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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 OF THE DSU

AB-2005-8

Report of the Appellate Body

TABLE OF CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
Australia – Automotive Leather II (Article 21.5 – US)	Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by the United States*, WT/DS126/RW and Corr.1, adopted 11 February 2000, DSR 2000:III, 1189
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
Canada – Aircraft (Article 21.5 – Brazil)	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/AB/RW, adopted 4 August 2000, DSR 2000:IX, 4299
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
EC – Bed Linen (Article 21.5 – India)	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 Appellate Body Report, WT/DS141/AB/RW
Mexico – Corn Syrup (Article 21.5 – US)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6675
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 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
US – Softwood Lumber IV	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 Appellate Body Report, WT/DS257/AB/R
US – Softwood Lumber IV (Article 21.5 – Canada)	Panel Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada, Recourse by Canada to Article 21.5*, WT/DS257/RW, 1 August 2005

TABLE OF ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
DSB	Dispute Settlement Body
DSU	*Understanding on Rules and Procedures Governing the Settlement of Disputes*
Final Countervailing Duty Determination	"Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products from Canada", *United States Federal Register*, Vol. 67, No. 63 (2 April 2002), p. 15545, as amended, Vol. 67, No. 99 (22 May 2002), p. 36070 (Exhibit US-1 submitted by the United States to the Panel)
First Assessment Review	"Notice of Final Results of Countervailing Duty Administrative Review and Rescission of Certain Company-Specific Reviews: Certain Softwood Lumber Products from Canada", *United States Federal Register*, Vol. 69, No. 243 (20 December 2004), p. 75917 (Exhibit CDA-8 submitted by Canada to the Panel)
GATT 1994	*General Agreement on Tariffs and Trade 1994*
Original Appellate Body Report	Report of the Appellate Body in the original *US – Softwood Lumber IV* proceedings
Original panel	Panel in the original *US – Softwood Lumber IV* proceedings
Original panel report	Report of the Panel in the original *US – Softwood Lumber IV* proceedings
Panel	Panel in these *US – Softwood Lumber IV (Article 21.5 – Canada)* proceedings
Panel Report	Report of the Panel in these *US – Softwood Lumber IV (Article 21.5 – Canada)* proceedings
SAA	"Statement of Administrative Action" in *Message from the President of the United States Transmitting the Uruguay Round Trade Agreements, Texts of Agreements Implementing Bill, Statement of Administrative Action and Required Supporting Statements*, H.R. Doc. No. 103-316, Vol. 1, p. 656 (Exhibit CDA-1 submitted by Canada to the Panel)
SCM Agreement	*Agreement on Subsidies and Countervailing Measures*
Section 129	Section 129 of the Uruguay Round Agreements Act, Pub. L. No. 103-465, § 129, 108 Stat. 4838, codified at 19 USC § 3538 (2000) pp. 720-721 (Exhibit CDA-2 submitted by Canada to the Panel)
Section 129 Determination	"Notice of Implementation Under Section 129 of the Uruguay Round Agreements Act; Countervailing Measures Concerning Certain Softwood Lumber Products from Canada", *United States Federal Register*, Vol. 69, No. 241 (16 December 2004), p. 75305 (Exhibit CDA-7 submitted by Canada to the Panel)
USDOC	United States Department of Commerce
Working Procedures	*Working Procedures for Appellate Review*, WT/AB/WP/5, 4 January 2005
WTO	World Trade Organization

WORLD TRADE ORGANIZATION
APPELLATE BODY

United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada

Recourse by Canada to Article 21.5 of the DSU

United States, *Appellant*
Canada, *Appellee*

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

AB-2005-8

Present:

Janow, Presiding Member
Baptista, Member
Sacerdoti, Member

I. Introduction

1. The United States appeals certain issues of law and legal interpretations developed in the Panel Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada, Recourse by Canada to Article 21.5* (the "Panel Report").[1] The Panel was established to consider a complaint by Canada with respect to the consistency with the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*") and the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994") of measures claimed by Canada to have been taken by the United States to comply with the recommendations and rulings of the Dispute Settlement Body (the "DSB") in the *US – Softwood Lumber IV* proceedings.[2]

2. In the proceedings before the original panel, Canada challenged a number of aspects of the final determination by the United States Department of Commerce (the "USDOC") that led to the imposition of countervailing duties on softwood lumber from Canada (the "Final Countervailing Duty Determination").[3] The original panel found that the failure of the USDOC to conduct a pass-through

[1]WT/DS257/RW, 1 August 2005.

[2]The recommendations and rulings of the DSB resulted from the adoption on 17 February 2004, by the DSB, of the Original Appellate Body Report, WT/DS257/AB/R, and the Original Panel Report, WT/DS257/R and Corr.1, in *US – Softwood Lumber IV*.

[3]"Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products from Canada", *United States Federal Register*, Vol. 67, No. 63 (2 April 2002), p. 15545, as amended, Vol. 67, No. 99 (22 May 2002), p. 36070 (Exhibit US-1 submitted by the United States to the Panel).

analysis[4] in respect of certain categories of log and lumber sales was inconsistent with Articles 10 and 32.1 of the *SCM Agreement* and Article VI:3 of the GATT 1994.[5] With regard to the pass-through issue, the Appellate Body upheld the original panel's finding that the "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", and reversed the original panel's finding that the "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."[6]

3. On 17 February 2004, the DSB adopted the Appellate Body Report and the original panel report, as modified by the Appellate Body Report.[7] The parties to the dispute agreed that the United States would have until 17 December 2004 to implement the recommendations and rulings of the DSB.[8] On 16 December 2004, the USDOC published a determination pursuant to Section 129 of the Uruguay Round Agreements Act ("Section 129").[9] In the determination made pursuant to

[4]The claims made by Canada included claims that the United States had acted inconsistently with its obligations under the *SCM Agreement* because "the USDOC erred in not conducting a pass-through analysis in determining subsidization of softwood lumber in the case of certain upstream transactions for inputs." (Original Panel Report, *US – Softwood Lumber IV*, para. 7.66) In general, a "pass-through" analysis involves an examination of whether subsidies paid to the producers of primary or upstream products (that do not fall within the scope of a countervailing duty investigation) "pass through" the production chain to downstream products (that are covered by the countervailing duty investigation). In this dispute, Canada claimed that the USDOC was required to conduct an analysis of the degree to which subsidies paid on the production of the input products, such as logs or primary lumber, passed through the production process to the downstream softwood lumber products covered by the investigation and the Final Countervailing Duty Determination (that is, to the products upon which countervailing duties were imposed). See *infra*, paras. 49-50.

[5]Original Panel Report, *US – Softwood Lumber IV*, para. 8.1(c). The original panel also addressed claims by Canada in respect of the USDOC's determination regarding the existence of a "financial contribution", the existence and amount of a "benefit", and the existence of "specific" subsidies.

[6]Original Appellate Body Report, *US – Softwood Lumber IV*, para. 167. (original emphasis) In addition to its findings with respect to the pass-through issue, the Appellate Body: upheld the original panel's finding that the USDOC's determination regarding the existence of a "financial contribution" was not inconsistent with Article 1.1(a)(1)(iii) of the *SCM Agreement*; reversed the panel's finding with respect to the interpretation of Article 14 of the *SCM Agreement*, as well as the panel's consequential finding that the United States acted inconsistently with Articles 10, 14, 14(d), and 32.1 of the *SCM Agreement* in its determination of the existence and amount of benefit in the underlying countervailing duty investigation; but found, however, that there were insufficient facts for it to complete the legal analysis with respect to Canada's claims regarding the calculation of the benefit. (*Ibid*.)

[7]WT/DS257/11.

[8]WT/DS257/13.

[9]Pub. L. No. 103-465, § 129, 108 Stat. 4838, codified at 19 USC § 3538 (2000) pp. 720-721 (Exhibit CDA-2 submitted by Canada to the Panel). Section 129 is entitled "Administrative action following WTO panel reports" and establishes a procedure that, amongst other things, allows the USDOC to issue a revised determination in a countervailing duty proceeding following relevant recommendations and rulings by the DSB. Excerpts from the text of Section 129 are set out *infra*, footnotes 79 and 82.

Section 129 (the "Section 129 Determination")[10], the United States performed a pass-through analysis in respect of certain transactions. The rate of subsidization established in the Section 129 Determination became the estimated countervailing duty rate (referred to as a cash deposit rate) applicable to imports of softwood lumber from Canada entering the United States on or after 10 December 2004.[11]

4. On 20 December 2004, the USDOC published the final results of the first administrative review of the countervailing duties on imports of softwood lumber from Canada that had been initiated in July 2003 (the "First Assessment Review").[12] In that review, the USDOC adopted the same pass-through methodology as it had used in the Section 129 Determination.[13] However, the USDOC's application of this methodology in the First Assessment Review did not, in the light of the evidence before it, result in any reduction to its calculated rate of subsidization.[14] The First Assessment Review established the final countervailing duty liability for imports of softwood lumber that entered the United States during the period 22 May 2002 to 31 March 2003. The results of the First Assessment Review also fixed the estimated countervailing duty rate (the cash deposit rate) for imports entering the United States on or after 20 December 2004.

5. Additional details regarding the Section 129 Determination and the First Assessment Review are set out in Section IV.A of this Report.

6. At the DSB meeting held 17 December 2004, the United States informed the DSB that it had complied with its recommendations and rulings in the original *US – Softwood Lumber IV* dispute.[15] Canada was of the view that the United States had failed to comply with the recommendations and

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[10]"Notice of Implementation Under Section 129 of the Uruguay Round Agreements Act; Countervailing Measures Concerning Certain Softwood Lumber Products from Canada", *United States Federal Register*, Vol. 69, No. 241 (16 December 2004), p. 75305 (Exhibit CDA-7 submitted by Canada to the Panel). See also USDOC Memorandum from B. Tillman to J. Jochum, "Section 129 Determination: Final Countervailing Duty Determination, Certain Softwood Lumber from Canada" (6 December 2004) (Exhibit CDA-5 submitted by Canada to the Panel).

[11]Section 129 Determination, *supra*, footnote 10, p. 75306.

[12]"Notice of Final Results of Countervailing Duty Administrative Review and Rescission of Certain Company-Specific Reviews: Certain Softwood Lumber Products from Canada", *United States Federal Register*, Vol. 69, No. 243 (20 December 2004), p. 75917 (Exhibit CDA-8 submitted by Canada to the Panel). See also USDOC Memorandum from B. Tillman to J. Jochum, "Issues and Decisions Memorandum: Final Results of Administrative Review: Certain Softwood Lumber Products from Canada" (13 December 2004) (Exhibit CDA-11 submitted by Canada to the Panel), section II.F. In the parlance of the United States, reviews intended to assess final duty liability are usually referred to as "administrative reviews". (United States' additional written memorandum, para. 2) In these proceedings, however, both participants, and the Panel, used the term "assessment review" to describe this type of review. We adopt the same approach in this Report.

[13]Panel Report, footnote 50 to para. 4.58. See also United States' additional written memorandum, para. 12.

[14]See *infra*, footnote 86.

[15]WT/DSB/M/180, paras. 22-25.

rulings. On 30 December 2004, Canada requested that the matter of compliance be referred to a panel pursuant to Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU").[16] On 14 January 2005, the DSB referred the matter to the original panel.[17] A member of the original panel was unable to participate in the proceedings and the parties, therefore, on 7 February 2005, agreed on a new panelist.[18] Before the Article 21.5 Panel (the "Panel"), Canada claimed that the United States had failed to comply with the recommendations and rulings of the DSB in both the Section 129 Determination and the First Assessment Review.[19] Canada claimed that the United States thereby continued to violate its obligations under Article VI:3 of the GATT 1994 and Articles 10 and 32.1 of the *SCM Agreement*.[20]

7. In its first written submission to the Panel, the United States requested a preliminary ruling that the First Assessment Review fell outside of the mandate of the Panel under Article 21.5 of the DSU. The Panel instructed the parties to "assume" in making their submissions "that the first assessment review does fall within the scope of these proceedings", but added that such assumption was "without prejudice to the Panel's eventual ruling on this issue".[21]

8. The Panel Report was circulated to the Members of the World Trade Organization (the "WTO") on 1 August 2005. The Panel rejected:

> - 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[.][22]

9. The Panel upheld 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 [the] 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

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[16]WT/DS257/15.

