

**UNITED STATES – INVESTIGATION OF THE INTERNATIONAL TRADE
COMMISSION IN SOFTWOOD LUMBER FROM CANADA
RECOURSE TO ARTICLE 21.5 OF THE DSU BY CANADA**

AB-2006-01

Report of the Appellate Body

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CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
<i>Argentina – Footwear (EC)</i>	Appellate Body Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515
<i>Argentina – Footwear (EC)</i>	Panel Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , WT/DS121/R, adopted 12 January 2000, as modified by Appellate Body Report, WT/DS121/AB/R, DSR 2000:II, 575
<i>EC – Asbestos</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243
<i>EC – Bed Linen (Article 21.5 – India)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, 965
<i>EC – Tube or Pipe Fittings</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, 2613
<i>Mexico – Corn Syrup (Article 21.5 – US)</i>	Appellate Body Report, <i>Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6675
<i>Thailand – H-Beams</i>	Appellate Body Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, 2701
<i>US – Cotton Yarn</i>	Appellate Body Report, <i>United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan</i> , WT/DS192/AB/R, adopted 5 November 2001, DSR 2001:XII, 6027
<i>US – Countervailing Duty Investigation on DRAMS</i>	Appellate Body Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea</i> , WT/DS296/AB/R, adopted 20 July 2005
<i>US – FSC (Article 21.5 – EC II)</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations" – Second Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/AB/RW2, adopted 14 March 2006
<i>US – Hot-Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697
<i>US – Lamb</i>	Appellate Body Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, 4051
<i>US – Lead and Bismuth II</i>	Appellate Body Report, <i>United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom</i> , WT/DS138/AB/R, adopted 7 June 2000, DSR 2000:V, 2595
<i>US – Section 211 Appropriations Act</i>	Appellate Body Report, <i>United States – Section 211 Omnibus Appropriations Act of 1998</i> , WT/DS176/AB/R, adopted 1 February 2002, DSR 2002:II, 589
<i>US – Shrimp (Article 21.5 – Malaysia)</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia</i> , WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6481

Short Title	Full Case Title and Citation
<i>US – Softwood Lumber IV (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU</i> , WT/DS257/AB/RW, adopted 20 December 2005
<i>US – Softwood Lumber VI</i>	Panel Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada</i> , WT/DS277/R, adopted 26 April 2004
<i>US – Softwood Lumber VI (Article 21.5 – Canada)</i>	Panel Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS277/RW, 15 November 2005
<i>US – Steel Safeguards</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, 3117
<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
<i>Anti-Dumping Agreement</i>	<i>Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994</i>
DSB	Dispute Settlement Body
DSU	<i>Understanding on Rules and Procedures Governing the Settlement of Disputes</i>
Original determination	USITC Report, Softwood Lumber from Canada, Investigations Nos. 701-TA-414 and 731-TA-928 (Final), USITC Pub. No. 3509 (May 2002) (Exhibit CDA-2 submitted by Canada to the Panel)
Original panel	Panel in the original <i>US – Softwood Lumber VI</i> proceedings
Original panel report	Panel Report, <i>US – Softwood Lumber VI</i>
Panel	Panel in these <i>US – Softwood Lumber VI (Article 21.5 – Canada)</i> proceedings
Panel Report	Panel Report, <i>US – Softwood Lumber VI (Article 21.5 – Canada)</i>
<i>SCM Agreement</i>	<i>Agreement on Subsidies and Countervailing Measures</i>
Section 129	Section 129 of the Uruguay Round Agreements Act, Public Law No. 103-465, § 129, 108 Stat. 4836, <i>United States Code</i> , Title 19, Section 3538 (2000) (Exhibit CDA-5 submitted by Canada to the Panel)
Section 129 Determination	Views of the Commission in <i>Softwood Lumber from Canada</i> , Investigations Nos. 701-TA-414 and 731-TA-928 (24 November 2004) (Exhibit CDA-1 submitted by Canada to the Panel; Exhibit US-1 submitted by the United States to the Panel)
SLA	<i>Softwood Lumber Agreement between the Government of Canada and the Government of the United States of America</i> , 29 May 1996, Can. T.S. 1996 No. 16 (entered into force 29 May 1996 with effect from 1 April 1996) (Exhibit CDA-16 submitted by Canada to the Panel)
USITC	United States International Trade Commission
<i>Working Procedures</i>	<i>Working Procedures for Appellate Review</i> , WT/AB/WP/5, 4 January 2005
WTO	World Trade Organization

WORLD TRADE ORGANIZATION
APPELLATE BODY

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

Recourse to Article 21.5 of the DSU by Canada

Canada, *Appellant*
United States, *Appellee*

China, *Third Participant*
European Communities, *Third Participant*

AB-2006-01

Present:

Baptista, Presiding Member
Abi-Saab, Member
Ganesan, Member

I. Introduction

1. Canada appeals certain issues of law and legal interpretations developed in the Panel Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada, Recourse to Article 21.5 of the DSU by Canada* (the "Panel Report").¹ The Panel was established to consider Canada's complaint regarding the consistency with the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "Anti-Dumping Agreement") and the *Agreement on Subsidies and Countervailing Measures* (the "SCM Agreement") of a measure taken by the United States to comply with the recommendations and rulings of the Dispute Settlement Body (the "DSB") in the *US – Softwood Lumber VI* proceedings.²

2. The original dispute related to the determination of the United States International Trade Commission (the "USITC"), on 16 May 2002, that the United States softwood lumber industry was threatened with material injury by reason of dumped and subsidized imports of softwood lumber from Canada (the "original determination").³ This original determination of a threat of material injury, along with separate determinations of dumping and subsidization by the United States Department of

¹WT/DS277/RW, 15 November 2005.

²The recommendations and rulings of the DSB resulted from the adoption on 26 April 2004, by the DSB, of the Original Panel Report, *US – Softwood Lumber VI*.

³USITC Report, *Softwood Lumber from Canada*, Investigations Nos. 701-TA-414 and 731-TA-928 (Final), USITC Pub. No. 3509 (May 2002) (Exhibit CDA-2 submitted by Canada to the Panel).

Commerce, served as the basis for the imposition of definitive anti-dumping and countervailing duties on imports of Canadian softwood lumber later that month.⁴

3. Canada alleged before the panel in *US – Softwood Lumber VI* (the "original panel") that several aspects of the USITC's investigation and determination of a threat of material injury were inconsistent with the *Anti-Dumping Agreement* and the *SCM Agreement*, in particular, with Articles 3.5 and 3.7 of the *Anti-Dumping Agreement* and Articles 15.5 and 15.7 of the *SCM Agreement*.⁵

4. The original panel concluded, *inter alia*, that:

... the USITC determination is not consistent with Article 3.7 the [*Anti-Dumping*] Agreement and Article 15.7 of the SCM Agreement in that the finding of a likely imminent substantial increase in imports is not one which could have been reached by an objective and unbiased investigating authority in light of the totality of the factors considered and the reasoning in the USITC determination [and]

... the USITC determination is not consistent with Article 3.5 of the [*Anti-Dumping*] Agreement and Article 15.5 of the SCM Agreement in that the causal analysis is based on a finding which is, itself, not consistent with Article 3.7 the [*Anti-Dumping*] Agreement and Article 15.7 of the SCM Agreement.⁶

5. The original panel report was not appealed and was adopted by the DSB on 26 April 2004.⁷ On 1 October 2004, Canada and the United States jointly informed the DSB that they had mutually agreed that the reasonable period of time to implement the recommendations and rulings of the DSB would be nine months, ending on 26 January 2005.⁸

⁴Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Softwood Lumber Products From Canada, *United States Federal Register*, Vol. 67, No. 99 (22 May 2002), pp. 36068-36070; Notice of Amended Final Affirmative Countervailing Duty Determination and Notice of Countervailing Duty Order: Certain Softwood Lumber Products From Canada, *United States Federal Register*, Vol. 67, No. 99 (22 May 2002), pp. 36070-36077.

⁵Panel Report, para. 2.4.

⁶Original Panel Report, paras. 8.1-8.2.

⁷WT/DS277/5.

⁸WT/DS277/7.

6. On 24 November 2004, the USITC published a new injury determination⁹ pursuant to Section 129 of the Uruguay Round Agreements Act¹⁰ (the "Section 129 Determination"). As part of this new proceeding, the USITC "reopened the record of the original investigation to gather additional information from public data sources and from questionnaires sent to [United States] and Canadian producers, held a public hearing, and gave parties opportunities to submit written comments."¹¹ The USITC concluded that "an industry in the United States is threatened with material injury by reason of imports of softwood lumber from Canada found to be subsidized"¹² and dumped in the United States.

7. On 25 January 2005, the United States notified the DSB that the United States' anti-dumping and countervailing duty orders on softwood lumber from Canada had been amended to reflect the new injury determination and that the DSB's recommendations and rulings deriving from the original panel report had thus been implemented.¹³

8. Canada considered that the United States had failed to bring its measures into conformity with the United States' obligations under the *Anti-Dumping Agreement* and the *SCM Agreement*. Canada therefore requested that the matter of compliance be referred to a panel pursuant to Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU").¹⁴ On 25 February 2005, the DSB referred the matter to the original panel.¹⁵ Before the Article 21.5 Panel (the "Panel"), Canada claimed that the United States had failed to comply with the recommendations and rulings of the DSB in the Section 129 Determination and, thereby, continued to act inconsistently with Articles 3.5 and 3.7 of the *Anti-Dumping Agreement*, and with Articles 15.5 and 15.7 of the *SCM Agreement*.

⁹Views of the Commission in Softwood Lumber from Canada, Investigations Nos. 701-TA-414 and 731-TA-928 (24 November 2004) (Exhibit CDA-1 submitted by Canada to the Panel).

¹⁰Public Law No. 103-465, § 129, 108 Stat. 4836, *United States Code*, Title 19, Section 3538 (2000) (Exhibit CDA-5 submitted by Canada to the Panel).

¹¹Panel Report, para. 2.9.

¹²Section 129 Determination, p. 2.

¹³WT/DSB/M/182, para. 26.

¹⁴WT/DS277/8.

¹⁵WT/DSB/M/184, para. 4.

9. The Panel Report was circulated to the Members of the World Trade Organization (the "WTO") on 15 November 2005. The Panel found that:

... the determination of the USITC in the section 129 proceeding investigation is not inconsistent with the asserted provisions of:

- Article 3.5 of the [*Anti-Dumping*] Agreement,
- Article 3.7 of the [*Anti-Dumping*] Agreement,
- Article 15.5 of the SCM Agreement, and
- Article 15.7 of the SCM Agreement.¹⁶

10. The Panel therefore considered that:

... the United States has implemented the decision of the [original panel], and the DSB, to bring its measure into conformity with its obligations under the [*Anti-Dumping*] and SCM Agreements.¹⁷

11. The Panel concluded:

Having found that the United States did not act inconsistently with its obligations under the asserted WTO Agreements, we consider that no recommendation under Article 19.1 of the DSU is necessary, and we make none.¹⁸

12. On 13 January 2006, Canada notified the DSB, pursuant to Article 16.4 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel and filed a Notice of Appeal¹⁹ pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*").²⁰ On 20 January 2006, Canada filed an appellant's submission.²¹ On 7 February 2006, the United States filed an appellee's submission.²² On the same day, the European Communities filed a third participant's submission²³, and China notified the Appellate Body Secretariat that it intended to appear at the oral hearing and make an oral statement.²⁴

¹⁶Panel Report, para. 8.1.

¹⁷*Ibid.*, para. 8.2.

¹⁸*Ibid.*, para. 8.3.

¹⁹WT/DS277/16 (attached as Annex I to this Report).

²⁰WT/AB/WP/5, 4 January 2005.

²¹Pursuant to Rule 21 of the *Working Procedures*.

²²Pursuant to Rule 22 of the *Working Procedures*.

²³Pursuant to Rule 24(1) of the *Working Procedures*.

²⁴Pursuant to Rule 24(2) of the *Working Procedures*.

13. On 18 January 2006, the Director of the Appellate Body Secretariat received a letter from the United States requesting to change the date scheduled for the oral hearing in this appeal —23 February 2006—on the grounds that "lead counsel for the United States [was] not available on that date, due to a long-established prior commitment." Neither Canada nor the third participants objected to the United States' request.²⁵ By letter dated 26 January 2006, the Division informed the participants and the third participants that it had decided to change the date of the oral hearing to 24 February 2006.

14. In its third participant's submission, the European Communities requested the Division hearing this appeal to allow the third participants additional time to make their presentations at the oral hearing. The European Communities based this request on "the particularly complex context of this dispute and the importance of factual issues"²⁶ and the need for the European Communities to have time to reflect on the United States' appellee's submission. The participants and third participants were given an opportunity to comment on this request²⁷ and were then informed, by letter dated 21 February 2006, that the Division had decided to allow 10 minutes to the third participants to deliver their oral presentations.

²⁵By letter dated 19 January 2006, the Appellate Body Division hearing this appeal referred to Rule 16(2) of the *Working Procedures* and invited the United States to provide further details in support of its request, in particular, the nature of the "exceptional circumstances", as well as the "manifest unfairness" that would ensue in the absence of a change to the date of the oral hearing. Canada and the third participants were also invited to submit comments on the United States' request. On 20 January 2006, the United States submitted additional reasons in support of its request. On 24 January 2006, Canada informed the Division that it preferred to have the oral hearing proceed on the originally scheduled date, although Canada also indicated that a delay of one day could "be accommodated". Neither China nor the European Communities submitted any comments on the United States' request.

²⁶European Communities' third participant's submission, para. 8.

²⁷By letter to the participants and third participants dated 14 February 2006, the Division indicated that it had preliminarily decided to allocate 10 minutes to each of the third participants to make its presentation at the oral hearing. The Division invited the European Communities, once it had reviewed the United States' submission, to inform the Division whether 10 minutes would be sufficient or, if not, how much extra time the European Communities was requesting. The Division also asked China, the other third participant in this appeal, whether it sought additional time for the presentation of its oral statement. Canada and the United States were invited to comment on the European Communities' request. On 20 February 2006, the European Communities responded by requesting 15 minutes for its oral presentation. Canada expressed no objection, with the understanding that any extension of time would not prejudice Canada's rights, including the time to make its oral presentation. The United States objected to the request, arguing that none of the arguments advanced by the European Communities justified giving third participants additional time for their oral presentations; the United States noted, in particular, that, under the currently applicable timetable for appeals, third participants, as a rule, file their submissions on the same day as the appellee(s), and, thus do not have time to reflect on the appellee's submission before filing their submission.

15. By letter dated 8 March 2006, Canada requested authorization from the Division to correct certain clerical errors in its appellant's submission, although the deadline for such a request had passed. On 9 March 2006, the Division invited the United States and the third participants to comment in writing on Canada's request.²⁸ No objections were received. By letter dated 17 March 2006, the Division granted the request because: the correct information was, in any event, set forth in one of the exhibits submitted by Canada to the Panel; the matter had been discussed at the oral hearing; and the United States did not object to the request.

16. The oral hearing in this appeal was held on 24 February 2006. The participants and third participants presented oral arguments and responded to questions posed by the Members of the Division hearing the appeal.

II. Arguments of the Participants and the Third Participants

A. Claims of Error by Canada – Appellant

1. Standard of Review

17. Canada asserts that the Panel failed to comply with its duties under Article 11 of the DSU to make an objective assessment of the matter before it in examining the USITC's Section 129 Determination. Canada, therefore, requests the Appellate Body to reverse the Panel's finding that the Section 129 Determination was consistent with the *Anti-Dumping Agreement* and the *SCM Agreement*.

(a) Objective Assessment of the Matter – Threat Factors

18. Canada submits that the Panel failed to interpret the legal provisions relevant to the finding of a threat of material injury, and failed to apply these provisions properly to the USITC's Section 129 Determination. According to Canada, the Panel failed to undertake an objective assessment of whether the USITC's Section 129 Determination was consistent with the legal requirements of Article 3.7 of the *Anti-Dumping Agreement* and Article 15.7 of the *SCM Agreement*. Rather than engage in an interpretation of the specific obligations imposed by these provisions and an examination of whether the USITC's conclusions conformed to them, the Panel erred "by reducing each issue to whether the USITC's conclusions were 'not unreasonable' or 'could not' have been [reached] by an

²⁸By letter dated 14 March 2006, the United States indicated that, although it would ordinarily have concerns about a participant's untimely request to modify its submission, in this case the United States did not object to Canada's request, given that the errors at issue were discussed at the oral hearing. The third participants did not submit any comments.

'objective and unbiased' investigating authority."²⁹ In so doing, the Panel failed to apply the law to the facts, and thus failed to examine whether the USITC's conclusions were in conformity with Article 3.7 and Article 15.7.

19. In Canada's view, the Panel's failure to interpret and apply Article 3.7 and Article 15.7 is also evidenced by its failure to recognize the "high standard"³⁰ that the *Anti-Dumping Agreement* and the *SCM Agreement* impose upon investigating authorities in making a threat determination. In this respect, Canada draws attention to two misconceptions in the Panel Report relating to the role of investigating authorities and panels in threat cases. The first misconception was in the Panel holding the investigating authority to a lower standard of care on the grounds that it made a determination of threat of injury rather than a determination of current material injury. This is contrary to the ordinary meaning of Article 3.7 of the *Anti-Dumping Agreement* and Article 15.7 of the *SCM Agreement*, as well as to the Appellate Body's finding in *Mexico – Corn Syrup (Article 21.5 – US)* that these provisions impose a "high standard" for a determination of threat of injury. The second misconception was when the Panel, in conducting its own review of the USITC's determination, adopted a more deferential standard on the grounds that the case involved a threat of injury determination. However, nothing in Article 11 of the DSU or in Appellate Body jurisprudence suggests that panels should apply a more deferential standard in threat cases. Canada submits that, rather than repeatedly and inappropriately deferring to the USITC's conclusions as "not unreasonable", the Panel should have evaluated whether those conclusions were based on facts and not merely on conjecture, whether they demonstrated a clearly foreseen and imminent change in circumstances that would cause material injury, and whether the totality of the factors relied upon by the USITC led to the conclusion that material injury would occur in the absence of protective measures.

20. Canada argues that the Panel's error is particularly evident with respect to Article 3.7(i) and (iii) of the *Anti-Dumping Agreement* and Article 15.7(ii) and (iv) of the *SCM Agreement*. As regards Articles 3.7(i) and 15.7(ii), Canada states that, even though the Panel acknowledged Canada's argument that these provisions required consideration of the rate of increase of dumped/subsidized imports on a year-to-year basis, the Panel "undertook no interpretation of its own, and instead found that '[t]he fact that the USITC concluded that the rate of increase was significant based on the overall rate of increase over the period of investigation rather than the year-on-year rate of increase is *not*

²⁹Canada's appellant's submission, para. 77.

³⁰*Ibid.*, para. 78 (referring to Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 100).

demonstrably unreasonable".³¹ As for Article 3.7(iii) of the *Anti-Dumping Agreement* and Article 15.7(iv) of the *SCM Agreement*, Canada argues that the Panel "completely ignored"³² Canada's legal argument that these provisions require a comparison between the price level or trends at which imports are entering and the price level or trends for the domestic product. Instead of examining whether the USITC's application of Articles 3.7(iii) and 15.7(iv) was consistent with a proper interpretation of these provisions, the Panel merely concluded that the USITC did not act "unreasonably" in reaching its conclusions.³³

(b) Objective Assessment of the Facts

21. Canada submits that the Panel failed to make an objective assessment of the facts, as required by Article 11 of the DSU, because it did not conduct "a critical and active analysis"³⁴ of the USITC's conclusions and explanations. Instead, the Panel simply "repeated over and over again its mantra that [the] USITC conclusions were 'not unreasonable'".³⁵

22. Canada asserts that, contrary to the Appellate Body's statement in *US – Lamb* as to what panels should not do, the Panel merely summarized the arguments advanced by the United States and Canada, and then concluded that the explanation offered by the USITC was "not unreasonable", without undertaking any "substantive review" or "critical examination" of the arguments and evidence submitted by both parties.³⁶ Canada argues that the Panel's application of a "not unreasonable" standard represents "an abdication of its review function".³⁷ It explains that the Panel treated as legally irrelevant the fact that Canada offered what the Panel acknowledged as "plausible alternative explanations" of the evidence, notwithstanding the Appellate Body's clear statement that it is a panel's obligation to assess the adequacy of the investigating authority's explanation in the light of plausible alternative explanations.³⁸ The Panel effectively, and erroneously, shifted the burden to Canada to demonstrate that the USITC "could not"³⁹ have reached a particular conclusion.

