.

6.3 The United States requests that we reconsider our findings at paragraphs 6.89 to 6.96, 6.122, and 6.132 to 6.137 of the interim report, in light of the record as a whole. The United States presents no new arguments or reasons in support of this request, stating rather that it believes that the Panel should have reached contrary conclusions in view of the reasons set forth in the United States' previous submissions to the Panel. The United States asks us to reconsider our conclusions in light of the record and USITC analysis as a whole, asserting that the record and analysis amply support the USITC's conclusion that the US lumber industry was threatened with material injury by reason of dumped and subsidized imports.

6.4 Canada opposes this aspect of the United States' request.

6.5 We decline to change our views and conclusions as set forth in the referenced paragraphs. In the course of our consideration of this dispute, we have carefully considered the record in the underlying investigation, the USITC's analysis and conclusions, and the argument of the parties before reaching our conclusions. Given no new arguments, we see no basis to alter our views in any material respect.

6.6 The United States requests that, in the first sentence of paragraph 6.10 of the interim report, and first, third, and last sentences of paragraph 6.11 of the interim report, we change the word "determination" to "determinations" and make conforming changes in those sentences.

6.7 Canada considers that it would be inappropriate to pluralize "determination" in these sentences. Canada understands the USITC to have issued a single threat of injury determination with respect to both dumped and subsidized imports.

6.8 We decline to make the changes requested by the United States to paragraphs 6.10 and 6.11 of the interim report. We share the view of Canada that the USITC issued a single threat of injury determination, which was equally applicable in the anti-dumping and countervailing investigations. We note that our view in this regard does not, of course, affect the fact that under US law, it may be that, formally, separate determinations are made in anti-dumping and countervailing duty investigations. However, we considered the USITC's report as constituting a single determination on the question of injury and threat of injury throughout our analysis, and we see no reason to change that treatment in these paragraphs. We note that in a few instances, we referred to "determinations" in the plural in the interim report. We have changed such references in the final report at paragraphs 6.1, 6.41, and 6.144, as these were inadvertent or typographical errors.

6.9 The United States proposes a change to the text of paragraph 6.13 of the interim report, to clarify its meaning. Canada made no comment on this aspect of the United States' request.

6.10 We agree with the United States that this paragraph could be clearer, and have therefore modified it along the lines suggested by the United States.

6.11 The United States requests that we amend the last sentence of paragraph 6.31 of the interim report to more accurately reflect its position, as set out in its first submission. Canada made no comment on this aspect of the United States' request.

6.12 We have reviewed the United States' submissions, and agree that the proposed text more accurately reflects the United States arguments, and have therefore made the requested modification to this paragraph.

6.13 Canada notes that, in the third sentence of paragraph 6.34, the interim report states that "Canada has not asserted any specific legal requirements with respect to special care". Canada asserts, it did make submissions in this regard, referring to paragraph 64 of its First Written Submission ("the standard of special care is one that requires an investigating authority to undertake "an especially meticulous examination"), and to paragraph 7 of Canada's response to Question #3 from the First Meeting with the Panel ("Canada articulated the standard as being "a particularly careful examination"). Canada considers that these formulations echo the first sentence of paragraph 6.34 of the interim report, which states that this obligation requires an investigating authority "to act with an enhanced degree of attention" and paragraph 6.37, which refers to "this obligation to act with an extra degree of attention". Accordingly, Canada requests that we replace the word "specific" in the third sentence of paragraph 6.34 of the interim report with the word "additional" to more accurately reflect Canada's submissions.

6.14 The United States made no comment on this aspect of Canada's request.

6.15 We decline to make the change proposed by Canada. As set out in the report, we found the parameters of the "special care" requirement set forth in Article 3.8 of the AD Agreement and Article 15.8 of the SCM Agreement unclear. It is in our discussion of this point that we observed that Canada had not asserted any specific legal requirements with respect to special care – that is, Canada made no arguments as to what might constitute the special care required by the Agreements in threat cases. This is not a question of **additional** requirements, but rather a question of specifying, in the sense of defining, the requirement of special care set out in the Agreements themselves. While the special care obligation might be considered an "additional" obligation in the sense that it is an obligation on investigating authorities considering threat of material injury *in addition* to other obligations set out in Articles 3 and 15 of the AD and SCM Agreements, the use of the word "additional" as proposed by Canada might be misunderstood to imply that Canada could have, or should have, suggested obligations in addition to those set out in the text of Article 3.8 of the AD Agreement and Article 15.8 of the SCM Agreement themselves. Nonetheless, we have modified this paragraph in order to clarify our views in this respect.

6.16 The United States proposes the addition of a sentence to paragraph 6.83 of the interim report, to more accurately reflect the USITC analysis discussed in that paragraph. Canada made no comment on this aspect of the United States' request.

6.17 We have reviewed the USITC determination in this respect, and have made clarifying changes to this paragraph, along the lines suggested by the United States.

6.18 The United States proposes deleting the fourth sentence of paragraph 6.93 of the interim report, asserting that it is somewhat redundant of the preceding sentence, but is a less accurate characterization of the USITC Final Report.

6.19 In Canada's view, the sentence proposed by the United States for deletion in paragraph 6.93 of the interim report is not redundant of the preceding sentence because the two sentences cover two

different concepts. Canada asserts that the third sentence deals with the increase in the volume of imports during the period of investigation while the second sentence deals with the rate of increase during the period of investigation. Canada, referring to the Panel's findings at paragraphs 6.77-6.78 of the Interim Report, considers that the two sentences constitute an accurate characterization of the USITC Final Report, and therefore requests that the Panel retain its current wording.

6.20 We share Canada's view that the two sentences in question deal with different aspects of analysis of threat of injury, the increase in import volume, and the rate of increase in imports. The existing wording, which addresses the two concepts separately, accurately describes our assessment of the USITC determination in this regard, and we therefore decline to change it.

6.21 Canada comments that, in paragraph 6.131 of the interim report, the sentence immediately following the quote from the footnote 195 of the USITC Final Report does not reflect fully Canada's submissions concerning that footnote. Canada argues that its submissions focused on the USITC's explicit rejection of the requirement, articulated by the Appellate Body, to separate and distinguish the effects of other known factors from those attributed to subject imports as part of fulfilling the non-attribution requirements in Articles 3.5 and 15.5. Accordingly, Canada proposes modifications to the last three sentences of this paragraph.

6.22 The United States expresses concern that Canada's proposed modification of paragraph 6.131 of the interim report could be misconstrued as not simply a summary of Canada's argument, but as an implication by the Panel itself that the Appellate Body has articulated a specific methodology that investigating authorities *must* employ in ensuring that they do not attribute injuries caused by other known factors to dumped or subsidized imports. The United States asserts that the Appellate Body in *EC Pipe* explicitly indicated that no specific methodology for this analysis is required. (Appellate Body Report, *European Communities - Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted August 18, 2003, para. 189 ("provided that an investigating authority does not attribute the injuries of other causal factors to dumped imports, it is free to choose the methodology it will use in examining the 'causal relationship' between dumped imports and injury")) Moreover, the United States comments that Canada's characterization of the meaning of the quoted portion of the USITC Final Report and the US case law it referenced omits the response made in the US submissions and could be misconstrued as the Panel's statement regarding US law. Therefore, the United States urges the Panel not to adopt the proposed modification, in order to avoid any confusion between Canada's arguments and the Panel's own views, and because the implication that could be attributed to the Panel under Canada's proposal is inaccurate. The United States further comments that Canada's argument on the issue of non-attribution is accurately set forth at paragraphs 4.56 and 4.209 of the interim report, and the summary statement in paragraph 6.131 is consistent with the arguments set forth at those two paragraphs. Because the summary as drafted is accurate, while the proposed modification is potentially confusing, the United States requests that the Panel decline to make the modification to this paragraph that Canada proposed.

6.23 The referenced text to which Canada proposes modifications is merely a summary statement of Canada's arguments on this issue, which are more fully set forth earlier in the Report, as are the United States' arguments in response. Particularly since our resolution of this aspect of Canada's claims did not turn on our evaluation of the quoted footnote from the USITC's Final Report, nor on Canada's arguments regarding the import of that footnote, we see no need to expand on the summary of Canada's arguments in this paragraph.

VII. FINDINGS

A. INTRODUCTION

7.1 At issue in this dispute is the United States International Trade Commission's investigation and determination of threat of material injury caused by dumped and subsidized imports of softwood

lumber imports from Canada and the anti-dumping and countervailing measures imposed on such imports. This is the latest in a series of Canadian challenges to various aspects of these investigations. WTO Panels have previously considered, *inter alia*, challenges to the United States Department of Commerce's preliminary countervailing duty and critical circumstances determinations⁶⁷, the United States Department of Commerce's final countervailing duty determination⁶⁸, and the United States Department of Commerce's final anti-dumping duty determination.⁶⁹ However, those previous disputes do not have any direct bearing on the issues before the Panel in this case, which concerns exclusively the injury aspects of the investigations, which were not addressed in the other disputes. The majority of the claims put forward by Canada in this case challenge the United States International Trade Commission's consideration of the evidence underlying its determination of threat of material injury by reason of dumped and subsidized imports of softwood lumber from Canada.

B. FACTUAL ASPECTS

7.2 Under US law, two agencies share responsibility for the conduct of anti-dumping and countervailing duty investigations – the United States Department of Commerce (USDOC) and United States International Trade Commission (USITC). USDOC has responsibility for the formal initiation of investigations, and the determination of the existence and margins of dumping and/or subsidization. USITC has responsibility for the determination of material injury to a domestic industry caused by dumped or subsidized imports. USITC conducts its investigation in every case on a timetable which is separate from but overlaps the time table for USDOC's investigation of dumping and subsidization. Moreover, USITC and USDOC both conduct their investigations in two phases, preliminary and final. The preliminary phase of the injury investigation begins on the day an application for anti-dumping or countervailing duty measures is filed, and is completed before the preliminary determination of dumping and/or subsidization is made by USDOC. The final phase of USITC's injury investigation usually is begun after USDOC's preliminary determination and overlaps the issuance of USDOC's final determination of dumping and/or subsidization. If USDOC's final determination is affirmative, USITC completes the final phase of its investigation and issues a final determination.

7.3 In this case, USITC instituted preliminary anti-dumping and countervailing duty injury investigations in response to a petition filed on 2 April 2001 on behalf of the US softwood lumber industry. In the preliminary phase, USITC determined, on 17 May 2001, that there was a reasonable indication that an industry in the United States was threatened with material injury by reason of imports from Canada of softwood lumber that were alleged to be subsidized by the Government of Canada and sold in the United States at dumped prices - less than fair value ("LTFV") in US parlance.^{70 71}

7.4 Subsequent to USDOC's affirmative preliminary and final determinations that imports of softwood lumber from Canada were subsidized and sold in the United States at dumped prices, USITC instituted the final phase of its investigation.

⁶⁷ Panel Report, *United States – Preliminary Determinations with Respect to Certain Softwood Lumber from Canada* ("US – Softwood Lumber III"), WT/DS236/R, adopted 1 November 2002.

⁶⁸ Panel Report, *United States – Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada* ("US – Softwood Lumber IV"), WT/DS257, circulated 29 August 2003, appeal pending.

⁶⁹ *United States – Final Dumping Determination on Softwood Lumber from Canada* ("US – Softwood Lumber V") WT/DS264 (pending before Panel).

⁷⁰ 66 Fed. Reg. 28541 (23 May 2001). (Exhibit CDA-4).

⁷¹ Under US law, the standard of determination in preliminary antidumping or countervailing duty investigations is whether there is a "reasonable indication" of material injury or a threat of material injury by reason of dumped and subsidized imports of softwood lumber from Canada.

7.5 On 16 May 2002, the USITC 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 LTFV.⁷² On 22 May 2002, USDOC issued antidumping and countervailing duty orders on imports of softwood lumber from Canada.⁷³

7.6 In its final determination, the USITC found a single domestic like product consisting of softwood lumber products. Based on the domestic like product determination, the USITC concluded that there was a single domestic industry, which included all producers of softwood lumber in the United States. The USITC found that several conditions of competition pertinent to the softwood lumber industry were relevant to its analysis.⁷⁴ In particular, these conditions included the recently expired United States/Canada Softwood Lumber Agreement (“SLA”); demand, including factors affecting demand, actual demand data and forecasts; supply conditions; species of lumber and substitutability; prices; and integration of the North American lumber market. The USITC determined that the domestic softwood lumber industry was not materially injured by reason of subject imports from Canada found to be sold at LTFV and to be subsidized, but found that there was a threat of material injury by reason of such imports.

7.7 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 USDOC had determined that there were 11 programmes that conferred countervailable subsidies to Canadian producers and exporters of softwood lumber, including: the Provincial Stumpage programmes in the Provinces of Quebec, British Columbia, Ontario, Alberta, Manitoba, and Saskatchewan; two programmes administered by the Government of Canada; two programmes administered by the Province of British Columbia; and one programme administered by the Province of Quebec. The USITC found that subject imports were likely to increase substantially based on: Canadian producers’ excess capacity and projected increases in capacity, capacity utilization, and production; the export orientation of Canadian producers to the US market; the increase in subject imports over the period of investigation; the effects of expiration of the SLA; subject import trends during periods when there were no import restraints; and forecasts of strong and improving demand in the US market. The USITC found that there was a moderate degree of substitutability between subject imports of softwood lumber from Canada 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 of softwood lumber from Canada.

7.8 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 as a result.

⁷² 67 Fed. Reg. 36022 (22 May 2002) (Exhibit CDA-2) and USITC Report in Softwood Lumber from Canada, Investigations Nos. 701-TA-414 and 731-TA-928 (Final), Publication 3509, (May 2002) (hereinafter USITC Final Report) (Exhibit CDA-1).

⁷³ 67 Fed. Reg. 36068-36077 (22 May 2002). (Exhibit CDA-2).

⁷⁴ USITC Final Report at 21-27 (Exhibit CDA-1).

C. CLAIMS SET FORTH IN CANADA'S PANEL REQUEST

7.9 Canada alleges violations of various provisions of the Anti-Dumping (AD) and SCM Agreements. Canada characterizes three of these as "overarching" violations, specifically the alleged violations of Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement, Article 3.8 of the AD Agreement and Article 15.8 of the SCM Agreement, and Article 12 of the AD Agreement and Article 22 of the SCM Agreement. Canada also alleges violations of specific provisions of Article 3 of the AD Agreement, Article 15 of the SCM Agreement and Article VI of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), in particular Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement, Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement, Article 3.4 of the AD Agreement and Article 15.4 of the SCM Agreement, Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement. Finally, Canada alleges violations of Articles 1 and 18.1 of the AD Agreement, Articles 10 and 32.1 of the SCM Agreement and Article VI:6(a) of the GATT 1994.

