

**ANNEX A**

**Submissions of Canada**

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## ANNEX A-1

### FIRST WRITTEN SUBMISSION OF CANADA

24 February 2005

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**TABLE OF CASES CITED IN THIS SUBMISSION**

Appellate Body Report	<i>United States - Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , Report of the Appellate Body, WT/DS257/AB/R, adopted 17 February 2004.
Panel Report	<i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , Report of the Panel, WT/DS257/R, adopted 17 February 2004.
<i>Canada – Aircraft</i>	<i>Canada – Measures Affecting the Export of Civilian Aircraft</i> , Report of the Appellate Body, WT/DS70/AB/R, adopted 20 August 1999.
<i>US – Canadian Pork</i>	<i>United States – Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada</i> , Report of the Panel, adopted 11 July 1991, BISD 38S/30.
<i>US – Countervailing Measures on Certain EC Products</i>	<i>United States – Countervailing Measures Concerning Certain Products from the European Communities</i> , Report of the Panel, WT/DS212/R, adopted 8 January 2003.
<i>US – Countervailing Measures on Certain EC Products</i>	<i>United States – Countervailing Measures Concerning Certain Products from the European Communities</i> , Report of the Appellate Body, WT/DS212/AB/R, adopted 8 January 2003.
<i>US – Lead and Bismuth II</i>	<i>United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom</i> , Report of the Panel, WT/DS138/R and Corr.2, adopted 7 June 2000.
<i>US – Lead and Bismuth II</i>	<i>United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom</i> , Report of the Appellate Body, WT/DS138/AB/R, adopted 7 June 2000.
<i>US – Softwood Lumber III</i>	<i>US – Preliminary Determinations with Respect to Softwood Lumber</i> , Report of the Panel, WT/DS236/R, adopted 2 November 2002.

**TABLE OF ABBREVIATIONS USED IN THIS SUBMISSION**

Alberta 21 May 2004 Pass-Through Questionnaire Response	Response of the Government of Alberta to the Department's 14 April 2004 Questionnaire Concerning Pass Through of Alleged Benefits (May 21, 2004) (Exhibit CDA-13).
Alberta 15 September 2004 Supp.Pass-Through Questionnaire Response	Response of the Government of Alberta to the Department's 17 August 2004 Supplemental Questionnaire Concerning Pass Through of Alleged Benefits (15 September 2004) (Exhibit CDA-14).
Alberta 12 November 2003 AR Questionnaire Response	Response of the Government of Alberta to the Department's 12 September 2003 Questionnaire (12 November 2003) (Exhibit CDA-38).
B.C. 15 September 2004 Supp. Pass-Through Questionnaire Response	Response of the Government of British Columbia to the Department's 17 August 2004 Supplemental Questionnaire Concerning Pass Through of Alleged Benefits (15 September 2004) (Exhibit CDA-32).
B.C. 12 November 2003 AR Questionnaire Response	Response of the Government of British Columbia to the Department's 12 September 2003 Questionnaire 12 (November 2003) (Exhibit CDA-33).
Draft Section 129 Determination	USDOC Memorandum from J. Jochum to J. May, <i>Draft Decision Memorandum, 129 Proceeding for the WTO Appellate Body finding in the Final Countervailing Duty Determination, Certain Softwood Lumber from Canada</i> (19 November 2004) (Exhibit CDA-6).
DSB	Dispute Settlement Body
DSU	<i>Understanding on Rules and Procedures Governing the Settlement of Disputes</i>
Final AR Determination	<i>Issues and Decision Memorandum: Final Results of Administrative Review: Certain Softwood Lumber from Canada, C-122-839</i> (13 December 2004) (Exhibit CDA-11).
Final AR Determination Notice	<i>Notice of Final Results of Countervailing Duty Administrative Review and Rescission of Certain Company-Specific Reviews: Certain Softwood Lumber Products from Canada, 69 Fed. Reg. 75,917</i> (Dep't Commerce, 20 December 2004) (Exhibit CDA-8).
Final Section 129 Determination	USDOC Memorandum from J. Jochum to B. Tillman, <i>Section 129 Determination: Final Countervailing Duty Determination, Certain Softwood Lumber from Canada</i> (6 December 2004) (Exhibit CDA-5).
GATT 1994	<i>General Agreement on Tariffs and Trade 1994</i>
Kalt 2004a	J.P. Kalt and D. Reishus, <i>Statement for the First Administrative Review</i> , Attachment 1 to Letter from British Columbia Lumber Trade Council to USDOC (15 March 2004) (Exhibit CDA-21).
Kalt 2004d	J.P. Kalt and D. Reishus, <i>Economics of Arms's Length Transactions and Subsidy Pass-Through</i> , submitted as Response of the Government of British Columbia to the Department's 17 August 2004 Supplemental Questionnaire Concerning Pass Through of Alleged Benefits (15 September 2004), Exhibit BC-PT-39 (Exhibit CDA-20).
Manitoba 21 May 2004 Pass-Through Questionnaire Response	Response of the Government of Manitoba to the Department's 14 April 2004 Questionnaire Concerning Pass Through of Alleged Benefits (May 21, 2004) (Exhibit CDA-43).

Manitoba 12 November 2003 AR Questionnaire Response	Response of the Government of Manitoba to the Department's 12 September 2003 Questionnaire (12 November 2003) (Exhibit CDA-47).
Norcon A	Response of the Government of British Columbia to the Department's April 14, 2004 Questionnaire Concerning Pass Through of Alleged Benefits (21 May 2004), Exhibit BC-PT-18 (Letter from Steptoe & Johnson to Akin, Gump, Strauss, Hauer & Feld (20 May 2004) attaching <i>Survey of Primary Sawmills' Arm's Length Log Purchases In the Province of British Columbia</i> (21 December 2001), filed with Letter from Steptoe & Johnson to USDOC (21 December 2001)) (Exhibit CDA-30).
Norcon B	Response of the Government of British Columbia to the Department's 17 August 2004 Supplemental Questionnaire Concerning Pass Through of Alleged Benefits (15 September 2004), Exhibit BC-PT-40 ( <i>Supplemental Report on Survey of Primary Sawmills' Arm's Length Log Purchases In the Province of British Columbia</i> (14 September 2004)) (Exhibit CDA-15).
Norcon C	Norcon Forestry Ltd., <i>Survey of Primary Sawmills' Arm's Length Log Purchases in British Columbia</i> (15 March 2004), submitted with Letter from Steptoe & Johnson to USDOC (15 March 2004) (Exhibit CDA-31).
OFIA/OLMA 15 September 2004 Supp. Questionnaire Response	Response of the Ontario Forest Industries Association and the Ontario Lumber Manufacturers Association on behalf of their members to the Department's 17 August 2004 Questionnaire Concerning Pass Through of Alleged Benefits (16 September 2004) (Exhibit CDA-49).
OFIA/OLMA 25 October 2004 Supp. Questionnaire Response	Response of the Ontario Forest Industries Association and the Ontario Lumber Manufacturers Association on behalf of their members to the Department's 5 October 2004 2 <sup>nd</sup> Supplemental Questionnaire Concerning Pass Through of Alleged Benefits (26 October 2004) (Exhibit CDA-50).
Ontario 21 May 2004 Pass-Through Questionnaire Response	Response of the Government of Ontario to the Department's 14 April 2004 Questionnaire Concerning Pass Through of Alleged Benefits (21 May 2004) (Exhibit CDA-48).
Preliminary AR Determination	<i>Notice of Preliminary Results of Countervailing Duty Administrative Review: Certain Softwood Lumber from Canada</i> , 69 Fed. Reg. 33,204 (Dep't Commerce, 14 June 2004) (Exhibit CDA-10).
SAA	"Statement of Administrative Action" in <i>Message from the President of the United States Transmitting the Uruguay Round Agreements, Texts of Agreements Implementing Bill, Statement of Administrative Action and Required Supporting Statements</i> , H.R. Doc. No. 103-316, vol. 1 at 656 (Exhibit CDA-1).
Saskatchewan 21 May 2004 Pass-Through Questionnaire Response	Response of the Government of Saskatchewan to the Department's 14 April 2004 Questionnaire Concerning Pass Through of Alleged Benefits (May 21, 2004) (Exhibit CDA-39).
Saskatchewan 12 November 2003 AR Questionnaire Response	Response of the Government of Saskatchewan to the Department's 12 September 2003 Questionnaire (12 November 2003) (Exhibit CDA-42).
SCM Agreement	<i>Agreement on Subsidies and Countervailing Measures</i>
USDOC	United States Department of Commerce

Weyerhaeuser 16 September 2004 Supp. Pass-Through Questionnaire Response	Response of Weyerhaeuser Company to the Department's 14 April 2004 Questionnaire Concerning Pass Through of Alleged Benefits (September 16, 2004) (Exhibit CDA-40).
Weyerhaeuser 26 October 2004 Supp. Pass-Through Questionnaire Response	Response of Weyerhaeuser Company to the Department's Second WTO Supplemental Pass-Through Questionnaire (26 October 2004) (Exhibit CDA-41).

## I. INTRODUCTION

1. This case is about the failure of the United States to implement the recommendations and rulings of the DSB in respect of its obligation to demonstrate whether, and to what extent, an input subsidy passes through arm's-length sales of input products. Article VI:3 of the GATT 1994 and Articles 10 and 32.1 of the SCM Agreement require the United States to demonstrate such a "pass through" as a precondition to imposing countervailing duties on downstream products produced from those inputs. The original panel and the Appellate Body in this dispute found that where the United States presumes, rather than demonstrates, a pass-through, it impermissibly imposes countervailing duties where no subsidy has been determined to exist.

2. On the facts of this dispute, the alleged input subsidy is the provision of goods – standing timber – by Canadian provincial governments for less than adequate remuneration. The input product is a log, which is produced from standing timber harvested from public lands (Crown logs). The downstream processed product is softwood lumber, which is produced from Crown logs.

3. The United States is imposing countervailing duties on imports of Canadian softwood lumber products. Accordingly, it must demonstrate how, and to what extent, any subsidy to Crown logs is *also* an indirect subsidy to softwood lumber in every instance where, on the facts of this dispute, the producer of the Crown log and the producer of the softwood lumber are unrelated.

4. The USDOC has failed to make any such demonstration. Despite the recommendations and rulings of the DSB requiring a demonstration of pass-through, the USDOC continues to presume that pass-through occurred for virtually all arm's-length transactions. Based on this presumption, the USDOC included the subsidy amount attributable to the production of the *log* in its calculation of the amount of the subsidy attributable to the production of *softwood lumber*, thereby significantly inflating the overall amount of the countervailing duty imposed on softwood lumber.

5. A pass-through analysis in this dispute would involve comparisons of log input sale prices to a market benchmark price, to establish whether, and to what extent, a benefit within the meaning of Article 1.1(b) of the SCM Agreement is conferred upon the recipients that used the inputs in the production of softwood lumber. Because the USDOC failed to consider virtually all of the arm's-length log transactions at issue, it did not make such comparisons. The USDOC therefore presumed that log producers lowered the price of logs by the full amount of the alleged input subsidy in their sales to unrelated softwood lumber producers.

6. The USDOC failed to consider arm's-length log transactions for three reasons.

7. First, it refused to collect or analyze record evidence pertaining to log transactions between tenured sawmills.

8. Second, the USDOC ignored record evidence concerning pricing submitted by the Canadian respondents because the information was in aggregate form. Although the USDOC used aggregate data to conduct the softwood lumber investigation, and consistently refused throughout the investigation to consider company-specific information, it nevertheless deemed aggregate data inappropriate for a pass-through analysis. No exception exists in the GATT 1994 or in the SCM Agreement allowing the USDOC to refuse to conduct the required pass-through analysis on the grounds that available data are in aggregate form.

9. Third, with respect to the evidence of log transactions that the USDOC did consider, it deemed there to have been a full pass-through of the alleged log subsidy if any of five factors it identified existed. Nothing in the original panel or Appellate Body reports suggests that these factors are relevant to a pass-through analysis. Those reports confirm that an investigating authority must establish the existence and amount of a benefit pass-through where a subsidy is received by someone

other than the producer or exporter of the investigated product; this obligation is without further qualification. The USDOC reliance on such factors to reject log transactions as being not at arm's length also is contrary to generally accepted economic principles.

10. The USDOC applied the results of the limited pass-through analysis that it did conduct to the countervailing duty rate established in the original investigation, which long before had been invalidated as a result of judicial review proceedings conducted in accordance with US law. A few days later, the USDOC imposed a new countervailing duty rate based on the results of its administrative review, in which it conducted no pass-through analysis at all.

11. In order to bring its imposition of duties into conformity with US obligations under the GATT 1994 and the SCM Agreement, the USDOC must establish, and not presume, whether and to what extent the benefit from the alleged log subsidy flows through to the production of softwood lumber where the parties to the log transaction are unrelated. The USDOC has not done so. Instead, it has claimed that for the vast majority of transactions no such analysis was required. This claim of compliance has no basis, and Canada asks the Panel to so determine.

12. Canada begins this submission with a description of the relevant facts underlying the dispute. Canada then addresses the US obligations at issue, the violation of these obligations, and the consequential effect on the US countervailing duties that continue to be imposed.

## II. FACTUAL BACKGROUND

### A. Procedural History

13. On 17 February 2004, the DSB adopted the recommendations and rulings in the reports of the original panel and the Appellate Body in *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*.<sup>1</sup>

14. On 5 March 2004, the United States notified the DSB, pursuant to Article 21.3 of the DSU, of its intention to implement these recommendations and rulings.<sup>2</sup> Canada and the United States agreed shortly afterward on a ten-month “reasonable period of time”, beginning 17 February 2004, for the United States to implement the recommendations and rulings of the DSB.<sup>3</sup>

15. At the DSB meeting of 17 December 2004, the United States informed the DSB that it had complied with its recommendations and rulings. Canada subsequently requested the establishment of an Article 21.5 compliance panel.<sup>4</sup>

16. The DSB established this Panel at its meeting of 14 January 2005, and referred the matter of suspension of concessions to Article 22.6 arbitration.<sup>5</sup>

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<sup>1</sup> DSB, *Minutes of Meeting (17 February and 19 March, 2004)*, WT/DSB/M/165, 30 March 2004, at 4(a), para. 49. See also Appellate Body Report and Panel Report.

<sup>2</sup> *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada, Communication from the United States*, WT/DS257/12, 9 March 2004.

<sup>3</sup> *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada, Agreement under Article 21.3(b) of the DSU*, WT/DS257/13, 30 April 2004.

<sup>4</sup> *United States – Final Countervailing Duty Determination With Respect to Certain Softwood Lumber from Canada, Recourse to Article 21.5 of the DSU by Canada, Request for Establishment of a Panel*, WT/DS257/15, 4 January 2005; and *United States – Final Countervailing Duty Determination With Respect to Certain Softwood Lumber from Canada, Recourse to Article 22.2 of the DSU by Canada*, WT/DS257/16, 4 January 2005.

<sup>5</sup> *United States – Final Countervailing Duty Determination With Respect to Certain Softwood Lumber from Canada, Recourse by Canada to Article 21.5 of the DSU, Constitution of the Panel*, WT/DS257/19, 14 February 2005; and *United States – Final Countervailing Duty Determination With Respect to Certain*



**B. DSB Recommendations and Rulings Concerning the US Failure to Demonstrate Pass-Through**

17. The United States imposes countervailing duties on imports of certain Canadian softwood lumber products based on the USDOC determination that Canadian provincial stumpage programmes subsidize the production of softwood lumber. Stumpage programmes impose obligations such as the payment of fees, road construction and maintenance requirements, and fire protection and insect and disease control, in exchange for rights to harvest standing timber on public lands. Standing timber is harvested and processed into logs.<sup>6</sup> Logs may then serve as inputs for further processing in, *inter alia*, sawmills and pulp mills to produce a wide variety of forest products, including softwood lumber. These facts, as confirmed by the original panel and the Appellate Body, as well as by the panel in *US – Softwood Lumber III*, have not changed since the initiation of the US countervailing duty investigation.<sup>7</sup>

18. On the basis of these facts, the original panel found that the USDOC was required to conduct subsidy “pass-through” analysis where:

- tenured timber harvesters who do not produce softwood lumber provide logs to unrelated downstream lumber producers (“independent harvester” transactions);
- tenured timber harvester/lumber producers provide logs to other unrelated lumber producers (“sawmill-to-sawmill” transactions); and
- tenured timber harvester/lumber producers sell lumber to unrelated downstream lumber re-manufacturers (“re-manufacturer” transactions).<sup>8</sup>

19. The panel concluded:

that the USDOC's failure to conduct a pass-through analysis in respect of upstream transactions for log and lumber inputs between unrelated entities was inconsistent with Article 10 SCM Agreement and Article VI:3 of GATT 1994, and we therefore *uphold* Canada's claim that the United States' imposition of countervailing duties in respect of such transactions was inconsistent with Articles 10 and 32.1 SCM Agreement and Article VI:3 of GATT 1994 (...).<sup>9</sup>

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*Softwood Lumber from Canada, Recourse by the United States to Article 22.6 of the DSU, Constitution of the Arbitrator*, WT/DS257/20, 14 February 2005.

<sup>6</sup> These obligations are imposed through complex tenure and licensing agreements.

<sup>7</sup> Panel Report, at para. 7.84 (“In considering Canada's pass-through claim in detail, we recall that countervailing measures are applied to imports of certain products (the subject merchandise), which in the countervailing duty investigation in dispute before us comprises softwood lumber products produced by sawmills from logs, and re-manufactured softwood lumber products produced by re-manufacturers from lumber obtained from sawmills.”); Appellate Body Report, at para. 124 (“We found above that the stumpage programmes of Canadian provinces at the heart of this case provide standing timber to timber harvesters, allegedly conferring a benefit. The standing timber eventually becomes felled trees or logs, which are processed into softwood lumber as well as remanufactured lumber products. USDOC defined the product subject to the investigation at issue as ‘certain softwood lumber’, which includes ‘primary’ lumber and ‘remanufactured’ lumber. The United States imposed countervailing duties on imports of these softwood lumber products from Canada.”). See also *US – Softwood Lumber III*, at paras. 7.68-7.69.

<sup>8</sup> Panel Report, at para. 7.99.

<sup>9</sup> Panel Report, at para. 8.1(c) [emphasis in original].

20. On appeal, the United States accepted these findings and conclusions, as applied to independent harvester transactions.<sup>10</sup> However, the United States asked the Appellate Body to reverse the panel's findings regarding sawmill-to-sawmill transactions and re-manufacturer transactions. The Appellate Body reversed the panel's findings on re-manufacturer transactions<sup>11</sup>, but upheld the panel's findings on sawmill-to-sawmill transactions:

[T]he Appellate Body... upholds the Panel's finding, in paragraph 7.99 of the Panel Report, that USDOC's failure to conduct a pass-through analysis in respect of arm's length sales of *logs* by tenured harvesters/sawmills to unrelated sawmills is inconsistent with Articles 10 and 32.1 of the *SCM Agreement* and Article VI:3 of the GATT 1994.<sup>12</sup>

21. The DSB subsequently adopted the Appellate Body report and the panel report and recommended that the United States bring its measure into conformity with its obligations under the SCM Agreement and the GATT 1994.<sup>13</sup>

### **C. US Action Taken to Address Pass-Through Subsequent to the Recommendations and Rulings of the DSB**

#### **1. Section 129 Determination**

22. The United States has enacted legislation that provides for proceedings to address DSB recommendations and rulings concerning a US countervailing duty measure. Section 129(b) of the *Uruguay Round Agreements Act* authorizes the USDOC to "issue a second determination ... to respond to the recommendations in a WTO panel or Appellate Body report."<sup>14</sup> Section 129 proceedings may involve the issuance of new questionnaires and application of new methodologies. The section 129 process represents one way in which the United States may bring the imposition of its countervailing duties into conformity with its obligations.