[17]WT/DSB/M/181.

[18]WT/DS257/19.

[19]Canada's first written submission to the Panel, para. 35; Panel Report, p. A-13. See also Panel Report, para. 4.51.

[20]Canada's first written submission to the Panel, para. 37; Panel Report, p. A-13.

[21]Statement by the Chairman of the Panel at the Substantive Meeting of the Panel with the Parties, 21 April 2005. (original underlining)

[22]Panel Report, para. 5.1. See also para. 4.50.

- 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.[23]

10. The Panel accordingly concluded that the United States remained in violation of Articles 10 and 32.1 of the *SCM Agreement* and Article VI:3 of the GATT 1994.[24] On this basis, and in the light of Article 3.8 of the DSU, the Panel concluded that, to the extent the United States acted inconsistently with the provisions of the *SCM Agreement* and the GATT 1994, and failed to implement properly the relevant recommendations and rulings of the DSB, it nullified or impaired benefits accruing to Canada under those Agreements.[25] Pursuant to Article 19.1 of the DSU, the Panel recommended that the United States bring its Section 129 Determination and First Assessment Review into conformity with such provisions.[26]

11. On 6 September 2005, the United States notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to Articles 16.4 and 17 of the DSU, and filed a Notice of Appeal[27], pursuant to Rule 20(1) of the *Working Procedures for Appellate Review* (the "*Working Procedures*"). On 13 September 2005, the United States filed an appellant's submission.[28] On 3 October 2005, Canada filed an appellee's submission.[29] On the same day, China and the European Communities each filed a third participant's submission.[30]

12. On 26 September 2005, pursuant to Rule 28(1) of the *Working Procedures*, the Appellate Body Division hearing this appeal requested the United States to submit an additional written memorandum explaining certain aspects of relevant United States laws and procedures. The United States filed an additional written memorandum on 5 October 2005. On 10 October 2005, Canada

[23]Panel Report, para. 5.2. The Panel rejected a claim by Canada that the USDOC improperly disregarded all aggregate transaction and pricing data submitted by the Canadian respondents. The Panel also rejected Canada's claim against the benchmarks used by the USDOC in its pass-through analysis. (*Ibid.*, para. 5.1)

[24]*Ibid.*, para. 5.4.

[25]*Ibid.*, para. 5.5.

[26]*Ibid.* The Panel declined to make a further recommendation under Article 19.1 of the DSU, as requested by Canada, and left it to the United States to determine the modalities of the implementation of its recommendation. (*Ibid.*, para. 5.7)

[27]WT/DS257/22 (attached as Annex I to this Report).

[28]Pursuant to Rule 21(1) of the *Working Procedures*.

[29]Pursuant to Rule 22(1) of the *Working Procedures*.

[30]Pursuant to Rule 24(1) of the *Working Procedures.*

submitted a written response to the United States' additional written memorandum.[31] The Division allowed the third participants additional time during the presentation of their oral statements at the hearing to respond to these additional memoranda.[32]

13. The oral hearing in this appeal was held on 12 October 2005. The participants and third participants presented oral arguments and responded to questions posed by the Members of the Division hearing the appeal.

II. Arguments of the Participants and the Third Participants

A. *Claims of Error by the United States – Appellant*

14. The United States appeals the Panel's conclusion that the First Assessment Review fell within the scope of review under Article 21.5 of the DSU. The United States considers this conclusion to be based on erroneous findings on issues of law and an incorrect interpretation of Article 21.5 of the DSU.

15. The United States submits that the Panel's jurisdiction under Article 21.5 is limited to those measures taken to comply with the recommendations and rulings of the DSB in the original *US – Softwood Lumber IV* proceedings. Although the United States acknowledges that a panel has the authority to decide whether a measure is one "taken to comply", it emphasizes that "measures taken to comply" within the meaning of Article 21.5 of the DSU are limited to those that have been, or must be, taken to address WTO-inconsistencies identified in the recommendations and rulings of the DSB. According to the Unites States, the relevant recommendations and rulings related solely to the USDOC's approach to the "pass-through" issue in the Final Countervailing Duty Determination. This was the measure identified in Canada's request for the establishment of the original panel; it was also the measure addressed in the relevant recommendations and rulings adopted by the DSB. The United States implemented those recommendations and rulings by means of a revision to the Final Countervailing Duty Determination through the Section 129 Determination. The relevant recommendations and rulings did not relate to any assessment review. The United States was, therefore, under no compliance obligation in regard to the First Assessment Review. Thus, the United States did not conduct the First Assessment Review with the intention of complying with the DSB's recommendations and rulings. Nonetheless, "in view of the original WTO findings", the USDOC

[31]Pursuant to Rule 28(2) of the *Working Procedures*.

[32]Pursuant to Rule 28(3) of the *Working Procedures.*

applied the same pass-through methodology in the First Assessment Review as it had applied in the Section 129 Determination.[33]

16. The United States argues that the Panel erred in overlooking the "fundamental" and "qualitative" differences between countervailing duty investigations and assessment reviews.[34] Instead, the Panel focused solely upon the fact that both procedures involved duties on softwood lumber. According to the United States, the *SCM Agreement* distinguishes between investigations—the purpose of which is "to determine the existence, degree, and effect of any alleged subsidy"—and assessment reviews—the purpose of which is to levy the duty. That the *SCM Agreement* recognizes assessment reviews—which are only used in retrospective duty assessment systems—as well as the fact that such reviews are distinct from investigations is, in the view of the United States, made clear by footnote 52 of the *SCM Agreement*. This footnote provides for different consequences to flow from a finding of no subsidies during the review period (no requirement to terminate the duty) than must flow from a finding of no subsidies during the period of investigation (no duty may be levied).

17. The United States explains that, under its system of retrospective duty assessment, even though liability for the payment of duties attaches at the moment the merchandise subject to a countervailing duty measure enters the United States, the actual amount of countervailing duties to be paid will not be calculated until an assessment review has been conducted, or until the time to request an assessment review has passed without any such request. In the course of a review, the USDOC determines the assessment rate based on the examination of previous imports; this rate also establishes the estimated countervailing duty (cash deposit) rate to be applied to future imports. After concluding the review, the USDOC instructs the customs administration to assess the definitive rate of countervailing duties to be levied. The DSB recommendations and rulings in the original proceedings encompassed only the Final Countervailing Duty Determination establishing the existence and amount of the subsidy under Article 18 of the *SCM Agreement*. These recommendations and rulings did not, asserts the United States, extend to duty assessment proceedings.

18. The United States notes that, as part of the reasoning that led the Panel to refuse to exclude the First Assessment Review from the scope of the present Article 21.5 proceedings, the Panel claimed that "US law allows DSB rulings and recommendations to be implemented through administrative reviews in certain circumstances" and that this "undermines the US argument that assessment reviews should be excluded from the scope of DSU Article 21.5 proceedings."[35] The United States submits that the Panel's reasoning in this regard is based on a misinterpretation of a

[33]United States' additional written memorandum, para. 12.

[34]Unites States' appellant's submission, paras. 4 and 17, and p. 8, sub-heading II.B.1.

[35]*Ibid*., para. 24 (quoting Panel Report, footnote 42 to para. 4.45).

provision of the Statement of Administrative Action to the Uruguay Round Agreements Act (the "SAA").[36] The United States adds that the SAA is, in any event, irrelevant in the present case because implementation was carried out through the Section 129 Determination and *not* through an administrative review.

19. The United States argues that the timing of the initiation of the First Assessment Review—*before* the adoption of the DSB recommendations and rulings—underlines that it was not a measure taken to comply with those recommendations and rulings. The United States argues that a "measure taken to comply with recommendations and rulings" presupposes the existence of adopted recommendations and rulings. The United States emphasizes that the word "'comply' when followed by the preposition 'with' is defined as 'accommodate oneself to (a person, circumstances, customs, etc.) ... Act in accordance with or *with* a request, command, etc. ... Consent or agree *to*, *to do*".[37] The USDOC initiated the First Assessment Review on 1 July 2003, eight months *before* the adoption of the DSB recommendations and rulings on 17 February 2004. The First Assessment Review, therefore, could not have been taken in order *to comply* with those recommendations and rulings.

20. The United States considers that the standard applied by the Panel to determine the scope of Article 21.5 proceedings is so broad as to render the jurisdictional limitations of Article 21.5 "nearly meaningless".[38] The United States claims that the interpretation by the Panel was guided by dispute settlement panel reports, and not by the customary rules of interpretation of public international law. For the United States, the Panel's interpretation of Article 21.5 had "no basis in the text or context of Article 21.5 itself, and ... is inconsistent with the object and purpose of the DSU."[39]

21. The United States emphasizes that the Section 129 Determination serves as the basis for the imposition of the countervailing duty and that it still applies. Contrary to Canada's arguments, "the 'existence' and 'consistency' of the Section 129 Determination is undisturbed. It has not been superseded, replaced, undone or rendered non-existent by the First Assessment Review."[40] The Panel, however, concluded that the First Assessment Review fell within the scope of the Article 21.5 proceedings because it "'could have an impact on' or could 'possibly undermine'" the Section 129

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[36]"Statement of Administrative Action" in *Message from the President of the United States Transmitting the Uruguay Round Trade Agreements, Texts of Agreements Implementing Bill, Statement of Administrative Action and Required Supporting Statements*, H.R. Doc. No. 103-316, Vol. 1, p. 656 (Exhibit CDA-1 submitted by Canada to the Panel).

[37]United States' appellant's submission, para. 30 (quoting *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. 1, p. 461 (original italics)).

[38]*Ibid*., paras. 5 and 32.

[39]*Ibid*., para. 5.

[40]United States' statement at the oral hearing.

Determination.[41] The United States contests this conclusion. The Section 129 Determination confirmed the existence of a subsidy that justified the imposition of countervailing duties. The First Assessment Review did not have, nor could it have had, any impact on that determination. The United States also emphasizes that the Section 129 Determination (and the Final Countervailing Duty Determination that it revised) considered the existence and amount of subsidization in the original period of investigation; the First Assessment Review, by contrast, was concerned with the amount of subsidization in a different period of review.

22. The United States argues that Section 129 proceedings and assessment reviews have different legal consequences and "wholly different" administrative records.[42] They are neither "inextricably linked" nor "clearly connected" proceedings.[43] Indeed, the Panel's erroneous finding to the contrary hinges on two aspects of an ancillary relationship between the Final Countervailing Duty Determination, the Section 129 Determination, and the First Assessment Review. The first is the fact that some imports, which were subject to the cash deposit rate determined in the Final Countervailing Duty Determination and revised in the Section 129 Determination, were also subject to final assessed duties determined in the First Assessment Review. The second aspect is that the cash deposit rate set in the Final Countervailing Duty Determination and amended by the Section 129 Determination was also affected, prospectively, by the First Assessment Review. On these bases, the Panel concluded that there was "considerable overlap in the effect of these various measures".[44]

23. Furthermore, according to the United States, the "effects" of a measure cannot be the appropriate standard to determine the scope of jurisdiction in Article 21.5 proceedings. This standard has no basis in the text of Article 21.5: the "effect" of a measure does not indicate whether that measure was "taken to comply".[45] Indeed, the United States argues, any alleged "overlap" in the effect of the three distinct measures was simply a "natural consequence" of the United States' system of retrospective duty assessment. That some imports initially subject to a cash deposit rate set by the Final Countervailing Duty Determination were later assessed based on the First Assessment Review is simply the logical consequence of having two separate sets of proceedings. Similarly, with respect to the fact that the cash deposit rate set by the Final Countervailing Duty Determination was also affected (prospectively) by the First Assessment Review, the United States submits that changes to the cash deposit rate are a natural result of taking into account information pertaining to a more recent period in an assessment proceeding. The United States underlines that the cash deposit rate is always

[41]United States' appellant's submission, paras. 32-33 (quoting Panel Report, para. 4.41).

