ANNEX B

Submissions of the United States

ANNEX B-1

FIRST SUBMISSION AND REQUEST FOR PRELIMINARY RULING OF THE UNITED STATES

10 March 2005

I. Introduction

1. On 6 December 2004, the US Department of Commerce ("Commerce") issued a revised determination ("Section 129 Determination")[1] that implemented the recommendations and rulings of the Dispute Settlement Body ("DSB") in *United States – Final Countervailing Duty Determination With Respect to Certain Softwood Lumber From Canada*.[2] The recommendations and rulings of the DSB at issue relate to Commerce's decision not to conduct a pass-through analysis with respect to certain arm's-length sales of logs in its Final Determination.[3]

2. As discussed further below, Commerce's Section 129 Determination fully implements the recommendations and rulings of the DSB, and is consistent with the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") and the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"). The Panel should find, therefore, that Canada's claims are unfounded.

3. In addition, as set out below, the United States requests a preliminary ruling that the final results of the first assessment review[4] of the countervailing duty order on softwood lumber from Canada, cited by Canada in its request for the establishment of a panel[5], are not "measures taken to comply" with the recommendations and rulings of the DSB under Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"). Therefore, these results fall outside the scope of Article 21.5, and this Panel lacks jurisdiction to review them.

4. As provided for in the Panel's working procedures, the United States will be providing a rebuttal submission on 31 March 2005.

II. Procedural History

5. On 2 April 2002, Commerce published the Final Determination, finding that provincial stumpage programmes in Canada provided a countervailable subsidy to Canadian lumber producers

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[1] *Section 129 Determination: Final Countervailing Duty Determination, Certain Softwood Lumber from Canada*, December 6, 2004 ("Section 129 Determination")

and that certain non-stumpage programmes provided countervailable subsidies.[6] Commerce did not conduct a pass-through analysis in the Final Determination.

6. On 3 May 2002, Canada requested consultations with the United States and thereafter the DSB established a panel pursuant to Article 6 of the DSU ("original panel").

7. On 29 August 2003, the original panel found that Commerce's failure to conduct a pass-through analysis in the Final Determination with respect to arm's-length sales to unrelated sawmills and lumber remanufacturers was inconsistent with Articles 10 and 32.1of the SCM Agreement and Article VI:3 of the GATT 1994[7] However, the Appellate Body in its 19 January 2004, report reversed that aspect of the original panel report relating to Commerce's decision in its investigation not to conduct a pass-through analysis in respect of arm's-length sales of lumber by tenured harvesters/sawmills to remanufacturers[8]

8. The Appellate Body upheld, however, the original panel's finding that Commerce acted inconsistently with the SCM Agreement and GATT 1994 by failing in the Final Determination to conduct a pass-through analysis in respect of arm's-length sales of logs by tenured harvesters/sawmills to unrelated sawmills.[9] On 17 February 2004, the DSB adopted its recommendations and rulings.[10]

9. On 5 March 2004, the United States notified the DSB of its intention to implement the recommendations and rulings of the DSB.[11] Thereafter, the United States and Canada established a ten-month "reasonable period of time" ending 17 December 2004, within which the United States agreed to implement the recommendations and rulings of the DSB.[12]

10. On 19 November 2004, Commerce issued a draft Section 129 Determination and provided an opportunity for parties to comment. On 6 December 2004, Commerce issued the Section 129 Determination, which revised the original countervailing duty investigation determination and implemented the DSB's recommendations and rulings, effective for imports on or after 10 December 2004. On 16 December 2004, the notice of implementation was published in the Federal Register.[13]

11. On 17 December 2004, the United States informed the DSB that it had complied with the DSB's recommendations and rulings by properly conducting its pass-through analyses of certain arm's-length log sales occurring during the period of investigation ("POI").
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III. Preliminary Ruling Request with Respect to the Final Results of the First Assessment Review

12. The United States requests a preliminary ruling that the final results of the first assessment review of the countervailing duty order on softwood lumber from Canada, cited by Canada in its request for the establishment of a panel in this dispute[14], are not "measures taken to comply" with the recommendations and rulings of the DSB under Article 21.5 of the DSU. Therefore, these results fall outside the scope of Article 21.5, and this Panel lacks jurisdiction to review them.

A. Article 21.5 Proceedings are Limited to "Measures Taken to Comply" With the DSB's Recommendations and Rulings

13. The subject matter of these proceedings is determined by the Panel's terms of reference and

DSB. Rather, it resulted from a *separate* affirmative request by Canada, among others, that Commerce review *new* sales and subsidies data for the purposes of assessing countervailing duties for imports during the review period and of setting a new estimated countervailing duty rate for subsequent imports. US law required Commerce to conduct this assessment review once Canada, among others, requested it.[24]

23. Indeed, the assessment review was initiated on 1 July 2003, *eight months* before the recommendations and rulings in this dispute were adopted. This review proceeding, therefore, had nothing whatsoever to do with "implementing" the DSB's recommendations and rulings. For obvious temporal reasons, the results of this assessment review – which was initiated before the DSB issued its recommendations and rulings – cannot be considered "measures taken to comply".

