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UNITED STATES – FINAL COUNTERVAILING DUTY DETERMINATION WITH RESPECT TO CERTAIN SOFTWOOD LUMBER FROM CANADA

Recourse by Canada to Article 21.5
(DS257)

Report of the Panel

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Australia – Salmon (Article 21.5 – Canada)	Panel Report, *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada*, WT/DS18/RW, adopted 20 March 2000, DSR 2000:IV, 2031
Brazil – Aircraft	Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, 1161
Canada – Aircraft	Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, adopted 20 August 1999, as upheld by the Appellate Body report, WT/DS70/AB/R, DSR 1999:IV, 1443
Dominican Republic – Import and Sale of Cigarettes	Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, 25 April 2005, adopted 19 May 2005.
Dominican Republic – Import and Sale of Cigarettes	Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/R, 26 November 2004, adopted 19 May 2005.
EC – Bed Linen (Article 21.5 – India)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003 Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/RW, adopted 24 April 2003, as modified by the Appellate Body Report, WT/DS141/AB/RW
US – Line Pipe	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002
US – Shrimp (Article 21.5 – Malaysia)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6481
US – Softwood Lumber III	Panel Report, *United States – Preliminary Determinations with Respect to Certain Softwood Lumber from Canada*, WT/DS236/R, adopted 1 November 2002

Short Title	Full Case Title and Citation of Case
US – Softwood Lumber IV	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004 Panel Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/R and Corr.1, adopted 17 February 2004, as modified by the Appellate Body Report, WT/DS257/AB/R

I. PROCEDURAL BACKGROUND

1.1 On 17 February 2004, the Dispute Settlement Body ("DSB") adopted the recommendations and rulings in the reports of the original panel and the Appellate Body in *US – Softwood Lumber IV*.

1.2 In respect of pass-through, the original panel concluded that:

> "the USDOC's[1] failure to conduct a pass-through analysis in respect of upstream transactions for log and lumber inputs between unrelated entities was inconsistent with Article 10 SCM Agreement and Article VI:3 of GATT 1994."[2]

1.3 More specifically, the original panel found that:

> "the USDOC's failure to conduct a pass-through analysis in respect of logs sold by tenure-holding timber harvesters (whether or not also lumber producers) to unrelated sawmills producing subject softwood lumber; and in respect of lumber sold by tenure-holding harvester/sawmills to unrelated lumber re-manufacturers was inconsistent with Article 10 and thus Article 32.1 SCM Agreement, and with Article VI:3 of GATT 1994."[3]

1.4 The original panel therefore upheld Canada's claim that the United States' imposition of countervailing duties in respect of such transactions was inconsistent with Articles 10 and 32.1 SCM Agreement and Article VI:3 of GATT 1994.[4]

1.5 The United States appealed from the original panel's pass-through conclusion. The Appellate Body stated that the United States "contend[ed] that the [original panel] erred in finding that a pass-through analysis is required in respect of sales of *logs* from tenure-holding sawmills producing softwood lumber to unrelated sawmills, and for sales of lumber by tenure-holding sawmills to unrelated lumber remanufacturers."[5] According to the Appellate Body, the United States "[did] not appeal the [original panel's] finding that, where a subsidy is received by an independent timber harvester[6], a pass-through analysis is required in respect of sales to unrelated sawmills or unrelated remanufacturers".[7]

1.6 In respect of pass-through, the Appellate Body stated that it upheld the original panel's finding that:

> "USDOC's failure to conduct a pass-through analysis in respect of arm's length sales of *logs* by tenured harvesters/sawmills to unrelated sawmills is inconsistent with Articles 10 and 32.1 of the *SCM Agreement* and Article VI:3 of the GATT 1994."[8]

1.7 The Appellate Body stated that it reversed the original panel's finding that:

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[1] We shall continue the original panel's practice of referring to the US Department of Commerce as "USDOC".

[2] Panel Report, *US – Softwood Lumber* IV (hereinafter "Panel Report"), para. 8.1(c).

[3] Panel Report, para. 7.99.

[4] Panel Report, para. 8.1(c).

[5] Appellate Body Report, *US – Softwood Lumber* IV, (hereinafter "Appellate Body Report"), para. 16, emphasis in original.

[6] Before the Appellate Body, the United States used the term "independent harvester" in the same way as it had in the original dispute, namely, "'entities that do *not* produce [softwood lumber] product[s] under investigation'". Appellate Body Report at para. 127. In the Section 129 Determination, the USDOC used the term "independent harvester" to refer to "tenured independent harvesters/sawmills" (see note 52 *infra*).

[7] Appellate Body Report, para. 16, footnote omitted.

[8] Appellate Body report, para. 167 (e), emphasis in original.

> "USDOC's failure to conduct a pass-through analysis in respect of arm's length sales of *lumber* by tenured harvesters/sawmills to unrelated remanufacturers is inconsistent with Articles 10 and 32.1 of the *SCM Agreement* and Article VI:3 of the GATT 1994."[9]

1.8 At the DSB meeting of 17 December 2004, the United States informed the DSB that it had complied with the DSB's recommendations and rulings.

1.9 On 30 December 2004, Canada requested the establishment of a panel pursuant to Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").[10] At the same time, Canada also requested authorization from the DSB to suspend the application to the United States of certain concessions or other obligations, pursuant to DSU Article 22.2.

1.10 At its meeting of 14 January 2005, the DSB decided, in accordance with DSU Article 21.5, to refer to the original panel the matter raised by Canada in document WT/DS257/15. At that meeting, it also was agreed that the Panel should have standard terms of reference as follows:

> "To examine, in the light of the relevant provisions of the covered agreements cited by Canada in document WT/DS257/15, the matter referred to the DSB by Canada in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements".[11]

1.11 The Panel was composed as follows:

Chairman: Mr Elbio O. Rosselli

Members: Ms Marta Calmon Lemme
Mr Remo Moretta

1.12 On 14 January 2005, the DSB also referred the matter of suspension of concessions to the Panel for arbitration pursuant to DSU Article 22.6.[12]

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

1.14 The Panel met with the parties and third parties on 21 April 2005.

1.15 The Panel submitted its interim report to the parties on 20 May 2005. The Panel submitted its final report to the parties on 3 June 2005.

II. FACTUAL ASPECTS

2.1 With a view to implementing the rulings and recommendations of the DSB in respect of this dispute, on 19 November 2004, the United States issued a draft determination pursuant to Section 129 of the *Uruguay Round Agreements Act*. The United States issued its final Section 129 Determination on 6 December 2004 (the "Section 129 Determination").

2.2 On 20 December 2004, the United States published the final results of the first assessment review of the countervailing duties on imports of softwood lumber from Canada (the "First

[9] Appellate Body Report, para. 167 (f), emphasis in original.
[10] WT/DS257/15.
[11] WT/DS257/19.
[12] WT/DS257/20.

Assessment Review"). Pursuant to the US retrospective system of duty assessment, the First Assessment Review provided for retrospective final assessment of the countervailing duties to be levied on import entries of softwood lumber from Canada between 22 May 2002 and 31 March 2003. The First Assessment Review also determined the cash deposit rate to be levied on imports of softwood lumber from Canada as of 20 December 2004. The First Assessment Review was initiated in July 2003, pursuant to a request in May 2003 from Canada and other interested parties.

2.3 The arguments of the parties and third parties as presented to the Panel are contained in their written and oral submissions, the texts of which are appended to this report.

III. INTERIM REVIEW

3.1 The Panel issued its interim report to the parties on 20 May 2005. On 24 May 2005, both parties submitted written requests to the Panel to review precise aspects of the interim report but neither party requested an interim review meeting. On 26 May 2005, both parties commented in writing on the other party's requests for review of the interim report. This section summarizes the parties' requests and comments, and contains the Panel's responses thereto, and forms part of the Panel's findings.

A. REQUEST BY CANADA FOR REVIEW OF PRECISE ASPECTS OF THE PANEL REPORT

1. Request of Canada

3.2 Canada asks the Panel to introduce changes into paragraphs 4.71-4.73, 4.82, 4.83, 4.88, and 4.89.

3.3 Canada asks the Panel to make findings, in paragraph 4.73, concerning the USDOC's exclusion of certain transaction-specific data on log sales (submitted by Tembec (Manitoba)). Canada notes that although the USDOC excluded these data from pass-through analysis for reasons other than not being at arm's length[13], these reasons were "equally inconsistent" with the United States' obligations pursuant to the DSB's recommendations and rulings. Canada asserts that the parties would "benefit" from findings by the Panel on the Tembec (Manitoba) data.

3.4 Canada also asks the Panel to expand the description of Canada's arguments in paragraph 4.83, concerning the USDOC's treatment of aggregate data submitted by Canadian respondents. The suggested amendments would expand on the description of Canada's arguments that the sample data submitted by Canadian respondents were representative, that it was impossible for respondents to provide the full data requested by the USDOC, or more data than they did provide, and that USDOC was obliged to use the data provided by the respondents as the basis of the pass-through analysis.

3.5 Concerning paragraph 4.88, Canada takes issue with the Panel's statement that Canada "has not disputed that the USDOC needed" company-specific and/or transaction-specific data for the purpose of determining affiliation of parties to the log sales transactions, which according to Canada is inaccurate in the light of the totality of Canada's arguments, as reflected in Canada's suggested redraft of paragraph 4.83. Canada also asks the Panel to insert a statement that the USDOC accepted that aggregate data could, and did, control for affiliation.

3.6 In paragraph 4.89, Canada asks the Panel to insert a statement that "investigating authorities nevertheless have an obligation to perform analyses, on the basis of available data, in a manner that is consistent with the obligation under Article VI:3 of GATT 1994 and Articles 10 and 32.1 of the SCM

[13] According to both parties, USDOC did not conduct a pass-through analysis in respect of these log sales because the sales were made after the end of the period of investigation.

Agreement not to presume that the subsidy passed through to an unrelated purchaser of the input product".

3.7 Canada states that the Panel finds in paragraphs 4.71-4.73, and 4.82 that the USDOC was required to conduct a pass-through analysis irrespective of any considerations as to whether or not sales were at "arm's length". Canada requests that the Panel insert a statement in this context that "even if the U.S. arguments on 'arm's length' were accepted, the five 'factors' identified by USDOC in this case, including who pays the stumpage and the presence of non-cash components to a transaction, do not transform an arm's-length transaction into one that is not at arm's length".

2. Comments of the United States

3.8 The United States submits that the Panel should reject all of the amendments proposed by Canada. Concerning paragraph 4.73, the United States argues that the issue concerning Tembec (Manitoba) raised by Canada in its request for interim review is outside the Panel's terms of reference, as Canada's claim on pass-through was concerned with the appropriateness of USDOC's arm's length analysis. The United States further argues that in any case, as acknowledged by Canada, Tembec (Manitoba) submitted no data to the USDOC concerning log sales during the period of investigation.

3.9 The United States objects to Canada's request to expand the description of Canada's arguments in paragraph 4.83, stating that the original summary is sufficient, and that if Canada's request were accepted, without an equivalent expansion of the description of the US arguments, this would create an appearance of imbalance. Furthermore, given that the submissions of the parties are appended to the report, the United States considers a full recitation of detailed arguments unnecessary.

3.10 Concerning paragraph 4.88, the United States disagrees as a factual matter that Canada disputed the USDOC's need for company-specific and/or transaction-specific for purposes of determining affiliation. The United States asserts that Canada is confusing the question of whether the USDOC needed certain data with whether the USDOC should have accepted whatever data Canada offered.

3.11 The United States also disagrees with Canada's suggested amendment to paragraph 4.89, stating that the suggestion is inappropriate, and would directly contradict the Panel's immediately preceding statement that the Panel is reluctant to instruct investigating authorities concerning data issues in pass-through analysis.

3.12 Finally, the United States takes issue with Canada's suggested amendment to paragraphs 4.71-4.73 and 4.82 to "clarify" certain points in respect of the USDOC's arm's length factors. According to the United States, given that the Panel found that the USDOC should have conducted a pass-through analysis regardless of the issue of arm's length, Canada's suggestion is irrelevant and would call on the Panel to make substantial new findings that would then need to be subjected to additional interim review.

B. REQUEST BY THE UNITED STATES FOR REVIEW OF PRECISE ASPECTS OF THE PANEL REPORT

1. Request of the United States

3.13 The United States requests the Panel to make certain technical drafting corrections and clarifications to paragraphs 2.2, 4.20, 4.21, and 4.48, and to footnote 45 of the interim report (footnote 47 of the final report). The United States also requests substantive changes to paragraphs 4.38, 4.41, 4.47, 4.48 and 4.49.