³¹Canada's appellant's submission, para. 93 (quoting Panel Report, para. 7.27). (emphasis added by Canada)

³²*Ibid.*, para. 84.

³³*Ibid.*, para. 90 (referring to Panel Report, para. 7.52).

³⁴*Ibid.*, para. 97.

³⁵*Ibid.*

³⁶*Ibid.*, paras. 98-103 (referring in footnotes to Appellate Body Report, *US – Lamb*, paras. 103, 106, and 147-148).

³⁷*Ibid.*, para. 104.

³⁸*Ibid.*, para. 105 (referring to Appellate Body Report, *US – Lamb*, para. 106; and Appellate Body Report, *US – Cotton Yarn*, para. 72).

³⁹Panel Report, para. 7.63. (original emphasis omitted)

23. Canada asserts that the Panel failed to make an objective assessment of the facts concerning two issues related to the USITC's causation analysis. The first was the USITC's failure to reconcile its finding of threat of injury with the fact that increasing imports were correlated with an improving, not declining, financial condition of the United States industry in the last 12 months of the period of investigation. According to Canada, if the most recent data show that a domestic industry is experiencing improving prices and profitability notwithstanding increasing imports, this would strongly contradict any conclusion that the subject imports threaten to cause material injury in the imminent future. In this case, the evidence that Canada identified to the Panel showed improving profitability and prices during the last 12 months of the period of investigation, despite the so-called "significant" rate of increase in imports following the expiration of the Canada-United States Softwood Lumber Agreement (the "SLA"). Yet, the Panel, according to Canada, failed to take account of the fact that the USITC provided no explanation in its Section 129 Determination as to how the improvements in profitability and prices during a period of increasing imports were consistent with its finding that likely increases in imports threatened to cause material injury in the imminent future, even though they had not caused such effects in the immediate past.

24. Secondly, Canada argues that the Panel failed to conduct an objective assessment of the USITC's conclusion that United States domestic overproduction would not be a cause of oversupply in the United States market in the imminent future, even though it had been a cause of oversupply in the recent past. Canada submits that the USITC's prediction about the United States industry's contribution to oversupply in the imminent future was based exclusively on the United States industry's actual historical conduct, which it contrasted with the Canadian industry's projected future conduct. However, because the recent historical data were essentially equivalent for the United States and Canadian industries, they provided no objective basis for concluding that "[United States] producers 'had brought their production into line with consumption' by the end of 2001 or 'restrained [their] overproduction' any more than Canadian producers had, or for predicting that [United States] overproduction would contribute any less to excess supply in the imminent future than it had in the recent past."⁴⁰ Canada asserts that the Panel "simply ignored"⁴¹ the fact that comparable historical data at the end of the investigation period showed that the Canadian industry had brought its production into line with consumption just as much as had the United States industry. In so doing, the Panel failed to analyze the "legally relevant question"⁴², namely, whether United States producers

⁴⁰Canada's appellant's submission, para. 134 (referring to Panel Report, para. 7.60; and Section 129 Determination, p. 69).

⁴¹*Ibid.*, para. 142.

⁴²*Ibid.*, para. 144.

would respond differently than Canadian producers to market conditions in the imminent future, despite having responded similarly in the recent past.

25. In addition, Canada argues that the Panel failed to objectively examine the USITC's conclusion that domestic supply and third-country imports were not "other known factors" causing injury to the United States domestic industry and that, therefore, it was unnecessary to conduct a non-attribution analysis of these factors. With regard to United States oversupply, Canada argues that comparable information for both the United States and Canadian industries indicated that the United States industry was no less likely than the Canadian industry to contribute to oversupply in the imminent future. The Panel thus erred in failing to conduct a critical and active assessment of the USITC's conclusion and analysis of the oversupply factor.

26. As for third-country imports, Canada emphasizes that the new evidence collected by the USITC in the Section 129 proceedings showed that the increase of third-country imports accelerated substantially in the first quarter of 2002. Canada identifies four alleged errors in the Panel's review of the USITC's approach to this issue. First, the Panel did not critically examine the USITC's reliance on the fact that the absolute or "baseline" volume and market share were much larger for subject imports than for third-country imports. Secondly, the Panel erroneously relied on the USITC's assertion that the volume of third-country imports was not likely to increase because these imports were not restrained during the period of investigation. Thirdly, the Panel did not critically examine the USITC's reliance on the higher average unit values of third-country imports as compared to subject imports. Fourthly, the Panel simply accepted the USITC's reliance on the fact that imports from any single third-country were small, without considering the relevant question of whether the cumulative effect of such imports from all third countries, taken together, posed a threat of injury to the United States industry.

27. Finally, Canada contends that the Panel erred by failing to address the issue of the cumulative impact of potential increases in cumulated third-country imports taken together with additional supply from the United States industry itself. In this case, the Panel was obliged to decide whether the non-attribution provisions of Article 3.5 of the *Anti-Dumping Agreement* and Article 15.5 of the *SCM Agreement* required the USITC to determine whether the cumulative effect of United States-produced lumber and third-country imports constituted an "other known causal factor" to which the USITC should attribute injury that it otherwise would mistakenly attribute to subject imports. For all of these reasons, Canada concludes that the Panel failed to conduct a detailed and searching analysis of the USITC's causation and non-attribution findings, and thus failed to make an objective assessment of the facts of the case.

(c) The Panel's Treatment of the Findings of the Original Panel

28. Canada submits that the Panel erroneously concluded that the findings in the original panel report were "irrelevant" to its review of the USITC's Section 129 Determination.⁴³ Canada asserts that the findings of the original panel, which were not appealed by the United States and were adopted by the DSB, "represent the final resolution of all claims in that dispute ... between the parties regarding the original determination of threat of material injury made by the USITC."⁴⁴ Canada argues that an examination of the findings of the original panel is particularly critical in cases such as this one, where the implementing measure is closely related to the original measure, and the claims made in the Article 21.5 proceedings closely resemble the claims made in the original panel proceedings.

29. With respect to the USITC's treatment of the export projections of Canadian producers, Canada argues that, even though the percentage of total production projected to be exported to the United States remained "well within the historical range"⁴⁵, the USITC nonetheless concluded that the projections were "inconsistent with other record evidence"⁴⁶ because they showed a smaller proportion of the projected production increases being exported to the United States than in the past. This conclusion had been rejected by the original panel. However, the Panel did not examine Canada's challenge to this aspect of the Section 129 Determination, and did not acknowledge the prior findings of the original panel on this issue. Instead, the Panel simply found that the USITC's explanation "provides reasoned support for the USITC's conclusion that there would be a substantial increase in imports in the near future."⁴⁷ Canada asserts that this constitutes a serious omission on the part of the Panel in the context of a review under Article 21.5 of the DSU, and a failure to conduct an objective assessment of the matter as provided for in Article 11.

30. Canada argues that the Panel furthermore failed to make findings consistent with the original panel report, when it considered the USITC's conclusion in the Section 129 Determination that import trends over the 1994–1996 period supported a finding that imports would increase substantially in the imminent future. According to Canada, notwithstanding the original panel's criticism of the USITC's attempt to rely on import trends from this much earlier period to draw inferences about likely future import trends, the USITC again relied on the increase in imports between 1994 and 1996 as "highly

⁴³Canada's appellant's submission, para. 63.

⁴⁴*Ibid.*, (referring to Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 93; Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 109; and Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, paras. 68–69).

⁴⁵*Ibid.*, para. 176 (quoting Original Panel Report, para. 7.91).

⁴⁶Section 129 Determination, p. 39.

⁴⁷Panel Report, para. 7.42.

probative"⁴⁸ evidence of how subject imports would enter the United States market in the imminent future. The Panel, however, did not take into account the USITC's failure to address the problems identified by the original panel. Canada asserts that the Panel was bound by the findings of the original panel to reject the USITC's reliance on 1994–1996 import trends.

(d) Whether the USITC Changed its Position as Compared to the Original Determination

31. Canada argues that the Panel failed to ensure that the USITC provided a reasoned and adequate explanation when, in two instances in the Section 129 Determination, the USITC simply changed the characterization of the evidence that had been before it in the original determination. First, Canada notes that in its original determination, the USITC concluded that the SLA appeared to have had "some"⁴⁹ restraining effect. In its Section 129 Determination, the USITC concluded that the SLA had a "significant"⁵⁰ restraining effect on the volume, market share, and price effects of subject imports. Canada argues that "some" and "significant" are not synonyms. The Panel affirmed the USITC's change of position on the effect of the SLA without conducting any analysis to determine whether this change in position was justified. Secondly, Canada notes that the original panel pointed out that the USITC's finding of "strong and improving"⁵¹ United States demand in the original determination did not support its conclusion that the United States industry was threatened with material injury. Canada points out that the USITC's response to the original panel's finding was to change its position and predict "relatively stable"⁵² United States demand, even though the record on this issue was the same in both the original proceedings and the Section 129 proceedings. The Panel failed to assess the USITC's revised conclusion in the light of its own original finding.

32. Canada argues that these errors, individually and as a whole, demonstrate a failure on the part of the Panel to fulfil its duties under Article 11 of the DSU.

⁴⁸Section 129 Determination, p. 28.

⁴⁹Original Determination, p. 41.

⁵⁰Section 129 Determination, p. 16.

⁵¹Original Panel Report, para. 7.95.

⁵²Canada's appellant's submission, para. 193 and footnote 210 thereto.

2. Threat of Injury

33. Canada argues that the Panel committed a legal error in finding that the USITC's threat analysis was consistent with Article 3.7 of the *Anti-Dumping Agreement* and Article 15.7 of the *SCM Agreement*. Canada challenges, in particular, the Panel's affirmation of the USITC's findings: (i) that there would be a likely substantial increase in import volumes; and (ii) that imports were entering at prices likely to have a significant depressing or suppressing effect on domestic prices.

34. First, Canada takes issue with the Panel's review of the USITC's finding concerning the likely increase in subject imports. Canada argues that the Panel failed to acknowledge its argument that the USITC should, under Articles 3.7(i) and 15.7(ii), have examined the rate of increase of dumped/subsidized imports on a year-to-year basis. In addition, Canada notes that two of the conclusions underlying the USITC's finding were its decision to reject Canadian producers' export projections—which the USITC acknowledged showed only a "slight increase" in exports to the United States in the imminent future—and its conclusion that import trends between 1994 and 1996, when Canadian imports were not restricted, meant that imports would increase substantially in 2002–2003 in the absence of protective measures. The USITC was not entitled to rely on these two conclusions because the original panel had found that these intermediate conclusions were not consistent with the United States' obligations under the covered agreements and did not support the USITC's subsequent conclusion of an imminent and substantial increase in imports. Neither the evidence nor the reasoning cited by the USITC in its Section 129 Determination for these two intermediate conclusions addressed the deficiencies identified by the original panel in respect of the original determination.

35. Secondly, Canada argues that Article 3.7(iii) of the *Anti-Dumping Agreement* and Article 15.7(iv) of the *SCM Agreement* require a comparison of prices of imported lumber with prices of domestically produced lumber. According to Canada, the prices at which imports are entering can threaten to cause imminent and significant price depression or price suppression, and increase demand for further imports, only if those prices are lower than prices for the comparable domestic product, or if the trends in those prices otherwise adversely affect prices for the comparable domestic product (for example, by falling faster, or rising slower, than domestic prices). Only this type of comparative analysis can support the ultimate conclusion that "further dumped [or subsidized] exports are imminent and that ... material injury would occur" in the absence of protective measures.

36. Canada asserts that no such price comparison was undertaken by the USITC, as is clear on the face of the Section 129 Determination. Instead, the USITC noted only that prices for both United States-produced and Canadian softwood lumber products followed the same general trends throughout the period of investigation. The USITC's failure to undertake a price comparison in the Section 129 Determination between imported and domestic prices means, according to Canada, that the Panel erred in sustaining the USITC's conclusion that "imports at the end of the period 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."⁵³

3. Causation and Non-attribution

37. Canada submits that the Panel erred in interpreting and applying Article 3.5 of the *Anti-Dumping Agreement* and Article 15.5 of the *SCM Agreement*.

38. Canada points out that the USITC's causation analysis relied on its conclusions concerning the likelihood of increased imports and their adverse price effects. Because these conclusions were, in Canada's view, inconsistent with Article 3.7 of the *Anti-Dumping Agreement* and Article 15.7 of the *SCM Agreement*, it must follow that the USITC's causation analysis also resulted in violations of Article 3.5 of the *Anti-Dumping Agreement* and Article 15.5 of the *SCM Agreement*. Canada argues that the Panel also erred when it affirmed the USITC's causation analysis despite the failure of the USITC to address the fact that, in the most recent 12 months, both prices and industry profitability improved and imports increased. Canada asserts that, in those circumstances, the USITC was obliged to provide a "very compelling" explanation as to why the requisite causal link between injury and the dumped/subsidized imports would exist in the imminent future.⁵⁴ Moreover, Canada asserts that the Panel erred in affirming the USITC's conclusion concerning the future contribution of the United States industry to oversupply, because that conclusion was based on "conjecture"⁵⁵: the data concerning the most recent period showed that the Canadian industry had curbed overproduction at least as much as had the United States industry, and the USITC cited no positive evidence that the United States industry's projected production and capacity would increase any less than would Canadian production and capacity. Therefore, Canada asserts, the Panel committed legal error by finding that the USITC determination was not inconsistent with Article 3.5 of the *Anti-Dumping Agreement* and Article 15.5 of the *SCM Agreement* due to the USITC's failure to demonstrate a causal relationship between the dumped or subsidized imports and the injury to the domestic industry.

⁵³Section 129 Determination, pp. 45-46.

⁵⁴Canada's appellant's submission, para. 236 (referring to Appellate Body Report, *Argentina – Footwear (EC)*, para. 144, in turn quoting Panel Report, *Argentina – Footwear (EC)*, para. 8.238).

⁵⁵*Ibid.*, para. 237.

39. Canada argues that the Panel also erred in affirming the USITC's findings with respect to "other known causal factors". Canada explains that the USITC justified its refusal to conduct a proper non-attribution analysis on the basis that the United States industry would stop contributing to oversupply of the United States market, and third-country imports are not an "other known causal factor", either individually, or taken together with United States-produced lumber. According to Canada, these premises are not justified. First, the USITC's explanation for its conclusion that the United States industry would no longer contribute to oversupply was "pure conjecture".⁵⁶ Secondly, the USITC's explanation for dismissing third-country imports as an "other" potential cause of injury was neither reasoned nor adequate. Thirdly, the USITC did not consider whether a non-attribution analysis was required of the cumulative impact of third-country imports and United States-produced lumber.

40. Canada asserts that, because the USITC failed to attribute properly injury caused by other known factors, the Appellate Body should reverse the Panel's finding that the USITC's determination with respect to non-attribution was consistent with Article 3.5 of the *Anti-Dumping Agreement* and Article 15.5 of the *SCM Agreement*.

4. Article 12.7 of the DSU

41. Canada claims that the Panel failed to set out a "basic rationale" for its findings as required under Article 12.7 of the DSU. Referring to the Appellate Body Report in *Mexico – Corn Syrup (Article 21.5 – US)*⁵⁷, Canada argues that the Panel offered no legal analysis or explanation about how it interpreted and applied the relevant legal provisions in Articles 3.5 and 3.7 of the *Anti-Dumping Agreement* and Articles 15.5 and 15.7 of the *SCM Agreement* in its review of the USITC's conclusions, or why the Panel's assessment of the facts led it to conclude that an "objective and unbiased" investigating authority could have reached those conclusions.

42. Canada argues that, if, like this Panel, all panels merely summarized the arguments of the disputing parties and then concluded that the investigating authority's conclusions were "not unreasonable", WTO Members would have no guidance as to the legal requirements of the covered agreements. This would defeat the purpose of the WTO dispute settlement system, as set forth in Article 3.2 of the DSU, to "provid[e] security and predictability to the multilateral trading system ... to clarify the existing provisions of [the covered] agreements". Canada adds that the Panel's failure to provide the basic rationale and legal explanations for its conclusions also obstructs the correct course of appellate review.

⁵⁶Canada's appellant's submission, para. 244.

⁵⁷Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 108.

5. Conclusion

43. Canada requests the Appellate Body to reverse the Panel's findings affirming the USITC's Section 129 Determination and to find, instead, that the USITC's determination was not consistent with the United States' obligations under Articles 3.5 and 3.7 of the *Anti-Dumping Agreement* and Articles 15.5 and 15.7 of the *SCM Agreement*.

B. *Arguments of the United States – Appellee*

1. Standard of Review

44. With respect to standard of review in general, the United States underlines the distinct roles of the USITC, the Panel in these Article 21.5 proceedings, and the Appellate Body, and contends that Canada's appeal on this issue fails to recognize these distinctions and mischaracterizes the role of the Panel. The United States also emphasizes that, notwithstanding Canada's focus on Article 11 of the DSU, the applicable standard of review is found in *both* Article 11 of the DSU and Article 17.6 of the *Anti-Dumping Agreement*, as the original panel properly recognized. Canada's appeal, however, seeks to downplay the importance of Article 17.6, as well as the point that "a panel [may not] substitute its judgment for that of the investigating authorities, even though the [p]anel might have arrived at a different determination were it considering the record evidence for itself."⁵⁸

(a) Objective Assessment of the Matter – Threat Factors

45. The United States argues that the Panel's assessment of the USITC's Section 129 Determination was entirely consistent with Article 11 of the DSU. Contrary to Canada's assertions, the Panel not only set forth the parties' arguments, but also addressed each of these arguments as part of its assessment of whether the Section 129 Determination was consistent with the covered agreements.

46. The United States observes that the role of a panel reviewing a determination by an investigating authority is distinct from the role of an investigating authority making a determination. The investigating authority is responsible for establishing the facts, evaluating the facts, and drawing conclusions in the light of its evaluation. In reviewing an investigating authority's determination, the role of a WTO panel is not to find the facts, weigh the evidence, or substitute its judgement for that of the investigation authority; such an approach would constitute a *de novo* review. Instead, the role of a WTO panel is to apply the applicable standard of review in assessing whether the investigating authority has established and evaluated the facts consistently with the obligations under the covered

⁵⁸Original Panel Report, para. 7.15.

agreements. The United States additionally notes that the role of the Appellate Body is also distinct from the role of a panel. According to the United States, the Appellate Body's role with respect to a panel is not to second-guess the panel's appreciation of the evidence, but, rather, to assess whether the panel has made an objective assessment of the matter before it.

47. Turning to Canada's allegation that the Panel incorrectly used a "not unreasonable" standard, the United States asserts that, by using the phrase, the Panel has not invented a "new" standard. The United States points out that the Panel referred to the Appellate Body's statement, in *US – Countervailing Duty Investigation on DRAMS*, that "a panel examining the evidentiary basis for a subsidy determination should, on the basis of the record evidence before the panel, inquire whether the evidence and explanation relied on by the investigating authority *reasonably* supports its conclusions."⁵⁹ Moreover, according to the United States, the Panel, in its application of Article 11 of the DSU, used the phrase "not unreasonable" as a shorthand means of expressing its conclusions regarding particular intermediate inferences that the USITC drew in the course of reaching its ultimate determination of threat of material injury.

48. The United States also disputes Canada's assertion that the Panel failed to interpret and apply the relevant provisions of the *Anti-Dumping Agreement* and the *SCM Agreement*. The United States notes that the key interpretive issues were resolved by the original panel. Therefore, the Panel properly observed that "there are no new issues of legal interpretation raised"⁶⁰ in the Article 21.5 proceedings.

49. The United States also points out that the Panel did not purport to apply a lower standard in reviewing the USITC's threat of injury determination. According to the United States, Canada mistakenly reads the Panel's recognition of the future-oriented nature of a threat determination as an expression of the view that a "lower standard of care" applies in cases involving threat of injury as compared with cases involving present injury. Furthermore, the Panel's discussion of the future-oriented nature of a threat determination was consistent with Appellate Body reports discussing the very same issue.⁶¹

⁵⁹United States' appellee's submission, para. 74 (quoting Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 188). (emphasis added by the United States)

⁶⁰Panel Report, para. 7.14.

⁶¹Referring to Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 85; Appellate Body Report, *US – Lamb*, para. 136; and Appellate Body Report, *US – Cotton Yarn*, footnote 50 to para. 77.