7.10 These claims for the most part require us to consider the substance of the USITC's final determination to determine whether it is consistent with US obligations under the AD and SCM Agreements. There are also several issues of interpretation of the Agreements raised by Canada's claims. Therefore, we address below first the general issues of standard of review and relevant principles of treaty interpretation, and then go on to address the specific claims.⁷⁵

D. STANDARD OF REVIEW

7.11 The injury determination of the USITC was based on a single analysis of the facts, and applies without distinction in the context of the anti-dumping and the countervailing duty measures issued by USDOC. The provisions of the AD and SCM Agreements governing injury determinations are in large part identical, and the differences that do exist do not undermine the extensive similarity. Thus, in order for us to find that the United States acted consistently with its obligations under the provisions AD and SCM Agreements, we must conclude that the determination of the USITC is consistent with the requirements of both Agreements. This raises the question of the standard of review to be applied in our examination of the USITC's determination.

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

⁷⁵ On 14 August 2003, the Secretariat received an unsolicited *amicus curiae* communication in connection with this dispute from the Northwest Ecosystem Alliance, which indicated that copies had been sent to each of the parties and third parties to the dispute. Having considered carefully the question of how to treat that communication, and any further such communications that might be received, and in light of the absence of consensus among WTO Members on the question of how to treat *amicus* submissions, we decided not to accept unsolicited *amicus curiae* submissions in the course of this dispute. However, we noted that we would consider any arguments raised by *amici curiae* to the extent that these arguments were taken up in the written submissions and/or oral statements of any party or third parties, noting that the communication in question had been received prior to the first meeting with the parties, and had been sent to the parties and third parties. We noted that, as a consequence of our decision in this regard, the communication from the Northwest Ecosystem Alliance does not form part of the record in this dispute. The parties, third parties, and the submitter were informed of our decision on 1 September 2003

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.⁷⁶

7.13 To date, no WTO panel has addressed to what extent, if any, these two standards are different. Thus, it is not clear from previous decisions whether the application of the Article 11 standard to a determination could, in appropriate factual circumstances, lead to differing outcomes than the application of the Article 11 and Article 17.6(i) standards together to the same determination. That issue would appear to be presented by this case.

7.14 Canada's argument as originally presented suggested that, in Canada's view, the Article 11 standard required something different and perhaps stricter than the Article 17.6 standard. This raised the possibility that, in Canada's view, different conclusions might be reached, on the basis of the same determination, regarding violations of corollary provisions of the AD and SCM Agreements. However, in response to questions from the Panel, Canada clarified that it did not consider that the standard of review under Article 11 of the DSU is stricter than that under Article 17.6 of the AD Agreement, but rather that they complement each other and should be read together.⁷⁷ Canada further clarified that it was not claiming that the USITC should have obtained additional information during the course of its investigation. Rather, Canada specified, its challenge concerned the USITC's evaluation of the evidence that was on the record before it. Finally, Canada observed that its understanding of the applicable standard of review for this dispute was compatible with the Declaration of Ministers relating to Dispute Settlement under the AD and SCM Agreements, which recognized the need for consistent resolution of disputes arising from anti-dumping and countervailing duty measures.

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.

⁷⁶ 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.

⁷⁷ Canada's Responses to Questions from the Panel and the United States - First Meeting, question 1.

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.⁷⁸ 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".⁷⁹

7.17 In light of Canada's clarification of its position, and based on our understanding of the applicable standards of review under Article 11 of the DSU and Article 17.6 of the AD Agreement, we do not consider that it is either necessary or appropriate to conduct separate analyses of the USITC determination under the two Agreements.

7.18 We consider this result appropriate in view of the guidance in the Declaration of Ministers relating to Dispute Settlement under the AD and SCM Agreements. While the Appellate Body has clearly stated that the Ministerial Declaration does not require the application of the Article 17.6 standard of review in countervailing duty investigations,⁸⁰ it nonetheless seems to us that in a case such as this one, involving a single injury determination with respect to both subsidized and dumped imports, and where most of Canada's claims involve identical or almost identical provisions of the AD and SCM Agreements, we should seek to avoid inconsistent conclusions.

7.19 With respect to the question of legal interpretation, Article 3.2 of the DSU provides that Members recognise that the dispute settlement system serves to clarify the provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". Article 31.1 of the Vienna Convention on the Law of Treaties ('Vienna Convention')⁸¹, which is generally accepted as such a customary rule, provides:

"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

7.20 There is a considerable body of WTO case law dealing with the application of these provisions on treaty interpretation in dispute settlement in the WTO. It is clear that interpretation must be based above all on the text of the treaty⁸², but that the context of the treaty also plays a role in certain circumstances. It is also well-established that these principles of interpretation "neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended".⁸³ Furthermore, panels "must be guided by the rules of treaty

⁷⁸ 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.

⁷⁹ Appellate Body Report, *US - Cotton Yarn*, para. 69, n.42, citing Appellate Body Report, *US - Lamb*, para. 106.

⁸⁰ Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* ("US – Lead and Bismuth II"), WT/DS138/AB/R, adopted 7 June 2000, DSR 2000:V, 2601 at para 49.

⁸¹ (1969) 8 *International Legal Materials* 679.

⁸² Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* ("Japan – Alcoholic Beverages II"), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97, p. 11.

⁸³ Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* ("India – Patents (US)"), WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9, para. 45.

interpretation set out in the Vienna Convention, and must not add to or diminish rights and obligations provided in the WTO Agreement".⁸⁴

7.21 In the context of WTO disputes under the AD Agreement, the Appellate Body has made it clear that Article 17.6(ii)

"The *first* sentence of Article 17.6(ii), echoing closely Article 3.2 of the DSU, states that *panels* "shall" interpret the provisions of the *Anti-Dumping Agreement* "in accordance with customary rules of interpretation of public international law." Such customary rules are embodied in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* ("*Vienna Convention*"). Clearly, this aspect of Article 17.6(ii) involves no "conflict" with the DSU but, rather, confirms that the usual rules of treaty interpretation under the DSU also apply to the *Anti-Dumping Agreement*. ...

The *second* sentence of Article 17.6(ii) ... *presupposes* that application of the rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention* could give rise to, at least, two interpretations of some provisions of the *Anti-Dumping Agreement*, which, under that Convention, would both be "*permissible interpretations*". In that event, a measure is deemed to be in conformity with the *Anti-Dumping Agreement* "if it rests upon one of those permissible interpretations".⁸⁵

7.22 Thus, it is clear to us that under the AD Agreement, a panel is to follow the same rules of treaty interpretation as in any other dispute. The difference is that if a panel finds more than one permissible interpretation of a provision of the AD Agreement, it may uphold a measure that rests on one of those interpretations. It is not clear whether the same result could be reached under Articles 3.2 and 11 of the DSU. However, it seems to us that there might well be cases in which the application of the Vienna Convention principles together with the additional provisions of Article 17.6 of the AD Agreement could result in a different conclusion being reached in a dispute under the AD Agreement than under the SCM Agreement. In this case, it has not been necessary for us to resolve this question, as we did not find any instances where the question of violation turned on the question whether there was more than one permissible interpretation of the text of the relevant Agreements.

E. BURDEN OF PROOF

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.⁸⁶ 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.⁸⁷ 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.

⁸⁴ *Ibid.*, para. 46.

⁸⁵ Appellate Body Report, *US – Hot-Rolled Steel*, para. 57.

⁸⁶ 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.

⁸⁷ *Ibid.*

F. ALLEGED VIOLATIONS OF ARTICLE 3.1 OF THE AD AGREEMENT AND ARTICLE 15.1 OF THE SCM AGREEMENT - OBLIGATIONS REGARDING "POSITIVE EVIDENCE" AND "OBJECTIVE EXAMINATION"

7.24 Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement are substantively identical. Article 3.1 provides

"A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products".

Article 15.1 of the SCM Agreement states:

"15.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the subsidized imports and the effect of the subsidized imports on prices in the domestic market for like products and (b) the consequent impact of these imports on the domestic producers of such products". (footnote omitted)

7.25 Canada asserts that the obligations set out in Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement contain substantive, overarching obligations that must be observed by investigating authorities in making injury determinations. Canada considers that the alleged violations of other, more specific provisions of Article 3 of the AD Agreement and Article 15 of the SCM Agreement demonstrate the asserted violations of Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement in this case. Thus, Canada has not made separate arguments supporting these claims of violation. In response to questions from the Panel, Canada clarified that it did not consider these claims to be dependent on the more specific claims it raised, but acknowledged that they are closely related. Canada explained that the "same facts give rise to violations under the overarching provisions as well as the specific provisions Canada has invoked in this dispute".⁸⁸

7.26 In the absence of independent argument supporting these overarching claims under Articles 3.1 and 15.1, and in light of Canada's explanation, it is our view that the resolution of these claims is substantively dependent on our resolution of the specific claims. In this regard, we note Canada's statement that, "Given substantive differences in the obligations in Articles 3.1 and 15.1 compared to [Articles 3.2, 3.4, 3.5 and 3.7 of the AD Agreement and Articles 15.2, 15.4, 15.5 and 15.7 of the SCM Agreement], certain factual scenarios could give rise to violations of Article 3.1 and 15.1 without violating the provisions of the other Articles. **However, Canada is not raising such facts in this dispute**".⁸⁹ Thus, in the absence of any additional arguments supporting the allegations of violation of Articles 3.1 and 15.1, if we find that the facts give rise to a conclusion of no violation under one of Canada's specific claims, we will also consider that those facts give rise to the same conclusion, no violation, with respect to the overarching claims under Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement. With respect to any aspect of the determination that is found to be inconsistent with any other provision of Articles 3 and 15 of the Agreements asserted by Canada, we can see no reason to conclude, in addition, that it also violates Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement. In the absence of additional arguments in support of these claims, to say that a violation of a specific provision of the Agreements also violates the overarching obligations in Articles 3.1 and 15.1 does not clarify the obligation set out in Articles 3.1 of the AD Agreement and 15.1 of the SCM Agreement. Nor would it

⁸⁸ Canada's Responses to Questions from the Panel and the United States - First Meeting, question 6.

⁸⁹ *Ibid.*, (emphasis added).

provide any guidance in the context of implementation of any recommendation of the DSB. Therefore, we will make no findings with respect to these claims.

7.27 Of course, we recognize the importance of the obligations in Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement to our evaluation of the USITC determination at issue in this dispute.⁹⁰ Thus, in considering Canada's specific claims of violation, we have considered the obligations established in those provisions in evaluating the USITC's determination in light of the specific allegations of violation.

7.28 In this regard, we have kept in mind statements of the Appellate Body regarding the meaning of "positive evidence" and "objective examination". While "positive evidence" involves the facts underpinning and justifying the injury determination, "objective examination" is concerned with the investigative process itself.⁹¹ The Appellate Body has interpreted "positive evidence" as follows:

"The term "positive evidence" relates, in our view, to the *quality* of the evidence that authorities may rely upon in making a determination. The word "positive" means, to us, that the evidence must be of an *affirmative, objective* and *verifiable* character, and that it must be *credible*."⁹² (emphasis in original)

The Appellate Body has defined an "objective examination":

"The term "objective examination" aims at a different aspect of the investigating authorities' determination. While the term "positive evidence" focuses on the facts underpinning and justifying the injury determination, the term "objective examination" is concerned with the investigative process itself. The word "examination" relates, in our view, to the way in which the evidence is gathered, inquired into and, subsequently, evaluated; that is, it relates to the conduct of the investigation generally. The word "objective", which qualifies the word "examination", indicates essentially that the "examination" process must conform to the dictates of the basic principles of good faith and fundamental fairness."⁹³ (footnote omitted)

The Appellate Body summed up the requirement to conduct an "objective examination" as follows:

"In short, an "objective examination" requires that the domestic industry, and the effects of dumped imports, be investigated in an *unbiased* manner, *without favouring the interests of any interested party*, or group of interested parties, in the investigation. The duty of the investigating authorities to conduct an "objective examination" recognizes that the determination will be influenced by the objectivity,

⁹⁰ We note in this respect the statement of the Appellate Body: "Article 3 as a whole deals with obligations of Members with respect to the determination of injury. Article 3.1 is an overarching provision that sets forth a Member's fundamental, substantive obligation in this respect. Article 3.1 informs the more detailed obligations in succeeding paragraphs." Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland (Thailand – H-Beams)*, WT/DS122/AB/R, adopted 5 April 2001, para. 106.

⁹¹ Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India ("EC – Bed Linen (Article 21.5 – India)"),* WT/DS141/AB/RW, adopted 24 April 2003, para 114, quoting Appellate Body Report, *US – Hot-Rolled Steel*, para. 192.

⁹² *Ibid.*

⁹³ *Ibid.*, quoting Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.

or any lack thereof, of the investigative process".⁹⁴ (footnote omitted, emphasis in original)

G. ALLEGED VIOLATIONS OF ARTICLE 3.8 OF THE AD AGREEMENT AND ARTICLE 15.8 OF THE SCM AGREEMENT REQUIREMENTS REGARDING "SPECIAL CARE"

7.29 Article 3.8 of the AD Agreement and Article 15.8 of the SCM Agreement provide that:

"with respect to cases where injury is threatened by dumped [subsidized] imports, the application of anti-dumping [countervailing] measures shall be considered and decided with special care".

No WTO panel has addressed the interpretation of these provisions to date.

(a) Parties' Arguments

7.30 Canada asserts that these provisions establish an independent obligation with which Members must comply, and that they provide context to assist in the interpretation of the other paragraphs of Article 3 of the AD Agreement and Article 15 of the SCM Agreement that govern threat of injury determinations. However, as is the case concerning the alleged violations of Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement, Canada does not make any independent arguments with respect to these claims, but rather asserts that the "failure to take "special care" permeates the entire determination of the [USITC]".⁹⁵

7.31 The United States asserts that Canada's argument indicates it considers that the "special care" provision means that there is a stricter, higher standard of review for threat analysis than for present material injury analysis in the context of the covered Agreements. The United States, referring to the decision of the Appellate Body in a safeguards dispute, *US – Line Pipe*, noted that the Appellate Body suggested that the distinction between threat of injury and present injury "serves the purpose of setting a *lower threshold* for establishing the *right* to apply a safeguard measure".⁹⁶

7.32 However, in response to questions from the Panel, Canada clarified that it was not arguing that the Panel must apply a different standard of review in cases involving threat of material injury.⁹⁷ Rather, Canada's argument was that the "special care" provisions imposed a stricter standard of determination in threat cases, requiring a "particularly careful examination of the required elements of Article 3 of the AD Agreement and Article 15 of the SCM Agreement".⁹⁸ Canada asserts that "special care" in threat cases is a crucial safeguard to protect against the dangers inherent in the predictive nature of such determinations.

