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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,

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

Section 129 (the "Section 129 Determination")

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 particip

- 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]

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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*

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 sue are sw[(Bed7268 TD0.00l.p5o11vio)-5.5ol.p5o11TJ22.9 in lt wi. toidealt TD0.TJTJ-20.776 (also(als8)-5ed" s.00

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

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 re

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

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

(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

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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

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).

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

measures taken to comply". Canada, as well as the third participants, assert that the words "existence or consistency" are key to understanding the sc

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

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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 Novembpu(on 6 thpu(on–vsoev3c4e3,7

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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. *Asslrit ana5(y)-suchquefd bd a-5.4(a)ma7.4( )5.bndesefulhe a ere -5.4(a)]read7.412*

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 s

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*

through analysis contained therein).[135] Even if, as the United States argues, modification of the cash deposit rate was not the *purpose*

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]144

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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