3.14 First, the United States requests that in paragraphs 4.38, 4.41 and 4.49, we change the references to "dispute settlement decisions" to "dispute settlement reports", to avoid potential

confusion with "decisions" that might be made, for example, pursuant to Article IX of the Marrakesh Agreement.

3.15 Second, the United States asserts that at paragraph 4.47, the Panel mischaracterizes the United States' argument concerning the *EC – Bed Linen (Article 21.5)* dispute. The United States indicates that its argument on that point is correctly summarized at paragraph 4.45.

3.16 Third, the United States contends that paragraph 4.48 is factually incorrect in stating that the Final Determination and the First Assessment Review involve "'pass-through of the subsidy benefit, in respect of **the same import entries** . . . . '"

2. Comments of Canada

3.17 Canada only comments on the last of the United States' comments, concerning the factual accuracy of the reference to "the same import entries" in paragraph 4.48. According to Canada, this statement is factually accurate, and the issue is correctly described at paragraph 4.41, the accuracy of which the United States does not contest.

C. EVALUATION BY THE PANEL

1. Request of Canada

3.18 Concerning Canada's request in respect of paragraph 4.73, we have not made any findings in respect of the issue concerning Tembec (Manitoba)'s sales of logs. We consider that this issue falls outside our terms of reference, as set by the request for establishment of the Panel, as it does not correspond to any of the legal claims set forth in the first four "tirets" on page two of the request (WT/DS257/15).

3.19 In response to Canada's requests concerning the summary of its arguments in paragraph 4.83, we have slightly modified the text of that paragraph, and have inserted footnote 65.

3.20 Concerning paragraph 4.88, we do not consider that Canada has disputed the USDOC's need for company-specific and/or transaction-specific data to determine affiliation of parties to log transactions. We have introduced footnote 66 to clarify our understanding of the nature of, and the USDOC's use of, the aggregate data that the USDOC accepted for purposes of determining affiliation.

3.21 We have not introduced in paragraph 4.89 the statement requested by Canada, but have introduced a final sentence to that paragraph, as well as footnote 67, to clarify our view in respect of the issues raised by Canada's comment.

3.22 We have not introduced in paragraphs 4.71-4.73 and 4.82 the statement requested by Canada concerning certain of the arm's length factors applied by the USDOC. Such a statement would be inappropriate in view of our findings that pass-through analysis should have been conducted in respect of log sales between unrelated parties, irrespective of any considerations as to whether or not such sales were "arm's length".

2. Request of the United States

3.23 We have accepted the United States' suggested changes to paragraphs 2.2, 4.20, 4.21, and 4.48, and to footnote 45 of the interim report (footnote 47 of the final report). We also have made other technical corrections to the report, as necessary.

3.24 We have not accepted the United States' suggestion in respect of paragraphs 4.38, 4.41 and 4.49, because we believe that it is clear from the context that the word "decisions" refers to the

findings cited in that section of the report, and is not used in a generic sense that could potentially sweep in other kinds of actions.

3.25 In the light of the US comments, we have amended paragraph 4.47 slightly, to refer to what we see as the implication of the US argument, rather than to refer to the US argument as such.

3.26 We have added footnote 44, to clarify to which import entries the phrase in paragraph 4.48 "the same import entries" refers. Footnote 44 contains a cross-reference to paragraph 4.41, cited by Canada in its comments on the US suggestion concerning this paragraph.

IV. FINDINGS

4.1 This case concerns Canada's claim that the USDOC failed to properly implement the rulings and recommendations of the DSB in respect of the *US – Softwood Lumber IV* proceeding. In particular, Canada claims that, in the Section 129 Determination and First Assessment Review, the USDOC continued to presume pass-through of subsidy benefit in respect of various categories of sales of logs to unrelated purchasers. Before examining Canada's claims, we shall first rule on a preliminary ruling requested by the United States.

A. US REQUEST FOR PRELIMINARY RULING

1. Arguments of the parties

4.2 The United States requests a preliminary ruling that the final results of the First Assessment Review of the countervailing duty order on softwood lumber from Canada are not "measures taken to comply" with the recommendations and rulings of the DSB under Article 21.5 of the DSU. According to the United States, these results fall outside the scope of Article 21.5, and this Panel lacks jurisdiction to review them.

4.3 The United States submits that the First Assessment Review was a proceeding: separate from both the original countervailing duty investigation determination challenged by Canada and the Section 129 Determination at issue here; initiated prior to the DSB's adoption of recommendations and rulings in this dispute; that had nothing to do with complying with the recommendations and rulings of the DSB.

4.4 The United States notes that the *EC – Bed Linen (Article 21.5 – India)* panel granted the European Communities' preliminary ruling request to exclude from consideration certain antidumping duty measures taken by the European Communities that were cited by India, but that the panel found were not "taken to comply." The United States asserts that, in that dispute, in which the European Communities was found to have incorrectly calculated anti-dumping duties in an investigation of bed linens from India, the European Communities voluntarily applied the revised calculation method to anti-dumping duties imposed on Pakistan and Egypt. The United States asserts that, after concluding that no duties should be imposed on bed linen from those sources (as a result of the recalculation), the European Communities re-examined whether imports from India, considered alone, caused injury to the domestic industry. According to the United States, the European Communities concluded that they did, and therefore affirmed the imposition of anti-dumping duties on bed linen from India. The United States asserts that India challenged this finding of injury and the resulting imposition of duties on bed linen from India as a WTO-inconsistent measure "taken to comply" under Article 21.5.

4.5 The United States notes that the panel, in deciding not to review the latter measure, stated that

> "[T]he fact that the EC, subsequent to its re-examination of the dumping determinations with respect to imports from Egypt and Pakistan, and in the context of a review initiated on the request of Eurocoton, carried out an analysis of whether

> injury was caused by imports from India alone does not, *ipso facto*, establish that Regulation 696/2002 is a measure "taken to comply". Rather the opposite would seem to be the case – that Regulation would seem to be an entirely new determination, reached as a result of events subsequent to the EC having adopted a measure to comply with the DSB's recommendation."[14]

4.6 The United States submits that the final results of the First Assessment Review are not "measures taken to comply". The United States asserts that, before the original panel, Canada challenged the USDOC's Final Determination in the countervailing duty investigation on softwood lumber from Canada.[15] After the DSB adopted its recommendations and rulings, and within the agreed "reasonable period of time", the United States made the Section 129 Determination, in which it conducted a "pass through" analysis and recalculated the countervailing duty rate.[16] The new reduced rate was applicable to entries of subject merchandise on or after 10 December 2004. The United States submits that original investigations and assessment reviews are different processes which serve distinct purposes. The purpose of an investigation is to determine the existence, degree, and effect of any alleged subsidy; the purpose of an assessment review is to determine the amount of duty to be assessed on previous imports of subject merchandise and the estimated countervailing duty rate to be applied to future imports. The United States argues that the distinction between countervailing duty investigations and assessment procedures is explicitly recognized in the Agreement on Subsidies and Countervailing Measures ("SCM Agreement").[17]

4.7 The United States submits that the First Assessment Review was not a measure taken to comply with the recommendations and rulings of the DSB. Rather, it resulted from a separate affirmative request by Canada, among others, that USDOC review new sales and subsidies data for the purposes of assessing countervailing duties for imports during the review period and of setting a new estimated countervailing duty rate for subsequent imports.

4.8 The United States also argues that the First Assessment Review was initiated on 1 July 2003, eight months before the DSB's recommendations and rulings in this dispute were adopted. The United States asserts that the First Assessment Review, therefore, had nothing whatsoever to do with "implementing" the DSB's recommendations and rulings. The United States submits that, for obvious temporal reasons, the results of this assessment review – which was initiated before the DSB issued its recommendations and rulings – cannot be considered "measures taken to comply". By contrast, the United States asserts that the USDOC initiated the Section 129 proceeding for the specific purpose of addressing the DSB's recommendations and rulings. The United States further asserts that the agreement of the parties on the "reasonable period of time" to implement the recommendations and rulings in this dispute was negotiated in the light of, and specifically refers to, the US procedures for implementing WTO reports[18] – that is, the Section 129 procedures.

4.9 The United States submits that Article 21.5 proceedings are by their nature more focused and limited than other panel proceedings under Article 6.2 of the DSU. The United States argues that it is beyond the scope of such a limited 90-day inquiry to fully examine an entirely new set of assessment review results based on a wholly new administrative record, consisting of new sales, new imports, potentially new respondents and potentially new subsidy programmes.

4.10 Canada submits that the final results of the First Assessment Review rendered non-existent the pass-through analysis and adjustment under the Section 129 Determination, and that the final results of the First Assessment Review are therefore an integral part of the Panel's determination "as

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[14] *EC – Bed Linen (Article 21.5 – India)* (Panel), para. 6.20.
[15] Panel Report, paras 2.1 - 2.4.
[16] Section 129 Determination. Exhibit CDA-5.
[17] The US refers in this regard to SCM Agreement, fn. 52.
[18] WT/DS257/13.

to the *existence* … of measures taken to comply" under Article 21.5 of the DSU. Canada also argues that upholding the US preliminary objection would be contrary to the purpose of Article 21.5 proceedings.

4.11 Regarding the Section 129 Determination being rendered non-existent by the First Assessment Review, Canada argues that in *Australia – Leather II (Article 21.5 - US)*, the United States itself argued that measures that undo measures taken to comply appropriately fall within the scope of Article 21.5 of the DSU:

> Under Article 21.5, this panel is to consider "the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings." Plainly, if this Panel can determine the "existence" of measures taken to comply with the recommendations, it can consider whether the measures purportedly taken to comply were effectively rendered non-existent.

4.12 Furthermore, Canada asserts that, in declining to include certain EC measures in its compliance review, the abovementioned *EC – Bed Linen (Article 21.5 - India)* panel specifically noted that India "does not argue that the subsequent two measures undo the compliance effectuated by the first measure."[19]

4.13 Canada also submits that the final results of the First Assessment Review are properly before the Panel because they are inextricably linked to the recommendations and rulings of the DSB and to what the United States claims as being its "measures taken to comply". Canada asserts that the treatment by USDOC of the pass-through issue in the final results of its First Assessment Review is nearly identical to its treatment of pass-through in the Section 129 Determination. Canada also notes that USDOC published preliminary results for the First Assessment Review containing a "pass-through" section nearly four months after the DSB made its recommendations and rulings, and issued final results nearly ten months after those recommendations and rulings. Canada asserts that the Section 129 Determination and the First Assessment Review are inextricably linked to the DSB recommendations because they both address the obligations of the United States to conduct pass-through analyses with respect to independent harvester and sawmill-to-sawmill log transactions for the same exports for the same period of time.

4.14 Regarding the US argument that assessment reviews and original investigations are different proceedings, and that the review was initiated prior to the recommendations and rulings of the DSB, Canada submits that the United States ignores the fact that, under US law, the USDOC may implement the recommendations and rulings of the DSB concerning an original investigation through a subsequent administrative review.[20]

4.15 Canada asserts that Article 21.5 of the DSU requires a compliance panel to examine the substance of a Member's measures notwithstanding any argument that the form of the measures could preclude compliance review. Canada notes that in *Australia – Automotive Leather II (Article 21.5 -*

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[19] *EC – Bed Linen (Article 21.5)*, Panel Report, at para. 6.21. Canada also refers to the Third Party Submission of the European Communities (Annex C-3), at para. 26, citing *Dominican Republic – Import and Sale of Cigarettes*, at paras. 7.11-7.21.

[20] Canada refers in this regard to the "Statement of Administrative Action" in *Message from the President of the United States Transmitting the Uruguay Round Agreements, Texts of Agreements Implementing Bill, Statement of Administrative Action and Required Supporting Statements*, H.R. Doc. No. 103-316, vol. 1 at 656 (Exhibit CDA-1), at 356-357. ("Furthermore, while subsection 129(b) [of the Uruguay Round Agreements Act] creates a mechanism for making new determinations in response to a WTO report, new determinations may not be necessary in all situations. In many instances, such as those in which a WTO report merely implicates the size of a dumping margin or countervailable subsidy rate (as opposed to whether a determination is affirmative or negative), it may be possible to implement the WTO report recommendations in a future administrative review under section 751 of the Tariff Act.")

