United States - Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada: Recourse by Canada to Article 21.5 of the DSU

Oral Statement of the United States

April 21, 2005

Introduction

1. Good morning, Mr. Chairman and members of the Panel. Thank you for agreeing to serve as panelists in this proceeding and for the opportunity to appear before you today.

2. We recognize that our statement is lengthy, which flows from the fact that this is our first opportunity to respond to Canada's second submission. We were disappointed that Canada opposed our request for sequential second submissions in this proceeding, which would have helped to avoid this situation. We thank you in advance for your time and attention as we deliver our statement.

3. We will begin this morning by addressing Canada's response to our preliminary ruling request. Then we will explain how the United States properly implemented the recommendations and rulings of the DSB by conducting the appropriate pass-through analysis.

Preliminary Ruling Request

4. As you know, the United States has requested a preliminary ruling that the results of the assessment review are not "measures taken to comply" pursuant to DSU Article 21.5, and are therefore outside this Panel's jurisdiction. As our request notes, the assessment review was a proceeding separate from both the original countervailing duty investigation determination challenged by Canada and the Section 129 Determination at issue here, was initiated prior to the DSB's adoption of recommendations and rulings in this dispute, and had nothing to do with complying with the recommendations and rulings of the DSB.

5. In an attempt to justify sweeping the separate assessment review results into its Article 21.5 panel request, Canada has resorted to relying on the supposed "broad" scope of Article 21.5 and "wide discretion" of the Panel to review measures under Article 21.5.[1] Canada also argues that a failure to include the assessment review results in this compliance proceeding would be contrary to the overall "purpose" of Article 21.5 proceedings.[2]

6. But the issue is simpler than Canada would have us believe. Either a measure is taken to comply – and falls within the terms of Article 21.5 – or it is not, and is thus not within this Panel's jurisdiction. As the Appellate Body stated in *Canada – Aircraft* – and none of the reports cited by Canada are to the contrary – Article 21.5 proceedings "do not concern just *any* measure of a Member of the WTO; rather Article 21.5 proceedings are limited to those

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[1] E.g., Canada Second Written Submission, paras. 7 - 8.

[2] Canada Second Written Submission, paras. 6, 26 - 30.

'measures *taken to comply* with the recommendations and rulings' of the DSB."[3]

7. Let us review the facts. Canada's original request for consultations concerned the *final countervailing duty investigation determination* published on April 2, 2002, and its panel request alleged errors in that final investigation determination.[4] The original panel's findings with respect to pass-through related solely to that final investigation determination. The Appellate Body stated that "[b]efore the Panel, Canada challenged a number of aspects of the final determination by [the Commerce Department] that led to the imposition of duties"[5] and the Appellate Body's findings and conclusions – including those with respect to the need for a "pass-through" analysis – thus related only to that final investigation determination.

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

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

10. Thus, Canada's repeated assertions that Commerce itself "purported" or "alleged" that it conducted the assessment review to implement the DSB's recommendations and rulings are inaccurate and have no basis.

11. Canada cannot deny that – in contrast to the assessment review – Commerce initiated the Section 129 proceeding for the specific purpose of addressing the DSB's recommendations and rulings. Indeed, the agreement of the parties on the "reasonable period of time" to implement the recommendations and rulings in this dispute was negotiated in the light of, and specifically refers

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[3] Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted August 20, 1999, para. 36.

[4] WT/DS257/3, 19 August 2002.

[5] Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted February 12, 2004, para. 1 ("Appellate Body Report").

to, the U.S. procedures for implementing WTO reports[6] – that is, the Section 129 procedures.

12. Faced with the undeniable fact that the assessment review results were not taken to comply with the DSB's recommendations and rulings, Canada instead argues that the Panel should nonetheless consider them in this proceeding, because the assessment review results either (a) somehow rendered the Section 129 Determination "non-existent" or (b) were "inextricably linked" to the recommendations and rulings of the DSB.