[42]*Ibid*., para. 6.

[43]*Ibid*., para. 34 (referring to Panel Report, para. 4.41).

[44]*Ibid*., para. 36 (quoting Panel Report, para. 4.41).

[45]*Ibid*., para. 40.

subject to change for subsequent imports if an assessment review is requested, irrespective of any WTO or Section 129 proceedings.

24. The United States claims that the Panel's interpretation of Article 21.5 treats WTO Members with a retrospective duty assessment system differently from Members with a prospective duty assessment system. The overlap in effect identified by the Panel simply would not exist in a prospective duty assessment system. Nevertheless, the Panel itself stated that "interpretation and application of Article 21.5 must accommodate both prospective and retrospective duty assessment systems."[46]

25. The United States submits that the Panel's only reference to customary rules of interpretation was its reference to the object and purpose of the DSU. The Panel asserted that a decision declining to examine the First Assessment Review in Article 21.5 proceedings would fail to ensure the "prompt settlement" of the dispute. Yet, the objective of promptly settling disputes does not, in itself, "justify sweeping into the limited expedited Article 21.5 procedures measures that are not 'taken to comply'"[47] with recommendations and rulings of the DSB. If a Member has a complaint regarding the *assessment* of countervailing duties in an assessment review, the regular dispute settlement procedures are available to address the dispute, consistent with the object and purpose of the DSU. In this context, the United States argues that the Panel's reference to the Appellate Body Report in *EC – Bed Linen (Article 21.5 – India)* was misplaced because, in that case, the Appellate Body used the notion of prompt settlement as an argument *against* including a new claim in Article 21.5 proceedings.

26. According to the United States, the Panel not only unduly relied on the reports by previous panels that dealt with Article 21.5 of the DSU, it also misapplied those panel reports. The United States considers that the situation before the panel in *Australia – Automotive Leather II (Article 21.5 – US)* can be distinguished from the present case. In that dispute, the repayment of a WTO-inconsistent subsidy and the payment of a new non-commercial loan were announced on the same day, with the loan being contingent upon repayment of the subsidy. The loan was therefore clearly within the scope of Article 21.5 as a "measure taken to comply". In this case, by contrast, the two proceedings at issue are separate and distinct both in timing and in nature. The United States also considers that the panel in *Australia – Salmon (Article 21.5 – Canada)* dealt with a matter quite distinct from that in the present dispute. The panel in that dispute used a "clearly connected" standard to include in the Article 21.5 proceedings a ban on salmon imports by the Australian state of Tasmania that had been implemented shortly after the removal of a ban on salmon imports by the

[46]United States' appellant's submission, para. 39 (quoting Panel Report, para. 4.49).

[47]*Ibid*., para. 42.

Australian federal government. The United States submits that the Tasmanian ban in that proceeding was, by its timing and its nature, an "obvious" and "specific" response to the removal of the ban by the Australian federal government.[48] By contrast, an assessment review is a procedure that occurs upon request of a party regardless of any compliance obligation resulting from WTO dispute settlement. The United States emphasizes that, in the present case, the First Assessment Review was requested eight months before the adoption of the *US – Softwood Lumber IV* original panel and Appellate Body reports.

27. Although the Panel in the present case made a distinction between the facts in this case and those in *EC – Bed Linen (Article 21.5 – India)*, the United States argues that there are obvious parallels between the facts in both cases, such that there should be a similar outcome in both disputes. In *EC – Bed Linen (Article 21.5 – India)*, the panel found that its jurisdiction did not extend to a measure that, according to the United States, was far more closely related to the measure taken to comply with the relevant recommendations and rulings of the DSB in that case than was the First Assessment Review to the measure taken to comply in this case. The United States adds that, like the measure considered in *EC – Bed Linen (Article 21.5 – India)*, the First Assessment Review was a result of "events subsequent to"[49] the Final Countervailing Duty Determination, namely, the request by Canada and others for a review of the sales and subsidies in a subsequent period.

28. Finally, although it admits that this argument is not relevant to the legal analysis, the United States considers the Panel's inclusion of the First Assessment Review in these Article 21.5 proceedings to be "unfairly prejudicial".[50] After having implemented the recommendations and rulings of the DSB, the United States considers it should not have been expected to defend its actions in a separate assessment proceeding for the first time under the expedited time-frames of Article 21.5 proceedings.

29. In addition to its appeal of the Panel's refusal of its request for a preliminary ruling excluding the First Assessment Review from the Article 21.5 proceedings, the United States requests the Appellate Body to reverse all of the Panel's consequential findings of inconsistency with respect to the First Assessment Review on the grounds that the First Assessment Review was not within the jurisdiction of the Panel under Article 21.5 of the DSU.[51]

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[48]United States' appellant's submission, para. 52.

[49]*Ibid*., para. 59.

[50]*Ibid*., para. 6.

[51]United States' Notice of Appeal, WT/DS257/22 (attached as Annex I to this Report), paras. 2-5.

B. *Arguments of Canada – Appellee*

30. Canada requests the Appellate Body to reject the United States' appeal and uphold the relevant findings and conclusions of the Panel with respect to the First Assessment Review. Canada observes that the USDOC, in its Section 129 Determination, completed a limited pass-through analysis but "refused to examine the vast majority of [the] transactions" between unrelated parties, "claiming they were not 'arm's length' transactions".[52] Canada alleges that, in the First Assessment Review, the USDOC completed no pass-through analysis and, therefore, no adjustment was made to the countervailing duty rate, notwithstanding the recommendations and rulings of the DSB and the limited pass-through analysis in the Section 129 Determination issued one week earlier. Canada emphasizes that the final countervailing duty rate established in the First Assessment Review applied *retrospectively* to import entries that were initially subject to the original countervailing duty rate established in the Final Countervailing Duty Determination. At the same time, the rate resulting from the First Assessment Review replaced *prospectively* the duty rate that had been revised by the Section 129 Determination. The First Assessment Review thus established a countervailing duty rate in the form of a cash deposit rate that reflected no pass-through analysis, but which superseded and replaced the rate determined in the Section 129 Determination. In this way, the First Assessment Review "effectively undid" any compliance purportedly achieved through the Section 129 Determination.[53]

31. Canada agrees with the Panel's interpretation and application of Article 21.5 of the DSU. In Canada's view, an Article 21.5 panel has jurisdiction to examine all measures that a WTO Member declares to be "measures taken to comply", but adds that this jurisdiction also extends to other measures taken by the Member that affect its compliance with the recommendations and rulings of the DSB. Measures affect compliance—and are, therefore, "measures taken to comply" under Article 21.5 of the DSU—if they affect the "existence" or "consistency" of measures that are declared to be taken to comply, that is, if they undermine or nullify the purported compliance. Canada asserts that an Article 21.5 panel cannot properly assess the effect of measures that are declared to be "measures taken to comply" unless it also reviews other measures that affect those expressly taken to comply. Canada submits that accepting the United States' arguments in this appeal would mean that in examining compliance under Article 21.5 of the DSU, the Panel could have reviewed only a measure that no longer applies—the Section 129 Determination—but could not have considered the First Assessment Review, which replaced and effectively undid the measure that had been taken to comply.

[52]Canada's appellee's submission, para. 17.

[53]*Ibid*., para. 2.

32. According to Canada, an Article 21.5 panel must examine fully the application and effect of all relevant measures, including the legal and factual setting in which they operate, in order to make findings on the "existence" of a measure taken to comply, or its "consistency with a covered agreement". This interpretation is consistent with the context in which the term "measures taken to comply" is used. Furthermore, the object and purpose of the DSU, as reflected in Articles 3.3, 3.7, and 21.1 of that Agreement, may be achieved only through a comprehensive review of measures that affect the "existence" or "consistency" of measures declared to be taken to comply.

33. Canada argues that the United States' appeal ignores the overlapping effects of its measures. Canada asserts that the First Assessment Review affects the "existence" and "consistency" of the Section 129 Determination for two reasons: first, because the subject-matter of the dispute—that is, the obligation to examine "pass-through" of alleged stumpage subsidies—arises in both the Section 129 Determination and the First Assessment Review; and, secondly, because the Final Countervailing Duty Determination, the Section 129 Determination, and the First Assessment Review have significantly overlapping effects, particularly in respect of the cash deposit rate. Canada emphasizes that the application and the effect of the First Assessment Review undid any compliance that might have resulted from the Section 129 Determination. Thus, after a limited pass-through analysis, the Section 129 Determination replaced the cash deposit rate under the Final Countervailing Duty Determination, which was based on no pass-through analysis at all. However, this revised cash deposit rate of the Section 129 Determination was then replaced, a mere ten days later, by the results of the First Assessment Review, which—like the original measure—contained no pass-through analysis at all.

34. Canada supports the Panel's finding that the First Assessment Review "was 'clearly connected to the panel and Appellate Body reports concerning the Final [Countervailing Duty] Determination' and 'inextricably linked to the treatment of pass-through in the Section 129 Determination.'"[54] In this context, Canada believes that the Panel relied on and correctly applied earlier jurisprudence on Article 21.5 of the DSU. Both the *Australia – Salmon (Article 21.5 – Canada)* and the *EC – Bed Linen (Article 21.5 – India)* panels found that barring an Article 21.5 panel from examining measures that have a clear connection to the original panel and Appellate Body reports would lead to "unreasonable or absurd results".[55] Furthermore, Canada understands the Appellate Body in *Canada – Aircraft (Article 21.5 – Brazil)* to have emphasized that an Article 21.5 panel may examine

[54]Canada's appellee's submission, para. 38 (quoting Panel Report, para. 4.41).

[55]*Ibid*., para. 26.

not only how the measures of a Member purport to achieve compliance, but also how they "*ought to have achieved* compliance".[56]

35. According to Canada, much of the United States' argument hinges on the distinction it draws between original investigations and assessment reviews within the United States' retrospective duty assessment system. However, the United States' description of its regime omits important points. In the view of the United States, an original determination establishes the basis for a countervailing duty, and an assessment review establishes the actual amount of duties to be levied. Canada points out, however, that the final results of an assessment review both replace the estimated duties collected for entries that occurred during the review period and establish the new estimated countervailing duty rate in the form of cash deposits. Furthermore, both the original investigation and the assessment review entail a substantive and "essentially the same"[57] analysis to determine whether, and to what extent, the imports were subsidized. This includes at each stage the legal obligation to examine whether a benefit was passed through. Canada notes that it is "routine practice" for the USDOC to incorporate into the administrative record of an assessment review "much, and sometimes all", of the record of the original investigation in the same proceedings.[58]

36. Canada dismisses as irrelevant the United States' argument that the recommendations and rulings of the DSB did not require the United States to conduct an assessment review because, had the First Assessment Review not been conducted, the Section 129 Determination would still be in effect and duties would be collected at the rate established in that determination. Canada further supports the finding of the Panel that it is not the timing of the *initiation* of an assessment review that is important, but, rather, the application and effects of the *results* of this review. The results of the First Assessment Review in the present case were issued about ten months after the adoption of the recommendations and rulings of the DSB.

37. Canada also considers "disingenuous" the United States' arguments with respect to the Panel's "misinterpretation" of the SAA.[59] As evidence of the linkage between assessment reviews and original countervailing duty investigations, the Panel noted that United States law allows DSB recommendations and rulings to be implemented through assessment reviews in certain circumstances. That the circumstances described in the SAA may be limited to cases where a USDOC methodology is at issue, rather than where the basis for the underlying definitive

[56]Canada's appellee's submission, para. 28 (original emphasis) (referring to Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 36).

[57]Comments of Canada on United States' additional written memorandum, para. 3.

[58]*Ibid*., para. 5.

[59]Canada's appellee's submission, para. 51.

countervailing duty order is at issue, does not mean that implementation in an assessment review is restricted to cases not involving investigation final determinations, as the United States suggests. Nor does the Panel's observation mean, as the United States intimates, that all DSB recommendations and rulings arising from final countervailing duty determinations could be implemented in an assessment review. Indeed, the SAA makes clear that, DSB recommendations and rulings that can only be implemented by revocation of the order would have to be implemented through a Section 129 determination rather than an assessment review. Accordingly, none of the United States' arguments discounts the Panel's observations with respect to the SAA.

