ANNEX B

PARTIES RESPONSES TO QUESTIONS
FROM THE SECOND MEETING

ANNEX B-1

CANADA'S RESPONSES TO QUESTIONS FROM THE PANEL - SECOND MEETING

(17 October 2003)

To Canada

Question 5. At para. 47 of its second oral statement, Canada refers to the "failure" of the USITC "to evaluate the effects of any factor other than subject imports, in its threat analysis – not to mention its failure to separate and distinguish such effects from those attributed to the subject imports". Is Canada suggesting that the asserted obligation to "separate and distinguish" the effects of other factors from those attributed to subject imports requires some particular kind of analysis that consists of separating and distinguishing? Or is Canada of the view that the "separate and distinguish" language describes, in other words, the "non-attribution" requirement set out in Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement that "the injuries caused by these other factors must not be attributed to the dumped imports"? If the former, could Canada please explain how it reconciles this view with Appellate Body statements that the AD Agreement does not prescribe the methodology by which an investigating authority must avoid attributing the injuries of other causal factors to dumped imports.

1. Canada is of the view that to comply with the non-attribution requirement of Article 3.5 of the *Anti-Dumping Agreement* and Article 15.5 of the *SCM Agreement*, an investigating authority must separate and distinguish the effects of other known causal factors from those of the dumped or subsidized imports. The "separate and distinguish" language used by the Appellate Body in such cases as *United States – Hot-Rolled Steel* describes, in other words, the "non-attribution" requirement set out in Articles 3.5 and 15.5.

2. For example, the Appellate Body stated in *United States – Hot-Rolled Steel*:

> 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.* Thus, in the absence of such separation and distinction of the different injurious effects, the investigating authorities would have no rational basis to conclude that the dumped imports are indeed causing the injury which, under the *Anti-Dumping Agreement*, justifies the imposition of anti-dumping duties.[1]

[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. 223 [emphasis added] ("US – Hot-Rolled Steel"). The Appellate Body re-iterated the above interpretation in European Communities – Anti-Dumping

3. The *Anti-Dumping Agreement* and the *SCM Agreement* do not prescribe any particular methodology for this non-attribution analysis. Nevertheless, as the Appellate Body has clarified, the requirement that an investigating authority examine any known factors other than subject imports and not attribute to the latter any injurious effects caused by the former, means that the authority must separate and distinguish the effects of other causal factors from the effects of subject imports. In other words, while the Agreements do not prescribe how to carry out the non-attribution requirement, they clearly impose an obligation to separate and distinguish the effects of all known causal factors from those attributed to subject imports.

4. In this dispute, the Commission failed to comply with the requirement to conduct a non-attribution analysis. In its threat analysis, the Commission did not identify, much less examine, *any* other known factor that could threaten injury to the domestic industry in addition to the subject imports. This failure is particularly striking given that in its present injury analysis, the Commission identified excess domestic supply as another known factor that contributed to injury during the period of investigation.[2] Having neglected to even identify any other causal factor in its threat analysis, the Commission also did not separate and distinguish the injurious effects of those other factors from the alleged injurious effects of the dumped and subsidized imports. Indeed, the Commission explicitly rejected the requirement to do so as having no basis in U.S. domestic case law.[3]

Question 6. With respect to the analysis of events in the future which the US argues underlies the USITC determination of threat of injury, Canada appears to argue that the US failed to adequately explain the reasoning underlying its conclusions. For instance, the United States argues that the statements concerning the restraining effects of the SLA support the conclusion that imports will increase in the future. It might be argued that from these statements, it can be understood that in the absence of restraining effects, *i.e.*, when the SLA is no longer in effect, imports will increase. Is Canada arguing that the failure to specify this latter aspect fatally undermines the USITC's analysis? Or would Canada agree that if the path of an investigating authority's reasoning is discernible, even if not clearly stated in its determination, a reviewing Panel may accept that reasoning as adequate?

5. The Panel is correct that Canada contends that the Commission did not provide a reasoned and adequate explanation of its affirmative threat of injury determination, including its finding that subject imports would increase substantially. As Canada has explained in its prior submissions, panels and the Appellate Body have made clear that an investigating authority must explain how the facts as a whole support its determination, addressing factors that detract from as well as support its determination and explaining why the factors considered were deemed relevant.[4] Therefore, the Commission's reasoning must be evident from its Final Determination and if the Panel is forced to speculate about the Commission's rationale, the Commission's explanation is not sufficient.[5]

Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil, Report of the Appellate Body, WT/DS219/AB/R, adopted 18 August 2003, para. 188.