24. Article 21.5 proceedings are by their nature more focused and limited than other panel proceedings under Article 6.2 of the DSU. Notably, instead of six months, the DSU anticipates that Article 21.5 proceedings will normally take no more than 90 days.[25] Canada, for its part, has underscored this aspect of these proceedings by systematically opposing any extensions of time in this proceeding.[26] For this reason, Article 21.5 proceedings are intended to focus, not on *any* measure cited by the complaining Member – as is the case for other dispute settlement proceedings – but only on *measures taken to comply* with DSB recommendations and rulings. It is beyond the scope of such a limited 90-day inquiry to fully examine an entirely new set of assessment review results based on a wholly new administrative record, consisting of new sales, new imports, potentially new respondents and potentially new subsidy programmes.

25. In sum, in this Article 21.5 proceeding, the Panel lacks jurisdiction to review the final results of the assessment review cited by Canada because these results are not "measures taken to comply" with the DSB's recommendations and rulings, adopted on 17 February 2004, related to Commerce's Final Determination in the original countervailing duty investigation.

IV. Canada Bears the Burden of Proving its Claims

26. It is well-established that the complaining party in a WTO dispute bears the burden of coming forward with argument and evidence that establish a *prima facie* case of a WTO inconsistency.[27] If the balance of evidence and argument is inconclusive with respect to a particular claim, Canada, as the complaining party, must be fo,8a theWmpu

34. Second, Commerce properly investigated and made a determination concerning whether particular sales were at "arm' s length." Contrary to Canada's arguments[32], nothing in the SCM Agreement, the GATT 1994, or the DSB's recommendations and rulings supports Canada's argument that an arm's-length analysis should be restricted to, in essence, a *per se* test based on affiliation alone. Further, part of the DSB's recommendations and rulings related only to a particular category of arm's-length log sales: those between tenured harvester/sawmills and unrelated, non-tenured sawmills.[33] The scope of the DSB' s recommendations and rulings should therefore not be broadened to include entities that were not part of those recommendations and rulings.

35. Finally, the results of Commerce's recalculation were applied to the only rate that was before the original panel and Appellate Body, *i.e.*, the 18.79 per cent *ad valorem* rate calculated in the Final Determination. Therefore, Canada's argument that Commerce applied the results of its pass-through analysis to a rate "which long before had been invalidated as a result of judicial review proceedings"[34] is without basis.

VII. Conclusion

36. For the reasons stated above, Canada's claims against US implementation of the DSB's recommendations and rulings have no basis in the SCM Agreement, the GATT 1994, or the recommendations and rulings of the DSB. The United States therefore requests that the Panel find that the United States properly implemented the recommendations and rulings of the DSB and that the Panel reject Canada's claims in their entirety. Further, the United States requests that this Panel find that the results of the first assessment review fall outside the Panel's jurisdiction in this Article 21.5 dispute.

[32] *E.g.*, First Written Submission of Canada, paras. 59 -65.
[33] *E.g.*, Appellate Body Report, para. 167(e).
[34] First Written Submission of Canada, para. 10.

ANNEX B-2

SECOND WRITTEN SUBMISSION OF THE UNITED STATES

31 March 2005

I. Introduction

1. On 10 March 2005, the United States filed its First Submission and Request for Preliminary Ruling. Pursuant to the Panel's working procedures, the United States is now filing its rebuttal submission.

2. To implement the recommendations and rulings of the Dispute Settlement Body ("DSB") in *United States – Final Countervailing Duty Determination With Respect to Certain Softwood Lumber From Canada*[1],, on 6 December 2004, the US Department of Commerce ("Commerce") issued a revised determination ("Section 129 Determination").[2] In accordance with those recommendations and rulings, in the context of its Final Determination[3], Commerce determined the amount of the subsidy that passed through the purchase transaction with respect to certain arm's-length log sales between unrelated parties. Ultimately, Commerce's analysis of log sales demonstrated to be at arm's length resulted in a C$28,344,121 reduction in the numerator of the *ad valorem* subsidy rate, which had the effect of reducing the country-wide subsidy rate from 18.79 per cent *ad valorem* to 18.62 per cent *ad valorem*.[4] Commerce's Section 129 Determination is consistent with the DSB's recommendations and rulings, the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") and the

United States to comply with the DSB's recommendations and rulings or results in a measure that is inconsistent with the SCM Agreement or the GATT 1994.

4. As described below, and contrary to Canada's arguments, Commerce conducted its pass-through analysis consistently with the DSB's recommendations and rulings, and the resulting measure at issue is consistent with the SCM Agreement and the GATT 1994.