23. As a result of the DSB recommendations and rulings concerning the US failure to demonstrate a pass-through for independent harvester and sawmill-to-sawmill transactions, the USDOC initiated section 129 proceedings.

24. In questionnaires issued by the USDOC, the Canadian respondents were requested to identify the volume of Crown timber purchased by sawmills in independent harvester transactions. With respect to sawmill-to-sawmill transactions, the USDOC request for information was limited to only a small subset of such transactions.<sup>15</sup> The Canadian respondents replied to these questionnaires, providing a detailed breakdown of the volume of independent harvester transactions and, in many

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<sup>10</sup> Appellate Body Report, at para. 127, and footnote 154. ("The United States notes that it 'does *not* appeal the Panel's finding that, where the subsidy is received by independent harvesters, *i.e.*, entities that do *not* produce [softwood lumber] product[s] under investigation and operate at arm's length, a pass through analysis would be required to determine if the subsidy received by the independent harvesters was indirectly bestowed on production of softwood lumber'. "[emphasis in original])

<sup>11</sup> Appellate Body Report, at paras. 165, 167(f).

<sup>12</sup> Appellate Body Report, at para. 167(e) [emphasis in original].

<sup>13</sup> DSB, *Minutes of Meeting (17 February and 19 March, 2004)*, WT/DSB/M/165, 30 March 2004, at 4(a), para. 49.

<sup>14</sup> SAA, at 1022 (Exhibit CDA-1). See also *Uruguay Round Agreements Act*, Pub. L. No. 103-465, § 129(b), 108 Stat. 4838, *codified at* 19 U.S.C. § 3538(b) (2000) (Exhibit CDA-2).

<sup>15</sup> Letter from USDOC to Embassy of Canada, *Certain Softwood Lumber Products from Canada: WTO "Pass-Through" Questionnaire* (14 April 2004), Question 2, at 11 (Exhibit CDA-3). ("Of the total volume of Crown timber entering sawmills reported by the province, what portion does the province claim was sold in arm's length transactions by tenured timber sawmills to sawmills that do not have a tenure and, therefore, requires an analysis to determine if the purchaser received a subsidy benefit?")

cases, comprehensive data on sawmill-to-sawmill transaction volumes.<sup>16</sup> Annex I contains a detailed explanation of the volumes of record evidence submitted by Canadian provinces and industry associations. For example, British Columbia provided the USDOC with a survey demonstrating that 11.6 per cent of Crown logs consumed in B.C. sawmills were purchased from unrelated non-lumber-producing tenure holders.<sup>17</sup> The survey also demonstrated that an additional 6.2 per cent of Crown logs consumed in B.C. sawmills were purchased in arm's-length transactions from unrelated lumber-producing tenure holders.<sup>18</sup>

25. The USDOC also requested company- or transaction-specific information for each individual log transaction, such as copies of the applicable log purchase agreements and confirmation of which party paid the stumpage fee.<sup>19</sup> In many instances, the Canadian respondents provided sample data, explaining that much of the information was impossible to collect as it involved hundreds of thousands of arm's-length transactions by thousands of companies in Canada. The USDOC nevertheless refused to provide reasonable alternatives even after Canadian respondents explained the impossibility of the USDOC request both in writing and in meetings with USDOC officials, and rejected all information provided in aggregate form.<sup>20</sup>

26. The USDOC then eliminated from consideration most of the transactions for which individual company data were provided on a transaction-by-transaction basis, claiming that "... a significant portion of the transactions included in the claims by Alberta, British Columbia, Manitoba, Ontario and Saskatchewan are not arm's-length sales."<sup>21</sup> The USDOC found that transactions between unrelated parties were not at "arm's length" if any of the following factors existed in the province: (1) limitations on log sales in Crown tenure contracts; (2) wood supply commitment letters; (3) the payment of stumpage fees by the downstream log purchaser; (4) log purchase agreements of a certain structure; or (5) fibre exchange agreements between tenured sawmills. Where any of these "factors" existed, the USDOC did not undertake any price comparisons to establish the pass-through of the log subsidy benefit or its amount.<sup>22</sup> These factors eliminated the vast majority of log transactions remaining after the USDOC had already excluded all aggregate data reported on the record, including all transactions in British Columbia and roughly 90 per cent of the transactions in Alberta.

27. The USDOC maintained that a pass-through analysis was therefore required for only a small fraction of the log transactions occurring between unrelated parties.<sup>23</sup> This analysis led to a reduction

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<sup>16</sup> The "Canadian respondents" comprise the Government of Canada, the Canadian provincial governments, the industry associations and certain Canadian lumber producers.

<sup>17</sup> See Annex I, at para. 79.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*, at para. 75.

<sup>20</sup> See Letter from Weil, Gotshal & Manges to USDOC (16 September 2004), at 2 (Exhibit CDA-4). See also Final Section 129 Determination, at 3-4 (Exhibit CDA-5) ("For sales not conducted at arm's length or for which respondents failed to provide sufficient data to determine whether they were conducted at arm's length, we did not conduct any further pass-through analysis and the volume of these sales was not removed from the numerator of the subsidy calculations."); and Comment 8, at 12-13 ("Although the surveys and sample data provided by the Canadian parties are sufficient for certain analyses undertaken in the context of the aggregate case, such data is not sufficient for the purposes of our pass-through analysis.").

<sup>21</sup> Final Section 129 Determination, at 6 (Exhibit CDA-5). See also Draft Section 129 Determination, at 7 (Exhibit CDA-6).

<sup>22</sup> Final Section 129 Determination, at 4 (Exhibit CDA-5) ("[W]here we determined that any of the sales reported by the Canadian parties were affected by one or several of the five factors listed above, we concluded that transactions were not conducted at arm's length."); and at 6-7 ("If, based on the evidence on the record, we were unable to ascertain that the amount qualified as an arm's-length transaction or that the stumpage for the log was paid by the harvester, we did not compare the price per cubic meter with the benchmark input price and the numerator was not reduced by that volume."). See also Draft Section 129 Determination, at 5, 7-8 (Exhibit CDA-6).

<sup>23</sup> Final Section 129 Determination at 7 (Exhibit CDA-5). ("We determine that the evidence on the record sufficiently demonstrates that, during the POI, there were some arm's-length log sales between sawmills

in the amount of the countervailing duty imposed by 0.17 percentage points (*i.e.*, from 18.79 per cent to 18.62 per cent), which came into force on 10 December 2004.<sup>24</sup>

28. On 13 December 2004, the USDOC released the final results of its administrative review, which contained no pass-through analysis despite arguments and evidence supplied by Canadian respondents that would have enabled the USDOC to conduct one. The revised countervailing duty amount resulting from the administrative review came into force on 20 December 2004.<sup>25</sup> Accordingly, ten days after the final section 129 determination came into force, subsequent action of the USDOC rendered moot the minor pass-through adjustment resulting from it.

## 2. The Administrative Review

29. The United States uses a “retrospective” duty assessment system to periodically review the amount of any countervailing duty imposed as a result of an original final countervailing duty determination. Where no administrative review is requested by an “interested party”, final assessment occurs at the amount of the countervailing duty established in the original determination. Where an administrative review is conducted, the USDOC reviews data for a period of approximately one year from the date of first imposition of final duties (the “period of review”). The revised amount of the countervailing duty established through an administrative review applies, for final assessment purposes, to imports made during that period of review.<sup>26</sup> The revised amount also serves as the amount of duties imposed on imports made after the results of the review come into force, and takes the form of a cash deposit required pending final assessment.

30. As they did for the section 129 proceeding, the Canadian respondents provided the USDOC with all the information necessary to conduct a pass-through analysis in the administrative review. Annex I contains a detailed explanation of this record evidence, which confirmed that a significant volume of log transactions required a pass-through analysis. Here, the USDOC’s request for information was limited exclusively to independent harvester transactions.<sup>27</sup>

31. On 14 June 2004, nearly four months after the adoption of the recommendations and rulings of the DSB, the USDOC published the preliminary results of its administrative review.<sup>28</sup>

32. The USDOC’s preliminary results did not contain a pass-through analysis for any of the log volumes in question. Instead, the USDOC rejected all record evidence provided by the Canadian respondents for reasons similar to those in its section 129 determination. For example, the USDOC rejected record evidence from Alberta, British Columbia and Ontario because, in some log

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and tenured harvesters/sawmills in Alberta, Manitoba, Ontario and Saskatchewan. ... The result of these calculations is that only a small portion of the Crown harvest volume originally included in the numerator is excluded from the numerator of our revised subsidy calculations.”)

<sup>24</sup> *Notice of Implementation under Section 129 of the Uruguay Round Agreements Act; Countervailing Measures concerning Certain Softwood Lumber Products from Canada*, 69 Fed. Reg. 75,305, at 75,306 (Dept. Commerce, 16 December 2004) (Exhibit CDA-7).

<sup>25</sup> Final AR Determination Notice, 69 Fed. Reg. at 75,919-75,920 (Exhibit CDA-8).

<sup>26</sup> The amount of duty applies only to those imports that represent merchandise entered or withdrawn from warehouse for consumption during this period. See, *e.g.*, Final AR Determination Notice, 69 Fed. Reg. at 75,919-75,920 (Exhibit CDA-8).

<sup>27</sup> See Annex I at para. 77. See *e.g.*, Letter from USDOC to Embassy of Canada, *Countervailing Duty Administrative Review: Certain Softwood Lumber Products from Canada* (12 September 2003), Questionnaire for the Province of Alberta, Question III (J) at III-6 (Exhibit CDA-9) (“Did the Government of Alberta (GOA) permit any person or company that did not own or operate a sawmill and was not affiliated with a sawmill to harvest Crown timber during the [period of review]?”).

<sup>28</sup> Preliminary AR Determination, 69 Fed. Reg. 33,204 (Exhibit CDA-10).

transactions, the purchasing sawmill paid the government stumpage charge rather than the independent harvester.<sup>29</sup>

33. The USDOC issued the final results of its administrative review on 13 December 2004.<sup>30</sup> In its final results, the USDOC mirrored the approach it took in its final section 129 determination and reproduced its discussion of the same five “factors” as the basis for not conducting a pass-through analysis for any of the transactions in question.<sup>31</sup> It applied these factors to reject all record evidence provided by the Canadian respondents, and determined that each province “failed to substantiate its claim that logs entering sawmills during the [period of review] included logs purchased in arm’s-length transactions.”<sup>32</sup>

34. As mentioned, the amount of the countervailing duty established in the administrative review superseded the amount adjusted as a result of its section 129 determination ten days after the latter came into force, thereby rendering any purported “prompt compliance with recommendations or rulings of the DSB” under Article 21.1 of the DSU of no effect.

### III. LEGAL ARGUMENT

35. The United States continues to violate its obligations under Article VI:3 of the GATT 1994 and Articles 10 and 32.1 of the SCM Agreement on three fronts.

36. First, the USDOC failed in both the 129 determination and the final results of the administrative review to collect or analyze record evidence pertaining to log transactions between tenured sawmills. It offered no explanation in its determinations or questionnaires for its disregard of the DSB recommendations and rulings in this respect.

37. Second, in its section 129 determination, the USDOC failed to analyze whether, and to what extent, a subsidy pass-through occurred for the vast majority of independent harvester transactions identified in the record evidence, and failed to do so for all such transactions in its administrative review. To justify this failure in its section 129 determination, the USDOC claimed that such analysis may only be done on a company-specific, transaction-by-transaction basis. This claim is without basis, and fails to take into account the efforts of the Canadian respondents to provide the necessary information in the context of an aggregate case.

38. The USDOC also justified its failure to conduct a pass-through analysis in both its section 129 and administrative review determinations by claiming that unrelated parties do not operate at “arm’s length” from each other if any one of five factors external to the transaction exists. There is no basis for the USDOC position under the GATT 1994 and the SCM Agreement, or in the findings of either the original panel or the Appellate Body. Its position also contradicts fundamental principles of economics. The USDOC is required to conduct a pass-through analysis, which involves comparisons to market benchmarks, where the direct recipient of an alleged benefit – the producer of the input product (in this case, logs) – is not the same entity as the indirect recipient of the benefit – the producer of the further processed product (in this case, softwood lumber). The United States may not now evade this obligation by disregarding transactions as being not at “arm’s length” on the basis of an unfounded standard.

39. Third, even in the few instances in its section 129 determination where the USDOC considered log transactions, it nevertheless failed to conduct a proper analysis under Article 1.1(b) of

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<sup>29</sup> *Ibid.*, at 33,208-33,209.

<sup>30</sup> Final AR Determination (Exhibit CDA-11).

<sup>31</sup> Compare Final Section 129 Determination, at 5-7 (Exhibit CDA-5) with Final AR Determination, at 46-47 (Exhibit CDA-11).

<sup>32</sup> Final AR Determination, at 7.

the SCM Agreement because most of the benchmarks it used did not reflect prevailing market conditions for logs in Canada.

40. Thus, for the vast majority of transactions in its section 129 determination and for all transactions in its administrative review, the USDOC conducted no pass-through analysis, and where it purported to conduct such analysis, it did so incorrectly. As a result, the USDOC continues impermissibly to presume a pass-through of the alleged input subsidy. In this dispute, the original panel and the Appellate Body have already confirmed that such a presumption is a violation of WTO obligations.

**A. GATT 1994 and the SCM Agreement Prohibit the United States From Imposing Countervailing Duties To Offset Subsidization That Has Not Been Demonstrated To Exist**

41. In this section, Canada sets out the basic WTO obligations requiring the United States to demonstrate, rather than presume, the existence and amount of a subsidy. Canada also sets out how these obligations have already been interpreted in this dispute as applying in a pass-through context.

42. A Member must establish that a subsidy exists before it may impose countervailing duties, and it may not impose such duties in an amount greater than the amount of the subsidy demonstrated to exist. Article VI:3 of the GATT 1994 sets out this fundamental obligation:

No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party *in excess* of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product ... The term “countervailing duty” shall be understood to mean a special duty levied for the purpose of *offsetting* any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise. [emphasis added]

43. Under this provision, any countervailing duty levied on a product that has not been determined to have been subsidized is necessarily, and fully, “in excess” and there is no lawful “offset”.<sup>33</sup> The obligation is reaffirmed in Article 10 of the SCM Agreement:

Members shall take all necessary steps to ensure that the imposition of a countervailing duty<sup>36</sup> on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated [footnote omitted] and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture.

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<sup>36</sup> The term “countervailing duty” shall be understood to mean a special duty levied for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise, as provided for in paragraph 3 of Article VI of GATT 1994.

44. Finally, Article 32.1 of the SCM Agreement confirms that the imposition of duties is unlawful where a Member fails in this obligation. It provides that “[n]o specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.”

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<sup>33</sup> The ordinary meaning of the verb “offset” is “[s]et off as an *equivalent* against; cancel out by, *balance* by something on the other side or of contrary nature; *counterbalance, compensate*”. See *New Shorter Oxford English Dictionary* (Oxford: Clarendon Press, 1993), at 1985 (Exhibit CDA-12) [emphasis added].

45. Nothing in the context or object and purpose of these provisions alters the fundamental obligation to demonstrate the existence and the amount of a subsidy with respect to a product before imposing countervailing duties on that product.<sup>34</sup>

46. Article 1.1 of the SCM Agreement sets out an exhaustive definition of “subsidy” that applies to this obligation.<sup>35</sup> Under this provision, there is no “subsidy” when a “benefit” has not been conferred upon a recipient.<sup>36</sup> The original panel, referring to the findings of the Appellate Body in *Canada – Aircraft*, found that the term “benefit” “implies some kind of comparison” and that the “marketplace” provides a basis for this comparison.<sup>37</sup>

47. In a pass-through context, the obligation on Members is to compare the transactions in question to the marketplace to determine whether, and to what extent, a benefit under Article 1.1(b) of the SCM Agreement is conferred.<sup>38</sup> As explained by the original panel, the results of such analysis may not be presumed:

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. If it is not demonstrated that there has been such a pass-through of subsidies from the subsidy recipient to the producer or exporter of the product, then it cannot be said that subsidization in respect of that product, in the sense of Article 10, footnote 36, and Article VI:3 of GATT 1994, has been found. Thus, we find that a pass-through analysis is required by these provisions ... where there are such upstream transactions.<sup>39</sup>

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<sup>34</sup> See Panel Report, at paras. 7.90-7.91 (“[B]oth of these provisions make explicit that there must be direct or indirect *subsidization* in relation to the manufacture, production or export of a *product* for a ‘countervailing duty’ in the sense of the [SCM] Agreement and GATT Article VI to be imposed on that product.” [emphasis in original]). See also *US – Softwood Lumber III*, at paras. 7.75, 8.1(c), and *US – Countervailing Measures on Certain EC Products*, Panel Report, at paras. 7.41-7.44, as upheld in *US – Countervailing Measures on Certain EC Products*, Appellate Body Report, at paras. 139 and 161(a), and *US – Lead and Bismuth II*, Panel Report, at para. 6.56, as upheld in *US – Lead and Bismuth II*, Appellate Body Report, at para. 63.

<sup>35</sup> The relationship between the definition in Article 1.1 of the SCM Agreement and the obligations under Article VI:3 of the GATT 1994 and Articles 10 and 32.1 of the SCM Agreement has been explained by the original panel. See Panel Report, at para. 7.88 (“[Footnote 36 to Article 10 of the SCM Agreement] defines what a countervailing duty is, and in so doing makes explicit the link between a ‘subsidy’ to a recipient in the sense of Article 1.1 and the manufacture, production or export of a *product* that is the subject of a CVD investigation and ultimately a countervailing duty. [emphasis in original]”).

<sup>36</sup> Panel Report, at para. 7.53; *Canada – Aircraft*, at para. 154.

<sup>37</sup> The original panel considered this issue in detail in the context of other claims in this dispute. See *e.g.*, Panel Report, at paras. 7.53-54. See also *Canada – Aircraft*, at para. 157.

<sup>38</sup> That pass-through analysis required pricing analysis had been established as far back as the *US – Canadian Pork* dispute. This GATT panel determined that:

[G]iven the existence of separate industries for swine and pork production in Canada operating at arm’s length, the subsidies granted to swine producers could be considered to be bestowed on the production of pork only if they had led to a decrease in the level of prices for Canadian swine paid by Canadian pork producers below the level they have to pay for swine from other commercially available sources of supply.

*US – Canadian Pork*, at para. 4.9.

<sup>39</sup> Panel Report, at para. 7.91. The original panel also explained that a Member may not simply presume whether and to what extent any subsequent “benefit” passed through an input transaction where the transacting parties are unrelated. In agreeing with the findings of the GATT panel in *US – Canadian Pork*, the panel stated:

48. Accordingly, where a subsidy is received by “someone other than the producer or exporter of the product under investigation”, a Member must establish whether and to what extent the benefit to an upstream recipient passes to a downstream entity through the purchase of an input product.