US), for example, the panel found that the subsequent loan was within its jurisdiction to examine under Article 21.5 of the DSU because it was "inextricably linked to the steps taken by Australia in response to the DSB's ruling in this dispute, in view of both its timing and its nature."[21] Canada also notes the finding of the panel in *Australia – Salmon (Article 21.5 - Canada)* that:

> … an Article 21.5 panel cannot leave it to the full discretion of the implementing Member to decide whether or not a measure is one "taken to comply". If one were to allow that, an implementing Member could simply avoid any scrutiny of certain measures by a compliance panel, *even where such measures would be so clearly connected to the panel and Appellate Body reports concerned, both in time and in respect of the subject-matter, that any impartial observer would consider them to be measures "taken to comply"*.[22]

4.16 Canada submits that the US reliance on *EC – Bed Linen (Article 21.5 - India)* is misplaced, as the panel in that dispute found that the EC measures in question were not "taken to comply" within the meaning of Article 21.5 of the DSU because they did not deal with the subject matter upon which the DSB had made recommendations and rulings. Canada submits that the panel expressly noted that "[t]he situation might be different had there been a claim in the original dispute challenging the cumulative assessment of the effects of imports from India, Egypt, and Pakistan."[23]

4.17 Canada asserts that the US argument that an Article 21.5 panel does not have jurisdiction to evaluate USDOC's treatment of additional record evidence concerning exports subject to a US definitive countervailing duty misses the point entirely, as a panel's assessment "as to the existence or consistency with a covered agreement of measures taken to comply" under Article 21.5 of the DSU necessarily involves an examination of new factual information. Canada notes in this regard that the Appellate Body stated in *EC – Bed Linen (Article 21.5 - India)* that:

> [A]n Article 21.5 panel is not confined to examining the "measures taken to comply" from the perspective of the claims, arguments, and factual circumstances relating to the measure that was the subject of the *original* proceedings. Moreover, the relevant facts bearing upon the "measure taken to comply" may be different from the facts relevant to the measure at issue in the original proceedings. It is to be expected, therefore, that the claims, arguments, and factual circumstances relating to the "measure taken to comply" will not, necessarily, be the same as those relating to the measure in the original dispute. Indeed, a complainant in Article 21.5 proceedings may well raise *new* claims, arguments, and factual circumstances different from those raised in the original proceedings, because a "measure taken to comply" may be *inconsistent* with WTO obligations in ways different from the original measure.[24]

4.18 Canada also submits that the US request for a preliminary ruling runs contrary to the very purpose of an Article 21.5 panel in its review of the imposition of countervailing measures, since the US obligation to demonstrate whether, and to what extent, alleged subsidies to log production pass through arm's length log purchases before imposing duties on softwood lumber products would remain in dispute for each annual assessment review under Article 21 of the SCM Agreement during the potential five-year life (or longer) of the US definitive countervailing measure. Canada asserts that such a result would leave the DSB in the absurd situation of having made numerous identical

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[21] Panel Report, *Australia – Automotive Leather II (Article 21.5 – US)*, para. 6.5.

[22] *Australia – Salmon (Article 21.5 - Canada)*, at para. 7.10(22) [emphasis added]. Canada also refers to *EC – Bed Linen (Article 21.5)*, Panel Report, at para. 6.17.

[23] *EC – Bed Linen (Article 21.5)*, Panel Report, at para. 6.18, fn. 36.

[24] *EC – Bed Linen (Article 21.5)*, Appellate Body Report, at para. 79 [emphasis in original]. Canada also refers to the EC Third Party Submission (Exhibit C-3), at para. 28, referring in addition to the Appellate Body's report in *US – Shrimp (Article 21.5 – Malaysia)*, at para. 86.

recommendations and rulings concerning a definitive countervailing duty for which compliance may never be secured. In this regard, Canada notes that the United States argued in *Australia – Salmon (Article 21.5 - Canada)* that:

> [W]e also wish to express the agreement of the United States with the broad and inclusive approach the Panel has taken thus far in defining the scope of this proceeding. The Panel's approach is the only one consistent with the purpose of the WTO dispute settlement system as reflected in Articles 3 and 21 of the Dispute Settlement Understanding: the prompt settlement of disputes. Disputes could not be settled "promptly" if a defending party were permitted to thwart a thorough review of its WTO compliance by staging the introduction of details of new measures over a period of time, and then arguing that they must escape WTO scrutiny for a further period of time.[25]

4.19 The United States denies that the results of the First Assessment Review rendered the Section 129 Determination non-existent. The United States submits that the Section 129 Determination, in implementing the recommendations and rulings of the DSB with respect to the final investigation determination, confirmed that the resulting imposition of countervailing duties on May 22, 2002, was consistent with the SCM Agreement. According to the United States, the very fact that Canada is, itself, challenging the Section 129 Determination shows that Canada believes that it is of ongoing effect and relevant to the issue of compliance.

4.20 The United States asserts that the present case is not a situation like that presented in *Australia – Automotive Leather II (Article 21.5 - US)*, in which a WTO-inconsistent subsidy was both withdrawn and "regranted" in another form on the same day, in "inextricably linked elements of a single transaction."[26] The United States asserts that first, in *Australia – Leather II (Article 21.5 - US)*, the United States was arguing that the panel should review whether a prohibited subsidy had actually been withdrawn, as specifically required by Article 4.7 of the SCM Agreement, when the repayment of a grant had been contingent on the simultaneous grant of a loan on non-commercial terms. The United States submits that, in contrast, this proceeding involves the question of whether a measure has been brought into conformity with a WTO agreement.

4.21 The United States submits that second, the *Australia – Leather II (Article 21.5 - US)* panel concluded that the subsidy had not been withdrawn at all, because the supposed repayment and the non-commercial loan were, in effect, a single transaction in which the subsidy simply shifted form. The United States asserts that, in this dispute, the Section 129 Determination and the First Assessment Review results are separate and independent actions. The United States asserts that the Section 129 Determination was made to bring the measure in dispute into conformity with the SCM Agreement as recommended by the DSB, whereas the First Assessment Review was conducted for a completely unrelated reason. According to the United States, therefore, the First Assessment Review in no way affects that result of the Section 129 Determination.

4.22 The United States also submits that the results of the First Assessment Review are not inextricably linked, either to the Section 129 Determination, or to the recommendations and rulings of the DSB. The United States notes Canada's reliance on *Australia – Leather II (Article 21.5 - US)*, and that panel's finding that the relevant subsidy had not been withdrawn, because the supposed repayment and the non-commercial loan were "inextricably linked elements of a single transaction."[27] The United States asserts that that situation is very different from this one. In particular, the United States notes that the Section 129 Determination and the First Assessment Review results were not in

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[25] *Australia – Salmon (Article 21.5 - Canada)*, Third Participant Submission of the United States, 9 December 1999, at para. 5. (Exhibit CDA-54)

[26] Panel Report, *Australia Leather II (Article 21.5 - US)*, para. 6.50.

[27] *Australia –Leather II (Article 21.5 - US),* para. 6.50.

any sense contingent on one another, nor were they in any sense part of a single transaction. The United States submits that the First Assessment Review would have taken place regardless of whether there was a Section 129 proceeding under way, and, indeed, regardless of whether there even was a WTO dispute.

4.23 The United States notes that Canada also relies on *Australia – Salmon (Article 21.5 - Canada)*. The United States asserts that the imposition of a ban by Tasmania, one of Australia's sub-federal units, was obviously a response to the modification of the ban. The United States asserts that the Tasmanian ban did not arise from a proceeding initiated as a matter of domestic law requirements, irrespective of any WTO challenge, but was rather an *ad hoc* action taken after the DSB had made recommendations and rulings against an Australian import ban and after Australia had taken action to modify the ban. By contrast, the United States asserts that the assessment review was initiated:

- upon request of the parties (including Canada), eight months before the DSB's recommendations and rulings were even adopted;
- pursuant to a US statutory provision that requires initiation upon request on a specific schedule and under specific deadlines; and
- for the purpose of assessing countervailing duties on entries not previously examined – not for the purpose of implementing any recommendations or rulings.

4.24 Regarding Canada's argument that the facts of *EC – Bed Linen (Article 21.5 - India)* should be distinguished from the present case, the United States submits that the *EC – Bed Linen (Article 21.5 - India)* dispute demonstrates that a new determination that was made in a subsequent segment of an antidumping or countervailing duty proceeding – and not made to implement recommendations and rulings of the DSB – falls outside the jurisdiction of Article 21.5 panels.

4.25 The United States further submits that properly applying DSU Article 21.5 does not "ignore the purpose of compliance proceedings". The United States asserts that, contrary to Canada's arguments, a review under Article 21.5 of the Section 129 Determination permits the prompt settlement of disputes: Canada complained about an inconsistency in the final investigation determination, and this Panel will review whether that inconsistency has been corrected. The United States argues that Canada appears to suggest that the US system of retrospective duty assessments somehow compels the Panel, in the special case of the United States, to sweep the assessment review into this Article 21. 5 proceeding.[28] The United States submits, however, that there is nothing in Article 21.5 or in the SCM Agreement that requires a different interpretation of "measures taken to comply" for those Members that employ a retrospective duty assessment system, rather than a prospective one.

2. Arguments of the third parties

4.26 The European Communities considers that the US view (if accepted) would turn the US system of countervailing duty assessment into a moving target that escapes the WTO disciplines. The European Communities submits that the phrase "taken to comply" cannot be read to limit the 21.5 proceeding to those measures that were explicitly taken to replace the measure at issue in the original proceedings, but must be read together with its immediate and broader context as well as the purpose of the DSU to reach a prompt solution of a dispute. The European Communities asserts that because the phrase is preceded by the term "existence" and followed by the expression "with the recommendations and rulings of the DSB", an Article 21.5 panel is tasked to assess whether or not there is a failure to comply and whether or not the original dispute has been resolved (as opposed to assessing the conformity of a particular measure with a particular provision of the *Agreement*

[28] The United States refers in this regard to Canada's Second Written Submission, para. 27 (Annex A-2).

Establishing the World Trade Organization ("WTO Agreement"), as panels are required to do in initial proceedings).

4.27 The European Communities submits that the broader purpose of Article 21.5 of the DSU is to secure the solution of a dispute between two WTO Members relating to the measures brought before the original Panel. The European Communities asserts that this was explicitly recognised by the panel in *Australia – Salmon (Article 21.5 - Canada)*, which even considered a measure taken during the Article 21.5 proceeding since "to do otherwise would, in our view, go against the principle of prompt settlement of disputes and could hamper implementation of both DSB recommendations in the original dispute and our findings in this case."[29]

4.28 The European Communities submits that the US view is based on the assumption that the measures to be attacked in countervailing duty cases are the determinations made by the investigating authorities. The European Communities asserts that this is false, since Article 10 of the SCM Agreement clarifies that the measure of concern is the "imposition of a countervailing duty", defined as a "special duty levied" for the purpose of offsetting a subsidy. The European Communities submits that it is the duty itself that interferes with trade and is the measure of concern. The European Communities asserts that the assessment review at hand in this case is a hybrid instrument. It fixes the final duty rate for the assessment period with retrospective effect, but is not a fully-fledged review of both the subsidy and injury within the meaning of Article 21 of the SCM Agreement.[30] The European Communities notes that the assessment review does not change the date of the expiry of the measure under Article 21.3. The European Communities does not accept the US argument that footnote 52 of the SCM Agreement recognises that these types of assessment review are separate from the original determination (and / or a Section 129 determination). The European Communities also notes that the United States has not disputed Canada's characterisation of the First Assessment Review as superseding both the original countervailing duty determination and the Section 129 Determination. The European Communities asserts that, at the date of the establishment of the Panel (14 January 2005), only the First Assessment Review was effectively in place. The European Communities submits that, according to WTO jurisprudence, a measure that essentially replaces an earlier measure remains within the terms of reference of an original Panel.[31] The European Communities submits that, *a fortiori*, an Article 21.5 Panel must be in a position to assess whether an annual administrative review determination that confirms and supersedes the original determination relating to the same countervailing duty constitutes a "continuing violation".

4.29 The European Communities also rejects the US argument that *EC – Bed Linen (Article 21.5 - India)* stands for a general proposition that any review measure is outside the scope of a 21.5 proceeding. The European Communities asserts that the review measures at issue in that case were entirely different in nature. In particular, those measures were either specific reviews of antidumping duties imposed on exporters from other Members (Egypt and Pakistan) or entirely new determinations in a review based on results of an event subsequent to the European Communities having adopted the implementing measure in *EC – Bed Linen (Article 21.5 - India)*. In other words, they were dismissed because they did not relate to the original dispute between the European Communities and India.

4.30 According to the European Communities, accepting the US view that the First Assessment Review is not subject to a DSU 21.5 panel review would turn the US system of duty assessment into a moving target that escapes from countervailing duty disciplines. Each assessment review would have to be subject to a new panel request, and by the time the panel, Appellate Body and implementation procedure was completed, another assessment review would have overtaken the results of any Section

[29] Panel Report, *Australia – Salmon (Article 21.5 - Canada)*, para. 7.21.
[30] Panel Report *US – Softwood Lumber III,* para 7.151.
[31] The European Communities refers to the Panel Report in *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.11-7.21

129 determination. A new panel would have to be started against this review, creating a "Groundhog Day" situation.