38. Canada rejects the United States' argument that the overlapping effects identified by the Panel "are nothing more than the natural consequence of the U.S. system of retrospective assessment".[60] Canada believes that such overlapping effects can also occur in prospective duty systems because a Member's compliance obligations must be factored into subsequent proceedings affecting the countervailing duties (such as reviews or duty refund procedures) when such proceedings come within the scope of Article 21.5 of the DSU. In any event, a potential distinction between a retrospective duty assessment system and a prospective duty system is irrelevant to the United States' obligation to comply with the recommendations and rulings of the DSB.

39. Canada disagrees with the United States regarding the significance of qualitative differences between final determinations and assessment reviews. Such differences do not require the exclusion of the First Assessment Review from the mandate of the Panel in this dispute. Canada maintains that the United States ignores the fact that a final countervailing duty determination involves both the "imposition" and the "levying" of definitive duties. The United States does not deny that the "collection" of definitive countervailing duties includes the collection of cash deposits following a final countervailing duty determination. However, the United States mischaracterizes the meaning of "levy" under the relevant provisions of the GATT 1994 and the *SCM Agreement*. According to Canada, footnote 51 to Article 19 of the *SCM Agreement* confirms that the term "levy" encompasses both the assessment and the "collection" of countervailing duties. Furthermore, Article 10 and footnote 36 thereto of the *SCM Agreement* define the term "countervailing duty" to mean "a special duty *levied* for the purpose of offsetting any subsidy". (emphasis added) Canada asserts that even if the United States is correct in arguing that the "levying" of definitive duties occurs only pursuant to an assessment review, this would not mean that the First Assessment Review would be excluded from the Article 21.5 proceedings in this case. Canada adds that the assessment of definitive duties is a "specific action" contemplated under Article 32.1 of the *SCM Agreement* and, therefore, is

[60]Canada's appellee's submission, para. 44 (quoting United States' appellant's submission, para. 37).

encompassed by the recommendations and rulings of the DSB that apply to "specific actions" under Article 32.1 of that Agreement.

40. Finally, Canada submits that the United States' position as to the scope of Article 21.5 proceedings is inconsistent with the object and purpose of the DSU—that is, the prompt settlement of disputes. Canada argues that, if the United States' position in the appeal were upheld, Canada would be forced to initiate new proceedings in respect of each annual assessment review and could never secure compliance with the recommendations and rulings of the DSB before the measure at issue would be superseded by the results of a new assessment review. To avoid these "absurd consequences"[61], the jurisdiction of an Article 21.5 panel must be interpreted to allow for a comprehensive review of all measures affecting the "existence" or "consistency" of measures declared to be taken to comply.

C. *Arguments of the Third Participants*

1. China

41. China supports the position of the Panel that the First Assessment Review fell within the scope of review under Article 21.5 of the DSU. China submits that the word "existence" in Article 21.5 suggests that a "measure taken to comply" must remain in place and in effect, and must not be nullified, invalidated, or rendered non-existent by other measures. Existence requires a lasting effect of the measure in place, which is more than the simple adoption of a single measure. In China's view, the adoption of additional measures, where these could invalidate the first measure, must be taken into account by an Article 21.5 panel in determining the existence of "measures taken to comply". On this basis, China believes that the Panel had jurisdiction to examine the First Assessment Review, which effectively invalidated the Section 129 Determination by establishing a new cash deposit rate. China asserts that acceptance of the United States' view—according to which a new case would have to be brought against new measures, because such measures may not be included in Article 21.5 proceedings—would run counter to the object and purpose of the DSU, which is the prompt settlement of disputes. If Members were allowed to replace, at their discretion and convenience, measures taken to comply, the object and purpose of the DSU could not be achieved.

42. Like the Panel, China believes that the First Assessment Review is "clearly connected" to the recommendations and rulings of the DSB and is "inextricably linked" to, and has an important effect on, the "existence" of the "measure taken to comply"—that is, the Section 129 Determination.[62]

[61]Canada's statement at the oral hearing.

[62]China's third participant's submission, para. 12.

Unlike the United States, China does not see "qualitative differences" between the original investigation and the First Assessment Review: both proceedings calculated the amount of the subsidy that, in turn, was the basis for fixing the amount of the countervailing duties to be levied.[63] China also supports the Panel's findings with regard to the "considerable overlap" in the prospective effects of the Section 129 Determination and the First Assessment Review regarding the determination of the cash deposit rate for future imports.

43. China does not support the argument of the United States that the First Assessment Review cannot be a "measure taken to comply" because it was initiated before the recommendations and rulings of the DSB. China asserts that what should be taken into consideration is the time when the First Assessment Review came into effect, not when it was initiated. China also disagrees with the view of the United States that the present situation may be distinguished from *Australia – Automotive Leather II (Article 21.5 – US)* on the grounds that, in that case, the loan was contingent upon repayment of the subsidy identified in the original proceedings. The test in that case was not one of "contingency"; rather, the panel considered whether the measures were "inextricably linked". In this case, the Panel was correct to find an "inextricable link" between the Section 129 Determination and the First Assessment Review. Nor does China support the United States' view that the facts outlined in the panel report in *EC – Bed Linen (Article 21.5 – India)* are parallel to the present case, because the First Assessment Review was not a result of events subsequent to the adoption of a compliance measure, as was the case in that dispute.

2. European Communities

44. Although the European Communities supports generally the conclusions of the Panel, it "regrets" the limited reasoning of the Panel.[64] The European Communities requests the Appellate Body to dismiss the United States' appeal, and also to modify the Panel's reasoning, taking account of the following observations made by the European Communities.

45. The European Communities asserts that the United States' arguments in this appeal are "entirely misconceived" and that "(if accepted) [they] would not only be contrary to Article 21.5 of the DSU, but also turn the US system of countervailing duty assessment into a moving target that escapes the WTO disciplines."[65] In the view of the European Communities, the role of an Article 21.5 panel is different from the role of an original panel. Whilst the task of an original panel is to solve a dispute relating to a particular specified measure, an Article 21.5 panel has the task of assessing

[63]China's third participant's submission, paras. 21-22.

[64]European Communities' third participant's submission, para. 8.

[65]*Ibid*.

whether or not the original dispute has been resolved. For that reason, an Article 21.5 panel has a broad mandate to determine whether a WTO Member has implemented fully its compliance obligations. These compliance obligations endure until full compliance is achieved.

46. The European Communities argues that Article 21.5 panels, in principle, have jurisdiction with respect to all factual and legal matters relating to the resolution of the original dispute. Measures initiated before the recommendations and rulings of the DSB do not necessarily fall outside the jurisdiction of the Article 21.5 panel. Indeed, the mandate of an Article 21.5 panel is not confined to the examination of only those measures that explicitly or deliberately relate to the measures found to be WTO-inconsistent in the original proceedings. A broad mandate to determine whether a Member has fully implemented its compliance obligations is consistent with the special rules for Article 21.5 proceedings, notably, recourse in most cases to the original panel as well as expedited time-frames. The purpose of Article 21.5 proceedings is to deal with any further dispute that relates to the original dispute with a view to delivering "swift justice".[66] This view is further corroborated by the terms "existence" of "measures taken to comply" in Article 21.5 of the DSU, which imply that situations of a complete failure of compliance also fall within the mandate of an Article 21.5 panel.

47. The European Communities argues that the existence of the requisite relationship between original measures and measures taken to comply must be decided on a substantive, rather than a formal, basis. The European Communities argues that the United States errs in its view regarding the delineation of measures challenged in countervailing duty cases. The measure to be reviewed by this Article 21.5 Panel is not a discrete determination, but, rather, the "continued application of a *countervailing duty* on the basis of the administrative review (superseding both the original determination and the Section 129 review)".[67] This is because it is the duty itself that interferes with trade and is the measure of concern. It is not, as the United States argues, the determination made by an investigating authority. Therefore, independently of the retrospective or prospective nature of the duty assessment system at issue, the question should be whether an interim or changed circumstances review relates to the same countervailing duty imposed on the same product for the same purpose. It must be assessed on a case-by-case basis whether a particular countervailing duty based on, or concerning the same product and purpose as, the original countervailing duty continues to exist. If so, a complaining Member may have recourse to an Article 21.5 panel. The European Communities argues that, otherwise, Members could escape their WTO obligations by formally terminating a measure and then re-adopting it.

[66]European Communities' third participant's submission, para. 23.

[67]*Ibid*. para. 9. (original emphasis)

III. Issues Raised in this Appeal

48. The following issues are raised in this appeal:

(a) whether the Panel erred in finding that the First Assessment Review falls within the scope of the present Article 21.5 proceedings, insofar as the pass-through analysis is concerned[68]; and

(b) whether, as a result of the above legal finding, the Panel also erred in making the following findings regarding the pass-through analysis in the First Assessment Review[69]:

(i) that, in the treatment of pass-through in the First Assessment Review, the United States failed to implement properly the recommendations and rulings of the Dispute Settlement Body (the "DSB") by failing to conduct a pass-through analysis in respect of sales, found by the United States Department of Commerce (the "USDOC") not to be at arm's length, of logs by tenured timber harvesters, whether or not they also produce lumber, to unrelated timber producers, whether or not they hold a stumpage contract[70];

(ii) that, in the First Assessment Review, the United States 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[71];

(iii) that, with respect to the First Assessment Review, the United States remains in violation of Articles 10 and 32.1 of the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*") and Article VI:3 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994")[72]; and

[68]Panel Report, paras. 4.41, 4.50 and 5.1.

[69]We understand that the United States challenges all of the Panel findings identified in its Notice of Appeal on the same basis, namely, that the First Assessment Review could not be examined by a panel acting pursuant to Article 21.5 of the DSU. (See *infra* paragraph 94)

[70]Panel Report, para. 5.2.

[71]*Ibid*.

[72]*Ibid*., para. 5.4.

(iv) that, with respect to the First Assessment Review, the United States has nullified or impaired benefits accruing to Canada under the *SCM Agreement* and the GATT 1994.[73]

IV. Scope of Article 21.5 of the DSU

A. *Background and Procedural History*

49. In the original *US – Softwood Lumber IV* proceedings, Canada challenged the final determination by the USDOC that led to the imposition of countervailing duties on softwood lumber from Canada (the "Final Countervailing Duty Determination").[74] Canada made a number of claims in respect of the USDOC's findings as to the existence and amount of the "benefit" element of the relevant subsidies, including that the USDOC had failed to conduct a "pass-through" analysis. The original panel described the pass-through issue as follows:

> The 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.[75]

50. In the original proceedings, Canada argued that, because the imported softwood lumber products subject to investigation were not the same as the upstream product (standing timber) in respect of which the alleged subsidies[76] were paid, the USDOC was required to establish, rather than

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[73]Panel Report, para. 5.5.

[74]"Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products from Canada", *United States Federal Register*, Vol. 67, No. 63 (2 April 2002), p. 15545, as amended, Vol. 67, No. 99 (22 May 2002), p. 36070 (Exhibit US-1 submitted by the United States to the Panel). The period of investigation for purposes of this proceeding was 1 April 2000 to 31 March 2001.

[75]Original Panel Report, para. 7.91. See also Panel Report, para. 4.65.

[76]Most notably, the so-called "stumpage" programmes. In Canada, "stumpage contracts" are the mechanism through which provincial governments provide timber harvesters with the right to harvest standing timber on Crown land. The original panel described certain characteristics of the various stumpage programmes run by the Canadian provincial governments as follows:

> [T]he provinces own the forests and the trees that grow in them. The only way for harvesters to obtain the trees standing on government-owned Crown land for harvesting and processing is by concluding stumpage agreements (tenures or licences) with the governments concerning these trees. The only way for the government to provide the standing timber that it owns to the harvesters and the mills for processing is by allowing the harvesters to come on the land and harvest the trees. Such legal rights and obligations are transferred through the stumpage agreements. It is thus through the stumpage agreements that the governments provide the standing timber to the harvesters.