50. The United States asserts that, contrary to Canada's allegation, the Panel did interpret the threat of injury provisions in the *Anti-Dumping Agreement* and the *SCM Agreement*, and found that "[n]othing in Articles 3.7, 15.7, or any other provisions of the [*Anti-Dumping*] and *SCM Agreements*, establishes methodological requirements for the investigating authorities' consideration of the factors set out in those Articles, or sets out standards for determining the significance of the various factors."⁶² The Panel correctly concluded that Article 3.7(i) of the *Anti-Dumping Agreement* and Article 15.7(ii) of the *SCM Agreement* do not prescribe any particular methodology for the determination of the rate of increase of dumped/subsidized imports. Likewise, the Panel correctly concluded that Article 3.7(iii) of the *Anti-Dumping Agreement* and Article 15.7(iv) of the *SCM Agreement* do not prescribe any particular methodology for the determination of the price suppression or depression effects of subject imports.

51. Therefore, according to the United States, the Panel did not fail to make an objective assessment of the matter as required by Article 11 of the DSU.

(b) Objective Assessment of the Facts

52. The United States asserts that the Panel objectively assessed the facts. The United States contests Canada's allegations that the Panel "abdicated" its responsibility or failed to conduct a critical and searching analysis of the USITC's conclusions. Consistent with the approach set out by the Appellate Body in *US – Countervailing Duty Investigation on DRAMS*, the Panel reviewed the totality of the factors considered by the USITC as a whole, rather than piecemeal, and appropriately reviewed the USITC's determination on its own terms. Canada's arguments mistakenly assume that a critical review of an investigating authority's explanation requires the rejection of an explanation if the reviewer identifies a plausible alternative explanation. As the Appellate Body recognized in *US – Lamb*, in order to conclude that an explanation is "not reasoned", it is not sufficient that an alternative explanation is merely found to be "plausible". Rather, the explanation under review must not seem "adequate in the light of that alternative explanation".⁶³ Thus, the existence of alternative plausible explanations with respect to any given factor does not necessarily preclude a finding that the investigating authority's conclusions could have been reached by an objective and unbiased decision-maker.

53. In response to Canada's argument that the Panel failed to objectively assess the USITC's treatment of facts showing that increasing imports coincided with an improving condition of the United States industry at the end of the period of investigation, the United States observes that the

⁶²Panel Report, para. 7.28.

⁶³Appellate Body Report, *US – Lamb*, para. 106.

Panel recognized that the USITC explicitly discussed the relationship between movements in all factors for the most recent period and placed these movements in the context of the period of investigation as a whole. In contrast to Canada's suggestion that data for the most recent period should be evaluated on its own, the Panel correctly recognized that recent short-term data should be placed in the context of the entire period of investigation. The United States points out that the USITC found that the evidence demonstrated that the coexistence of substantial increases in subject imports, rising prices, and some improvement in financial performance for the most recent period resulted from temporary increases in consumption. The evidence of sharp declines in United States housing starts in March 2002 indicated that this increase in consumption was not likely to be sustained. Moreover, the USITC's specific analysis of each factor showed that subject imports increased at a substantially higher rate than apparent United States consumption, and that while increases in prices generated some improvement in the domestic industry's financial performance, prices in the first quarter of 2002 were at levels as low as they had been in 2000.

54. As regards domestic oversupply, the United States notes that the Panel recognized that, in the Section 129 Determination, the USITC relied on evidence regarding United States production and capacity to support its finding that United States producers had brought their production in line with consumption. The USITC also found, based on the evidence, that, although domestic production had come in line with consumption, it had not kept pace with the increases in consumption in the first quarter of 2002. Furthermore, according to the United States, the Panel understood that the availability of capacity in Canada, likely increases in production, and the likelihood that exports will be shipped predominantly to the United States market are factors that "do not affect the question whether excess supply from domestic sources potentially threatens the domestic industry."⁶⁴ At the same time, the Panel recognized that "those factors support the conclusion that imports from Canada are likely to increase".⁶⁵ Thus, in response to what Canada calls the "legally relevant question"⁶⁶, the USITC found, based on its evaluation of the evidence, that United States producers would respond differently than would Canadian producers to market conditions in the imminent future. The Panel found the determination of the USITC to be one that an objective and unbiased decision-maker could have made.

55. The United States submits, furthermore, that the Panel assessed whether the USITC evaluated evidence of third-country imports in an unbiased and objective manner, and whether it provided an adequate explanation as to how the evidence supported its findings. The United States asserts that the

⁶⁴Panel Report, para. 7.73 (quoted in United States' appellee's submission, para. 189).

⁶⁵*Ibid.* (quoted in United States' appellee's submission, para. 189).

⁶⁶Canada's appellant's submission, para. 144. See also *supra*, para. 24.

Panel did critically examine Canada's arguments, including the argument that the USITC should have based its analysis on incremental increases in third-country imports. The Panel considered that argument in the light of the fact that the USITC evaluated incremental increases in the context of the "baseline" volume of third-country imports, recognizing that third-country imports were non-subject imports, and that third-country imports had higher unit values than subject imports. The United States adds that there was no basis for the USITC to examine the collective effect of third-country imports, or to assess the collective effect of cumulated third-country imports and United States overproduction.

(c) The Panel's Treatment of the Findings of the Original Panel

56. The United States contends that Canada's arguments, with respect to the issues of export projections of Canadian producers and import trends during the 1994–1996 period, assume incorrectly that the original panel made findings that constrained what the Panel could find in the Article 21.5 proceedings. According to the United States, the original panel's statements regarding these issues pertained only to the sufficiency of the explanations provided by the USITC in its original determination. The Panel confirmed this reading of the original panel report, stating that "[the] original [panel's] conclusions concerning lack of evidence did not refer to whether evidence existed on a particular point, but rather whether the USITC's determination relied upon and explained relevant evidence in such a way as to lend reasoned support to the determination."⁶⁷ The United States adds that the USITC addressed the original panel's findings in the Section 129 Determination by providing explanations that had been absent in its original determination.

57. The United States argues that Canada also "overstates and mischaracterizes"⁶⁸ previous Appellate Body observations on the significance of original panel reports for the analysis to be undertaken by panels established under Article 21.5 of the DSU. The United States contends that previous Appellate Body reports do not support Canada's position on this issue, because they address circumstances readily distinguishable from those in this case.⁶⁹ The United States submits that the Panel correctly understood the relevance of the original panel report to the Article 21.5 proceedings and, in the light of the findings in that original panel report, the Panel focused on the explanations that the USITC had provided in the Section 129 Determination. Accordingly, the United States concludes that there is no merit in Canada's assertion that the discussion of these factual issues in the original panel report constituted a final resolution of these issues.

⁶⁷Panel Report, footnote 55 to para. 7.11.

⁶⁸United States' appellee's submission, para. 79.

⁶⁹The United States refers to Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 89; Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 78-79 and 109; Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 68.

58. As regards export projections, the United States notes that the original panel faulted the USITC, not for failing to provide an objective and unbiased rationale for its finding on this issue, but for providing no rationale at all. The United States submits that the USITC corrected this flaw in the Section 129 Determination, which contains detailed analyses and explanations of Canadian producers' capacity, sufficient excess capacity, and projected increases in production and capacity in 2002 and 2003, as well as the fact that Canadian exports that are tied to the United States market accounted for 60–65 per cent of Canadian production and shipments during the period of investigation.

59. The United States additionally notes that, in the original determination, the USITC did not discuss the increase in subject imports during the period 1994 to 1996 in the context of market conditions that existed at that time. The USITC corrected this in its Section 129 Determination. In particular, the USITC placed the increases in subject imports during the 1994–1996 period (before the entry into force of the SLA) in the context of import trends for United States demand and United States production.

(d) Whether the USITC Changed its Position as Compared to the Original Determination

60. The United States argues that there is no basis for Canada's contention that the Panel erred by not questioning the findings in the Section 129 Determination that Canada believes to be new or changed as compared with the original determination. According to the United States, the role of a panel pursuant to Article 21.5 of the DSU is not to assess the measure taken to comply against the original panel report but, rather, to assess it against the obligations under the covered agreements. Thus, the Panel was correct in observing that it had to review the Section 129 Determination "on its own term[s]" and that "[t]he fact that the USITC made somewhat different findings, or expressed different conclusions based on different or additional analysis and evidence than in the original determination is simply not dispositive [of] whether the section 129 determination is inconsistent with the United States obligations under the [*Anti-Dumping*] and SCM Agreements."⁷⁰

61. The United States argues, furthermore, that Canada's argument is based on the incorrect assumption that the USITC's findings in the Section 129 Determination concerning the restraining effects of the SLA were different from its findings in the original determination. The original panel found that "[t]he USITC determination simply does not address why the expiration of an agreement during the term of which exports nonetheless increased, would result in an imminent **substantial** increase in exports."⁷¹ The USITC corrected this in its Section 129 Determination by considering

⁷⁰Panel Report, para. 7.57. See also para. 7.12.

⁷¹Original Panel Report, para. 7.93. (original emphasis)

evidence demonstrating that the constraints on the volume of subject imports resulted in higher prices for such imports and higher costs for construction than in the absence of the SLA, and that while the SLA was in effect, imports did not keep pace with increases in demand. The evidence did not demonstrate that the SLA had merely resulted in a shift in imports. Reviewing the USITC's evaluation under the applicable standard, the Panel found that the USITC's explanation did indeed seem adequate. Therefore, the Panel properly assessed whether the USITC evaluated evidence of the restraining effect of the SLA in an unbiased and objective manner, and whether it provided an adequate explanation as to how the evidence supported its findings.

62. The United States submits that Canada's allegation concerning forecasts of United States demand is also misplaced. The original panel expressed concern about the absence of any finding that imports from Canada would increase more than demand, thereby accounting for an increased share of the United States market, and the absence of any discussion of Canadian market share. The USITC corrected this in the Section 129 Determination. The United States observes that the Panel recognized that, in the Section 129 Determination, "the USITC found that there was no basis in the record evidence to conclude that likely substantial increases in imports would be outpaced by increases in demand."⁷² Consequently, in the United States' view, the Panel properly assessed whether the USITC evaluated evidence of United States demand projections in an unbiased and objective manner, and whether it provided an adequate explanation as to how the evidence supported its findings.

2. Threat of Injury

63. The United States argues that the Panel properly found the USITC's determination of the existence of a threat of injury to be consistent with the relevant provisions of the covered agreements. The Panel correctly noted the five factors on which the USITC based its finding that imports were likely to increase substantially in the imminent future, and properly assessed Canada's challenges to those factors. Neither the *Anti-Dumping Agreement* nor the *SCM Agreement* prescribes any particular methodology that would require the USITC to evaluate rates of increase of imports on a year-to-year basis.

64. As for the Panel's review of the USITC's finding that imports were entering at prices likely to have significant depressing or suppressing effects on domestic prices, the United States contends that, contrary to Canada's allegation, the Panel properly interpreted Article 3.7(iii) of the *Anti-Dumping Agreement* and Article 15.7(iv) of the *SCM Agreement*. The Panel correctly concluded that these provisions do not prescribe any particular methodology for determining the price suppression or depression effect of imports. The United States explains that Article 3.7(iii) of the *Anti-Dumping*

⁷²Panel Report, para. 7.38.

Agreement and Article 15.7(iv) of the *SCM Agreement* do not specify the type of evidence or analysis necessary to support a finding with respect to this factor. For instance, they do not identify price underselling as a necessary consideration or finding in the context of a threat analysis. The United States points out that, in contrast, Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement* expressly require consideration of both price underselling (undercutting) and price depression or suppression in a present material injury analysis.

65. The United States further submits that Canada's argument "ignores the fact that, during the Section 129 proceeding, '[a]ll parties to the investigations agreed that making direct cross-species price comparisons in order to assess underselling was inappropriate.'"⁷³ The USITC found that, although the differences in tree species for much of the imported and domestic softwood lumber limit the meaningfulness of any direct price comparisons, the evidence indicated competition across species such that prices of one particular species will affect the prices of other species, particularly those that are used in the same or similar applications. The USITC also concluded that imported and domestically produced softwood lumber were interchangeable and substitutable. Furthermore, the United States explains that the USITC relied on published United States and Canadian lumber price series, evidence of substitutability of United States and Canadian lumber, and evidence of cross-species price effects, to determine that subject imports were entering at prices that were likely to have a significant depressing or suppressing effect on domestic prices. According to the United States, Canada has not shown that any of the alternative types of evidence that it suggested the USITC should have used would have undermined the USITC's finding on the likely price effects of imports.

3. Causation and Non-attribution

66. The United States argues that the Panel did not err in concluding that the USITC's Section 129 Determination is consistent with Article 3.5 of the *Anti-Dumping Agreement* and Article 15.5 of the *SCM Agreement*.

67. The United States observes that the USITC was justified, in its causation analysis, in relying on its findings of a likely increase in imports and price effects of the imports, because the findings were consistent with Article 3.7 of the *Anti-Dumping Agreement* and Article 15.7 of the *SCM Agreement*. In addition, the United States observes that, as the Panel recognized, the USITC explicitly discussed the relationship between movements in all factors—not only selected ones—for the most recent period and placed these recent movements in the context of the entire period of investigation. The United States also challenges Canada's reliance on data allegedly showing the improving financial performance of the United States industry at the end of the period of

⁷³United States' appellee's submission, para. 120 (quoting Section 129 Determination, p. 47).

investigation, pointing out that the data to which Canada refers⁷⁴ related to a subset of the industry which is substantially more profitable than the industry as a whole.

68. As regards Canada's arguments on non-attribution, the United States notes that the USITC found that none of the alleged "other factors" expressly referred to in the original panel report constituted "other known factors". To put it differently, the other known factors "had effectively been found *not* to exist".⁷⁵ Having made these findings, the USITC had no basis to undertake a further examination to ensure that injury caused by those factors was not attributed to subject imports. The United States argues that this approach is consistent with the approach the Appellate Body found, in *EC – Tube or Pipe Fittings*⁷⁶, to be permissible under the *Anti-Dumping Agreement*.

69. The United States submits that Canada has no basis for its contention that the Panel erred by failing to address whether the USITC should have evaluated the cumulative impact of third-country imports, and the collective impact of third-country imports and domestic supply. The United States argues, first, that the Appellate Body should reject these arguments, because they are based on Canada's erroneous assumption that these alleged "other factors" had been found to be "other known factors." Moreover, contrary to Canada's argument, the Appellate Body Reports in *US – Steel Safeguards*, *EC – Tube or Pipe Fittings*, and *US – Hot-Rolled Steel* do not support the proposition that a collective analysis of other known factors is required or even the norm.⁷⁷ Secondly, the United States submits that Canada's reliance on the cumulation provision in the *Anti-Dumping Agreement* and the *SCM Agreement*, as the basis for asserting that the USITC was required to consider third-country non-subject imports on a cumulative basis, is entirely unfounded because third-country imports are fairly traded and not subject to anti-dumping or countervailing duty investigations. Contrary to Canada's argument, the observation of the Appellate Body, in *EC – Tube or Pipe Fittings*, concerning cumulation of dumped imports "is not 'equally relevant to an analysis of [non-subject imports and] causation under Article 3.5 of the [Anti-Dumping] Agreement.'"⁷⁸

⁷⁴See Canada's appellant's submission, para. 116.

⁷⁵United States' appellee's submission, para. 137 (quoting Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 178). (original emphasis)

⁷⁶Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 178.

⁷⁷Appellate Body Report, *US – Steel Safeguards*, para. 490; Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 192; Appellate Body Report, *US – Hot-Rolled Steel*, para. 228.

⁷⁸United States' appellee's submission, para. 140 (quoting Canada's appellant's submission, footnote 166 to para. 158).

70. The United States adds that, even accepting, *arguendo*, Canada's premise that an examination of the cumulative effect of imports from all sources is required, Canada has failed to point to any evidence in the USITC record that would have supported a finding that the requisite conditions of competition existed with respect to third-country imports that would have justified their collective consideration. Canada's argument also fails to address the fact that imports from each third country would have been considered negligible within the meaning of Article 5.8 of the *Anti-Dumping Agreement* and Article 11.9 of the *SCM Agreement*.

4. Article 12.7 of the DSU

71. According to the United States, the Panel met the requirement of Article 12.7 of the DSU to set forth a "basic rationale". The Panel's basic rationale is plain from the analysis set forth in the Panel Report itself, from the Panel's incorporation, where appropriate, of other documents (including the original panel report), and from the Panel's explanation of the relevance of the Appellate Body Report in *US – Countervailing Duty Investigation on DRAMS* and other panel and Appellate Body reports to which it referred. The Panel did interpret and apply the relevant provisions of the covered agreements, and its report clearly shows that it made an objective assessment of the matter before it. As Canada's argument under Article 12.7 rests on the same flawed bases as its arguments under Article 11 of the DSU, the former must fail for the same reasons as the latter.

5. Conclusion

72. The United States requests the Appellate Body to reject Canada's claims of error in their entirety and uphold the Panel's findings and conclusions. The United States adds that, in the event that the Appellate Body were to find that the Panel had not conducted an objective assessment of the matter, it should not complete the analysis in this case because Canada has not provided any "road map" as to how this might be done, and because of the complexities of the facts and the number of different variables that would have to be considered in order to do so.⁷⁹

C. *Arguments of the Third Participants*

1. China

73. Pursuant to Rule 24(2) of the *Working Procedures*, China chose not to submit a third participant's submission. In its statement at the oral hearing, China addressed the issue of the proper standard of review that the Panel should have applied.

⁷⁹United States' response to questioning at the oral hearing.

2. European Communities

74. The European Communities considers these proceedings under Article 21.5 of the DSU to be "rather unusual", because the USITC's Section 129 Determination was made in 2004 regarding the existence of a threat of material injury dating back to 2002.⁸⁰ The European Communities is of the view that, while it may be possible to implement DSB rulings and recommendations relating to a trade defence measure by reviewing the original measure and correcting any defects, this possibility may not always be appropriate, especially in a case such as this one where the original determination related to a prediction.

75. The European Communities observes that the Panel seems to have ignored the findings of the original panel and looked at the case "with a fresh eye".⁸¹ The European Communities asserts that, although a "fresh eye" approach may have some validity in the case of a new measure, it may not be appropriate in a case involving a corrected determination. The European Communities explains that an Article 21.5 proceeding is not only about the consistency of a measure taken to comply with the covered agreements, but also about the existence of such a measure. Thus, if the recommendations and rulings of the DSB have not been complied with, a measure taken to comply does not "exist", at least in part.

76. As regards the standard of review, the European Communities emphasizes that the application of the standard of review in specific cases will vary, depending upon the requirements of the particular provisions and agreements at issue. In this case, the Panel appeared to have applied an extremely deferential "not unreasonable" or "not demonstrably unreasonable" standard of review.⁸² In this regard, the European Communities agrees with Canada that the Panel should not have only concluded that the USITC's conclusions were "not unreasonable", it should also have carried out a more in-depth evaluation as to whether those conclusions were actually based on facts and not on mere allegation or conjecture. According to the European Communities, Article 17.6(i) of the *Anti-Dumping Agreement* requires more than a finding of "not unreasonableness". In any event, the European Communities asserts that Article 17.6(i) does not apply to determinations made pursuant to the *SCM Agreement*. Given that the USITC made a single injury determination for the anti-dumping and countervailing duty investigations relating to Canadian softwood lumber, the stricter standard of review applies to that determination, namely, the standard set out in Article 11 of the DSU.⁸³

⁸⁰European Communities' third participant's submission, para. 10.

⁸¹*Ibid.*, para. 12.

⁸²*Ibid.*, para. 18.

⁸³European Communities' response to questioning at the oral hearing.

77. The European Communities agrees with Canada's assertion that the Panel's failure to interpret and apply Article 3.7 of the *Anti-Dumping Agreement* and Article 15.7 of the *SCM Agreement* "is also evident in its apparent misapprehension of the high standard ... impose[d] upon investigating authorities in making a threat determination."⁸⁴ Furthermore, the European Communities supports Canada's argument that a proper interpretation of Article 3.7(iii) of the *Anti-Dumping Agreement* and Article 15.7(iv) of the *SCM Agreement* requires a comparison between current import prices and prices for the domestic product. According to the European Communities, the examination of import price trends in isolation, without comparing them to domestic prices for like products, and without examining the effect that the former would have on the latter, would not be consistent with the correct interpretation of these provisions or with the high standard that investigating authorities need to maintain when considering a threat of material injury.

78. Finally, the European Communities agrees with Canada that, when there is "a lack of coincidence"⁸⁵ between increased imports and injury to domestic industry, an investigating authority is required to provide a compelling explanation of the existence of a causal link between dumped/subsidized imports and a threat of material injury. The European Communities adds that this also is an essential factor in the interpretation of Article 3.5 of the *Anti-Dumping Agreement* and Article 15.5 of the *SCM Agreement*.