4.31 China asserts that, on the one hand, the First Assessment Review was made in a totally separate investigation procedure and based on the import data that is irrelevant to that of the original investigation. On the other hand, China asserts that the two determinations at issue were made under the framework of the same set of proceedings which effectively affects import of softwood lumber from Canada and the First Assessment Review supersedes the Section 129 Determination. In China's view, the first argument relates to the question of whether the First Assessment Review is a "measure[] taken to comply", while the second argument concerns the matter whether the Section 129 Determination is rendered non-existent.

4.32 Although China acknowledges that the First Assessment Review may not be properly categorized as a "measure[] taken to comply", China argues that this consideration does not lead to a decisive answer to the question of whether this measure is properly before this panel. China recalls that, on the basis of the plain language of Article 21.5, the purpose of the proceedings under this provision is to review and solve the dispute on "the *existence* or *consistency* with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB. China believes that "existence" and "consistency" are two distinct aspects of the subject measure. The latter involves review that is not only "limited to 'the issue of whether or not [a Member] has implemented the DSB recommendation'" [32], but also "in the light of any provision of any of the covered agreements."[33] On the other hand, the former relates to the status of the revised new measure. According to China, both aspects are equally important though the "existence" matter is crucial in solving the threshold issue in these proceedings.

4.33 China asserts that the dispute of *Australia – Automotive Leather II (Article 21.5 - US)* demonstrates a similar fact pattern that should be referenced by this Panel. China notes that, in that case, the Article 21.5 panel said:

> The 1999 loan is inextricably linked to the steps taken by Australia in response to the DSB's ruling in this dispute, in view of both its timing and its nature. In our view, the 1999 loan cannot be excluded from our consideration without severely limiting our ability to judge, on the basis of the United States' request, whether Australia has taken measures to comply with the DSB's ruling. In the absence of any compelling reason to do so, we decline to conclude that a measure specifically identified in the request for establishment is not within our terms of reference. [34]

4.34 In China's view, in an Article 25.1 procedure, if the complaining party submits that a "measure[] taken to comply" is invalidated by a subsequent measure, the compliance panel should at least assess this claim that relates to the "measure[] taken to comply" on the basis of relevant facts – the subsequent measure. China asserts that to exclude the second measure would put the panel at the risk of failing to make a comprehensive and well-founded judgement on the existence of a measure taken to comply with DSB recommendations and rulings. China believes that, as a result of the countervailing duty assessment system adopted by the US, the results of an assessment review may, at least in form, replace the original final determination. In particular, China notes that the results of the First Assessment Review were announced ten days after the Section 129 Determination took effect. Thus, the First Assessment Review established a new rate for cash deposit for the goods from Canada and replaced the rate in the Section 129 Determination. According to China, such changes in the applicable duty rate deserve further consideration on whether the First Assessment Review, in

[32] *Canada - Aircraft (Article 21.5)*, Appellate Body Report, para.40.
[33] *Australia - Salmon (Article 21.5 - Canada)*, para.7.10.
[34] *Australia – Automotive Leather II (Article 21.5 - US)*, para. 6.5.

substance, rendered the Section 129 Determination non-existent. China therefore submits that the facts presented by Canada in these proceedings, at least, have demonstrated that there is likelihood that the First Assessment Review may nullify the Section 129 Determination.

4.35 In summary, China is of the opinion that, although the First Assessment Review may not be a measure taken to comply, it is closely linked to and may have an important effect on the existence of the purported measure taken to comply – the Section 129 Determination. On such basis, China believes it is the mandate of this Panel to consider the First Assessment Review in these proceedings.

3. Evaluation by the Panel

4.36 The US request for a preliminary ruling concerns the scope of Article 21.5 of the DSU, which provides in relevant part:

> Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel.

4.37 In particular, the US request requires us to determine whether or not the First Assessment Review, or at least the treatment of pass-through contained therein, constitutes a "measure[] taken to comply" with the rulings and recommendations of the DSB in respect of the Final Determination.

4.38 In addressing this issue, we are guided by dispute settlement decisions regarding the scope of DSU Article 21.5. These decisions indicate that Article 21.5 proceedings are not restricted to measures formally, or explicitly, taken by Members to implement DSB rulings and recommendations. In this regard , we note that the panel in *Australia – Salmon II (Article 21.5 – Canada)* found that:

> an Article 21.5 panel cannot leave it to the full discretion of the implementing Member to decide whether or not a measure is one "taken to comply". If one were to allow that, an implementing Member could simply avoid any scrutiny of certain measures by a compliance panel, even where such measures would be so clearly connected to the panel and Appellate Body reports concerned, both in time and in respect of the subject-matter, that any impartial observer would consider them to be measures "taken to comply".[35]

4.39 That case concerned Australia's implementation of DSB rulings and recommendations regarding import restrictions on untreated fresh, chilled or frozen salmon from Canada. Australia stated that it implemented the DSB's rulings and recommendations through a series of import risk analyses that entered into force on 19 July 1999. On 20 October 1999, during the course of the Article 21.5 proceedings concerning the measures adopted by Australia in July 1999, the Government of Tasmania adopted measures restricting all imports of salmonids. The panel employed the following terms in finding that the October 1999 measure fell within the terms of its DSU Article 21.5 review:

> "Without attempting to give a precise definition of "measures taken to comply" that should apply in all cases, we are of the view that in the context of this dispute at least any quarantine measure introduced by Australia subsequent to the adoption on 6 November 1998 of DSB recommendations and rulings in the original dispute – and within a more or less limited period of time thereafter -- that applies to imports of fresh chilled or frozen salmon from Canada, is a "measure taken to comply". The Tasmanian ban, introduced on 20 October 1999, imposes an import prohibition on all

[35] *Australia – Salmon (Article 21.5 – Canada)*, page 106.

> imports of salmonids into part of Australia on quarantine grounds. We thus find that it is a measure taken to comply in the sense of Article 21.5."[36]

4.40 The scope of DSU Article 21.5 proceedings was also addressed by the panel in *Australia – Leather II (Article 21.5 - US)*. That case concerned Australia's implementation of DSB's rulings and recommendations regarding the withdrawal of a prohibited export subsidy. In September 1999, the subsidy recipient repaid the prospective element of the subsidy. Simultaneously, the Government of Australia provided a loan to the original subsidy recipient. In finding that both the repayment of the original subsidy, and the new loan, fell within the scope of its DSU Article 21.5 review, the panel stated:

> The 1999 loan is inextricably linked to the steps taken by Australia in response to the DSB's ruling in this dispute, in view of both its timing and its nature. In our view, the 1999 loan cannot be excluded from our consideration without severely limiting our ability to judge, on the basis of the United States' request, whether Australia has taken measures to comply with the DSB's ruling. In the absence of any compelling reason to do so, we decline to conclude that a measure specifically identified in the request for establishment is not within our terms of reference.[37]

4.41 The parties agree that the Section 129 Determination falls within the scope of these DSU Article 21.5 proceedings. In our view, and taking into account previous dispute settlement decisions regarding DSU Article 21.5, the USDOC's treatment of pass-through in the First Assessment Review is also covered by these proceedings, because it is clearly connected to the panel and Appellate Body reports concerning the Final Determination, and because it is inextricably linked to the treatment of pass-through in the Section 129 Determination. In particular, we note that certain import entries subject to the prospective effect of the Final Determination are also subject to the retrospective effect of the First Assessment Review. Thus, while the First Assessment Review resulted in an assessment rate for import entries during the period 22 May 2002 – 31 March 2003, those entries had initially been subject to the cash deposit rate determined in the Final Determination.[38] Furthermore, the prospective effect of the Section 129 Determination was superseded by the prospective effect of the First Assessment Review, in the sense that import entries that would have been subject to the cash deposit rate fixed by the Section 129 Determination became subject to the cash deposit rate fixed by the First Assessment Review, once the latter took effect. Thus, even though the period of investigation of the Final Determination and Section 129 Determination may differ from the period of review of the First Assessment Review, and even though the latter was initiated before the DSB adopted any rulings or recommendations regarding this matter, there is in fact considerable overlap in the effect of these various measures. Since the pass-through analysis in the First Assessment Review could, therefore, have an impact on, and possibly undermine, any implementation of the DSB rulings and recommendations regarding pass-through by the Section 129 Determination, we consider that the pass-through analysis in the First Assessment Review should also fall within the scope of these DSU Article 21.5 proceedings.[39]

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[36] *Australia – Salmon (Article 21.5 – Canada)*, page 106 (footnote deleted).

[37] *Australia – Leather II (Article 21.5 - US)*, para. 6.5.

[38] Import entries subject to the Section 129 Determination cash deposit would be assessed pursuant to a subsequent assessment review, if requested. We do not attach importance to the fact that import entries subject to the Section 129 Determination cash deposit were not formally subject to the First Assessment Review, since the Section 129 Determination amended and replaced the Final Determination, such that there is no need to distinguish between the coverage of these two measures for present purposes.

[39] We do not here mean to imply that, on the basis of our interpretation and analysis of the scope of DSU Article 21.5, other elements of the First Assessment Review, dealing with issues unrelated to the scope of the DSB's adopted recommendations and rulings in the original dispute between the parties, could be treated as part of a "measure[] taken to comply" and thereby challenged through an Article 21.5 proceeding.

4.42 The United States argues that the findings of the *Australia – Leather II (Article 21.5 - US)* panel should be distinguished, because the Section 129 Determination and First Assessment Review were not contingent on one another. We acknowledge that the First Assessment Review was not contingent on the Section 129 Determination, and note that the First Assessment Review might very well have been initiated even if the Section 129 Determination had not been undertaken. However, the degree of contingency between the relevant measures was clearly not the sole, or determining factor, in the reasoning of the *Australia – Leather II (Article 21.5 - US)* panel regarding the inclusion of the loan in the DSU Article 21.5 proceeding.[40] That panel was concerned more generally with the "timing and nature" of the subsequent loan. As noted above, we consider that there is sufficient overlap in the timing, or temporal effect, and nature of the Final Determination, Section 129 Determination and First Assessment Review for the latter to fall within the scope of the present DSU Article 21.5 proceedings.

4.43 The United States also argues that the findings of the panel in *Australia – Salmon (Article 21.5 - Canada)* should be distinguished because that case concerned an *ad hoc* action taken after the DSB adopted its rulings and recommendations, whereas the First Assessment Review was initiated pursuant to domestic law requirements, eight months before, and independent of any consideration of, the rulings and recommendations of the DSB in *US – Softwood Lumber IV*. We note, however, that the *Australia – Salmon (Article 21.5 - Canada)* panel made no reference to the *ad hoc* nature of the Tasmanian import ban in its findings. Accordingly, since the *ad hoc* nature of that import ban did not influence that panel's findings, this is no basis on which to distinguish those findings from the present case. In any event, we consider that the *Australia – Salmon (Article 21.5 - Canada)* panel was concerned primarily with the timing and subject-matter of the Tasmanian import restriction, and its subsequent impact on the July 1999 implementing measures adopted by the Government of Australia, just as we are concerned primarily with the potential impact of the results of the First Assessment Review on the Final Determination and Section 129 Determination.

4.44 The United States also argues that the First Assessment Review is a new determination, separate from the Final Determination and Section 129 Determination, and initiated prior to the DSB's adoption of recommendations and rulings in this dispute. The United States relies on the following findings of the panel in *EC – Bed Linen (Article 21.5 - India)*:

> [T]he fact that the EC, subsequent to its re-examination of the dumping determinations with respect to imports from Egypt and Pakistan, and in the context of a review initiated on the request of Eurocoton, carried out an analysis of whether injury was caused by imports from India alone does not, *ipso facto*, establish that Regulation 696/2002 is a measure "taken to comply". Rather the opposite would seem to be the case – that Regulation would seem to be an **entirely new determination**, reached as a result of **events subsequent** to the EC having adopted a measure to comply with the DSB's recommendation.[41]

4.45 According to the United States, the *EC – Bed Linen (Article 21.5 - India)* dispute demonstrates that a new determination that was made in a subsequent segment of an anti-dumping or

[40] In its comments on Canada's reply to Question 21 from the Panel, the US asserts that "the fact that the grant repayment was conditioned on the provision of the new non-commercial loan was central to the panel's finding that the two actions were 'inextricably linked elements of a single transaction'". We note that the US refers in this regard to para. 6.50 of the *Australia – Leather II (Article 21.5 - US)* report, where the panel was addressing the substantive issue of whether or not Australia had withdrawn its prohibited subsidies. Contingency between the subsidy repayment and new loan was not mentioned explicitly by that panel at para. 6.5 of its report, where it was determining whether or not to include the new loan in the scope of its DSU Article 21.5 proceeding.