II. Commerce Conducted a Pass-Through Analysis That is Consistent with the DSB's Recommendations and Rulings and with the SCM Agreement and GATT 1994

5. Canada does not challenge Commerce's general approach of reducing the numerator of the *ad valorem* subsidy rate calculation to eliminate subsidies attributed to arm's-length sales in which no benefit was passed through. Instead, Canada complains that Commerce, rather than conducting a pass-through analysis, "presumed" pass through. A foundation of Canada's "presumption" argument is its assertion that Commerce must adopt an unreasonable definition of the term "arm's length"[5] that

the sale, and thus undermine the arm's-length nature of the sale. Finally, to conduct the "competitive benefit" analysis, through which Commerce measured whether and to what extent any subsidy passes through, Commerce required specific data on prices, species, size, grade, quality, discounts delivery terms, and payment terms.

8. Therefore, Commerce asked Canada, through questionnaires, to identify the volume of log sales subject to its pass-through claims, and to provide specific information necessary to determine whether log sales were between unrelated parties and at arm's length. This would allow Commerce to identify transactions that were eligible for the last phase of the analysis (competitive benefit). The

independent harvesters concerning affiliations and corporate relationships, as well as information relating to the terms of the sales, including log sales data and purchase contracts.[15]

12. On 15 September 2004, the Canadian parties submitted their responses to this supplemental questionnaire. Certain sawmills and independent harvesters submitted responses to the pass-through appendix. However, notwithstanding Commerce's earlier notice to Canada that in the absence of the requested data Commerce might not have sufficient data to complete its pass-through analysis, Canada once again provided incomplete responses to Commerce's data requests. Canada posited two reasons for its failure to respond properly to Commerce's requests: first, it claimed that certain of the requests were voluminous and that it was burdensome for it to collect the data; second, it claimed that certain information requested by Commerce was not relevant.[16]

13. On 5 October 2004, Commerce issued a second supplemental pass-through questionnaire and a supplemental pass-through appendix. Because the provincial governments failed to respond adequately to Commerce's earlier questionnaires, Commerce again requested clarifying and additional information. As noted in its second supplemental pass-through questionnaire, Commerce modified certain of its requests, where practicable, in response to Canada's claim that to provide the information was burdensome.[17] With respect to Canada's claim that certain information was not relevant, Commerce reiterated to Canada that it needed the data to conduct the DSB's recommended analysis. The Canadian parties submitted a response to the second supplemental questionnaire on 25 October 2004.

14. By refusing to provide certain of the data requested by Commerce, Canada was and is attempting to restrict Commerce's ability to conduct a meaningful pass-through analysis. Canada contends that Commerce's arm's-length analysis should be nothing more than a simple determination of whether the parties to the transaction are unrelated. Indeed, Canada argues that Commerce erred in not relying upon Canada's "aggregate" data – data that (although limited to sales between unrelated parties) fails to address factors other than affiliation that could render the transactions something other than arm 's length. As discussed below, Commerce's arm's-length analysis properly included examination of issues beyond mere affiliation.

B. Commerce Properly Conducted Its Arm's-Length Analysis as Part of Its Pass-Through Analysis

15. Commerce first analyzed the information provided by Canada to determine whether the sales were between related parties. If they were, no

recommendations and rulings concerned only sales between unrelated parties.[18] Commerce next analyzed the sales between unrelated parties to determine if they were at arm's length. Canada challenges this necessary step in its entirety, in the apparent and mistaken belief that all sales between formally unrelated parties are necessarily at arm's length. Therefore, according to Canada, by even analyzing whether such sales are, in fact, at arm's length, and then eliminating sales that fail the arm's-length test from the pass-through analysis, Commerce is somehow illegally "presuming" pass-through. This is incorrect. Indeed, it is Canada that is "presuming" no pass through for all sales

17. Thus, the issue is not merely one of affiliation. In this regard, the DSB's recommendations and rulings themselves recognize a distinction between arm's length and affiliation presenting arm's-length sales as a subset of sales between unrelated entities. Specifically, the DSB ruled that Commerce should have conducted "a pass-through analysis in respect of *arm's length sales* of *logs* . . . to *unrelated* sawmills".[23] This is completely inconsistent with Canada's contention that an arm's-length analysis requires nothing more than a determination of affiliation.[24]

18. Commerce properly examined, in its pass-through analysis, whether the parties to the log sales were related through common ownership and also whether any of the circumstances surrounding the log sales affected the nature of the sales to such an extent that they could not be considered arm's length. Initially, and as discussed above, Commerce examined whether any of the log sales at issue were between affiliated parties. Consistent with the DSB's recommendations and rulings, when Commerce found that sales were between affiliated parties, it performed no further pass-through analysis.[25] If the sales were between unaffiliated parties, Commerce examined the circumstances surrounding the transactions as part of its "arm's length" analysis.