(Original Panel Report, para. 7.15) (footnotes omitted)

presume, that any benefit received by the harvesters of standing timber passed through to the producers of the downstream softwood lumber products subject to investigation. Ultimately, the original panel and the Appellate Body found that the USDOC's calculation of the benefit was inconsistent with the United States' obligations under the covered agreements, due to the failure of the USDOC to complete a pass-through analysis with respect to two categories of transactions.[77]

51. Following the DSB's adoption on 17 February 2004 of the original panel and Appellate Body reports, the United States and Canada agreed on a reasonable period of time for implementation that would expire on 17 December 2004.[78] In response to the DSB's recommendations and rulings, the United States initiated a proceeding pursuant to Section 129 of the Uruguay Round Agreements Act ("Section 129")[79] and, on 16 December 2004, the USDOC published a determination pursuant to that provision (the "Section 129 Determination").[80] In this determination, the USDOC sought to bring the Final Countervailing Duty Determination into conformity with the recommendations and rulings of the DSB by completing a pass-through analysis in respect of certain transactions. This pass-through

[77]The first such category was where a harvester of subsidized logs, that did not itself own a sawmill, sold logs to a producer of softwood lumber. The second was where a harvester of subsidized logs, that did own a sawmill, sold logs to a different producer of softwood lumber. (See also the summary of the findings of the original panel and the Appellate Body at paragraph 4.59 of the Panel Report.)

[78]WT/DS257/13.

[79]Section 129 (*supra*, footnote 9) is entitled "Administrative action following WTO panel reports" and provides, in relevant part:

> (b) Action by Administering Authority.—
>
> (1) Consultations with Administering Authority and Congressional Committees— Promptly after a report by a dispute settlement panel or the Appellate Body is issued that contains findings that an action by the administering authority in a proceeding under title VII of the Tariff Act of 1930 is not in conformity with the obligations of the United States under the Antidumping Agreement or the Agreement on Subsidies and Countervailing Measures, the Trade Representative shall consult with the administering authority and the congressional committees on the matter.
>
> (2) Determination by Administering Authority— Notwithstanding any provision of the Tariff Act of 1930, the administering authority shall, within 180 days after receipt of a written request from the Trade Representative, issue a determination in connection with the particular proceeding that would render the administering authority's action described in paragraph (1) not inconsistent with the findings of the panel or the Appellate Body.
>
> (3) Consultations before Implementation— Before the administering authority implements any determination under paragraph (2), the Trade Representative shall consult with the administering authority and the congressional committees with respect to such determination.
>
> (4) Implementation of Determination— The Trade Representative may, after consulting with the administering authority and the congressional committees under paragraph (3), direct the administering authority to implement, in whole or in part, the determination made under paragraph (2).

[80]*Supra*, footnote 10.

analysis resulted in a small reduction of the countervailing duty rate that had been calculated in the Final Countervailing Duty Determination.[81] The rate of subsidization established in the Section 129 Determination became the cash deposit rate (estimated duty rate) applied to softwood lumber entries as from 10 December 2004.[82] At the DSB meeting held on 17 December 2004, the United States informed the DSB that it had complied with the recommendations and rulings of the DSB in the *US – Softwood Lumber IV* dispute.[83]

52. Three days later, on 20 December 2004, the USDOC published the final results of the first administrative review on imports of softwood lumber from Canada (the "First Assessment Review")[84], which established final countervailing duty liability for imports of softwood lumber that entered the United States during the period 22 May 2002 to 31 March 2003. In that review, the USDOC adopted the same pass-through methodology as it had used in the Section 129 Determination.[85] However, the USDOC's application of this methodology in the First Assessment Review did not, in the light of the evidence before it, result in any reduction to its calculated rate of

[81]The final countervailing duty rate that resulted from the Final Countervailing Duty Determination was 18.79 per cent, once corrected for ministerial errors. The Section 129 Determination reduced the rate to 18.62 per cent.

[82]Section 129(c) (*supra*, footnote 9) establishes the effective date for determinations made pursuant to that provision as follows:

> (c) Effects of Determinations; Notice of Implementation—
>
> (1) Effects of Determinations— Determinations concerning title VII of the Tariff Act of 1930 that are implemented under this section shall apply with respect to unliquidated entries of the subject merchandise (as defined in section 771 of that Act) that are entered, or withdrawn from warehouse, for consumption on or after—
>
> ...
>
> (B) in the case of a determination by the administering authority under subsection (b)(2), the date on which the Trade Representative directs the administering authority under subsection (b)(4) to implement that determination.

[83]WT/DSB/M/180, paras. 22-25.

[84]*Supra*, footnote 12.

[85]Panel Report, footnote 50 to para. 4.58. See also United States' additional written memorandum, para. 12.

subsidization.[86] In addition to establishing final duty liability for imports that entered the United States during the period of review, the results of the First Assessment Review also fixed the estimated countervailing duty rate (the cash deposit rate) for imports entering the United States as from 20 December 2004.

53. For ease of reference, we set out the relevant sequence of events in the following chart:

22 May 2002	The USDOC publishes the Final Countervailing Duty Determination in respect of softwood lumber from Canada.[*]
17 February 2004	The DSB adopts the reports of the panel and the Appellate Body in *US – Softwood Lumber IV*.
16 December 2004	The USDOC publishes the notice of implementation of the Section 129 Determination.[†] The Section 129 Determination applies to softwood lumber entries on or after 10 December 2004.
17 December 2004	The agreed "reasonable period of time" to implement the DSB's recommendations and rulings in *US – Softwood Lumber IV* expires.
20 December 2004	The USDOC publishes the final results of the First Assessment Review.[±] The cash deposit rate that resulted from the First Assessment Review applies to softwood lumber entries on or after 20 December 2004.

[*] *The period of investigation preceding the imposition of countervailing duties was 1 April 2000–31 March 2001.*

[†] *Because the Section 129 Determination revised the Final Countervailing Duty Determination, it examined data relating to the original period of investigation from 1 April 2000–31 March 2001.*

[±] *The period of review for purposes of the First Assessment Review was 22 May 2002–31 March 2003.*

54. In its request for recourse to a panel under Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), Canada made claims that both the Section 129 Determination and the First Assessment Review were inconsistent with the United States' obligations under the covered agreements.[87] In the proceedings before the Panel, the United States argued that the pass-through analysis conducted in the Section 129 Determination was consistent with its obligations under the covered agreements. The United States also argued that the First Assessment Review was not a measure taken to comply with the recommendations and rulings of the DSB in this

[86]The USDOC determined in the First Assessment Review that the five Canadian provinces claiming that it was necessary to conduct a pass-through analysis in respect of transactions occurring during the relevant period of review had "each failed to substantiate its claim that logs entering sawmills during the [period of review] included logs purchased in arm's length transactions." (USDOC Memorandum from B. Tillman to J. Jochum "Issues and Decision Memorandum: Final Results of Administrative Review: Certain Softwood Lumber Products from Canada" (13 December 2004) (Exhibit CDA-11 submitted by Canada to the Panel), section II.F) In the First Assessment Review, the USDOC calculated a rate of subsidization of 17.18 per cent *ad valorem* based on data from the period of review of 22 May 2002 to 31 March 2003. At the oral hearing in this appeal, the United States explained that this rate was subsequently reduced to 16.37 per cent to correct ministerial errors. (See "Notice of Amended Final Results of Countervailing Duty Administrative Review: Certain Softwood Lumber Products from Canada", *United States Federal Register*, Vol. 70, No. 36 (24 February 2005), p. 9046)

[87]WT/DS257/15.

dispute and did not, therefore, fall within the scope of the Panel's jurisdiction under Article 21.5 of the DSU. The United States did not, in its arguments to the Panel, respond to Canada's claims regarding the consistency of the First Assessment Review; in particular, it did not engage in a substantive defence of the pass-through analysis conducted by the USDOC in the First Assessment Review.[88] Instead, the essence of the United States' argument was that the Panel lacked jurisdiction to consider those claims.

55. The Panel found that it could examine the pass-through analysis in the First Assessment Review, and that, due to deficiencies in both pass-through analyses conducted by the USDOC, the United States had failed, in both the Section 129 Determination and the First Assessment Review, to demonstrate that "the benefit of subsidized log inputs had passed through to the processed product".[89] The United States does not appeal the Panel's findings with respect to the Section 129 Determination. Nor does the United States ask us to review the *substance* of the Panel's findings with respect to the First Assessment Review. Instead, as explained below, the principal issue on appeal is whether the Panel had jurisdiction to review the results of the First Assessment Review in these proceedings under Article 21.5 of the DSU.

B. *Introduction to the Principal Issue on Appeal*

56. On 10 March 2005, the United States submitted a request for a preliminary ruling to the Panel, along with its first written submission. The United States claimed that the results of the First Assessment Review fell "outside the scope of Article 21.5, and this Panel lack[ed] jurisdiction to review them".[90] Accordingly, the United States asked the Panel to make a preliminary ruling that:

> ... the final results of the first assessment review of the countervailing duty order on softwood lumber from Canada, cited by Canada in its request for the establishment of a panel in this dispute, are not "measures taken to comply" with the recommendations and rulings of the DSB under Article 21.5 of the DSU.[91] (footnote omitted)

57. On 16 March 2005, the Panel invited Canada to comment on this request in its second written submission to the Panel, due on 31 March 2005.[92] In its second written submission, Canada asked the Panel to reject the United States' request for a preliminary ruling, and argued that the First Assessment

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[88]Panel Report, paras. 4.96, 4.105-4.106, and footnote 50 to para. 4.58.

[89]*Ibid*., para. 5.2.

[90]United States' first written submission to the Panel, para. 12; Panel Report, p. B-4.

[91]*Ibid*.

[92]Letter from the Secretary to the Panel (on behalf of the Chairman of the Panel) to Canada, 16 March 2005.

Review was within the jurisdiction of the Panel under Article 21.5 of the DSU.[93] At the substantive meeting of the parties with the Panel, held on 21 April 2005, the Chairman of the Panel informed the parties that, for purposes of their submissions at that meeting, they "should assume that the first assessment review does fall within the scope of these proceedings", but added that such assumption was "without prejudice to the Panel's eventual ruling on this issue".[94]

58. In its Report, the Panel declined to make the ruling sought by the United States, and said as follows:

> [W]e 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.[95]

59. The United States appeals this ruling and requests the Appellate Body to find that the Panel erred in concluding that the First Assessment Review fell within the scope of its mandate, insofar as the pass-through analysis is concerned. For the same reasons, the United States also requests the Appellate Body to reverse the Panel's findings of inconsistency with respect to the First Assessment Review.[96]

60. The United States alleges that, in its interpretation of Article 21.5, the Panel adopted an unduly broad standard that is not supported by a proper analysis of text, context, and object and purpose of Article 21.5, and that is not consistent with previous panel and Appellate Body reports. The United States points out that the recommendations and rulings of the DSB in the original dispute related solely to the USDOC's failure to analyze pass-through in the original countervailing duty investigation, and that these recommendations and rulings were implemented in the Section 129 Determination, *not* the First Assessment Review. The United States points out the fundamental differences between investigations and assessment reviews, emphasizing that these differences, along with the distinct nature and purpose of assessment reviews, make clear that such reviews cannot be "measures taken to comply" with recommendations and rulings relating to an original countervailing duty determination. The United States further contends that the Panel's ruling is "unfairly prejudicial" because it compelled the United States to defend its actions in an assessment review—an "entirely

[93]Canada's second written submission to the Panel, paras. 3-5; Panel Report, p. A-35.

[94]Statement by the Chairman of the Panel at the Substantive Meeting of the Panel with the Parties, 21 April 2005. (original emphasis)

[95]Panel Report, para. 4.50. See also para. 5.1.