III. Issues Raised in This Appeal

79. The following issues are raised in this appeal:

- (a) whether the Panel failed to make an objective assessment of the matter, including an objective assessment of the facts, because it articulated or applied an improper standard to review the Section 129 Determination, and, thereby, acted inconsistently with Article 11 of the DSU;
- (b) if the Panel is found to have acted inconsistently with Article 11 of the DSU, whether:
 - (i) the finding of threat of injury in the Section 129 Determination is consistent with the United States' obligations under Article 3.7 of the *Anti-Dumping Agreement* and Article 15.7 of the *SCM Agreement*; and/or,

⁸⁴Canada's appellant's submission, para. 78 (quoted in European Communities' third participant's submission, para. 22).

⁸⁵European Communities' third participant's submission, para. 25.

- (ii) the causation and non-attribution analyses in the Section 129 Determination are consistent with the United States' obligations under Article 3.5 of the *Anti-Dumping Agreement* and Article 15.5 of the *SCM Agreement*;
- (c) if the Panel is found to have acted consistently with Article 11 of the DSU, whether the Panel erred in concluding that:
 - (i) the finding of threat of injury in the Section 129 Determination is consistent with the United States' obligations under Article 3.7 of the *Anti-Dumping Agreement* and Article 15.7 of the *SCM Agreement*; and/or,
 - (ii) the causation and non-attribution analyses in the Section 129 Determination are consistent with the United States' obligations under Article 3.5 of the *Anti-Dumping Agreement* and Article 15.5 of the *SCM Agreement*; and
- (d) whether the Panel failed to comply with its duties under Article 12.7 of the DSU because it failed to set out the applicability of relevant provisions and to provide a "basic rationale" for its findings.

IV. Background and Procedural History

80. In the original *US – Softwood Lumber VI* proceedings, Canada challenged the determination of the United States International Trade Commission (the "USITC"), on 16 May 2002, that the United States softwood lumber industry was threatened with material injury by reason of dumped and subsidized imports of softwood lumber from Canada (the "original determination").⁸⁶ Canada alleged that this determination was inconsistent with the *Anti-Dumping Agreement* and the *SCM Agreement*, in particular, with Articles 3.5 and 3.7 of the *Anti-Dumping Agreement* and Articles 15.5 and 15.7 of the *SCM Agreement*.⁸⁷

81. The panel in *US – Softwood Lumber VI* (the "original panel") found the original determination to be inconsistent with Article 3.7 of the *Anti-Dumping Agreement* and Article 15.7 of the *SCM Agreement* because "the finding of a likely imminent substantial increase in imports is not one which could have been reached by an objective and unbiased investigating authority in light of the totality of the factors considered and the reasoning in the USITC determination."⁸⁸ In consequence, the original panel also found that the USITC's causal analysis, which rested upon the finding relating to the

⁸⁶USITC Report, *Softwood Lumber from Canada*, Investigations Nos. 701-TA-414 and 731-TA-928 (Final), USITC Pub. No. 3509 (May 2002) (Exhibit CDA-2 submitted by Canada to the Panel).

⁸⁷Panel Report, para. 2.4.

⁸⁸Original Panel Report, para. 8.1(a).

likelihood of an imminent substantial increase in imports, was inconsistent with Article 3.5 of the *Anti-Dumping Agreement* and Article 15.5 of the *SCM Agreement*.⁸⁹ Although this finding was sufficient to rule on Canada's claims relating to causation, the original panel nevertheless proceeded to examine Canada's allegations that the USITC had failed in its causation analysis to comply with applicable obligations governing non-attribution.⁹⁰ The original panel expressed "serious concerns"⁹¹ with this part of the USITC's analysis, and stated that it "would [have] conclude[d] that the USITC determination is not consistent with the obligation in Article 3.5 of the [*Anti-Dumping*] Agreement and Article 15.5 of the SCM Agreement that 'injuries caused by these other factors must not be attributed' to the subject imports."⁹²

82. Following adoption by the DSB of the original panel report on 26 April 2004⁹³, the United States Trade Representative, on 27 July 2004, requested the USITC, pursuant to Section 129 of the Uruguay Round Agreements Act⁹⁴, to issue a new injury determination⁹⁵ "that would render the [USITC's] action in connection with [the USITC's original affirmative threat of material injury determination] not inconsistent with the findings of the [original] panel".⁹⁶ In the proceedings that it undertook pursuant to this request, the USITC "reopened the record of the original investigation to gather additional information from public data sources and from questionnaires sent to [United States] and Canadian producers, held a public hearing, and gave parties opportunities to submit written comments."⁹⁷ The USITC sought to address "only the issues related to the [original panel's] findings ... and did not address issues that were not in dispute in the original [p]anel proceeding or which the [original panel] had found not inconsistent with the United States' obligations under the WTO

⁸⁹Original Panel Report, para. 7.122.

⁹⁰The original panel did so in order to assist the Appellate Body in completing the analysis in the event that the original panel's finding regarding the USITC's original determination of threat of injury were to be appealed and reversed. (*Ibid.*, para. 7.132)

⁹¹*Ibid.*, para. 7.132. The original panel noted that the USITC did not refer "at all" to imports from third countries, despite the increase of imports from these countries and the fact that the issue was raised during the investigation. (para. 7.134) The original panel also criticized the absence of a "discussion of the relationship between predicted increases in imports and the predicted strong and increasing demand for lumber in the [United States] market". (para. 7.134) It furthermore described the USITC's failure to discuss the likely future effects of domestic lumber production as a "glaring omission". (para. 7.135) The original panel suggested, in this regard, that there was a lack of evidence to support the USITC's "conclusion that there would be no [United States] oversupply affecting lumber prices in the future", as well as a failure to link that conclusion "to the USITC's analysis of causation of material injury in the near future". (para. 7.135)

⁹²*Ibid.*, para. 7.137.

⁹³WT/DS277/5.

⁹⁴*Supra*, footnote 10.

⁹⁵*Supra*, footnote 9.

⁹⁶Section 129 Determination, p. 1.

⁹⁷Panel Report, para. 2.9. See also Section 129 Determination, p. 4.

Agreements."⁹⁸ The USITC stated its understanding that the original panel had based its findings of inconsistency on "insufficient explanation" in the original determination and, therefore, the USITC understood that it was "to provide more explanation and reasoning for its decision".⁹⁹

83. On 24 November 2004, the USITC issued its views in the Section 129 Determination. The USITC determined, on the basis of the record from the original investigation, the original panel report, additional information collected in the Section 129 proceedings, and comments received during those proceedings, that an industry in the United States was threatened with material injury by reason of imports of softwood lumber from Canada found to be subsidized and dumped in the United States.¹⁰⁰

84. The principal elements of the Section 129 Determination were summarized by the Panel in the following manner.

(a) With respect to future imports of Canadian softwood lumber, the USITC found:

... based on a significant rate of increase in imports from a significant baseline volume level, and taking into account increases in imports during periods of no import restraints, that there was a likelihood of substantially increased imports, and concluded that dumped and subsidized imports would increase in the imminent future. Looking at current import trends, the restraining effects of the [United States]-Canada Softwood Lumber Agreement (SLA), excess Canadian capacity and projected increases in capacity, capacity utilization and production, and demand projections, the USITC concluded that imports would increase at a substantial rate in the imminent future beyond historical levels.¹⁰¹

(b) With respect to price effects, the USITC:

... concluded that imports were entering the United States at prices that were likely to have a significant depressing or suppressing effect on domestic prices and likely to increase demand for further imports, and that imports were therefore likely to adversely impact the [United States] lumber industry in the imminent future.¹⁰²

⁹⁸Panel Report, para. 2.9. See also Section 129 Determination, p. 4.

⁹⁹Section 129 Determination, pp. 5-6.

¹⁰⁰Panel Report, para. 2.8. See also Section 129 Determination, p. 6. One USITC Commissioner dissented and found that the domestic industry producing softwood lumber was not threatened with material injury. (Panel Report, footnote 54 to para. 7.10. See also Section 129 Determination, pp. 89-101)

¹⁰¹Panel Report, para. 7.10.

¹⁰²*Ibid.*

- (c) In its analysis of other factors potentially threatening injury, the USITC:

... concluded that excess supply from the domestic industry, third country imports, importation relative to demand, the integration of the North American softwood lumber industry, substitute products, and domestic production constraints, were not other factors potentially causing injury to the domestic industry, and therefore considered that there was no basis to examine whether any injury could be attributed to them.¹⁰³ (footnote omitted)

85. The Panel found that the Section 129 Determination was not inconsistent with Articles 3.5 and 3.7 of the *Anti-Dumping Agreement* or with Articles 15.5 and 15.7 of the *SCM Agreement*¹⁰⁴, and, therefore, that "the United States has implemented the decision of the [original panel], and the DSB, to bring its measure into conformity with its obligations under the [*Anti-Dumping*] and *SCM Agreements*."¹⁰⁵

86. The United States maintains before us, as it did before the Panel, that, in the Section 129 Determination, the USITC addressed all of the concerns expressed by the original panel¹⁰⁶ and

¹⁰³Panel Report, para. 7.10.

¹⁰⁴*Ibid.*, para. 8.1.

¹⁰⁵*Ibid.*, para. 8.2.

¹⁰⁶The original panel identified problems with each of the six elements relied upon by the USITC in reaching its finding of a substantial imminent increase in imports.

- (i) As regards the increase in the volume of Canadian softwood lumber imports over the period of investigation, the original panel determined that the USITC did not rely on a significant rate of increase during that period. (Original Panel Report, para. 7.90)
- (ii) As regards the Canadian producers' alleged excess capacity and projected increases in capacity, capacity utilization and production, the original panel found that the evidence before the USITC did not support a conclusion that there would be a substantial increase in capacity (para. 7.90), or that excess capacity indicated a likelihood of substantially increased exports. (para. 7.91)
- (iii) With respect to the alleged "export orientation" of Canadian producers—that is, the USITC's reliance on the historical pattern of exports from Canada to the United States—the original panel stated that the USITC determination did not address how the projected increases in exports to the United States, which were in line with historical patterns, supported the finding that imports would increase substantially. (para. 7.92)
- (iv) Regarding the effects of the expiration of the SLA, the original panel found that the USITC had not addressed why the expiration of that agreement would result in an imminent substantial increase in exports when exports had, in any event, increased during the term of the SLA. (para. 7.93)
- (v) Regarding the USITC's treatment of import trends during periods when trade restrictions were not in effect, the original panel noted that the USITC had not analyzed market conditions during the period before the imposition of the SLA, and the period immediately after the expiration of the SLA, in such a way as to support the conclusion that imports would increase substantially. (para. 7.94)
- (vi) The original panel found that the USITC's "forecast of strong and improving demand" did not support a finding that imports would increase substantially, particularly in the absence of any finding that imports from Canada would increase by more than demand. (para 7.95)

properly reached a determination, supported by the evidence on record, that imports from Canada would increase at a substantial rate in the imminent future.¹⁰⁷ The United States submits that the USITC evaluated the significance of the volume of subject imports and increases in imports in context, which included taking into account the significant restraining effect of the Canada-United States Softwood Lumber Agreement (the "SLA")¹⁰⁸ and the impact that the expiration of that agreement would have on the market for softwood lumber. In addition, the USITC analyzed capacity and found that Canadian producers had sufficient excess capacity, and had projected substantial increases in capacity and production in 2002 and 2003, to substantially increase exports to the United States.¹⁰⁹ The USITC analyzed the import trends before and during the period of investigation, specifically in the context of the prevailing market conditions.¹¹⁰ The United States further points out that, in the Section 129 Determination, the USITC found that there was no evidentiary basis to conclude that likely substantial increases in subject imports would be outpaced by increases in United States demand.¹¹¹

87. As regards price effects, the United States observes that the USITC found that the substantial and increasing volume of subject imports at significantly declining prices during the period of investigation adversely affected prices for the domestic product.¹¹² In addition, the United States notes that dumped/subsidized imports of softwood lumber from Canada were increasing substantially after expiration of the SLA and at the end of the period examined, and that imports were entering at prices at their lowest levels during the period of investigation.¹¹³ The USITC found that the declines in the domestic industry's performance made it vulnerable to future injury, and that this was the case notwithstanding certain improvements in the industry's financial performance in the first quarter of 2002. The USITC found that data for a single quarter were not necessarily an accurate indicator of industry performance, and that the improvements in the industry's performance were attributable to temporary increases in prices that were not likely to be sustained.¹¹⁴

¹⁰⁷United States' appellee's submission, para. 37.

¹⁰⁸*Softwood Lumber Agreement between the Government of Canada and the Government of the United States of America*, 29 May 1996, Can. T.S. 1996 No. 16 (entered into force 29 May 1996 with effect from 1 April 1996). (Exhibit CDA-16 submitted by Canada to the Panel) Pursuant to the SLA, which expired on 31 March 2001, the United States undertook not to take action under its trade remedy laws against imports of Canadian softwood lumber, and Canada agreed to require export permits for exports of softwood lumber to the United States, and to collect fees for export quantities above specified volume thresholds.

¹⁰⁹United States' appellee's submission, para. 34 (referring to Section 129 Determination, pp. 31-40).

¹¹⁰*Ibid.*, para. 27 (referring to Section 129 Determination, pp. 20-31).

¹¹¹*Ibid.*, para. 32 (referring to Section 129 Determination, pp. 17 and 75-80).

¹¹²*Ibid.*, para. 38 (referring to Section 129 Determination, pp. 46 and 53-54).

¹¹³*Ibid.*, para. 39.

¹¹⁴*Ibid.*, paras. 39 and 40.

88. With respect to causation, the United States explains that the original panel report expressed concern with what the original panel saw as an inadequate treatment by the USITC of other factors that might be potentially causing injury to the domestic industry.¹¹⁵ According to the United States, in the Section 129 Determination, the USITC integrated its causation discussion into its analysis of the threat factors and, particularly in its analysis of the likely volume and likely price effects of subject imports, demonstrated a causal relationship between the likely substantial increases in subject imports and the likely price effects, and their consequent threat in the imminent future to the already vulnerable domestic industry.¹¹⁶ The United States submits that the USITC also provided a detailed and reasoned analysis of six other factors alleged to be causing injury to the domestic industry¹¹⁷ and found that the evidence did not demonstrate that any of these factors was an "other known factor".¹¹⁸

V. Standard of Review

A. *The Applicable Standard of Review*

89. On appeal, Canada asserts that the Panel acted inconsistently with Article 11 of the DSU in three principal ways: (i) by failing to make an objective assessment of the applicability of relevant provisions of the covered agreements and the conformity of the Section 129 Determination with those provisions¹¹⁹; (ii) by failing to make an objective assessment of the facts¹²⁰; and (iii) by failing to consider and apply adopted findings from the original panel report.¹²¹ Several of the findings that, according to Canada, demonstrate the Panel's failure to comply with its duties under Article 11, are also the subject of separate Canadian claims that the Panel erred in its interpretation and application of the relevant substantive provisions of the *Anti-Dumping Agreement* and the *SCM Agreement*¹²², and/or that the Panel failed to set out a "basic rationale" for its findings as required by Article 12.7 of the DSU.¹²³

¹¹⁵United States' appellee's submission, para. 41 (referring to Original Panel Report, paras. 7.134-7.136).

¹¹⁶*Ibid.*, para. 42.

¹¹⁷*Ibid.*, para. 43 (referring to Section 129 Determination, pp. 68-85).

¹¹⁸*Ibid.*, para. 43.

¹¹⁹Canada's appellant's submission, para. 61.

¹²⁰*Ibid.*, para. 62.

¹²¹*Ibid.*, para. 63.

¹²²*Ibid.*, paras. 205-245.

¹²³*Ibid.*, para. 196-204.

90. At the core of Canada's various claims under Article 11 of the DSU is the allegation that the Panel erred in the standard of review that it articulated and applied to the Section 129 Determination. Before turning to the details of Canada's arguments, we wish to highlight two particular features of the measure at issue. First, we note that, in these proceedings under Article 21.5 of the DSU, we must review the Panel's assessment of the Section 129 Determination because that is the "measure taken to comply" with the recommendations and rulings of the DSB. At the same time, we are cognizant of the "continuum of events" that led to this appeal including, in particular, the close relationship between the Section 129 Determination and the original determination.¹²⁴ Secondly, as in the original determination, the Section 129 Determination served as the basis for the imposition of anti-dumping and countervailing duties.

91. As regards the standard of review to be applied when a single injury determination is challenged under both Agreements, we recall that panels are to assess the consistency of measures challenged under the *SCM Agreement* in accordance with the general standard of review set out in Article 11 of the DSU.¹²⁵ Measures challenged under the *Anti-Dumping Agreement*, however, are to be scrutinized in accordance with the standard of review expressly prescribed in Article 17.6 of the *Anti-Dumping Agreement*, along with Article 11 of the DSU.¹²⁶ Although Canada challenged the Section 129 Determination under both the *Anti-Dumping Agreement* and the *SCM Agreement*, Canada's appeal focuses on the standard of review under Article 11 of the DSU.¹²⁷ The United States considers that Canada's appeal deliberately downplays the significance of Article 17.6 of the *Anti-Dumping Agreement*, but the United States does not request us to give "separate consideration"

¹²⁴The Section 129 Determination was intended to rectify the WTO-inconsistencies that the original panel identified in the original determination. Moreover, the record before the USITC in the Section 129 Determination included the entirety of the record from the original USITC investigation, as well as certain additional evidence, and parts of the analysis contained in the Section 129 Determination are expressly incorporated from the original determination. (See *infra* para. 102 and footnotes 151-153 thereto) In similar circumstances, the Appellate Body observed that:

In proceeding under Article 21.5 of the DSU, the Panel conducted its work against the background of the original proceedings, and with full cognizance of the reasons provided by the original panel. *The original determination and original panel proceedings, as well as the redetermination and the panel proceedings under Article 21.5, form part of a continuum of events.*

(Appellate Body Report, *Mexico — Corn Syrup (Article 21.5 — US)*, para. 121 (emphasis added)) See also Appellate Body Report, *US — FSC (Article 21.5 — EC II)*, para. 87.

¹²⁵Appellate Body Report, *US — Lead and Bismuth II*, para. 51.

¹²⁶Appellate Body Report, *US — Hot-Rolled Steel*, para. 55.

¹²⁷We note that in footnote 60 to paragraph 60 of its appellant's submission, Canada states:

Because Canada's appeal raises no issues requiring separate consideration under Article 17.6 of the [*Anti-Dumping*] Agreement, this submission refers exclusively to Article 11 of the DSU.

to the issues on appeal as a result of that provision.¹²⁸ The United States also points out that the original panel considered this issue and, after referring to the Appellate Body Report in *US – Hot-Rolled Steel*¹²⁹ and the *Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures*¹³⁰, concluded that it was not "necessary or appropriate to conduct separate analyses of the [original] determination under the two Agreements."¹³¹

92. We need not, in this appeal, answer the question of whether there may ever be circumstances in which separate consideration of a single injury determination would be required in the light of the standards of review under the *Anti-Dumping Agreement* and the *SCM Agreement*. In our view, this is not such a case, and neither of the participants requests such separate consideration.¹³² We also wish to add that whether such separate consideration is called for may depend not only on Article 11 of the DSU and Article 17.6 of the *Anti-Dumping Agreement*, but also on the substantive provisions of the *Anti-Dumping Agreement* and *SCM Agreement* that are at issue in the dispute. This is because, as

¹²⁸United States' response to questioning at the oral hearing.

¹²⁹In that report, the Appellate Body considered the relationship between Article 17.6(i) of the *Anti-Dumping Agreement* and Article 11 of the DSU, and stated that there is no "conflict" between these provisions. Both Articles 17.6(i) of the *Anti-Dumping Agreement* and Article 11 of the DSU "require[] panels to 'assess' the facts and this ... clearly necessitates an active review or examination of the pertinent facts." The Appellate Body also said that while Article 17.6(i) "does not expressly state that panels are obliged to make an assessment of the facts which is 'objective' ... it is inconceivable that Article 17.6(i) should require anything other than that panels make an *objective* 'assessment of the facts of the matter'." (Appellate Body Report, *US – Hot Rolled Steel*, para. 55. (original emphasis))

The Appellate Body also characterized Article 17.6(ii) as "supplementing, rather than replacing, the DSU, and Article 11 in particular", observing that this provision "simply adds that a panel shall find that a measure is in conformity with the *Anti-Dumping Agreement* if it rests upon one permissible interpretation of that Agreement." (para. 62)

¹³⁰This Declaration provides as follows:

Ministers,

Recognize, with respect to dispute settlement pursuant to the Agreement on Implementation of Article VI of GATT 1994 or Part V of the Agreement on Subsidies and Countervailing Measures, the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures.