19. Commerce properly examined the circumstances surrounding the sales Canada reported as occurring between unrelated parties. Although Canada objects to Commerce's approach, Canada can point to no language in the SCM Agreement, the GATT 1994, or the DSB's recommendations and rulings that establishes the *per se* affiliation analysis advanced by Canada. Indeed, the record evidence demonstrates that many of the sales that Canada claims are arm's-length sales are affected by government mandates and other conditions that render those sales not at arm's length or otherwise ineligible for the pass-through analysis. These will be discussed in the following section.

2. The Record Demonstrates that Under the Canadian Stumpage System, Many of the Circumstances of the Sales are Controlled by Government Mandates and Other Conditions

20. Canada's simplistic *per se* approach is divorced from the r

consistent with any reasonable reading of the term "arm's length," that the affected sales were not at arm's length.[28]

22. Further, based on the record, Commerce determined that there was an additional factor[29] – other than the above government-mandated restrictions – that affected many of the Canadian log sales such that they could not be considered to be at arm's length. The actual structure of certain log purchase agreements[30] empowered the purchasing sawmill to control so many aspects of the transaction that Commerce determined that transactions covered by such purchase agreements could not be considered to be arm's length. Specifica

C. Commerce Appropriately Required That Canada Provide Company-Specific Information to Determine Whether the Transactions for Which a Pass-Through Analysis Was Requested Were Eligible for Such Analysis

25. Canada contends that Commerce improperly disregarded "aggregate" data that it submitted containing sales information from the provinces that generally identified the purchasers and sellers and the volume and value of sales that Canada identified using its *per se* test as arm's-length transactions.[34] Canada also complains that Commerce refused to rely upon certain "sample" data. As discussed above, however, Commerce correctly determined that the arm's-length component of its pass-through analysis required more than just a determination concerning whether parties were affiliated. Additionally, Commerce correctly determined that other factors affected the pass-through analysis. Thus, Commerce required specific information on each transaction for which Canada requested a pass-through analysis, which necessitated that Canada provide more than just its aggregate data and, in some cases, more than its self-selected sample data.[35] This follows not only from the very nature of the enquiry, but also from the DSB's recommendations and rulings themselves.

26. The DSB's recommendations and rulings required that Commerce determine whether transactions between independent harvesters and sawmills, as well as between tenured harvesters/sawmills and sawmills, "passed through" the benefit from subsidies provided to the independent harvesters or tenured harvesters/sawmills. This is a company-specific issue, *i.e.*, an issue that is specific to each combination of log buyer and log seller, and the DSB recognized it as such.

27. Specifically, for instance, the Appellate Body referred to "the producer of the input" and "the producer of the product processed from the input", finding that, "it would not be possible to determine whether countervailing duties levied on the processed product are *in excess* of the amount of the total subsidy accruing to that product, without establishing whether, and in what amount, subsidies bestowed upon the producer of the input flowed through, downstream, to the producer of the product processed from that input".[36] While noting that the United States, in accordance with Article 19.3 of the SCM Agreement, had conducted an aggregate countervailing duty investigation, both the original panel and the Appellate Body found that this did not excuse Commerce from examining whether the *individual transaction* between the input supplier and the producer passed through the subsidy benefit. Thus, "before being entitled to impose countervailing duties on a processed product, for the purpose of offsetting an input subsidy, a Member must first determine, in accordance with Article 1.1, that a financial contribution exists, and that the benefit conferred directly on *the input producer* has been passed through, at least in part, to *the producer* of the processed product."[37]

28. Finally, the Appellate Body was unequivocal that, where the input transaction is *not* at arm's length, there is no need for the investigating authority to analyze whether the subsidy passed through:

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[34] First Written Submission of Canada, paras. 8, 76.

[35] Commerce did not disregard "sample" data provided by Canada. To the contrary, in response to certain concerns expressed by Canada, Commerce permitted Canada to submit subsets of data responding to its qu TD-3.9(i)-08 Exubhi(i)-bi(i)-7(i)-0C(i)5(Ddy)-8(Alate -ry)4432ub4ry ,4.7(pub)2(a)D[(ge 5 .7(i)-06ub)2(.)-5.TD0.7(Wi(i)-7(i)-

Where countervailing duties are used to offset subsidies granted to producers of input products, while the duties are to be imposed on *processed* products, and where input producers and downstream producers operate at *arm's length*

31. In many instances, however, Canada failed to provide the requisite information despite repeated requests that it do so. For example, although Commerce limited its request for tenure agreements containing domestic processing or other mandated requirements to those companies that participated in the Norcon Survey, British Columbia failed to provide the copies that Commerce requested.[47] British Columbia did, however, provide *samples* of such tenure agreements, but the domestic processing requirements included in the sa

32. The truth is that, although Canada prevailed before both the original panel and the Appellate Body in arguing that Commerce was required to conduct this pass-through analysis, Canada apparently was unprepared to support many of its claims of no pass through with necessary evidence. Instead, Canada seeks to undermine Commerce's ability to conduct a full examination of the pass-through issue. Commerce – reasonably and in accordance with the DSB's recommendations and rulings – found that the subsidy benefit passed through where the evidence indicated that the input transaction was not at arm's-length or where the transaction otherwise was ineligible for a pass-through analysis because it was not a sale or because the purchasing sawmill paid the stumpage to the Crown. Where Commerce found the input transaction to be a sale at arm's length, Commerce completed the pass-through analysis required by the recommendations and rulings.

