ANNEX A

PARTIES' RESPONSES TO QUESTIONS
FROM THE FIRST MEETING

ANNEX A-1

CANADA'S RESPONSES TO QUESTIONS FROM THE PANEL AND THE UNITED STATES - FIRST MEETING

24 September 2003

To Canada

1. Is Canada of the view that the standard of review under Article 11 of the DSU is stricter than that under Article 17.6 of the AD Agreement? If so, could Canada please provide the Panel with specific indications of the effect of that difference, in Canada's view, on the Panel's consideration of the claims in this case.

In this context, could Canada please comment on the relevance and effect of the Declaration of Ministers at Marrakech relating to dispute settlement under the AD and SCM Agreements.

1. Canada is not saying that the standard of review under Article 11 of the *DSU* is stricter than that under Article 17.6 of the *Anti-Dumping Agreement* but rather that Articles 17.6 and 11 complement each other and should be read together. As the Appellate Body stated in *US – Hot-Rolled Steel*,[1] both provisions require that panels make an "objective assessment" of the facts of the matter.

2. In *US – Cotton Yarn*, the Appellate Body clarified that an objective assessment of the matter requires a panel to assess whether the competent authority has evaluated all relevant factors, examined all pertinent facts and provided a reasoned and adequate explanation as to how the facts as a whole support its determination.[2] A panel must also consider whether the competent authority's explanation addresses fully the nature and complexities of the data and responds to other plausible interpretations of the data.[3] The United States appears to accept these principles and, in particular, to agree that under both the *Anti-Dumping Agreement* and the *SCM Agreement*, the competent authority must provide reasoned and adequate explanations of the nature described above.[4]

3. Canada further notes that the European Communities appears to agree with both parties that the duties of panels under both provisions "do not differ significantly"[5], but "fails to see, on which legal basis Canada would ask this Panel to determine whether the USITC has considered all the facts, including those that *should have been* before the ITC but were not raised by the interested parties".[6] Canada would like to clarify that it is not claiming that the Commission should have obtained certain additional information that is not in its administrative record. Canada's challenge concerns the Commission's evaluation of the record that was before it.

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[1] *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, Report of the Appellate Body, WT/DS184/AB/R, adopted 23 August 2001, para. 55 ("*US – Hot-Rolled Steel*").

[2] *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, Report of the Appellate Body, WT/DS192/AB/R, adopted 5 November 2001, para. 74 ("*US – Cotton Yarn")*.

[3] *Ibid*.

[4] First Written Submission of the United States, paras. 67-68.

[5] Third Party Submission of the European Communities, 22 August 2003, para. 16.

[6] *Ibid*., para. 23. [emphasis in original]

4. Finally, regarding the Declaration *of Ministers at Marrakech Relating to Dispute Settlement Under the AD and SCM Agreements*, the Appellate Body has ruled that it "does not prescribe a standard of review to be applied".[7] In any event, Canada's interpretation of the applicable standard of review for this dispute is compatible with the Ministers' recognition of the "need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures".

2. Is Canada of the view that in a case such as this one, involving a single injury determination with respect to both subsidized and dumped imports, where most of the claims involve identical or almost identical provisions of the AD and SCM Agreements, there might

Dumping Agreement and Article 15 of the *SCM Agreement* in injury determinations, much less exhibit the special care with which an investigating authority must analyze the threat of injury.

8. What amounts to "special care" will depend on the facts and circumstances of each investigation. It is best illustrated through examples of what does not amount to special care. In this dispute, the Commission concluded that "we find that subject imports from Canada are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices and are likely to increase demand for further imports"[10] despite lacking sufficient evidence regarding current prices from which to draw conclusions regarding current price effect, much less future price effect.[11] This is only one of many examples of the Commission's failure to exercise special care. Other examples of a lack of special care by the Commission are found in Canada's answers to Questions #6 and #11 of the Panel.

9. Overall, the Commission was required to provide an objective, reasoned and adequate explanation of how the relevant factors and record evidence supported its affirmative threat determination and why contrary record evidence did not warrant a negative threat determination. The Commission did not do this and could not do this on the basis of the record before it. Arriving at an affirmative threat determination notwithstanding the paucity of analysis and evidence supporting such a determination clearly falls below the standard of "special care" required in a threat case.

4. 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".**

Could Canada address the implications of the phrase "the application of … measures" in terms of the timing of the obligations provided for in this provision? Could Canada indicate how, in its view, the "special care" requirement affects or changes the obligation in Articles 3.1 of the AD Agreement and 15.1 of the SCM Agreement that a determination of injury "shall be based on positive evidence and involve an objective examination…". Is Canada arguing that the "special care" provision means that there is a stricter, higher standard of review is applicable in cases of threat than in cases of present material injury? If so, could Canada point to the legal basis for that argument. Or is Canada arguing that a stricter standard of determination applies in threat cases? If so, what, in Canada's view, does such a stricter standard of determination entail, and how specifically does Canada consider that the USITC's determination shows the lack of special care.

10. With respect to the timing of the obligations provided for in these provisions, the phrase "the application of… measures" must be interpreted in its context which includes the phrase "shall be considered and decided" and its location within the text of Article 3 of the *Anti-Dumping Agreement* and Article 15 of the *SCM Agreement* - both of which are entitled "Determination of Injury" and contain obligations relating to the examination and determination of injury.[12] The "application of … measures" is "considered and decided" during the injury investigation and determination phase. Thus,

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[10] Commission Report, p.44. [emphasis added] (Exhibit CDA-1)

[11] First Written Submission of Canada, para. 107-112; see also: *In the Matter of Certain Softwood Lumber Products from Canada: Final Affirmative Threat of Injury*

imposes a "high standard" strongly suggests that it has already endorsed this interpretation. The application of the obligations in Articles 3.8 and 15.8 and their relation to Articles 3.1 and 15.1 are discussed in Canada's answers to Questions #3 and #4 of the Panel.