49. The Appellate Body agreed. Drawing on the text of Article VI:3 of the GATT 1994, it found that a Member may not presume that a subsidy passes through transactions where “the producer of the input is not the same entity as the producer of the processed product”.<sup>40</sup> The Appellate Body also explained in no uncertain terms that analysis under Article 1.1(b) of the SCM Agreement is required:

Where a subsidy is conferred on input products, and the countervailing duty is imposed on processed products, the initial recipient of the subsidy and the producer of the eventually countervailed product, may not be the same. In such a case, there is a *direct recipient* of the benefit – the producer of the *input* product. When the input is subsequently processed, the producer of the *processed product* is an *indirect recipient* of the benefit – provided it can be established that the benefit flowing from the input subsidy is passed through, at least in part, to the processed product. Where the input producers and producers of the processed products operate at *arm's length*, the pass-through of input subsidy benefits from the direct recipients to the indirect recipients downstream cannot simply be presumed; it must be established by the investigating authority. In the absence of such analysis, it cannot be shown that the essential elements of the subsidy definition in Article 1 are present in respect of the *processed product*.<sup>41</sup>

50. Despite the clarity of these findings, the United States, in purporting to bring the imposition of its countervailing duties into conformity with this obligation, ignored this obligation entirely with respect to some transactions and unilaterally re-defined the circumstances under which this obligation arises with respect to all other transactions.

## **B. The United States Continues to Impose Countervailing Duties Based On an Impermissible Presumption of Subsidization**

51. Applied to the two factual situations at issue in this dispute, both the original panel and the Appellate Body have made abundantly clear to the United States that it is required under Article VI:3 of the GATT 1994 and under Articles 10 and 32.1 of the SCM Agreement to perform a benefit analysis under Article 1.1(b) for both independent harvester and sawmill-to-sawmill transactions. It has not done so.

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That panel found, as we do, that investigating authorities had the affirmative obligation to make a determination of subsidization in respect of a *product*, and could not simply assume such subsidization where the subsidies were bestowed in respect of a product (the input product) that was different from the *product subject to countervailing duty*, and where the input producers were unrelated to the producers of that subject merchandise. [emphasis in original]

[at para. 7.92]

<sup>40</sup> Appellate Body Report, at paras. 140-141. See also *US – Softwood Lumber III*, at paras. 7.74-7.75.

<sup>41</sup> Appellate Body Report, at para. 143 [emphasis in original]. See also Panel Report, at para. 7.92. The United States had even agreed with the original panel. As noted by the Appellate Body:

[T]he United States accepts that a pass-through analysis is required where a subsidy is bestowed *indirectly* on producers of products subject to the investigation (“subject products”). Thus, if a subsidy is received directly by an entity *other* than a producer of subject products, and that entity subsequently sells inputs to producers of subject products, the investigating authority is required to determine whether at least some of that subsidy is passed through in the sale to the producers of such products.

Appellate Body Report, at para. 129 [emphasis in original], *US – Softwood Lumber III*, at para. 7.70.



52. Instead, the United States has attempted at every turn to avoid its obligations to perform the required analysis and make the required demonstration. This non-compliance with the recommendations and rulings of the DSB has allowed the United States to continue to illegally inflate the amount of its countervailing duties on softwood lumber.

**1. The United States Failed to Conduct Pass-Through Analysis for Log Transactions Between Unrelated Parties**

53. The USDOC failed to conduct the required pass-through analysis for three reasons.

54. First, it presumed a full pass-through of the alleged input subsidy for all log transactions between tenured sawmills. In its section 129 determination, the USDOC restricted its request to the following information:

Of the total volume of Crown timber entering sawmills reported by the province, what portion does the province claim was sold in arm's length transactions *by tenured timber sawmills to sawmills that do not have a tenure* and, therefore, requires an analysis to determine if the purchaser received a subsidy benefit?<sup>42</sup>

55. By restricting its request to log purchases by "sawmills that do not have a tenure", the USDOC inexplicably excluded information on transactions in which the purchasing sawmill had tenure – transactions that constitute the vast majority of sawmill-to-sawmill transactions in Canada. Nowhere did the USDOC make any request for information relating to purchases by sawmill owners that *did* hold tenure. It simply ignored the findings of the original panel and the Appellate Body with respect to such sawmill-to-sawmill transactions, which provide no basis for refusing to conduct a pass-through analysis simply because the purchasing sawmill holds tenure.<sup>43</sup>

56. The transaction volumes between tenured sawmills were excluded by the USDOC despite explicit calls for their inclusion. For example, Alberta noted at the outset of an initial questionnaire response that it believed "that the Department also should be requesting data on arm's length sales of logs between tenureholders where both the buyer and seller are sawmillers" and that it "stands ready to collect and supply this additional information on an expedited basis".<sup>44</sup> These calls went unanswered.

57. In its administrative review, the USDOC failed to request information on any sawmill-to-sawmill transactions. In its only request for information on arm's-length log transactions, the USDOC restricted its request in its initial questionnaire to the volume and value of Crown logs sold by independent harvesters to softwood lumber producers ("by any person or company that did not own or operate a sawmill" or "by non-mill-owning tenure holders").<sup>45</sup>

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<sup>42</sup> Letter from USDOC to Embassy of Canada, Certain Softwood Lumber Products from Canada: WTO "Pass-Through" Questionnaire (April 14, 2004), Question 2 (Exhibit CDA-3) [emphasis added].

<sup>43</sup> Appellate Body Report, at para. 167(e); Panel Report, at paras. 7.99 and 8.1(c).

<sup>44</sup> Alberta 21 May 2004 Pass-Through Questionnaire Response, at AB-1 (Exhibit CDA-13); See also Alberta 15 September 2004 Supp. Pass-Through Questionnaire Response, at 1 (Exhibit CDA-14). ("At the outset, Alberta wishes to note that Alberta's response to the original questionnaire of 14 April 2004 did not provide all the relevant data on arm's length sellers of Crown logs, due to the constraints imposed by the Department's narrow questions. Specifically, in the original questionnaire on this subject, the Department told Alberta to limit our responses to those sellers of softwood logs harvested from provincial lands who did not own sawmills themselves.")

<sup>45</sup> Letter from USDOC to Embassy of Canada, *Countervailing Duty Administrative Review: Certain Softwood Lumber Products from Canada* (September 12, 2003), attaching Questionnaire for the Province of Alberta, Questions III (J), (K), and (L), at III-6; Questionnaire for the Province of British Columbia, Questions III (K), (L), and (M), at IV-7; Questionnaire for the Province of Manitoba, Questions III, (D), (E) and (F), at V-5; Questionnaire for the Province of Ontario, Questions III, (K) and (L), at VI-6; and Questionnaire for the

58. Second, in its section 129 determination, the USDOC disregarded all aggregate transaction and pricing data submitted by the Canadian respondents. The USDOC considered only information on a company-specific, transaction-by-transaction basis knowing that there were hundreds of thousands of eligible transactions made by thousands of companies.<sup>46</sup> The USDOC disregarded such evidence even though its investigation was undertaken on an aggregate basis precisely because there are thousands of companies involved.<sup>47</sup> The USDOC thus ignored entirely the original panel's views that company-specific data are not necessarily required to conduct pass-through analysis.<sup>48</sup> The USDOC stated only that, while the aggregate information provided by the Canadian parties is sufficient for certain analyses undertaken in the context of its aggregate case, "such data is not sufficient for the purposes of our pass-through analysis."<sup>49</sup>

59. Third, in both its section 129 and administrative review determinations, the USDOC applied a contrived standard to limit the number of Crown log transactions requiring analysis. In the USDOC view, a log transaction requires analysis only if it is at arm's length, and a transaction is at arm's length only where:

- the transacting parties are unrelated; *and*
- none of the external factors identified by the USDOC exists.<sup>50</sup>

60. While the USDOC did not contest that the Crown log volumes identified by the Canadian respondents satisfy this first condition, it nevertheless rejected nearly all remaining transactions in its

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Province of Saskatchewan, Questions III, (D), (E) and (F), at VIII-4 (Exhibit CDA-9). See also Preliminary AR Determination, 69 Fed. Reg., at 33,208 (Exhibit CDA-10).

<sup>46</sup> See *e.g.*, B.C. September 15, 2004 Supp. Questionnaire Response, Narrative, at 5 and Norcon B, at 4 (Exhibit CDA-15).

<sup>47</sup> USDOC Memorandum from B.T. Carreau to F. Shirzad, *Issues and Decision Memorandum: Final Results of the Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada* (21 March 2001), at 15 (Exhibit CDA-16) ("In the Initiation Notice, we stated that, due to the extraordinarily large number of Canadian producers, we anticipated that we would conduct this investigation on an aggregate basis consistent with section 777A(e)(2)(B) of the Act. No parties objected to this. [footnote omitted] For the purposes of this final determination, we have aggregated the subsidy information on an industry-wide basis. Specifically, we used the information provided by the [Government of Canada] and the Provincial governments and calculated one subsidy rate for the Canadian softwood lumber industry for exports of softwood lumber to the United States.").

See also Final AR Determination, at 47 (Exhibit CDA-11) ("In this proceeding we are examining subsidies that directly benefit the lumber manufacturing process in Canada *on an aggregate basis*" [emphasis added]).

<sup>48</sup> Panel Report, at para. 7.98 ("[W]e are not convinced that the need to conduct a pass-through analysis for these transactions would necessarily or inevitably convert every aggregate case into a company-specific case.") and footnote 170 ("For example, inquiry into possible relationships between the entities concerned, and the use of sampling or other statistical techniques in respect of the relevant transactions at issue, might offer possible approaches to be explored.").

<sup>49</sup> Final Section 129 Determination, Comment 8, at 12 (Exhibit CDA-5).

<sup>50</sup> *Ibid.*, at 2 ("[T]o determine whether transactions are at arm's-length requires information about the relationship between the parties to the transaction (*e.g.*, affiliations) and the circumstances surrounding the transactions." [emphasis added]). See also Draft Section 129 Determination, at 3 (Exhibit CDA-6).

Final Section 129 Determination, at 4 (Exhibit CDA-5) ("We first examined whether any of the log sale transactions at issue were between affiliated parties, as defined by section 771(33) of the Tariff Act of 1930, as amended. If any of the log sales reported by the Canadian parties were determined to have been between affiliated parties, we concluded that these were not arm's-length transactions and no further pass-through analysis was conducted"). See also Draft Section 129 Determination, at 5 (Exhibit CDA-6).

section 129 determination and did reject all transactions in its administrative review based on the second condition.<sup>51</sup>

61. The second condition in the USDOC test has no foundation under the GATT 1994 or the SCM Agreement, nor does it accord with basic economics. Under this condition, the USDOC excluded from examination any reported independent harvester and sawmill-to-sawmill transactions that included any of the following five “factors”, chosen arbitrarily as exclusive criteria: (1) limitations on log sales in Crown tenure contracts; (2) wood supply commitment letters; (3) payment of the stumpage fees by the downstream lumber producers; (4) the structure of certain log purchase agreements; or (5) fibre exchange agreements between Crown tenure holders.<sup>52</sup> The USDOC concluded, without any demonstrative analysis, that these factors “affect” the outcome of these transactions.<sup>53</sup> The USDOC conclusion has no basis and should be rejected.

62. A transaction between unrelated parties is by definition an arm’s-length transaction.<sup>54</sup> Because the external factors identified by the USDOC do not transform an arm’s-length transaction into one that is not at arm’s length, the existence of any such factors cannot excuse the United States from its obligation to conduct the required benefit pass-through analysis. As the original panel and the Appellate Body confirmed, such analysis is required in every instance where the subsidized input producer is unrelated to the producer of the subject merchandise.<sup>55</sup> The creation of this new definition of “arm’s length” by the USDOC is nothing more than an attempt to resurrect US arguments that failed before the panel in *Canada – Softwood Lumber III*.<sup>56</sup>

63. The USDOC refusal to conduct a pass-through analysis on the basis of these factors is also inconsistent with basic economics. Extensive economic evidence placed on the record demonstrated that none of the factors identified by the USDOC alters the fact that sellers of Crown logs attempt to obtain the best price available in transactions with unrelated purchasers.<sup>57</sup> These factors do not make

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<sup>51</sup> See *e.g.*, Draft Section 129 Determination, at 9 (“The Department accepted the certifications that the transactions listed in the PWC’s survey results submitted by the [Government of Alberta] were transactions between unaffiliated parties.”) and at 10 (“In its 25 October 2004 questionnaire response, the [Government of British Columbia] explained that the Norcon survey controlled for affiliation between the 74 participating mills and independent harvesters based on the Department’s statutory test, which we accepted.”). The US law standard that the USDOC directed the Canadian respondents to rely on to certify that transactions occurred between unrelated parties was section 771(33) of the *Tariff Act of 1930* (19 U.S.C. § 1677(33)). See Exhibit CDA-17.

<sup>52</sup> The United States relied on the same factors in both its section 129 determination and its administrative review determination.

<sup>53</sup> Final Section 129 Determination, at 4 (Exhibit CDA-5) (“Evidence on the record indicates that government-mandated restrictions affect many of the log transactions that Canada reported as arm’s-length sales.”). See also Final AR Determination, at 47 (Exhibit CDA-11), where the USDOC states, in the absence of any prior demonstration, that “[t]he government mandates at issue here are conditions that are placed on the tenure licenses that have a direct impact on the disposition of Crown logs sold by independent harvesters.”

<sup>54</sup> See *e.g.*, *New Shorter Oxford English Dictionary* (Oxford University Press: New York, 1993) at 114 (Exhibit CDA-18) (“at arm’s length... (of dealings) with neither party controlled by the other”); *Black’s Law Dictionary*, 6<sup>th</sup> ed. (St. Paul, Minn.: West, 1990), at 109 (Exhibit CDA-19) (“Arm’s-length transaction... [one that is] negotiated by unrelated parties, each acting in his or her own self interest; the basis for a fair market value determination.”). The SAA also defines an arm’s length transaction as a transaction between unrelated parties “or between related parties such that the terms of the transaction are those that would exist if the transaction had been negotiated between unrelated parties.” See SAA, at 928 (Exhibit CDA-1).

<sup>55</sup> Panel Report, at para. 7.92 (“...where the input producers were unrelated to the producers of that subject merchandise”); Appellate Body Report, at para. 140 (“Where the producer of the input is not the same entity as the producer of the processed product...”). See also *US – Softwood Lumber III*, at para. 7.74 (“... here a downstream producer of subject merchandise is unrelated to the allegedly subsidized upstream producer of the input ...”).

<sup>56</sup> See *ibid.*, at paras. 4.289-4.291, and 7.79.

<sup>57</sup> See Kalt 2004d (Exhibit CDA-20). See also Kalt 2004a, at 43-48 (Exhibit CDA-21).

the transacting parties act in accordance with interests other than their own, nor do they align the parties' otherwise opposing objectives regarding the outcome of the transaction.<sup>58</sup> Accordingly, they do not obviate the need to demonstrate and quantify any alleged log subsidy pass-through.

64. In particular, record economic evidence demonstrated that the government regulations identified by the USDOC do not change the fact that transactions between unrelated parties occur in a market setting, and that a market absent of any form of government intervention is not a *sine qua non* for an arm's-length transaction.<sup>59</sup> Requirements by the government to supply, for example, say nothing about the subsequent negotiations and whether the transaction outcome is a market price. The evidence also demonstrated that the question of who remits the government stumpage fee is irrelevant; the mere payment of the fee by a downstream purchaser does not mean the upstream seller reduced the market value of its log by the amount of the stumpage subsidy.<sup>60</sup> This typical business arrangement, merely guaranteeing payment of base fees, logically has nothing to do with whether a transaction is at arm's length. Nor does the presence of non-cash components in a transaction (*e.g.*, payment through exchange of goods or services) imply that the harvester has accepted anything less than the market value of the log.<sup>61</sup>

65. As a result of its refusal to analyze log transactions as required by the findings of the original panel and the Appellate Body and by basic principles of economics, the USDOC impermissibly presumed that the alleged log input subsidy fully passed through all such transactions.

## **2. In the Few Instances Where the United States Did Perform Pass-Through Analysis, It Used Inappropriate Benchmarks That Produced Results That Were Subsequently Nullified**

66. Even in the few instances in its section 129 determination where the USDOC considered log transactions, it nevertheless failed to conduct proper analyses under Article 1.1(b) of the SCM Agreement.

67. In conducting pass-through analyses in its section 129 determination, the USDOC relied on benchmarks that do not reflect a comparison to the "marketplace".<sup>62</sup> The USDOC, for example, derived its benchmark, in part, from log imports that were: (1) extremely small and highly variable in volume; (2) largely unrepresentative of the species harvested in each province; and (3) extraordinarily high in value and unrepresentative of prices paid in each province for logs used in softwood lumber production. Accordingly, these prices did not reflect market conditions in Canada during the period of investigation. The Canadian respondents urged the USDOC to correct its use of benchmarks, but these comments were disregarded.<sup>63</sup>

68. The marginal decrease the USDOC made to the amount of its countervailing duties as a result of this flawed benefit analysis in its section 129 determination was in any event overtaken ten days later, and after the end of the reasonable period of time to implement, by full re-inflation of the countervailing duty amount as a result of its administrative review determination. As explained above, the United States undertook no pass-through analysis for any of the log transactions identified

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<sup>58</sup> See *e.g.*, Kalt 2004a, at 43-46.

<sup>59</sup> *Ibid.*, at 48-51; Kalt 2004d, at 9-10 (Exhibit CDA-20).

<sup>60</sup> Kalt 2004d, at 4-7.

<sup>61</sup> *Ibid.*, at 8-9.

<sup>62</sup> See *e.g.*, Panel Report, at para. 7.53-54. See also *Canada – Aircraft*, at para. 157. The USDOC used as a benchmark company-specific prices that individual purchasing sawmills paid for other logs it obtained from private lands or for logs it imported. Where actual company-specific purchase data were not available, the USDOC used a weighted-average of private log prices and imported log prices. See Final Section 129 Determination, at 6 (Exhibit CDA-5).

<sup>63</sup> See Letter from Weil, Gotshal & Manges to USDOC (26 November 2004), at 5 (Exhibit CDA-22).

in the administrative review. Accordingly, in both its determinations, occurring within days of each other, the United States failed to conform to its obligations concerning the imposition of countervailing duties.

**3. As a Result of Its Failure to Conduct the Required Pass-Through Analysis, the United States Continues Impermissibly to Inflate the Amount of Countervailing Duties**

69. The effect of the failure by the United States to comply with the recommendations and rulings of the DSB is an impermissible inflation of the amount of its countervailing duties. Because the USDOC calculated the amount of the subsidy going to the production of softwood lumber based on the entire volume of the Crown harvest that entered sawmills, *either directly or indirectly*, it is now required to do one of two things: either (1) conduct an appropriate pass-through analysis for all Crown log transactions involving unrelated parties, including through the use of aggregate data; or (2) exclude from the calculation of the overall *ad valorem* subsidy rate amounts of subsidy that have been presumed to pass through such transactions.

70. More particularly, should the USDOC choose not to conduct the required pass-through analysis, it must exclude from the numerator of the subsidy rate calculation benefit amounts derived from the following transaction volumes:

- Crown logs purchased in independent harvester transactions; and
- Crown logs purchased in sawmill-to-sawmill transactions.

71. Only by taking these steps will the United States comply with the recommendations and rulings of the DSB.

**IV. REQUEST FOR FINDINGS AND RECOMMENDATIONS**

72. The United States failed to implement the recommendations and rulings of the DSB in respect of its obligation to demonstrate whether, and to what extent, a subsidy to the production of Crown logs passes through transactions between unrelated parties. As such, Canada requests that the Panel:

- Find that the US imposition of countervailing duties in respect of the Crown log transactions identified in this dispute is inconsistent with Article VI:3 of GATT 1994 and Articles 10 and 32.1 of the SCM Agreement;
- Recommend in accordance with Article 19.1 of the DSU that the United States: (1) refund the amount of the countervailing duties imposed to offset alleged subsidy amounts presumed to pass through; or, (2) revise its measures to meet the requirements of Article VI:3 GATT 1994 and Articles 10 and 32.1 of the SCM Agreement and refund the duties to the extent that they exceed the amount of the alleged subsidy demonstrated to have passed through to the production of softwood lumber;<sup>64</sup> and
- Recommend that the United States bring its measures into conformity with its WTO obligations.