[2] "The Commission had found in its present material injury analysis that excess domestic supply was an other known factor", Answers of the United States to the Panel's Questions in Connection with the First Substantive Meeting, para. 31 n.50.

[3] *Softwood Lumber from Canada*, Investigations Nos. 701-TA-414 and 731-TA-928 (Final), Publication 3509, May 2002, p. 31, n.195 ("Commission Report"). (Exhibit CDA-1)

[4] See Oral Statement of Canada at the Second Substantive Meeting of the Panel, paras. 8-10; First Written Submission of Canada, paras. 47-51; Oral Statement of Canada at the First Substantive Meeting, para. 16; Second Written Submission of Canada, paras. 25 and 45; Canada's Responses to the Questions From the Panel in Connection with the First Substantive Meeting, paras. 2, 18-19, 23 and 36.

[5] The concept that the "decisional path be reasonably discernible" is not found in WTO panel or Appellate Body jurisprudence. It is a concept introduced by the United States in discussing whether the investigating authority's consideration or evaluation of factors must be explicit or implicit. See First Written Submission of the United States, paras. 3, 86 and 114; Second Written Submission of the United States, para. 1;

6. With regard to the effects of the SLA, provided as an example by the Panel in its question, the key problem with the Commission's analysis is not that it omitted from its Final Determination an explicit statement that without the alleged restraining effect of the SLA, imports would increase in the

> profits of the domestic producers, etc, in such a manner as to constitute material injury.[8]

10. In this dispute, the Commission failed to conduct such an analysis and did not even attempt to make projections as to future changes in the relevant factors. Canada recognizes that a prediction of future events based on extrapolation of current data necessarily involves some uncertainty, but if a threat determination rests on conjecture or remote possibility, it does not comply with the requirements of Articles 3.7 and 15.7.[9]

11. In addition, as noted by Canada in its prior submissions, although the Commission did refer to trends in the past with respect to Articles 3.4/15.4 factors, the Commission did not attribute those trends to any material impact of subject imports, nor did it explain how subject imports would affect those trends and produce material injury in the imminent future. The Commission did not identify any clearly foreseen and imminent change in circumstances under which the subject imports would have an injurious impact on the domestic industry in the future.

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[8] *Mexico – Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States*, Report of the Panel, WT/DS132/R, adopted 24 February 2000, para. 7.132 ("*Mexico – HFCS*"). [emphasis added]

[9] In this regard, in interpreting the requirement that a threat determination under the *Agreement on Safeguards* be based upon facts and not on conjecture, the Appellate Body stated at paragraph 136 of its report in *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, Report of the Appellate Body, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001:

> . . . Article 4.1(b) requires that a "threat" determination be based on "facts" and not on "conjecture". As facts, by their very nature, pertain to the present and the past, the occurrence of future events can never be definitively proven by facts. There is, therefore, a tension between a future-oriented "threat" analysis, which, ultimately, calls for a degree of "conjecture" about the likelihood of a future event, and the need for a fact-based determination. *Unavoidably, this tension must be resolved through the use of facts from the present and the past to justify the conclusion about the future*, namely that serious injury is "clearly imminent". Thus, a fact-based evaluation, under Article 4.2(a) of the *Agreement on Safeguards*, must provide the basis for a projection that there is a high degree of likelihood of serious injury to the domestic industry in the very near future. [emphasis added]

See also: First Written Submission of Canada, paras. 73-75.

ANNEX B-2

UNITED STATES' RESPONSES TO QUESTIONS FROM THE PANEL - SECOND MEETING

(17 October 2003)

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

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

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

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[1] *See* US Second Written Submission, para. 18.

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

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

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

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

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

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

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

6. The Commission considered the evidence regarding price trends and found that prices declined "substantially through the third and fourth quarters of 2000 to their lowest point in the 1999-2001 period."[7] The Commission found that the substantial volume of subject imports had *some* effect on prices for the domestic like product during the period of investigation, albeit not significant effects. There was a particular fact that played a critical role in the Commission's conclusion of no significant *present* price effects: the excess supply in 2000 that resulted in price declines was due to

excess supply in 2000 from both Canadian exports and domestic product, and Canadian export market share had been relatively stable.