33. As demonstrated by the Section 129 Determination, when Canada properly supported its claims, Commerce was able to, and did, conduct its analysis. Commerce did not improperly "presume" pass-through – to the contrary, as set forth above, Commerce conducted a pass-through analysis in compliance with the SCM Agreement, the GATT 1994, and the recommendations and rulings of the DSB.

D. Commerce Used Appropriate Benchmarks in its Pass-Through Analysis

34. Canada criticizes Commerce benchmarks but fails to allege any inconsistency with a provision of the SCM Agreement, the GATT 1994, or the DSB's recommendations and rulings. Thus, the Panel should reject Canada's argument on this basis alone.

35. In any event, Commerce selected appropriate benchmarks. Where Commerce – upon examining record evidence – determined that the input transaction was at arm's length, it proceeded to determine whether there was a competitive benefit: *i.e.*, whether the benefit "passed through". As previously explained, a subsidy provided to the producer of an input product confers a competitive benefit on a downstream purchaser of the input when the price paid for the subsidized input is lower than the a market determined benchmark price for the same product. In selecting a market determined benchmark, Commerce used, where possible, the actual company-specific prices that the purchasing mill paid for logs harvested from private lands and for imported logs.[55] Where those data were not available, Commerce relied on publicly available prices for logs harvested from private lands and logs imported into the province.[56]

36. Commerce's competitive benefit analysis demonstrated that many of the arm's-length log sales during the POI in Alberta, Ontario, and Saskatchewan, were made at prices below the

[57] because they were unrepresentative of both the species harvested and of the prices paid in each province for logs used in lumber1.0 Tueh-071 0 TD0.0009 Tc0.0114 Tw[(production. Canada is i

result of Commerce's competitive bep ons, therefore, only some portion of the Crown harvest volume originally included in et5lnumerator is excluded from et5lnumerator of the revised subsidy4calcula ions.

37. Canada nowpp TD0 Tntend Commerce relied on benchmarks that do not reflect "a comparip TD7(s)1.8(on)]T

Commerce *conduct* a pass-through analysis. Commerce did so and based its determination upon what the record evidence *demonstrated* the facts to be and not upon what Canada *presumed* the result should be for sales between all unrelated parties.

F. Commerce Properly Investigated Categories of Sales Identified by the DSB

43. According to the DSB's recommendations and rulings, Commerce should investigate transactions between independent harvesters and sawmills[62], as well as between tenured harvesters/sawmills and unrelated sawmills.[63] Although Canada claims that Commerce "inexplicably excluded information of transactions in which the purchasing sawmill had tenure"[64] there is nothing inexplicable about it, as these transactions were not part of the DSB's recommendations and rulings. In this respect, there was a specific definition of both "tenured timber harvester/sawmill" and "sawmill". "Tenured timber harvester/sawmill" was defined as "an enterprise holding a stumpage contract that fells trees and produces logs, and also processes logs into softwood lumber."[65] "Sawmill" was defined as "an enterprise that processes logs into softwood lumber and *does not hold a stumpage contract"*..[66]

44. Given these precise definitions that e xharrcer" w

46. The United States reiterates its request, set out in its submission of 10 March 2005, that the Panel preliminarily rule that the results of the first assessment review are not "measures taken to comply" and therefore are outside Panel's jurisdiction in this proceeding. In particular, the United States noted in its preliminary ruling request that original investigations and assessment reviews are different processes with different administrative records that serve distinct purposes.[70] In this case, the assessment review was initiated at the behest of Canada, among others, eight months before the recommendations and rulings in this dispute were adopted.

47. This is not a situation like that presented in *Australia – Automotive Leather*, in which a WTO-inconsistent subsidy was both withdrawn and "regranted" in another form on the same day, in "inextricably linked elements of a single transaction".[71] Rather, the assessment review is a completely separate proceeding, based on a different record, designed to assess countervailing duties – a proceeding, moreover, that can be requested by Canada at regular intervals well into the future. Finally, it cannot be seriously asserted that, where there have been DSB recommendations and rulings with respect to the imposition of supplemental duties on a product, any subsequent proceedings related to those duties are "measures taken to comply". A previous panel has already found this not to be the case, in *EC – Bed Linens (Panel).*[72] In sum, the United States reiterates that the results of the first assessment review are neither "measures taken to comply" with recommendations and rulings, nor do they render actual measures taken to comply "non-existent".