¹³¹Original Panel Report, para. 7.17. The original panel also recognized that, although there might be cases in which the operation of Article 17.6(ii), together with the application of the relevant principles of interpretation codified in the *Vienna Convention on the Law of Treaties* (done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679) could lead to a different conclusion under the *Anti-Dumping Agreement* than under the *SCM Agreement*, the case before it did not present any instances involving more than one permissible interpretation of the text of the *Anti-Dumping Agreement*. (para. 7.22)

¹³²We note that in its oral statement at the hearing in this appeal, the European Communities stated that a single standard of review should be applied to the Section 129 Determination, but argued that such standard of review must correspond to the most demanding standard of review under either of the Agreements. According to the European Communities, this is the consequence that necessarily flows from the United States' choice to make only one injury determination for two separate trade defence instruments covered by two different WTO agreements.

the Appellate Body has previously observed, and as discussed further below, the proper standard of review to be applied by a panel must also be understood in the light of the specific obligations of the relevant agreements that are at issue in the case.¹³³

93. We begin our analysis with an examination of the requirements of Article 11 of the DSU in the context of the review by a panel of determinations made by investigating authorities. As Canada's appeal is primarily focused on the Panel's examination of how the USITC treated the evidence before it, we examine first the duties that apply to panels in their review of the *factual components* of the findings made by investigating authorities. The Appellate Body has considered these duties on several previous occasions.¹³⁴ It is well established that a panel must neither conduct a *de novo* review nor simply defer to the conclusions of the national authority. A panel's examination of those conclusions must be critical and searching, and be based on the information contained in the record and the explanations given by the authority in its published report. A panel must examine whether, in the light of the evidence on the record, the conclusions reached by the investigating authority are reasoned and adequate. What is "adequate" will inevitably depend on the facts and circumstances of the case and the particular claims made, but several general lines of inquiry are likely to be relevant. The panel's scrutiny should test whether the reasoning of the authority is coherent and internally consistent. The panel must undertake an in-depth examination of whether the explanations given disclose how the investigating authority treated the facts and evidence in the record and whether there was positive evidence before it to support the inferences made and conclusions reached by it. The panel must examine whether the explanations provided demonstrate that the investigating authority took proper account of the complexities of the data before it, and that it explained why it rejected or discounted alternative explanations and interpretations of the record evidence. A panel must be open to the possibility that the explanations given by the authority are not reasoned or adequate in the light of other plausible alternative explanations, and must take care not to assume itself the role of initial trier of facts, nor to be passive by "simply *accept[ing]* the conclusions of the competent authorities".¹³⁵

¹³³Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 184; Appellate Body Report, *US – Lamb*, para. 105.

¹³⁴See Appellate Body Report, *Argentina – Footwear (EC)*, paras. 119-121; Appellate Body Report, *US – Cotton Yarn*, paras. 74-78; Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 183, and 186-188; Appellate Body Report, *US – Hot-Rolled Steel*, para. 55; Appellate Body Report, *US – Lamb*, paras. 101 and 105-108; Appellate Body Report, *US – Steel Safeguards*, para. 299; and Appellate Body Report, *US – Wheat Gluten*, paras. 160-161.

¹³⁵Appellate Body Report, *US – Lamb*, para. 106. (original emphasis)

94. A key aspect of how a panel must review a determination relates to the evidentiary basis for both the intermediate factual findings made by a national authority, as well as for its overall conclusions. In its Report in *US – Countervailing Duty Investigation on DRAMS*, the Appellate Body considered how a panel is to review the evidentiary basis for findings when the overall conclusions are based on the authority's assessment of the totality of multiple pieces of circumstantial evidence. The Appellate Body observed that, even where the investigating authority draws its conclusion from the *totality* of the evidence, it will often be appropriate, or necessary, for a panel "to examine the sufficiency of the evidence supporting an investigating authority's conclusion ... by looking at each individual piece of evidence".¹³⁶ In addition to such review of how the investigating authority treated individual pieces of evidence, the Appellate Body underlined that a panel must also, with due regard to the approach taken by that authority, examine how the totality of the evidence supports the overall conclusion reached. In this connection, the Appellate Body emphasized that panels have "the obligation to consider, in the context of the *totality* of the evidence, how the *interaction* of certain pieces of evidence may justify certain inferences that could not have been justified by a review of the individual pieces of evidence in isolation."¹³⁷

95. In *US – Countervailing Duty Investigation on DRAMS*, the Appellate Body further pointed out that the standard of review to be applied in a given case is also a function of the substantive provisions of the specific covered agreements that are at issue in the dispute.¹³⁸ In disputes involving a threat of injury determination under the *Anti-Dumping Agreement* and the *SCM Agreement*, the provisions of the two Agreements relevant to the standard of review include: Articles 3.1, 3.5, 3.7, 3.8, and 12 of the *Anti-Dumping Agreement*; and Articles 15.1, 15.5, 15.7, 15.8, and 22 of the *SCM Agreement*.

96. Article 3.1 of the *Anti-Dumping Agreement* and Article 15.1 of the *SCM Agreement* are "overarching provision[s]" that reinforce elements of Article 11 of the DSU by imposing certain "fundamental" obligations, in particular, that determinations of injury, including threat of injury, be based on positive evidence and an objective examination of the specific factors set out in these

¹³⁶ Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 145.

¹³⁷ *Ibid.*, para. 157. (original emphasis) In other words, "a piece of evidence that may initially appear to be of little or no probative value, when viewed in isolation, *could*, when placed beside another piece of evidence of the same nature, form part of an overall picture that gives rise to a **reasonable** inference of entrustment or direction." (para. 154 (original italics; boldface added)) In this regard, we wish to point out the particular circumstances of that case, where the question before the Appellate Body was how a panel should scrutinize the evidentiary basis for a determination by an investigating authority when that basis consisted of circumstantial evidence.

¹³⁸ *Ibid.*, para. 184. See also Appellate Body Report, *US – Cotton Yarn*, paras. 75-78; and Appellate Body Report, *US – Lamb*, para. 105. The European Communities stresses this point in its third participant's submission. (European Communities' third participant's submission, paras. 16-17)

provisions.¹³⁹ Article 3.7 of the *Anti-Dumping Agreement* and Article 15.7 of the *SCM Agreement* combine positive requirements—that such a determination "be based on facts" and show how a "clearly foreseen and imminent" change in circumstances would lead to further dumped/subsidized imports causing injury in the near future—with an express prohibition of a determination based "merely on allegation, conjecture or remote possibility". These provisions enjoin a panel to scrutinize carefully the inferences and explanations of the investigating authority in order to ensure that any projections or assumptions made by it, as to likely future occurrences, are adequately explained and supported by positive evidence on the record.¹⁴⁰ A panel should also keep in mind that Article 3.8 of the *Anti-Dumping Agreement* and Article 15.8 of the *SCM Agreement* exhort Members to exercise "special care" when considering and deciding to apply anti-dumping and countervailing measures in cases of threat of injury.¹⁴¹

97. Finally, we observe that it is in the nature of anti-dumping and countervailing duty investigations that an investigating authority will gather a variety of information and data from different sources, and that these may suggest different trends and outcomes. The investigating authority will inevitably be called upon to reconcile this divergent information and data. However, the evidentiary path that led to the inferences and overall conclusions of the investigating authority must be clearly discernible in the reasoning and explanations found in its report. When those inferences and conclusions are challenged, it is the task of a panel to assess whether the explanations provided by the authority are "reasoned and adequate" by testing the relationship between the evidence on which the authority relied in drawing specific inferences, and the coherence of its reasoning. In particular, the panel must also examine whether the investigating authority's reasoning takes sufficient account of conflicting evidence and responds to competing plausible explanations of that evidence. This task may also require a panel to consider whether, in analyzing the record before it, the investigating authority evaluated all of the relevant evidence in an objective and unbiased manner, so as to reach its findings "without favouring the interests of any interested party, or group of interested parties, in the investigation."¹⁴²

98. In sum, a panel charged with reviewing the factual basis for a threat of injury determination must determine whether the investigating authority has provided "a reasoned and adequate explanation" of:

¹³⁹Appellate Body Report, *Thailand – H-Beams*, para. 106.

¹⁴⁰Appellate Body Report, *US – Lamb*, para. 136. See also Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 85.

¹⁴¹See Original Panel Report, Section VII.G, entitled "Alleged Violations of Article 3.8 of the [*Anti-Dumping*] Agreement and Article 15.8 of the *SCM Agreement* Requirements Regarding 'Special Care'".

¹⁴²Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.

- (a) how individual pieces of evidence can be reasonably relied on in support of particular inferences, and how the evidence in the record supports its factual findings;
- (b) how the facts in the record, rather than allegation, conjecture, or remote possibility, support and provide a basis for the overall threat of injury determination;
- (c) how its projections and assumptions show a high degree of likelihood that the anticipated injury will materialize in the near future; and
- (d) how it examined alternative explanations and interpretations of the evidence and why it chose to reject or discount such alternatives in coming to its conclusions.

99. Moreover, the injunction that panels should not substitute their own conclusions for those of the competent authorities does *not* mean that all a panel needs to do in order to comply with its duties when reviewing a determination is to consider whether the investigating authority's findings or conclusions appear to be "reasonable" or "plausible" in the abstract. To the contrary, a panel can assess whether an authority's explanation for its determination is reasoned and adequate *only* if the panel critically examines that explanation in the light of the facts and the alternative explanations that were before that authority. A panel's consideration of whether a certain inference can reasonably be drawn from individual pieces of evidence and/or from evidence in its totality is one of the means by which a panel satisfies its duty to examine whether a determination was based on positive evidence on the record. In its assessment, the panel should seek to review the determination while giving due regard to the approach taken by the investigating authority, or it risks constructing a case different from the one put forward by that authority. Finally, in its assessment of whether the conclusions reached by an investigating authority are reasoned and adequate, "[a] panel may not reject an [investigating authority's] conclusions simply because the panel would have arrived at a different outcome if it were making the determination itself."¹⁴³

B. *Canada's Appeal*

100. Canada claims that the Panel articulated and applied an incorrect standard of review in assessing the Section 129 Determination. In Canada's view, the Panel's explanation, at the outset of its findings, as to how it intended to go about its task reveals the following errors: (i) the Panel incorrectly explained its role in the context of these Article 21.5 proceedings¹⁴⁴; (ii) the Panel erroneously identified a standard to be used to review a determination of *threat* of injury that is

¹⁴³ Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 187.

¹⁴⁴ Canada's appellant's submission, paras. 166-169.

lower than the standard to be applied to review a determination of *current* material injury¹⁴⁵; and (iii) the Panel used an overly deferential standard of review, asking only whether the USITC's findings "could" have been reached by an unbiased and objective decision-maker on the facts.¹⁴⁶ Canada adds that the Panel went on to apply the wrong standard of review throughout its analysis and cites, as evidence of this "excessively deferential" standard¹⁴⁷, the Panel's repeated characterization of various USITC findings as "not unreasonable".¹⁴⁸

1. The Role of an Article 21.5 Panel Assessing a Redetermination

101. We begin with Canada's arguments relating specifically to the role of a panel acting pursuant to Article 21.5 of the DSU. Canada makes two sets of claims of error relating to how the Panel assessed the Section 129 Determination in the light of the findings of the *original* panel and in the light of the *original* USITC threat of injury determination. Canada asserts that the Panel failed to make an objective assessment of the matter before it because it failed to apply findings from the original panel report even though these findings had been adopted by the DSB and are binding upon the parties to the dispute. Canada's arguments seem to assume that a panel is *required* to evaluate the facts in an Article 21.5 proceeding in exactly the same way as it evaluated those facts in the original panel proceedings, and to hold an investigating authority making a redetermination to the inferences that it drew from the same evidence in the original determination. Canada points to paragraph 7.12 of the Panel Report as exposing the errors in the approach taken by the Panel.¹⁴⁹

102. Article 21.5 of the DSU identifies the task of a panel operating pursuant to that provision as resolving disagreements "as to the existence or consistency with a covered agreement of a measure taken to comply with the recommendations and rulings" of the DSB. This task cannot be done in abstraction from the measure that was subject of the original proceedings.¹⁵⁰ The measure taken to

¹⁴⁵Canada's appellant's submission, paras. 79-80.

¹⁴⁶*Ibid.*, para. 106.

¹⁴⁷*Ibid.*, para. 109.

¹⁴⁸*Ibid.*, paras. 2, 9, 97, and 199.

¹⁴⁹See *infra*, para. 105.

¹⁵⁰Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 68; Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, para. 61. The Appellate Body has already recognized certain circumstances in which the scope of proceedings under Article 21.5 may be limited by the scope of the original proceedings. For example, a party cannot make the same claim of inconsistency against the same measure (or component of a measure) in an Article 21.5 proceeding if the original panel and Appellate Body found the measure to be consistent with the obligation at issue (Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, paras. 89-99), or if the original panel found that the complaining party had not made out its claim with respect to the measure (or component of a measure). (Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 92-93 and 99) Similarly, a party may not, in proceedings under Article 21.5 of the DSU, seek to have the Appellate Body "revisit the original panel report" when that report was not appealed. (Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 78)

comply in this case is the Section 129 Determination. Although it is distinct from the original determination, the Section 129 Determination incorporates by reference many parts of the analysis in the original determination¹⁵¹, and retains and relies on much of the evidence collected in the original investigation. As explained in the Section 129 Determination, the USITC not only sought "to provide more explanation and reasoning for its decision", that is, to fill in the gaps that the original panel had found in the reasoning and explanation in the original injury determination¹⁵²; it also re-opened the record and collected more information and evidence.¹⁵³ Furthermore, Canada's claims under Articles 3.5 and 3.7 of the *Anti-Dumping Agreement* and Articles 15.5 and 15.7 of the *SCM Agreement* required the Panel to review, *inter alia*, how the investigating authority treated the totality of the factors and evidence considered, including the new elements. This involved review of the USITC's analysis of how those factors and the various pieces of evidence interacted. In these circumstances, we do not see why the Panel would be bound by the findings of the original panel.

103. This does not mean that a panel operating under Article 21.5 of the DSU should not take account of the reasoning of an investigating authority in an original determination, or of the reasoning of the original panel. Article 21.5 proceedings do not occur in isolation but are part of a "continuum of events".¹⁵⁴ This is a consequence of the mandate of an Article 21.5 panel, namely, to examine whether recommendations and rulings from the original dispute have been implemented consistently with the covered agreements. When an investigating authority making a redetermination provides different explanations of, or draws different inferences from, specific pieces of evidence that were also before it in the original investigation, this may be relevant to the assessment of whether its reasoning is adequate and based on positive evidence. Such deviations from prior reasoning may raise questions about the objectivity of the authority's assessment of the evidence or the credibility of its explanations. Similarly, doubts could arise about the objective nature of an Article 21.5 panel's assessment if, on a specific issue, that panel were to deviate from the reasoning in the original panel report in the absence of any change in the underlying evidence in the record and explanations given

¹⁵¹At pages 6-7 of the Section 129 Determination, the USITC stated:

We adopt from the original Commission report our prior views and findings in their entirety regarding domestic like product, domestic industry and related parties, use of publicly available information, conditions of competition, cross-cumulation, Maritime Provinces, effects of subsidies or dumping, and consideration of the nature of the subsidy and its likely trade effects. (footnote omitted)

¹⁵²Section 129 Determination, pp. 5-6 and footnote 20.

¹⁵³*Ibid.*, p. 4.

¹⁵⁴Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 121.

by the investigating authority in a redetermination.¹⁵⁵ These concerns are not, however, based on the binding effect of the adopted findings of the original panel.

104. Given the particular circumstances of this case, and the way in which the USITC approached its task in the Section 129 Determination, we believe that it may well have been necessary for the Panel, in order to properly consider the adequacy of the USITC's reasoning and explanation on specific points, to refer to either the original determination and/or the reasoning and findings and conclusions contained in the original panel report. We must, therefore, examine whether the Panel viewed its role in this way.

105. Canada alleges that paragraph 7.12 of the Panel Report¹⁵⁶ reveals the "critical legal error"¹⁵⁷ made by the Panel in explaining its role under Article 21.5 of the DSU. We agree with

¹⁵⁵We would have concerns, for example, if an Article 21.5 panel were to see no problem in a particular inference drawn by an investigating authority in a redetermination in circumstances where the original panel found that such inference lacked proper support and the inference drawn in the redetermination was based on the same evidence and explained in the same way as in the original determination.

¹⁵⁶Paragraph 7.12 of the Panel Report reads:

The role of a Panel in an Article 21.5 proceeding is to evaluate the challenged measure to determine its consistency with the defending Member's obligations under the relevant WTO Agreements. Thus, the Panel is not limited by its original analysis and decision – rather, it is *to consider, with a fresh eye, the new determination before it, and evaluate it in light of the claims and arguments of the parties in the Article 21.5 proceeding*. While it is true that "a panel acting pursuant to Article 21.5 of the DSU would be expected to refer to the initial panel report, particularly in cases where the implementing measure is closely related to the original measure, and where the claims made in the proceeding under Article 21.5 closely resemble the claims made in the initial panel proceedings", in a case involving a new determination in the same case, it is clear that the facts are likely to be very similar to the original. Thus, what is most important for our analysis is the reasoning and explanation of the USITC in its section 129 determination. Consequently, *our findings concerning the original determination have little if any persuasive effect in our review of the determination now before us*. In this regard we note that Canada argues in a number of instances that the USITC's section 129 determination fails to address certain questions raised by the Panel in its original determination. While we cannot preclude the possibility that a Member might implement a DSB recommendation by specifically answering points raised by a panel (or the Appellate Body) in the relevant decisions, this is by no means required by the DSU. Nor is it the only means by which implementation may be achieved. In this case, the USITC has provided a determination in the section 129 proceeding which purports to re-examine the evidence, and additional evidence, and address those aspects of its original decision we found to be insufficient in light of the obligations of the [*Anti-Dumping*] and SCM Agreements. We must review that determination on its own merits, as a whole. Whether the USITC addressed particular questions we raised may be relevant in our review, but is not necessarily determinative. (emphasis added; footnotes omitted)

¹⁵⁷Canada's appellant's submission, para. 162.

Canada that certain statements made by the Panel in that paragraph (a panel must "consider, with a fresh eye" and "our findings concerning the original determination have little if any persuasive effect") could be seen as problematic to the extent that they suggest that the Panel totally disregarded the original proceedings in conducting its assessment. Yet, when these statements are read in the context of the whole paragraph, it is clear that the Panel's approach is more nuanced. The Panel referred to the Appellate Body statement in *Mexico – Corn Syrup (Article 21.5 – US)* to the effect that Article 21.5 panels can be expected to refer to their original panel reports, in particular, when matters before them are closely related to the matters before the original panels. The Panel concluded this paragraph by expressly acknowledging that the issue of "[w]hether the USITC addressed particular questions [the original panel] raised [in the original panel report] may be relevant" to its examination of the Section 129 Determination. Accordingly, when paragraph 7.12 of the Panel Report is read as a whole, we do not see that it contains any clear error in the Panel's articulation of its role under Article 21.5 of the DSU, given the nature of the Section 129 Determination. This does not, however, answer the question whether the Panel took proper account of divergences in the way in which the USITC treated particular facts and evidence in the Section 129 Determination, as compared with the original determination.

2. Whether the Panel Identified an Improper Standard of Review for a Threat of Injury Determination

106. Canada also argues that the Panel erred in identifying the appropriate standard of review to be applied in reviewing a determination of *threat of injury*, in particular, by identifying a *lower* standard for such determinations. Canada points, in particular, to the following statements made by the Panel:

The possible range of reasonable predictions of the future that may be drawn based on the observed events of the period of investigation may be broader than the range of reasonable conclusions concerning the present that might be drawn based on those same facts. That is to say, while a determination of threat of material injury must be based on the facts, and not merely on allegation, conjecture, or remote possibility, predictions based on the observed facts may be less susceptible to being found, on review by a panel, to be outside the range of conclusions that might be reached by an unbiased and objective decision maker on the basis of the facts and in light of the explanations given.¹⁵⁸

107. According to Canada, the above statements show that the Panel wrongly "held the investigating authority to a *lower* standard of care and explanation on the grounds that it made a determination of threat rather than a determination of current material injury"¹⁵⁹ and also reveal that

¹⁵⁸Panel Report, para. 7.13.