(b) Analysis by the Panel

7.33 The adjective "special" is defined as, *inter alia*, "Exceptional in quality or degree; unusual; out of the ordinary".⁹⁹ The noun "care" is defined, *inter alia*, as "Serious attention, heed; caution, pains, regard".¹⁰⁰ Thus, it seems clear to us that a degree of attention over and above that required of

⁹⁴ *Ibid.*

⁹⁵ Canada's first written submission at para 65.

⁹⁶ Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* ("*US – Line Pipe*"), WT/DS202/AB/R, adopted 8 March 2002, para. 169 (emphasis in original).

⁹⁷ Canada's Responses to Questions from the Panel and the United States - First Meeting, question 4.

⁹⁸ *Ibid.*

⁹⁹ The New Shorter Oxford English Dictionary (Clarendon Press 1993)

¹⁰⁰ *Ibid.*

investigating authorities in all anti-dumping and countervailing duty injury cases is required in the context of cases involving threat of material injury. We note that Articles 3.8 and 15.8 explicitly state that "**the application** of measures shall be considered and decided with special care" (emphasis added). Thus, it might be argued that the provision comes into play only after the investigation and consideration of all the relevant factors set out in other provisions of Articles 3 and 15 concerning the analysis of injury.¹⁰¹ However, we consider that such a conclusion is not appropriate in the context of Article 3.8 of the AD Agreement or Article 15.8 of the SCM Agreement. These provisions are part of the Article of each Agreement, Articles 3 and 15, which, governs the overall determination of injury, which under both Agreements is defined as including threat of material injury.¹⁰² Articles 3.7 and 15.7, set forth factors specific to the determination of threat of material injury, and state that investigating authorities shall base a determination of threat of material injury on facts and not allegation, conjecture or remote possibility. In our view, Articles 3.8 and 15.8 reinforce this fundamental obligation. Thus, we consider that Article 3.8 and Article 15.8 apply during the process of investigation and determination of threat of material injury, that is, in the establishment of whether the prerequisites for application of a measure exist, and not merely afterward when final decisions whether to apply a measure are taken.

7.34 Thus, we are faced with the question of what is entailed by this obligation to act with an enhanced degree of attention, so as to demonstrate compliance with the "special care" obligation. The Agreements require, as noted above, an objective evaluation based on positive evidence in making **any** injury determination, including one based on threat of material injury. Canada has not asserted any specific legal requirements with respect to special care – it has made no arguments as to what it considers might constitute the special care required by the Agreements in threat cases. It is not clear to us what the parameters of such "special care" in the context of an objective evaluation based on positive evidence would be. In these circumstances, we consider it appropriate to consider alleged violations of Articles 3.8 and 15.8 only after consideration of the alleged violations of specific provisions. While we do not consider that a violation of the special care obligation **could** not be demonstrated in the absence of a violation of the more specific provision of the Agreements governing injury determinations, we believe such a demonstration would require additional or independent arguments concerning the asserted violation of the special care requirement beyond the arguments in support of the specific violations,

7.35 Our review of Canada's arguments indicates that the factual circumstances Canada asserts demonstrate the failure of the USITC to take the requisite "special care" are the same factual circumstances that give rise to the asserted specific violations. Indeed, Canada points to examples of what it considers are aspects of the USITC determination that demonstrate a lack of special care which are the same aspects that Canada argues demonstrate violations of other provisions of Articles 3 of the AD Agreement and 15 of the SCM Agreement. Thus, it appears to us that Canada is asserting that the violations of the specific provisions cited in Canada's claims and the violations of Article 3.8 and 15.8 are co-extensive.

7.36 In light of the foregoing, in the circumstances of this case we can see no basis for a finding of violation of the special care requirement with respect to any aspect of the determination which is otherwise found to be **consistent** with the other provisions of Articles 3 and 15 asserted by Canada. On the other hand, with respect to any aspect of the determination that is found to be **inconsistent**

¹⁰¹ We note that, in the context of interpreting Article 15 of the AD Agreement, which requires Members to give special regard to the special situation of developing countries "when considering the application of anti-dumping measures", this phrase has been found to refer "to the final decision whether to apply a final measure, and not intermediate decisions concerning such matters as investigative procedures and choices of methodology during the course of the investigation." Panel Report, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India* ("US – Steel Plate"), WT/DS206/R and Corr.1, adopted 29 July 2002, para 7.111.

¹⁰² Footnote 9 of the AD Agreement, and footnote 45 of the SCM Agreement.

with any other provision of Articles 3 and 15 the Agreements asserted by Canada, we can see no reason to conclude, in addition, that it also violates the special care requirement. Clearly, whatever the precise parameters of "special care" in the context of a threat determination may be, an aspect of the determination which does not satisfy the other, more specific obligations of Articles 3 and 15 cannot satisfy the special care obligation. However, to say so does not in any respect clarify the obligation set out in Articles 3.8 of the AD Agreement and 15.8 of the SCM Agreement. Nor would it provide any guidance in the context of implementation of any recommendation of the DSB. Therefore, we will make no findings with respect to this claim.

7.37 We do, nonetheless, consider the obligation of special care to be important in our evaluation of the allegations of violations of specific provisions. Even though we do not address the issue of special care as a separate violation, that obligation provides important context for our understanding of the obligations on the USITC in making a determination of threat of material injury. We have therefore kept this obligation on the investigating authority to act with an extra degree of attention in the forefront of our minds in evaluating the particular claims in this dispute.

H. ALLEGED VIOLATIONS OF ARTICLE 12 OF THE AD AGREEMENT AND ARTICLE 22 OF THE SCM AGREEMENT

7.38 Article 12.2.2 of the AD Agreement provides:

"A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6".

Article 12.2.1, referred to in Article 12.2.2, provides:

"A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular:

- (i) the names of the suppliers, or when this is impracticable, the supplying countries involved;
- (ii) a description of the product which is sufficient for customs purposes;
- (iii) the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2;
- (iv) considerations relevant to the injury determination as set out in Article 3;
- (v) the main reasons leading to the determination".

7.39 Article 22.5 of the SCM Agreement, and Article 22.4 referred to therein, are similar, and the minor textual differences are not relevant to this dispute.

7.40 As with its other overarching claims, Canada does not make specific arguments with respect to these claims. Rather, as Canada clarified in response to the Panel's questions, Canada's claims under these provisions are procedural, dealing with the content of the notices, and not with the substantive elements of the underlying USITC determination. Canada specified that the asserted requirement for a "reasoned and adequate explanations" of the USITC's determination, which it alleges was not provided in this case, did not derive from Articles 12.2.2 and 22.5, but rather from the substantive obligations of Article 3 of the AD Agreement and Article 15 of the SCM Agreement.¹⁰³ In our view, Canada's claims under Articles 12.2.2 of the AD Agreement and 22.5 of the SCM Agreement are thus dependent on the disposition of the specific claims of violation.

7.41 In evaluating these claims, we note that our conclusions with respect to each of the alleged substantive violations asserted by Canada rest on our examination of the USITC's published determination, which constitutes the notices provided by the United States under Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement with respect to the injury determination in this case. No additional materials have been cited to us with respect to the determination for consideration in determining whether or not the USITC's determination are consistent with the relevant provisions of the Agreements. Thus, if we find no violation with respect to a particular specific claim, such a conclusion must rest on the USITC's published determination. In this circumstance, it is clear to us that no violation of Articles 12.2.2 and 22.5 could be found to exist in this case, where it is not disputed that the USITC determination accurately reflects the analysis and determination in the investigations. On the other hand, if we find a violation of a specific substantive requirement, the question of whether the notice of the determination is "sufficient" under Article 12.2.2 of the AD Agreement or Article 22.5 of the SCM Agreement is, in our view, immaterial.

7.42 As was pointed out by the Panel in *EC – Bed Linen*:

"A notice may adequately explain the determination that was made, but if the determination was substantively inconsistent with the relevant legal obligations, the adequacy of the notice is meaningless. Further, in our view, it is meaningless to consider whether the notice of a decision that is substantively inconsistent with the requirements of the AD Agreement is, as a separate matter, insufficient under Article 12.2. A finding that the notice of an inconsistent action is inadequate does not add anything to the finding of violation, the resolution of the dispute before us, or to the understanding of the obligations imposed by the AD Agreement".¹⁰⁴

We share the views of the *EC – Bed Linen* Panel in this respect, and adopt them as our own. In this regard, we note Canada's statement that "as a practical matter, Canada recognizes that it would be unusual for an injury determination to either satisfy the obligations in Articles 3 and 15 but not Articles 12.2.2 and 22.5 or *vice versa*".¹⁰⁵ Canada has made no arguments to suggest that this is such an unusual case. Therefore, we will make no findings with respect to the alleged violations of Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement.

¹⁰³ Canada's Responses to Questions from the Panel and the United States - First Meeting, question 7.

¹⁰⁴ Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* ("*EC – Bed Linen*"), WT/DS141/R, adopted 12 March 2001, as modified by the Appellate Body Report, WT/DS141/AB/R, at para. 6.259.

¹⁰⁵ Canada's Responses to Questions from the Panel and the United States - First Meeting, question 7.

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

7.43 Article 3.7 of the AD Agreement provides:

"A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.¹⁰ In making a determination regarding the existence of a threat of material injury, the authorities should consider, *inter alia*, such factors as:

(i) a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation;

(ii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;

(iii) 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; and

(iv) inventories of the product being investigated.

No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur.

¹⁰ One example, though not an exclusive one, is that there is convincing reason to believe that there will be, in the near future, substantially increased importation of the product at dumped prices".

Article 15.7 of the SCM Agreement is the same except that it sets out an additional factor the authorities should consider – "nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom".

7.44 Canada alleges a series of violations of these provisions, which are addressed below.

1. "Change in circumstances"

(a) Parties' Arguments

7.45 Canada asserts that Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement require that the "change in circumstances" from the non-injurious period of investigation that will create a situation in which the dumping or subsidy will cause injury must be "clearly foreseen and imminent". Canada refers to this as the "logical predicate" for an affirmative finding of threat of material injury.¹⁰⁶ Canada asserts that the change in circumstances which would create a situation in which the dumping or the subsidy would cause injury must be clearly anticipated and on the brink of

¹⁰⁶ Canada's first written submission at para. 76.

happening. Canada argues that in this case, the USITC failed to provide a reasoned evaluation of this fundamental question. In particular, Canada argues that the USITC did not explain how the evidence before it provided a non-conjectural basis for concluding that the *status quo* would change such that imports that did **not** cause injury to the domestic industry during the period of investigation **would** cause material injury in the imminent future.

7.46 Canada argues that one of the few “change[s] in circumstances” identified in the USITC’s determination, the prediction of “strong and improving demand” in the US lumber market, would appear to make threat of injury less likely, not more likely. Thus, Canada asserts, the USITC failed to provide a reasoned, adequate and consistent explanation supporting a finding that there was a change in circumstances that would create a situation in which the dumping or subsidy would cause injury imminently. Canada notes that the USITC found that imports were likely to increase and that subject imports were likely to have a significant price depressing effect in the future. However, Canada asserts that the USITC did not properly evaluate whether “the change in circumstances...would *cause* injury” or whether “unless protective action is taken, material injury *would occur*”.

7.47 The United States argues that threat of material injury is material injury that has not yet occurred, but remains a future event whose actual materialization cannot be assured with absolute certainty. Thus, the United States asserts that the Agreements recognize that a Member need not wait until material injury actually has occurred before taking remedial action. Moreover, the United States argues that the threat provision recognizes that injury may not occur suddenly but may result from a progression of trade conditions adverse to the industry. The United States points to the text in this regard, which provides an example of the requisite “change in circumstances” in footnote 10 -- “that there is convincing reason to believe that there will be, in the near future, substantially increased importation of the product at dumped [subsidized] prices”.

7.48 The United States takes issue with the view that the “change in circumstances” language requires the investigating authority to identify “a” change in circumstances, *i.e.*, “an event,” that will abruptly change the *status quo* from a threat of material injury to present material injury. In the US view, this interpretation is neither necessary nor justified. In this regard, the United States points to the statement of the Appellate Body in *US-Line Pipe* as describing the reality of how injury may occur to a domestic industry:

"In the sequence of events facing a domestic industry, it is fair to assume that, often there is a continuous progression of injurious effects eventually rising and culminating in what can be determined to be “serious injury”. Serious injury does not generally occur suddenly. Present serious injury is often preceded in time by an injury that threatens clearly and imminently to become serious injury, as we indicated in *US-Lamb*. Serious injury is, in other words, often the realization of a threat of serious injury. . . . the precise point where a “threat of serious injury” becomes “serious injury” may sometimes be difficult to discern. But, clearly, “the serious injury” is something *beyond* a “threat of serious injury”.¹⁰⁷

7.49 The United States further argues that the Appellate Body has recognized generally that there is a continuum of an injurious condition of a domestic industry that ascends from a threat of injury up to injury, citing the Appellate Body statement that:

"In terms of the rising continuum of an injurious condition of a domestic industry that ascends from a “threat of serious injury” up to “serious injury”, we see “serious

¹⁰⁷ Appellate Body Report, *US – Line Pipe*, para. 168 .

injury” – because it is something *beyond* a “threat” – as necessarily *including* the concept of a “threat” and *exceeding* the presence of a “threat”.¹⁰⁸

7.50 The United States argues that based on the facts regarding the present and past situation of the domestic industry, an investigating authority can make reasonable projections about the future, namely whether material injury is “clearly foreseen and imminent”. The United States argues that the USITC determined that the domestic industry was vulnerable based on its analysis of the factors in Article 3.4, found that the volume of dumped and subsidized imports was significant, but did not find that those imports had caused material injury in light of the lack of significant price effects. The USITC then found that dumped and subsidized imports were likely to increase, and were likely to have significant price effects in the near future, supporting a finding of threat of material injury. In the US view, there is no need to find that there will be an abrupt change in the *status quo* to justify a finding of threat of material injury – it is sufficient that material injury is the foreseeable result of the sequence of events.