IV. The Panel Should Not Make the Specific Recommendations Sought by Canada

48. In its first submission, Canada has asked the Panel to make certain findings and recommendations in the event that it agrees with Canada. Specifically, Canada asks that the DSB find that the imposition of duties by the United States is inconsistent with the SCM Agreement and the GATT 1994 and recommend either that the United States refund the duties collected to offset the amounts determined to pass through or revise its measure to be consistent with the relevant agreements and refund the duties to the extent they exceed the amount of the subsidy determined to have passed-through.[73]

49. The Panel should decline to make such recommendations. The text of DSU Article 19.1 is unequivocal regarding the recommendation that a panel is

V. Conclusion

50. For the reasons stated above, Canada's claims against the measure taken to comply with the DSB's recommendations and rulings have no basis in the SCM Agreement, the GATT 1994, or the

Exhibit List

Number	Name
US-3	Response of the Government of Ontario to the Department's 17 August 2004 Supplemental Pass-Through Questionnaire (15 September 2004) (relevant pages).
US-4	Response of the Government of British Columbia to the Department's 17 August 2004 Supplemental Questionnaire Concerning Pass Through of the Alleged Benefits (September 15, 2004) (relevant pages).
US-5	BLACK'S LAW DICTIONARY, Seventh Edition (West Group 1999) at 103 (definition "arm' s length").
US-6	6 December 2004, "Pass-Through" Analysis Calculations for the Province of Ontario
US-7	6 December 2004, "Pass-Through" Analysis Calculations for the Province of Alberta
US-8	6 December 2004, "Pass-Through" Analysis Calculations for the Province of Saskatchewan
US-9	Response of the Government of British Columbia to the Department's 5 October 2004 Supplemental Questionnaire Concerning Pass Through of Alleged Benefits (October 25, 2004)(relevant pages).
US-10	6 December 2004, Country-wide Rate Calculations Net of Subsidy Benefits That Did

ANNEX B-3

ORAL STATEMENT OF THE UNITED STATES

pass-through related solely to that final investigation determination. The Appellate Body stated that "[b]efore the Panel, Canada challenged a number of aspects of the final determination by [the Commerce Department] that led to the imposition of duties"[5] and the Appellate Body's findings and conclusions – including those with respect to the need for a "pass-through" analysis – thus related only to that final investigation determination.

8. Therefore, to implement the DSB's recommendations and rulings, Commerce issued a new determination – the Section 129 Determination – that revised the original final investigation determination by conducting the recommended pass-through analysis. By correcting the only "inconsistency" identified by the DSB with respect to the final investigation determination, the United States fully implemented the recommendations and rulings of the DSB to bring the measure into compliance with the SCM Agreement.

9. Long before there were any DSB recommendations and rulings to implement, and pursuant to long-standing, standard procedures, Commerce initiated the first assessment review, at the request of Canada, among others. The purpose of the assessment review was to determine the precise countervailing duties that would be levied on particular entries of merchandise entering the United States after the United States had already imposed the countervailing duty measure (in US parlance, after the publication of the countervailing duty order). This assessment review would have been conducted regardless of the existence of any dispute challenging the original investigation determination and it was nearly half over when the recommendations and rulings in this dispute were d th Tcevi, Co

established one of the bases for imposing countervailing duties. The Panel should recall in this connection that the remedy Canada sought in the dispute before the original panel was the revocation of the countervailing duty order, which was based in part on the final investigation determination.

15. The Section 129 Determination, in implementing the recommendations and rulings of the DSB with respect to the final investigation determination, confirmed that the resulting imposition of countervailing duties on 22 May 2002, was consistent with the SCM Agreement. The assessment review could not, and did not, render that Section 129 Determination non-existent. Indeed, the very fact that Canada is, itself, challenging the Section 129 Determination shows that Canada believes that it is of ongoing effect and relevant to the issue of compliance.

16. Further, the Section 129 Determination was fully implemented, and revised the original final investigation determination in every respect necessary to implement the recommendations and rulings of the DSB. For instance, the Section 129 Determination revised the cash deposit rate established by the final investigation determination – a cash deposit rate that, under US law, stays in effect unless and until a party requests an assessment review. If no assessment review is requested, countervailing duties are assessed at the cash deposit rate.

17. Canada's allegation that the Section 129 Determination was "rendered non-existent" appears to be an allusion to the argument that the United States made in the dispute *Australia – Leather*, where withdrawal of the subsidy was non-existent. The situation there, however, is not at all analogous to the facts of this dispute.

18. First, in *Australia – Leather*, the United States was arguing that the panel should review whether a prohibited subsidy had actually been withdrawn, as specifically required by Article 4.7 of the SCM Agreement, when the repayment of a grant had been contingent on the simultaneous grant of a loan on non-commercial terms. In contrast, this proceeding involves the question of whether a measure has been brought into conformity with a WTO agreement.