[41] *EC – Bed Linen (Article 21.5)*, para. 6.20 (bold emphasis added).

countervailing duty proceeding – and not made to implement recommendations and rulings of the DSB – falls outside the jurisdiction of DSU Article 21.5 panels.[42]

4.46 In *EC – Bed Linen (Article 21.5 - India)*, the European Communities imposed anti-dumping duties on imports of bed linen from Egypt, India and Pakistan. The European Communities made a cumulative injury assessment. The European Communities was found to have incorrectly calculated anti-dumping duties on imports from India. The European Communities amended its calculation in respect of such imports from India. The parties agreed that the re-determination of dumping in respect of imports from India fell within the scope of DSU Article 21.5. The European Communities also applied the revised calculation method to other anti-dumping duties imposed on imports from Egypt and Pakistan. As a result, the European Communities found that anti-dumping duties should not be imposed on such imports. Consequently, the European Communities conducted a separate injury analysis in respect of imports from India, to determine whether such imports alone caused injury to the domestic industry. The European Communities found that they did, and therefore affirmed the imposition of anti-dumping duties on imports of bed linen from India. India claimed that the determinations in respect of Egypt and Pakistan, and the finding of injury and the resulting imposition of anti-dumping duties on bed linen from India, were measures "taken to comply" under DSU Article 21.5. The above panel finding relied on by the United States concerns the Panel's exclusion of the India-specific injury determination from the scope of the DSU Article 21.5 proceedings.

4.47 While we acknowledge that the First Assessment Review is a new determination made in a subsequent segment of a countervailing duty proceeding, we disagree with what we see as the implication of the United States argument, i.e., that *EC – Bed Linen (Article 21.5 – India)* stands for the principle that a measure taken in a subsequent segment of a proceeding could never constitute a "measure[] taken to comply" in the meaning of DSU Article 21.5, if it is not explicitly so identified. Rather, we understand the panel in *EC – Bed Linen (Article 21.5 – India)* to have ruled that, in the particular circumstances of that case, the measure taken in a subsequent segment of a proceeding did not constitute a "measure[] taken to comply". In our view, the above finding of the *EC – Bed Linen (Article 21.5)* panel can be distinguished from the present case, as the First Assessment Review does not concern "events subsequent" to the Final Determination and Section 129 Determination. The relevant measure in *EC – Bed Linen (Article 21.5 - India)* concerned an injury determination initiated as a result of a re-determination of dumping in respect of imports that were not covered by the relevant rulings and recommendations of the DSB. Thus, not even the re-determination of dumping in respect of those imports was a "measure[] taken to comply", let alone the new injury determination prompted by that re-determination of dumping. By contrast, the First Assessment Review is far more closely connected to what the United States considers is the "measure[] taken to comply", i.e., the Section 129 Determination. In particular, the First Assessment Review is concerned with the same

[42] The US also argues that Article 21.5 proceedings are by their nature more focused and limited than other panel proceedings under Article 6.2 of the DSU, and that it is beyond the scope of such a limited 90-day inquiry to fully examine an entirely new set of assessment review results based on a wholly new administrative record, consisting of new sales, new imports, potentially new respondents and potentially new subsidy programmes. We note, however, that US law allows DSB rulings and recommendations to be implemented through administrative reviews in certain circumstances (see "Statement of Administrative Action" in *Message from the President of the United States Transmitting the Uruguay Round Agreements, Texts of Agreements Implementing Bill, Statement of Administrative Action and Required Supporting Statements*, H.R. Doc. No. 103-316, vol. 1 at 656 (Exhibit CDA-1), at 356-357). This undermines the US argument that assessment reviews should be excluded from the scope of DSU Article 21.5 proceedings. Furthermore, we note that measures taken to comply with the rulings and recommendations of the DSB may be every bit as complex, if not more so, than the original measure in dispute. DSU Article 21.5 does not provide for accelerated procedures because implementation measures are necessarily simple, or straightforward. It does so in order to ensure that justice is delivered swiftly. In any event, we note that we are only finding that part of the First Assessment Review (i.e., the pass-through analysis) is covered by these DSU Article 21.5 proceedings. We are not finding that the entirety of the First Assessment Review is covered by these proceedings.

substantive issue as the Section 129 Determination, i.e., pass-through. In addition, the First Assessment Review applies to import entries that were initially subject to the cash deposit rate fixed by the measure subsequently replaced by the Section 129 Determination. Furthermore, the panel in *EC – Bed Linen (Article 21.5 - India)* explicitly noted that India "[did] not argue that the subsequent two measures und[id] the compliance effectuated by the first measure".[43] We can only assume that the panel would have reached a different conclusion if India had argued that the subsequent measures undid the compliance effectuated by the first measure, as Canada has done in the present case.

4.48 We further note that in addressing the scope of the Article 21.5 proceedings in *EC – Bed Linen (Article 21.5 - India)*, the Appellate Body had regard to "the object and purpose of the DSU". In this regard, the Appellate Body noted that, by virtue of Article 3.3 of the DSU, "the prompt settlement of disputes" is "essential to the effective functioning of the WTO". Given the overlap in effect of the Final Determination, Section 129 Determination, and the First Assessment Review, we are very conscious that if we exclude the pass-through analysis in the First Assessment Review from these proceedings, Canada and the United States will still dispute the same issue, i.e., pass-through of subsidy benefit, in respect of the same import entries[44], as they did in the original proceedings concerning the Final Determination. In our view, this would be wholly inconsistent with the object and purpose of the DSU which, as noted above, is to ensure the prompt settlement of disputes.

4.49 Before concluding, we note that Canada, China and the European Communities have made a number of arguments that might suggest that DSU Article 21.5 should be interpreted broadly in the present case because of the peculiarities of the system of retrospective duty assessment applied by the United States. We do not consider it appropriate to base our findings on such arguments, because the interpretation and application of DSU Article 21.5 must accommodate both prospective and retrospective duty assessment systems. As a consequence, we have considered carefully the operation of DSU Article 21.5 in the context of both prospective and retrospective duty assessment systems, in light of the abovementioned dispute settlement decisions.

4.50 For the foregoing reasons, we reject the US request for a preliminary ruling that the First Assessment Review falls outside the scope of these DSU Article 21.5 proceedings, in so far as the pass-through analysis is concerned.

B. SCOPE OF USDOC'S PASS-THROUGH ANALYSIS

4.51 Canada's main argument in this proceeding is that USDOC, in implementing the rulings and recommendations of the DSB, continued to presume a pass-through of subsidy benefits, rather than conducting the required analysis. Canada claims that this resulted in the imposition of countervailing duties in a manner inconsistent with Articles 10 and 32.1 of the SCM Agreement, and Article VI:3 of the GATT 1994. In particular, Canada argues that USDOC completely excluded entire groups of transactions, on the basis that these were not arm's length sales, and in addition erred by rejecting the aggregate data and information provided by Canada in support of its pass-through claim, requiring instead company-specific data[45], and also by applying "inappropriate"[46] benchmark prices for those transactions that were individually examined for pass-through. Canada also claims that, in the Section 129 Determination and the First Assessment Review, the USDOC continued to presume pass-through

[43] *EC – Bed Linen (Article 21.5)*, para. 6.21.

[44] We refer to those import entries for which the Final Determination set the cash deposit rate, and the First Assessment Review finalized the duty assessment. *See*, para. 4.41, *supra*.

[45] We recall here that the United States objected (at our substantive meeting with the parties) to Canada's assertion that the USDOC had "rejected" any data submitted by Canada in the Section 129 proceeding (Canada's first written submission, para. 32). In commenting on this argument, Canada clarified that it was not claiming that the United States had outright rejected the information in question, but instead that the USDOC had failed to analyse various record data when any of the five factors existed (Canada's reply to Question 27 from the Panel).

[46] Canada's first written submission, page 22, heading 2 (Annex A – 1).

in respect of purchases of logs from sawmills by unrelated tenure-holding sawmills. Furthermore, Canada claims that the USDOC presumed pass-through in respect of all sawmill-to-sawmill transactions in the context of the First Assessment Review. Canada claims that, as a result of all the above, the United States impermissibly inflated the amount of countervailing duties levied on imports of softwood lumber from Canada. We shall examine each of these claims in turn.[47]

1. Arm's length transactions

(a) Arguments of the parties

4.52 Canada asserts that pass-through should be investigated whenever there is a transaction between unrelated parties. In both the Section 129 Determination and the First Assessment Review, however, USDOC only investigated pass-through in respect of a narrower category of transactions, namely those that were found by USDOC to be at arm's length. Canada states that the USDOC found that transactions between unrelated parties were not at arm's length if any one of the following factors existed in the province: (1) limitations on log sales in Crown tenure contracts; (2) wood supply commitment letters; (3) payment of the stumpage fees by the downstream log purchaser; (4) log purchase agreements of a certain structure; or (5) fibre exchange agreements between tenured sawmills.

4.53 Canada disputes the application of what Canada refers to as USDOC's "external factor" test. According to Canada, a transaction between unrelated parties is by definition an arm's length transaction. Canada asserts that, because the external factors identified by the USDOC do not transform an arm's length transaction into one that is not at arm's length, the existence of any such factors cannot excuse the United States from its obligation to conduct the required benefit pass-through analysis. According to Canada, none of the factors identified by USDOC alters the fact that sellers of logs attempt to obtain the best price available in transactions with unrelated purchasers.

4.54 The United States asserts that the DSB's recommendations and rulings concerned only (1) arm's length sales (2) between unrelated parties. According to the United States, both of these conditions must be fulfilled before a pass-through analysis becomes necessary. In particular, the United States argues that sales between formally unrelated parties are not necessarily arm's length. The United States asserts that the DSB's recommendations and rulings themselves recognize a distinction between arm's length and affiliation, presenting arm's length sales as a subset of sales between unrelated entities, since the DSB (by virtue of para. 167(e) of the Appellate Body's report) ruled that USDOC should have conducted "a pass-through analysis in respect of arm's length sales of *logs* . . . to unrelated sawmills." (emphasis in original) The United States argues that whether the entities operate "at arm's length" involves more than just a question of formal affiliation; it involves an analysis of whether one party effectively "controls" the other or whether the parties have roughly equal bargaining power. The United States argues that its five factor test addresses this issue of control, since many of the circumstances of sales of lumber in Canada are controlled by government mandates and other government-imposed conditions.

4.55 The United States asserts that USDOC identified two categories of government-mandated restrictions whereby log sellers are not free to act in their best interests to choose and negotiate among

[47] Canada's request for establishment of a panel also refers to a claim concerning the USDOC "applying the results of the 'pass-through' analysis to a countervailing duty cash deposit rate invalidated as a result of judicial review proceedings conducted in accordance with US law, and failing to apply the results to a valid rate" (WT/DS257/15, page 2). Although this claim was alluded to in the introduction to Canada's first written submission (para. 10) (see Annex A – 1), Canada did not revert to this claim in the substantive part of that submission. Nor did Canada pursue this claim in its subsequent oral or written submissions to the Panel. We therefore consider that Canada has effectively abandoned this claim. In any event, we find that the very brief reference to this issue at para. 10 of Canada's first written submission is insufficient to establish a *prima facie* case in support of Canada's claim.

potential buyers: (1) limitations on log sales that are contained in Crown tenure contracts, such as appurtenancy and local processing requirements, and (2) wood supply agreements. The United States asserts that USDOC also determined that many of the Canadian log sales could not be considered to be at arm's length because the actual structure of certain log purchase agreements empowered the purchasing sawmill to control many aspects of the transaction. Specifically, with respect to certain log purchase agreements, the sawmill actively manages all aspects of harvest and delivery. With respect to others, the sawmill finances or provides other goods or services as part of the transaction.

4.56 The United States asserts that USDOC also considered that it was not required to conduct a pass-through analysis when two other factors were present: (i) payment of the stumpage fees by the downstream lumber producers and (ii) fibre exchange agreements between Crown tenure holders. Although the United States submits that these factors are "not exclusively arm's-length issues",[48] it is clear that the USDOC found that transactions were not arm's length when these factors existed.[49]

4.57 The United States argues that its approach to implementing the DSB's recommendations and rulings is based on the explicit language of the Appellate Body's ruling.

(b) Evaluation by the Panel

4.58 The United States has emphasized before us throughout this Article 21.5 proceeding that it based its approach to pass-through, in the Section 129 Determination[50], on the language of the Appellate Body's report, and specifically on the Appellate Body's use of the phrase "arm's length" in its ruling. We recall that the exact wording of the Appellate Body's ruling is:

> "the Appellate Body ... upholds the Panel's finding ... that USDOC's failure to contact a pass-through analysis in respect of **arm's length** sales of *logs* by tenured harvesters/sawmills to unrelated sawmills is inconsistent..."[51]

We further recall that our finding being upheld by the Appellate Body makes no reference to the term "arm's length".