13. Neither of these assertions is true.

The assessment review results did not render the Section 129 Determination "non-existent"

14. First, in no way did the assessment results render the Section 129 Determination non-existent. The final investigation determination challenged by Canada – a determination of the existence and the amount of the subsidy – established one of the prerequisites under Article 19.1 of the SCM Agreement for the imposition of a countervailing duty. That investigation determination did not establish the amount of duties that would be levied, or assessed, on the imports; that task is undertaken as part of the separate assessment review. The final investigation determination simply established one of the bases for imposing countervailing duties. The Panel should recall in this connection that the remedy Canada sought in the dispute before the original panel was the revocation of the countervailing duty order, which was based in part on the final investigation determination.

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

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

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

18. First, in *Australia – Leather*, the United States was arguing that the panel should review whether a prohibited subsidy had actually been withdrawn, as specifically required by Article 4.7

[6] WT/DS257/13.

of the SCM Agreement, when the repayment of a grant had been contingent on the simultaneous grant of a loan on non-commercial terms. In contrast, this proceeding involves the question of whether a measure has been brought into conformity with a WTO agreement.

19. Second, the *Australia – Leather* panel concluded that the subsidy had not been withdrawn at all, because the supposed repayment and the non-commercial loan were, in effect, a single transaction in which the subsidy simply shifted form. By contrast, in this dispute, the Section 129 Determination and the assessment review results are separate and independent actions. The simple fact is, the Section 129 Determination was made to bring the measure in dispute into conformity with the SCM Agreement as recommended by the DSB, whereas the assessment review was conducted for a completely unrelated reason. As such, the assessment review in no way affects that result of the Section 129 Determination, and Canada has not shown otherwise.

The Results of the Assessment Review are not "Inextricably Linked", either to the Section 129 Determination, or to the Recommendations and Rulings of the DSB.

20. In the alternative, Canada uses three WTO reports to argue that the assessment results are "inextricably linked" to the recommendations and rulings of the DSB, and therefore should be considered "measures taken to comply". These reports, however, only demonstrate further how the assessment review is not within the scope of this Article 21.5 proceeding.

21. We've just discussed one of those disputes, *Australia – Leather*, in which the panel reviewed both the measure that Australia claimed was taken to comply – the repayment of a subsidy grant – and another measure that Australia claimed was not taken to comply – the new non-commercial loan. The panel in that dispute concluded that the subsidy had not been withdrawn, because the supposed repayment and the non-commercial loan were, as Canada quotes the panel, "inextricably linked elements of a single transaction."[7]

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

23. In this dispute, by contrast, there is no such connection between the Section 129 Determination and the assessment review results: they were not in any sense contingent on one another, nor were they in any sense part of a single transaction. The assessment review would have taken place regardless of whether there was a Section 129 proceeding under way, and, indeed, regardless of whether there even was a WTO dispute.

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[7] Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by the United States*, WT/DS126/RW, adopted February 11, 2000, para. 6.50 ("*Australia – Leather*").

[8] *Australia – Leather*, para. 6.5.

24. Canada similarly cites to the dispute *Australia – Salmon*, in which, in response to DSB recommendations and rulings, Australia modified its ban on salmon imports to permit imports that satisfied certain criteria. In what was obviously a response to the modification of the ban, Tasmania, one of Australia's sub-federal units, imposed its own ban. The Tasmanian ban did not arise from a proceeding initiated as a matter of domestic law requirements, irrespective of any WTO challenge. Rather, it was an *ad hoc* action taken after the DSB had made recommendations and rulings against an Australian import ban and after Australia had taken action to modify the ban. All of the evidence – both in terms of timing and subject matter – pointed to these bans being truly "inextricably linked." Therefore, that panel properly found that the Tasmanian ban was a measure taken to comply.

25. By contrast, in this case, the assessment review was initiated

- upon request of the parties (including Canada), *eight months before* the DSB's recommendations and rulings were even adopted,
- pursuant to a U.S. statutory provision that requires initiation upon request on a specific schedule and under specific deadlines, and
- for the purpose of assessing countervailing duties on entries not previously examined – not for the purpose of implementing any recommendations or rulings.