¹⁵⁹Canada's appellant's submission, para. 79. (original emphasis)

"the Panel's own review was conducted according to a more deferential standard because it involved a threat of injury determination."¹⁶⁰ The United States, in response, contends that the above statements by the Panel in no way suggest a lower standard of care applicable to threat determinations, but simply recognize the future-oriented nature of such determinations. The United States suggests that Canada mischaracterizes the Panel's statements and ignores the context in which they were made.¹⁶¹

108. We do not read the above statements by the Panel as carrying the significance that Canada seeks to attribute to them. The Panel itself did not say that it was identifying the applicable standard of review when it made those statements. Rather, the statements come at the end of a paragraph on determinations of threat of injury, a paragraph which begins with the sentence "[w]e must also keep in mind the nature of the determination we are reviewing".¹⁶² Within the paragraph itself, the Panel reproduced a quote from the Appellate Body Report in *Mexico – Corn Syrup (Article 21.5 – US)*, which recognized that, notwithstanding the "intrinsic uncertainty" of future events:

... 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".¹⁶³

109. When they are placed in this context, we are not persuaded that the Panel's statements amount to a denial of the high standard that applies to a threat of injury determination. In particular, the excerpt from the Panel Report relied upon by Canada does not seem, to us, to be inconsistent with the requirement that the reasoning set out by an investigating authority making a determination of threat of injury must clearly disclose the assumptions and extrapolations that were made, on the basis of the record evidence, regarding future occurrences. Nor are the Panel's statements inconsistent with the requirements that the reasoning of the investigating authority demonstrate that such assumptions and extrapolations were based on positive evidence and not merely on allegation, conjecture, or remote possibility; and show a high degree of likelihood that projected occurrences will occur.

110. At the same time, the Panel's reasoning does raise two concerns. First, the Panel stated that "predictions based on the observed facts may be less susceptible to being found, on review by a panel, to be outside the range of conclusions that might be reached by an unbiased and objective decision maker on the basis of the facts and in light of the explanations given."¹⁶⁴ Taken at face value, this could imply a greater likelihood of panels upholding a *threat* of injury determination, as compared to

¹⁶⁰Canada's appellant's submission, para. 80.

¹⁶¹United States' appellee's submission, paras. 100-107.

¹⁶²Panel Report, para. 7.13.

¹⁶³Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 85.

¹⁶⁴Panel Report, para. 7.13.

a determination of *current* material injury, when those determinations rest on the same level of evidence. Any such implication would be erroneous, but we do not view the Panel's statement as having such an implication. Of somewhat greater concern, however, is the Panel's statement that the "*possible* range of *reasonable* predictions of the future that may be drawn based on the observed events of the period of investigation may be broader than the range of reasonable conclusions concerning the present that might be drawn based on those same facts."¹⁶⁵ We are not persuaded that, in making this observation, the Panel intended to express the view that a threat of injury determination must be upheld if the investigating authority's report discloses the occurrence of injury as one reasonable prediction within the possible range of future occurrences. If this were the Panel's view, then it would be erroneous.

3. Whether the Panel's Standard of Review was "Excessively Deferential"

111. We turn now to examine the various statements and findings made by the Panel that, according to Canada, prove that the Panel applied an incorrect and "excessively deferential" standard to review the Section 129 Determination.¹⁶⁶ Canada points, first, to the fact the Panel explained that it would inquire only whether the USITC's findings "could" have been reached by an unbiased and objective decision-maker on the basis of the record evidence. Canada adds that the Panel went on to apply the wrong standard of review throughout its analysis and cites, as evidence of this, that the Panel repeatedly characterized various findings of the USITC as "not unreasonable".¹⁶⁷

112. We are not persuaded that the Panel erred in stating that its task was to consider "whether the conclusions reached, in light of the explanations given, were such as *could* have been reached by an unbiased and objective decision maker based on the facts."¹⁶⁸ Indeed, such a standard is consistent with previous Appellate Body statements on the standard of review, including the appeal in *US – Countervailing Duty Investigation on DRAMS*, upon which the Panel relied.¹⁶⁹ We do not, however, consider the Panel's repeated findings, that it had not been demonstrated that an objective and unbiased authority "could not" have reached the same conclusion that the USITC had reached¹⁷⁰, as amounting to the same standard.

¹⁶⁵Panel Report, para. 7.13. (emphasis added)

¹⁶⁶Canada's appellant's submission, para. 109.

¹⁶⁷*Ibid.*, paras. 2, 9, 97, and 199.

¹⁶⁸Panel Report, para. 7.19. (emphasis added)

¹⁶⁹*Ibid.*, para. 7.20.

¹⁷⁰See, for example, Panel Report, paras. 7.39, 7.57, and 7.63.

113. Similarly, although we consider that a panel would be acting consistently with the applicable standard of review if it sets out to determine whether an objective and unbiased authority could *reasonably* find that a particular piece of evidence supports an intermediate factual finding, we are not persuaded that this is the same as the Panel's version of this standard, which appears simply to involve testing whether the USITC's conclusions were "not unreasonable". In our view, the Panel's repeated references to the USITC's conclusions as "not unreasonable" suggest that the Panel applied an insufficient degree of scrutiny to the Section 129 Determination¹⁷¹ and failed to engage in the type of critical and searching analysis called for by Article 11 of the DSU. Inquiring into whether an

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- ¹⁷¹(i) With respect to the allegedly "new" finding that the rate of increase in Canadian imports over the period of investigations was "significant", the Panel stated that: "[t]he fact that the USITC concluded that the rate of increase was significant based on the overall rate of increase over the period of investigation rather than the year-on-year rate of increase is *not demonstrably unreasonable*" (Panel Report, para. 7.27 (emphasis added)) and "the conclusion that a 2.8 percent increase in imports was significant is *not unreasonable*, in light of the totality of the factors considered by the USITC". (para. 7.27 (emphasis added))
- (ii) With respect to import trends, and the question of whether the USITC was required to compare trends in the 1994–1996 period (before the SLA came into effect) with the trends in the April–August 2001 period (immediately after the expiry of the SLA), as well as the issue of the significance of the trends in the latter period, the Panel stated that "[w]e cannot conclude that the USITC's analysis ... is *unreasonable*." (para. 7.35 (emphasis added))
- (iii) With respect to forecasts of United States demand and the relationship of imports to demand (this is, whether demand growth would outstrip import increases), the Panel stated that the Section 129 Determination "provides a *not unreasonable explanation* for its conclusion (para. 7.39 (emphasis added))
- (iv) As regards various issues raised in connection with the USITC's reasoning on the likely price effects of increased imports, the Panel stated that it could not "conclude that the USITC acted *unreasonably* in finding that increased imports at such price levels posed a threat of injury to the [United States] industry, when viewed, as the USITC did, against the background of the circumstances of the industry during the period of investigation." (para. 7.52 (emphasis added))
- (v) With respect to the USITC's findings that the United States industry was vulnerable, the Panel found that "we cannot conclude that the USITC's finding is *unreasonable* or not based on positive evidence." (para. 7.55 (emphasis added))
- (vi) With respect to alleged inconsistencies between the USITC's findings regarding present material injury and threat of material injury, the Panel found that "while it is possible to disagree with the USITC's analysis, we cannot conclude that it is *unreasonable*." (para. 7.57 (emphasis added))
- (vii) With respect to the causal link, the Panel reasoned that "[w]hile it is possible to disagree with the USITC's analysis, we cannot conclude that it is *unreasonable*." (para. 7.63 (emphasis added))
- (viii) With respect to non-attribution, the Panel expressed the view that "there is *nothing unreasonable* in the USITC's conclusion that the mere fact of cross-border integration, even if increasing, does not pose a potential threat of injury to the [United States] lumber industry." (para. 7.71 (emphasis added))

authority's finding is "not unreasonable" does not, in our view, necessarily answer the question of whether that finding is based on positive evidence rather than conjecture or remote possibility.¹⁷²

114. Moreover, a number of other statements made by the Panel belie the standard of review that the Panel indicated, at the outset of its analysis, that it would apply to the Section 129 Determination. For example, the Panel stated:

On review, a panel must consider whether the determination made is one that could be reached by an unbiased and objective investigating authority on the basis of the facts before it and in light of the explanations given. Merely that alternative conclusions might also be within the range of possible determinations that would satisfy that standard does not demonstrate that the conclusions actually reached are not consistent with the requirements of the [*Anti-Dumping*] and SCM Agreements.¹⁷³

115. The Panel further observed that:

While Canada's arguments demonstrate that there is a plausible alternative line of reasoning that could be followed, under the standard of review applicable in this case, this is not sufficient for us to find a violation. Moreover, we consider that while it may be possible to debate each aspect of the USITC determination, and come to different conclusions depending on the starting point and focus of each line of argument and analysis, our obligation is to consider whether the USITC's reasoning and conclusion as set forth in its determination were those of an objective decision maker in light of the facts, and not whether every possible argument is resolved in favour of that determination.¹⁷⁴

¹⁷²The line of inquiry apparently taken by the Panel is also distinct from an inquiry into the question of whether a specific inference can reasonably be drawn from particular pieces of circumstantial evidence, which was the issue discussed at paragraph 188 of the Appellate Body Report in *US – Countervailing Duty Investigation on DRAMS*.

¹⁷³Panel Report, para. 7.28.

¹⁷⁴*Ibid.*, para. 7.35.

116. According to the United States, Canada's arguments "confuse the concept of reviewing an explanation in light of plausible alternative explanations, on the one hand, and automatically rejecting an explanation upon finding an alternative explanation to be plausible, on the other." The United States asserts that the "[o]bjective assessment [under Article 11] requires the former but not the latter."¹⁷⁵

117. In our view, a panel is not compelled under Article 11 to "automatically reject" the explanation given by an investigating authority merely because a plausible alternative explanation has been proffered. At the same time, a panel may find the investigating authority's explanation inadequate when, even though that explanation seemed "reasoned and adequate" at the outset, or in the abstract, it no longer seems so when viewed in the light of the plausible alternatives. In other words, it is not the mere existence of plausible alternatives that renders the investigating authority's explanation "implausible". Rather, in undertaking its review of a determination, including the authority's evaluation (or lack thereof) of alternative interpretations of the evidence, a panel may conclude that conclusions that initially, or in the abstract, seemed "reasoned and adequate" can no longer be characterized as such.¹⁷⁶

4. Review of Specific Examples of the Panel's Standard of Review

118. A close examination of the Panel's findings persuades us that the Panel used an improper standard of review throughout its Report. Our view is based on the entirety of the Panel Report, of which the three examples below are particularly illustrative.

¹⁷⁵United States' appellee's submission, para. 183

¹⁷⁶A panel's duty to consider whether the investigating authority's explanation is "reasoned and adequate" in the light of alternative plausible explanations should not be read as a requirement that panels must reject the authority's explanation if it does not rebut the alternatives. Rather, a panel must verify that the investigating authority has taken account of and responded to plausible alternative explanations that were raised before it and that, having done so, the explanations provided by it in support of its determination remain "reasoned and adequate".

(a) The Panel's Review of the Injury Determination

119. The Panel summarized the basis for the USITC's findings of a likely substantial imminent increase in imports as follows:

The USITC's overall conclusion was that, based on 1) the trends during the period of investigation, which it concluded showed a significant rate of increase in imports, 2) the restraining effects of the SLA during the period of investigation and the likely effects of its expiration, 3) import volumes and trends in import volumes during periods of no import restrictions, 4) evidence of excess capacity, projected increases in capacity, capacity utilization and production, and export orientation in Canada, and 5) [United States] demand forecasts, there would be a substantial increase in imports.¹⁷⁷

120. Although our concerns are also evident in other parts of the Panel's review of the USITC analysis of each of the factors, we consider the Panel's treatment of the issues arising in connection with the fourth factor—excess capacity; projected increases in capacity, capacity utilization and production; and export orientation—as clearly illustrating the deficiencies in the standard of review applied by the Panel.

121. The Panel summarized Canada's challenge to the USITC's reliance on this fourth factor as follows:

... Canada asserts that the USITC continued to rely on "slight" increases in projected capacity in support of its finding that imports would increase substantially in the imminent future, despite Canadian producer projections that were within the range of historical experience. In Canada's view, the USITC's conclusion that Canadian producer projections were inconsistent with other data, and therefore not to be relied upon, was improper in light of new data that was consistent with the projections originally reported by Canadian producers.¹⁷⁸

¹⁷⁷Panel Report, para. 7.18.

¹⁷⁸*Ibid.*, para. 7.40.

122. The Panel then summarized the United States' defence of the USITC's approach as follows:

... on the issue of available excess Canadian capacity, the [original panel] had found that the USITC's discussion regarding the Canadian industry's export orientation did not support the conclusion that excess capacity would be exported to the United States beyond the "historical" level. In response, in its section 129 determination, the USITC analyzed capacity and concluded that Canadian producers had sufficient excess capacity, and projected increases in production and capacity in 2002 and 2003, to substantially increase exports to the United States. In this regard, the USITC noted that Canada has substantial capacity to produce softwood lumber, equal to about 60 percent of [United States] consumption. Excess Canadian capacity in 2001 had increased to a level equivalent to 10 percent of [United States] apparent consumption, as capacity utilization declined to 84 percent from 90 percent in 1999. The USITC found even more telling the fact that Canadian producers projected increases in production and capacity utilization from 2001 to 2003, a period during which demand in the [United States] market was forecast to remain relatively unchanged or increase only slightly. In the United States' view, Canada's arguments focus inappropriately on the incremental increase in production capacity, without putting the information into context. In this regard, the United States notes that Canadian production is tied to the [United States] market, the most important market for Canadian producers, accounting for 60-65 percent of Canadian production and shipments. Data considered in the section 129 investigation showed that in the first quarter 2002, as apparent Canadian consumption declined by 23 percent compared with the first quarter of 2001, Canadian producers shifted sales from the home market to the [United States] market. The United States maintains that the USITC properly focused on this evidence of the export orientation of Canadian lumber producers, and discounted Canadian producers' projections that additional production would be exported to the United States at below historical levels.¹⁷⁹ (footnotes omitted)

123. Having narrated the respective arguments of the parties, the Panel limited its own analysis of these competing explanations to the following single sentence:

Once more, the explanation concerning the available excess capacity in Canada and the likelihood that a substantial portion of projected increases in production would enter the [United States] market, set forth in the section 129 determination provides reasoned support for the USITC's conclusion that there would be a substantial increase in imports in the near future.¹⁸⁰

¹⁷⁹Panel Report, para. 7.41.

¹⁸⁰*Ibid.*, para. 7.42.

124. The brevity of the Panel's analysis of this issue is, in our view, difficult to reconcile with its duty to conduct a critical and searching analysis. With this sentence, the Panel appears to accept that the USITC's explanation "provide[d] reasoned support" for its conclusion, without examining the specific reasoning which led the USITC to that conclusion, and without looking behind the reasoning to test its adequacy in the light of the evidence on the record. The Panel also failed to distinguish between the distinct, but related, factors that were discussed in the arguments of the parties, namely: (i) projected increases in production and capacity; (ii) capacity utilization and available excess capacity in Canada; and (iii) the export orientation of Canadian producers.

125. Furthermore, we recall that Canada argues that the Panel's finding on this issue was inconsistent with its duties under Article 11 of the DSU because the Panel accepted the USITC's explanation without any reference to or acknowledgement of the findings in the original panel report, which included the following:

The share of total Canadian shipments represented by exports to the United States during the period of investigation was 57.4 per cent in 1999 and 2000, and increased to 60.9 per cent in 2001. Canadian producers projected a decline in that share, but only to 58.8 per cent in 2002 and 58.5 per cent in 2003, figures well within the historical range. These figures cannot, in our view, support the conclusion that excess capacity indicates a likelihood of substantially increased exports.¹⁸¹ (footnote omitted)

The data regarding exports to the United States *do not* ... suggest that there would be any *notable change* in the levels of exports to the United States, but *rather a continuation of the historical patterns*. Nothing in the USITC determination addresses how the projected increases in exports to the United States supports the finding that imports would increase substantially.¹⁸² (emphasis added)

126. As discussed above, an investigating authority making a redetermination is not bound to give the same explanations of, or draw the same inferences from, specific pieces of evidence as it did in its original determination. Nevertheless, a marked departure from the explanations given in the original determination may, when the evidence is essentially the same and no explanation is given for that departure, undermine the extent to which the explanations in the redetermination can be viewed as "reasoned and adequate". The Panel, however, simply did not examine the question of the extent to which the same evidence that was before the USITC in the original determination was the basis for different explanations in the Section 129 Determination.

¹⁸¹Original Panel Report, para. 7.91.

¹⁸²*Ibid.*, para. 7.92.

127. Canada also argued, before the Panel, that new evidence collected in the Section 129 proceedings "vindicate[d]" the export projections made by Canadian producers in the original investigation, and made clear that those projections should not have been rejected by the USITC. According to Canada, that new data showed that the behaviour of all Canadian producers during the investigation period was consistent with the behaviour that a subset of the Canadian industry projected for 2002 and 2003, and that those projections were also consistent with the USITC's hypothesis that projected increases in production would likely be distributed among the United States, Canadian, and other markets in shares consistent with historical experience.¹⁸³

128. In our view, Canada's arguments identify a number of issues that the Panel should have scrutinized carefully. For example, the Panel should have examined whether the rate of increase of dumped/subsidized imports during the period of investigation supported the USITC's finding of likely "substantial" increased imports in the imminent future. In addition, the Panel should have questioned the extent to which, in reaching this finding, the USITC relied on projected capacity increases and, if so, whether these projections provided support for its finding of a likely substantial imminent increase in imports.¹⁸⁴ The Panel should have scrutinized the evidentiary basis, and the adequacy of the reasons given, for the USITC's decision to accept Canadian producers' projected increases in production, but not their projected increases in exports to the United States.¹⁸⁵ In the light of the reason given by the USITC, in the Section 129 Determination, for rejecting Canadian producers' projected export levels¹⁸⁶, the Panel should have asked whether it was reasonable for the USITC to rely on projected incremental increases in Canadian production as a basis for rejecting projected incremental increases in exports.¹⁸⁷ The Panel should, in this regard, have examined the record before

¹⁸³Canada's first written submission to the Panel, paras. 83 and 84.

¹⁸⁴The USITC repeatedly referred to projected increases in capacity, capacity utilization, and production. The Panel did not break down these references into their constituent elements and examine whether each element was supported by the evidence. In contrast, the original panel did so and, with respect to projected increases in capacity, observed: "the evidence before the USITC indicated that Canadian capacity was projected to increase by less than one per cent in 2002, and a further 0.83 per cent in 2003. This certainly does not, in our view, support a conclusion that there would be a substantial increase in capacity, and indeed, the USITC does not appear to have found otherwise." (Original Panel Report, para. 7.90 (footnote omitted))

¹⁸⁵Again, such an inquiry would seem even more appropriate in these Article 21.5 proceedings, given that the original panel had criticized the USITC in the original determination for rejecting the projected levels of exports to the United States, when those projected levels were consistent with historical averages. (*Ibid.*, para. 7.91)

¹⁸⁶The USITC explained that "Canadian producers' export projections implausibly posited that the [United States] market would suddenly no longer account for at least 60 percent of additional Canadian production, consistent with historical levels, but rather that only 20 percent of additional Canadian production would be exported to the United States." (Section 129 Determination, p. 39 (footnote omitted))

¹⁸⁷In response to a question at the oral hearing as to what the USITC meant by "oversupply", the United States pointed out that, in the first quarter of 2002, Canadian producers had decreased production but increased exports to the United States and explained, in this connection, that the behaviour of Canadian producers was such that production levels had nothing to do with the levels of exports to the United States.

the USITC in order to ascertain whether, historically, there was any meaningful correlation between incremental changes in Canadian production and the incremental changes in Canadian exports to the United States. The Panel might also have scrutinized how the USITC treated the projected evolution of demand in the Canadian market in connection with its decision to reject Canadian producers' projected supply to that market¹⁸⁸, or how the USITC dealt with the variety of different data that were before it in the Section 129 proceedings.¹⁸⁹

(b) The Panel's Analysis of the Causal Relationship

129. The Panel's scrutiny of the USITC's causation analysis also demonstrates the error in the Panel's approach. In examining the USITC's analysis of the causal link, the Panel again began its analysis by summarizing the respective arguments of the parties. The Panel recognized that "Canada ha[d] presented a reasonable alternative interpretation of the evidence in the record".¹⁹⁰ However, the Panel concluded that Canada had "failed to demonstrate that the USITC's analysis and determination that the projected increased levels of imports, in light of the prices at the end of the period of investigation and given the vulnerable condition of the domestic industry, threatened material injury to the [United States] industry is not one that could be reached by an objective and unbiased investigating authority."¹⁹¹ The Panel distinguished the case before it from the original proceedings, in which the original panel had found that the USITC's conclusion that imports would increase substantially was inconsistent with Article 3.7 of the *Anti-Dumping Agreement* and Article 15.7 of the *SCM Agreement*.¹⁹² The Panel found no such inconsistency with respect to the USITC's findings

¹⁸⁸The USITC stated that "Canadian producers projected that home market shipments would somehow increase beyond 2000 levels" notwithstanding that "Canadian demand had declined by almost 20 percent from 2000 to 2001 and was not forecast to return imminently to 2000 levels". (Section 129 Determination, p. 40 (footnote omitted)) The USITC did not cite a specific source as the basis for the forecast of Canadian demand.