7.51 The EC, as third party, considers that the investigating authorities are required to determine that there is a clearly foreseen and imminent change in circumstances that would create a situation in which dumping or subsidization would cause injury. However, the EC also is of the view that the condition of a domestic industry may develop in a continuous line from non-injury to injury, and that it is not possible to predict when the change occurs. However, in the EC's view, the point is not when circumstances will change, but that there must be an analysis of the factors that create a change in circumstances. Thus, the EC does not consider that an abrupt change in circumstances must be identified, but rather that there must be an analysis of the factors relating to the future dumped and/or subsidized imports that leads to the conclusion that the industry is on the brink of injury.

7.52 Japan, as third party, supports Canada's view that an investigating authority must comply with the obligation to identify the “change in circumstances” that is necessary to move from “no injury” at the time of the determination to imminent injury justifying a threat determination. However, Japan does not consider that there must be an abrupt change in this context.

(b) Analysis by the Panel

7.53 The text of Articles 3.7 and 15.7 concerning “change of circumstances” is not a model of clarity. It provides “The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.”¹⁰⁹ Thus, Articles 3.7 and 15.7 on their face seem to require that some “change of circumstances” must be clearly foreseen and imminent, and that it is this change of circumstances that would create a situation in which injury would occur. Footnote 10 in the AD Agreement, which is not repeated in the SCM Agreement, provides an example of what might constitute a change in circumstances: “One example, though not an exclusive one, is that there is convincing reason to believe that there will be, in the near future, substantially increased importation of the product at dumped prices”.

7.54 Thus, the sole example given of a “change of circumstances” in the text is that there will be substantially increased importation of the product at dumped prices. However, the likelihood of substantially increased imports is also one of the specific factors that Articles 3.7(i) and 15.7(ii) of the AD and SCM Agreements, respectively, provide should be considered in determining the existence of a threat of material injury. The text also specifies that no one of the factors listed in Article 3.7 or Article 15.7 “by itself can necessarily give decisive guidance, but the totality of the factors considered must lead to the conclusion that further [dumped/subsidized] exports are imminent, and that unless protective action is taken, material injury would occur”. Thus, the text indicates that both the change of circumstances, and further dumped or subsidized imports, must be imminent, and the likelihood of increased imports is both a relevant change of circumstances and a factor to be considered in

¹⁰⁸ Appellate Body Report, *US – Line Pipe*, para. 170.

determining the existence of threat. In our view, based on the text of the Agreements, it is not clear that these various elements of Articles 3.7 and 15.7 need necessarily be distinct factual circumstances, each of which must be considered separately in assessing whether there is a threat of material injury.

7.55 Moreover, while the change in circumstances must be clearly foreseen and imminent, the text does not clearly require the identification of a single event as the relevant change in circumstances. Thus, the text does not give us clear guidance as to the nature of the change in circumstances, or the degree of specificity with which it must be identified.

7.56 Looking at the context of Articles 3.7 and 15.7, in particular the remainder of Articles 3 and 15 as a whole, we note that Article 3 of the AD Agreement and Article 15 of the SCM Agreement both deal with the determination of injury. "Injury" is defined in the Agreements to mean "material injury to a domestic industry, threat of material injury to a domestic industry, or material retardation of the establishment of such and industry".¹⁰⁹ It seems clear to us that these three concepts describe different types of injury, occurring at different times and potentially in different ways.¹¹⁰ Thus, the focus of Article 3.7 and Article 15.7, in the context of Articles 3 and 15 as a whole, is the determination of one of these three types of injury, threat of material injury. The factors set out in Article 3.7 and Article 15.7 are elements that should be considered in making a determination of threat of material injury.

7.57 Following this view, we consider that the relevant "change in circumstances" referred to in Articles 3.7 and 15.7 is one element to be considered in making a determination of threat of material injury. However, we can find no support for the conclusion that such a change in circumstances must be identified as a single or specific event. Rather, in our view, the change in circumstances that would give rise to a situation in which injury would occur encompasses a single event, or a series of events, or developments in the situation of the industry, and/or concerning the dumped or subsidized imports, which lead to the conclusion that injury which has not yet occurred can be predicted to occur imminently.

7.58 Of course, a reviewing Panel must be able, in dispute settlement, to determine that the investigating authority has considered this element in its analysis. Thus, the investigating authorities' consideration must be discernible from its determination. The nature of that consideration would, in our view, necessarily vary depending on the facts of the particular case. Again, however, it must be possible for the reviewing Panel to ensure that the consideration of the investigating authority took into account relevant facts before it, and was an unbiased and objective evaluation of those facts. What is critical, however, is that it be clear from the determination that the investigating authority has evaluated how the future will be different from the immediate past, such that the situation of no present material injury will change in the imminent future to a situation of material injury, in the absence of measures.

7.59 In this case, Canada argues that the USITC failed to identify any circumstances that would change such that material injury would occur in the near future. The United States, on the other hand, argues that the discussion of facts and likely events throughout the USITC analysis, demonstrated a progression of circumstances which would create a situation in which dumping and subsidies would cause injury. In the US view, the continuation of adverse trends into the future, as identified in the USITC determination, is sufficient to satisfy the change in circumstances requirement.

¹⁰⁹ AD Agreement footnote 9, SCM Agreement footnote 45.

¹¹⁰ The Appellate Body, in interpreting the analogous injury provision of the Safeguards Agreement, which allows for a finding of "serious injury or threat thereof" and defines "threat of serious injury" as "serious injury that is clearly imminent", found that "we agree with the Panel that the respective definitions of "serious injury" and "threat of serious injury" are two distinct concepts that must be given distinctive meanings in interpreting the Agreement on Safeguards." Appellate Body Report, *US – Line Pipe*, para. 167.

7.60 As noted above, we do not disagree, in principle, with the United States' view that Article 3.7 and Article 15.7 do not require that the investigating authority identify a specific event that will change such that a situation of no injury will become a situation of injury in the future. In this case, the facts the United States points to as demonstrating the "progression" of circumstances which would create a situation in which injury would occur in the near future are thoroughly intertwined with the USITC's discussion of the present condition of the domestic industry, the present impact of imports, and the facts asserted in support of the conclusion that imports will increase substantially. Thus, in our view, the USITC considered these various elements in concluding that the continuation of the trends in the situation of the domestic industry, coupled with predicted substantially increased imports, would result in an imminent change in circumstances such that injury would occur. However, while this may be enough to allow us to conclude that the USITC considered whether there would be a change in circumstances such that the dumped and subsidized imports would cause injury, it does not answer the question whether the overall determination of threat, based on the totality of the factors considered, is consistent with the requirements of the Agreements. That question is addressed further below.

2. Consideration of factors in Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement

(a) Parties' Arguments

7.61 Canada argues that the USITC failed to consider properly the factors listed in Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement and other relevant factors based on the evidence before it. Canada points to the decision of the Panel in *Thailand – H-Beams* with respect to the meaning of the term "consider", asserting that that Panel found that "consider" means "‘contemplate mentally, especially in order to reach a conclusion’; ‘give attention to’; and ‘reckon with; take into account’".¹¹¹ The Panel went on to state that it must "be apparent in the relevant documents in the record that the investigating authorities have given attention to and taken into account" the factors required to be considered.¹¹² It found that the investigating authorities "considered" the significance of an increase in imports where they "went beyond a ‘mere recitation of trends in the abstract and put the import figures into context’".¹¹³ Canada asserts that the USITC failed in this regard.

7.62 Canada asserts that the USITC's affirmative threat of injury determination is grounded in its finding of a likely substantial increase in the subject imports. Canada considers that, on the basis of this finding alone, the USITC concluded that the subject imports were likely to have a significant depressing or suppressing effect on domestic prices in the future. Canada argues that this central finding is not supported by the USITC's analysis of the factors listed in Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement. Moreover, Canada maintains that this central finding is also not supported by the other factors examined by the USITC. Thus, Canada considers that the totality of the factors considered by the USITC do not provide a non-conjectural basis for concluding that "subject imports are likely to increase substantially," and therefore the USITC's threat of injury determination does not comply with Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement. Moreover, Canada maintains that the USITC's prediction that subject imports are likely to have a significant price depressing effect in the future is derived exclusively from its finding that the volume of subject imports was likely to increase substantially. In Canada's view, the fundamental flaws in the volume finding thus mean that the price finding is equally flawed and cannot be sustained.

¹¹¹ Panel Report, *Thailand – H-Beams*, para. 7.161

¹¹² *Ibid.*

¹¹³ *Ibid.*, at para. 7.170.

7.63 The United States does not disagree with the contention that the USITC was required to consider the factors in Articles 3.7 and 15.7. However, the United States argues that the Agreements do not require the investigating authorities to make **findings** on each factor. Rather, the United States argues that it is sufficient, if it is apparent in the relevant documents in the record, that the USITC has given attention to and taken the factor into account. The United States notes that after interpreting the term "consider", the Panel in *Thailand - H-Beams* went on to state: "We therefore do not read the textual term 'consider' in Article 3.2 to require an explicit 'finding' or 'determination' by the investigating authorities".¹¹⁴ The United States argues that while *Thailand - H-Beams* involved Article 3.2 of the AD Agreement, the conclusion that "consider" does not mean "make a finding" should equally apply to Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement.

7.64 Moreover, the United States asserts that consideration of a factor does not necessarily require an explicit separate evaluation of that factor if the analysis of the factor is implicit in the analyses of other factors, and that what is important is that the investigating authority's decisional path be reasonably discernible, not that there be an explicit explanation or finding for each factor to be considered.¹¹⁵ The United States considers that this conclusion follows from the fact that the Agreements provide that "No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur". Further, the United States argues, the investigating authority is not required to explicitly address every minute detail or specific aspect of every argument that is raised by parties. The United States asserts that the USITC clearly considered the relevant evidence and arguments raised by parties but found other evidence to be more persuasive. In the US view, Canada's arguments have little to do with whether the USITC's findings are reasonable and supported by positive evidence, or whether the USITC addressed alternative arguments, but rather ask the Panel to weigh the evidence for itself. The United States maintains that the USITC's conclusion that imports would increase substantially, and would have significant price depressing or suppressing effects, was based on an adequate consideration of relevant factors.

7.65 The EC, as third party, supports the US argument that the term "consider" does not require an explicit finding on each of the relevant factors.

(b) Analysis by the Panel

7.66 We begin our analysis by addressing the interpretation of the term "consider" as used in Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement. The decision of the Panel in *Thailand - H-Beams* is pertinent to our analysis. While that Panel was faced with the question of interpreting the term "consider" as used in Article 3.2 of the AD Agreement, we find that a consistent interpretation is necessary, as the term "consider" has, in our view, the same purpose in Article 3.2 as in Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement. Article 3.2 of the AD Agreement establishes factors that the investigating authorities are to "consider" with regard to the volume of imports and the impact of imports on prices, in the context of making a determination of material injury. Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement similarly set forth a series of factors investigating authorities should "consider" in the context of making a determination of threat of injury. We can conceive of no basis for concluding that a different understanding of the term might be appropriate in these two contexts. Therefore, the views of the *Thailand - H-Beams* Panel are highly persuasive in our understanding of the term as used in Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement.

¹¹⁴ *Ibid.*, at para. 7.161.

¹¹⁵ Appellate Body Report, *European Communities - Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil* ("EC - Tube or Pipe Fittings"), WT/DS219/AB/R, 22 July 2003, paras. 160-161.

7.67 Thus, we are of the view that, in order to conclude that the investigating authorities have "considered" the factors set out in Articles 3.7 and 15.7, it must be apparent from the determination before us that the investigating authorities have given attention to and taken into account those factors.¹¹⁶ That consideration must go beyond a mere recitation of the facts in question, and put them into context.¹¹⁷ However, the investigating authorities are not required by Articles 3.7 and 15.7 to make an explicit "finding" or "determination" with respect to the factors considered.¹¹⁸

7.68 In this context we note that the parties agreed that the use of the word "should" in Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement indicated that, unlike the situation under Article 3.4 of the AD Agreement, consideration of each of the factors listed in Articles 3.7 and 15.7 is not mandatory.¹¹⁹ Consequently, a failure to consider a factor at all, or a failure to adequately consider, a particular factor would not necessarily demonstrate a violation of the provisions. Whether a violation existed would depend on the particular facts of the case, in light of the totality of the factors considered and the explanations given. In this case, it is clear from the face of the determination that the USITC in fact addressed the facts concerning each of the factors set out in Articles 3.7 and 15.7 of the Agreements. Indeed, Canada does not argue that any relevant factor was ignored by the USITC, or not addressed in the determination. Thus, we cannot conclude that the USITC failed to consider the factors set forth in Articles 3.7 and 15.7, in the sense of not taking them into account at all.

7.69 However, this does not answer the question whether the USITC's overall determination of a threat of material injury is consistent with the requirement of Articles 3.7 and 15.7 that the totality of the factors considered lead to the conclusion that further dumped and subsidized exports are imminent and that, unless protective action was taken, material injury would occur. In assessing this question, for the sake of clarity, we discuss each of the factors considered by the USITC, and the parties' arguments concerning that consideration individually. However, our determination is based on our assessment of the USITC's determination as a whole, taking into account the evidence that was before it and the analysis in the determination itself. This is, in our view, in line with the injunction in the text that no one factor can necessarily give decisive guidance, but the totality of the factors considered must lead to the conclusion regarding threat of material injury.

7.70 As is discussed in more detail below, the USITC's affirmative threat determination was based principally on the conclusion that dumped and subsidized imports were likely to increase substantially. In making this conclusion, the USITC relied on a number of factors it considered relevant which are not specifically identified in Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement. The USITC found that the projected increased imports were likely to have a significant price depressing effect in the future. Therefore, the USITC concluded that imports were entering at prices that were likely to have a significant depressing or suppressing effect on domestic prices and were likely to increase demand for further imports. The USITC determined that further 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.

(i) *The nature of the subsidies in question*

7.71 Canada argues that the USITC's evaluation of this factor was limited to a description of the programmes found by the USDOC to confer countervailable subsidies, a statement that "[n]one of the subsidies identified by Commerce are subsidies described in Article 3 or 6.1 of the WTO Subsidies Agreement," and a footnote regarding evidence submitted by the CLTA, a Canadian party

¹¹⁶ See *ibid.*

¹¹⁷ See *ibid.*, at para. 7.170.

¹¹⁸ See *ibid.*, at para. 7.161.