(i) Scope of original panel findings compared with scope of appeal and scope of Appellate Body rulings

4.59 Before entering into the details of the Appellate Body's ruling, and its potential implications for the parties, we first recall that in the original dispute there were three broad categories of transactions in respect of which we found that the United States' failure to conduct a pass-through analysis was inconsistent with various provisions of the covered Agreements. Specifically, these categories were: (1) sales of logs by tenured timber harvesters that do not produce lumber to unrelated lumber producers; (2) sales of logs by tenured harvester-sawmills to unrelated sawmills; and (3) sales of lumber by tenured harvester-sawmills to unrelated lumber re-manufacturers. The United States did not appeal our finding in respect of the first of these categories of transactions. It did appeal our findings in respect of the second and third categories of transactions. The Appellate Body, in turn, upheld our finding in respect of the second category, and reversed our finding in respect of the third category.

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[48] US second written submission, para. 23 (see Annex B – 2).

[49] See, for example, page 4 of Section 129 Determination (Exhibit CDA-5) ("where we determined that any of the sales reported by the Canadian parties were affected by one or several of the five factors listed above, we concluded that the transactions were not conducted at arm's length").

[50] The US arguments in this proceeding did not cover USDOC's conduct of the Final Assessment Review. We note, however, that the USDOC adopted the same approach to pass-through in the First Assessment Review as in the Section 129 Determination.

[51] Appellate Body Report, para. 167(e) (italic emphasis in original, bold emphasis supplied).

4.60 Given both the scope and the outcome of the US appeal, the DSB's recommendations and rulings which the United States was obliged to implement in respect of the first category of transactions consist exclusively of our findings. In respect of the second category, these recommendations and rulings consist of our findings and the relevant findings of the Appellate Body. In respect of the third category, in view of the reversal on appeal of our findings, there were no DSB recommendations and rulings for the United States to implement. We take up the first and second categories separately.[52]

(ii) Sales of logs by tenured timber harvesters that do not produce lumber to unrelated lumber producers

4.61 Canada objects to USDOC's application of the five factors in all situations in order to identify for further pass-through analysis log sale transactions that were made at "arm's length". Canada argues that, instead, a pass-through analysis is required in respect of all log sales between unrelated entities. The United States did not appeal our findings in respect of sales of logs by tenured timber harvesters that do not produce lumber to unrelated lumber producers. Thus, as noted, our findings alone constitute the substance of the DSB's recommendations and rulings in respect of this category of transactions. We therefore start by recalling the details of our analysis and findings on the pass-through issue in general, along with our specific pass-through findings on this category of transactions.

4.62 We recall that, as a general matter, the primary focus of our discussion and findings on pass-through in our Panel Report centred on affiliation. Thus, we described the "basic question" presented by Canada's pass-through claim as

> "whether USDOC was obligated to conduct a pass-through analysis in respect of the input transactions between timber harvesters (both those that produce lumber and those that do not) and **unrelated** sawmills, and between sawmills and unrelated re-manufacturers ...".[53]

4.63 We then explained that we understood Canada's claim to be

> "that where upstream transactions between **unrelated** entities exist for inputs, any subsidies to the producers of those inputs cannot be assumed also to be subsidies to the downstream product under investigation."[54]

4.64 We noted that

> "[w]here the subsidies at issue are received by **someone other than** the producer of the investigated product, the question arises whether there is subsidization in respect of that product."[55]

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[52] We note that Canada's arguments concerning the USDOC pass-through analysis refer to transactions between "independent harvesters" and sawmills. This could mean that Canada's claim is limited to the first category of transactions identified above. However, since note 2 of the USDOC's Section 129 Determination provides that "[f]or purposes of this determination, the referenced log sales by tenured independent harvesters/sawmills will be referred to as sales by independent harvesters", we understand Canada's claim concerning "independent harvester" transactions to include both of categories of transactions. Furthermore, we understand that both categories of transactions were covered by the Section 129 Determination, whereas only the first category of transaction was covered by the First Assessment Review. If the USDOC were to have applied its five factor approach in respect of the second category of transactions in the First Assessment Review, our evaluation would have been the same as for the USDOC's treatment of that category of transactions in the Section 129 Determination.

[53] Panel Report, para. 7.81 (emphasis supplied).

[54] Panel Report, para. 7.85 (emphasis supplied).

4.65 We then stated that

> "[t]he heart of the pass-through issue is whether, where a subsidy is received by **someone other than** the producer or exporter of the product under investigation, the subsidy nevertheless can be said to have conferred benefits in respect of that product."[56]

4.66 Finally, we concluded, at paragraph 7.99 of our report, that

> the USDOC's failure to conduct a pass-through analysis in respect of logs sold by tenure-holding timber harvesters (whether or not also lumber producers) to **unrelated** sawmills producing subject softwood lumber ... was inconsistent with Article 10 and thus Article 32.1 SCM Agreement, and with Article VI:3 of GATT 1994.[57]

4.67 This conclusion was repeated in similar terms in the final section of the Panel Report, where we held that:

> "the USDOC's failure to conduct a pass-through analysis in respect of upstream transactions for log and lumber inputs between **unrelated** entities was inconsistent with Article 10 SCM Agreement and Article VI:3 of GATT 1994".[58]

4.68 At most places in our analysis and conclusions, therefore, we did not use the term "arm's length" in discussing the pass-through issue, but instead addressed the potential obligation to conduct a pass-through analysis as pertaining to transactions between unrelated parties.

4.69 We acknowledge, however, that we did make some limited references to the term "arm's length" in our findings, although we did not define that term. Footnote 163 of our Panel Report, which was included in a sentence describing the "basic question presented by [Canada's] claim" as concerning the need to conduct a pass-through analysis in respect of transactions between unrelated entities, states, in relevant part:

> "We note that this claim only concerns such alleged **arms'-length** transactions between unrelated entities ..."[59]

4.70 We also used the term "arm's length" at paragraphs 7.94 and 7.95 of our report, in the context of the first category of transactions, namely log sales to lumber producers by timber harvesters that do not produce lumber. In particular, in paragraph 7.94 we identified such sales as the first type of "arms' length" transaction that we needed to address. We then summarized the US position as being that no pass-through analysis was needed for such transactions because of their small volume and because they might not be at "arms' length". This latter was a reference back to the US argument, summarized at paragraph 7.76 of our report, that "the many restrictions imposed on tenure holders, including requirements to process timber locally, 'suggests that all or most of the sales by independent loggers may not be at arms'-length'". We noted, at paragraph 7.95 of our report, that the United States neither cited to any record evidence establishing "the volume of the possible arms'-length sales at issue", nor argued that USDOC had made efforts to collect such information. We went on to say that the United States had not conducted the required pass-through analysis for these transactions, and had "point[ed] to no factual basis in the record for its conclusion that such an analysis was not necessary".

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[55] Panel Report, para. 7.85 (emphasis supplied).
[56] Panel Report, para. 7.91 (emphasis supplied).
[57] Panel Report, para. 7.99 (emphasis supplied).
[58] Panel Report, para. 8.1(c) (emphasis supplied).
[59] Panel Report, note 163 (emphasis supplied).

4.71 As noted above, however, our overall conclusion in respect of all categories of log sales (including by timber harvesters not owning sawmills to sawmills) was clear in stating that pass-through analysis was required where the parties to such transactions were unrelated. In short, based on the language of our conclusion and the underlying language of our analysis, in the original dispute before us, our primary focus in respect of the pass-through issue was in fact transactions between unrelated parties.

4.72 Indeed, in the present Article 21.5 proceeding, even the United States explicitly acknowledges that our findings were not premised on or restricted by any concept of "arm's length" transactions. In particular, in response to one of our questions, the United States notes that

> "as evident in paragraph 7.95, however, the original panel's findings did not depend upon whether or not the sales claimed by Canada were, in fact, arm's length sales."[60]

4.73 We thus conclude that, in respect of log sales by tenure-holding timber harvesters that do not own sawmills to unrelated sawmills, the USDOC's exclusion from pass-through analysis of certain such sales on the grounds that they were not at "arm's length" was inconsistent with the United States' obligations pursuant to the DSB's recommendations and rulings.

(iii) Sales of logs by tenured harvester-sawmills to unrelated sawmills

4.74 We now turn to the second broad category of log sales at issue in this Article 21.5 proceeding, in respect of which the United States appealed our finding that a pass-through analysis was required. For this category – log sales by tenured harvester/sawmills to unrelated sawmills – the Appellate Body upheld our finding but in doing so introduced the term "arm's length", which does not appear in our finding. We recall that in the original dispute and before the Appellate Body, both parties used the term "arm's length" at various points in their arguments, apparently with considerably different meanings. They presented no arguments concerning the issue of "arm's length" as such, however. As noted above, in the Panel Report we did make some limited references to the term "arm's length", although not in the context of the second category of log sales, and we did not ascribe any particular definition to this term. In addition, and most significantly for this Article 21.5 proceeding, the term arm's length appears in numerous places in the Appellate Body's analysis (although without being defined), especially in its ruling at paragraph 167(e) upholding our finding in respect of this category of log sales.

4.75 We understand the United States to argue in the present proceeding that it based its implementation of the DSB's recommendations and rulings on the explicit wording used by the Appellate Body, which according to the United States upheld our finding to the extent of "arm's length" sales of logs by tenured harvester/sawmills to unrelated sawmills. In other words, the United States views the Appellate Body (and thus the DSB) as having modified, albeit implicitly, our conclusions concerning the pass-though issue in respect of this category of log sales. On this basis, a primary focus of the USDOC's analysis in the Section 129 Determination in respect of log sales by tenured harvester/sawmills to unrelated sawmills was to identify which transactions in the universe of such sales were and were not at arm's length. For Canada, however, the term "arm's length" has to do exclusively with corporate affiliation – any transaction between unaffiliated parties is, by definition, an arm's length transaction. Thus, for Canada, the Appellate Body used the term "arm's length" synonymously with "unrelated".[61] Canada argues that therefore, the USDOC, by not conducting a competitive benefit analysis in respect of the sales between unrelated parties that it found not to be at "arm's length", failed to comply with the DSB's recommendations and rulings.

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[60] US Answers to Panel's questions, 29 April 2005 (Article 21.5 proceeding), at paragraph 9.

[61] See, for example, para. 10 of Comments of Canada on the Responses by the United States Following the Substantive Meeting of the Panel.

4.76 We thus find ourselves confronted with significant ambiguity surrounding the issue of pass-through in the DSB's recommendations and rulings in respect of log sales by tenured harvester/sawmills to unrelated sawmills, which ambiguity seems to have arisen from the inclusion of the term "arm's length" in the conclusion set forth at para. 167(e) of the Appellate Body Report.[62] It is not clear to us why the Appellate Body chose to include this term in its ruling. This ambiguity is compounded by the fact that the participants in the appellate proceedings were each relying on separate meanings of that term. In this regard, while we can understand that the United States sought to give meaning to the Appellate Body's use of the term "arm's length", we disagree with the United States' reasoning.

4.77 There are several important factors in respect of which we are in no doubt. First, the scope of the DSB recommendations and rulings to be implemented by the United States is not based exclusively on the adopted findings of the Appellate Body. The findings of the original panel adopted by the DSB are also relevant in this regard.

4.78 Second, as noted above and as acknowledged by the United States, *our* overall conclusion in respect of all categories of log sales (whether or not the tenured log seller owns a sawmill) was clear in stating that pass-through analysis was required where the parties to such transactions were unrelated.

4.79 Third, the explicit language used by the Appellate Body at para. 167(e) of its report was to "uphold" our conclusion in respect of log sales by tenured harvester/sawmills to unrelated sawmills, as set forth in the relevant part of the first sentence of para. 7.99 of the Panel Report. That is, para. 167(e) of the Appellate Body Report contains no explicit modification of the finding at para. 7.99 of the Panel Report in respect of log sales by tenured harvester/sawmills to unrelated sawmills.

4.80 Nor does the United States argue that there is such an *explicit* modification. Rather, the United States' argument is that the Appellate Body, in introducing the word "arm's length" into its ruling, *implicitly modified* our conclusion. In this context we recall that Article 17.13 of the DSU permits the Appellate Body to "uphold, modify or reverse" the findings of a panel. We would expect, however, that any such action would be explicit. In particular, if the Appellate Body intended to modify a finding that it was explicitly upholding, such modification presumably likewise would be made explicitly. Indeed, in other cases, the Appellate Body has been very explicit when modifying a panel's findings, identifying precisely which finding (or which part of a finding) was being modified.[63] In this case, however, the Appellate Body Report contains no discussion of the meaning of the term "arm's length", nor any explanation of how it may have intended to distinguish that term from the word "unrelated". We consider that for an Article 21.5 panel to accept, in such circumstances, that the Appellate Body had *implicitly* modified the underlying panel findings could have serious systemic implications, since it could result in significant uncertainty regarding the import of Appellate Body reports, and the resultant DSB rulings and recommendations. For these reasons, it would not be appropriate for us to proceed on the basis that the Appellate Body may have intended to modify our findings in respect of sales by tenured harvester/sawmills to unrelated sawmills but refrained from saying so explicitly.