6. Could Canada discuss whether its claims under Article 3.1 of the AD Agreement and Article 15.1 of the SCM Agreement are dependent on the Panel's resolution of Canada's claims of violation of Articles 3.2, 3.4, and 3.7 of the AD Agreement and 15.2, 15.4, and 15.7 of the SCM Agreement? If not, could Canada please indicate to the Panel the arguments in support of independent claims of violation?

14. Canada's claims under Article 3.1 of the *Anti-Dumping Agreement* and Article 15.1 of the *SCM Agreement* are closely related to its claims under Articles 3.2, 3.4, 3.5 and 3.7 of the *Anti-Dumping Agreement* and Articles 15.2, 15.4, 15.5 and 15.7 of the *SCM Agreement.* However, they are not dependent on those claims. On the facts of this dispute, the Commission's investigation and determination give rise to violations of the overarching obligations in Articles 3.1 and 15.1 and, at the same time, the specific obligations in the other Articles that Canada has invoked in its challenge. Given substantive differences in the obligations in Articles 3.1 and 15.1 compared to these other Articles, certain factual scenarios could give rise to violations of Articles 3.1 and 15.1 without violating the provisions of the other Articles. However, Canada is not raising such facts in this

17. With respect to the failure of the Commission to base its determination of threat of injury on "positive evidence", the evidence on the Commission's record does not support an affirmative threat finding. For example, there is no positive evidence:

- of "a significant rate of increase of [dumped or subsidized] imports" given that first, the evidence showed only a 2.8 percent increase over the Commission's period of investigation and second, that the Commission concluded, in light of its finding that subject imports had not had a significant price effect and the small increase in their market share, that subject imports did not have a significant impact on the domestic industry[19], and then made a finding of no present injury;

- of "sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped [subsidized] exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports" given the projections of the Canadian exporters showing that exports to the United States were expected to increase only slightly in absolute terms from the non-injurious levels of 2001 and to decrease as a percentage of total Canadian exports[20]; and

- that "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" given that the Commission was unable to draw conclusions regarding the current effect of current prices of subject imports during the period of investigation.

21. Canada wishes to make two distinct but related points to clarify the relationship between Canada's claims under Article 12.2.2 of the *Anti-Dumping Agreement* and Article 22.5 of the *SCM Agreement* and the rest of Canada's claims under these Agreements.

22. First, Canada's claims with respect to Articles 12.2.2 and Article 22.5 are best understood as procedural claims, in the sense that these Articles set out specific obligations regarding the content of the public notice or separate report regarding an affirmative determination, *i.e.*, in the context of this case, what must be in the Commission's Report or reasons. These requirements include providing, in sufficient detail, all relevant information on the matters of fact and law as well as the reasons that have led to the imposition of final measures, including reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers. Canada's point is that the Report in question here simply does not contain what it is required to contain under Articles 12.2.2 and 22.5. Canada's claims under the other provisions are substantive in nature and address how the Commission's determination itself falls short of the obligations set out in Articles 3 and 15 of the *Anti-Dumping Agreement* and *SCM Agreement*, respectively.

23. Canada's second point is that Articles 12.2.2 and 22.5 do not require an investigating authority to provide a "reasoned and adequate explanation" of its decision. Rather, as discussed above and in Canada's previous submissions, this obligation flows from the substantive obligations in Articles 3 and 15 viewed in the light of the standard of review under Article 11 of the *DSU* and Article 17.6(i) of the *Anti-Dumping Agreement*. Furthermore, Article 3.1 of the *Anti-Dumping Agreement* and Article 15.1 of the *SCM Agreement* also place related requirements on investigating authorities, for example, the need to base an injury determination on an "objective examination". Therefore, the US assertion, in its closing statement at the first meeting of the Panel, that the olD?342s0ffirmatSiBel, that the

"second" examination of the Articles 3.4 and 15.4 factors in the sense that examination of them in the threat context duplicates the examination in the current injury context. Examination of the Article 3.4 and 15.4 factors in the threat of injury analysis is the first time that the investigating authority examines them in this predictive context.

26. Canada is not suggesting that the examination of these factors in the two contexts are unrelated. To the contrary, the threat analysis must take into account, and be consistent with, the current injury analysis. That means, for example, that the Commission must find a change in circumstances from the conditions prevailing during the period of investigation so that the non-injurious *status quo* would change and injury from dumping or subsidy would occur.

27. In the absence of an evaluation of the relevant economic factors in the future, it is impossible for the competent authorities to determine whether likely increased dumped/subsidized imports would adversely affect the domestic industry in such a manner as to cause injury. In other words, that imports are likely to increase does not necessarily mean that they will account for an increased market share, have an adverse effect on domestic production, sales and output, or adversely affect the profits of domestic producers, etc. in such a way that injury would occur. It is only through an examination of the likely impact of the dumped imports on the domestic industry concerned in the future that a reasoned determination that injury would likely occur can be made.

28. This interpretation of Articles 3.4 and 15.4 in the context of threat of injury flows from the views of the panel in *Mexico – HFCS*. For example, at paragraph 7.141 of its report the panel stated the following:

> Merely that dumped imports will increase, and will have adverse price effects, does not, *ipso facto*, lead to the conclusion that the domestic industry will be injured – if the industry is in very good condition, or <u>if there are other factors at play, dumped imports may not threaten injury</u>. <u>Such a conclusion thus requires the investigating authority to analyze, based on the information before it, the likely impact of further dumped imports on the domestic industry</u>. SECOFI 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 <u>there is no meaningful analysis, based on facts, concerning the likely impact of further dumped imports on the domestic industry in the final determination</u>, *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.[23]

developments in the situation of the industry, and/or the dumped or subsidized imports, which lead to the conclusion that injury which has not yet occurred can be predicted to occur imminently, and need not refer to any specific event. Canada argues at paragraph 9 of its oral statement that "to establish threat, some imminent and foreseeable change from the non-injurious present must be identified" but that "a" specific change need not be shown. Could Canada expand on this assertion – what might constitute the relevant change if not an event, and how must it be shown? Could Canada indicate what is the legal basis for its assertion that the change in circumstances must be explicitly identified?