¹¹⁹ See Canada's Responses to Questions from the Panel and the United States - First Meeting and United States Response to Questions from the Panel - First Meeting, question 34.

participating in the investigation, regarding the stumpage programmes.¹²⁰ Canada argues that the USITC failed to consider all the relevant evidence before it concerning the nature of the subsidies and, in particular, the likely trade effects of stumpage programmes. Specifically, Canada argues that the USITC failed to take account of evidence that stumpage programmes do not increase the production of logs or lumber or lower their prices, or increase the quantity or lower the prices of lumber exports, and thus have no trade effects. Canada relies, in this regard, principally on the studies that were presented as evidence to the USITC by representatives of Canadian producers.

7.72 The United States argues that Canada misperceives the obligation of the investigating authorities with respect to this factor. In the US view, Canada implies that a proper consideration would have required the USITC to make a finding concerning the nature of the subsidies and their likely trade effects. However, the United States contends that the Agreements do not require a finding. The United States maintains that the USITC's determinations reflect consideration of the information the USDOC provided the USITC regarding the subsidies, which was information regarding the nature of the subsidies, but not findings regarding the effects of the subsidies. The parties to the investigations did present such information, in the form of competing economic theories about the nature and effects of the countervailable subsidies. The United States asserts that the USITC considered all of the evidence presented on this issue by the parties, but did not make the finding sought by the Canadian parties. This is, in the US view, consistent with the requirements of the Agreement, particularly when the evidence did not provide a sufficient factual basis to allow the USITC to draw reasoned and adequate conclusions about the trade effects of the subsidies.

7.73 We note that during the investigation proceeding, Canadian parties presented arguments, economic theories and analysis, primarily based on studies prepared by an economist, Dr. William Nordhaus. Contrary arguments, theories, and analysis were presented to the USITC by US lumber producers. These same arguments, theories and analysis have been put before us in this dispute. The USITC did not accept the Canadian arguments, but did not make any specific factual findings as to the effects of the subsidies. Canada's argument suggests that it believes that the absence of a conclusion regarding the evidence and theories presented concerning the effects of the subsidies demonstrates that the USITC did not adequately consider this factor, and essentially asks the Panel to resolve the underlying issue regarding trade effects of the subsidies.

7.74 We do not agree with Canada's position on this point. It seems clear to us the USITC did in fact consider the evidence before it regarding the nature of the subsidies and the trade effects arising therefrom. As discussed above, we do not understand the obligation to "consider" a factor to require the investigating authorities to make an explicit finding regarding the evidence concerning that factor.

¹²⁰ "Stumpage programmes" are the agreements under which enterprises are accorded the right, for a fee, to harvest timber on government lands in Canada. According to the Panel in *US – Softwood Lumber IV*, "stumpage programmes provide standing timber owned by the provinces to harvesters. The only way for harvesters to obtain the trees standing on government-owned Crown land for harvesting and processing is by concluding stumpage agreements (tenures or licences) with the governments concerning these trees. The only way for the government to provide the standing timber that it owns to the harvesters and the mills for processing is by allowing the harvesters to come on the land and harvest the trees. Such legal rights and obligations are transferred through the stumpage agreements. It is thus through the stumpage agreements that the governments provide the standing timber to the harvesters. The price to be paid for the timber, in addition to the volumetric stumpage charge for the trees harvested, consists of various forest management obligations and other in-kind costs relating to road-building or silviculture for example. In return, the tenure holders receive ownership rights over the trees during the period of the tenure. In other words, with the stumpage agreements, ownership over the trees passes from the government to the tenure holders. Standing timber has thus been provided to the tenure holders."

US – Softwood Lumber IV, para. 7.15 (footnotes omitted).

The USITC noted the types of subsidies found to exist by the USDOC, and considered the arguments by the parties on this issue. The USITC concluded that the economic theory underlying the Canadian party's argument was "not clearly applicable" in the market, and explained, albeit briefly, why it took that view.¹²¹ In our view, this demonstrates that the USITC considered this factor. Moreover, to accept Canada's position in this dispute, we would have to resolve the underlying factual question in order to conclude that the USITC erred in not accepting the Canadian party's argument in this regard. Such a ruling would, we believe, require us to trespass into the realm of *de novo* fact-finding, which we will not do.

7.75 Moreover, the USITC did not rely on its consideration of the nature of the subsidies as an element of its affirmative determination of threat of material injury. In such a case, where the nature of the subsidies is **not** an element cited in support of the determination in dispute, we cannot conclude that the failure to make an explicit finding on this factor demonstrates a violation of the Agreement.

(ii) *Significant rate of increase of dumped and subsidized imports*

7.76 Canada argues that the USITC merely made observations concerning the increase in volume and apparent domestic consumption of dumped and subsidized imports without any evaluation of whether the rate of increase was "significant" and, if so, whether that rate of increase indicated a "likelihood of substantially increased importation". Moreover, Canada argues, the USITC could not have found a significant rate of increase in light of its earlier findings on material injury.

7.77 The United States does not appear to rely on this factor directly as support for the USITC's determination of threat. However, the United States notes that the USITC found that the level of imports was already significant during the period of investigation, and had increased, and that the volume increased substantially during periods when no restraints were in place.

7.78 We note that the USITC found that the volume of imports was likely to increase substantially, based on factors other than the rate of increase during the period of investigation. Thus, it appears that this factor was not an element supporting the USITC's affirmative determination of threat. Again, given our understanding of the term "consider", we believe that the discussion of this factor in the determination is sufficient to preclude a conclusion that the USITC failed to properly consider this factor.

(iii) *Sufficient disposable capacity or imminent substantial increase in capacity*

7.79 Canada argues that rather than considering this factor, the USITC merely made observations concerning the evidence on capacity. Canada notes that the USITC stated that Canadian capacity increases were projected, but did not find that there was an imminent, substantial increase in capacity. Moreover, Canada argues, the USITC merely noted the existence of excess Canadian capacity without explaining how that theoretical ability to increase imports would translate into the likelihood of substantially increased dumped and subsidized exports. In this respect, Canada asserts that the USITC ignored the projections provided by Canadian producers regarding their future exports to the United States.

7.80 The United States argues that the USITC gave more weight to the actual capacity data in concluding that capacity existed to increase exports. With respect to the Canadian producers' projections concerning likely future exports to the United States, the USITC found it likely that exports to the United States and other destinations would increase consistent with the historical distribution of exports, while the Canadian producers' export projections showed a lesser proportion of the projected increases being exported to the United States. Thus, the USITC concluded that

¹²¹ USITC Final Report (Exhibit CDA-1) at page 39, footnote 245.

information regarding capacity supported the conclusion that exports to the United States would increase.

7.81 Again, it seems clear to us the USITC considered the capacity factor in its analysis, but reached a conclusion divergent from that argued before it by the Canadian parties and by Canada in this dispute. This alone does not, of course, demonstrate a violation of the Agreements with respect to consideration of the relevant factors. This factor did play a part in the USITC's overall affirmative threat determination, as discussed further below.

(iv) Price depression and suppression

7.82 With respect to this factor, Canada argues that the USITC failed to evaluate **present** import prices to determine whether, given their level, they are likely to cause significant price depression or suppression in the future and whether that level of pricing is likely to increase demand for further imports. In Canada's view, the USITC's conclusion on this factor relies on an analysis of the impact of future imports on prices, and does not address the impact of current import prices. Moreover, Canada asserts that in light of the USITC's finding of no significant price effects during the period of investigation, there is no basis for a finding that imports would have a significant depressing or suppressing effect on prices in the future.

7.83 In its analysis of the present condition of the domestic industry, the USITC did consider present import prices. The USITC concluded that dumped and subsidized imports had some effect on prices in the domestic market, noting that both imports and domestic producers contributed to excess supply and thus declining prices. However, in light of the relatively stable (albeit large) share of the market held by imports, the USITC did not find any significant price effects. This conclusion, however, formed part of the basis for the USITC's conclusion that dumped and subsidized imports would have a significant price depressing effect in the future. Thus, in our view, it seems clear that the USITC considered this factor, and that it formed part of the USITC's overall threat determination, as discussed further below.

(v) Inventories of the product being investigated

7.84 Canada argues that the USITC's consideration of this factor was limited to a single sentence, which does not contain any explanation of how this factor weighed in the determination.

7.85 The United States asserts that this suffices as "consideration", and that in any event, the USITC did not rely on the level of inventories in order to reach its conclusion of threat of injury.

7.86 It is clear to us that, in light of the factors and analysis presented in the determination actually made, the USITC did not rely on this factor in support of its determination of threat of material injury. In light of this, we cannot conclude that the consideration of the inventories factor was so inadequate as to constitute a violation of Article 3.7 of the AD Agreement and 15.7 of the SCM Agreement.

(vi) Consideration of other factors

7.87 Having concluded that the USITC did not violate Articles 3.7 and 15.7 of the AD and SCM Agreements by failing to properly consider the factors listed therein, we are then left with the question whether the USITC's determination, based on the totality of the factors considered, including factors not listed in the Agreements, is consistent with those provisions. Thus, we turn now to an assessment of the elements that the United States relies on as demonstrating the adequacy of the reasoning and factual basis underlying the USITC's determination.

7.88 The United States asserts that the USITC determined that during the period of investigation, imports were at a significant level, and prices declined, particularly at the end of the period, such that

the condition of the industry had deteriorated and was vulnerable. The USITC concluded that imports were likely to increase substantially based on (1) Canadian producers' excess capacity and projected increases in capacity, capacity utilization, and production; (2) the export orientation of Canadian producers to the US market; (3) the increase in the volume of subject imports over the period of investigation; (4) the effects of expiration of the SLA; (5) subject import trends during periods when there were no import restraints; and (6) forecasts of strong and improving demand in the US market. The USITC then concluded that, in light of the at least moderate substitutability of domestic and imported lumber, the fact that prices of one species affected the prices of other species, and that the significant volume of imports during the period of investigation had some adverse effects on prices, the projected substantial increase in imports would likely have a significant price depressing effect on domestic prices and were likely to increase demand for imports.

7.89 It is clear to us that the fundamental basis of the USITC's affirmative threat determination is the conclusion that dumped and subsidized imports from Canada would increase **substantially**. However, looking at the evidence relied on by the United States in support of the determination, we cannot accept that this conclusion is one that could be reached by an objective and unbiased decision maker. It seems to us that, at most, the evidence relied upon by the USITC could support a conclusion that imports of softwood lumber would continue at the historical levels, and might increase somewhat, in keeping with increased demand, and consistent with historical patterns. But we can find no rational explanation in the USITC's determination, based on the evidence cited, for the conclusion that there would be a substantial increase in imports imminently. In reaching this decision we have kept in mind that we may not substitute our judgment for that of the USITC, but must nonetheless carry out a detailed and searching analysis of the evidence relied upon and the reasoning and explanations given.

7.90 During the period of investigation, dumped and subsidized imports from Canada were, in the USITC's judgement, already at significant levels in terms of absolute volume and in terms of market share. As noted above, 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. With respect to the capacity of Canadian producers, the evidence before the USITC indicated that Canadian capacity was projected to increase by less than one per cent in 2002, and a further 0.83 per cent in 2003.¹²² This certainly does not, in our view, support a conclusion that there would be a substantial increase in capacity, and indeed, the USITC does not appear to have found otherwise.

7.91 Thus, it is only the existing excess capacity that might be viewed as supporting a finding that imports would increase substantially in the future. Excess capacity had increased during the period of investigation, without resulting in a finding by the USITC of a significant increase in imports to the United States. The share of total Canadian shipments represented by exports to the United States during the period of investigation was 57.4 in 1999 and 2000, and increased to 60.9 in 2001. Canadian producers projected a decline in that share, but only to 58.8 per cent in 2002 and 58.5 per cent in 2003, figures well within the historical range.¹²³ These figures cannot, in our view, support the conclusion that excess capacity indicates a likelihood of substantially increased exports.

7.92 The United States argues that reliance on the historical distribution of exports to the United States and other countries supports the USITC's finding. Nothing in the USITC's determination suggests that the share of production shipped to the United States would alter in any significant degree. Thus, we do not see how this factor supports the conclusion of a substantial increase in imports. Similarly, while the USITC relied on the "export-orientation" of the Canadian industry toward the United States market, this was true throughout the period of investigation. The data regarding exports to the United States do not, however, suggest that there would be any notable change in the levels of exports to the United States, but rather a continuation of the historical patterns.

¹²² USITC Final Report (Exhibit CDA-1) at Table VII-2.

¹²³ *Ibid.*

Nothing in the USITC determination addresses how the projected increases in exports to the United States supports the finding that imports would increase substantially.

7.93 The United States also relies on the effects of the expiration of the Softwood Lumber Agreement (SLA). The USITC found that "the SLA appears to have restrained the volume of subject imports from Canada at least to some extent as subject imports only increased by 8.8 per cent and market share remained relatively constant while apparent consumption increased by 13.1 per cent from 1995 to 2001".¹²⁴ First, we note that the increase in the volume of imports during the period of investigation was apparently not considered significant by the USITC. Nor did the USITC consider that there was a significant rate of increase during the period of investigation. Second, the USITC noted that shipments from provinces not covered under the SLA, and whose exports were therefore not affected, more than doubled. However, the USITC did not explain how it concluded that this indicated that the SLA had acted to restrain overall exports, as opposed to resulting in a shift in supply distribution from provinces covered by the SLA to those not covered. The USITC had not found that the SLA had significantly restrained exports during the period it was in effect, which might have suggested that its expiration would lead to a substantial increase in exports. The USITC determination simply does not address why the expiration of an agreement during the term of which exports nonetheless increased, would result in an imminent **substantial** increase in exports.

7.94 The United States argues that trends in imports during periods when the SLA was not in effect support the conclusion that imports were likely to increase substantially. There were two periods relied upon in this regard – the period prior to the SLA from 1994-1996, and the period from April 2001 to August 2001, immediately after the SLA expired and before the imposition of provisional measures. There is no discussion in the USITC's determination that would suggest that market conditions during the period before the imposition of the SLA, a period that precedes the period of investigation in this case, would be sufficiently similar to predicted market conditions, so as to warrant the conclusion that imports would increase substantially. With respect to the period from April to August 2001, the USITC did not discuss whether the increase in imports during that period represented an accurate gauge of what would happen in the future, in the absence of anti-dumping and countervailing measures, or simply a shift in timing of exports to take advantage of the window between expiration of the SLA and provisional measures. In this regard, we note that the applications for anti-dumping and countervailing measures were filed the business day after the expiration of the SLA, and thus exporters would be aware of the possibility of provisional measures at a predictable date. While it seems obvious that the expiration of the SLA would result in unrestrained exports, the facts cited by the USITC, in light of the lacunae in the explanations given, do not support the conclusion of an imminent substantial increase in imports.