4.81 In any event, while acknowledging the existence of a certain ambiguity, on balance we are not persuaded that the Appellate Body's finding that a pass-through analysis was required in respect of

[62] We recall here that the United States does not consider that our findings in the original dispute were conditioned on any concept of "arms' length". See para. 4.72, *supra*.

[63] See, for example, para. 196(d) of the Appellate Body Report in *Brazil –Aircraft*. *See* also paras. 199 and 263(f) of the Appellate Body Report in *US – Line Pipe*. Although para. 168 of the Appellate Body Report refers to modification of the Panel Report, there is no indication precisely which part of the Panel Report is being modified. In such circumstances, there is no reason to believe that the Appellate Body was referring to anything other than the modification resulting from the Appellate Body's explicit reversal of certain of the original panel's findings.

"arm's length sales of *logs* by tenured harvesters/sawmills to unrelated sawmills" is necessarily different from (in the sense that it would modify) our finding that a pass-through analysis was required in respect of "logs sold by tenure-holding timber harvesters (whether or not also lumber producers) to unrelated sawmills". In particular, we note that the Appellate Body used a virtually identical formulation – also including a reference to "arm's length sales" - at para. 123 of its Report. Footnote 147 to para. 123 confirms that, in para. 123, the Appellate Body was indeed referring to para. 7.99 of the Panel Report. Since para. 123 of the Appellate Body report marks the beginning of the Appellate Body's introduction to the pass-through issue, we do not understand the Appellate Body to be substantively modifying para. 7.99 of the Panel Report at that juncture. Instead, it would seem much more reasonable to conclude that the Appellate Body was merely paraphrasing the relevant finding set forth at para. 7.99 of the Panel Report. Equally, we do not agree that a modification should necessarily be implied from the use of virtually identical language later in the Appellate Body Report. Instead, one could again understand the Appellate Body to be merely paraphrasing the relevant finding of the original panel.

4.82 In light of all of the foregoing considerations, and notwithstanding our acknowledgement of a certain ambiguity in respect of the term "arm's length", we do not accept the US argument, based on para. 167(e) of the Appellate Body Report, that the rulings and recommendations of the DSB only required a pass-through analysis in respect of "arm's length" log sales by tenured harvester/sawmills to unrelated sawmills. Instead, given that the Appellate Body upheld, without explicit modification, the relevant finding at para. 7.99 of the Panel Report, we consider that the United States was required to implement the recommendations and rulings of the DSB by conducting a pass-through analysis in respect of all log sales by tenured harvester/sawmills to unrelated sawmills -- covered by the finding at para. 7.99 of the Panel Report regarding sales of logs by "tenure-holding harvesters (whether or not also lumber producers) to unrelated sawmills producing softwood lumber" -- irrespective of any considerations as to whether or not such sales were "arm's length".

2. Rejection of aggregate data

(a) Arguments of the parties

4.83 Canada claims that in its Section 129 Determination, USDOC considered only company-specific, transaction-by-transaction data for the pass-through analysis, disregarding all aggregate transaction and pricing data submitted as an alternative by the Canadian respondents[64,65]. Canada asserts that the specific data requested by USDOC was impossible to collect as it involved hundreds of thousands of transactions by thousands of companies in Canada. Canada claims that USDOC nevertheless refused to provide reasonable alternatives for data submission, even though its CVD investigation was undertaken on an aggregate basis. Canada claims that the Panel already made it clear that company-specific data are not necessarily required to conduct a pass-through analysis. Canada refers in this regard to para. 7.98 of the Panel Report, where the Panel stated that it was "not convinced that the need to conduct a pass-through analysis for these transactions would necessarily or inevitably convert every aggregate case into a company-specific case." Canada also refers to footnote 170 of the Panel Report, where the Panel stated "[f]or example, inquiry into possible relationships between the entities concerned, and the use of sampling or other statistical techniques in respect of the relevant transaction at issue, might offer possible approaches to be explored."

[64] As noted above, however, Canada clarified in response to questioning by the Panel that it did not claim that USDOC outright rejected the data. Rather, Canada challenged how the USDOC did and did not use them. See para. 4.51 and footnote 45, *supra*.

[65] Concerning these alternative data, Canada asserts that in many instances, Canadian respondents provided data from a representative sample of Canadian companies. According to Canada, the data provided were as much as were practicably available, and could and should have been used by the USDOC to complete its pass-through analysis.

4.84 The United States asserts that, to conduct its pass-through analysis, the USDOC first had to obtain data from Canada supporting Canada's claim that a portion of the total volume of Crown logs processed into lumber – as reported by Canada – should be reduced to account for arm's length log sales between unrelated parties in which no benefit passed through. The United States submits that, because the USDOC had conducted the original investigation on an aggregate basis and not on a company-specific basis and had not previously conducted such a pass-through analysis, the administrative record did not contain evidence supporting Canada's claims.

4.85 The United States asserts that the USDOC therefore asked Canada, through questionnaires, to identify the volume of log sales subject to its pass-through claims, and to provide specific information necessary to determine whether during the period of investigation there were arm's length sales of logs by independent harvesters to unrelated sawmills and by tenured harvesters/sawmills to unrelated sawmills. According to the United States, this would allow the USDOC to identify transactions that were eligible for the last phase of the analysis (competitive benefit). The requested information related to, *inter alia*, the relationship between the parties to the specific transactions (such as whether the parties were affiliated) and the circumstances surrounding the subject sales.

4.86 The United States further submits that the DSB's recommendations and rulings treated pass-through as a company-specific issue. In particular, the United States notes that the Appellate Body referred to the need to determine whether a benefit conferred "on the input *producer*" passed through to the "*producer* of the processed product" (emphasis supplied).

4.87 The United States rejects Canada's argument that the Panel already indicated that company-specific data are not necessarily required to conduct pass-through analyses. The United States argues that, in response to US arguments to the effect that there is a mismatch between an investigation conducted on an aggregate basis and the company-specific nature of the pass-through issue, the Panel simply found that pass-through can indeed be examined during an aggregate investigation. According to the United States, the Panel did not suggest that company-specific information should not be used to analyze whether there was a pass-through of subsidies.

(b) Evaluation by the Panel

4.88 First, we note the US argument that the USDOC needed company-specific and / or transaction-specific data in order to determine whether or not the parties to the transactions were related. Canada has not disputed that the USDOC needed such data for this purpose. Since the question of affiliation is central to the threshold issue of whether or not a pass-through analysis is required, we see no reason why the USDOC should be prevented from collecting company-specific and /or transaction-specific data for this purpose.[66]

4.89 Second, Canada has not argued that a company-specific and/or transaction-specific analysis is inconsistent with any particular provision of the SCM Agreement. In the absence of specific provisions, we are reluctant to instruct investigating authorities what data they should collect, and how they should use those data, in the context of their pass-through analyses. Nor do we consider that investigating authorities have an obligation simply to accept such alternative data as may be

[66] We note that the USDOC did accept some aggregate data for purposes of determining affiliation in respect of parties to log transactions in certain provinces. The Section 129 Draft Decision Memorandum (Exh. CDA-6 at pp. 9, 10, 13, 14) indicates that the basis for doing so was certifications provided with the data to the effect that the individual companies included in the aggregate figures were unaffiliated. Thus, our understanding is that it was these certifications, which necessarily concerned only the specific companies involved, that were accepted by the USDOC.

volunteered to them by respondents based on the respondents' assessment that the authorities' information requests are too burdensome.[67]

4.90 Third, Canada has not established that a company-specific and/or transaction-specific analysis is precluded by the rulings and recommendations of the DSB. Although we stated in our Panel Report that we were "not convinced that the need to conduct a pass-through analysis for these transactions would necessarily or inevitably convert every aggregate case into a company-specific case",[68] we certainly did not state that the USDOC should be precluded from proceeding on a company-specific basis if it chose to do so.

4.91 Finally, we recall that Canada has acknowledged that it does not assert that the USDOC rejected outright all of the aggregate information submitted by Canadian respondents.[69]

4.92 For the above reasons, we reject Canada's claim that the USDOC improperly disregarded all aggregate transaction and pricing data submitted by the Canadian respondents.

3. Sawmill-to-sawmill transactions

(a) Arguments of the parties

4.93 Canada claims that in the Section 129 Determination, the USDOC continued to presume pass-through in respect of all log transactions between tenured sawmills. Canada's claim is based on its assertion that, in the Section 129 Determination, the USDOC did not investigate sales of logs between tenured sawmills. Canada asserts that the original Panel and Appellate Body findings provide no basis for refusing to conduct a pass-through analysis simply because the purchasing sawmill holds tenure.

4.94 Canada also claims that in the First Assessment Review, USDOC presumed pass-through in respect of all sawmill-to-sawmill transactions since it failed to request information on any purchases of logs by sawmills from other sawmills.

4.95 Regarding the USDOC's Section 129 Determination, the United States asserts that the scope of the Appellate Body's ruling was limited – by footnote 151 of the Appellate Body's report – to sales of logs to sawmills that "do[] not hold a stumpage contract", i.e., to sawmills that do not hold tenure. According to the United States, the Appellate Body therefore only upheld the original panel's finding that the USDOC should have conducted a pass-through analysis with respect to transactions between tenured timber harvester/sawmills and unrelated, non-tenure holding sawmills. The United States submits that the USDOC properly implemented the rulings and recommendations of the DSB by following the specific direction issued by the Appellate Body.

4.96 The United States does not respond to Canada's claim concerning the scope of the information requested by USDOC in the First Assessment Review.

(b) Evaluation by the Panel

4.97 We shall first address Canada's claim regarding the scope of the information requested by the USDOC in its Section 129 Determination. We shall then examine Canada's claim regarding the First Assessment Review.

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[67] In this regard, we consider that the accuracy of certain aggregate data in respect of affiliation is not informative of whether the substance of the aggregate data in terms of volume and price is either representative or accurate. These are entirely separate issues.

[68] Panel Report, para. 7.98.

[69] See footnote 45 *supra*.

(i) Section 129 Determination

4.98 As a preliminary matter, we note that Canada's claim does not cover purchases of logs by sawmills from tenured timber harvesters that do not themselves produce lumber. Canada's claim concerning the scope of the USDOC's investigation is restricted to sawmill-to-sawmill transactions.[70]

4.99 On substance, we note that the United States' defence to this claim is based on the definition of "sawmill" found at footnote 151 of the Appellate Body Report. That definition explicitly restricts the term "sawmill" as used in the Appellate Body Report to "an enterprise that processes logs into softwood lumber and does not hold a stumpage contract". Our Panel Report, however, does not adopt the same definition of "sawmill" as employed by the Appellate Body. Rather, our findings regarding inter-sawmill transactions concerned purchases by all sawmills, whether or not they hold a stumpage contract. [71] Furthermore, in the panel proceedings, neither party suggested that the definition of "sawmill" should be restricted in any way.

4.100 Second, we recall that the Appellate Body did not explicitly modify our finding at para. 7.99 of the Panel Report concerning inter-sawmill transactions. Rather, our finding was explicitly upheld by the Appellate Body. The United States submits that, because of the definition of "sawmill" set forth at footnote 151 of the Appellate Body Report, our finding regarding inter-sawmill transactions (as set forth at para. 7.99 of the Panel Report) was only upheld by the Appellate Body in so far as it concerned log purchases by sawmills that did not hold a stumpage contract. We disagree.

4.101 The considerations that we highlight at para. 4.80, *supra*, in respect of the issue of *implicit modification* of a panel's findings are equally pertinent here, to the extent that the US argues that the Appellate Body made such an implicit modification. We do acknowledge the possibility that the Appellate Body's use of a different, narrower definition of "sawmill" in its report than we did in the Panel Report may have led to a certain ambiguity as to the scope of the Appellate Body's, and thus the DSB's rulings, and it is not clear to us why the Appellate Body introduced this narrower definition. That said, however, the practical effect of the definition set forth at footnote 151 of the Appellate Body Report is that the Appellate Body's findings regarding inter-sawmill transactions were restricted to transactions involving purchases by sawmills that did not hold a stumpage contract. In other words, the Appellate Body made no findings regarding our conclusion concerning inter-sawmill transactions involving purchases by sawmills that did hold a stumpage contract. In the absence of any findings by the Appellate Body regarding this latter category of transactions, our findings regarding such transactions stand, and form the sole basis for the DSB's recommendations and rulings in respect of these transactions.