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

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

8. The Commission assessed the condition of the domestic industry and found that it "is vulnerable to injury in light of declines in its performance over the period of investigation, particularly its financial performance."[9] In brief, the record reflects that many performance indicators declined significantly from 1999 to 2000, and then declined slightly or stabilized from 2000 to 2001.[10] With respect to the domestic industry's financial performance in particular, the evidence also generally shows declines during the period of investigation, with a dramatic drop from 1999 to 2000, as prices declined.[11] The Commission found that "the deterioration in the condition of the domestic industry during the period of investigation is largely the result of substantial declines in price.[12]

9. In making its negative present material injury finding, the Commission summarized the impact of the subject imports on the domestic industry as follows: "In light of our finding that subject imports have not had a significant price effect, and the small increase in their market share, we conclude that subject imports did not have a significant impact on the domestic industry," *i.e.*, they had not caused material injury.[13]

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

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[8] ITC Report at 35.
[9] ITC Report at 37.
[10] *See* ITC Report at 37-38.
[11] *See* ITC Report at 38-39.
[12] ITC Report at 36.
[13] ITC Report at 36.
[14] ITC Report at 32 ("Imports of softwood lumber from Canada held a substantial share of the domestic market with fluctuations within a range of 2.7 percentage points over the last seven years, and subject imports' 2001 market share (34.3 per cent) was lower than that in 1995 prior to the SLA (35.7 per cent).").
[15] ITC Report at 32 and 41-42; *see also* ITC Report at Table IV-2.
[16] ITC Report at Table IV-2.

market share was significant. Rather it is an indicator of the SLA's restraining effect and supports an affirmative threat of injury finding.

11. Furthermore, there also was evidence at the end of the period of investigation which foreshadowed the existence of a threat of material injury. The ITC found that "[p]rices during the first quarter of 2001 rose somewhat or remained near their levels in the fourth quarter of 2000, then significantly increased in mid-2001 before declining again in the third and fourth quarters of 2001.[17] Prices in the third and fourth quarters of 2001 had declined to levels as low as 2000. Subject imports also increased in the third quarter until the preliminary duties were imposed in August 2001.[18] There also was evidence regarding excess supply which generally was considered the cause for the substantial price declines in 2000. This time, however, the evidence indicated that US producers had curbed their production, but that overproduction remained a problem in Canada. Therefore, the Commission reasonably found that the additional subject imports, which it concluded were likely, would further increase the excess supply in the market, putting further downward pressure on prices.[19] Such evidence supports the ITC's findings of the existence of a threat of material injury.

Question 3: The Panel understands the United States to be arguing that the situation of the US lumber market in the imminent future is expected to be much like the situation during the period of investigation – strong, and even improving demand, significant level of subject imports, and increases in those imports, continuing oversupply in the market, and consequent negative price effects. However, the Panel understands the United States to contend that, unlike during the period of investigation, domestic producers will not contribute to the oversupply in the imminent future, and therefore the negative price effects will be attributable to oversupply of Canadian lumber. Is the Panel's understanding of the theory of the United States correct? Could the United States please indicate where in the determination this theory for the future is set forth? Could the United States please indicate the evidence, other than or in addition to the Bank of America analyst's report quoted at footnote 217 of the USITC determination, that supports the view that unlike during the period of investigation, domestic producers will not contribute to the oversupply in the imminent future?

12. While the situation of the US lumber market in the imminent future is expected to have some similarities to the situation during the period of investigation, there are differences in addition to the oversupply issue referenced by the Panel. In particular, the restraining effect of the Softwood Lumber Agreement (SLA) would no longer be in place. As discussed above, the ITC found that the SLA, which expired, had kept market share relatively stable. While the ITC had found that the volume and market share of subject imports were already significant and had increased even with the restraining effect of the SLA in place, the Commission also found that subject imports had increased substantially during periods without import restraints. For example, during the April-August 2001 period, which was free from import restraints, subject imports had increased by 11.3 per cent compared to the same period in 2000.[20] Moreover, the increases in imports under the SLA occurred in spite of some of these imports being subject to $50 and $100 fees. The Commission recognized that the significant quantities of imports subject to $100 fees under the SLA indicated that "in the absence of the SLA they [Canadian producers] would have shipped more, given the near prohibitive level of the $100 fee."[21] The Commission discussed its analysis regarding these factors on pages 40-43 of the ITC Report.

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[17] ITC Report at 34.

[18] Official import statistics (USA-25).

[19] ITC Report at 43-44.

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

[21] ITC Report at 41.

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

14. In addition to the evidence cited in footnote 217 of the ITC Report[22], the Commission considered domestic supply on pages 24-25, 34-35, 37-38, and 43-44 of the ITC Report and Canadian supply on pages 40corstanding that the ITC found the evidenc the I 32 (, the Commiss2ion) Ij 6

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

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