¹⁸⁹Between the time of the original investigation and the Section 129 proceedings, Statistics Canada had changed its methodology for reporting softwood lumber production, with the result that the annual Canadian production figures for 1996 to 2001 were different than the annual figures obtained in the original investigation for the same period. The USITC also observed, in this connection, that in the light of the lower questionnaire response rate and the change in methodology, "[d]ata from public sources and questionnaire responses in this proceeding, therefore, are not necessarily comparable with data from the original investigation." (Section 129 Determination, p. 34) It is certainly the case that these methodological issues complicate the task of reviewing, in particular, how the USITC dealt with Canadian production, capacity, and capacity utilization in the course of its analysis. Yet, just as these methodological difficulties do not excuse the USITC from clearly explaining the basis for its determination, neither do they excuse the Panel from rigorously reviewing that determination and the various factual findings on which it was based.

¹⁹⁰Panel Report, para. 7.62.

¹⁹¹*Ibid.*

¹⁹²*Ibid.*

regarding the likely imminent substantial increase in imports. The Panel observed that, "[w]hile it is possible to disagree with the USITC's analysis, we cannot conclude that it is unreasonable."¹⁹³ The Panel added:

It is the task of the investigating authority to weigh the evidence and make a reasoned judgement—this implies that there may well be evidence, and arguments, that detract from the conclusions reached. Unless such evidence and arguments demonstrate that an unbiased and objective investigating authority **could not** reach a particular conclusion, we are obliged to sustain the investigating authorities' judgment, even if we would not have reached that conclusion ourselves.¹⁹⁴ (original boldface)

130. It is difficult to reconcile the above statement by the Panel with its duty to carry out a critical and searching analysis to ensure that the investigating authority's explanations are reasoned and adequate, and remain so even in the light of plausible alternative explanations put forward by interested parties. Moreover, the Panel's approach also imposes on complaining parties an unduly high burden of proving a negative; of proving that an unbiased and objective investigating authority *could not* have reached the particular conclusion.

131. In addition, the original panel observed that "[h]aving found that a fundamental element of the causal analysis is not consistent with the Agreements, it is clear to us that the causal analysis cannot be consistent with the Agreements."¹⁹⁵ The Panel in these proceedings under Article 21.5 of the DSU seems to have assumed that the opposite of this statement must also be true—that is, having found that one fundamental element (injury) of the causal analysis is *consistent* with the Agreements, the Panel seems to have concluded that the entire causal analysis must also be consistent with the Agreements. This is not the case. The Panel had a duty to examine, first, whether the USITC's finding, in the Section 129 Determination, of a likely imminent substantial increase in imports, was consistent with the requirements of Article 3.7 of the *Anti-Dumping Agreement* and Article 15.7 of the *SCM Agreement*; and, secondly, whether the USITC's analysis of causation was consistent with the requirements of Article 3.5 of the *Anti-Dumping Agreement* and Article 15.5 of the *SCM Agreement*. That the USITC chose to conduct an "integrated" or "unitary" analysis of threat of injury and

¹⁹³Panel Report, para. 7.63.

¹⁹⁴*Ibid.*

¹⁹⁵Original Panel Report, para. 7.122.

causation¹⁹⁶ did not relieve the USITC of the need to comply with each of the requirements set out in these provisions, nor did it relieve the Panel of its duty to examine whether the Section 129 Determination demonstrated how compliance with these distinct sets of obligations had been achieved.

132. In this regard, we also wish to highlight that this part of the Panel's analysis makes no mention of the positive requirement, in Article 3.5 of the *Anti-Dumping Agreement* and Article 15.5 of the *SCM Agreement*, that an investigating authority demonstrate that further dumped/subsidized imports would cause injury. The Panel does not quote from these provisions and it does not refer back to the original panel report, which also does not analyze the requirement to demonstrate a causal link. In particular, the Panel did not examine whether the USITC identified and explained the positive evidence establishing a genuine and substantial relationship of cause and effect between imports and threat of injury.¹⁹⁷ There is no indication in the Panel Report that the Panel identified the reasons given by the USITC that supported the establishment of the causal link, or that it looked behind those reasons to test their basis in the record and their continued adequacy in the light of the plausible alternative explanations put forward by the interested parties.

(c) The Panel's Analysis of Non-Attribution

133. We also see error in the approach taken by the Panel to review the USITC's treatment of "other factors".¹⁹⁸ This is particularly evident in its findings on Canada's claim that the USITC had acted inconsistently with the second sentence of Article 3.5 of the *Anti-Dumping Agreement* and Article 15.5 of the *SCM Agreement* by failing to carry out a non-attribution analysis in respect of the

¹⁹⁶According to the United States, in the Section 129 Determination, "the [US]ITC integrated its causation discussion into its analysis of the threat factors." (United States' appellee's submission, para. 42) The United States further explains that the USITC's analysis of the threat factors "subsumes the causal link question" and is, therefore "best characterized as a unitary analysis, whereby the [US]ITC considers whether a domestic industry is being threatened with material injury 'by reason of' subject imports as a single question." (footnote 39 to para. 42)

¹⁹⁷Appellate Body Report, *US – Wheat Gluten*, para. 69.

¹⁹⁸Although the Panel did not, in this part of its Report, expressly refer to the interpretations of the second sentences of Article 3.5 of the *Anti-Dumping Agreement* and Article 15.5 of the *SCM Agreement* that were contained in the original panel report, we consider the Panel's statement, at the outset of its analysis, that "there are no new issues of legal interpretation raised" (Panel Report, para. 7.14) to be an incorporation by reference of the interpretations made in the original panel report. That report did contain some discussion of the content of the so-called "non-attribution" requirement.

issue of potential future oversupply from United States producers.¹⁹⁹ The Panel's consideration of this issue is set out in paragraph 7.73 of the Panel Report:

Finally, with respect to potential [United States] oversupply, we note that the principal basis for the USITC's conclusion that the condition of the industry during the period of investigation could not be attributed to Canadian imports was the fact that [United States] supply contributed to the price declines in the market. In the section 129 determination, the USITC explained that, in light of the increased correlation between [United States] production, capacity and demand at the end of the period of investigation, excess supply from [United States] sources was not a potential threat of injury. The availability of capacity in Canada, likely increased production, and the likelihood that exports will be predominantly to the [United States] market are not relevant to the question whether the USITC erred in so concluding. While those factors support the conclusion that imports from Canada are likely to increase, they do not affect the question whether excess supply from domestic sources potentially threatens the domestic industry.

134. In our view, the Panel's analysis of this issue is wholly inadequate. The Panel's analysis is limited to the second sentence of the above excerpt, where the Panel merely refers to the USITC explanation "that, in light of the increased correlation between [United States] production, capacity and demand at the end of the period of investigation, excess supply from [United States] sources was not a potential threat of injury." The Panel's lack of analysis on this issue is all the more surprising given that the original panel, in its analysis of the same issue, characterized the USITC's "failure to discuss the likely future effects of domestic supplies of lumber" as a "glaring omission".²⁰⁰

135. In this appeal, the United States does not seem to dispute Canada's assertion that, for purposes of non-attribution, "the legally relevant question, and the one the USITC itself sought to answer, was whether [United States] producers would respond differently from Canadian producers to market conditions in the imminent future, even though they had responded similarly in the recent past."²⁰¹ According to the United States, the USITC did answer this question in a proper manner. Regardless

¹⁹⁹Before the Panel, Canada argued that the potential future "oversupply" of the market by United States producers was an "other known factor" for which the USITC was required to conduct a non-attribution analysis. (Panel Report, paras. 7.64 and 7.65) Canada emphasized that the USITC had found that Canadian imports did not cause present material injury because excess supply from *both* Canadian imports and domestic production led to price declines during the period of investigation. Canada also relied on the fact that the original panel had criticized the USITC's failure, in the original determination, to discuss the likely future effects of domestic lumber production, and had suggested that there was a lack of evidence to support the USITC's conclusion that there would be no United States oversupply affecting lumber prices in the future. (*Supra*, footnote 91)

²⁰⁰Original Panel Report, para. 7.135.

²⁰¹Canada's appellant's submission, para. 144 (quoted in United States' appellee's submission, para. 186).

of how this question was addressed by the USITC in the Section 129 Determination, we see no indication in the Panel Report that the *Panel* properly reviewed the USITC's treatment of this question. The only analysis made by the Panel is confined to the second sentence of the excerpt quoted above. But this sentence contains no specific reference to the Section 129 Determination and no analysis of whether the USITC's conclusion on this point was supported by positive evidence. The Panel did not engage in any meaningful review of the USITC's treatment of projected United States supply, and, in particular, of whether the USITC's finding that United States producers would not contribute to future oversupply could be reconciled with its finding, in the context of its analysis of present material injury, that both United States and Canadian producers contributed to oversupply in the past.²⁰²

136. We note that the Section 129 Determination makes clear that the USITC's finding that domestic oversupply was not an other causal factor rested on two principal bases: first, on the evidence regarding domestic production and capacity; and, secondly, on evidence indicating that domestic producers had brought their production in line with consumption.²⁰³ The Panel should have tested the evidentiary foundations for these bases, but it failed to do so.²⁰⁴ The Panel should also have satisfied itself that the inferences that the USITC drew from these two bases were consistent with the way in which the USITC treated evidence relating to the likely future behaviour of Canadian producers. We further note, in this connection, that analyzing future "oversupply" implies some comparison against future demand, yet the USITC itself observed that demand forecasts from industry analysts were "somewhat mixed"²⁰⁵, and that this "raised questions about the usefulness of these forecasts."²⁰⁶

(d) The Totality of the Evidence and Factors Considered

137. Lastly, we wish to mention one further concern that we have with the standard of review applied by the Panel. The Panel examined, separately, the various USITC findings challenged by Canada, but did not undertake any assessment of whether the *totality* of the factors and evidence

²⁰²Original determination, pp. 31-37. In the Section 129 Determination, the USITC stated that "[b]ecause we find that excess supply from both subject imports and domestic production led to declines in price and deterioration in the domestic industry's condition in 2000, we do not conclude that subject imports had a significant impact resulting in present material injury to the domestic industry." (Section 129 Determination, p. 58 (footnote omitted))

²⁰³Section 129 Determination, p. 69.

²⁰⁴For example, the Panel could have sought to identify what data regarding United States production and capacity the USITC relied upon in finding that future oversupply was no longer a risk, and to test whether such data supported the conclusion drawn from it. The Panel could have tested the evidentiary basis for the finding that United States producers would not engage in future oversupply in a similar manner.

²⁰⁵Section 129 Determination, p. 77.

²⁰⁶*Ibid.*, p. 79.

considered supported the ultimate finding of a threat of material injury. In neglecting this aspect of its review, the Panel does not seem to have taken account of the express requirement in Article 3.7 of the *Anti-Dumping Agreement* and Article 15.7 of the *SCM Agreement* that "the *totality* of the factors considered must lead to the conclusion that further [dumped/subsidized] exports are imminent and that, unless protective action is taken, material injury would occur." (emphasis added) This neglect is particularly striking given that the original panel recognized the need to undertake such an analysis, and the Panel asked Canada a specific question in this regard.²⁰⁷

(e) Summary

138. In sum, the Panel's analysis, viewed as a whole, reveals a number of serious infirmities in the standard of review that it articulated and applied in assessing the consistency of the Section 129 Determination with Articles 3.5 and 3.7 of the *Anti-Dumping Agreement* and Articles 15.5 and 15.7 of the *SCM Agreement*. First, the Panel's repeated reliance on the test that Canada had *not* demonstrated that an objective and unbiased authority "could not" have reached the conclusion that the USITC did, is at odds with the standard of review that has been articulated by the Appellate Body in previous reports. As we noted earlier, the standard applied by the Panel imposes an undue burden on the complaining party. Secondly, the "not unreasonable" standard employed by the Panel at various reprises is also inconsistent with the standard of review that has been articulated by the Appellate Body in previous reports, and it is even more so for ultimate findings as opposed to intermediate inferences made from particular pieces of evidence. Thirdly, the Panel did not conduct a critical and searching analysis of the USITC's findings in order to test whether they were properly supported by evidence on the record and were "reasoned and adequate" in the light of alternative explanations of that evidence.²⁰⁸ Fourthly, the Panel failed to conduct an analysis of whether the totality of the factors and evidence considered by the USITC supported the ultimate finding of a threat of material injury.

139. We emphasize that we are not finding here that the Section 129 Determination does not contain sufficient support for the inferences that the USITC made from the evidence on the record, or that the conclusions reached by the USITC were not reasoned or adequate. Our conclusion is, rather, that the *Panel* has not engaged in the requisite degree of scrutiny to enable it to have made the

²⁰⁷Question 8 posed by the Panel to the parties.

²⁰⁸As we noted earlier, the Panel's failure is evident, in particular, in: (i) the Panel's treatment of the USITC's analysis of capacity, capacity utilization, production, and the export orientation of Canadian producers in the context of the USITC's finding of a likely substantial imminent increase in imports; (ii) the Panel's treatment of the USITC's demonstration of the causal link between imports and injury; and (iii) the Panel's treatment of the USITC's analysis of why United States producers could not contribute to future oversupply and could not, therefore, be an "other factor" contributing to future injury.

findings it did on the basis of an objective assessment, as required by Article 11 of the DSU. In our view, this inadequate level of scrutiny, resting as it did on the Panel's reliance on a "not unreasonable" standard and on a standard that an unbiased and objective authority "could not" have reached such conclusions, permeates the entire Panel Report.

5. Conclusion

140. We find that, taken together, all of the above demonstrates that the Panel failed to comply with its duties under Article 11 of the DSU in the standard of review that it articulated and applied to assess the consistency of the Section 129 Determination with Articles 3.5 and 3.7 of the *Anti-Dumping Agreement* and Articles 15.5 and 15.7 of the *SCM Agreement*. The Panel's failure in this regard means that the substantive findings and conclusions that the Panel made as a result of its scrutiny of the Section 129 Determination must also fall. Accordingly, we *reverse* the Panel's findings, in paragraph 8.1 of the Panel Report, that:

... the determination of the USITC in the section 129 proceeding investigation is not inconsistent with the asserted provisions of:

- Article 3.5 of the [*Anti-Dumping*] Agreement,
- Article 3.7 of the [*Anti-Dumping*] Agreement,
- Article 15.5 of the SCM Agreement, and
- Article 15.7 of the SCM Agreement.

141. We note that, having reversed these findings on the grounds that the Panel articulated and applied an incorrect standard of review to the Section 129 Determination, we need not examine Canada's claim that the Panel failed to satisfy its duty, under Article 12.7 of the DSU, to provide a "basic rationale" for its findings and conclusions.

VI. Canada's Request to Complete the Analysis

A. *Introduction*

142. Having reversed the Panel's findings on the above basis, we now consider Canada's request that we find the Section 129 Determination inconsistent with Articles 3.5 and 3.7 of the *Anti-Dumping Agreement* and Articles 15.5 and 15.7 of the *SCM Agreement*.

143. We note that, in its appellant's submission, Canada did not expressly request the Appellate Body "to complete the analysis". At the oral hearing, Canada asserted that, although it did not use the

phrase "complete the analysis", it clearly made such a request by asking the Appellate Body to "find that the USITC's determination was not consistent with the United States' obligations under Articles 3.5 and 3.7 of the [*Anti-Dumping*] Agreement and Articles 15.5 and 15.7 of the SCM Agreement."²⁰⁹ Canada explained that the Appellate Body could find the USITC's Section 129 Determination to be inconsistent with these provisions on the basis of errors of legal interpretation and the USITC's treatment of certain factors.²¹⁰ The United States argued that the Appellate Body should not accept Canada's request because Canada did not clearly request the Appellate Body to complete the analysis, and did not provide a "road map" for the Appellate Body to follow if it decided to do so.²¹¹ This also meant that the United States was not given an opportunity to respond to the request to complete the analysis. The United States added that, in any event, the complexity of the facts of this case would not allow the Appellate Body to complete the analysis.²¹²

144. We begin with the claims that Canada has described as involving errors of legal interpretation on the part of the Panel and then turn to Canada's claims regarding the USITC's treatment of certain factors.

B. *Canada's Allegations Involving Errors of Legal Interpretation*

1. Threat of Injury – Likelihood of Increased Importation

145. Canada submits, first, that there is a *legal requirement* under Article 3.7(i) of the *Anti-Dumping Agreement* and Article 15.7(ii) of the *SCM Agreement* to determine the "rate" of increase of dumped/subsidized imports on a "year-to-year" or annual basis. According to Canada, the "rate" of increase cannot simply be determined by comparing the increase in volume of imports between the beginning and the end of the investigation period, as the USITC did in this case. At the oral hearing, however, Canada conceded that there is no "legal requirement" to determine the rate of increase of dumped/subsidized imports solely on the basis of a year-to-year comparison or annual basis, and argued, instead, that the USITC should have determined the rate of increase on the basis of whether there was a significant increase in the market share of the imports in the United States market.²¹³ The United States responds that Article 3.7(i) and Article 15.7(ii) do not prescribe a particular methodology to determine the rate of increase of imports or the likelihood of increased

²⁰⁹Canada's appellant's submission, para. 248.

²¹⁰Canada's response to questioning at the oral hearing.

²¹¹United States' response to questioning at the oral hearing.

²¹²*Ibid.* (referring to Appellate Body Report, *US – Hot-Rolled Steel*, para. 236).

²¹³According to Canada, neither the average yearly increase in Canadian imports between 1999 and 2000 and between 2000 and 2001 (which was only 1.4 per cent), nor the market share of Canadian imports (which was practically stable during the investigation period), supports the USITC's finding of a likelihood of substantially increased imports in the near future. (Canada's response to questioning at the oral hearing)

importation. Moreover, according to the United States, the evidence on the record provided a proper basis for the USITC's finding of a likelihood of substantially increased importation.²¹⁴

146. Article 3.7(i) of the *Anti-Dumping Agreement* and Article 15.7(ii) of the *SCM Agreement* provide that, in making a threat of injury determination, an investigating authority should consider whether there is "a significant rate of increase of [dumped/subsidized] imports into the domestic market indicating the likelihood of substantially increased importation". These provisions lay emphasis on two aspects: first, that there is a "significant" rate of increase in imports; and secondly, that such a rate of increase reveals the likelihood of "substantially" increased importation in the near future. Taken together, they refer to the observed behaviour of the volume of imports.

147. Although the concept of a "rate" of increase implies measuring the increase with reference to some time period, neither of these provisions stipulates any specific time period or any specific methodology for measuring the rate of increase of imports. As for Canada's argument at the oral hearing regarding market share, we observe that these provisions do not prescribe that the measurement be done with reference to market share of the imports or any other index. We, therefore, agree with the Panel that Article 3.7(i) of the *Anti-Dumping Agreement* and Article 15.7(ii) of the *SCM Agreement* do not prescribe a specific methodology for determining the rate of increase in imports. Whatever be the methodology followed by an investigating authority, its determination must show, on the basis of positive evidence and an objective examination, that the rate of increase of dumped/subsidized imports is "significant" so as to indicate the likelihood of "substantially" increased imports in the near future.