7.95 The last factor relied on by the United States is the forecast of strong and improving demand in the US market. All the USITC found in this regard was that the United States would continue to be an important market for Canadian producers.¹²⁵ We cannot see how this conclusion, which simply posits the continuation of the historical situation, supports a finding that imports would increase substantially. This is particularly the case given the complete absence of any discussion of third country imports, which had increased during the period of investigation. A situation of strong and improving demand would certainly suggest that the US market would be an attractive one for exporters, but this would seem to be true for all exporters not only Canadian producers. Moreover, in a situation of strong and improving demand, increases in imports proportional to the increase in demand would seem to be without any injurious effect. The USITC did not make any findings that imports from Canada would increase more than demand, thereby accounting for an increased share of the US market. Indeed, the USITC did not address market share at all in the context of its threat of material injury determination.

¹²⁴ USITC Final Report (Exhibit CDA-1) at p. 41.

¹²⁵ USITC Final Report (Exhibit CDA-1) at p. 43.

7.96 Based on the foregoing, we are of the view that, in light of the totality of the factors considered and the reasoning in the USITC's determination, we cannot conclude that the finding of a likely imminent substantial increase in imports is one which could have been reached by an objective and unbiased investigating authority. Therefore, we find that the USITC's determination is not consistent with the obligations set forth in Articles 3.7 and 15.7.

J. ALLEGED VIOLATIONS OF ARTICLES 3.2 AND 3.4 OF THE AD AGREEMENT AND ARTICLES 15.2 AND 15.4 OF THE SCM AGREEMENT

7.97 Articles 3.2 of the AD Agreement and 15.2 of the SCM Agreement require an investigating authority to consider whether there has been a significant increase in the volume of the dumped or subsidized imports, either in absolute terms or relative to production or consumption in the importing Member, whether there has been significant price undercutting by those imports, and whether the effect of such imports is to otherwise depress or suppress prices to a significant degree. Canada asserts that the provisions of Articles 3.2 and 3.4 of the AD Agreement and Article 15.2 and 15.4 of the SCM Agreement apply equally to investigations involving threat of injury determinations, in light of the definition of the term "injury" in footnote 9 to the AD Agreement and footnote 45 of the SCM Agreement to include "threat of material injury".

(a) Parties' Arguments

7.98 Canada argues that the USITC did not undertake the required consideration of these factors. Thus, Canada asserts that the USITC did not consider whether the increase in the volume of subject imports it observed over its period of investigation was significant, which Canada maintains it was not, and acknowledged that it could not draw any conclusion as to whether there had been significant underselling by the subject imports, and could not conclude that the dumped and subsidized imports had a significant price effect during the period of investigation. Canada then asserts that the USITC failed to explain properly how it could reach its affirmative threat of injury determination in the light of these findings, and thus violated Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement in the context of threat of injury.

7.99 Canada also argues that the USITC failed to assess the likely impact of the likely increase in imports on the domestic industry. In Canada's view, a threat of injury determination case "requires a meaningful evaluation of how each of the factors listed in Article 3.4 of the AD Agreement and Article 15.4 of the SCM Agreement will evolve in the future".¹²⁶ Canada notes that an evaluation of each of the factors is required, and asserts that in this context, "evaluation" has been interpreted to mean "a process of analysis and assessment requiring the exercise of judgment on the part of the investigating authority" and "not simply a matter of form".¹²⁷ Canada cites the decision of the Panel in *European Communities – Bed Linen (Article 21.5 – India)* in asserting that the investigating authority must "assess the role, relevance and relative weight of each factor in the particular investigation".¹²⁸ An "evaluation" "implies the analysis of data through placing it in context in terms of the particular evolution of the data pertaining to each factor individually, as well as in relation to other factors examined".¹²⁹ Canada argues that the USITC assessed the current state of the domestic softwood lumber industry in its "vulnerability" analysis, but failed to evaluate the likely state of the domestic industry in the future, and in particular, how further dumped and subsidized imports would affect the domestic industry's condition. In Canada's view, this constitutes a fatal deficiency in the USITC's threat of injury analysis. Canada considers that while the USITC did address a number of

¹²⁶ Canada's first written submission at para. 145.

¹²⁷ Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India: Recourse to Article 21.5 of the DSU by India ("European Communities – Bed Linen (Article 21.5 – India)")*, WT/DS141/RW, adopted April 24, 2003, as modified by the Appellate Body Report, para. 6.162.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

the mandatory listed factors, but only with respect to the past, and did not assess how any of the listed factors was likely to evolve in the future. Therefore, it failed to undertake any meaningful evaluation of the listed factors for the purpose of its threat of injury analysis.

7.100 The United States argues that consideration of the factors listed in Articles 3.2 and 3.4 of the AD Agreement and Articles 15.2 and 15.4 of the SCM Agreement establishes a background against which the investigating authority can evaluate whether dumped and subsidized imports will likely increase substantially, likely will have price effects, and consequently will affect the industry's condition in such a manner that material injury would occur in the absence of protective action. The United States argues that the USITC addressed all of the factors in its analysis of present material injury analysis, finding that the volume of imports was significant, there were some price effects by subject imports, that the condition of the domestic industry had deteriorated primarily as a result of declining prices, and that the industry was in a vulnerable state. Moreover, the United States argues, projections based on the present and past facts, provide positive evidence justifying the USITC's determination that the domestic industry was on the verge of material injury by reason of the continued dumped and subsidized softwood lumber imports from Canada.

7.101 The United States asserts that Canada's arguments are variations of the arguments raised regarding likely substantial increases in imports and likely price effects, which the United States argues are based on Canada's premise that there could be no threat because there allegedly were no findings of injurious effects in the present material injury analysis. The United States considers that premise to be incorrect. The United States notes the finding of the USITC, in its material injury analysis, that the volume of imports was significant and supported a finding of material injury, but that there were no significant price effects. The United States argues that the USITC's findings in its present injury analysis regarding the impact of subject imports on the domestic industry foreshadows and supports its finding of threat of material injury. Like Canada, the United States refers to the Panel decision in *Mexico – Corn Syrup* to the effect that consideration of the factors relating to the impact of imports on the domestic industry "establish a background against which the investigating authority can evaluate whether imminent further dumped imports will affect the industry's condition in such a manner that material injury would occur in the absence of protective action, as required by Article 3.7".¹³⁰ The United States asserts that the USITC established such a background in finding 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, and reasonably concluded that the deterioration in the performance of the domestic industry, particularly its financial performance, made it vulnerable to injury. In the US view, Canada's challenge suggests a requirement to quantify future events, a requirement the United States maintains does not exist in the relevant Agreements.

7.102 Japan, as third party, asserts that the dumped imports were not a cause of the vulnerable state of the domestic industry, and thus that conclusion does not form a valid basis for the determination of threat of injury. Japan considers that the USITC failed to evaluate the impact of likely further dumped (and subsidized) imports on the domestic industry and thus failed to comply with Article 3.4 of the AD Agreement and Article 15.4 of the SCM Agreement.

7.103 With respect to the alleged violations of Articles 3.4 of the AD Agreement and 15.4 of the SCM Agreement, Canada clarified its view, in response questions from the Panel, that an examination of the listed "injury" factors must be carried out in a "predictive context" in making a threat of injury determination.¹³¹ Canada argues that in the absence of an evaluation of these factors in the future, it is impossible to determine whether future dumped/subsidised imports will cause injury. The United

¹³⁰ Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States ("Mexico – Corn Syrup")*, WT/DS132/R and Corr.1, adopted 24 February 2000, DSR 2000:III, 1345, para. 7.132.

¹³¹ Canada's Responses to Questions from the Panel and the United States - First Meeting, question 8.

States, on the other hand, argues that it is not necessary to specifically address these injury factors a second time where, as it asserts is the case here, it is clear from the discussion of these factors what the condition of the industry is, such that a background for the conclusion of likely future injury caused by dumped/subsidized imports is established.

(b) Analysis by the Panel

7.104 In this context, we recall that the Agreements define "injury" to include threat of injury unless otherwise specified. Thus, the requirements of Articles 3.2 and 3.4 of the AD Agreement and Articles 15.2 and 15.4 of the SCM Agreement might, as Canada argues, be understood to apply directly in the threat of injury context such that a predicted "impact" with respect to each of the listed factors must be assessed. However, in our view the text, context, and object and purpose of the relevant provisions do not lead to such an interpretation.

7.105 It seems clear to us that, as the Panel found in *Mexico – Corn Syrup*, there must, in every case in which threat of material injury is found, be an evaluation of the condition of the industry in light of the Article 3.4/15.4 factors to establish the background against which the impact of future dumped/subsidized imports must be assessed, in addition to an assessment of specific threat factors. However, once such an analysis has been carried out, we do not read the relevant provisions of the Agreements to require an assessment of the likely impact of future imports by reference to a consideration of projections regarding each of the Article 3.4/15.4 factors. There is certainly nothing in the text of either Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement, or Article 3.4 of the AD Agreement and Article 15.4 of the SCM Agreement, setting out an obligation to conduct a second analysis of the injury factors in cases involving threat of material injury. Of course, such an assessment could be undertaken, to the extent available information permitted, and might be useful. However, in many instances, it seems likely that the necessary information would not be available, for instance projected productivity, return on investment, projected cash flow, etc. Even if projections are made on the basis of the information gathered in the investigation, this might result in a degree of speculation in the decision-making process, which is not consistent with the requirements of the Agreements.

7.106 In this case, it is clear on the face of the USITC determination that the injury factors were considered in the context of finding no present material injury. Indeed, Canada does not contend otherwise. It also seems clear to us that the USITC took that consideration into account in its threat of material injury analysis. At least, that is our understanding of the USITC's statement at the beginning of the section of the report entitled "threat of material injury by reason of subject imports" that "[a]s an initial matter, we find that the domestic industry producing softwood lumber is vulnerable to injury in light of declines in its performance over the period of investigation, particularly its financial performance".¹³² The USITC then went on to address the additional threat factors set out in Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement. In our view, this is an adequate approach to the analysis of threat of material injury with respect to the requirements of consideration of the elements set out in Articles 3.2, 3.4, and 3.7 of the AD Agreement, and the corresponding provisions of the SCM Agreement.

7.107 In this context, we note the findings of the Panel in *Mexico – Corn Syrup* with respect to the nature and purpose of consideration of the Article 3.4 factors in the context of a threat of material injury determination:

"With respect to the question of threat of material injury, we believe an investigating authority cannot come to a reasoned conclusion, based on an unbiased and objective evaluation of the facts, without taking into account the Article 3.4 factors relating to the impact of imports on the domestic industry. These factors all relate to an

¹³² USITC Final Report (Exhibit CDA-1) at p. 37.

evaluation of the general condition and operations of the domestic industry – sales, profits, output, market share, productivity, return on investments, utilization of capacity, factors affecting domestic prices, cash flow, inventories, employment, wages, growth, ability to raise capital. Consideration of these factors is, in our view, necessary in order to **establish a background** against which the investigating authority can evaluate whether imminent further dumped imports will affect the industry's condition in such a manner that material injury would occur in the absence of protective action, as required by Article 3.7".¹³³ (emphasis added)

7.108 We share the view of the *Mexico-Corn Syrup* Panel in this regard. In our estimation, this requirement of consideration of the Article 3.4 factors in a threat determination is satisfied by what the USITC did in this case. That is, the USITC did consider the Article 3.4/15.4 factors to establish a background against which to evaluate the effects of future dumped and subsidized imports.

7.109 Canada points to another passage in the Panel's decision in *Mexico – Corn Syrup Panel* in support of its argument that a "predictive analysis" of the Article 3.4/15.4 injury factors is required. That Panel, in finding a violation of Article 3.4, stated that SECOFI, the Mexican investigating authority:

"concluded that imports were likely to increase, based on the increases during the period of investigation, and the available capacity of the exporting producers, but there is no meaningful analysis, based on facts, concerning the likely impact of further dumped imports on the domestic industry in the final determination, e.g., whether such increased imports are likely to account for an increased share of the growing Mexican market, have an effect on production or sales of sugar, or affect the profits of the domestic producers, etc., in such a manner as to constitute material injury".¹³⁴

In Canada's view, this demonstrates that an analysis of projections regarding the injury factors is required.

7.110 We do not agree. The *Mexico – Corn Syrup* Panel was faced with a case in which there was no discussion of the Article 3.4 injury factors **at all**. The Panel found that, in the absence of any discussion of the condition of the domestic industry against which the impact of future imports was to be assessed, findings that imports would increase and be priced below the domestic like product were insufficient to support a conclusion of threat of material injury. The issue of whether a second analysis of the Article 3.4 factors was required in the context of making a determination of threat of material injury was simply not a question in that dispute, and was not specifically addressed by the Panel. In this case, the USITC specifically found that the domestic industry was in a vulnerable condition, based on its consideration of the Article 3.4/15.4 injury factors. Against that background, conclusions that an imminent substantial increase in imports is likely, at prices likely to have significant price depressing and suppressing effects and likely to increase demand for imports, exacerbating price pressure on domestic producers, and thus that material injury would occur, could, if those conclusions are themselves consistent with the obligations of the Agreements, support a finding of threat of material injury.

7.111 With respect to the factors set out in Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement, we see even less basis for concluding that they must be directly considered in a "predictive" context in making a threat of material injury determination. These provisions require the investigating authorities to consider events in the past, during the period investigated, in making a determination regarding present material injury. Thus, the text directs the investigating authorities to

¹³³ *Mexico – Corn Syrup*, para. 7.132.

¹³⁴ *Ibid.*, at para. 7.140

consider whether there "has been" a significant increase in imports, whether there "has been" significant price undercutting, or whether the effect of imports is otherwise to depress prices or prevent price increases which otherwise "would have" occurred. As with the consideration of the Article 3.4/15.4 factors, the consideration of the Article 3.2/15.2 factors forms part of the background against which the investigating authorities can evaluate the effects of future dumped and/or subsidized imports.¹³⁵

7.112 We therefore find no violation of Articles 3.2 and 3.4 of the AD Agreement or of Articles 15.2 and 15.4 of the SCM Agreement.

