

V. CONCLUSIONS AND RECOMMENDATIONS

5.1 In light of the above, we reject:

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

5.2 We uphold Canada's claims that:

- in the Section 129 Determination, and in the treatment of pass-through in the First Assessment Review, the United States failed to properly implement the recommendations and rulings of the DSB in this dispute by failing to conduct a pass-through analysis in respect of sales, found by USDOC not to be at arm's length, of logs by tenured timber harvesters, whether or not they also produce lumber, to unrelated lumber producers, whether or not they hold a stumpage contract; and
- in the Section 129 Determination, and in the First Assessment Review, the USDOC therefore included in its subsidy numerator transactions for which it had not demonstrated that the benefit of subsidized log inputs had passed through to the processed product.

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

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

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

5.6 Pursuant to DSU Article 19.1, Canada has requested that we suggest ways in which the United States could implement our recommendation. In particular, Canada suggests⁷⁸ that the United States do one of the following two things:

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

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

or

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

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