19. Second, the *Australia – Leather* panel concluded that the subsidy had not been withdrawn at all, because the supposed repayment and the non-commercial loan were, in effect, a single transaction in which the subsidy simply shifted form. By contraSc0n0006 Tchta58c -1.153 TD0.0007 Tc553 Tw[(t5.1(e)uest had

repayment and the non-commercial loan were, as Canada quotes the panel, "inextricably linked elements of a single transaction."[7]

22. But, as we mentioned, that situation is very different from this one. In *Australia – Leather*, the repayment of the grant by the grant recipient was specifically and directly conditioned on the grant recipient receiving the non-commercial loan – there would have been no repayment at all if there had been no loan. It was on that basis that the panel found that the loan was "inextricably linked to the steps taken by Australia in response to the DSB's rulings in [that] dispute, in view of both its timing and nature."[8]

23. In this dispute, by contrast, there is no such connection between the Section 129 Determination and the assessment review results: they were not in any sense contingent on one another, nor were they in any sense part of a single transaction. The assessment review would have

34. Moreover, Canada appears to suggest that the US system of retrospective duty assessments somehow compels the Panel, in the special case of the United States, to sweep the assessment review into this Article 21. 5 proceeding.[9] But there is nothing in Article 21.5 or in the SCM Agreement that requires a different interpretation of "measures taken to comply" for those Members that employ a retrospective duty assessment system, rather than a prospective one.

35. Canada suggested this morning, in paragraph 33 of its oral statement, that the United States had somehow conceded that the assessment review was inconsistent with US WTO obligations. Canada bases this suggestion on the absence of an explanation in the US submissions or oral statement of the pass-through analysis in the first assessment review. This is untrue. The United States has not discussed the assessment review because it falls outside of this Panel's jurisdiction. The United States does not in any sense concede that the pass-through analysis in the assessment review is inconsistent with WTO obligations.

Conclusion

36. In sum, Mr. Chairman and members of the Panel, the results of the first assessment review are not "measures taken to comply" and therefore fall outside the Panel's jurisdiction in this Article 21.5 dispute. Therefore, we reaffirm our request that the Panel so rule.

Pass-Through Analysis

Canada Bears the Burden of Proof

37. It is important to recall that Canada bears the burden of establishing a prima facie case of a WTO inconsistency. In its panel request, Canada specifically refers to three separate provisions: Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994.[10] Although Canada concludes that the United States has acted inconsistently with these provisions, it has failed to demonstrate any such inconsistency or to describe why any of the specific actions that form the bases of its arguments are inconsistent with these provisions. For instance, Canada challenges Commerce's arm's-length analysis yet fails to identify how that analysis is inconsistent with any of the cited provisions. Similarly, Canada challenges the pass-through benchmarks Commerce relied upon yet once again fails to identify any way in which these benchmarks are inconsistent with the cited provisions. Consequently, Canada has failed to make its prima facie case and for that reason alone the Panel should reject Canada's claims.

The United States Properly Implemented the DSB's Recommendations and Rulings

38. The substantive issue facing this Panel is whether the United States properly implemented the recommendations and rulings of the DSB in conducting its pass-through analysis with respect to the final investigation determination. The answer is clearly "yes". The positions of the United States with respect to its Section 129 Determination are more fully contained in our written submissions. This morning, we will not repeat all of the points made in those submissions but rather will briefly highlight what we consider to be significant issues as well as respond to the issues raised in Canada's second written submission. As to those issues not raised in this oral statement, we refer the Panel to our written submissions.

39. Initially, we will briefly outline Commerce's pass-through methodology. Next, we will discuss the nature of Commerce's arm's-length analysis and Canada's attempt to truncate that analysis. Then we will focus upon Canada's improper challenge to the benchmarks Commerce relied upon in conducting its pass-through analysis. Finally, we will address Canada's peculiar claim that

[9] Canada Second Written Submission, para. 27.
[10] WT/DS257/15.

US compliance with the express terms of the Appellate Body Report, was an effort by the United States to avoid its WTO obligations.

Pass-Through Methodology

40. The DSB determined that the United States acted inconsistently with certain of its WTO obligations when it failed in its final investigation determination to conduct a pass-through analysis with respect to two categories of arm's-length log sales between unrelated parties. To implement those recommendations and rulings Commerce was first required to obtain additional information from Canada relating to the POI. That information was requested through a series of questionnaires. Specifically, Commerce requested information relating to those log sales for which Canada was claiming that the subsidy did not pass through to the purchasing sawmill.