30. Article 3.7 of the *Anti-Dumping Agreement* and Article 15.7 of the *SCM Agreement* require that in order to justify an affirmative determination of threat of injury, an investigating authority identify "[t]he change in circumstances which would create a situation in which the dumping [subsidy] would cause injury". This interpretation is confirmed by the following statement of the Appellate Body in *Mexico – HFCS*:

> We note that Article 3.7 of the *Anti-Dumping Agreement* provides that a

10. Are the elements identified in the bullet points at paragraph 23 of its oral statement those Canada considers necessary for a threat determination?

35. The elements identified in the bullet points at paragraph 23 of Canada's First Oral Statement are those contained in Articles 3.1 and 15.1 and reflect the overarching requirements to be met by determinations of injury – whether based on a finding of current injury or threat of injury. As stated above in response to Question #6, these Articles require that injury determinations be based on positive evidence and an objective examination of the volume, price effect and impact of subject imports. In the threat context, due to its inherently predictive nature, the likely volume, price effect and impact of subject imports form the focus of the relevant examination. These elements contained in Articles 3.1 and 15.1 are expanded upon by the requirements set out in subsequent provisions in Articles 3 and 15.[26] In other words, they are necessary, but not exclusive, elements for a threat determination.

11. Canada argues at paragraph 153 of its first submission that the USITC "failed to examine and evaluate all evidence before it relevant to the demonstration of the necessary causal relationship". Could Canada indicate what it would have expected to find in an adequate determination regarding causal relationship?

36. The causal relationship between the subject dumped and subsidized imports and the threatened injury is an essential requirement of Article 3.7 of the *Anti-Dumping Agreement* and Article 15.7 of the *SCM Agreement,* which require an investigating authority to identify "the change in circumstances which would create a situation in which the dumping [subsidy] would cause injury" [emphasis added]. As elaborated upon in Articles 3.5 and 15.5 of those Agreements, the "demonstration of a causal relationship between the dumped [subsidized] imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities". In addition, the authorities "shall also examine any known factors other than the dumped [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 [subsidized] imports". To ensure compliance with this non-attribution requirement, investigating authorities must separate and distinguish the effects of the other known factors from those attributed to the subject imports. Finally, the Commission had to provide a reasoned and adequate explanation of how the relevant facts pertaining to these causation issues supported its affirmative threat determination. To be "adequate", the Commission's affirmative threat determination and its causation finding had to comply with all of these requirements. It did not do so.

37. The Commission's investigation and determination falls short of the applicable requirements for several reasons:

- It failed to take into account its own finding that the United States was not self-sufficient in lumber and that a significant volume of imports was needed to fulfil demand.[27] This finding, together with the Commission's prediction of strong and

[26] As discussed at paragraphs 58-59 of Canada's First Written Submission, the Appellate Body has recognized that these obligations inform the more detailed obligations in succeeding paragraphs, including Articles 3.2, 3.4, 3.5, 3.7 and 3.8 of the *Anti-dumping Agreement* and Articles 15.2, 15.4, 15.5, 15.7 and 15.8 of the *SCM Agreement*.

[27] The Commission recognized that "[a]pparent domestic consumption exceeds domestic production capabilities. As a result some imports are required in the US market to satisfy demand." (Commission Report, pp. 24-25). (Exhibit CDA-1) What is meant by "some" can be ascertained by examining the data appended to the Commission Report. Even assuming that US producers could operate their mills at 100 percent capacity on a sustained basis and that they could obtain the necessary timber supply to feed that capacity (both unrealistic assumptions), for 2001 the total US production capacity of 40.0 billion board feet (Table III-6, Commission Report, p. III-11 (Exhibit CDA-1)) falls almost 14 billion board feet short of total apparent consumption of

the fee or charge for the input, unless they are outside the normal range, has no impact on marginal cost, price or quantity of the downstream product that the input goes into. Here, the economic rent for standing timber is derived from the demand for lumber, and the output of lumber is not determined by stumpage charges in the normal range. No matter how low the stumpage charge is – as long as it is positive and in this case it is agreed that charges were positive – then the quantity of logs produced will be no greater, and their prices will be no lower, than they would be in a competitive market. In such circumstances, there will be no trade effect from the subsidy in question.

42. Thus, an objective examination of the evidence regarding the nature of the subsidy and its likely trade effects should have led the Commission to conclude that the stumpage charges levied by Canadian provinces would not lead to an increase in imports beyond the non-injurious level observed in the period of investigation. As such, the Commission's finding that imports were likely to increase substantially and cause injury could not be based on positive evidence or an objective examination and, therefore, should have led the Commission to make a negative threat of injury determination.

13. In its oral statement, Canada states that the Agreements "require" a likelihood of substantially increase dumped and subsidised exports (paragraph 62) and that the USITC "did not find the requisite imminent, substantial increase " in capacity. Is Canada of the view that in the absence of affirmative findings or conclusions on these factors, an affirmative determination of threat of material injury is precluded?

43. Article 3.7(ii) and 15.7(iii) require that when an investigating authority considers "sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter", it do so in the context of whether this capacity indicates a likelihood of substantially increased dumped [subsidized] exports. That is what Canada meant when it referred, at paragraph 62 of its First Oral Statement, to "the likelihood of substantially increased dumped and subsidized exports to the United States that the Agreements require".