Unlike the obvious "close connection" in *Australia – Salmon*, there is nothing that links the assessment review to the recommendations and rulings of the DSB in this dispute.

26. Finally, Canada tries to distinguish the findings in *EC – Bed Linens* from this dispute, claiming that the panel excluded the results of a review from that Article 21.5 proceeding because that review did not deal with the same "subject matter" as the original determination. Canada also cites *EC – Bed Linens* as establishing that it is appropriate for this Panel to review Commerce's actions with regard to a subsequent time period characterized by new data, including completely different import entries.

27. To the contrary, however, the *EC – Bed Linens* dispute demonstrates that a new determination that was made in a subsequent segment of an antidumping or countervailing duty proceeding – and not made to implement recommendations and rulings of the DSB – falls outside the jurisdiction of Article 21.5 panels. For instance, the fact that measures taken to comply might involve new facts does not justify expanding Article 21.5 proceedings to encompass measures not taken to comply. Indeed, this Appellate Body discussion cited by Canada has nothing to do with the question of what constitutes "measures taken to comply," but rather the question of whether those measures are "consisten[t] with a covered agreement."

28. In sum, the assessment review that Canada has attempted to sweep into this Article 21.5 proceeding has nothing in common with those measures considered to be "inextricably linked" or "closely connected" in other disputes. To the contrary, the assessment review results have no relation at all to either the Section 129 Determination or the recommendations and rulings. They are simply not measures taken to comply and are therefore outside this Panel's jurisdiction.

Contrary to Canada's arguments, respecting the jurisdictional mandate of Article 21.5 does not "ignore the purpose of compliance proceedings".

29. Canada has failed to show that the assessment review is a measure taken to comply in that it is "inextricably linked" to the recommendations and rulings of the DSB. Nor has Canada shown that measures taken to comply do not exist because the assessment review rendered the Section 129 Determination non-existent.

30. Canada therefore resorts to the argument that limiting the Panel's review only to the measures taken to comply – that is, not sweeping the separate assessment review into the Article 21.5 basket – somehow ignores the "purpose of compliance proceedings". The United States disagrees, for reasons which we will discuss shortly. But regardless, a baseless reference to the general "purpose of compliance proceedings" cannot direct a result that is not supported by a good faith reading of the text, in its context and in light of the object and purpose of the DSU.

31. Further, the United States does not understand how properly applying DSU Article 21.5 can result in "ignor[ing] the purpose of compliance proceedings". Contrary to Canada's arguments, with respect to the only claim found to be WTO-inconsistent – the pass-through analysis conducted in the final investigation determination – a review under Article 21.5 of the Section 129 Determination permits the prompt settlement of disputes: Canada complained about an inconsistency in the final investigation determination, and this Panel will review whether that inconsistency has been corrected.

32. What Canada appears to be seeking is to avoid the need to bring a separate WTO dispute against the United States on the separate assessment proceeding. Canada instead hopes to "kill two birds with one stone" – albeit improperly – by sweeping a review of the separate assessment proceeding into this Article 21.5 proceeding. Canada complains that having to initiate a separate dispute settlement proceeding with respect to an assessment review somehow ignores the purpose of compliance proceedings. However, in negotiating the DSU, Members agreed that the expedited procedures of Article 21.5 would only be available for two very specific questions: (1) the existence or (2) the consistency of measures taken to comply. Members did not agree that the special procedures under Article 21.5 would be available for any claim for which the complaining party felt it would be more convenient to use Article 21.5.

33. If Canada believes that an assessment review is conducted inconsistently with the SCM Agreement, it is within its WTO rights to request consultations with respect to that assessment review and, if appropriate, request a panel. Indeed, assessment reviews can present different legal issues and entail different obligations from final investigation determinations – in addition to involving completely different administrative records – that make a separate set of consultations entirely appropriate.