[96]See *supra*, para. 48(b).

separate" proceeding from the original countervailing duty investigation, with a "wholly different" administrative record—for the first time under the expedited time-frames of an Article 21.5 review.[97]

C. *The Scope of Proceedings under Article 21.5 of the DSU*

61. The principal issue in this appeal concerns the scope of proceedings under Article 21.5 of the DSU. Specifically, we must consider whether and to what extent a panel acting pursuant to Article 21.5 of the DSU may assess a measure that the implementing Member maintains is *not* "taken to comply", when the complaining Member nevertheless identifies that measure in its request for recourse to an Article 21.5 panel and raises claims against it.

62. The United States points to the express limitation on the category of measures that may be subject to review in Article 21.5 proceedings, namely "measures taken to comply with the recommendations and rulings of the DSB". The United States emphasizes that Article 21.5 neither directs nor authorizes panels to examine any "connected" measures that "could have an impact on", or "possibly undermine", the measures taken to comply.[98] Canada asserts that even measures not declared by Members as "taken to comply" may nevertheless be reviewed by an Article 21.5 panel when they affect the "existence" or "consistency" of measures that *are* declared to be "taken to comply". For Canada, such "undeclared measures are also 'measures taken to comply' for purposes of Article 21.5", in particular, when they "undermine or undo purported compliance with DSB recommendations and rulings."[99]

1. Text, Context, Object and Purpose

63. We begin by setting out the full text of Article 21.5:

> 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. The panel shall circulate its report within 90 days after the date of referral of the matter to it. When the panel considers that it cannot provide its report within this time frame, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report.

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[97]United States' appellant's submission, para. 6.

[98]*Ibid*., para. 33 (referring to Panel Report, para. 4.41).

[99]Canada's appellee's submission, para. 5.

64. The first sentence of Article 21.5 is of most relevance to the question before us. It identifies the types of disputes ("disagreement as to the existence or consistency with a covered agreement of measures") covered by that provision, and the procedures that are to be employed ("these dispute settlement procedures") in resolving them. With respect to the subject matter of Article 21.5 proceedings, "the 'matter' in Article 21.5 proceedings consists of two elements: the specific *measures* at issue and the legal basis of the complaint (that is, the *claims*)."[100] As we have stated, we are called upon in this appeal to consider the *measures* that may be evaluated by a panel acting pursuant to Article 21.5.

65. The words of Article 21.5 themselves delimit a particular category of measures that fall within the scope of proceedings conducted pursuant to that provision, as was recognized by the Appellate Body in *Canada – Aircraft (Article 21.5 – Brazil)*:

> Proceedings under Article 21.5 do not concern just *any* measure of a Member of the WTO; rather, Article 21.5 proceedings are limited to those "measures *taken to comply* with the recommendations and rulings" of the DSB.[101] (original emphasis)

66. In examining the meaning of "measures taken to comply" in Article 21.5, we begin with the word "taken". There is a wide range of dictionary meanings of the word "taken", which is the past participle of the verb "take". The meanings of "take" include, for example, "[b]ring into a specified position or relation"; "[s]elect or use for a particular purpose."[102] The preposition "to" is "[u]sed in verbs ... in the sense of 'motion, direction, or addition to', or as the mark of the infinitive."[103] As the United States points out, the word "comply" is defined as "accommodate oneself to (a person, circumstances, customs, etc.) ... Act in accordance with or *with* a request, command, etc."[104] The French and, in particular, Spanish versions of this phrase ("mesures prises pour se conformer" and "medidas destinadas a cumplir", respectively) also imply that relevant measures are associated with the objective of complying. On its face, therefore, the phrase "measures taken to comply" seems to refer to measures taken *in the direction of*, or *for the purpose of achieving*, compliance.

67. By virtue of the remainder of its first sentence, it is also clear that the scope of Article 21.5 encompasses any "disagreement as to the existence or consistency with a covered agreement of

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[100]Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 78. (original emphasis)

[101]Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 36.

[102]*Shorter Oxford English Dictionary*, 5th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2002), Vol. 2, p. 3170.

[103]*Ibid*., Vol. 2, p. 3284.

[104]United States' appellant's submission, para. 30 (quoting *The New Shorter Oxford English Dictionary*, *supra*, footnote 37, p. 461 (original italics) (Exhibit US-15 submitted by the United States to the Panel)).

measures taken to comply". Canada, as well as the third participants, assert that the words "existence or consistency" are key to understanding the scope of a panel's jurisdiction under Article 21.5.[105] In order to make an assessment of the "existence or consistency" of "measures taken to comply", it seems to us that a panel must be able to assess measures taken to comply in their full context, including how such measures are introduced into, and how they function within, the particular system of the implementing Member. The word "existence" suggests that measures falling within the scope of Article 21.5 encompass not only positive acts, but also *omissions*. It also suggests that, as part of its assessment of whether a measure taken to comply *exists*, a panel may need to take account of facts and circumstances that impact or affect such existence. The word "consistency" implies that panels acting pursuant to Article 21.5 must objectively assess whether new measures are, in fact, consistent with relevant obligations under the covered agreements. As the Appellate Body has already stated, such an evaluation involves consideration of "that new measure in its totality" and the "fulfilment of this task requires that a panel consider both the measure itself and the measure's application."[106] The fact that Article 21.5 mandates a panel to assess "existence" and "consistency" tends to weigh against an interpretation of Article 21.5 that would confine the scope of a panel's jurisdiction to measures that *move in the direction of*, or *have the objective of achieving*, compliance. These words also suggest that an examination of the effects of a measure may also be relevant to the determination of whether it constitutes, or forms part of, a "measure[] taken to comply".[107]

68. A further feature of the first sentence of Article 21.5 is the express link between the "measures taken to comply" and the recommendations and rulings of the DSB. Accordingly, determining the scope of "measures taken to comply" in any given case must also involve examination of the recommendations and rulings contained in the original report(s) adopted by the DSB. Because such recommendations and rulings are directed at the measures found to be

[105]Canada argues that "[o]nly through a comprehensive review of measures that affect the 'existence' or 'consistency' of measures declared to be taken to comply can an Article 21.5 proceeding contribute to the prompt settlement of disputes and fulfil the aim of the dispute settlement mechanism." (Canada's appellee's submission, para. 31) China, for its part, argues that "the existence of a measure requires the state of being or continuance in being of the subject measure, and to maintain such a state of being, there should not be any other measure that would in effect nullify or invalidate such measure." (China's third participant's submission, para. 7) The European Communities submits that "[t]he term 'existence' envisages a situation of failure to comply with the DSB's rulings and recommendations" and argues that it is "of fundamental importance that Article 21.5 panels have a broad mandate to determine whether or not the 'situation' after the expiry of the reasonable period of time for implementation is such that the Member concerned has fully implemented its compliance obligations." (European Communities' third participant's submission, paras. 18 and 20)

[106]Appellate Body Report, *US – Shrimp, (Article 21.5 – Malaysia)*, para. 87.

[107]Both participants agree that the effects of measures taken by an implementing Member can be relevant to determining whether or not that measure may be examined in proceedings under Article 21.5 of the DSU. (Participants' responses to questioning at the oral hearing)

inconsistent in the original proceedings[108], such an examination necessarily involves consideration of those original measures. Lastly, the end of the first sentence of Article 21.5 indicates that where there is disagreement regarding measures taken to comply, there should be recourse to the original panel "wherever possible", thus expressing a preference for dealing with these "disagreements" before the original panel that made the original recommendations and rulings in the dispute, rather than starting over again in new proceedings before a new panel.

69. Having thus considered the first sentence of Article 21.5, we note first that the phrase "measures taken to comply" does place some limits on the scope of proceedings under that provision—an issue that is not disputed. At the same time, in order to fulfil its mandate under Article 21.5, a panel must be able to take full account of the factual and legal background against which relevant measures are taken, so as to determine the existence, or consistency with the covered agreements, of measures taken to comply.

70. Article 21.5 is one paragraph within an Article entitled "Surveillance of Implementation of Recommendations and Rulings". As a whole, Article 21 deals with events *subsequent* to the DSB's adoption of recommendations and rulings in a particular dispute. The various paragraphs of Article 21 make clear that following such recommendations and rulings, further relevant developments and disagreements are to be dealt with through the reporting and surveillance modalities set out therein, and in such a way as to achieve "prompt resolution". Article 21 obliges an implementing Member to keep the DSB apprised of its intentions (paragraph 3) and ongoing efforts (paragraph 6) regarding implementation. At the same time, Article 21 sets out a number of mechanisms to ensure collective oversight of that Member's implementation. With respect to the determination of the reasonable period of time, these are found in Article 21.3, and with respect to measures taken to comply, they are found in Article 21.5. Thus, within Article 21 as a whole, the declarations of the implementing Member form an integral part of the surveillance of implementation, but they do not stand alone. Rather, they are complemented by, and subject to, multilateral review within the World Trade Organization (the "WTO").

71. Turning to the role played by Article 21.5 within the broader framework of the DSU, we note that there are key differences between proceedings under Article 21.5 of the DSU and "regular" panel proceedings. First, the composition of an Article 21.5 panel is, in principle, already determined—wherever possible, it is the original panel. These individuals will be familiar with the contours of the

[108]Article 19.1 of the DSU mandates the recommendations that panels and the Appellate Body are to make in the event of a finding that a measure is inconsistent with a covered agreement: they "shall recommend that the Member concerned bring the measure into conformity with that agreement." (footnotes omitted) Thus, the text of Article 19.1 confirms the link between the measure taken to comply and the inconsistent measure that was the subject of the original proceedings.

dispute, and the experience gained from the original proceedings should enable them to deal more efficiently with matters arising in an Article 21.5 proceeding "against the background of the original proceedings".[109] Secondly, the time-frames are shorter—an Article 21.5 panel has, in principle, 90 days in which to issue its report, as compared to the six to nine months afforded original panels. Thirdly, there are some limits on the claims that can be raised in Article 21.5 proceedings.[110] Yet, these limits should not allow circumvention by Members by allowing them to comply through one measure, while, at the same time, negating compliance through another.

72. Taken together, these observations underscore the balance that Article 21.5 strikes between competing considerations. On the one hand, it seeks to promote the prompt resolution of disputes, to avoid a complaining Member having to initiate dispute settlement proceedings afresh when an original measure found to be inconsistent has not been brought into conformity with the recommendations and rulings of the DSB, and to make efficient use of the original panel and its relevant experience. On the other hand, the applicable time-limits are shorter than those in original proceedings, and there are limitations on the types of claims that may be raised in Article 21.5 proceedings. This confirms that the scope of Article 21.5 proceedings logically must be narrower than the scope of original dispute settlement proceedings. This balance should be borne in mind in interpreting Article 21.5 and, in particular, in determining the measures that may be evaluated in proceedings pursuant to that provision.