4.102 We note the US argument in this regard that in its notice of appeal, the United States challenged "the entirety of the findings of the original panel that Commerce had to conduct a pass-through analysis with respect to transactions between producers of subject merchandise"[72]. We understand the United States to argue that the scope of its appeal therefore covered the Panel's findings regarding purchases by all sawmills, whether or not they hold a stumpage contract, and that the Appellate Body's findings should therefore reflect the scope of the US appeal. This would mean that our conclusion regarding log purchases by sawmills that do hold a stumpage contract would somehow be subject to the findings of the Appellate Body. While we see merit in such an argument (in the sense that the scope of the Appellate Body's findings should normally reflect the scope of the

[70] Thus, at para. 55 of its first written submission (see Annex A – 1), Canada accuses the United States of ignoring the findings of the original panel and Appellate body concerning "sawmill-to-sawmill transactions" . Canada does not complain, in the context of this claim, that the USDOC failed to investigate sales by tenured timber harvesters that do not produce lumber.

[71] In order to avoid any uncertainty, in these proceedings we continue to use the term "sawmill" to refer to an enterprise that processes logs into softwood lumber, whether or not it holds a stumpage contract.

[72] See US Response to Question 1 from the Panel.

appellant's appeal), we note that the Appellate Body's "sawmill" definition would appear to apply to the entirety of the Appellate Body Report, including the section entitled "Claims of Error by the United States – Appellant". In that section, the Appellate Body states that the United States "contends that the Panel erred in finding that a pass-through analysis is required in respect of sales of *logs* from tenure-holding sawmills producing softwood lumber to unrelated **sawmills**".[73] Furthermore, in describing the "Scope of the Issue Appealed", the Appellate Body states that "[t]his appeal thus concerns the situations where: (i) a tenured timber harvester owns a sawmill and processes some of the logs it harvests into softwood lumber, but at the same time sells at arm's length some of the logs it harvests to unrelated **sawmills** for processing into lumber ...".[74] Notwithstanding the terms of the US Notice of Appeal, therefore, the issue addressed by the Appellate Body, and therefore the scope of the Appellate Body's findings, was explicitly restricted (as a result of footnote 151 of the Appellate Body's Report) to inter-sawmill transactions involving log purchases by sawmills not holding a stumpage contract. Inter-sawmill transactions involving log purchases by sawmills holding a stumpage contract were therefore not covered by the Appellate Body's findings.[75] Accordingly, our finding regarding such transactions could not have been reversed or otherwise modified by the Appellate Body.

4.103 Since our finding at para. 7.99 of the Panel Report regarding inter-sawmill transactions involving log purchase by sawmills holding a stumpage contract could not have been reversed or otherwise modified by the Appellate Body, that finding must be reflected in the scope of the rulings and recommendations of the DSB. Thus, by failing in the Section 129 Determination to analyse pass-through in respect of inter-sawmill transactions involving purchases by (unrelated) sawmills that hold a stumpage contract, the United States failed to properly implement the rulings and recommendations of the DSB regarding such transactions.

(ii) First Assessment Review

4.104 Canada submits that, in its administrative review, the USDOC failed to request information on any sawmill-to-sawmill transactions. Canada asserts that, in its only request for information on arm's length log transactions, the USDOC restricted its request in its initial questionnaire to the volume and value of Crown logs sold by independent harvesters (i.e., "by any person or company that did not own or operate a sawmill" or "by non-mill-owning tenure holders") to softwood lumber producers. Canada refers in this regard to the questionnaires sent by the USDOC to various Canadian provinces (Exhibit CDA-9), and the USDOC's Preliminary Assessment Review Determination Exhibit CDA-10).

4.105 The United States did not respond to Canada's claim, which concerns the conduct of the First Assessment Review. When asked a question regarding this claim, the United States responded on the basis of the information requested by the USDOC in the Section 129 Determination, rather than the First Assessment Review.[76] We presume that the United States declined to respond in respect of the First Assessment Review because of its view that the latter measure falls outside the scope of the present proceedings. We recall, however, our finding that the First Assessment Review does fall within the scope of these proceedings insofar as the pass-through issue is concerned. We also recall that we warned the parties at our substantive meeting with them in the present proceeding that, in the

[73] Appellate Body Report, para. 16 (italic emphasis in original, bold emphasis supplied).
[74] Appellate Body Report, para. 128 (emphasis supplied).
[75] The scope of the appeal is described in the penultimate sentence of para. 124 of the Appellate Body Report. That sentence refers to certain sales of logs and lumber "to sawmills". Since the word "sawmills" is qualified by the abovementioned footnote 151, it is clear that the scope of the appeal was restricted to certain sales of logs and lumber to "enterprise[s] that process[] logs into softwood lumber and do[] not hold a stumpage contract".
[76] See US Response to Question 4 from the Panel.

absence of any ruling on the US preliminary request at that time, the parties should assume in their arguments and submissions that the First Assessment Review falls within these proceedings.

4.106 We find that Canada has *prima facie* established, on the basis of the abovementioned Exhibits, that the USDOC failed in the First Assessment Review to investigate pass-through in respect of any sawmill-to-sawmill transactions. Given the original panel and Appellate Body findings regarding sawmill-to-sawmill transactions, we do not see how the USDOC could have properly implemented the rulings and recommendations of the DSB in this case without also analysing pass-through in respect of sales of logs between sawmills in the First Assessment Review. In the absence of any argumentation concerning this matter by the United States, we find on the basis of the above that Canada has established a *prima facie* case that the United States has failed to properly implement the rulings and recommendations of the DSB by excluding sawmill-to-sawmill transactions from the pass-through analysis in the First Assessment Review.

C. THE BENCHMARKS USED IN THE USDOC'S PASS-THROUGH ANALYSIS

1. Arguments of the parties

4.107 In its first submission, Canada challenges the benchmarks used by the USDOC in determining whether subsidy benefits passed through in certain log sales between unrelated parties. In particular, Canada challenges the import price data used by the USDOC (in conjunction with price data for logs purchased from private holders of forested land) in constructing the market price benchmarks for determination of benefit.

4.108 The United States disputes this challenge on two grounds. First, the United States asserts that this issue is outside the Panel's terms of reference as it is not referred to in Canada's request for establishment of a panel. Second, the United States argues that even if the issue were properly before the Panel, it has no substantive merit, as the import data used by USDOC were reasonable, and Canada has pointed to no provision of any covered agreement that has been violated by the use of these data.

2. Evaluation by the Panel

4.109 Turning to whether this challenge is outside our terms of reference, we recall that Canada's request for establishment refers to four specific alleged failures by the United States to comply with the DSB's recommendations and rulings, which can be summarized as (1) excluding certain categories of transactions from pass-through analysis; (2) presuming that certain transactions were not at arm's length and thus that benefits passed through; (3) applying the results of the pass-through analysis to a countervailing duty cash deposit rate that had been invalidated in judicial review procedures under US law[77]; (4) failing to conduct a pass-through analysis in the first administrative review of the lumber CVD measure.

4.110 None of these four alleged failures refers to or has any evident connection with either the methodology or the data that USDOC used in its *calculations* of pass-through of benefits in respect of those transactions where it performed such calculations. Rather, this issue is distinct from and independent of the four listed allegations. While Canada, in response to a question from us, asserts that "Canada identified its challenge to the pass-through benchmarks in its panel request", it points to no specific language in the request in this regard, and we find no such reference. Canada's argument seems to be, rather, that the statement in the request that the United States' measure(s) taken to comply are "inconsistent with Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994" is sufficient to bring this challenge within our terms of reference. We disagree.

[77] We have already expressed our view that Canada has effectively abandoned this claim, or at least failed to establish a *prima facie* case in support thereof. See note 47 above.

Canada's request describes the four specific alleged violations (legal claims), none of which has to do with the benchmarks used, and then identifies the various measures which in Canada's view are inconsistent by virtue of these alleged violations. Thus, we find that the issue of the market benchmarks used by USDOC represents a separate challenge, not referred to in the request for establishment. It therefore falls outside our terms of reference.

4.111 In light of the above, we reject Canada's claim regarding the benchmarks used by the USDOC in its pass-through analysis.

D. COUNTERVAILING DUTY AMOUNT

1. Arguments of the parties

4.112 Canada submits that the effect of the failure by the United States to comply with the recommendations and rulings of the DSB is an impermissible inflation of the amount of its countervailing duties. Canada submits that the United States is now required to do one of two things: either (1) conduct an appropriate pass-through analysis for all Crown log transactions involving unrelated parties, including through the use of aggregate data; or (2) exclude from the calculation of the overall *ad valorem* subsidy rate amounts of subsidy that have been presumed to pass through such transactions.

4.113 The United States submits that the USDOC properly calculated the revised countervailing duty rate by reducing the numerator of the *ad valorem* subsidy rate by C$ 28,344,121.

2. Evaluation by the Panel

4.114 We have identified a number of deficiencies in the USDOC's implementation of the rulings and recommendations of the DSB regarding *US – Softwood Lumber IV*, in particular in respect of the pass-through issue in both the Section 129 Determination and the First Assessment Review.

4.115 As a result of such failures to properly implement the rulings and recommendations of the DSB, the USDOC included in its numerator transactions for which it had not demonstrated that the benefit of subsidized log inputs had passed through to the processed product. As in the original proceeding, we find that this results in the imposition of countervailing duties in a manner inconsistent with Articles 10 and 32.1 of the SCM Agreement, and Article VI:3 of the GATT 1994.

V. CONCLUSIONS AND RECOMMENDATIONS

5.1 In light of the above, we reject:

- the US request for a preliminary ruling that the First Assessment Review falls outside the scope of the present DSU Article 21.5 proceeding, insofar as the pass-through analysis is concerned;
- Canada's claim that the USDOC improperly disregarded all aggregate transaction and pricing data submitted by the Canadian respondents;
- Canada's claim against the benchmarks used by the USDOC in its pass-through analysis;

5.2 We uphold Canada's claims that:

- in the Section 129 Determination, and in the treatment of pass-through in the First Assessment Review, the United States failed to properly implement the recommendations and rulings of the DSB in this dispute by failing to conduct a pass-through analysis in respect of sales, found

by USDOC not to be at arm's length, of logs by tenured timber harvesters, whether or not they also produce lumber, to unrelated lumber producers, whether or not they hold a stumpage contract; and

- in the Section 129 Determination, and in the First Assessment Review, the USDOC therefore included in its subsidy numerator transactions for which it had not demonstrated that the benefit of subsidized log inputs had passed through to the processed product.

5.3 We do not consider it necessary to make any conclusion regarding the claim identified in Canada's Request for Establishment of a panel regarding USDOC "applying the results of the 'pass-through' analysis to a countervailing duty cash deposit rate invalidated as a result of judicial review proceedings conducted in accordance with US law, and failing to apply the results to a valid rate".

5.4 We therefore conclude that the United States remains in violation of Article 10 and 32.1 of the SCM Agreement, and Article VI:3 of the GATT 1994.

5.5 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that, to the extent the United States has acted inconsistently with the provisions of the SCM Agreement and of GATT 1994, and failed to properly implement the recommendations and rulings of the DSB in this dispute, it has nullified or impaired benefits accruing to Canada under that Agreement. Pursuant to Article 19.1 of the DSU, therefore, we recommend that the United States bring its Section 129 Determination and First Assessment Review into conformity with these provisions.

5.6 Pursuant to DSU Article 19.1, Canada has requested that we suggest ways in which the United States could implement our recommendation. In particular, Canada suggests[78] that the United States do one of the following two things:

- It should refund the amount of the countervailing duties it imposed to offset alleged subsidy amounts impermissibly presumed to pass through;

or

- It should revise its measures to meet its WTO obligations and refund the amount of the countervailing duties it imposed to the extent that they exceeded the amount of the alleged subsidy demonstrated to have passed through to the production of softwood lumber.

5.7 Given the complexities of the issue at hand, we consider that in the first instance the modalities of the implementation of our recommendation are for the United States to determine. We therefore decline to make the suggestions proposed by Canada.

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[78] Canada's suggestion is made at para. 58 of its oral statement (see Annex A – 3). That paragraph also contains a request for a recommendation which differs from the request set forth at para. 72 of Canada's first written submission (see Annex A – 1). We understand that para. 58 of Canada's oral statement is intended to amend and replace para. 72 of Canada's first written submission. This was certainly the understanding expressed by the United States at our meeting with the parties, to which Canada did not object.