148. At the oral hearing, Canada agreed that Article 3.7(i) of the *Anti-Dumping Agreement* and Article 15.7(ii) of the *SCM Agreement* do not prescribe a particular methodology to be used by investigating authorities in every case. Thus, Canada's argument is essentially directed at the USITC's appreciation of the evidence on the record, that is, at the question whether the evidence supported the USITC's finding that the rate of increase in dumped/subsidized imports was "significant" and that it

²¹⁴The United States explains that the USITC's analysis began by noting that subject import volumes were already at significant levels during the period of investigation, accounting for between 33.2 per cent and 34.7 per cent of the United States market. Over this high baseline, these imports increased by 2.8 per cent from 1999 to 2001, even with the restraining effect of the SLA in place and a decline in apparent United States consumption of 0.4 per cent. Moreover, the USITC found that there was a greater increase in subject imports at the end of the period of investigation, when such imports were no longer subject to the SLA, including when they were not yet subject to preliminary anti-dumping or countervailing duties. Thus, there was a pattern of substantially increasing subject imports at the end of the period of investigation, with increases of 2.4 per cent from 2000 to 2001, 4.9 per cent from April to December 2001, and 14.6 per cent in the first quarter 2002 as compared to the first quarter of 2001. (United States' appellee's submission, paras. 27-31 (referring to Section 129 Determination, pp. 20-31))

indicated that imports would increase "substantially" in the near future. We return to this issue below.²¹⁵

2. Threat of Injury – Price Effects

149. We turn to Canada's arguments concerning the USITC's analysis of adverse price effects. Canada asserts that the Section 129 Determination is inconsistent with Article 3.7(iii) of the *Anti-Dumping Agreement* and Article 15.7(iv) of the *SCM Agreement*, because these provisions impose a requirement to compare the prices of imports with domestic prices. Canada argued before the Panel that these provisions "require a *comparison* between the price levels or trends at which 'imports are entering' and the price levels or trends for the domestic product."²¹⁶ According to Canada, "[t]his is because the prices at which 'imports are entering' can only threaten to cause imminent price depression or price suppression, and increase demand for further imports, if those prices are lower than prices for the comparable domestic product, or if trends in those prices otherwise adversely affect prices for the domestic product (*e.g.*, by falling faster, or rising slower, than domestic prices)."²¹⁷ Canada explains that the USITC conducted no such comparison between import prices and prices of the domestic product. Instead, "the USITC noted only that prices for *both* [United States]-produced and Canadian softwood lumber products followed the same general trends throughout the period of investigation."²¹⁸

150. The United States responds that Article 3.7(iii) and Article 15.7(iv) do not prescribe a particular methodology with respect to either a comparison of prices or a determination of price effects. In addition, the United States explains that differences in the tree species used to produce softwood lumber in Canada and in the United States do not permit a direct price comparison in this case between the imported and the like domestic product.²¹⁹

151. Article 3.7(iii) of the *Anti-Dumping Agreement* and Article 15.7(iv) of the *SCM Agreement* state that investigating authorities should consider, as part of their determination of threat of injury, "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". These provisions do not prescribe a particular methodology for the examination of the price effects of dumped/subsidized imports. Regardless of the methodology followed by an investigating authority, it is clear from the

²¹⁵See *infra*, Section VI.C.

²¹⁶Canada's appellant's submission, para. 86. (original emphasis; footnote omitted)

²¹⁷*Ibid.*, para. 86.

²¹⁸*Ibid.*, para. 216. (original emphasis)

²¹⁹United States' appellee's submission, para. 120.

plain language of these provisions that the authority must examine: (i) the trends in the prices at which "imports are entering"; (ii) the "effect" of those prices on "domestic prices"; and (iii) the "demand for further imports". Discerning the "effect" of prices of imports on domestic prices necessarily calls for an analysis of the interaction between the two.²²⁰ Otherwise, the links between the prices of imports and the depressing or suppressing effect on domestic prices, and the consequent likelihood of a "demand for further imports" may not be properly established.

152. At the oral hearing, Canada agreed that Article 3.7(iii) of the *Anti-Dumping Agreement* and Article 15.7(iv) of the *SCM Agreement* do not prescribe a particular methodology for examining the effect of the prices of imports on domestic prices. Rather, Canada's case was that the USITC did not make a proper price comparison. The United States responded at the oral hearing that, even though direct price comparisons were difficult because of the different species involved, the USITC did examine pricing data for the species most commonly produced in Canada and the United States.²²¹ Therefore, like its arguments relating to the rate of increase, Canada's claim is essentially directed at the appreciation of the evidence by the USITC, that is, at the question whether the evidence on the record supported a finding that the prices of imports were having a depressing or suppressing effect on domestic prices and would likely increase demand for further imports.²²²

3. Causal Link – Collective Non-attribution Analysis

153. Finally, Canada asserts that, as part of its non-attribution analysis, the USITC was required to conduct an examination of the cumulated effect of third-country imports, as well as of the collective effect of cumulated third-country imports and United States oversupply.²²³ Canada finds support for this proposition in several Appellate Body reports.²²⁴ The United States responds that such collective analyses were not required because the USITC found that neither third-country imports nor United

²²⁰The United States seems to acknowledge that an investigating authority must examine the correlation between imported and domestic prices. According to the United States, "[a] price suppression or depression analysis considers trends for import and domestic prices to determine certain *correlations* between them." (United States' appellee's submission, para. 119 (emphasis added))

²²¹At the oral hearing, Canada stated that the "domestic prices" that should be examined under Article 3.7(iii) of the *Anti-Dumping Agreement* and Article 15.7(iv) of the *SCM Agreement* are exclusively the prices of domestically produced goods, and do not include the prices of the imported goods. In this case, the USITC relied on indexes of composite prices, and explained that the indexes distinguished between the species of trees used to produce softwood lumber and not by the country of production. In our view, whether an investigating authority may properly rely on a specific index in examining domestic prices will depend on the particular facts of the case.

²²²See *infra*, Section VI.C

²²³Canada's appellant's submission, para. 244.

²²⁴*Ibid.*, paras. 241-243 (quoting Appellate Body Report, *US – Hot-Rolled Steel*, paras. 222-223; Appellate Body Report, *EC – Tube or Pipe Fittings*, paras. 178 and 192; and Appellate Body Report, *US – Steel Safeguards*, para. 491).

States oversupply were "other known factors" threatening to cause injury to the United States domestic industry.²²⁵

154. Article 3.5 of the *Anti-Dumping Agreement* and Article 15.5 of the *SCM Agreement* require investigating authorities to "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." The Appellate Body has considered the issue of whether the non-attribution requirement of Article 3.5 of the *Anti-Dumping Agreement* obliges investigating authorities to examine the *collective* effects of "other known factors", or whether it is sufficient to look at the *individual* effects of several different "other known factors". The Appellate Body held that "Article 3.5 does not compel, *in every case*, an assessment of the *collective* effects of other causal factors".²²⁶ At the same time, the Appellate Body recognized that "there may be cases where, because of the specific factual circumstances therein, the failure to undertake an examination of the collective impact of other causal factors would result in the investigating authority improperly attributing the effects of other causal factors to dumped imports."²²⁷

155. Accordingly, answering the question whether the USITC was required to conduct a non-attribution analysis of cumulated third-country imports, or of the collective effect of cumulated third-country imports and United States oversupply, requires an examination of the particular facts of this case. It follows that this argument of Canada is also essentially directed at the appreciation of the evidence on the record.

C. *The USITC's Appreciation of the Relevant Factors*

156. We turn now to consider whether we can conduct our own review of the USITC's Section 129 Determination. As noted above, Canada takes issue with two aspects of the USITC's determination of threat of injury, namely: (i) the USITC's consideration of the rate of increase of dumped/subsidized imports and the likelihood of increased importation in the near future; and (ii) the effects of the prices of imports on domestic prices. In addition, Canada challenges several aspects of the USITC's

²²⁵United States' appellee's submission, para. 138.

²²⁶Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 191. (original emphasis)

²²⁷*Ibid.*, para. 192. (footnote omitted) The last sentence of this paragraph reads:

We are therefore of the view that an investigating authority is not required to examine the collective impact of other causal factors, provided that, under the specific factual circumstances of the case, it fulfils its obligation not to attribute to dumped imports the injuries caused by other causal factors.

causation and non-attribution analyses. Canada argues that the USITC's causation analysis is flawed because the USITC failed "to address the fact that, in the most recent 12 months, imports were increasing at the same time that prices and industry profitability were improving."²²⁸ Canada also raises questions about the USITC's finding that oversupply from United States domestic producers had ceased by the end of the period of investigation, and would not recur in the near future.²²⁹

157. In previous appeals, the Appellate Body has stated that, in certain circumstances, it may be appropriate for it to complete the analysis in order to contribute to the prompt settlement of the dispute.²³⁰ However, the Appellate Body has emphasized that in order for it to complete the analysis there must be sufficient factual findings by the panel or undisputed facts in the record to enable it to do so.²³¹ Canada, as the complaining party, must persuade us that there are sufficient uncontested facts on the record to enable us to complete the analysis by stepping into the shoes of the Panel. We observe, in this regard, that one of the bases for Canada's appeal of the standard of review applied by the Panel is that the Panel failed to carry out a critical and searching analysis of the explanations provided by the USITC in the light of the alternative explanations of the evidence on the record put forward by Canadian interested parties. There is thus an element of contradiction between Canada's assertion that we have before us a sufficient record of *uncontested* facts or factual determinations by the Panel on which to complete the analysis, and its appeal with respect to the standard of review applied by the Panel.

158. We also note that, according to Article 3.7 of the *Anti-Dumping Agreement* and Article 15.7 of the *SCM Agreement*, a finding of threat of material injury must be based on the "totality of the factors considered". In this case, several closely inter-related factors are at play in the USITC's determination of threat of material injury. Contested facts underlie the analysis of both the specific threat factors and of those factors acting collectively. For example, in order to assess whether the evidence supports the USITC's determination that imports were increasing at a "significant" rate, indicating a likelihood of "substantially" increased importation, we would have to review the data on the trends in the volume of imports, the effects of the SLA during the period of investigation, and the impact of its expiration, as well as the USITC's findings concerning Canadian excess capacity. The record indicates that the effect of the SLA is a matter that is highly contested between the participants.

²²⁸Canada's appellant's submission, para. 233.

²²⁹*Ibid.*, para. 237.

²³⁰Appellate Body Report, *US – Steel Safeguards*, para. 431.

²³¹Appellate Body Report, *US – Section 211 Appropriations Act*, para. 343; Appellate Body Report, *EC – Asbestos*, para. 78.

Indeed, at the oral hearing, Canada referred to this as "the single most litigated issue" before the USITC during the initial investigation. Canada also contested the USITC's findings concerning the SLA in these Article 21.5 proceedings.²³² Likewise, Canada challenged the USITC's findings concerning Canadian capacity in these Article 21.5 proceedings.²³³ The USITC's finding of adverse price effects is premised on its finding of likelihood of increased imports. Thus, it would not be possible to assess the USITC's finding of price effects without having reached a conclusion on the USITC's finding of increased importation. The task of assessing the USITC's examination of price effects is further complicated by the need to review extremely detailed factual issues, such as the comparability between species and the use of composite price indexes.

159. Contested facts also underlie the USITC's causation and non-attribution analyses. For example, it is unclear what data was before the USITC regarding the alleged coincidence of increasing imports and the improving performance of the United States industry.²³⁴ The United States asserts, in this regard, that the data on the industry's operating margins referred to by Canada are based on a subset of the industry that is substantially more profitable than the industry as a whole.²³⁵ Furthermore, Canada contests the evidence relied upon by the USITC to conclude that United States producers would not contribute to oversupply in the imminent future.²³⁶ Canada alleges, in this regard, that the USITC took opposite approaches to future supply from Canadian and United States

²³²Canada argued before the Panel that the studies relied upon by the USITC "do not address the key issue of whether the SLA had any significant restraining effect *at the time it expired*." (Panel Report, para. 4.23 (original emphasis)) Canada stated that a study introduced by petitioners in the Section 129 proceedings had serious methodological deficiencies. (para. 4.24) At the oral hearing, the United States denied that the USITC had relied exclusively on this study.

In addition, Canadian interested parties had asserted before the USITC that the SLA had resulted in a redistribution, among Canadian provinces, of exports of softwood lumber to the United States. The USITC concluded that "[t]he record does not show that the SLA merely led to a redistribution of exports from Canadian provinces not covered by the SLA, particularly the Maritime Provinces, and that upon its expiration, pre-SLA provincial trade patterns returned." (Section 129 Determination, p. 26 (footnote omitted))

²³³According to Canada, the capacity of Canadian producers was projected to increase only slightly, and excess capacity would be used primarily to supply markets other than the United States. (See Panel Report, paras. 4.37-4.40)

²³⁴Canada was unable to confirm at the oral hearing whether it submitted to the USITC the data upon which it now relies to argue that the condition of the United States industry was improving over a 12 month period ending in the first quarter 2002, rather than in just the first quarter of 2002.

²³⁵United States' appellee's submission, para. 178 (referring to Canada's appellant's submission, para. 116).

²³⁶Canada's appellant's submission, para. 238.

producers.²³⁷ The record also shows that whether United States demand for softwood lumber would remain stable, decrease, or increase in the near future was contested. Finally, the integrated nature of the USITC's threat of injury and causation analyses further complicates any effort aimed at completing the analysis.²³⁸

160. Thus, completing the analysis in this case would require us to review extensive aspects of the USITC's threat of injury and causation analyses, and would require us to engage in a comprehensive examination of highly complex and contested facts.²³⁹ The fact that Canada, the participant making the request, focused its arguments on the errors made by the Panel and provided little information to enable us to complete the analysis does not facilitate this task.

161. For all these reasons, we are unable to complete the analysis and determine whether the Section 129 Determination meets the requirements of Articles 3.5 and 3.7 of the *Anti-Dumping Agreement* and Articles 15.5 and 15.7 of the *SCM Agreement*. Therefore, we express no views on the consistency or inconsistency of the Section 129 Determination with these provisions.

VII. Findings and Conclusions

162. For the reasons set forth in this Report, the Appellate Body:

- (a) finds that the Panel acted inconsistently with Article 11 of the DSU because it articulated and applied an improper standard of review in its assessment of the Section 129 Determination and, consequently, reverses the Panel's findings, in paragraphs 7.57, 7.63, 7.74, and 8.1 of the Panel Report, that the Section 129 Determination is not inconsistent with the obligations of the United States under Articles 3.5 and 3.7 of the *Anti-Dumping Agreement* and Articles 15.5 and 15.7 of the *SCM Agreement*;

²³⁷Canada's response to questioning at the oral hearing. Canada asserts that the USITC examined export projections of Canadian producers, but not for United States producers. Instead, the USITC used historical data for United States producers and discounted the United States producer-supplied data. However, according to Canada, historical data showed that Canadian producers had curbed production as much as their United States counterparts. In addition, Canada argues that the USITC failed to acknowledge that the relatively steady capacity utilization rates of United States producers were not strikingly dissimilar to those of Canadian producers, and that, in 2001, United States producers had more total unused capacity than had Canadian producers. (Canada's appellant's submission, paras. 131-133)

²³⁸See *supra*, para. 131.

²³⁹See Appellate Body Report, *US – Hot-Rolled Steel*, para. 236.

- (b) does not find it necessary to examine whether the Panel failed to comply with its duties under Article 12.7 of the DSU to set out the applicability of relevant provisions and to provide a "basic rationale" for its findings;
- (c) is unable to complete the analysis and determine whether the Section 129 Determination is consistent with the United States' obligations under Articles 3.5 and 3.7 of the *Anti-Dumping Agreement* and Articles 15.5 and 15.7 of the *SCM Agreement*;
- (d) and, consequently, reverses the Panel's conclusion, in paragraph 8.2 of the Panel Report, that "the United States has implemented the decision of the Panel, and the DSB, to bring its measure into conformity with its obligations under the [*Anti-Dumping*] and SCM Agreements."

163. As a result of these findings, the Appellate Body is unable to make a recommendation to the Dispute Settlement Body.

Signed in the original in Geneva this 24th day of March 2006 by:

Luiz Olavo Baptista
Presiding Member

Georges Abi-Saab
Member

A.V. Ganesan
Member

ANNEX I

**WORLD TRADE
ORGANIZATION**

WT/DS277/16
16 January 2006

(06-0177)

Original: English

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

Recourse to Article 21.5 of the DSU by Canada

Notification of an Appeal by Canada
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 20(1) of the Working Procedures for Appellate Review

The following notification, dated 13 January 2006, from the Delegation of Canada, is being circulated to Members.

Pursuant to paragraph 4 of Article 16 of the *Understanding and Rules and Procedures Governing the Settlement of Disputes* (the "DSU") and Rule 20 of the Working Procedures for Appellate Review, Canada hereby notifies its decision to appeal certain issues of law and certain legal interpretations covered in the Panel Report on *United States – Investigation of the International Trade Commission In Softwood Lumber From Canada: Recourse to Article 21.5 of the DSU by Canada* (WT/DS/277/RW dated 15 November 2005).

Canada seeks review by the Appellate Body of the Panel's conclusion that the United States implemented the rulings and recommendations of the Dispute Settlement Body¹ and the Panel's findings that the November 24, 2004 threat of injury determination by the U.S. International Trade Commission (USITC) was not inconsistent with Articles 15.5 and 15.7 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement")² and Articles 3.5 and 3.7 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement")³. The Panel has erred in law and in its legal interpretations of the applicable provisions of the covered agreements. Canada therefore seeks review of the following:

1. The Panel's failure to carry out its duty under Article 11 of the DSU to make an objective assessment of the matter before it, by:

¹*United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, Recourse by Canada to Article 21.5 (DS257), Report of the Panel, WT/DS277/RW, circulated November 15, 2005, para. 8.2.

²*Ibid.*, paras. 7.57 and 8.1.

³*Ibid.*, paras. 7.74 and 8.1.

- (a) failing to assess the applicability of the relevant covered agreements to the USITC's determination and failing to assess the conformity of the determination with those agreements, and, more specifically, by failing to apply the specific provisions of Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement to the findings and conclusions in the USITC determination, and as a result, failing to examine whether those findings and conclusions were in conformity with those provisions;⁴
- (b) declining to examine the USITC's determination in light of the adopted findings of the original panel in this dispute⁵;
- (c) failing to make an objective assessment of the facts of the case by not conducting a detailed and searching analysis of the USITC's findings that:
 - (i) there was a clearly foreseen and imminent change in circumstances that would threaten injury to the domestic industry in the absence of protective measures⁶; and
 - (ii) there was a causal link between the subject imports and a threat of material injury to the domestic industry and that it was not required to conduct a non-attribution analysis⁷.

2. The Panel's failure to carry out its duties under Article 12.7 of the DSU to set out the applicability of relevant provisions and provide a "basic rationale" for its findings.⁸

3. The Panel's errors in finding that the USITC determination was not inconsistent with Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement, and in particular, its failure to apply the requirements of those provisions that:

- (a) a threat of material injury determination must be based on a clearly foreseen and imminent change in circumstances which would create a situation in which the dumping or subsidy would cause injury and must be based on facts and not merely on allegation, conjecture or remote possibility; and
- (b) the totality of the factors considered must lead to the conclusion that further dumped or subsidized exports are imminent and, unless protective action is taken, material injury would occur.⁹

4. The Panel's errors in finding that the USITC's conclusion that subject imports were entering the United States at prices likely to have adverse price effects is not inconsistent with Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement, despite the USITC's failure to conduct a comparison of import and domestic prices as required by those provisions.¹⁰

⁴*Ibid.*, paras. 7.19 – 7.22, 7.26-7.28, 7.35, 7.39, 7.42, 7.50-7.52, 7.55-7.57.

⁵*Ibid.*, paras. 7.12, 7.35, 7.39, 7.42.

⁶*Ibid.*, paras. 7.13, 7.35, 7.39, 7.42, 7.52.

⁷*Ibid.*, paras. 7.62-7.63.

⁸*Ibid.*, paras. 7.24-7.57.

⁹*Ibid.*, paras. 7.13, 7.19 -7.22, 7.26-7.28, 7.35, 7.39, 7.42, 7.50-7.52, 7.55-7.57, 7.62-7.63, 7.72-7.73).

¹⁰*Ibid.*, paras. 7.50-7.52.

5. The Panel's errors in finding the USITC's conclusion that the volume of subject imports would increase substantially in the imminent future is not inconsistent with Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement when this conclusion relied on two other conclusions that the DSB had already found, in the original proceeding, to be inconsistent with the United States' WTO obligations.¹¹

6. The Panel's errors in finding the USITC's determination not inconsistent with Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement despite the failure of the USITC to: (i) demonstrate "a causal relationship between the dumped or subsidized imports and the injury to the domestic industry"; (ii) examine "any known factors other than the dumped or subsidized imports which at the same time are injuring the domestic industry"; and (iii) properly attribute injuries caused by these other factors. In particular, the Panel erred by:

- (a) affirming the USITC's conclusion that there was a causal link between dumped and subsidized imports and future material injury to the domestic industry even though fundamental elements of the USITC's analysis were in error;¹²
- (b) affirming the USITC's decision not to conduct a non-attribution analysis based on its erroneous conclusion that there were no known "other causal factors" potentially threatening material injury to the U.S. industry;¹³
- (c) failing to require the USITC to separate and distinguish the threat of injury posed by other sources of supply in the marketplace, considered both individually and on a cumulative basis, from the alleged threat attributed to oversupply from Canadian imports alone.¹⁴

Canada respectfully requests that the Appellate Body reverse the findings and conclusions of the Panel and find that the United States has failed to implement the DSB's rulings and recommendations.

¹¹*Ibid.*, paras. 7.26-7.28, 7.35, 7.39, 7.42.

¹²*Ibid.*, paras. 7.62-7.63.

¹³*Ibid.*, paras. 7.71-7.74.

¹⁴*Ibid.*, paras. 7.71-7.73.