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<sup>64</sup> See *US – Canadian Pork*, at para. 4.11.

## ANNEX I: RECORD EVIDENCE

73. The Canadian respondents provided the USDOC with detailed evidence that could have been used to properly establish and calculate the amount of any benefit pass-through in both the section 129 proceedings and the administrative review. As explained, the United States rejected nearly all of the record evidence and instead simply presumed a full pass-through.

74. After initiating implementation proceedings under section 129, the USDOC issued a first questionnaire on 14 April 2004.<sup>65</sup> The Canadian respondents provided responses in accordance with the USDOC's directions on 21 May 2004. In providing their responses, the provinces relied on the definition of "affiliated person" under US law to certify whether the transacting parties were unrelated and the USDOC accepted all such certifications.<sup>66</sup>

75. After receiving responses to its first questionnaire, the USDOC issued two supplemental "pass-through" questionnaires on 17 August and 5 October 2004, requesting the provinces to collect large amounts of company-specific data.<sup>67</sup> The USDOC asked the provinces to collect the government tenure agreements applying to every independent harvester and sawmill involved in arm's-length log transactions.<sup>68</sup> The USDOC also requested information on all parties related to (*i.e.*, affiliated with) both the independent harvester and the purchasing sawmill, on who paid the stumpage fee related to the log in question, and on the contractual terms and pricing of each individual transaction that required a pass-through analysis.<sup>69</sup>

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<sup>65</sup> Letter from USDOC to Embassy of Canada, Certain Softwood Lumber Products from Canada: WTO "Pass-Through" Questionnaire (April 14, 2004) (Exhibit CDA-3).

<sup>66</sup> See *e.g.*, Final 129 Determination, at 9 (Exhibit CDA-5) ("Based on the certifications and information provided by the relevant companies and the [Government of Alberta], the Department accepted the data reported to be from unaffiliated parties."). See also Draft 129 Determination, at 9 (Exhibit CDA-6) ("The Department accepted the certifications that the transactions listed in the PWC's survey results submitted by the [Government of Alberta] were transactions between unaffiliated parties"); at 10 ("In its October 25, 2004 questionnaire response, the [Government of British Columbia] explained that the Norcon survey controlled for affiliation between the 74 participating mills and independent harvesters based on the Department's statutory test, which we accepted."); at 12 ("The Department accepts the [Government of Manitoba]'s claim that the transactions were conducted between unaffiliated parties"); at 13 ("The Department accepts the certifications that the transactions listed in the [Government of Ontario]'s breakdowns [are between unaffiliated parties]"); and at 15 ("The Department accepts the [Government of Saskatchewan]'s claim that the transactions were conducted between unaffiliated parties.").

<sup>67</sup> Letter from USDOC to Embassy of Canada, Certain Softwood Lumber Products from Canada: WTO Supplemental "Pass-Through" Questionnaire (17 August 2004) (Exhibit CDA-23); Letter from USDOC to Embassy of Canada, Certain Softwood Lumber Products from Canada: WTO Second Supplemental "Pass-Through" Questionnaire (5 October 2004) (Exhibit CDA-24).

<sup>68</sup> See Letter from USDOC to Embassy of Canada, Certain Softwood Lumber Products from Canada: WTO "Pass-Through" Questionnaire (April 14, 2004), Question 1(c), Question 2(c), at 10-11 (Exhibit CDA-3); Letter from USDOC to Embassy of Canada, Certain Softwood Lumber Products from Canada: WTO Supplemental "Pass-Through" Questionnaire (August 17, 2004), British Columbia, Questions 3, 9(b), at 3-4; Alberta, Question 1, at 8; Manitoba, Question 2, at 10; and Saskatchewan, Question 3, at 12 (Exhibit CDA-23); and Letter from USDOC to Embassy of Canada, Certain Softwood Lumber Products from Canada: WTO Second Supplemental "Pass-Through" Questionnaire (October 5, 2004), British Columbia, Questions 3, 4, at 3-5; Alberta, Question 1, at 8 (Exhibit CDA-24).

<sup>69</sup> See Letter from USDOC to Embassy of Canada, Certain Softwood Lumber Products from Canada: WTO "Pass-Through" Questionnaire (April 14, 2004), Question 1(b), Question 2(b), at 10-11 (Exhibit CDA-3); Letter from USDOC to Embassy of Canada, Certain Softwood Lumber Products from Canada: WTO Supplemental "Pass-Through" Questionnaire (August 17, 2004), British Columbia, Questions 2, 4, 6-7, 9, at 3-5; Ontario, Questions 1-4, at 6; Alberta, Questions 2-3, 6-7, at 8-9; Manitoba, Question 3, at 10; and Saskatchewan, Questions 4, 6, at 12-13; and Pass-Through Appendix, at 9-17 (Exhibit CDA-23); and Letter from USDOC to Embassy of Canada, Certain Softwood Lumber Products from Canada: WTO Second Supplemental "Pass-Through" Questionnaire (October 5, 2004), British Columbia, Questions 1, 6-7, 9, at 3-5;

76. The Canadian respondents provided as much information as was practicably available to them and emphasized that the USDOC could complete its pass-through analysis with the aggregate provincial data.<sup>70</sup> For example, in meetings and written submissions to the USDOC, British Columbia noted that the documentation relating to all log purchase agreements and tenure agreements would involve several truckloads of paper, and offered several alternative approaches, all of which were rejected. British Columbia nevertheless provided hundreds of pages of sample agreements, and offered to provide any additional samples requested by the USDOC. As outlined above, the USDOC rejected almost all record evidence submitted in the section 129 proceeding.

77. In relation to the administrative review, the USDOC initiated this segment of this proceeding on 1 July 2003, for the period from 22 May 2002–31 March 2003.<sup>71</sup> In its initial questionnaire issued on 12 September 2003, the USDOC requested the Canadian provinces to report the volume and value of Crown logs sold by independent harvesters to unrelated lumber producers, but solicited no information on sawmill-to-sawmill transactions.<sup>72</sup> The Canadian respondents provided the USDOC with evidence that confirmed that there was a significant volume of logs sold in such transactions and which therefore required a pass-through analysis.<sup>73</sup> The Canadian parties also provided additional information throughout the proceedings and during verification. The USDOC collected no additional information and issued no new questionnaires concerning pass-through. In the preliminary and final results of the administrative review, the USDOC refused to conduct a pass-through analysis using any of the information provided by the Canadian respondents.<sup>74</sup>

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Ontario, Question 1, at 7; Alberta, Questions 5, 8, 10, at 9-10; Manitoba, Question 1, at 11; Saskatchewan, Question 1, at 13, Second Pass-Through Appendix, at 22-23 (Exhibit CDA-24).

<sup>70</sup> See e.g., B.C. 15 September 2004 Supp. Questionnaire Response, Narrative, at 5 and Norcon B, at 4 (Exhibit CDA-15); B.C. 5 October 2004 Supp. Questionnaire Response, at BC-PT-22, Exhibit BC-PT-55 (Exhibit CDA-25). The public version of Exhibit BC-PT-55, which supplements the information provided in Norcon B, excludes business proprietary information as it is not susceptible to public summarization.

<sup>71</sup> *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 68 Fed. Reg. 39,055 (Dep't Commerce 1 July 2003) (Exhibit CDA-26). On 16 January 2004, the USDOC extended the time for completion of the preliminary results. See *Certain Softwood Lumber Products from Canada: Extension of Time Limit for Preliminary Results of Countervailing Duty Administrative Review*, 69 Fed. Reg. 2,568 (Dep't Commerce 16 January 2004) (Exhibit CDA-27). Similarly, in the preliminary results the USDOC extended the amount of time available for the final results of the administrative review. See Preliminary AR Determination, 69 Fed. Reg. at 33,205 (Exhibit CDA-10).

<sup>72</sup> See Letter from USDOC to Embassy of Canada, *Countervailing Duty Administrative Review: Certain Softwood Lumber Products from Canada* (12 September 2003), attaching Questionnaire for the Province of Alberta, Questions III (J), (K), and (L), at III-6; Questionnaire for the Province of British Columbia, Questions III (K), (L), and (M), at IV-7; Questionnaire for the Province of Manitoba, Questions III, (D), (E) and (F), at V-5; Questionnaire for the Province of Ontario, Questions III, (K) and (L), at VI-6; and Questionnaire for the Province of Saskatchewan, Questions III, (D), (E) and (F), at VIII-4 (Exhibit CDA-9); and Preliminary AR Determination, 69 Fed. Reg. at 33, 208 (Exhibit CDA-10) ("During the underlying investigation, the Canadian parties claimed that a portion of the Crown logs processed by sawmills were purchased by the mills in arm's-length transactions with independent harvesters. Canada further claimed that such logs must be excluded from the subsidy calculation unless the Department determines that the benefit to the independent harvester passed through to the lumber producers. In anticipation of a similar claim in this administrative review, we requested in the original questionnaire that each of the Canadian provinces report the volume and value of Crown logs sold by independent harvesters to unrelated parties during the [period of review].").

<sup>73</sup> See Letter from Weil Gotshal & Manges to USDOC, *Certain Softwood Lumber from Canada: First Administrative Review, Pass Through of Benefit to Arm's Length Purchasers of Logs and Lumber Inputs* (24 May 2004) (Exhibit CDA-28). See also Norcon C (Exhibit CDA-29), as revised in Letter from Steptoe & Johnson to USDOC (April 26, 2004) (Exhibit CDA-30); and Kalt 2004a, at 43-50 (Exhibit CDA-21).

<sup>74</sup> Preliminary AR Determination, 69 Fed. Reg., at 33,208-33,209 (Exhibit CDA-10); Final AR Determination, at 45-48 (Exhibit CDA-11).

78. What follows is a brief summary of the record evidence for each province in both the section 129 proceedings and the administrative review.

#### A. British Columbia

79. In the section 129 proceeding, British Columbia provided the USDOC with a study by Norcon Forestry Ltd. and the accounting firm PricewaterhouseCoopers (“Norcon A”) of 74 sawmills representing approximately 53 per cent of the total volume of the Crown timber harvest, which reviewed thousands of log purchase transactions with unrelated parties. Norcon A was supplemented by a further study by Norcon Forestry Ltd. (“Norcon B”). Norcon B demonstrated that 11.6 per cent of Crown logs consumed in B.C. sawmills were purchased from independent harvesters that held tenure.<sup>75</sup> These surveys also demonstrated that an additional 6.2 per cent of Crown logs consumed in B.C. sawmills were purchased in arm’s-length sawmill-to-sawmill transactions.<sup>76</sup> The USDOC accepted that the surveys controlled for affiliation based on the affiliation standard under section 771(33) of the *Tariff Act of 1930*.<sup>77</sup> In addition to providing the aggregate results of these surveys, British Columbia provided detailed transaction-specific information on the thousands of transactions included in the surveys, including information on volume, value, the types of logs sold, the purchaser and the seller, for both private and Crown log purchases. The company-specific evidence provided in these surveys was equivalent to the information the USDOC requested in its supplemental questionnaires and could have been used to calculate pass-through using the USDOC’s price-to-price comparison methodology.<sup>78</sup> British Columbia also provided hundreds of pages of sample log purchase agreements and tenure agreements, as well as three economic studies demonstrating that the factors identified by USDOC do not alter the arm’s-length nature of the transactions at issue.

80. British Columbia also commissioned Norcon Forestry Ltd. to conduct an additional, larger survey of sawmills for the administrative review (“Norcon C”). Norcon C surveyed 132 sawmills, receiving responses that accounted for 87 per cent of the logs consumed by sawmills in 2002.<sup>79</sup> Norcon C demonstrated that 20 per cent of logs consumed in sawmills were harvested from Crown lands and purchased from independent harvesters.<sup>80</sup> In addition, British Columbia also provided evidence that 5.7 per cent of logs consumed in sawmills were purchased in sawmill-to-sawmill transactions.<sup>81</sup> In total, British Columbia demonstrated that a minimum of 25.7 per cent of logs harvested from Crown lands and consumed in sawmills were purchased from unrelated parties during the period of review.<sup>82</sup> The USDOC subsequently verified the evidence contained in Norcon C.<sup>83</sup>

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<sup>75</sup> Norcon A (Exhibit CDA-31), as revised in B.C. 15 September 2004 Supp. Pass-Through Questionnaire Response, at 2, note 1 (Exhibit CDA-32) and Norcon B, at 2 (Exhibit CDA-15).

<sup>76</sup> Norcon A, at Appendix III (Exhibit CDA-31); Norcon B (Exhibit CDA-15). Purchases under fibre exchange agreements were not within the scope of the surveys.

<sup>77</sup> Draft 129 Determination, at 10 (Exhibit CDA-6).

<sup>78</sup> Norcon B (Exhibit CDA-15); and B.C. October 25, 2004 Supp. Pass-Through Questionnaire Response, Narrative, at BC-PT-22 and Exhibit BC-PT-55 (Exhibit CDA-25). The public versions of Norcon B and Exhibit BC-PT-55 do not contain the company-specific evidence referred to, as it is business proprietary information that is not susceptible to public summarization.

<sup>79</sup> Norcon C (Exhibit CDA-29).

<sup>80</sup> *Ibid.*; as amended in Letter from Steptoe & Johnson to USDOC (April 26, 2004) (Exhibit CDA-30).

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.* As further corroboration of the substantial percentage of the B.C. harvest yielding logs traded in arm’s-length transactions, the record of the administrative review also establishes that, over the past three years, between 26 and 30 per cent of the logs from timber harvested on the B.C. Coast was sold through the Vancouver Log Market. Similarly, in the B.C. Interior, logs accounting for about 26 per cent of the total harvest were sold domestically rather than internally consumed by integrated companies. See B.C. 12 November 2003 AR Questionnaire Response, Log Export Response at BC-LER-8, Exhibit BC-LER-1 (Exhibit CDA-33).



## B. Alberta

81. Alberta used a computer database for the section 129 proceedings to identify the volume of softwood logs sold by: (1) harvesters who did not own sawmills; and (2) harvesters that did own sawmills but that did not supply these sawmills with Crown logs from their own tenure. Alberta provided this data to PricewaterhouseCoopers, who conducted a confidential survey of the recipients of these logs.<sup>84</sup> The confidential survey requested that the recipient sawmills identify whether each transaction was a purchase and whether the transaction involved an unrelated vendor using the definition of “affiliated” found in section 771(33) of the *Tariff Act of 1930*. PricewaterhouseCoopers then used the survey results to determine the volume of logs sold between unrelated parties.<sup>85</sup> The report contained confidential company-specific data on the total qualifying transactions for each company broken down by vendors without sawmills and vendors who were not selling from sawmill-related tenures.<sup>86</sup> Alberta demonstrated on this basis that there were some 730,618 cubic metres of arm’s-length transactions between unrelated entities.<sup>87</sup>

82. Alberta also provided the USDOC in the administrative review with evidence that 2,399,893 cubic metres of logs were transferred to sawmills from unrelated parties in the period of review.<sup>88</sup> Furthermore, Alberta demonstrated that some 1,724,826 cubic metres of logs moved from unrelated parties to the 15 largest lumber-producing mills.<sup>89</sup> Alberta indicated that these data likely represented both cash sales and other forms of transactions (e.g., log swaps). Alberta also provided evidence showing that a total of 1,513,171 cubic metres of logs were purchased in “cash transactions” by mills from unrelated entities, from both Crown and private sources.<sup>90</sup>

## C. Saskatchewan

83. In the section 129 proceeding, Saskatchewan provided evidence that Forest Product Permit (“FPP”) licensees that did not own sawmills sold some 81,403 cubic metres of logs, which represented approximately 4.9 per cent of the Crown harvest in the period of investigation.<sup>91</sup> Saskatchewan collected this evidence through “woodflow reports” maintained in six sawmills as a condition of their tenure.<sup>92</sup> These “woodflow reports” listed the source of all logs processed in these sawmills. Saskatchewan also requested that sawmills identify whether they were related to these FPP

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<sup>83</sup> USDOC Memorandum from S. Moore to File, *Countervailing Duty Administrative Review of Certain Softwood Lumber from Canada: Verification of the Norcon Forestry Survey and the British Columbia Lumber Trade Council (BCLTC) Survey* (June 2, 2004) at 9-12 (Exhibit CDA-34).

<sup>84</sup> Alberta September 15, 2004 Supp. Pass-Through Questionnaire Response, Exhibit AB-S-78; revising Alberta 21 May 2004 Pass-Through Questionnaire Response, Narrative at AB-2, Exhibit AB-S-75, and Exhibit AB-S-76 (Exhibit CDA-35). The public versions of Exhibit AB-S-76 and Exhibit AB-S-78 do not contain the cited business proprietary information as it is not susceptible to public summarization.

<sup>85</sup> As Alberta does not have a category for “sawlogs”, Alberta’s submissions use “Section 80/81” logs as a basket category of coniferous volume used to produce either lumber products, pulp or roundwood.

<sup>86</sup> Alberta 15 September 2004 Supp. Pass-Through Questionnaire Response, AB-S-78; revising Alberta 21 May 2004 Pass-Through Questionnaire Response, at Exhibit AB-S-76 (Exhibit CDA-35). The public versions of Exhibit AB-S-76 and Exhibit AB-S-78 do not contain the cited information as it is business proprietary and not susceptible to public summarization.

<sup>87</sup> *Ibid.*

<sup>88</sup> See Government of Alberta Verification Exhibit GOA-6, Amended Table 50 (18 April 2004) (Exhibit CDA-36).

<sup>89</sup> Government of Alberta Verification Exhibit GOA-7, Amended Table 59 (Exhibit CDA-37).

<sup>90</sup> See Bearing Point, *Timber Damage Assessment (TDA) Table – 2003 Update* (17 October 2003), at 9, submitted in Alberta 12 November 2003 AR Questionnaire Response, Exhibit AB-S-69 (Exhibit CDA-38).

<sup>91</sup> Saskatchewan 21 May 2004 Pass-Through Questionnaire Response, at SK-1, Exhibit SK-S-29 (Exhibit CDA-39). The public version of Exhibit SK-S-29 does not contain the cited business proprietary information as it is not susceptible to public summarization.

<sup>92</sup> Saskatchewan May 21, 2004 Pass-Through Questionnaire Response, at SK-3-4 (Exhibit CDA-39).

licensees. Saskatchewan and Weyerhaeuser also provided additional company-specific evidence to the USDOC in response to the supplemental questionnaires.<sup>93</sup>

84. Saskatchewan provided evidence concerning transactions between independent harvesters and unrelated sawmills in the administrative review. In particular, this evidence demonstrated that licensees that did not hold a license to operate sawmills harvested 173,766 cubic metres of Crown timber during the period of review.<sup>94</sup> Saskatchewan also submitted business proprietary evidence that demonstrated that at least 3.8 per cent of the softwood logs were sold by independent harvesters to unrelated sawmills.

#### **D. Manitoba**

85. Manitoba provided evidence during the section 129 proceeding that some 48,100 cubic metres or 8.7 per cent of timber harvested from Crown land was sold by Timber Sales Agreement (“TSA”) licensees that did not own sawmills.<sup>95</sup> Manitoba requested that these TSA licensees provide certification of: (1) the volume of their Crown harvest; (2) the identity of the purchasing sawmills; and (3) whether they were related to the purchasing sawmills.<sup>96</sup>

86. In the administrative review, Manitoba demonstrated that “independent loggers,” *i.e.*, those TSA licensees and Quota holders that did not own sawmills, harvested 61,583 cubic metres or 4.45 per cent of the total Crown harvest of logs in the period of review.<sup>97</sup>

#### **E. Ontario**

87. Ontario provided the USDOC with the requested pass-through data for the total value and volume of Crown timber entering the 25 largest sawmills from independent harvesters that accounted for 91.3 per cent of all Crown softwood timber in the section 129 proceeding.<sup>98</sup> Furthermore, these sawmills certified that these transactions occurred with unrelated tenure holders and provided the USDOC with the relevant certifications for specific sales. On this basis, Ontario determined that 17.75 per cent of Crown logs were sold at arm’s length.<sup>99</sup> The Ontario Forest Industries Association and the Ontario Lumber Manufacturers Association also provided extensive transaction specific

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<sup>93</sup> Weyerhaeuser 16 September 2004 Supp. Pass-Through Questionnaire Response (Exhibit CDA-40); and Weyerhaeuser 26 October 2004 Supp. Pass-Through Questionnaire Response (Exhibit CDA-41).