44. To find that an imminent, substantial increase in capacity indicated a likelihood of substantially increased imports, the Commission would have had to first find an imminent, substantial increase in capacity. But the Commission did not and could not on the basis of the evidence on the record find that "requisite" imminent, substantial increase in capacity. Indeed, the data on the record indicated either a slight decline in capacity over the 2002-2003 period or a slight increase of less than one percent annually.[34]

45. With respect to disposable capacity, the United States did not address whether the Canadian producers' disposable capacity indicated substantially increased exports. In fact, the evidence on the record indicated that the projections of Canadian producers were for only a slight increase in exports.

46. Therefore, the Commission could not rely on Articles 3.7(ii) and 15.7(iii) to support its finding of a likely substantial increase in imports.

47. The fact that an investigating authority cannot rely on Articles 3.7(ii) and 15.7(iii) is not, in itself, fatal to an investigating authority's threat of injury finding. In the present case, what is fatal to the Commission's threat of injury finding is that it is not supported by any of the factors enumerated in Articles 3.7 and 15.7 and the Commission's analysis of the other factors it cites in support of its finding was similarly flawed.

14. The Panel understands that Canada is not arguing that a combined analysis of injury caused by dumped and subsidized imports is *per se* inconsistent with the cited Agreements. As Canada is not challenging combined analysis *per se*, could Canada please explain in detail what

[34] First Written Submission of Canada, para. 103.

determination is confirmed by the considerable argument and evidence on this point that was presented to the Commission during its investigation and by the Commission's failed attempt to address this factor in its Final Determination.

52. The Commission's treatment of this factor is inconsistent with the *SCM Agreement* because the Commission failed to examine all pertinent facts related to this factor and to provide a reasoned and adequate explanation as to how those facts supported its determination. In particular, the Commission failed to address fully the nature and complexities of the data related to this factor and to respond to the interpretations of this evidence advanced by the Canadian parties. Since one interpretation, that the subsidies at issue had no trade effects, detracted from an affirmative threat of injury finding from subsidized imports, it was particularly important that the Commission adequately evaluate and examine this factor. It did not do so.

53. The Commission's limited discussion of the Nordhaus study did not satisfy these requirements because the Commission (a) mischaracterized the economic principles underlying the study, and (b) incorrectly stated that the record evidence it cited conflicted with Dr. Nordhaus' analysis when that evidence was either irrelevant or actually supported his analysis.

54. Each of the three statements that the Commission used to justify its assertion that "the economic theory presented by CLTA is not clearly applicable in this market" is not only conclusory and superficial but incorrect:

- The Commission's entire discussion is based on the premise that "Ricardian rent theory relies on the assumption of fixed supply." As explained in Exhibit CDA-25, the Nordhaus study did not assume a fixed supply of harvestable timber. Consistent with economic theory, the Nordhaus study recognized that stumpage charges outside the normal range may affect timber supply, and demonstrated that stumpage charges in the normal range do not affect such supply, as the Canadian parties expressly explained to the Commission.

- The Commission's proposition that "lumber supply is not necessarily fixed" was not disputed. That lumber supply varies is irrelevant to Dr. Nordhaus' study, which addressed whether timber supply was affected by Canadian stumpage charges. In any event, as explained in Exhibit CDA-25, neither of the two pieces of record evidence cited by the Commission contradicts Dr. Nordhaus' analysis of timber supply.

- The Commission stated that "the record also contains several other studies that have reached different conclusions regarding the effects of stumpage fees on output". As explained in Exhibit CDA-25, none of the four studies discussed in the cited page of Exhibit USA-5 undermines the analysis in the Nordhaus study that stumpage charges in the normal range do not affect the supply of logs or lumber.

55. Given the implications of the position that the subsidies did not have any trade effects for the Commission's threat of injur

To both parties

33. Could the parties please address the distinctions they see, if any, between "finding", "evaluation" and "consideration" in the context of analysis of factors in a determination under Article 3 of the AD Agreement and/or Article 15 of the SCM Agreement.

56. Canada's position is that there is a distinction between a "finding", on the one hand, and "evaluation" and "consideration", on the other. In the context of an investigation involving a determination of threat of injury pursuant to Article 3.7 of the *Anti-Dumping Agreement* and 15.7 of the *SCM Agreement*, an investigating authority is required to make a finding on whether "further [dumped or subsidized] exports are imminent and that, unless protective action is taken, material injury would occur".

57. As stated at paragraph 24 of Canada's First Oral Statement at the first substantive meeting of the Panel, Article 3.7 of the *Anti-Dumping Agreement* and 15.7 of the *SCM Agreement* provide that an investigating authority should "consider" certain factors. The term "consider" requires that it must be apparent in the relevant documents in the record that the investigating authority has given attention to and taken into account the factors required to be considered. This requires an examination of factors that goes beyond a mere recitation of factors in the abstract without putting the facts into context[36], but does not necessarily require an explicit "finding" or determination by the investigating authorities on each relevant factor. However, Articles 3.7 and 15.7 require that the "totality of the factors considered must lead to the conclusion that further [dumped or subsidized] exports are imminent and that, unless protective action is taken, material injury would occur".

58. It is also important to note that pursuant to the applicable standard of review under Article 11 of the *DSU* and Article 17.6(i) of the *Anti-Dumping Agreement*, it is the duty of the Panel to assess whether the investigating authority has evaluated all relevant factors, whether it has examined all the pertinent facts, and whether it provided an adequate explanation as to how those facts support its determination.[37] In effect, this standard defines when an investigating authority can be considered to have acted consistently with the *Anti-Dumping Agreement* and the *SCM Agreement* in the course of its "consideration" of the relevant factors under Articles 3.7 and 15.7. In this light, an investigating authority's "consideration" of relevant factors must include an examination or evaluation of such factors.