41. As a threshold matter, Commerce examined the data provided by Canada to determine whether the sales were between affiliated, that is, related, parties. Consistent with the DSB's recommendations and rulings, when Commerce found that the sales were between affiliated parties, it performed no further pass-through analysis. If the sales were identified as being between unaffiliated parties, Commerce examined the circumstances surrounding the transactions to determine whether the parties operated at arm's length. Where Commerce determined that the transaction was at arm's length, it next determined whether there was a competitive benefit, that is, whether the benefit "passed through" to the purchasing mill using market-determined benchmarks. Ultimately Commerce's analysis of arm's-length log sales between unaffiliated parties resulted in a reduction in the numerator of the *ad valorem* subsidy rate which in turn, had the effect of reducing the country-wide subsidy rate.

42. Consistent with the DSB's recommendations and rulings, Commerce conducted a pass-through analysis and based its determination upon what the record evidence demonstrated the facts to be.

Commerce Properly Conducted its Arm's-Length Analysis

43. There is no dispute between the parties that for a transaction to be eligible for consideration in Commerce's pass-through analysis, the DSB determined that the transaction must be between unrelated parties and be at arm's length.[11] Canada does not challenge Commerce's affiliation determinations, so we will not discuss those threshold determinations. Rather, the dispute between the parties concerns the interpretation of the term "arm's length" – a term that is not defined in the text of the SCM Agreement.

44. The Appellate Body found that both the SCM Agreement and the GATT 1994 require that Commerce establish that the benefit is passed through to the downstream processor where subsidies are bestowed directly on producers of an input product while the countervailing duties are to be imposed on processed products, "and where the input producers and downstream processors operate at *arm's length*".[12] Thus, where the two producers do not operate at arm's length, no pass-through analysis is required because the subsidy bestowed on the input producer benefits the producer of the processed product. The United States properly determined that whether entities operate at "arm's length" involves more than simply an examination of formal affiliation – rather, it involves analysis of whether one party effectively controls the other or whether the parties have roughly equal bargaining power.

45. Canada, however, conflates the issues of affiliation and arm's length arguing that an arm's-length determination requires nothing more than a determination of affiliation. Indeed, Canada's *per se* approach to arm's length is set forth in paragraph 62 of its first written submission when it

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states "that a transaction between unrelated parties is by definition an arm's-length transaction". Because Canada treats these disparate concepts as one, Canada contends that by analyzing whether such sales are, in fact, at arm's length, and then eliminating sales that are not at arm's-length from the pass-through analysis, Commerce somehow "presumed" pass-through. To the contrary, it is Canada that is presuming no pass through whenever there are sales between unaffiliated parties.

46. By contrast, the DSB recognized a distinction between arm's length and affiliation in its recommendations and rulings, noting that Commerce should have conducted a "pass-through analysis in respect of *arm's length* sales of *logs . . . to unrelated* sawmills".[13] Canada's approach which would end the analysis once affiliation is determined is thus inconsistent with the DSB's recommendations and rulings.

47. In contrast, and consistent with the DSB's recommendations and rulings, Commerce properly examined the circumstances surrounding the sales that Canada reported a6 Td ruo16 Td r3sc0.0'

necessity for such benchmarks but rather, argues that because Commerce's benchmarks include import prices, the benchmarks are not representative of market conditions in Canada.

59. In selecting market-determined benchmarks, Commerce used, where possible, the actual company-specific prices that the purchasing mill paid for logs harvested from private lands and for imported logs. Commerce requested in its supplemental pass-through questionnaires and accompanying pass-through appendices that Canada provide such data to assist Commerce in developing market benchmarks. As evidenced by Commerce's calculations, where those company-specific purchase data were available, Commerce used them. Where such data were not available, Commerce used publicly available prices for logs harvested from private lands and for imported logs.

60. Canada raises two separate challenges to the US benchmarks in its second submission. The first challenge relates solely to the benchmark developed for Saskatchewan. The second challenge relates to Commerce's inclusion of import prices in its benchmarks generally. We will discuss Canada's general challenge to the inclusion of import prices in the benchmarks before discussing Canada's specific challenge relating solely to Saskatchewan.

61. In developing its benchmarks, Commerce determined to use prices based on market conditions in Canada. Import log prices, like domestic log prices, reflect prices that purchasers in Canada paid for logs during the POI. Consequently, Commerce included import prices in its benchmarks. Despite the fact that these import prices are actual Canadian transaction prices, Canada argues that Commerce must ignore these prices. There is no basis, however, for doing so.

62. Moreover, Canada's claim that the import data are taken from an excessively broad tariff classification is misplaced. Canada collects data on several categories of imports of "wood in the rough . . . Other, coniferous" - "Poles," "Piles and fence posts," "Logs for pulping," and "Other," (the "Other" category is broken down by species).[16] Logs used for lumber production thus fall into this last category, which was the only category Commerce included in its benchmarks. **Although Canada speculates that other higher value products may also have been included in this last category, the evidence is to the contrary. For example, Canada states that imports of high-value veneer logs would also fall into this cat[illegible]**