<sup>94</sup> Saskatchewan 12 November 2003 AR Questionnaire Response, at SK-34-35 (Exhibit CDA-42).

<sup>95</sup> Manitoba 21 May 2004 Pass-Through Questionnaire Response, Exhibit MB-S-38 (Exhibit CDA-43); as revised in Manitoba September 15, 2004 Supp. Pass-Through Questionnaire Response, Revised Exhibit MB-S-38 (Exhibit CDA-44).

<sup>96</sup> Manitoba 21 May 2004 Pass-Through Questionnaire Response, at MB-1 (Exhibit CDA-43). Tembec (Manitoba) the largest of the independent harvesters accounting for 51 per cent of this volume also completed the USDOC Pass-Through Appendix. See Response of Tembec (Manitoba) to the US Department of Commerce 17 August 2004 Supplemental Questionnaire “Pass-Through Appendix” (16 September 2004) (Exhibit CDA-45); and Response of Tembec (Manitoba) to the US Department of Commerce 5 October 2004 Second Supplemental Questionnaire “Supplemental Pass-Through Appendix” (25 October 2004) (Exhibit CDA-46). In its final section 129 determination, the USDOC wrongly excluded all of these transactions on the basis that they occurred outside the period of investigation. See Draft Section 129 Determination, at 12 (Exhibit CDA-6).

<sup>97</sup> Manitoba 12 November 2003 AR Questionnaire Response, Narrative at MB-16, Exhibits MB-S-2 and MB-S-4b (Exhibit CDA-47).

<sup>98</sup> See Ontario 21 May 2004 Pass-Through Questionnaire Response, Narrative at ON-2, Exhibit ON-PASS-1, Exhibit ON-PASS-3 (Exhibit CDA-48). The data provided to the USDOC were drawn directly from the TREES database maintained by the Ontario Ministry of Natural Resources (“MNR”). This MNR database was carefully examined and verified by the USDOC during the period of investigation, as it contains all the needed independent harvester and sawmill-specific sales data for this timeframe.

<sup>99</sup> *Ibid.* The 17.75 per cent is a subsequent revision to the 18.12 per cent referred to in the Ontario 21 May 2004 Pass-Through Questionnaire Response.

evidence, sales documentation, and other documents supporting the absence of pass-through of benefit in the data supplied by the Government of Ontario.<sup>100</sup>

88. In the first administrative review, Ontario provided evidence demonstrating that approximately 6,465,085 cubic metres (or 42 per cent of the total timber harvested from Crown land) was harvested by independent harvesters.<sup>101</sup> In addition, in response to the USDOC's request at verification, Ontario provided detailed evidence concerning the largest 25 sawmills in Ontario log purchases from unrelated tenure holders during the period of review.<sup>102</sup> As the USDOC verified, those 25 sawmills purchased 31 per cent or 4,391,708 cubic metres of Crown softwood logs from unrelated tenure holders.<sup>103</sup> The 4,391,708 cubic metres of Crown softwood logs from unrelated tenure holders equal 29 per cent of the total Crown softwood volume harvested during the period of review.

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<sup>100</sup> OFIA/OLMA 16 September 2004 Supp. Questionnaire Response (Exhibit CDA-49) and OFIA/OLMA 25 October 2004 Supp. Questionnaire Response (Exhibit CDA-50).

<sup>101</sup> See Letter from Hogan & Hartson to USDOC, *Certain Softwood Lumber Products from Canada: Service of Government of Ontario Verification Exhibits on Petitioner's Counsel* (6 April 2004), Minor Corrections, at 16-127 (Exhibit CDA-51). The "Minor Corrections" verification exhibit is not included in Exhibit CDA-51 as it contains business proprietary information that is not susceptible to public summarization. See also Letter from Hogan & Hartson to USDOC, *Certain Softwood Lumber Products from Canada: Factual Submission* (15 March 2004), Exhibit 9 (final version of Exhibit ON-STATS-1) (Exhibit CDA-52).

<sup>102</sup> See Letter from Hogan & Hartson to USDOC, *Certain Softwood Lumber Products from Canada: Service of Government of Ontario Verification Exhibits on Petitioner's Counsel* (6 April 2004), Ownership Interest Data, at 4750-4760 (Exhibit CDA-51). The "Ownership Interest Data" verification exhibit is not included in Exhibit CDA-51 as it contains business proprietary information that is not susceptible to public summarization. See also *ibid.*, Minor Corrections, at 16-127 and Letter from Hogan & Hartson to USDOC, *Certain Softwood Lumber Products from Canada: Factual Submission* (March 15, 2004), Exhibit 9 (final version of Exhibit ON-STATS-1) (Exhibit CDA-52).

<sup>103</sup> See Letter from Hogan & Hartson to USDOC, *Certain Softwood Lumber Products from Canada: Service of Government of Ontario Verification Exhibits on Petitioner's Counsel* (6 April 2004), Ownership Interest Data, at 4756 (Exhibit CDA-51).

## TABLE OF EXHIBITS

- CDA-1      “Statement of Administrative Action” in *Message from the President of the United States Transmitting the Uruguay Round Agreements, Texts of Agreements Implementing Bill, Statement of Administrative Action and Required Supporting Statements*, H.R. Doc. No. 103-316, vol. 1 at 656, 928, 1022-1027.
- CDA-2      *Uruguay Round Agreements Act*, Pub. L. No. 103-465, § 129, 108 Stat. 4838, codified at 19 U.S.C. § 3538 (2000).
- CDA-3      Letter from USDOC to Embassy of Canada, *Certain Softwood Lumber Products from Canada: WTO “Pass-Through” Questionnaire* (14 April 2004).
- CDA-4      Letter from Weil, Gotshal & Manges to USDOC, *Certain Softwood Lumber from Canada: WTO Implementation Questionnaire Response Concerning Pass-Through of Alleged Benefit* (16 September 2004).
- CDA-5      USDOC Memorandum from J. Jochum to B. Tillman, *Section 129 Determination: Final Countervailing Duty Determination, Certain Softwood Lumber from Canada* (6 December 2004).
- CDA-6      USDOC Memorandum from J. Jochum to J. May, *Draft Decision Memorandum, 129 Proceeding for the WTO Appellate Body finding in the Final Countervailing Duty Determination, Certain Softwood Lumber from Canada* (19 November 2004).
- CDA-7      *Notice of Implementation under Section 129 of the Uruguay Round Agreements Act: Countervailing Measures concerning Certain Softwood Lumber Products from Canada*, 69 Fed. Reg. 75,305 (Dep’t. Commerce 16 December 2004).
- CDA-8      *Notice of Final Results of Countervailing Duty Administrative Review and Recission of Certain Company-Specific Reviews: Certain Softwood Lumber Products from Canada*, 69 Fed. Reg. 75,917 (Dep’t Commerce 20 December 2004).
- CDA-9      Letter from USDOC to Embassy of Canada, *Countervailing Duty Administrative Review: Certain Softwood Lumber Products from Canada* (12 September 2003), attaching Questionnaire for the Province of Alberta, Questions III (J), (K), and (L), at III-6; Questionnaire for the Province of British Columbia, Questions III (K), (L), and (M), at IV-7; Questionnaire for the Province of Manitoba, Questions III, (D), (E) and (F), at V-5; Questionnaire for the Province of Ontario, Questions III, (K) and (L), at VI-6; and Questionnaire for the Province of Saskatchewan, Questions III, (D), (E) and (F), at VIII-4-5.
- CDA-10     *Notice of Preliminary Results of Countervailing Duty Administrative Review: Certain Softwood Lumber from Canada*, 69 Fed. Reg. 33,204 (Dep’t Commerce 14 June 2004)

- CDA-11 USDOC Memorandum from B.E. Tillman to J.J. Jochum, *Issues and Decision Memorandum: Final Results of Administrative Review: Certain Softwood Lumber from Canada*, C-122-839 (13 December 2004).
- CDA-12 *New Shorter Oxford English Dictionary* (Oxford: Clarendon Press, 1993) at 1985 (“offset”).
- CDA-13 Response of the Government of Alberta to the Department’s 14 April 2004 Questionnaire Concerning Pass Through of Alleged Benefits (21 May 2004), Narrative at AB-1 – AB-7.
- CDA-14 Response of the Government of Alberta to the Department’s 17 August 2004 Supplemental Questionnaire Concerning Pass Through of Alleged Benefits (15 September 2004), Narrative at 1.
- CDA-15 Response of the Government of British Columbia to the Department’s 17 August 2004 Supplemental Questionnaire Concerning Pass Through of Alleged Benefits (15 September 2004), Narrative at 5 and Exhibit BC-PT-40.
- CDA-16 USDOC Memorandum from B.T. Carreau to F. Shirzad, *Issues and Decision Memorandum: Final Results of the Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada*, (21 March 2001) at 15.
- CDA-17 *Tariff Act of 1930*, § 771(33), *codified at* 19 U.S.C § 1677(33) (2000).
- CDA-18 *New Shorter Oxford English Dictionary* (Oxford: Clarendon Press, 1993) at 114 (“at arm’s length... (of dealings) with neither party controlled by the other”)
- CDA-19 *Black’s Law Dictionary*, 6<sup>th</sup> ed. (St. Paul, Minn.: West, 1990) at 109 (“arm’s-length transaction”).
- CDA-20 J.P. Kalt and D. Reishus, *Economics of Arms’s Length Transactions and Subsidy Pass-Through*, submitted as Response of the Government of British Columbia to the Department’s 17 August 2004 Supplemental Questionnaire Concerning Pass Through of Alleged Benefits (15 September 2004), Exhibit BC-PT-39.
- CDA-21 J.P. Kalt and D. Reishus, *Statement for the First Administrative Review*, Attachment 1 to Letter from British Columbia Lumber Trade Council to USDOC (15 March 2004).
- CDA-22 Letter from Weil, Gotshal & Manges to USDOC, *Certain Softwood Lumber from Canada: Comments on Draft Section 129 Determination* (26 November 2004).

- CDA-23 Letter from USDOC to Embassy of Canada, *Certain Softwood Lumber Products from Canada: WTO Supplemental "Pass-Through" Questionnaire* (17 August 2004).
- CDA-24 Letter from USDOC to Embassy of Canada, *Certain Softwood Lumber Products from Canada: Second WTO Supplemental "Pass-Through" Questionnaire* (5 October 2004).
- CDA-25 Response of the Government of British Columbia to the Department's 5 October 2004 Supplemental Questionnaire Concerning Pass Through of Alleged Benefits (25 October 2004), Narrative at BC-PT-22 and Exhibit BC-PT-55.
- CDA-26 *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 68 Fed. Reg. 39,055 (Dep't Commerce 1 July 2003).
- CDA-27 *Certain Softwood Lumber Products from Canada: Extension of Time Limit for Preliminary Results of Countervailing Duty Administrative Review*, 69 Fed. Reg. 2,568 (Dep't Commerce 16 January 2004).
- CDA-28 Letter from Weil, Gotshal & Manges to USDOC, *Certain Softwood Lumber from Canada: First Administrative Review, Pass-Through of Benefit to Arm's-Length Purchasers of Log and Lumber Inputs* (24 May 2004).
- CDA-29 Norcon Forestry Ltd., *Survey of Primary Sawmills' Arm's Length Log Purchases in British Columbia* (15 March 2004), submitted with Letter from Steptoe & Johnson to USDOC (15 March 2004).
- CDA-30 Letter from Steptoe & Johnson to USDOC (26 April 2004), recording minor corrections to the *Norcon Arm's Length Log Survey*.
- CDA-31 Response of the Government of British Columbia to the Department's 14 April 2004 Questionnaire Concerning Pass Through of Alleged Benefits (21 May 2004), Exhibit BC-PT-18 (Letter from Steptoe & Johnson to Akin, Gump, Strauss, Hauer & Feld (20 May 2004) attaching *Survey of Primary Sawmills' Arm's Length Log Purchases In the Province of British Columbia* filed with Letter from Steptoe & Johnson to US Department of Commerce (21 December 2001)).
- CDA-32 Response of the Government of British Columbia to the Department's 17 August 2004 Supplemental Questionnaire Concerning Pass Through of Alleged Benefits (15 September 2004), Narrative at 2, note 1.
- CDA-33 Response of the Government of British Columbia to the Department's 12 September 2003 Questionnaire (12 November 2003), Log Export Response Narrative at BC-LER-7 – BC-LER-9 and Exhibit BC-LER-1.

- CDA-34 USDOC Memorandum from S. Moore to File, *Countervailing Duty Administrative Review of Certain Softwood Lumber from Canada: Verification of the Norcon Forestry Survey and the British Columbia Lumber Trade Council (BCLTC) Survey* (2 June 2004) at 9-12.
- CDA-35 Response of the Government of Alberta to the Department's 14 April 2004 Questionnaire Concerning Pass Through of Alleged Benefits (21 May 2004) at AB-2-3, Exhibit AB-S-75, Exhibit AB-S-76, and Exhibit AB-S-78.
- CDA-36 Government of Alberta Verification Exhibit GOA-6, Amended Table 50 (18 April 2004).
- CDA-37 Government of Alberta Verification Exhibit GOA-7, Amended Table 59.
- CDA-38 Bearing Point, *Timber Damage Assessment (TDA) Table – 2003 Update* (17 October 2003), submitted in Response of the Government of Alberta to the Department's 12 September 2003 Questionnaire (12 November 2003), Exhibit AB-S-69.
- CDA-39 Response of the Government of Saskatchewan to the Department's 14 April 2004 Questionnaire Concerning Pass Through of Alleged Benefits (21 May 2004), Narrative at SK-1 – SK-5 and Exhibit SK-S-29.
- CDA-40 Response of Weyerhaeuser Company to the Department's 14 April 2004 Questionnaire Concerning Pass Through of Alleged Benefits (16 September 2004).
- CDA-41 Response of Weyerhaeuser Company to the Department's Second WTO Supplemental Pass-Through Questionnaire (26 October 2004).
- CDA-42 Response of the Government of Saskatchewan to the Department's 12 September 2003 Questionnaire (12 November 2003), Narrative at SK-34 – SK-35.
- CDA-43 Response of the Government of Manitoba to the Department's 14 April 2004 Questionnaire Concerning Pass Through of Alleged Benefits (21 May 2004), Narrative at MB-1, Exhibit MB-S-38.
- CDA-44 Response of the Government of Manitoba to the Department's 17 August 2004 Supplemental Questionnaire Concerning Pass Through of Alleged Benefits (15 September 2004), Revised Exhibit MB-S-38.
- CDA-45 Response of Tembec Inc. (Manitoba) to the Department's 17 August 2004 Questionnaire Concerning Pass Through of Alleged Benefits (16 September 2004), at 1-7.

- CDA-46      Response of Tembec Inc. (Manitoba) to the Department's 5 October 2004 Second Supplemental Questionnaire Concerning Pass-Through of Alleged Benefits (25 October 2004), Narrative, at 1-2 and Attachments A and B.
- CDA-47      Response of the Government of Manitoba to the Department's 12 September 2003 Questionnaire (12 November 2003), Narrative at MB-14 – MB-16, Exhibit MB-S-2 and Exhibit MB-S-4b.
- CDA-48      Response of the Government of Ontario to the Department's 14 April 2004 Questionnaire Concerning Pass Through of Alleged Benefits (21 May 2004), Narrative at ON-1 - ON-2, Exhibit ON-PASS-1 and Exhibit ON-PASS-3.
- CDA-49      Response of the Ontario Forest Industries Association and the Ontario Lumber Manufacturers Association on behalf of their members to the Department's August 17, 2004 Questionnaire Concerning Pass Through of Alleged Benefits (16 September 2004).
- CDA-50      Response of the Ontario Forest Industries Association and the Ontario Lumber Manufacturers Association on behalf of their members to the Department's 5 October 2004 2<sup>nd</sup> Supplemental Questionnaire Concerning Pass Through of Alleged Benefits (26 October 2004).
- CDA-51      Letter from Hogan & Hartson to USDOC, *Certain Softwood Lumber Products from Canada: Service of Government of Ontario Verification Exhibits on Petitioner's Counsel* (6 April 2004).
- CDA-52      Letter from Hogan & Hartson to USDOC, *Certain Softwood Lumber Products from Canada: Factual Submission* (15 March 2004), Exhibit 9 (final version of Exhibit ON-STATS-1).



## ANNEX A-2

### RESPONSE OF CANADA TO THE REQUEST BY THE UNITED STATES FOR PRELIMINARY RULINGS AND REBUTTAL SUBMISSION OF CANADA

31 March 2005

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Appellate Body Report	<i>United States – Final Countervailing Duty Determination With Respect to Certain Softwood Lumber from Canada</i> , Report of the Appellate Body, WT/DS257/AB/R, adopted 17 February 2004.
<i>Australia – Automotive Leather II (Article 21.5 – US)</i>	<i>Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by the United States</i> , Report of the Panel, WT/DS126/RW and Corr. 1, adopted 11 February 2000.
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<i>Dominican Republic – Cigarettes</i>	<i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , Report of the Panel, WT/DS302, issued 26 November 2004 (under appeal).
<i>EC – Bed Linen (Article 21.5 – India)</i> , Panel Report	<i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , Report of the Panel, WT/DS141/RW, adopted 24 April 2003.
<i>EC – Bed Linen (Article 21.5 – India)</i> , Appellate Body Report	<i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , Report of the Appellate Body, WT/DS141/AB/RW, adopted 24 April 2003.
<i>US – Shrimp (Article 21.5 – Malaysia)</i>	<i>United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia</i> , Report of the Appellate Body, WT/DS58/AB/RW, adopted 21 November 2001.

## I. INTRODUCTION

1. In this submission, Canada addresses the arguments made by the United States in two parts. First, Canada responds to the request by the United States for a preliminary ruling that the final results of the administrative review fall outside the jurisdiction of the Panel in this dispute. Second, Canada rebuts the few assertions the United States makes in its first written submission.

2. For the reasons set out in this submission, Canada requests that the Panel reject the US request as being without merit, and determine that the final results of the administrative review are properly reviewable under Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”). Canada also requests that the Panel reject the US assertion that the US Department of Commerce (“USDOC”) conducted proper pass-through analyses.

## II. RESPONSE OF CANADA TO THE REQUEST BY THE UNITED STATES FOR PRELIMINARY RULINGS

3. The request by the United States for a preliminary ruling in this dispute is a request that the Panel insulate the US imposition of countervailing measures on softwood lumber from compliance under the WTO Agreement. The Panel should reject this request as being without legal basis, and as running contrary to the very purpose of the dispute settlement system.

4. First, the final results of the administrative review are properly before the Panel because they rendered the pass-through analyses and resulting adjustment provided in the section 129 determination non-existent. There is no support in the DSU for the US contention that a panel may not review, under Article 21.5, measures that undo claimed “measures taken to comply”. Article 21.5 requires the Panel in this case to determine the “existence” of any measure taken by the United States to bring the imposition of its countervailing duty into compliance with the recommendations and rulings of the Dispute Settlement Body (“DSB”) on pass-through.