59. As discussed at paragraph 146 of Canada's First Written Submission, an "evaluation" has been interpreted to mean "a process of analysis and assessment requiring the exercise of judgement on the part of the investigating authority" and "not simply a matter of form". The investigating authority must "assess the role, relevance and relative weight of each factor in the particular investigation". Moreover, 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. Thus, an investigating authority's findings on whether "further [dumped or subsidized] exports are imminent and that, unless protective action is taken, material injury would occur" must be the result of a proper "consideration" and "evaluation" of relevant factors.

60. It is Canada's position that the Commission's examination of relevant factors under each of the relevant provision in Articles 3 and 15 and, consequently, its determination of threat of injury fall

further dumped or subsidized exports are imminent and that, unless protective action is taken, injury would occur.

34. The Panel notes that Article 3.7 of the AD Agreement and Article 15.7 of the SCM

case it is agreed that charges were positive – then the quantity of logs produced will be no greater, and their prices will be no lower, than they would be in a competitive market. In such cir

Questions posed by the United States to Canada

1. At paragraph 120 of its 4 September 2003, oral statement, Canada states that "the United States simply does not understand Canada's argument" regarding combined investigations. Canada then goes on to contend, at paragraph 122, that the United States failed to comply with what Canada refers to as "the specific requirements of the *Anti-Dumping Agreement* and the *SCM Agreement*, as well as Article VI of the GATT 1994." However, the alleged specific requirements that Canada lists, with the exception of the nature of the subsidies, are not distinct but rather are common to both covered Agreements. In light of this fact, the United States asks that Canada clarify its position on combined investigations.

68. Canada's response to this question is provided by Canada's Oral Statement and by our answer to Question #14 of the Panel.

2. At paragraph 25 of its 4 September 2003 oral statement, Canada refers to the discussion of the term "considered" in the *Thailand - H-Beams* panel report. Following the statement quoted by Canada, the panel in that report stated: "We therefore do not read the textual term 'consider' in Article 3.2 to require an explicit 'finding' or 'determination' by the investigating authorities . . ." (*Thailand - H-Beam*, Panel Report, para. 7.161) At the first substantive meeting of the Panel in the present dispute, Canada stated that it agreed with the interpretation of the panel in *Thailand-H-Beams* that the obligation to "consider" does not require an investigating authority to make an explicit "finding." Please confirm that this is Canada's position.

69. Yes. This is Canada's position. However, it must be apparent from the record that the investigating authority has given attention to and taken into account the factors to be considered. The investigating authority must go beyond simply reciting facts. It must put the factors into context. See paragraph 83 of Canada's First Written Submission and paragraphs 22-29 of Canada's First Oral Statement.

Indeed, Article 3.7 requires that projections be based on facts . Article 3.8 simply reinforces this point by describing the approach to be taken in reviewing the facts.

3. It is evident in the ITC's Report that the Commission based it threat determination on

could the United States address whether it is necessary to consider the likely impact of dumped and/or subsidized imports on the condition of the industry in the future, with reference to the Article 3.4/Article 15.4 factors, in the context of a determination of threat of material injury? If so, what would the United States envision argue such consideration must entail?

10. In making a threat of material injury determination, the investigating authority should consider the evidence regarding the factors listed in Article 3.7 of the Anti-Dumping Agreement and Article 15.7 of the SCM Agreement, as well as the present and past evidence regarding the factors listed in Articles 3.2 and 3.4 of the Anti-Dumping Agreement and Articles 15.2 and 15.4 of the SCM Agreement. Consideration of these factors 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.

11. Where the investigating authority has considered the Article 3.4 and Article 15.4 factors one time, it need not consider them a second time. Canada's contention that there is a requirement that the factors in Article 3.4 of Anti-Dumping Agreement and Article 15.4 of the SCM Agreement be considered a second time in the context of a threat analysis has no basis in the covered Agreements. Neither the Appellate Body nor any Panel has found such a requirement. Moreover, it is not clear what Canada contemplates would be involved in such a second analysis of the Article 3.4 and Article 15.4 factors that would not involve speculation and conjecture. Significantly, Canada has failed to explain why it considers a second analysis of these factors required under the covered Agreements, when Canada itself does not conduct such an additional analysis in its own trade remedy proceedings.[11] Canada's argument seems to be tied to its overarching failure to recognize that threat of injury generally involves a continuation of adverse conditions, and thus the threat and present material injury analyses necessarily are intertwined rather than entirely separate.

12. The Panel in Mexico-HFCS specifically recognized 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".[12] The Mexico-HFCS panel did not find that two separate analyses of Article 3.4 factors were required. It was concerned that those factors did not appear to have been considered at all.[13] Moreover, as discussed in the US first written submission, two very important

[11] *See, e.g., The Dumping of Leather Footwear with Metal Toe Caps, Originating in or Exported from the People's Republic of China, Excluding Waterproof Footwear Subject to the Finding Made*

increase. Canada acknowledges that imports at this level would continue and even increase[18], and that Canada is "a much smaller market with abundant timber resources".[19]

16. The Commission based its conclusion of likely substantial increases in subject imports on six subsidiary findings:[20] (1) Canadian producers' excess capacity and projected increases in capacity, capacity utilization, and production[21]; (2) the export orientation of Canadian producers to the US market[22]; (3) the increase in 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[23]; and (6) forecasts of strong and improving demand in the US market.[24]

17. The second part of this question suggests that there is an absolute amount or percentage change in import volumes that would necessarilchange in import voL or,

> assumptions relating to such events made by those authorities in the course of their analyses. In determining the existence of a *threat* of material injury, the **investigating authorities will necessarily have to make assumptions relating to the "occurrence of *future* events" since such future events "can never be definitively proven by facts**". Notwithstanding this intrinsic uncertainty, a "proper establishment" of facts in a determination of threat of material injury must be based on events that, although they have not yet occurred, must be "clearly foreseen and imminent", in accordance with Article 3.7 of the *Anti-Dumping Agreement*.[27]

In *Mexico - HFCS* and other disputes, the Appellate Body has recognized that a threat of injury determination does not require projecting by a certain amount levels of increases or absolute volume in order to make a finding of a likelihood of substantially increased imports.