K. ALLEGED VIOLATIONS OF ARTICLES 3.5 AND 3.7 OF THE AD AGREEMENT AND ARTICLE 15.5 AND 15.7 OF THE SCM AGREEMENT

7.113 Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement provide as follows:

"3.5 It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in patterns of consumption, trade-restrictive practices of and competition between foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry".

"15.5 It must be demonstrated that the subsidized imports are, through the effects⁴⁷ of subsidies, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the subsidized imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the subsidized imports. Factors which may be relevant in this respect include, *inter alia*, the volumes and prices of non-subsidized imports of the product in question, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

⁴⁷ As set forth in paragraphs 2 and 4".

7.114 Canada asserts that these provisions have two main elements: first, there must be a demonstration of a causal relationship between the dumped or subsidized imports and the injury to the domestic industry, which must be based on an examination of all relevant evidence before the authorities; and, second, the authorities must examine any known factors other than the dumped or

¹³⁵ Of course, the proper establishment of a background under Articles 3.2 and 3.4 and 15.2 and 15.4 of the AD and SCM Agreements does not determine whether the evaluation of the effects of future imports is consistent with the requirements governing determinations of threat of material injury set out in Articles 3.7 and 15.7 of the AD and SCM Agreements.

subsidized imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped or subsidized imports. In Canada's view, the USITC failed to satisfy the requirements relating to each element.

7.115 The United States does not dispute that there are two main elements to the establishment of the causal relationship in anti-dumping and countervailing duty investigations. However, the United States contends that the USITC determination in dispute fully complies with those requirements, in that the USITC considered all the relevant evidence in establishing the causal relationship, and properly avoided attributing injuries caused by other factors to the dumped and subsidized imports from Canada.

7.116 Japan, as third party, supports Canada's view that the USITC failed to demonstrate a causal relationship and failed to comply with the non-attribution requirement in Articles 3.5 and 15.5 of the AD and SCM Agreements, respectively. In the latter context, Japan focuses on the asserted failure of the USITC to separate and distinguish the effects of other known factors on the domestic industry from the effects of further dumped (and subsidized) imports.

7.117 Korea, as third party, considers that the USITC determination fails to properly demonstrate a causal relationship and non-attribution on positive evidence. Korea considers that the USITC identified other known factors causing injury, specifically the domestic industry's contribution to oversupply, but nevertheless attributed injury to the Canadian imports. Korea is also of the view that the USITC's threat determination rests on an "unscientific" prediction that imports would increase substantially in the absence of anti-dumping and countervailing duty orders.

7.118 We address below the two aspects of Canada's claim regarding the causal analysis separately.

1. Alleged failure to demonstrate a causal relationship

(a) Parties' Arguments

7.119 In Canada's view, the USITC failed to explain how the predicted substantial increase in the volume of imports would be likely to have a significant price depressing effect in the future and therefore would threaten to cause injury to the domestic industry. In particular, Canada considers that the USITC failed to examine and evaluate all evidence relevant to the question of causal relationship, including several "conditions of competition" USITC considered were pertinent to the softwood lumber industry and relevant to the analysis. In this regard, Canada points to the fact that the United States is not self-sufficient in lumber and that a significant volume of imports is needed to fulfil demand, the concept that competition between subject imports and the domestic product is attenuated to some extent, and the fact that there was increasing integration in the North American lumber market and US domestic producers were responsible for purchasing or importing lumber from Canada. Canada argues that the USITC stated that these conditions were both pertinent and relevant, but then ignored them in its threat of injury analysis. Canada also argues that there is nothing in the USITC's determination to support its finding that subject imports were likely to have a significant price depressing effect in the future.

7.120 The United States argues that, in making its determination, the USITC examined all record evidence and carried out a thorough analysis of all relevant factors that the dumped and subsidized imports threaten to cause injury to the domestic industry. The United States asserts that, in its present material injury analysis, the USITC found the domestic industry vulnerable to injury, but concluded that it could not find that subject imports had injured the domestic industry, largely because it had not found that there were significant price effects. The United States asserts that the USITC concluded in its threat analysis that dumped and subsidized imports already at significant levels would continue to enter the US market at significant levels and were projected to increase substantially. The additional imports would increase the excess supply in the market, putting further downward pressure on prices,

which at the end of the period of investigation had declined to levels as low as they had been in 2000. The United States asserts that USITC reasonably found that subject imports were likely to increase substantially and were entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices, and were likely to increase demand for further imports, thereby threatening material injury. The United States considers that Canada's claims under Article 3.5 and 15.5 are based on the premise that there could be no threat because there allegedly were no injury findings in the present material injury analysis, a premise which the United States rejects.

7.121 Moreover, the United States asserts that the USITC considered and addressed each of the issues raised by Canada, but reached different conclusions based on the evidence from those urged by Canada. Thus, for instance, the United States argues that the USITC considered growth in demand and the need for imports in light of the inability of US producers to satisfy demand, but found that demand was not likely to increase in the manner Canada suggests or to have the effects that Canada posits, as strong demand had not, during the period of investigation, translated into price improvements, and was not expected to do so in the future. The United States also maintains that the USITC appropriately considered the substitutability of subject imports and domestic product and properly took the record evidence into account in making its determinations as evident in its opinion. The USITC found that imports and domestic species of softwood lumber are used in the same applications and that regional preferences merely reflect availability of species, and that the differences in species between subject imports and domestic product did not attenuate competition in a significant manner. The United States maintains that Canada recognizes that the USITC considered the integration of the North American lumber industry as a condition of competition, but criticizes the USITC for not speculating that integrated companies would not harm related companies without referring to any evidence to support its supposition that integrated firms will not harm their related parties.

(b) Analysis by the Panel

7.122 As discussed above, 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. We therefore find that the determination is not consistent with Article 3.5 of the AD Agreement and Article 15.5. of the SCM Agreement in this regard.

2. Alleged absence of the required non-attribution analysis

(a) Parties' Arguments

7.123 Canada argues that the USITC failed to identify, much less examine, any other known factors that could threaten injury to the domestic industry in addition to the subject imports. Canada maintains that having neglected even to identify other causal factors, the USITC also did not separate out and distinguish the injurious effects of those other factors from the alleged injurious effects of the dumped and subsidized imports. Canada notes that in a footnote to its report, the USITC stated that it is not required, under US case law, to separate and distinguish the injurious effects of the other known factors from the injurious effects of the dumped and subsidized imports.¹³⁶ Therefore, Canada argues that the USITC determination does not comply with the requirements in the third and fourth sentences

¹³⁶ USITC Final Report (Exhibit CDA-1) at p. 31, footnote 195.

of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement relating to “non-attribution”.

7.124 In Canada's view, there was strong evidence before the USITC that factors other than the subject Canadian softwood lumber imports were having substantial adverse effects on the US domestic industry during the period of investigation. Canada also notes that the USITC found that the industry had itself contributed to the oversupply that led to price declines over the period of investigation, and argues that the USITC failed to examine this, as well as the likely future role of non-subject imports and their potential contribution to any threatened injury to the US industry, and other known factors potentially injurious to the domestic industry, such as changes in the patterns of consumption.

7.125 The United States argues that the USITC properly examined any known factors other than the dumped and subsidized imports which are injuring the domestic industry to ensure that it did not attribute injury from other causal factors to the subject imports. The United States asserts that the USITC's methodology was consistent with the AD and SCM Agreements, which it argues do not specify **how** the investigating authority is to satisfy the non-attribution test. In the US view, the purpose of the non-attribution requirements is to ensure the existence of an unsevered causal link between the dumped and subsidized imports and the injury to the domestic industry. In this context, the United States cites the decision of the Appellate Body in *EC – Tube or Pipe Fittings*, which stated that “provided that an investigating authority does not attribute the injuries of other causal factors to dumped imports, it is free to choose the methodology it will use in examining the ‘causal relationship’ between dumped imports and injury”.¹³⁷

7.126 The United States maintains that the USITC's methodology ensures that the injurious effects of other causal factors are not attributed to subject imports. The United States describes that methodology as involving the examination of other “known” factors to assess whether they may be causing injury to the domestic industry. When the USITC finds a factor not to have injurious effects on the domestic industry, the United States states that such factor is not an “other known factor” for purposes of Article 3.5 of the AD Agreement or Article 15.5 of the SCM Agreement and no further consideration or examination of the factor is called for. The United States considers that this approach is sanctioned by the Appellate Body decision in *EC – Tube or Pipe Fittings*.

7.127 The United States considers that Canada's principal argument is that US domestic supply was a known causal factor which the USITC found contributed to injury in its present material injury analysis, but ignored in its threat analysis. The United States argues that in its threat evaluation, the USITC found that the domestic producers had curbed their production, but that overproduction remained a problem in Canada.¹³⁸ Thus, while US domestic overproduction had contributed to adverse price effects in 2000, the United States maintains that the evidence demonstrated that it was no longer contributing to excess supply while Canadian imports continued to oversupply. Consequently, the USITC was entitled to not consider this as an “other factor” causing injury, and was not required to address it further in its threat determination..

7.128 With respect to the other causal factors which Canada alleges the USITC failed to consider (non-subject imports, other substitutes for lumber, and cyclical demand and housing construction cycles) the United States maintains that it is clear from the determination that these issues were considered and parties' arguments were addressed, but that the USITC did not consider these issues as rising to the level of “other known factors injuring the domestic industry”. Consequently, the United States argues that there was no obligation to address them further.

¹³⁷ Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 189, citing to Appellate Body Report, *US-Hot-Rolled Steel*, para. 224.

¹³⁸ USITC Final Report (Exhibit CDA-1) at p. 35, footnote 217.

(b) Analysis by Panel

7.129 The non-attribution requirement in anti-dumping investigations has been addressed by the Appellate Body in several recent cases. Although it has not been specifically considered in a countervailing duty case, given that the relevant provisions in the two Agreements are identical, and in light of the Declaration of Ministers relating to Dispute Settlement under the AD and SCM Agreements, it is clear to us that the requirement is the same in the context of both anti-dumping and countervailing duty investigations.

7.130 In its most recent statement on the non-attribution requirement in anti-dumping cases, the Appellate Body explained that:

"This obligates investigating authorities in their causality determinations not to attribute to dumped imports the injurious effects of other causal factors, so as to ensure that dumped imports are, in fact, "causing injury" to the domestic industry. In *US – Hot-Rolled Steel* we described the non-attribution obligation as follows:

... In order that investigating authorities, applying Article 3.5, are able to ensure that the injurious effects of the other known factors are not "attributed" to dumped imports, they must appropriately assess the injurious effects of those other factors. Logically, such an assessment must involve *separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports*. If the injurious effects of the dumped imports are not appropriately separated and distinguished from the injurious effects of the other factors, the authorities will be unable to conclude that the injury they ascribe to dumped imports is actually caused by those imports, rather than by the other factors.

Non-attribution therefore requires separation and distinguishing of the effects of other causal factors from those of the dumped imports so that injuries caused by the dumped imports and those caused by other factors are not "lumped together" and made "indistinguishable".¹³⁹

We underscored in *US – Hot-Rolled Steel*, however, that the *Anti-Dumping Agreement* does not prescribe the *methodology* by which an investigating authority must avoid attributing the injuries of other causal factors to dumped imports: . . . Thus, provided that an investigating authority does not attribute the injuries of other causal factors to dumped imports, it is free to choose the methodology it will use in examining the "causal relationship" between dumped imports and injury".¹⁴⁰

7.131 In this case, in addition to pointing out what it considers to be the deficiencies in the USITC's analysis, Canada points to a statement in the USITC's decision:

"CLTA [a Canadian party] contended that the Commission "must separate and distinguish the injurious effects of the other factors from the injurious effects of dumped imports." CLTA's Prehearing Brief at 8; *see also*. Government of Canada's Prehearing Brief at 4-11. This argument does not have a basis in the case law. *Asociacion de Productores de Salmon y Trucha de Chile AG v. United States*, 180 F. Supp. 2d 1360, 1375 (Ct. Int'l Trade 2002) ("Chilean Salmon") (affirmed that "[t]he Commission is not required to isolate the effects of subject imports from other factors

¹³⁹ *Ibid.*, para. 228.

¹⁴⁰ Appellate Body Report, *EC – Tube or Pipe Fittings*, paras. 188-189.

contributing to injury” or make “bright line distinctions” between the effects of subject imports and other causes. *Id.*); Taiwan Semiconductor Industry Ass’n v. USITC, 266 F.3d 1339, 1345 (Fed. Cir. 2001) (“[T]he Commission need not isolate the injury caused by other factors from injury caused by unfair imports. . . . Rather, the Commission must examine other factors to ensure that it is not attributing injury from other sources to the subject imports.” *Id.* (emphasis in original)).¹⁴¹

Canada contends that this statement makes it clear that the USITC failed to satisfy the non-attribution test. However, Canada does not dispute that non-attribution is required under US law. Thus, the question facing us in this dispute is whether the USITC analysis of causation satisfies the non-attribution requirement set forth in the Agreements.

7.132 As discussed above, having found that a fundamental element of the causal analysis is not consistent with the Agreements, we consider that the USITC’s causal analysis cannot be consistent with the Agreements, and we therefore concluded that the determination is not consistent with Article 3.5 of the AD Agreement and Article 15.5. of the SCM Agreement in this regard. In light of this conclusion, we consider that we cannot meaningfully evaluate the question of violation of the non-attribution aspect of those provisions. In the absence of a finding that dumped and subsidized imports caused – in this case threatened – material injury that is consistent with the Agreements, the question of whether injuries caused by other factors are attributed to dumped and subsidized imports becomes meaningless. Nonetheless, we do have serious concerns with the analysis of the USITC in this regard. In order to elucidate our views should the Appellate Body reach the question and give some guidance should the issue arise in implementation, and in view of the fundamental significance of the non-attribution requirement, we set out our concerns below.

7.133 It is clear from the determination that USITC addressed other factors potentially causing injury in the context of its determination, in particular in discussing the “conditions of competition” relevant to the US softwood lumber industry, with respect to the finding of no present material injury. Thus, it would seem that there was some analysis in the USITC decision that addressed other factors potentially causing injury. For instance, the USITC noted in discussing the volume of imports that imports from countries not subject to investigation were small in volume but had increased during the period of investigation.¹⁴² In this regard, we note particularly the USITC’s finding that both domestic and imported Canadian softwood lumber contributed to excess supply in the market during the period of investigation, and thus to the declining prices.¹⁴³ This finding was fundamental to the further conclusion that Canadian imports had no **significant** effect on prices, and did not have a significant impact on the domestic industry, and the ultimate finding of no present material injury caused by the subject Canadian imports. Based on this reasoning, it seems to us that the USITC did undertake some analysis of other factors potentially causing injury, which analysis led in part to the negative finding with respect to present material injury caused by imports.