5. Second, the administrative review results are within the jurisdiction of the Panel under Article 21.5 of the DSU because, like the section 129 determination, these results are inextricably linked to the recommendations and rulings of the DSB in this case. In both measures, the USDOC purports to bring its countervailing duty on softwood lumber into conformity with its obligations to conduct pass-through analyses; in both measures, its treatment of the pass-through issue and record evidence is nearly identical.

6. Third, the US request runs contrary to the very purpose of Article 21.5 compliance proceedings. If the US position were to prevail, Canada would be required to bring an absurd multiplicity of “new” dispute settlement cases on the same issue, involving the same claims, to secure the same recommendations and rulings from the DSB. Acceding to the request would preclude any “prompt settlement of situations” under Article 3.3, “positive solution to a dispute” under Article 3.7, or “prompt compliance” under Article 21.1 of the DSU. Acceptance of the US position would allow the United States to evade compliance with DSB rulings in perpetuity, frustrating the very purpose of the DSU.

### A. Article 21.5 of the DSU Establishes a Broad Scope for Review

7. Article 21.5 of the DSU provides for expedited dispute settlement procedures to ensure full implementation of recommendations and rulings of the DSB:

Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such

dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. . . .

8. The ordinary meaning of the phrase “measures taken to comply,” read in context and in light of the object and purpose of Article 21 and of the DSU as a whole, provides the Panel with wide discretion to examine whether a Member has complied with the recommendations and rulings of the DSB. The Appellate Body in *Canada – Aircraft (Article 21.5 – Brazil)* confirmed that the scope of Article 21.5 is to be interpreted broadly:

[T]he phrase “measures taken to comply” refers to measures which have been, *or which should be*, adopted by a Member to bring about compliance with the recommendations and rulings of the DSB.<sup>1</sup>

9. An Article 21.5 panel is therefore not limited to examining only those measures that an implementing Member claims to have been “taken to comply”. As the United States itself has recognized, it is for the Panel alone to determine the “measures taken to comply”.<sup>2</sup> It is also for the Panel to determine whether such measures exist and, if so, whether they are consistent with the implementing Member’s WTO obligations.

**B. The Final Results of the Administrative Review Are within the Panel’s Jurisdiction of the Panel under Article 21.5 Because They Rendered Non-Existent Any Purported Compliance Achieved in the Section 129 Determination**

10. In its request for a preliminary ruling, the United States fails to address the fact that the final results of the administrative review rendered non-existent, the limited pass-through analysis and resulting adjustment provided in the section 129 determination.

11. As explained in Canada’s first written submission, the USDOC failed to perform appropriate pass-through analysis for the log transactions identified in the administrative review.<sup>3</sup> The USDOC therefore presumed, rather than demonstrated, the full pass-through of a benefit in arm’s-length transactions.<sup>4</sup> Accordingly, on 20 December 2004, the date on which the final results of the administrative review came into force, the USDOC nullified the pass-through analysis and resulting adjustment it provided in the section 129 determination.<sup>5</sup>

12. It is an uncontested fact that the final results of the administrative review rendered ineffective the pass-through analysis and adjustment under the section 129 determination. Consequently, the final results of the administrative review are an integral part of the Panel’s determination “as to the *existence* . . . of measures taken to comply” under Article 21.5 of the DSU.<sup>6</sup>

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<sup>1</sup> *Canada – Aircraft (Article 21.5 – Brazil)*, at para. 36 [emphasis added]. (“[I]n principle, there would be two separate and distinct measures: the original measure which *gave rise* to the recommendations and rulings of the DSB, and the ‘measures taken to comply’ which are – or should be – adopted to *implement* those recommendations and rulings.”) [emphasis in original]

<sup>2</sup> US First Submission and Request for Preliminary Rulings, at para. 14. See also *EC – Bed Linen (Article 21.5 – India)* Appellate Body Report, at para. 78 (“We agree with the Panel that it is, ultimately, for an Article 21.5 panel – and not for the complainant or the respondent – to determine which of the measures listed in the request for its establishment are ‘measures taken to comply’.”).

<sup>3</sup> First Written Submission of Canada, at paras. 53-60.

<sup>4</sup> *Ibid.*, at paras. 3-5.

<sup>5</sup> *Ibid.*, at paras. 28, 68.

<sup>6</sup> An examination of the “existence” of something, according to the ordinary meaning of that term, includes assessing “Reality, as [opposed] to appearance” and establishing “[t]he fact or state of existing”. *The New Shorter Oxford English Dictionary* (Oxford: The Clarendon Press, 1993), at 882. (Exhibit CDA-53)

13. The Appellate Body in *EC – Bed Linen (Article 21.5 – India)* explained that the mandate of a compliance panel under Article 21.5 includes examining the existence of “measures taken to comply” and that such an examination is not limited to the factual circumstances or legal issues addressed in the original panel proceedings:

We addressed the function and scope of Article 21.5 proceedings for the first time in *Canada – Aircraft (Article 21.5 – Brazil)*. (...) We explained there that the mandate of Article 21.5 panels is to examine either the “existence” of “measures taken to comply” or, more frequently, the “consistency with a covered agreement” of implementing measures. This implies that an Article 21.5 panel is not confined to examining the “measures taken to comply” from the perspective of the claims, arguments, and factual circumstances relating to the measure that was the subject of the *original* proceedings.<sup>7</sup>

14. In *Australia – Leather II (Article 21.5 – US)*, the United States itself argued that measures that undo implementation appropriately fall within the scope of Article 21.5 of the DSU:

Under Article 21.5, this panel is to consider “the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings.” Plainly, if this Panel can determine the “existence” of measures taken to comply with the recommendations, it can consider whether the measures purportedly taken to comply were effectively rendered non-existent.<sup>8</sup>

15. As discussed, the compliance panel in that case found the government replacement loan at issue was within their terms of reference under Article 21.5 of the DSU.

16. The panel in *EC – Bed Linen (Article 21.5 – India)* shared the view that the scope of Article 21.5 is wide. In declining to include certain EC measures in its compliance review, that panel specifically noted that India “does not argue that the subsequent two measures undo the compliance effectuated by the first measure.”<sup>9</sup>

17. Because the final results of the administrative review undo the pass-through analysis and resulting adjustment provided in the section 129 determination, the final results are properly before the Panel.

**C. The Final Results of the Administrative Review Are Inextricably Linked to the Recommendations and Rulings of the DSB and Are Therefore “Measures Taken to Comply”**

18. The final results of the administrative review are properly before the Panel also because they are inextricably linked to the recommendations and rulings of the DSB and to what the United States claims as being its “measures taken to comply”.

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<sup>7</sup> *EC – Bed Linen (Article 21.5 – India)*, Appellate Body Report, at para. 79 [italics in original].

<sup>8</sup> *Australia – Automotive Leather II (Article 21.5 – US)*, Annex 1-2, at para. 30. See also Third Party Submission of China, at paras. 12-18.

<sup>9</sup> *EC – Bed Linen (Article 21.5 – India)*, Panel Report, at para. 6.21. See also Third Party Submission of the European Communities, at para. 26, citing *Dominican Republic – Cigarettes*, at paras. 7.11-7.21 (“The Panel also considers it necessary to examine Law 2-04 to secure a positive solution to the matter mandated to this Panel since Decree 636-03 has been replaced by Law 2-04.”); and, e.g., *Chile – Price Band System*, at para. 144. (“[A] complaining party should not have to adjust its pleadings throughout dispute settlement proceedings in order to deal with a disputed measure as a ‘moving target’.”)

19. As explained in Canada's first written submission, the treatment by USDOC of the pass-through issue in the final results of its administrative review is nearly identical to its section 129 pass-through determination.<sup>10</sup> The USDOC reproduced in the former the discussion of the five "factors" from the latter nearly word for word.<sup>11</sup> Moreover, these discussions apply to the same Canadian exports over the same period. In addition, the USDOC published preliminary results for the administrative review containing a "pass-through" section nearly four months after the DSB made its recommendations and rulings, and issued final results nearly ten months after those recommendations and rulings.<sup>12</sup>

20. The United States, recognizing the complete identity of issues in both determinations and the relevance of their timing, is left with arguing before the Panel that form ought to prevail over substance. The United States argues that assessment reviews and original investigations are different proceedings, and that while the administrative review attempted to address the pass-through issue, the review itself was initiated prior to the recommendations and rulings of the DSB.<sup>13</sup> In doing so, the United States ignores the fact that, under US law, the USDOC may implement the recommendations and rulings of the DSB concerning an original investigation through a subsequent administrative review.<sup>14</sup>

21. Article 21.5 of the DSU requires a compliance panel to examine the substance of a Member's measures notwithstanding any argument that the form of the measures could preclude compliance review. In *Australia – Automotive Leather II (Article 21.5 – US)*, for example, the panel rejected Australian claims that a government loan issued to an automotive leather producer as a replacement measure for a previous grant, which the DSB had recommended be withdrawn, was not a measure "taken to comply". The panel confirmed that the subsequent loan was within its jurisdiction to examine under Article 21.5 of the DSU because it was "inextricably linked to the steps taken by Australia in response to the DSB's ruling in this dispute, in view of both its timing and its nature."<sup>15</sup>

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<sup>10</sup> First Written Submission of Canada, at para. 33.

<sup>11</sup> Compare USDOC Memorandum from J. Jochum to B. Tillman, *Section 129 Determination: Final Countervailing Duty Determination, Certain Softwood Lumber from Canada* (6 December 2004), at 5-7 (Exhibit CDA-5) with *Issues and Decision Memorandum: Final Results of Administrative Review: Certain Softwood Lumber from Canada*, C-122-839 (13 December 2004), at 46-47 (Exhibit CDA-11).

<sup>12</sup> First Written Submission of Canada, at paras. 31, 33-34. The USDOC also recognized that arguments from the Canadian respondents regarding the need to conduct pass-through analyses were based on the recommendations and rulings of the DSB in this respect. See *Issues and Decision Memorandum: Final Results of Administrative Review: Certain Softwood Lumber from Canada*, C-122-839 (13 December 2004), at 43 (Exhibit CDA-11). ("They argue that, in accordance with recent WTO Appellate Body and Panel findings, the Department should conduct a pass-through analysis of logs purchased at arm's length by lumber producers to determine whether the alleged subsidy to timber harvesters from provincial stumpage benefited those lumber producers.")

<sup>13</sup> US First Submission and Request for Preliminary Rulings, at paras. 21-23.

<sup>14</sup> See "Statement of Administrative Action" in *Message from the President of the United States Transmitting the Uruguay Round Agreements, Texts of Agreements Implementing Bill, Statement of Administrative Action and Required Supporting Statements*, H.R. Doc. No. 103-316, vol. 1 at 656 (Exhibit CDA-1), at 356-357. ("Furthermore, while subsection 129(b) [of the Uruguay Round Agreements Act] creates a mechanism for making new determinations in response to a WTO report, new determinations may not be necessary in all situations. In many instances, such as those in which a WTO report merely implicates the size of a dumping margin or countervailable subsidy rate (as opposed to whether a determination is affirmative or negative), it may be possible to implement the WTO report recommendations in a future administrative review under section 751 of the Tariff Act.")

<sup>15</sup> *Australia – Automotive Leather II (Article 21.5 – US)*, at para. 6.5. ("In our view, the [new] loan cannot be excluded from our consideration without severely limiting our ability to judge, on the basis of the United States' request, whether Australia has taken measures to comply with the DSB's ruling.")

22. In *Australia – Salmon (Article 21.5 – Canada)*, the panel was faced with a sub-national ban on certain imported Canadian salmon products, which was introduced subsequent to national measures that Australia declared were taken to comply. Australia argued that the sub-national ban was not a measure “taken to comply” within the meaning of Article 21.5 of the DSU. The panel rejected the Australian argument, reasoning that:

... an Article 21.5 panel cannot leave it to the full discretion of the implementing Member to decide whether or not a measure is one “taken to comply”. If one were to allow that, an implementing Member could simply avoid any scrutiny of certain measures by a compliance panel, *even where such measures would be so clearly connected to the panel and Appellate Body reports concerned, both in time and in respect of the subject-matter, that any impartial observer would consider them to be measures “taken to comply”*.<sup>16</sup>

23. The United States avoids such rationale and attempts to shield its administrative review results from examination by the Panel by selectively quoting from the panel findings in *EC – Bed Linen (Article 21.5 – India)*.<sup>17</sup> The US reliance on *EC – Bed Linen (Article 21.5 – India)*, however, is misplaced. As the EC notes in its third party submission, the panel in that dispute found that the EC measures in question were not “taken to comply” within the meaning of Article 21.5 of the DSU because they did not deal with the subject matter upon which the DSB had made recommendations and rulings.<sup>18</sup> Indeed, the panel expressly noted that “[t]he situation might be different had there been a claim in the original dispute challenging the cumulative assessment of the effects of imports from India, Egypt, and Pakistan.”<sup>19</sup>

24. The United States also attempts to confuse the issue by claiming that an Article 21.5 panel does not have jurisdiction to evaluate USDOC treatment of additional record evidence concerning exports subject to a US definitive countervailing duty.<sup>20</sup> This assertion misses the point entirely. The Panel’s assessment “as to the existence or consistency with a covered agreement of measures taken to comply” under Article 21.5 of the DSU necessarily involves an examination of new factual information. As stated by the Appellate Body in *EC – Bed Linen (Article 21.5 – India)*:

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

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<sup>16</sup> *Australia – Salmon (Article 21.5 – Canada)*, at para. 7.10(22) [emphasis added]. See also *EC – Bed Linen (Article 21.5 – India)*, Panel Report, at para. 6.17.

<sup>17</sup> US First Submission and Request for Preliminary Rulings, at paras. 15-16.

<sup>18</sup> Third Party Submission of the European Communities, at para. 17 (“It is important to note that the two measures in *EC – Bed linen* were not dismissed from the scope of that 21.5 proceeding because they were ‘review measures’. They were dismissed because they did not relate to the original dispute between the EC and India.”).

<sup>19</sup> *EC – Bed Linen (Article 21.5 – India)*, Panel Report, at para. 6.18, fn. 36.

<sup>20</sup> US First Submission and Request for Preliminary Rulings, at para. 24.

raised in the original proceedings, because a “measure taken to comply” may be *inconsistent* with WTO obligations in ways different from the original measure.<sup>21</sup>

25. The section 129 determination and the final results of the administrative review are inextricably linked to the DSB recommendations and rulings in this dispute because they both address the obligations of the United States to conduct pass-through analyses with respect to independent harvester and sawmill-to-sawmill log transactions for the same exports for the same period of time.<sup>22</sup> The mere fact that the administrative review might have been initiated under a distinct provision of US law does not excuse the failure by the USDOC, for example under Article 10 of the *Agreement on Subsidies and Countervailing Measures* (“SCM Agreement”), to “take all necessary steps to ensure that the imposition” of the US countervailing duty on softwood lumber “was in accordance with” the requirement to conduct pass-through analyses under “the provisions of Article VI of GATT 1994 and the terms of this Agreement”.

**D. The US Request to Exclude the Final Results of the Administrative Review from the Panel’s Jurisdiction Ignores the Purpose of Compliance Proceedings**

26. As a broader systemic matter, the US request for a preliminary ruling runs contrary to the very purpose of an Article 21.5 panel in its review of the imposition of countervailing measures.

27. The US request, taken to its logical conclusion, would require Canada to make a series of identical claims to address an unchanging issue under Article VI:3 of the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”) and Articles 10 and 32.1 of the SCM Agreement. The US obligation to demonstrate whether, and to what extent, alleged subsidies to log production pass through arm’s-length log purchases *before* imposing duties on softwood lumber products would remain in dispute for each annual assessment review under Article 21 of the SCM Agreement during the potential five-year life (or longer) of the US definitive countervailing measure. Such a result would leave the DSB in the absurd situation of having made numerous identical recommendations and rulings concerning a definitive countervailing duty for which compliance may never be secured. Were the Panel to allow the US request in this case, it would effectively insulate US countervailing measures from compliance with the recommendations and rulings of the DSB concerning pass-through.

28. The EC has noted the absurdity of the US request in this respect in its third party submission:

Accepting the US view that the administrative review is not subject to a DSU 21.5 Panel review would turn the US system of duty assessment into a moving target that escapes from countervailing duty disciplines. Each administrative review would have to be subject to a new panel request, and by the time the panel, Appellate Body and implementation procedure was completed, another administrative review would have overtaken the results of any Section 129 determination.<sup>23</sup>

29. Acceding to the US request would therefore preclude any “prompt settlement of situations” under Article 3.3, “positive solution to a dispute” under Article 3.7, or “prompt compliance” under Article 21.1 of the DSU. In *Australia – Salmon (Article 21.5 – Canada)*, the United States paradoxically took the following position:

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<sup>21</sup> *EC – Bed Linen (Article 21.5 – India)*, Appellate Body Report, at para. 79 [italics in original]. See also EC Third Party Submission, at para. 28, referring in addition to the Appellate Body’s report in *US – Shrimp (Article 21.5 – Malaysia)*, at para. 86.

<sup>22</sup> Third Party Submission of China, at paras. 14-15.

<sup>23</sup> Third Party Submission of the European Communities, at para. 29.



[W]e also wish to express the agreement of the United States with the broad and inclusive approach the Panel has taken thus far in defining the scope of this proceeding. The Panel's approach is the only one consistent with the purpose of the WTO dispute settlement system as reflected in Articles 3 and 21 of the Dispute Settlement Understanding: the prompt settlement of disputes. Disputes could not be settled "promptly" if a defending party were permitted to thwart a thorough review of its WTO compliance by staging the introduction of details of new measures over a period of time, and then arguing that they must escape WTO scrutiny for a further period of time.<sup>24</sup>

30. In this dispute, the DSB ruled that the United States must demonstrate, rather than presume, that a subsidy passes through arm's-length log transactions. The United States defies this ruling when, in an administrative review of the amount of the countervailing duty that gave rise to the matter before the DSB, it performs none of the required analysis and continues to presume pass-through. The Panel should therefore reject the U.S. preliminary ruling request and find that the results of the first administrative review are properly before it in this proceeding.

### **III. REBUTTAL SUBMISSION OF CANADA**

31. Canada established in its first written submission that in both the section 129 determination and in the administrative review, the USDOC continued to presume, rather than demonstrate, a pass-through of a subsidy in arm's-length purchases of logs by sawmills in violation of US obligations under Article VI:3 of the GATT 1994 and Articles 10 and 32.1 of the SCM Agreement.

32. The United States responds to the entirety of Canada's claims in only two paragraphs.<sup>25</sup> In these paragraphs, the United States contends that the USDOC properly determined that the overwhelming majority of log purchase transactions were not at arm's length and properly rejected significant volumes of record evidence. It also claims that the "recommended analysis" was performed for transactions that were found to be at arm's length, using "appropriate log prices as benchmarks". Finally, the United States claims that the recommendations and rulings of the DSB concerned only those sawmill-to-sawmill transactions in which the purchaser did not hold tenure.

33. Canada addresses each of these US assertions in turn.

34. First, the reliance by the USDOC on the five "factors" as a pretense to reject arm's-length log transactions is not supported by the GATT 1994, or the SCM Agreement, nor does it accord with basic economics. As a matter of well-established economic principles, transactions do not have to take place in a regulatory vacuum, if such a marketplace even exists, to be "at arm's length".

35. Second, where the USDOC accepted that transactions were at arm's length, it failed to perform proper market comparisons.

36. Third, neither the original panel nor the Appellate Body restricted the requirement for a pass-through analysis to log transactions where the purchasing sawmills did not hold tenure, and nowhere in the original proceeding or appeal did Canada or the United States argue that a pass-through analysis should be restricted to such transactions.