Questions 20, 21, and 22:

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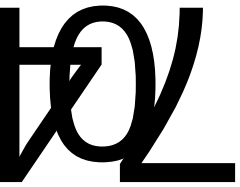
21. While the text provides a clear example in which the change in circumstances is a sequence of projected events, it sets no requirement to explicitly "identify" that change in circumstances, as Canada alleges.[29] Nor has any WTO or GATT dispute settlement panel interpreted the Agreements to require such explicit "identification." Nor does the negotiating history of the Agreements support such an interpretation.[30]

22. Consistent with all of its actual obligations under the covered Agreements, including Articles 3.7 and 15.7, the Commission provided a detailed explanation of how the totality of the evidence supported its conclusion that there will be in the near future substantially increased importation of softwood lumber from Canada at dumped and subsidized prices. In doing so, the ITC addressed the likely events and facts that were clearly foreseen for dumped and subsidized imports in the imminent future which would affect the US market and would cause material injury to the US industry to occur.

23. The United States has provided a detailed accounting of the facts and likely events demonstrating the progression or change in circumstances which would create a situation in which the dumped and subsidized imports would cause material injury in its second submission at paragraph 18. This progression of injurious effects was addressed by the Commission throughout its analysis.[31] Briefly, the facts demonstrating a progression of injurious effects justifying the Commission's determination that subject imports constitute a threat of material injury to the domestic industry in the United States include: the volume of subject imports already was significant; subject imports had increased during the period of investigation even with the restraining effect of the Softwood Lumber Agreement (SLA); imports had some adverse price effects on domestic prices; and the condition of the domestic industry had deteriorated, primarily as a result of substantial declines in prices, and thus was in a vulnerable state. These findings in the present injury analysis foreshadow injury and clearly support the existence of a threat of material injury. The ITC's affirmative threat determination is

[29] Canada repeatedly alleges that the ITC failed to comply with this nonexistent "obligation to identify." *See* Canada's Opening Statement at First Panel Meeting, paras. 35, 36, 41, and 45.

[30] The GATT Committee on Anti-Dumping Practices adopted "Recommendation concerning Determination of Threat of Material Injury" on 21 October 1985, which provided the same example of the



based on the following evidence: (1) six factors showing a likelihood of substantial increases in subject imports based on evidence regarding, inter alia, Canadian producers' excess production capacity and projected increases in capacity, capacity utilization and production, the export orientation of Canadian producers to the US market and subject import trends during periods when there were no import restraints, such as the SLA.; (2) likely price pressure resulting from the excess supply in the US market caused by these increases in imports, particularly with evidence that prices declined substantially at the end of the period of investigation; and 3) the consequent threat of material injury to a domestic industry, which already was in a vulnerable state, resulting from the likely increases in imports and price effects. For the foregoing reasons, the Commission determined that an industry in the United States was threatened with material injury by reason of imports of softwood lumber from Canada that are subsidized by the Government of Canada and sold in the United States at less than fair value.

24. Specifically, in response to Panel question 21, we note that the ITC considered the evidence regarding the six findings demonstrating the likelihood of substantially increased importation as elements of the progression of circumstances, i.e., the change in circumstances, which would create a situation in which the dumping and subsidies would cause injury. In response to Panel question 22, we note that the ITC considered that the likely substantial increases in subject imports would result in excess supply to the US market. Evidence regarding likely excess supply, which generally caused the substantial price declines in 2000 that led to the deterioration in the condition of the domestic industry, indicated that US producers had curbed their production, but that overproduction "remains a problem in Canada".[32] Therefore, the Commission reasonably found that the additional subject imports, which it concluded were likely, would further increase the excess supply in the market, putting further downward pressure on prices, and as such were elements of the progression, i.e., the change in circumstances, which would create a situation in which the dumped and subsidized imports would cause injury to the US industry.

Q23: Could the United States point to the specific passages in the USITC determination and report that, in its view, demonstrate the "consideration" of each of the relevant factors in its decision, as distinct from the recitation of facts?

25. The ITC's consideration of the relevant factors that it relied on in making its determinations are set forth on pages 21-27 and 31-44 of the ITC Report.[33] It is evident in the ITC Report that the Commission appropriately considered the relevant factors and did not provide a mere recitation of facts, as Canada has asserted. In addressing whether an investigating authority had considered factors, the Panel in Thailand-H-Beam explained that when investigating authorities put figures into context, they went beyond a mere recitation of trends in the abstract.[34] The following excerpt from the Views of the Commission regarding excess Canadian production capacity is illustrative of the ITC's consideration of relevant factors and demonstrates that the ITC did not merely recite facts. The ITC stated:

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[32] *See, e.g.,* ITC Report at 35, n. 217 *citing* Petitioners' Posthearing Brief at 2 and Appendix H, Exh. 2 at 11 (Bank of America, "Wood & Building Products Quarterly," at 11 (Nov. 2001)). (USA-5).

[33] Specifically, the ITC considered and addressed the volume of imports and likely substantial increases in imports on pages 31 and 40-43 of the ITC Report, price effects and likely price effects on pages 32-35 and 43-44, nature of the subsidies on page 39, other threat factors on page 44, the vulnerable condition of the domestic industry on pages 36-39, and possible other causal factors on pages 21-27.