2. Examination of Previous Cases

73. A number of previous proceedings have raised the issue of what measures fall within the scope of jurisdiction of a panel acting pursuant to Article 21.5. Panels and the Appellate Body alike have found that what is a "measure taken to comply" in a given case is not determined exclusively by the implementing Member. A Member's designation of a measure as one taken "to comply", or not, is

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

[110]The Appellate Body has confirmed the existence of such limits in several cases. For example, in *US – Shrimp (Article 21.5 – Malaysia)*, the Appellate Body found that the panel had committed no error in refusing to "re-examine, for WTO-consistency, even those aspects of a new measure that were part of a previous measure that was the subject of a dispute, and were found by the Appellate Body to be *WTO-consistent* … and that remain unchanged as part of the new measure." (Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 89 (original emphasis)) The Appellate Body has also found that a complaining party may not ask an Article 21.5 panel to re-examine certain matters ("the *particular* claim and the *specific* component of a measure that is the subject of that claim") when the original panel made findings in respect of these matters and those findings were not appealed. (Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 92-93) See also Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 121-122) However, when the measure taken to comply is a new measure, different from the measure at issue in the original proceedings, "a panel is not confined to examining the 'measures taken to comply' from the perspective of the claims, arguments and factual circumstances that related to the original measure". (Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 41) See also the discussion in Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 88-89.

relevant to this inquiry, but it cannot be conclusive.[111] Conversely, nor is it up to the complaining Member alone to determine what constitutes the measure taken to comply. It is rather for the Panel itself to determine the ambit of its jurisdiction.[112]

74. To be sure, characterizing an act by a Member as a measure taken to comply when that Member maintains otherwise is not something that should be done lightly by a panel. Yet, a panel, in examining the factual and legal circumstances within which the implementing Member takes action, may properly reach just such a finding in some cases. We regard the cases of *Australia – Salmon (Article 21.5 – Canada)* and *Australia – Automotive Leather II (Article 21.5 – US)* as useful illustrations of when such a finding is appropriate. In each of these cases, the panel examined a measure that the implementing Member maintained was not a measure taken to comply. At issue in *Australia – Salmon (Article 21.5 – Canada)* was whether the Article 21.5 panel could examine an import ban on salmon that had been adopted by the Australian state of Tasmania shortly after the Australian federal government had notified a number of steps that it had taken in order to remove the inconsistencies identified by the original panel regarding its treatment of imported salmon.[113] In reaching the conclusion that it could examine this ban, the panel looked at the *timing* of the ban, in particular, the fact that it was introduced "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"[114]; as well as the *nature* of the ban, which was, like the measures challenged in the original proceedings, "a quarantine measure ... that applies to imports of fresh chilled or frozen salmon from Canada".[115]

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[111]In response to questioning at the oral hearing, both parties agreed that a Member's designation of the relevant measure taken to comply is relevant, but it is not dispositive of the issue of what measures may be considered by a panel acting pursuant to Article 21.5 of the DSU. If this were otherwise, an implementing Member would be able to avoid proceedings under Article 21.5 simply by deciding what measures to notify, or not to notify, to the DSB. (See Panel Report, *Australia – Automotive Leather II (Article 21.5 – US)*, para. 6.4)

[112]Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 78. See also Panel Report, *Australia – Automotive Leather II (Article 21.5 – US)*, para. 6.4; and Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.10, sub-para. 22.

[113]That panel observed that it could not merely allow an implementing Member to identify the relevant measure to be assessed in Article 21.5 proceedings because:

> ... 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".

(Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.10, sub-para. 22) (emphasis added)

[114]*Ibid*.

[115]*Ibid*.

75. In *Australia – Automotive Leather II (Article 21.5 – US)*, Australia withdrew from a company a grant that had been found to be a prohibited subsidy. At the same time, Australia granted a loan on non-commercial terms to a related company. The loan was specifically conditioned on repayment of the original subsidy. Although Australia argued that the loan was "not part of the implementation of the DSB's ruling and recommendation" and did not, therefore, fall within the scope of the Article 21.5 proceedings[116], the panel disagreed. It found that the loan fell within the scope of its terms of reference because, *inter alia*, the loan at issue was "inextricably linked" to the measure that Australia itself stated it had taken to comply, "in view of both its timing and its nature".[117]

76. The panel in *Australia – Automotive Leather II (Article 21.5 – US)* also explained that, to have excluded the new loan offered by Australia from its mandate, would have "severely limit[ed its] ability to judge, on the basis of the United States' request, whether Australia ha[d] taken measures to comply with the DSB's ruling."[118] Finally, we recall that, in *EC – Bed Linen (Article 21.5 – India)*, the Appellate Body upheld the panel's finding that certain parts of a measure may fall within the scope of Article 21.5 proceedings when other, separate elements of the same measure do not, and recognized that the ways in which distinct elements of a measure interact with and affect each other may be relevant to the determination of which of them falls within the scope of Article 21.5 proceedings.[119]

3. Summary

77. Taking account of all of the above, our interpretation of Article 21.5 of the DSU confirms that a panel's mandate under Article 21.5 of the DSU is not necessarily limited to an examination of an implementing Member's measure declared to be "taken to comply". Such a declaration will always be relevant, but there are additional criteria, identified above, that should be applied by a panel to determine whether or not it may also examine other measures. Some measures with a particularly close relationship to the declared "measure taken to comply", and to the recommendations and rulings of the DSB, may also be susceptible to review by a panel acting under Article 21.5. Determining whether this is the case requires a panel to scrutinize these relationships, which may, depending on the particular facts, call for an examination of the timing, nature, and effects of the various measures. This also requires an Article 21.5 panel to examine the factual and legal background against which a declared "measure taken to comply" is adopted. Only then is a panel in a position to take a view as to whether there are sufficiently close links for it to characterize such an other measure as one "taken to

[116]Panel Report, *Australia – Automotive Leather II (Article 21.5 – US)*, para. 6.1.

[117]*Ibid*., para. 6.5.

[118]*Ibid*.

[119]Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 86.

comply" and, consequently, to assess its consistency with the covered agreements in an Article 21.5 proceeding.

4. Review of the Panel's Approach

78. Turning to examine the legal standard articulated by the Article 21.5 Panel in this case, we note that the Panel stated, first, that it would be "guided by dispute settlement decisions regarding the scope of DSU Article 21.5".[120] The Panel observed that "Article 21.5 proceedings are not restricted to measures formally, or explicitly, taken by Members to implement DSB rulings and recommendations."[121] The Panel then went on to examine the panel reports in *Australia – Salmon (Article 21.5 – Canada)* and *Australia – Automotive Leather II (Article 21.5 – US)*. The Panel observed that, in this case, there was no dispute that the Section 129 Determination fell within the scope of the Article 21.5 proceedings.[122] With respect to the First Assessment Review, the Panel's reasoning reveals that it employed the following two tests:

> [Whether] 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 [Countervailing Duty] Determination, and because it is *inextricably linked* to the treatment of pass-through in the Section 129 Determination.[123] (emphasis added)

and

> [Whether there was] sufficient overlap in the timing, or temporal effect, and nature of the Final [Countervailing Duty] Determination, Section 129 Determination and First Assessment Review for the latter to fall within the scope of the present DSU Article 21.5 proceedings.[124]

79. Accordingly, it is clear from the previous panel reports the Panel cited, and from the language it used ("clearly connected" and "inextricably linked"), that the Panel employed a nexus-based test similar to the ones articulated in *Australia – Automotive Leather II (Article 21.5 – US)* and *Australia – Salmon (Article 21.5 – Canada)* to determine whether the First Assessment Review fell within the scope of its jurisdiction. We see no error in the Panel's adoption of such a standard, which accords with our own interpretation of Article 21.5. Accordingly, in the next section, we consider whether the Panel erred in its *application* of this legal standard.

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[120]Panel Report, para. 4.38.

[121]*Ibid*.

[122]*Ibid*., para. 4.41.

[123]*Ibid*.

[124]*Ibid*., para. 4.42.

D. *The Panel's Application of Article 21.5 in this Case*

80. In examining whether the Panel erred in finding that it had authority to review the pass-through analysis in the First Assessment Review, we recall the United States' arguments that the DSB recommendations and rulings were implemented in the Section 129 Determination, *not* the First Assessment Review, and that there are fundamental differences between investigations and assessment reviews. Further, the United States stresses that the First Assessment Review was initiated eight months before the recommendations and rulings of the DSB in this case and was governed by statutory provisions, timelines, and procedures that have nothing to do with those recommendations and rulings. Hence, according to the United States, the Panel erred in finding the First Assessment Review to be a "measure taken to comply" with the DSB recommendations and rulings in this dispute.

81. Turning to the Panel's application of Article 21.5 to the facts of this case, we observe, first, that the United States appears to cast the Panel's refusal to grant its request for a preliminary ruling as a finding that the First Assessment Review *per se* is a "measure taken to comply" within the meaning of Article 21.5 of the DSU. Our examination of the Panel's reasoning, however, indicates that the Panel took a more nuanced approach. The Panel determined that the Section 129 Determination was a "measure taken to comply". At the same time, it found that *the pass-through analysis* in the First Assessment Review was so "inextricably linked" and "clearly connected" to both the Section 129 Determination and the Final Countervailing Duty Determination as to fall within the scope of the Panel's authority under Article 21.5.[125] We understand the Panel, therefore, to have found that a specific component of the First Assessment Review—rather than the First Assessment Review in its entirety—fell within the scope of its jurisdiction under Article 21.5. Indeed, the Panel itself expressly so stated, albeit in a footnote:

> [W]e 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.[126]

82. We also observe that the United States emphasizes the separate nature of original countervailing duty investigations and duty assessment proceedings, and cites, *inter alia*, to its domestic law in this regard. Although such references may be useful, the Appellate Body has already observed that municipal law classifications are not determinative of issues raised in WTO dispute

[125]Panel Report, para. 4.41.

[126]*Ibid*., footnote 42 to para. 4.45.

settlement proceedings.[127] We also note the argument of the United States that the *SCM Agreement* recognizes that original countervailing duty investigations are proceedings distinct from duty assessment reviews.[128] This does not, in our view, answer the question of whether the Panel was entitled, in these proceedings under Article 21.5 of the DSU, to examine the pass-through analysis conducted by the USDOC in the First Assessment Review.

83. To answer that question, we turn to the specific circumstances of this case and examine them in the light of our interpretation of Article 21.5.[129] As regards *subject matter*, we note that the Final Countervailing Duty Determination, the Section 129 Determination, and the First Assessment Review are all countervailing duty proceedings that were conducted by the USDOC. Each of these proceedings involved a determination of the rate of subsidization of softwood lumber from Canada. Moreover, in each of these proceedings, the USDOC calculated the rate of subsidization of *softwood lumber* based on financial contributions made to, and benefit received by, *timber harvesters*. In other words, the product that was subject to the three countervailing duty proceedings was the same, and in each proceeding the issue of whether the subsidy had "passed through" was raised by Canadian interested parties and considered by the USDOC. Moreover, the "pass-through" methodology adopted by the USDOC was the same in the Section 129 Determination and the First Assessment Review.[130] Looking to the scope of coverage of the three relevant measures, we note that the Section 129 Determination revised the Final Countervailing Duty Determination and confirmed the continued existence of the conditions for the imposition of a countervailing duty. To the extent that the Section 129 Determination revised or replaced the Final Countervailing Duty Determination, and thereby became the basis for the continued imposition of countervailing duties, then the Section 129 Determination must be deemed to have the same relationship to the First Assessment Review that the Final Countervailing Duty Determination has with the First Assessment Review. In this connection, we observe that the softwood lumber imports that entered during the period 22 May 2002 to 31 March 2003 were, upon entry, subjected to the cash deposit rate determined in the Final

[127]Appellate Body Report, *US – Softwood Lumber IV*, para. 56.

[128]United States' appellant's submission, para. 20. The United States refers in footnotes 22 and 23 to Article 11.1 and footnote 52 of the *SCM Agreement*.

[129]*Supra*, para. 77.

[130]The Panel also noted that "the USDOC adopted the same approach to pass-through in the First Assessment Review as in the Section 129 Determination." (Panel Report, footnote 50 to para. 4.58)

Countervailing Duty Determination, and, subsequently, to the final duty liability determined in the First Assessment Review.[131]

84. An additional link between the Section 129 Determination and the First Assessment Review relates to *timing*. The publication and effective dates of both proceedings coincided in time, with each also corresponding closely to the time of the expiration of the reasonable period of time for implementation. In fact, the First Assessment Review took effect a mere 10 days after the effective date of the Section 129 Determination. Although, as regards timing, the United States emphasizes that the First Assessment Review was initiated eight months before the DSB's recommendations and rulings, we do not consider the date of initiation to be determinative in this case for two reasons. First, the results of the First Assessment Review were published 10 months after adoption of the recommendations and rulings of the DSB. Secondly, in acknowledging that the pass-through methodology used by the USDOC in the First Assessment Review was adopted "in view of"[132] the recommendations and rulings of the DSB in *US – Softwood Lumber IV*, the United States appears also to acknowledge that the USDOC had time to take account of those recommendations and rulings.

85. The First Assessment Review also directly affected the Section 129 Determination because the cash deposit rate resulting from the Section 129 Determination (which reflected a small reduction due to pass-through analysis contained therein) was "updated"[133], or "superseded"[134], by the cash deposit rate resulting from the First Assessment Review (which reflected no reduction from the pass-

[131]Having made a similar observation, the Panel added that:

> [i]mport 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.