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<sup>24</sup> *Australia – Salmon (Article 21.5 – Canada)*, Third Participant Submission of the United States, 9 December 1999, at para. 5. (Exhibit CDA-54)

<sup>25</sup> US First Submission and Request for Preliminary Rulings, at paras. 33-34.

**A. The Five “Factors” Used by the USDOC to Disregard Arm’s-Length Transactions Are Irrelevant to Whether Entities Operate at Arm’s Length**

37. Both the original panel and the Appellate Body confirmed that a Member may not presume that a subsidy passes through transactions where a subsidy is received by “someone other than the producer or exporter of the product under investigation” or where “the producer of the input is not the same entity as the producer of the processed product”.<sup>26</sup>

38. Canada has demonstrated that the US softwood lumber subsidy calculations include amounts attributable to log purchases by sawmills from unrelated parties.<sup>27</sup> The Canadian respondents provided substantial record evidence concerning such purchases, which the USDOC rejected without having demonstrated that a pass-through occurred. The United States can point to no record evidence or analysis demonstrating that alleged stumpage subsidies passed through to the purchasing lumber producers; instead, it asserts only that “Commerce did not ‘presume’ pass-through”.<sup>28</sup> Nevertheless, the USDOC continued to include that alleged stumpage subsidy amount in its softwood lumber subsidy calculations.

39. The reliance by the USDOC on its five “factors” to dismiss, without analysis, the majority of the transactions as non-arm’s-length is not supported by the GATT 1994, the SCM Agreement, or basic economics. None of the “factors” identified by the USDOC as having “an impact on the disposition of the Crown logs sold by independent harvesters”<sup>29</sup> transform an arm’s-length transaction into one that is not at arm’s length. Nor can these “factors” otherwise be used to avoid conducting an analysis of log transactions.<sup>30</sup>

40. Basic economic principles dictate that domestic processing requirements do not affect the arm’s-length nature of a transaction, as such regulations do not alter the opposition of economic interest between sawmill and harvester.<sup>31</sup> Indeed, if anything, such a requirement may provide the harvester greater market power because it would limit where a sawmill may acquire its inputs.<sup>32</sup> Thus, there is no basis to disregard transactions due to the presence of domestic processing requirements.

41. The USDOC’s assertion that a transaction is not at “arm’s length” where a log purchaser is responsible for the payment of stumpage fees is equally without support. An independent harvester will extract from a sawmill the *full market value* of what it provides to the sawmill (*i.e.*, the log), regardless of who “writes the check”.<sup>33</sup> This fundamental economic principle is commonly found in introductory economic texts. Although the party writing the check may affect the observed log price, it will never affect the *value paid* by the sawmill for the logs.<sup>34</sup> Moreover, a contractual provision specifying the party responsible for remitting stumpage is no different than a provision specifying

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<sup>26</sup> First Written Submission of Canada, at paras. 47-50.

<sup>27</sup> Canada First Submission, at paras. 3-5, 26.

<sup>28</sup> US First Submission and Request for Preliminary Rulings, at para. 33.

<sup>29</sup> Final Section 129 Determination, at 9 (Exhibit CDA-5).

<sup>30</sup> First Written Submission of Canada, at paras. 62-64.

<sup>31</sup> J.P. Kalt and D. Reishus, *Statement for the First Administrative Review*, Attachment 1 to Letter from British Columbia Lumber Trade Council to USDOC (15 March 2004), at 42-43, 48-51, 55 (Exhibit CDA-21); J.P. Kalt and D. Reishus, *Economics of Arms’s Length Transactions and Subsidy Pass-Through*, submitted as Response of the Government of British Columbia to the Department’s 17 August 2004 Supplemental Questionnaire Concerning Pass Through of Alleged Benefits (September 15, 2004), Exhibit BC-PT-39, at 9-10 [“Kalt 2004d”] (Exhibit CDA-20).

<sup>32</sup> Kalt 2004d, at 10.

<sup>33</sup> *Ibid.*, at 4-5.

<sup>34</sup> *Ibid.*, at 6-7.

which party is responsible for satisfying outstanding liens or governmental obligations that might affect a transaction.

42. Finally, in an industrial context it is common for a buyer of goods or services to provide equipment, expertise or materials as part of a transaction. The essence of an arm's-length transaction is that the seller is able to extract from the buyer the value of what the seller provides. Accordingly, these transactions remain at arm's length even if the buyer provides goods or services used by the seller – whether cash, material, credit extended or other consideration.<sup>35</sup>

43. Moreover, the United States cannot be excused from its obligation to conduct the required pass-through analysis on the pretense that transaction-specific information, which was not reasonably required to perform the analysis, was not available. Given that the investigation and review were conducted on an aggregate basis, it is particularly incongruous for the United States to refuse to consider such information with respect to its pass-through analysis. The Canadian respondents provided all information that was reasonably available, including aggregate information sufficient to conduct the analysis.<sup>36</sup>

#### **B. The USDOC Improperly Relied on Log Import Transactions in Performing Its Pass-Through Analysis**

44. In the few instances where the USDOC purported to perform a pass-through analysis, it used benchmarks derived from log import transactions that did not reflect “market” conditions.<sup>37</sup> As the Appellate Body and the original panel made clear, the USDOC was required to establish whether the alleged stumpage subsidy conferred on timber harvesters was passed through the arm's-length log transaction. The section 129 determination benchmarks, however, which included prices for imported logs, were unrepresentative of the timber and market conditions in these provinces for which they were being used.

45. Specifically, the USDOC used extremely small and highly variable log imports relied on to calculate the benchmark for Saskatchewan. For all provinces other than Québec, log import volumes are extremely low, representing only 22.85 per cent of imports into Canada.<sup>38</sup> Accordingly, the use of import prices in benchmarks for Saskatchewan (which accounted for only 0.00175 per cent of imports during the period of investigation) necessarily resulted in the introduction of unrepresentative values. The USDOC did not investigate whether this small volume of imported logs was representative of the Crown harvest, and should not have assumed that it was.

46. Additionally, log import prices are extraordinarily high in value because they typically involve special purchases. The prices are unrepresentative of prices paid for logs used in softwood lumber production. The tariff categories that apply to logs are overly inclusive and capture products used as inputs for high-end applications. Tariff item 4403 of the Canadian *Customs Tariff*, “wood in the rough” is a catch-all category for rough wood items not otherwise specified. Subheading 4403.20 – “other coniferous” – refers to a broad category – coniferous wood in the rough that is untreated.

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<sup>35</sup> Kalt 2004d, at 8-9.

<sup>36</sup> First Written Submission of Canada, at paras. 76, 79.

<sup>37</sup> USDOC Memorandum from Robert Copyak to James Terpstra, “*Pass-Through*” Analysis Calculations for the Province of Saskatchewan, 129 Proceeding for the WTO Appellate Body Finding in the Final Countervailing Duty Determination, Certain Softwood Lumber from Canada (6 December 2004) (Exhibit CDA-59); USDOC Memorandum from Robert Copyak to James Terpstra, “*Pass-Through*” Analysis Calculations for the Province of Ontario, 129 Proceeding for the WTO Appellate Body Finding in the Final Countervailing Duty Determination, Certain Softwood Lumber from Canada (6 December 2004) (Exhibit CDA-60).

<sup>38</sup> Response of the Government of Canada to USDOC's November 24, 2003 Supplemental Remand Questionnaire Response (3 December 2003), at GOC-2 and Exh. GOC-GEN-59 (Exhibit CDA-55).

While the category may include untreated logs, it can also include logs that have been debarked, sawn logs such as roughly squared logs, house logs, pulp logs, round logs for veneer production, tree stumps and roots of special woods, and ‘certain growths’ for making special furniture veneers or smoking pipes. Many of these products are of higher value and are of a higher price than untreated logs destined, for example, for housing construction and many are not used for lumber production at all.<sup>39</sup> As a result, these import prices did not reflect a “market” price for logs used in softwood lumber production and should not have been used to derive benchmarks.

47. Accordingly, the use by the USDOC of these unrepresentative log import prices in the section 129 determination distorted the results of its limited pass-through analysis.

**C. US Arguments Concerning Sawmill-to-Sawmill Transactions Have No Basis in the Findings of Either the Original Panel or the Appellate Body**

48. Finally, the United States contends that the recommendations and rulings of the DSB were limited to a particular category of sawmill-to-sawmill transactions, even though no such argument was made by either Canada or the United States during the original proceedings, and neither the original panel nor the Appellate Body made any such distinction.<sup>40</sup> The United States seeks to place tenured sawmills on one side of the transaction, but non-tenured sawmills on the other.<sup>41</sup> The United States, through this limitation, is attempting in yet another creative way to avoid its obligation to conduct the pass-through analysis identified by both the original panel and the Appellate Body under Article VI:3 of the GATT 1994 and Articles 10 and 32.1 of the SCM Agreement.

49. The original panel concluded that a pass-through analysis is required for all arm’s-length log transactions between unrelated sawmills:

[T]he USDOC’s failure to conduct a pass-through analysis in respect of logs sold by tenure-holding timber harvesters (whether or not also lumber producers) to unrelated sawmills producing subject softwood lumber ... was inconsistent with Article 10 and thus Article 32.1 SCM Agreement, and with Article VI:3 of GATT 1994.<sup>42</sup>

50. The Appellate Body agreed and upheld:

... the Panel’s finding, in paragraph 7.99 of the Panel Report that USDOC’s failure to conduct a pass-through analysis in respect of arm’s length sales of *logs* by tenured harvesters/sawmills to unrelated

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<sup>39</sup> See also Response of the Government of Alberta to the USDOC’s 25 September 2003 Questionnaire (14 October 2003), at AB-17 (“To repeat, it is critical to note that the statistics [used by the Department] ...are for ‘wood in the rough,’ which would include roughly squared timbers, untreated telephone poles and other such processed wood products and may not include any logs in the round, with bark attached.”) (Exhibit CDA-56)l Response of the Government of British Columbia to the USDOC’s September 25, 2003 Questionnaire (14 October 2003), at BC-19 (Exhibit CDA-57); and Response of the Gouvernement du Québec to the USDOC’s 25 September 2003 Questionnaire (October 14, 2003), at 14 (Exhibit CDA-58).

<sup>40</sup> In footnote 151 of its report, the Appellate Body indicates that the term “sawmill” refers to “an enterprise that processes logs into softwood lumber and does not hold a stumpage contract.” Appellate Body Report, at para. 124, fn. 151. The Appellate Body also cites to record evidence on independent harvester transactions Canada provided before the original panel as confirming the existence of arm’s-length sales of logs by “... tenured timber harvesters/sawmills to unrelated sawmills not holding stumpage rights ...”, Appellate Body Report, at para. 150.

<sup>41</sup> First Submission and Request for Preliminary Ruling of the United States, at para. 34.

<sup>42</sup> Panel Report, at para. 7.99.

sawmills is inconsistent with Articles 10 and 32.1 of the *SCM Agreement* and Article VI:3 of the GATT 1994.<sup>43</sup>

51. The Appellate Body, therefore, upheld the conclusions of the original panel that a pass-through analysis was required for all arm's-length log transactions between sawmills. There is no qualifier in the Appellate Body's decision that purchasing sawmills must be "non-tenured", and there is no such qualifier in the original panel decision that it upheld. There would be no legal or economic reason to restrict the requirement to conduct a pass-through analysis to purchasing sawmills without tenure, and had the Appellate Body intended to restrict the scope of its ruling in this manner, it would have done so explicitly.

52. Whether the purchasing sawmill holds or does not hold stumpage rights is irrelevant to the Appellate Body's reasoning. The crux of the Appellate Body's reasoning relates to the fact that the transaction concerns an input product (*i.e.*, a log). Where a lumber producer sources its log input other than from its own timber harvesting and *log production*, the receipt of an alleged stumpage subsidy is necessarily indirect and requires pass-through analysis before it may be countervailed as an alleged subsidy to *lumber production*.<sup>44</sup> The Appellate Body did not condition its conclusion on circumstances concerning the purchasing sawmills.

## II. CONCLUSION

53. Canada requests that the Panel determine the final results of the first administrative review are within the jurisdiction of the Panel under Article 21.5 of the DSU. Canada also requests the Panel to reject as unfounded the claims made by the United States in its first written submission.

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<sup>43</sup> Appellate Body Report, at para. 167(e) [*italics in original*].

<sup>44</sup> Appellate Body Report, at paras. 146-47, 156-59.

**TABLE OF EXHIBITS**

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- CDA-53      *The New Shorter Oxford English Dictionary*, (Oxford: The Clarendon Press, 1993), at 882.
- CDA-54      *Australia – Salmon (Article 21.5 - Canada)*, Third Participant Submission of the United States, 9 December 1999, at para. 5.
- CDA-55      Response of the Government of Canada to USDOC’s November 24, 2003 Supplemental Remand Questionnaire Response (3 December 2003), at GOC-2 and Exh. GOC-GEN-59.
- CDA-56      Response of the Government of Alberta to the USDOC’s 25 September 2003 Questionnaire (14 October 2003), at AB-17.
- CDA-57      Response of the Government of British Columbia to the USDOC’s 25 September 2003 Questionnaire (14 October 2003), at BC-19.
- CDA-58      Response of the Gouvernement du Québec to the USDOC’s 25 September 2003 Questionnaire (14 October 2003), at 14.
- CDA-59      USDOC Memorandum from Robert Copyak to James Terpstra, “*Pass-Through*” *Analysis Calculations for the Province of Saskatchewan, 129 Proceeding for the WTO Appellate Body Finding in the Final Countervailing Duty Determination, Certain Softwood Lumber from Canada* (6 December 2004).
- CDA-60      USDOC Memorandum from Robert Copyak to James Terpstra, “*Pass-Through*” *Analysis Calculations for the Province of Ontario, 129 Proceeding for the WTO Appellate Body Finding in the Final Countervailing Duty Determination, Certain Softwood Lumber from Canada* (6 December 2004).

## ANNEX A-3

### ORAL STATEMENT OF CANADA

21 April 2005

#### I. INTRODUCTION

1. We are here today because the Dispute Settlement Body has ruled that a subsidy on harvested timber – that is, logs – does not necessarily pass-through to the softwood lumber manufactured from those logs. This is so where the producer sells the logs to an unrelated entity who turns the logs into lumber. In these circumstances, before the United States may apply countervailing duties to the softwood lumber manufactured from those logs, it has an obligation under Article VI:3 of the GATT and Articles 10 and 32.1 of the SCM Agreement to establish that the benefit of the subsidy has passed-through from the producer of the logs to the producer of the lumber.

2. The United States' compliance obligations in this case were uncomplicated. Before it applied countervailing duties to lumber made from logs acquired in such arm's-length transactions, it had an obligation to conduct a pass-through analysis to determine whether the benefit of any subsidies on those logs passed through to the lumber. By agreement with Canada, the United States had ten months in which to conduct that analysis.

3. Instead of complying, the United States has gone to great lengths to avoid the obligations flowing from the DSB's ruling. At the end of the ten months the United States issued a revised countervailing duty determination under section 129 of its *Uruguay Round Implementation Act*. The United States did conduct a pass-through analysis for a small fraction of the transactions that were the subject of the DSB's ruling, but for the overwhelming majority of transactions it did no pass-through analysis. Instead, it invented an elaborate threshold test which it used to exclude most arm's-length transactions from any pass-through analysis. The test the United States invented to exclude arm's-length transactions from pass-through analysis has no basis in WTO law. It defies basic principles of economics and is even contrary to the criteria for arm's-length transactions under the United States' own law.

4. On the basis of its flawed threshold test, the United States has also sought to evade its obligations by claiming that it lacked the necessary information to do a pass-through analysis. As Canada will show, it supplied the United States with all the information it needed and went to great lengths to comply with its requests. The United States' onerous additional demands involved information that was irrelevant to a pass-through analysis, did not come until most of its reasonable period of time to comply had expired, and would have imposed an impossible evidentiary burden on Canadian respondents in the process.

5. The United States also failed to perform any pass-through analysis for other sales of logs, those to companies that produced both logs and lumber. Nothing in the adopted findings of the panel or the Appellate Body licensed the exclusion of these transactions.

6. In all of these instances, the United States simply assumed that the entire benefit passed through from the logs to the softwood lumber and included the full amount of that benefit in its duty calculations on the lumber. In the original case, the DSB ruled that the United States' presumption of pass-through was inconsistent with its obligations under the GATT and the SCM Agreement. The United States has repeated its presumption of pass-through in the determinations challenged here and they are similarly inconsistent with its WTO obligations.

7. The United States' purported compliance measure took effect on 10 December 2004. But then, three days later, the United States issued another determination covering the same products over the same period. In this new determination, which was made pursuant to the United States' administrative review process, the United States definitively set the countervailing duties for the softwood lumber covered by the DSB's ruling using the same flawed that it used reasoning in its section 129 determination. Yet this time it conducted no pass-through analysis at all, not even the extremely circumscribed analysis of the section 129 determination.

8. This administrative review determination took effect on December 20, 2004 and superseded the section 129 determination. That is, the section 129 determination ceased to be effective after just ten days, and just three days after the United States informed the DSB that it had complied with its recommendations and rulings by properly conducting a pass-through analysis.

9. In sum, the United States' section 129 determination did not redress its non-compliance with its obligations under the GATT and the SCM Agreement. Moreover, to the extent that it even partially complied with these obligations, it rendered that limited compliance non-existent by the administrative review.

10. Despite this, the United States continues to insist that it has complied with the recommendations and rulings of the DSB. It insists, as well, that its administrative review determination is not properly before this panel, regardless of how that determination has undone even the United States' purported compliance measure in this case, the section 129 determination.

11. Canada's response to the United States' request for a preliminary ruling has addressed why the administrative review determination is properly within the scope of your review. The third party submission of the European Communities reaches the same conclusion. So too does the third party submission of China, although it takes a different path to get there. In Canada's view, this issue is crucial, as it goes directly to the ability of the United States to impose a non-compliant measure while relying on its domestic anti-dumping and countervail regime to evade its WTO obligations. Canada will be pleased to take questions on this matter, but because it has been thoroughly canvassed in previous submissions and in the third party submissions, Canada will not take up time today with further affirmative argument on it.

12. Canada will focus today on the assertions made by the United States in its second written submission. First, Mr. Cochlin will explain why the US presumption of pass-through is contrary to its obligations under the GATT and the SCM Agreement and why the threshold test the United States has devised is both incorrect and unfounded. Then, Mr. Owen will explain that the United States had all the available information it required to perform the pass-through analysis mandated by the DSB's ruling, and how Canada nevertheless made considerable efforts to comply with the unreasonable and irrelevant US demands for additional information.

## **II. COMMERCE CONTINUED TO PRESUME, RATHER THAN DEMONSTRATE, INDIRECT SUBSIDIZATION**

13. Mr. Chairman, Members of the Panel, the central question in dispute before you is this: did the United States continue to *presume* the pass-through of alleged stumpage subsidies in violation of Article VI:3 of the GATT and Articles 10 and 32.1 of the SCM Agreement?

14. Contrary to the numerous, repeated assertions by the United States, a presumption of pass-through is exactly what the United States Department of Commerce ("Commerce") applied where it, first, rejected transactions based on its contrived "arm's-length" threshold test; second, refused to



consider in any way certain sawmill-to-sawmill transactions; and finally, claimed that information necessary to conduct pass-through analyses was otherwise deficient.

15. The issue of “pass-through” arises in this case because, in many instances, sawmills could have only received the alleged stumpage subsidy *indirectly* – through purchases of Crown log inputs from unrelated harvesters or other sawmills. Indirect subsidization of softwood lumber production therefore would occur only if the input subsidy “passed through” from the log seller to the purchasing sawmill.