[34] *Thailand - H-Beams*

Canadian producers' capacity increased from 32,100 mmbf in 1999 to 32,800 mmbf in 2001, following a steady increase from 1995 to 1999.[35] Canadian production capacity in 2001 was 10.4 per cent higher than in 1995. Canadian production declined from 29,041 mmbf in 1999 to 27,457 mmbf in 2001.[36] Nevertheless, Canadian production in 2001 was 5.2 per cent higher than that of 1995; Canadian capacity utilization peaked in 1999 at 90.5 per cent, and was 88.9 per cent in 2000 and decreased again to 83.7 per cent in 2001.[37] In the three years prior to the period of investigation, also while under the SLA, Canadian capacity utilization had been at a relatively stable level ranging from 87.3 per cent to 87.7 per cent. In 2001, excess

Q27. In paragraph 94 of its first written submission, Canada asserts that the USITC's

evidence provided by builders and purchasers at the Commission's hearing.[67] Thus, these regional preferences do not reflect a lack of substitutability but simply a predisposition toward locally-milled species. As the Commission has recognized in prior investigations, Canadian softwood lumber and the domestic like product generally are interchangeable, notwithstanding differences in species and preferences.[68]

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

42. It is evident that imported and domestic softwood lumber, notwithstanding differences in species, are interchangeable and compete with each other. Thus, the Commission's finding of at least moderate substitutability, in conjunction with the evidence that different species are used in the same applications and the evidence regarding the effect of prices of one species on those of another species, fully supports the Commission's conclusion of likely price effects.

Q29. Could the United States explain the basis for the USITC's conclusion regarding significant price effects in this case, in light of the absence of any conclusions regarding underselling?

43. Article 3.7(iii) of the Anti-Dumping Agreement and Article 15.7 (iv) of the SCM Agreement state that an investigating authority "should consider, inter alia . . . 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". Thus, the listed factors for a threat analysis in the covered Agreements do not include required consideration of underselling. Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement, on the other hand, state that an investigating authority "shall consider" whether there has been a significant price under cutting "or" significant price depression or suppression. Articles 3.2 and 15.2 use the disjunctive "or" rather than the conjunctive "and" in setting forth the applicable obligation.[69] This shows a recognition that price depression or suppression may occur whether or not there is price undercutting. Thus, the fact that the Commission determined, as agreed to by all parties to the proceeding[70], that making direct

[67] Hearing Transcript at 185-190 and 204-209 (USA-11 and USA-23) (Florida: floor joists - SYP, wall/framing - SPF, headers - SYP, trusses - SYP, Id. at 185-190, 204; Texas: floor joists - SYP, wall/framing - SYP, headers - SYP, trusses - SYP, Id. at 205; Indiana and West: floor joists - SPF, wall/framing - SPF, headers - SPF, trusses - SPF, Id. at 205-207; Massachusetts: floor joists - SPF, wall/framing - SPF, headers -

cross-species price comparisons in order to assess underselling was inappropriate, does not have a bearing on the ITC's conclusion regarding significant price effects at all and particularly in its threat analysis.[71],[72]

44. As discussed in the US first written submission, the fact that the differences in species of softwood lumber did not lend itself to direct price comparisons did not preclude a price trends analysis to consider whether there was a correlation between the prices that indicated price suppression or depression.[73] First, the Commission found that the evidence indicated that prices of a particular species will affect the prices of other species, particularly those that are used in the same or similar applications, as discussed in response to question 28.[74] Moreover, both the questionnaire and public data on the record permitted an analysis of price trends. In particular, the Commission considered pricing information for softwood lumber published in Random Lengths, which is the source the industry most cited throughout this investigation as a pricing guide.[75] The Commission reasonably found, based on the price trends analysis discussed in its opinion[76], that subject imports were likely to have a significant depressing effect on domestic prices.

Q30. At page 40 of the USITC determination (Exhibit USA-1), the USITC states "We find that subject imports are likely to increase substantially based on several factors: …". Could the United States clarify whether each of the factors listed in the remainder of that sentence was considered to support the conclusion set out, or whether the listed factors are those which were considered, and that some of them supported the finding of likely increased imports while others did not?

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comparisons are difficult to compile. See, e.g., Transcript at 93, 269-273 (USA-11); Dealers/Builders' Posthearing Brief at 12-14 (USA-10).

[71] ITC Report at 34-34. The Commission found that because of the nature of this market, direct price comparisons between domestic products and subject imports are highly problematic whether based on questionnaire or public data. While the Commission collected pricing data for six specific softwood lumber products from purchasers, the Commission placed little weight on this information because the reported quantities of softwood lumber involved in the delivered price comparisons are very limited. The Commission concluded that it could not draw any conclusions regarding underselling from the questionnaire data in these investigations.

While there are a number of different sources of public pricing information regarding softwood lumber products (including Random Lengths, Crow's, Madison's, and the Southern Pine Bulletin), these data series do not yield improved comparisons, despite their much broader coverage. Although prices of one species affect those of others, absolute price levels differ, making direct cross-species comparisons inappropriate for purposes of an underselling analysis. Thus, the Commission concluded that it could not determine, based on this record, whether there has been significant underselling by subject imports. ITC Report at V-3 - V-5.

[72] In conducting a price underselling analysis, the Commission makes direct comparisons of prices for a comparable product, i.e. , same model, same size and grade of a species of lumber, etc., and calculates a margin of underselling or overselling for the import prices relative to the domestic prices.

[73] *See* US First Written Submission, paras. 201-202 and 241. A price suppression or depression analysis considers trends for import and domestic prices to determine certain specific correlations between them. The pricing trend data is not necessarily limited to a size/grade or model. Using this trends analysis and other evidence, the Commission determines whether imports have prevented increases in prices for domestic products that otherwise would have occurred (suppression) or whether imports in the market have exerted downward pressure on domestic prices (depression).