7.134 However, in the context of its analysis of threat of material injury, we see no similar discussion of other factors that are threatening injury at the same time as dumped and subsidized imports. There is no reference at all to imports from countries not subject to investigation. Yet, in light of the increase in such imports during the period of investigation, and given that the matter was specifically put before the USITC in arguments, it would seem that some discussion of the likely future impact of such imports should have been undertaken. Nor is there any discussion of the relationship between predicted increases in imports and the predicted strong and increasing demand for lumber in the US market. In the absence of some increase in Canadian market share in the future, it is difficult to see how the USITC could come to the conclusion that Canadian imports would cause injury in the future when they had not done so during the period of investigation, despite their

¹⁴¹ USITC Final Report (Exhibit CDA-1) at page 31, footnote 195.

¹⁴² USITC Final Report (Exhibit CDA-1) at page 32, footnote 199.

¹⁴³ USITC Final Report (Exhibit CDA-1) at page 35.

significant and increased volume and market share. There is similarly no discussion of the effects of increasing integration of the North American lumber market on the behaviour of lumber producers and the potential effects on trade flows.

7.135 A glaring omission is the failure to discuss the likely future effects of domestic supplies of lumber. The single reference to domestic oversupply and its potential effect on the domestic industry in the future is in a footnote in the section of the report discussing price declines during the period of investigation. The last sentence of that footnote cites a consultant's report stating that lumber overproduction had been "curbed considerably [in the United states] but remains a problem in Canada".¹⁴⁴ Even were this single statement drawn from a consultant's report deemed sufficient to support the conclusion that there would be no US oversupply affecting lumber prices in the future, there is nothing in the report to link such a conclusion to the USITC's analysis of causation of material injury in the near future.

7.136 We do not mean to suggest that all aspects of the investigating authorities' determination must be entirely contained in the specific parts of the report dealing with particular issues. Certainly, in dispute settlement, a Member may argue the consistency of an anti-dumping or countervailing duty determination based on the entirety of that determination. However, that does not excuse the investigating authority from the necessity of, at the time of its determination, providing an adequate explanation of its analysis such that a Panel can, with confidence, understand the reasoning underlying the decision that was actually made in order to be able to assess its consistency with the relevant provisions of the Agreements.

7.137 Given the overall absence of discussion of other factors potentially causing injury in the future, we would conclude that the USITC determination is not consistent with the obligation in Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement that "injuries caused by these other factors must not be attributed" to the subject imports.

L. ALLEGED VIOLATIONS OF THE SCM AGREEMENT AND THE AD AGREEMENT IN THE USITC'S COMBINED INJURY ANALYSIS

(a) Parties' Arguments

7.138 Canada argues that by carrying out a combined injury analysis in the anti-dumping and countervailing duty investigations, the USITC failed to comply with the specific requirements that must be satisfied by an investigating authority when making a determination of injury, or threat of injury, in an anti-dumping or subsidy investigation. Specifically, Canada asserts that Articles 1, 9.1, and 18.1 of the AD Agreement establish that a final anti-dumping duty can be imposed only when the investigating authority has complied with the specific requirements of the AD Agreement, and that the same principle applies for the imposition of a final countervailing duty in light of parallel provisions in Articles 10 and 32.1 of the SCM Agreement. Canada asserts that when an investigation involves both dumped and subsidized imports, the investigating authority is obliged to comply with the specific requirements of both the AD Agreement and the SCM Agreement. Canada considers this obligation to satisfy the distinct requirements of both the AD Agreement and the SCM Agreement is reinforced by paragraph (a) of Article VI:6 of GATT 1994, which provides: "No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping *or* subsidization, *as the case may be*, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry" [emphasis added].

7.139 Canada asserts that by combining the dumped and subsidized imports in its threat of injury analysis, the USITC failed to comply with the specific requirements of the AD Agreement and the

¹⁴⁴ USITC Final Report (Exhibit CDA-1) at page 35, footnote 217.

SCM Agreement, and of Article VI of GATT 1994, because it failed to undertake all of the necessary evaluations specified in the AD Agreement and SCM Agreement respectively. Canada points to several of the asserted substantive violations as examples in this regard – alleged failure to properly consider the nature and trade effects of the subsidies in question as required by Article 15.7(i) of the SCM Agreement, failure to consider all the mandatory factors under Articles 3.4 of the AD Agreement and Article 15.4 of the SCM Agreement; and failure to conduct a proper causation analysis under Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement. Moreover, Canada maintains, the USITC never provided a reasoned explanation of why, in the particular circumstances of this case, it was appropriate to conduct its analysis as it did.

7.140 Canada asserts that the USITC failed to satisfy the specific requirements of the AD and SCM Agreements by carrying out a combined analysis, thereby making it more likely that an affirmative determination would be the result. In this regard Canada refers to the statement of the Appellate Body in *US-Hot Rolled Steel* that, “investigating authorities are not entitled to conduct their investigation in such a way that it becomes more likely that, as a result of the fact-finding or evaluation process, they will determine that the domestic industry is injured”.¹⁴⁵

7.141 In USITC practice, the consideration of subsidized and dumped imports jointly in the consideration of whether the volume and price effects of subject imports threatened the domestic industry with material injury is known as “cross-cumulation”. The United States contends that USITC’s cross-cumulation in this case, that is, the conduct of combined investigations, is consistent with US obligations under the AD Agreement and the SCM Agreement. The United States maintains that the requirements contained in the AD and SCM Agreements regarding the determination of injury are virtually identical. In the US view, the fact that neither Agreement speaks to the issue of cross-cumulation does not mean that such an analysis is precluded or inconsistent with either Agreement, as Canada alleges.

7.142 The United States argues that Canada’s reliance on the “effect of dumping or subsidization” language in Article VI:6 of GATT 1994 to mandate separate investigations fails to recognize the more specific language in each of the covered Agreements regarding the injury analysis, which specifies that the appropriate focus for an injury assessment is the “effect of dumped imports” and the “effect of subsidized imports” rather than the “effect of dumping or subsidization”. In this regard, the United States points to the decision of the Panel in *EC-Bed Linen* which stated that the language “through the effects of dumping” in Article 3.5 of the AD Agreement “did not require that the volume, price, and impact ‘effects’ to be considered be those of dumping, but rather those of the dumped imports, that is, the ‘effects of dumping’ were equated . . . with ‘the effects of dumped imports.’”¹⁴⁶

7.143 The United States asserts that the purpose of the Agreements is to provide a remedy against unfair trade practices causing injury to a domestic industry, and suggests that it would frustrate that purpose to deny a remedy where the cumulative effect of dumped and subsidized imports is injury to the domestic industry. The United States points to the Appellate Body decision in *EC – Tube or Pipe Fittings* addressing the cumulation provision in the AD Agreement (Article 3.3) in support of its view. The Appellate Body stated that “the role of cumulation [is to] ensur[e] that each of the multiple sources of ‘dumped imports’ that cumulatively contribute to a domestic industry’s material injury be subject to anti-dumping duties”.¹⁴⁷ The United States argues that although the Appellate Body

¹⁴⁵ Appellate Body Report, *US – Hot-Rolled Steel*, para. 196.

¹⁴⁶ Panel Report, *EC-Bed Linen*, para. 6.141.

¹⁴⁷ Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 117. The Appellate Body observed: “A cumulative analysis logically is premised on a recognition that the domestic industry faces the impact of the “dumped imports” as a whole and that it may be injured by the total impact of the dumped imports, even though those imports originate from various countries. . . . negotiators appear to have recognized that domestic industry confronted with dumped imports originating from several countries may be injured by the cumulated effects of those

decision concerned Article 3.3 of the AD Agreement, and involved cumulation of dumped imports from more than one country, the same logic supports the USITC's consistent practice of considering dumped and subsidized imports from the same country together. The United States asserts that other countries, including Canada, have this same practice. Finally, the United States maintains that the allegation that the USITC conducted its investigations on a joint basis so as to more likely result in an affirmative determination in this case has no merit.

7.144 Canada clarified, in its oral statement and in its answer to the Panel's question 14 after the first meeting, that it is not arguing that a combined analysis of injury caused by dumped and subsidized imports is *per se* inconsistent with the Agreements. Rather, Canada argues that the alleged violations of Articles 1, 9.1, and 18.1 of the AD Agreement and Articles 10 and 32.1 of the SCM Agreement, and Article VI:1 of GATT 1994 are "consequential" to the asserted specific violations, and argues that any violation of any of the common provisions in Articles 3 and 15 of the AD and SCM Agreements respectively should result in a finding by the Panel that the injury determination as a whole is inconsistent with both Agreements. The United States does not appear to disagree with the principle underlying Canada's position, *i.e.*, that a finding of violation of a provision of either Agreement would undermine the entire determination. However, the United States argues that the attempt to raise the specific alleged violations a second time as separate violations based on the mere carrying out of combined investigations and making of a single determination should be rejected.

(b) Analysis by the Panel

7.145 Although the focus of Canada's argument was not entirely clear at the outset of this proceeding, over the course of the proceeding it was made clear that Canada is **not** arguing that a combined analysis or a single determination of injury caused by dumped and subsidized imports is *per se* inconsistent with the cited provisions of the Agreements.¹⁴⁸ However, in the absence of a challenge to a combined analysis or combined determination *per se*, it is less than clear to us what the alleged violation asserted by Canada is.

7.146 The request for establishment and the argument in the first submission both refer to the failure of the USITC to undertake the evaluations required by the AD and SCM Agreements. Thus, it seems to us that Canada is relying on the specific violations alleged in support of an argument that, if any provision of either Agreement is found to have been violated, both the anti-dumping and countervailing duty measures should be found to be inconsistent with the Agreements due to that fact that a single combined investigation and determination are at issue. It is clear to us that both measures depend on the single injury determination. We agree with the view that if that single determination is found to be inconsistent with a provision of either the AD or SCM Agreement, then a necessary underpinning of both measures is lacking, and both measures must be found to be inconsistent with the United States' obligations. Any other conclusion would of necessity involve the Panel in a speculative exercise of attempting to decipher what the analysis and conclusions of the USITC would

imports, and that those effects may not be adequately taken into account in a country-specific analysis of the injurious effects of dumped imports."

Id. at para. 116.

¹⁴⁸ Indeed, it seems clear that, as the US asserts, Canada itself undertakes a combined analysis in similar circumstances. In a recent case involving dumped and subsidized imports of stainless steel bar from Brazil and subsidized stainless steel bar from India, the Canadian International Trade Tribunal conducted a single, integrated injury analysis. Moreover, although the CITT discussed whether to cumulate the imports from India and Brazil, it did not distinguish in any way between dumped and subsidized imports in that discussion, or elsewhere in its analysis. *Certain Stainless Steel Round Bar Originating In or Exported from Brazil and India*, Inquiry No.: NQ-2000-002. See also, *Certain Grain Corn Originating In or Exported from the United States of America and Imported into Canada for use or consumption west of the Manitoba-Ontario Border*, Inquiry No.: NQ-2000-005 (Exhibit USA-22) and cases cited therein at footnote 14.

have been in the absence of the aspect found to be in violation. We do not believe such an exercise could be carried out consistent with the standard of review in either Article 11 of the DSU, or Article 17.6 of the AD Agreement.

7.147 However, is not altogether clear to us that such a finding would also, without more, support a finding of violation of Articles 1, 9.1, and 18.1 of the AD Agreement, Articles 10 and 32.1 of the SCM Agreement, and paragraph (a) of Article VI:6 of GATT 1994. Canada has made no independent arguments in support of these claims. Indeed, Canada acknowledged in response to questions from the Panel that these violations are consequential to the finding of violations under the specific requirements of the AD and SCM Agreements.¹⁴⁹ Thus, in absence of any additional or independent argument in support of Canada's claims under these provisions, a finding of violation with respect to any of the specific allegations would result in a finding of violation of these provisions as well. However, such a finding would neither elucidate the scope of these provisions nor assist in any meaningful way in implementation of any recommendation of the DSB. Therefore, in these circumstances, we consider that it is neither appropriate nor necessary to make findings on these claims.

VIII. CONCLUSIONS AND RECOMMENDATION

8.1 In light of the findings above, we conclude

- (a) that the USITC determination is 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 is 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, we conclude that the USITC determination is not inconsistent with the asserted provisions.

8.2 In light of the findings above, we conclude

- (a) that the USITC determination is not consistent with Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement in that the causal analysis is based on a finding which is, 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 SCM Agreement in respect of other aspects of the USITC determination, we conclude that it is neither necessary nor appropriate to make findings with respect to these claims.

8.3 In light of the findings above, we conclude that the USITC determination is not inconsistent with Articles 3.2 and 3.4 of the AD Agreement and Articles 15.2 and 15.4 of the SCM Agreement.

8.4 With respect to those of Canada's claims not addressed above, *i.e.*, alleged violations of Articles 1, 3.1, 3.8, 12, and 18.1 of the AD Agreement and Articles 10, 15.1, 15.8, 22, and 32.1 of the SCM Agreement, and Article VI:6(a) of the GATT 1994, we conclude, in light of the findings above, that it is neither necessary nor appropriate to make findings with respect to these claims.

¹⁴⁹ Canada's Responses to Questions from the Panel and the United States - First Meeting, question 14.

8.5 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent the United States has acted inconsistently with the provisions of the AD and SCM Agreements, it has nullified or impaired benefits accruing to Canada under that Agreement.

8.6 We therefore recommend that the Dispute Settlement Body request the United States to bring its measures into conformity with its obligations under the AD and SCM Agreements.

8.7 In addition to its request for findings of violation, Canada requests that we 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".¹⁵⁰

8.8 Article 19.1 of the DSU provides that:

"In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations".

While we are free to suggest ways in which we believe the United States could appropriately implement our recommendation, we decide not to do so in this case. We have found that the United States failed to act consistently with the requirements of the AD and SCM Agreements in its analysis and explanation of its determination of threat of material injury, and have recommended that the United States bring its measures into conformity with its obligations. In this regard, we note Article 21.3 of the DSU, which provides:

"At a DSB meeting held within 30 days after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB".
(footnote omitted).

Thus, while a panel may suggest ways of implementing its recommendation, the choice of means of implementation is decided, in the first instance, by the Member concerned. In this case, we see no particular need to suggest a means of implementation, and therefore decline to do so.

¹⁵⁰ Canada's first written submission at para. 181.