16. Both the original panel and the Appellate Body made clear that Commerce is required to demonstrate – and not presume – such alleged indirect subsidization before it could lawfully impose countervailing duties under Article VI:3 of the GATT and Articles 10 and 32.1 of the SCM Agreement.<sup>1</sup> Commerce must demonstrate that the alleged direct subsidy to *log* production passes through and becomes an indirect subsidy to *lumber* production. Such analysis involves demonstrating, by making appropriate market comparisons, that the purchasing sawmills received a “benefit” within the meaning of Article 1.1(b) of the SCM Agreement.

17. The United States does not contest that it has an obligation to conduct a pass-through analysis in this case.<sup>2</sup> Indeed, for a small fraction of the log transactions identified in its section 129 determination, Commerce compared log prices to market benchmarks to demonstrate the existence and amount of a pass-through.<sup>3</sup> In most respects, Canada does not contest this limited analysis.

18. However, for the vast majority of log transactions covered by its section 129 determination, and for all transactions covered by its administrative review results, Commerce performed no such analysis. Instead, it attempted at every turn to avoid the obligation to demonstrate a pass-through.

19. For all log volumes rejected by Commerce, it presumed, rather than demonstrated, a pass-through. It deemed – without proof or analysis – that the alleged subsidy to the upstream log producer *automatically* becomes a subsidy to the unrelated downstream purchasing sawmill.

20. The United States goes to great lengths to divert the Panel’s attention from Commerce’s presumption of a pass-through.<sup>4</sup> It wants the Panel to believe that it is operating within its discretion, and that it is aggressively trying to meet its pass-through obligations. The fact remains, however, that without having done pass-through analyses and without having employed a presumption, Commerce would have been required to limit its numerator to only Crown timber going *directly* to softwood lumber production. As the United States explains, however, Commerce instead established the numerator of its subsidy calculation by requesting and using the total volume of all harvested Crown timber entering sawmills either *directly or indirectly*.<sup>5</sup>

### III. COMMERCE APPLIED A CONTRIVED “ARM’S LENGTH” TEST TO AVOID PERFORMING THE REQUIRED PASS-THROUGH ANALYSES

21. The primary way in which Commerce avoided having to perform a pass-through analysis was by devising a novel test for determining whether a transaction was at arm’s length. The United States no longer claims that it had no obligation to conduct any pass-through analysis at all, as it did in the original proceedings. It now claims, instead, that the obligation only arises where Canada can demonstrate that a transaction has occurred not only between unrelated parties, but also outside any

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<sup>1</sup> First Written Submission of Canada, at paras. 41-50.

<sup>2</sup> Second Written Submission of the United States, at para. 35-36.

<sup>3</sup> *Ibid.*, at para. 39.

<sup>4</sup> *Ibid.*, at paras. 15, 40-42.

<sup>5</sup> *Ibid.*, at paras. 7 and 9, footnote 12.

possible influence of “government-mandated restrictions and other factors”.<sup>6</sup> The United States maintains that an “arm’s length” transaction is defined by more than “mere affiliation”.<sup>7</sup> In so doing, it ignores even the arm’s length standard set out in its own law, and which it has routinely used.<sup>8</sup>

22. Through an exercise in *ex post facto* rationalization, the United States argues that Commerce’s so-called factors are justified by a three-pronged test, custom-tailored for this dispute.<sup>9</sup> First, a transaction must be between unrelated parties. Second, one party to the transaction must not “effectively control” the other. Third, both parties must have “roughly equal bargaining power”.

23. Canada does not contest the first of these requirements. It is the only part of Commerce’s arm’s length test that is warranted, based on the findings and conclusions of the original panel, as upheld by the Appellate Body.<sup>10</sup>

24. The second requirement of the US test is no different than the first. “Effective control” is already covered in the US statutory definition of “affiliated parties”, which Commerce incorporated in its questionnaires. The only transactions for which Canadian respondents claimed that Commerce should do a pass-through analysis were those between parties that were not “affiliated”. That statutory definition covers a wide range of relationships between parties to a transaction, ranging from family relationships, to direct or indirect ownership of an organization, and expressly includes any situation where one person “controls” any other person. According to the statute, the term “control” refers to situations in which a person “is legally or operationally in a position to exercise restraint or direction over the other person”.<sup>11</sup> Commerce did not contest, but rather confirmed, that the definition of “affiliated parties” was applied properly in this case.<sup>12</sup>

25. The third requirement – “roughly equal bargaining power” – is pure fabrication, tailored for this case to justify Commerce’s use of so-called factors to reject transactions. Nowhere is it found in the analysis of the original panel or the Appellate Body. Moreover, were “roughly equal bargaining power” a requirement for arm’s-length transactions, almost any transaction anywhere could be rejected by investigating authorities on that basis alone. One party to a transaction will often have greater bargaining power than the other, but this does not mean that the terms of the transaction do not reflect a market outcome.

26. Fundamentally, by rejecting transactions on the hypothesis that their outcome might somehow be “affected” by market conditions, Commerce conflates the obligation to conduct a pass-through analysis, which would demonstrate the existence and amount of a pass-through, with the task of identifying transactions to which that obligation applies.<sup>13</sup>

27. Moving to the five factors themselves, we have detailed in our written submissions why they are irrelevant to whether a pass-through analysis is required. I therefore propose to make just three points today.

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<sup>6</sup> *Ibid.*, at para. 20.

<sup>7</sup> *Ibid.*, at paras. 16-17.

<sup>8</sup> First Written Submission of Canada, at para. 62, footnote 54 (citing SAA at 928; Exhibit CDA-1).

<sup>9</sup> Second Written Submission of the United States, at para. 16.

<sup>10</sup> First Written Submission of Canada, at paras. 47-49.

<sup>11</sup> *Ibid.*, at para. 60, footnote 51, citing to section 771(33) of the *Tariff Act of 1930* (19 U.S.C. § 1677(33)) (Exhibit CDA-17).

<sup>12</sup> First Written Submission of Canada, at paras. 60, 74; Second Written Submission of the United States, at para. 15, footnote 18.

<sup>13</sup> *See, e.g.*, Third Party Submission of China, at paras. 26-27.

28. First, the United States makes the telling concession that its “additional factors” are not “exclusively arm’s-length issues”.<sup>14</sup> The factors in question here regard who paid the stumpage fees, and whether transactions involved a fibre exchange agreement.

29. As a matter of basic economics, neither factor is an “arm’s length” issue at all. The issue of who remits the government stumpage fee says nothing about whether the alleged input subsidy passed through to the purchaser. A contractual provision assigning to the buyer the obligation to pay a debt owed by the seller does not affect the value of the good sold. The value of a log is determined by the supply and demand for that log.<sup>15</sup> Moreover, what the United States calls the “vehicle by which the Crown bestows the subsidy”<sup>16</sup> has been found in this case to be the provision by government of standing timber to timber harvesters. Therefore, the US argument that the government provided the alleged stumpage subsidy directly to sawmills, where they paid the stumpage fee on behalf of the harvester, is not supported by the facts. Standing timber is provided to the upstream timber harvester, not the downstream sawmill. These facts do not suddenly change simply because the purchasing sawmill might remit the government stumpage on behalf of the upstream stumpage holder.

30. Similarly, a barter arrangement in the form of a fibre exchange agreement merely provides that the buyer is paying the consideration owed to the seller in goods rather than in cash. Indeed, barter is perhaps the oldest form of market transaction. This factor is irrelevant to determining whether the seller is able to extract from the buyer the value of what the seller provides, and hence whether any subsidy has passed through.

31. Second, with respect to Commerce’s “log purchase agreement” factor, the United States in its rebuttal submission cites various possible contractual arrangements to explain Commerce’s failure to conduct a pass-through analysis.<sup>17</sup> These contractual terms are part of the agreed structure of a transaction between unrelated parties, and as Canada has explained, simply reflect the results of the bargain reached.<sup>18</sup>

32. Finally, Canada explained that provincial regulations imposing “limitations on log sales” and “wood supply agreements”<sup>19</sup> do not dictate the material terms of the log sale agreement, such as price, delivery arrangements, or timing. A regulatory vacuum is not a prerequisite for arm’s-length transactions.<sup>20</sup> Were it so, no sale could ever be found to be at arm’s-length.

33. By way of conclusion to this section, we note that the United States to date has offered no justification regarding Commerce’s presumption of a pass-through for all transactions in the administrative review; it argues only that the measure is not properly before the Panel.<sup>21</sup> Accordingly, up to this point, the United States here has essentially conceded that the failure by Commerce to perform a pass-through analysis in the administrative review was inconsistent with US obligations.

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<sup>14</sup> Second Written Submission of the United States, at para. 22, footnote 29, and at para. 23.

<sup>15</sup> First Written Submission of Canada, para. at 64; Rebuttal Submission of Canada, at para. 41.

<sup>16</sup> Second Written Submission of the United States, at para. 23.

<sup>17</sup> *Ibid.*, at para. 22.

<sup>18</sup> First Written Submission of Canada, at paras. 64; Rebuttal Submission of Canada, at para. 42.

<sup>19</sup> Second Written Submission of the United States, at para. 21.

<sup>20</sup> First Written Submission of Canada, at paras. 64; Rebuttal Submission of Canada, at para. 40.

<sup>21</sup> Second Written Submission of the United States, at paras. 46-47.

#### **IV. COMMERCE Failed TO CONDUCT ANY ANALYSIS WHERE THE PURCHASING SAWMILL HELD A STUMPAGE CONTRACT**

34. I turn now to address another instance in which Commerce impermissibly presumed a pass-through.

35. Commerce limited its questionnaires to only a select subset of sawmill-to-sawmill transactions, denying a pass-through analysis where the purchasing sawmills held tenure.

36. As justification here, the United States claims that the Appellate Body reversed, rather than upheld, the original panel's conclusion in paragraph 7.99 of its report.<sup>22</sup> Allow me to quote directly from paragraph 7.99:

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

37. The original panel's conclusion covers transactions where the purchasing sawmills held tenure. There is no reversal of this conclusion in the Appellate Body's report; to the contrary, there are pages of reasoning in support.<sup>23</sup>

38. In an attempt to explain Commerce's exclusion of these transactions, the United States offers only that, “tenure-holding sawmills are direct subsidy recipients”.<sup>24</sup> This statement fails entirely to explain how the alleged stumpage subsidy passes from upstream timber harvesters to downstream purchasing sawmills. Commerce simply presumed the pass-through.

39. The only other reason the United States offers for Commerce's refusal to conduct the required analysis is that the Canadian respondents failed to provide necessary data. As my colleague Mr. Owen will now explain, the US claims in this respect are false, and the Canadian respondents provided more than sufficient evidence to allow Commerce to conduct a pass-through analysis in both determinations.

#### **V. THE RECORD EVIDENCE WAS SUFFICIENT TO PERFORM A PROPER PASS-THROUGH ANALYSIS**

##### **A. The Canadian Respondents Provided All Available Evidence Necessary for Commerce to Perform a Pass-Through Analysis**

40. Mr. Chairman, Members of the Panel, the United States complains that Canada failed to provide the necessary data to allow Commerce to conduct a pass-through analysis and is, in fact, “attempting to restrict” its ability to conduct such an analysis.<sup>25</sup>

41. These assertions are patently false. Commerce had everything it needed and more to conduct a pass-through analysis.<sup>26</sup> The Canadian respondents provided pricing data that was representative of the arm's-length transactions in these provinces and was more than sufficient to conduct a pass-

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<sup>22</sup> *Ibid.*, at para. 44.

<sup>23</sup> Rebuttal Submission of Canada, at paras. 51-52.

<sup>24</sup> Second Written Submission of the United States, at para. 44.

<sup>25</sup> *Ibid.*, at paras. 14, 32.

<sup>26</sup> See First Written Submission of Canada, at para. 58.

through analysis. Commerce should have used this information to calculate the amount of pass-through applicable to the entire volume of arm's-length transactions for each province.

42. Allow me to briefly outline this information.

43. British Columbia provided Commerce with the name of the seller, volume, value, and species information for each of the more than 3,000 arm's-length purchases by sawmills that accounted for 53 per cent of the Crown harvest in that province.<sup>27</sup> In addition, for these same sawmills, British Columbia provided equally detailed information on more than 2,500 arm's-length transactions involving logs harvested from private lands.<sup>28</sup> These data could have been used to calculate the amount of pass-through for these transactions and an average amount of pass-through for the remaining arm's-length volumes in this province. Instead, Commerce ignored all of these data.

44. Alberta had PricewaterhouseCoopers compile transaction-specific pricing data for approximately 80 per cent of arm's-length transactions for which it claimed a pass-through analysis.<sup>29</sup> Commerce relied on these transaction-specific data to calculate its pass-through adjustment. It failed, however, to use these pricing data to calculate the average pass-through of subsidies – if any – for the remaining volumes of arm's-length transactions.

45. Saskatchewan and Manitoba both provided extensive transaction-specific pricing data. More specifically, Saskatchewan requested Weyerhaeuser – its largest softwood lumber producer – to provide their data. Weyerhaeuser was involved in approximately 40 per cent of independent harvester transactions in this province.<sup>30</sup> Similarly, Manitoba provided Commerce with transaction-specific information from Tembec, an independent harvester which was involved in 51 per cent of the arm's-length transactions in that province.<sup>31</sup>

46. Ontario provided company-specific data relating to sawmills responsible for 91.3 per cent of the Crown harvest.<sup>32</sup> The Ontario industry associations also provided Commerce with transaction-specific information for two of the largest independent harvesters and 23 of the largest sawmills in that province. In fact, Commerce received transaction-specific pricing data from companies accounting for over 90 per cent of the Crown harvest entering sawmills during the period of investigation.<sup>33</sup>

47. In short, Canadian respondents provided Commerce with transaction-specific information for the majority of transactions between independent harvesters and sawmills in most provinces. In addition, Ontario provided company- or sawmill-specific data. Commerce, therefore, had more than enough information to conduct pass-through analyses.

48. No pricing data was requested by Commerce in the administrative review.<sup>34</sup> Moreover, the Canadian respondents had no opportunity to present this information, as Commerce did not request this evidence in the section 129 proceeding until after closure of the factual record in the administrative review. Commerce is now requesting this transaction-specific information in its second administrative review.

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<sup>27</sup> First Written Submission of Canada, at para. 80.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*, at para. 81.

<sup>30</sup> *Ibid.*, at para. 83.

<sup>31</sup> *Ibid.*, at fn 96.

<sup>32</sup> *Ibid.*, at para. 87.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*, at para. 77.

49. Given Commerce's failure to request transaction-specific evidence, it should have either removed the arm's-length volumes that had been identified from the numerator or used the sawmill-specific information submitted by some provinces to conduct pass-through analyses. Instead, Commerce chose to rely on its "factors" to once again impermissibly presume a full pass-through of the alleged stumpage subsidy.

#### **B. Commerce's Accusation that Canada Withheld Evidence is Without Merit**

50. So, as I have outlined, the United States had everything it needed to conduct its analysis. It now accuses Canada, however, of being unprepared to support its pass-through claims with evidence. Why? Because Canada did not provide transaction-specific information for each of the five "factors" in response to supplemental questionnaires issued six to eight months into the reasonable period of time. This information was unnecessary and irrelevant to a pass-through analysis. Given the timing of the questionnaire and the type of information sought, this information was also impossible to provide.

51. A large portion of the evidence Commerce complains it did not receive was irrelevant and unnecessary for conducting a pass-through analysis.<sup>35</sup> As Mr. Cochlin has explained, tenure agreements, wood supply commitment letters, payment of stumpage fees by the log purchaser, log purchase agreements and fibre exchange agreements are not relevant to whether a transaction is conducted at arm's length.

52. In many instances, the amount of information requested by Commerce was impossible to provide. For example, British Columbia was expected to retrieve, copy and submit more than 3,000 tenure agreements that were scattered over dozens of district forestry offices.<sup>36</sup> This would have amounted to upwards of 60,000 pages of documents. Canada notified Commerce on multiple occasions of the impossibility of complying with this request, offered numerous sample agreements, and otherwise sought a reasonable alternative. Only after nearly five months did Commerce agree to modify its demands, requesting "excerpts" from all agreements in the province containing certain specified provisions. Commerce's "compromise" would have required British Columbia to locate and manually review all tenure agreements in the province to identify the relevant excerpts, and submit reams of complete tenure agreements, in a little over two weeks.

53. Further, Commerce solicited none of the transaction-specific pricing data that it now asserts are so "essential" for a pass-through analysis in its first questionnaire. Instead, Commerce waited until more than half of the reasonable period of time had elapsed before requesting these data in its supplemental questionnaires and pass-through appendices.<sup>37</sup> Commerce also waited until this time to request information on three of its five "factors", including copies of log purchase agreements and fibre exchange agreements for every arm's-length transaction in the provinces during the period of investigation.<sup>38</sup> In addition, Commerce demanded that the Canadian respondents identify every transaction where a sawmill paid stumpage on behalf of an independent harvester.

54. The pass-through appendices used to collect information from companies on affiliation, pricing data and the "factors" contained more than twenty-four pages of questions and attachments. The supplemental questionnaires directed the provinces to distribute the appendices to *all independent harvesters and sawmills* that were involved in arm's-length transactions. In the case of British Columbia, this would have required the distribution of the appendices to 3,000 independent

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<sup>35</sup> *Ibid.*, at paras. 75-76.

<sup>36</sup> *Ibid.*, at para. 76 (citing to BC September 15, 2004 Supp. Questionnaire Response, Narrative, at 5 and Norcon B, at 4 (Exhibit CDA-15)).

<sup>37</sup> *Ibid.*, at para. 75.

<sup>38</sup> *Ibid.*

harvesters and 175 sawmills operating in that province. If British Columbia had provided Commerce with the required nine copies and produced the other twenty copies required for the service list, *without responses*, this would have amounted to *almost two million, two hundred and ten thousand pages of information*. If the independent harvesters and sawmills had filled out the questionnaires, Commerce would have received *millions more pages of documentation*. As I am sure you will agree, it is hardly reasonable to expect British Columbia to manage the printing and submission of millions of pages of documents in under two months; in fact, it borders on the absurd.

55. Finally, as we explained earlier, Commerce was given more than enough data to conduct a pass-through analysis. The United States has not offered a single valid reason for refusing to use most of this information.

## VI. CONCLUSION

56. In conclusion, the United States presumed a pass-through in violation of its WTO obligations. Commerce's presumption of a pass-through covers the vast majority of log transaction volumes identified in the section 129 proceedings, and all transaction volumes identified in the administrative review. Canada has explained that Commerce was not justified in rejecting the log transactions that it did, whether by: first, applying a new "arm's length" threshold test; second, claiming that the Appellate Body reversed the original panel findings and conclusions with respect to certain sawmill-to-sawmill transactions; or third, claiming that information was missing or deficient.

57. In both its section 129 determination and its administrative review, Commerce once again necessarily and impermissibly presumed pass-through.

58. Canada therefore requests that the Panel:

- *Find* that the US imposition of countervailing duties in respect of the Crown log transactions identified in this dispute is inconsistent with Article VI:3 of the GATT and Articles 10 and 32.1 of the SCM Agreement;
- *Recommend* that the United States bring its measures into conformity with its obligations under those provisions; and
- *Suggest*, in accordance with Article 19.1 of the DSU, that the United States do one of the following two things:
  - It should refund the amount of the countervailing duties it imposed to offset alleged subsidy amounts impermissibly presumed to pass through;
  - or*
  - It should revise its measures to meet its WTO obligations *and* refund the amount of the countervailing duties it imposed to the extent that they exceeded the amount of the alleged subsidy demonstrated to have passed through to the production of softwood lumber.