[74] ITC Report at 26-27, 32-35, and 43.

[75] ITC Report at V-4-5. Random Lengths, Inc. collects weekly price data from suppliers and purchasers and calculates weighted-average prices based on such factors as the size of the transaction and the quality of the lumber. Random Lengths publishes these data in its weekly and annual publications. Id.

[76] ITC Report at 32-35 and 43.

45. The Commission found that subject imports are likely to increase substantially based on evidence regarding each of the six factors listed on page 40, and discussed in detail on pages 40-43, of the ITC Report. The ITC found that each of the six factors supported its conclusion.

Q31. Could the United States please indicate the facts that form the basis for the USITC's conclusion that there would be an imminent substantial increase in imports?

46. The United States refers the Panel to its response to question 19, the substance of which also responds to question 31.

Q32. The Panel understands that Canada is not arguing that a combined analysis of injury caused by dumped and subsidized imports is per se inconsistent with the cited Agreements. Could the United States comment on the view that, in the event the Panel finds a violation of any other provision of the relevant Agreements, the injury determination as a whole should be deemed inconsistent with both the AD and SCM Agreements?

47. The ITC's determinations are consistent with all US obligations under both covered Agreements. With the exception of consideration of the record evidence regarding the "nature of the subsidies" factor pursuant to Article 15.7(i) of the SCM Agreement, the ITC's analysis of injury by reason of dumped and subsidized imports involved factors, evidence, analysis, and findings common to both Agreements. Thus, if the Panel were to find a violation, it necessarily would involve a provision (with the one noted exception) common to both the Anti-Dumping Agreement and the SCM Agreement. Canada's attempts to raise the same claims it has made regarding specific provisions under Article 3 of the Anti-Dumping Agreement and Article 15 of the SCM Agreement as a separate alleged violation on the basis of a combined investigation or cross-cumulation violation should be rejected. As Canada concedes, none of its claims relate to cross-cumulation or combined investigations at all, but rather are attempts to establish duplicative violations based on the same claims. Its arguments under the heading of "Combined Investigations" are simply restatements of its arguments concerning particular provisions of the covered Agreements. The Panel should reject these combined investigation arguments for the same reasons it should reject the particular arguments, as discussed in this and other US submissions.

Q33. Could the parties please address the distinctions they see, if any, between "finding", "evaluation" and "consideration" in the context of analysis of factors in a determination under ant Agreements, the injury determinatio? Tw (a5 0 TD -0.0804 Tc 4.0861 Tw (d the parties 97n the vi01s

an authority's evaluation

57. Article 15.7(i) of the SCM Agreement states that an investigating authority should consider: "the nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom".

58. An interpretative question of this nature should be considered in the context of the facts of a particular case. The Commission considered the "nature of the subsidy and trade effect" factor in its threat of material injury analysis, as evident in the Views of the Commission. Specifically, the Commission examined the information presented to it by the US Department of Commerce regarding 11 programmes that Commerce found conferred countervailable subsidies to Canadian producers and exporters of softwood lumber.[86] While Commerce provided the Commission information regarding the nature of the subsidies, Commerce explicitly made no findings regarding the effects of the subsidies.[87]

59. In considering this information, the Commission recognized that none of the subsidies identified by Commerce are subsidies described in Article 3 or 6.1 of the SCM Agreement.[88] Thus, this case did not involve any export subsidies. However, when export subsidies are involved, the Commission has considered the relevant trade effects that may result from such subsidies.

60. In this case, parties to the underlying proceedings presented the Commission competing economic theories about the nature and effects of the countervailable subsidies. It is evident in the Views of the Commission that the ITC fully considered all of the evidence presented on this issue by the parties.[89] However, it declined to adopt the positions of any of the parties due to the conflicting evidence and economic theories specifically regarding the effects of stumpage fees on lumber output.[90]

61. The Commission consideration in this case of whether there were trade effects likely to arise from the subsidies is consistent with US obligations under Article 15.7(i) of the SCM Agreement.

Q36. Could the parties please discuss, in detail, their interpretation of the phrase "clearly foreseen and imminent" as used in Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement, with specific reference to what they consider to be the relevant time frames involved? Would the parties discuss, in addition, what precisely they consider should be found

materialize".[92] Threat of injury, thus, is an anticipation of material injury that must be on the verge of occurring, i.e., clearly foreseen and imminent, which will differ from case to case. The term "clearly foreseen" relates to the "likelihood" that the injury will materialize. While there is a recognition that "future events 'can never be definitively proven by facts,'" projections based on the past and present facts permit an assessment of whether there is a high degree of likelihood of injury in the very near future.[93],[94]

63. The relevant time frames for consideration of whether dumped and subsidized imports would cause injury, i.e., would be clearly foreseen and imminent, should be evaluated in light of the facts and circumstances of each industry, product, and marketplace. There is no bright-line test to determine when injury is "imminent", nor does the term necessarily mean "immediate". The "imminent" time frame applicable to a threat of injury analysis will vary from case-to-case. In this case, the Commission found it appropriate to the facts and circumstances of the softwood lumber industry and market to consider evidence for a one-to-two year period in the future in its threat of injury analysis, i.e., 2002 and 2003.

[92] *US-Lamb Meat*, AB Report, para. 125.

[93] *See Mexico-HFCS* , AB Report, paras. 83 and 85; *US-Lamb Meat*, AB Report, paras. 125 ("To us, the word 'clearly' relates also the *factual* demonstration of the existence of the 'threat.'") and 136.

[94] The GATT Committee on Anti-Dumping Practices adopted "Recommendation concerning Determination of Threat of Material Injury" on 21 October 1985, which provides some further clarification on the phrase "clearly foreseen and imminent:"