(Panel Report, footnote 38 to para. 4.41)

[132]United States' additional written memorandum, para. 12.

[133]In response to questioning at the oral hearing, the United States explained that one of the consequences of an assessment review is that it updates the amount of the deposits that are required from importers.

[134]Canada's appellee's submission, para. 19.

through analysis contained therein).[135] Even if, as the United States argues, modification of the cash deposit rate was not the *purpose* of the First Assessment Review[136], it was undeniably *an effect*.

86. Turning to the evaluation by the Panel of the various links between these measures, we note that the Panel observed that the pass-through analysis in the First Assessment Review was "clearly connected to the panel and Appellate Body reports concerning the Final [Countervailing Duty] Determination".[137] The Panel also characterized the pass-through analysis in the First Assessment Review as "inextricably linked to the treatment of pass-through in the Section 129 Determination".[138] The Panel made these observations based on the following explanation:

> [C]ertain 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. 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, ... there is in fact considerable overlap in the effect of these various measures.[139] (footnote omitted)

87. In the sentence immediately following this excerpt, the Panel added that "[s]ince the pass-through analysis in the First Assessment Review could, therefore, have an impact on, and possibly undermine" implementation by the Section 129 Determination with respect to pass-through, "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."[140] The United States takes issue with this statement, and argues that the Panel's finding must be reversed because the "universe of measures that have some connection with measures taken to comply and that 'could have an impact on' or could 'possibly

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[135]From the date of imposition of the countervailing duties until 10 December 2004 (the effective date of the Section 129 Determination), softwood lumber imports from Canada were subject to the cash deposit rate established as a result of the Final Countervailing Duty Determination; from 10 December 2004 to 19 December 2004, such lumber imports were subject to the cash deposit rate established as a result of the Section 129 Determination; and as from 20 December 2004, softwood lumber imports were subject to the cash deposit rate established as a result of the First Assessment Review.

[136]The United States submitted that "the purpose of an assessment review ... is to levy the duty, *i.e.*, to determine the definitive or final legal assessment of duties." (United States' appellant's submission, para. 20) (footnote omitted)

[137]Panel Report, para. 4.41.

[138]*Ibid*.

[139]*Ibid*.

[140]*Ibid*. (footnote omitted)

undermine' those measures is so broad as to render meaningless the strict requirement of the text of Article 21.5".[141] We do not read this statement by the Panel as a separate or independent test of when measures may be considered in Article 21.5 proceedings, or even as the primary reason for the Panel's finding. The statement is, rather, an additional reason, which follows the Panel's detailed review of the multiple points of convergence, both in terms of subject matter and time, that exist among the relevant measures. We do not, therefore, understand the Panel to have found, as the United States argues[142], that *every* measure that has "some connection" with and that "could have an impact on" or could "possibly undermine" a measure taken to comply may be scrutinized in proceedings under Article 21.5 of the DSU. Indeed, such an approach would be too sweeping.[143]

88. We recognize that the First Assessment Review was not initiated in order to comply with the recommendations and rulings of the DSB, and that it operated under its own timelines and procedures, which were independent of the Section 129 Determination. Nevertheless, these considerations are not sufficient to overcome the multiple and specific links between the Final Countervailing Duty Determination, the Section 129 Determination, and the pass-through analysis in the First Assessment Review.

89. Lastly, we note that the United States refers to the "prejudice" that it suffered by virtue of the fact that the Panel's failure to grant the request for a preliminary ruling meant that it was forced to defend its actions in an assessment review—an "entirely separate" proceeding, with a "wholly different" administrative record—for the first time under the expedited time-frames of an Article 21.5 proceeding.[144] We observe, in this connection, that the measure at issue in proceedings under Article 21.5 will, in principle, be a different measure than the measure at issue in the original proceedings.[145] Thus, a Member cannot be said to suffer prejudice solely by virtue of the fact that it must defend a *new* or *different* measure in Article 21.5 proceedings. Moreover, the arguments made by the United States do not identify any prejudice suffered to the conduct of its *defence* in these Article 21.5 proceedings. The United States was invited by the Panel to submit arguments in defence of the pass-through analysis in the First Assessment Review as an alternative argument, in the event that the Panel did not grant its request for a preliminary ruling, but it elected not to do so. For

[141]United States' appellant's submission, para. 33 (referring to Panel Report, para. 4.41).

[142]*Ibid*.

[143]Furthermore, we observe that, in these proceedings, Canada did not challenge the First Assessment Review *per se*. Rather, in raising claims against the pass-through analysis, Canada challenged a single element among the many different issues presented to, and analyzed by, the USDOC in the context of the First Assessment Review. The pass-through analysis that was the subject of Canada's claims was, for purposes of these Article 21.5 proceedings, a discrete component of the First Assessment Review, and could be assessed as such.

[144]United States' appellant's submission, para. 6. See also para. 43.

[145]Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 36.

these reasons, the United States has not established that it suffered any prejudice by virtue of the fact that the Panel's approach forced it to defend the pass-through analysis in the First Assessment Review in Article 21.5 proceedings.

90. In view of the above, we conclude that the Panel properly included the pass-through analysis in the First Assessment Review in its examination of the "measures taken to comply" because of the close connection that the Panel found to exist between that pass-through analysis and both the Final Countervailing Duty Determination and the Section 129 Determination.

91. We therefore see no error on the facts of this case in the Panel's finding 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.[146]

92. Accordingly, we *uphold* the Panel's finding, in paragraphs 4.41, 4.50, and 5.1 of the Panel Report, that the First Assessment Review falls within the scope of the present Article 21.5 proceedings, insofar as the pass-through analysis is concerned.[147]

93. In upholding the Panel's finding with respect to the scope of Article 21.5, we wish to make clear that the Panel's approach is not, in our view, so "broad [as] to render the jurisdictional limits of Article 21.5 nearly meaningless"[148], as the United States contends. In particular, the Panel's reasoning—which we have upheld—should not be read to mean that every assessment review will necessarily fall within the jurisdiction of an Article 21.5 panel.[149]

E. *Disposition of the Remaining Issues on Appeal*

94. We understand, and the United States confirmed at the oral hearing, that the sole basis for its appeal of the remaining Panel findings identified in its Notice of Appeal is the same as the basis for its principal ground of appeal: that the First Assessment Review could not be examined by the Panel in these Article 21.5 proceedings. Because we have upheld the Panel's finding that it could examine the pass-through analysis in the First Assessment Review, and because the United States did not appeal

[146]Panel Report, para. 4.42.

[147]*Ibid*., paras. 4.50 and 5.1.

[148]United States' appellant's submission, para. 32.

[149]This dispute does not raise the issue of whether or to what extent the obligations that apply in the context of an assessment review are the same as the obligations that apply in an original countervailing duty investigation. The United States did not argue before the Panel, or before us, that it had no obligation, under the covered agreements, to conduct the same pass-through analysis in an assessment review as it must conduct in an original countervailing duty investigation.

the substance of the remaining findings that the Panel made with respect to the pass-through analysis in the First Assessment Review, we have no basis for disturbing those remaining findings.[150]

V. Findings and Conclusions

95. For the reasons set forth in this Report, the Appellate Body upholds the Panel's finding, in paragraphs 4.41, 4.50, and 5.1 of the Panel Report, that the First Assessment Review falls within the scope of the present Article 21.5 proceedings, insofar as the pass-through analysis is concerned.

96. Having so held, and in the absence of a request by the United States that we review the Panel's examination of the substance of the pass-through analysis in the First Assessment Review[151], the Appellate Body finds that the Panel acted within the scope of its authority in reaching the following legal conclusions:

(a) in paragraph 5.2 of the Panel Report, that the United States failed, in the treatment of pass-through in the First Assessment Review, to implement properly the recommendations and rulings of the DSB by not conducting a pass-through analysis with respect to sales, found not to be at arm's length, of logs by tenured timber harvesters, whether or not they also produce lumber, to unrelated timber producers, whether or not they hold a stumpage contract;

(b) in paragraph 5.2 of the Panel Report, that, in the First Assessment Review, the United States 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;

(c) in paragraph 5.4 of the Panel Report, that, with respect to the First Assessment Review, the United States remains in violation of Articles 10 and 32.1 of the *SCM Agreement* and Article VI:3 of the GATT 1994; and

(d) in paragraph 5.5 of the Panel Report, that, with respect to the First Assessment Review, the United States has nullified or impaired benefits accruing to Canada under the *SCM Agreement* and the GATT 1994.

[150]United States' Notice of Appeal, WT/DS257/22 (attached as Annex I to this Report), paras. 2-5 (referring to Panel Report, paras. 5.2 and 5.4-5.5).

[151]*Supra*, para. 94.

97. The Panel recommended, in paragraph 5.5 of the Panel Report, that the United States bring its measures, found to be inconsistent with the *SCM Agreement* and the GATT 1994, into conformity with its obligations under those Agreements. Having found that the Panel acted within the scope of its jurisdiction in making such findings of inconsistency, it is not for us to make any additional recommendation, under Article 19.1 of the DSU.

Signed in the original in Geneva this 17th day of November 2005 by:

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Merit E. Janow
Presiding Member

_____ _____

Luiz Olavo Baptista
Member

Giorgio Sacerdoti
Member

Annex I

WORLD TRADE ORGANIZATION

WT/DS257/22
12 September 2005

(05-3950)

Original: English

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

Recourse by Canada to Article 21.5 of the DSU

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

The following notification, dated 6 September 2005, from the Delegation of the United States, is being circulated to Members.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the Working Procedures for Appellate Review, the United States hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Report of the Panel on *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada: Recourse to Article 21.5 of the DSU by Canada* (WT/DS257/RW) ("Panel Report") and certain legal interpretations developed by the Panel in this dispute.

1. The United States seeks review by the Appellate Body of the Panel's legal conclusion that the First Assessment Review does not fall outside the scope of the present DSU Article 21.5 proceeding, insofar as the pass-through analysis is concerned.[1] This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations of DSU Article 21.5.

2. The United States seeks review by the Appellate Body of the Panel's legal conclusion that the United States failed, in the treatment of pass-through in the First Assessment Review, to properly implement the recommendations and rulings of the Dispute Settlement Body by not conducting a pass-through analysis with respect to sales, found not to be at arm's length, of logs by tenured timber harvesters, whether or not they also produce lumber, to unrelated timber producers, whether or not they hold a stumpage contract.[2] This erroneous conclusion is based on the Panel's erroneous legal conclusion, described in paragraph 1, above, that the First Assessment Review does not fall outside the scope of the DSU Article 21.5 proceeding.

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[1] Panel Report, paras. 4.36-4.50, and 5.1, first subparagraph.

[2] Panel Report, paras. 4.58-4.82, 4.104-4.106, and 5.2, first subparagraph.

3. The United States seeks review by the Appellate Body of the Panel's legal conclusion that, in the First Assessment Review, the United States 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.[3] This erroneous conclusion is based on the Panel's erroneous legal conclusion, described in paragraph 1, above, that the First Assessment Review does not fall outside the scope of the DSU Article 21.5 proceeding.

4. The United States seeks review by the Appellate Body of the Panel's legal conclusion that, with respect to the First Assessment Review, the United States remains in violation of Articles 10 and 32.1 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") and Article VI:3 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994").[4] This erroneous conclusion is based on the Panel's erroneous legal conclusion, described in paragraph 1, above, that the First Assessment Review does not fall outside the scope of the DSU Article 21.5 proceeding.

5. The United States seeks review by the Appellate Body of the Panel's legal conclusion that, with respect to the First Assessment Review, the United States has nullified or impaired benefits accruing to Canada under the SCM Agreement and the GATT 1994.[5] This erroneous conclusion is based on the Panel's erroneous legal conclusion, described in paragraph 1, above, that the First Assessment Review does not fall outside the scope of the DSU Article 21.5 proceeding.

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[3] Panel Report, paras. 4.114-4.115, and 5.2, second subparagraph.

[4] Panel Report, paras. 4.114-4.115 and 5.4.

[5] Panel Report, para. 5.5.