34. Moreover, Canada appears to suggest that the U.S. system of retrospective duty assessments somehow compels the Panel, in the special case of the United States, to sweep the

assessment review into this Article 21. 5 proceeding.[9] But there is nothing in Article 21.5 or in the SCM Agreement that requires a different interpretation of "measures taken to comply" for those Members that employ a retrospective duty assessment system, rather than a prospective one.

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

Conclusion

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

Pass-Through Analysis

Canada Bears the Burden of Proof

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

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

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

[9] Canada Second Written Submission, para. 27.

[10] WT/DS257/15.

well as respond to the issues raised in Canada's second written submission. As to those issues not raised in this oral statement, we refer the Panel to our written submissions.

39. Initially, we will briefly outline Commerce's pass-through methodology. Next, we will discuss the nature of Commerce's arm's-length analysis and Canada's attempt to truncate that analysis. Then we will focus upon Canada's improper challenge to the benchmarks Commerce relied upon in conducting its pass-through analysis. Finally, we will address Canada's peculiar claim that U.S. compliance with the express terms of the Appellate Body Report, was an effort by the United States to avoid its WTO obligations.

Pass-Through Methodology

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

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

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

Commerce Properly Conducted its Arm's-Length Analysis

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

[11] Appellate Body Report, para 176(e).

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

45. Canada, however, conflates the issues of affiliation and arm's length arguing that an arm's-length determination requires nothing more than a determination of affiliation. Indeed, Canada's *per se* approach to arm's length is set forth in paragraph 62 of its first written submission when it states "that a transaction between unrelated parties is by definition an arm's-length transaction." Because Canada treats these disparate concepts as one, Canada contends that by analyzing whether such sales are, in fact, at arm's length, and then eliminating sales that are not at arm's-length from the pass-through analysis, Commerce somehow "presumed" pass-through. To the contrary, it is Canada that is presuming no pass through whenever there are sales between unaffiliated parties.

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

47. In contrast, and consistent with the DSB's recommendations and rulings, Commerce properly examined the circumstances surrounding the sales that Canada reported as occurring between unrelated parties to determine whether those transactions were at arm's length. Where parties to a transaction are not free to bargain with whomever they choose or to bargain on terms not encumbered by government mandates and restrictions that were imposed as a condition of obtaining the logs in the first place, Commerce properly determined that such transactions were not at arm's length.

48. The SCM Agreement, the GATT 1994 and the DSB's recommendations and rulings do not require that Commerce's arm's-length analysis be constrained in the fashion proposed by Canada. Indeed, as previously noted, although Canada generally alleges that Commerce's arm's-length analysis is inconsistent with WTO obligations, it fails to cite to any specific WTO provision that supports its position that an arm's-length analysis can be nothing more than an

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[12] Appellate Body Report, para. 146 (emphasis in original).

[13] Appellate Body Report, para 176(e)(emphasis added, except that emphasis on "logs" is in original.)

examination of affiliation.

49. As we will discuss next, the facts presented to Commerce demonstrate that under the Canadian stumpage system, many of the circumstances of the log sales are controlled by government mandates and other conditions that rendered those sales not at arm's length or otherwise ineligible for the pass-through analysis.

Commerce Properly Considered the Circumstances of the Sales in its Arm's Length Analysis

50. In our second written submission we detailed the government mandates and other conditions that Commerce identified in its Section 129 Determination as controlling, limiting or otherwise affecting the subject log sales. Briefly, the government-mandated restrictions include appurtenancy, local processing requirements, and wood supply agreements which dictate to the harvester those entities to which it must sell. These government mandates restrict the ability of a seller to act in its best interests when selecting from among potential buyers. Where parties are not able to negotiate freely, such sales could not be considered to be at arm's length.

51. Additionally, certain log purchase agreements were such that the purchasing mill controls significant aspects of the transaction or provided other goods or services as part of the transaction so that sales under these agreements could not be arm's-length sales. Canada does not deny the existence of these conditions (although the Government of British Columbia does contend, with no support, that it does not enforce the appurtenancy requirements contained in its tenure agreements). Rather, Canada argues that it is basic economics that these restrictions do not affect the arm's-length nature of the transactions between the parties.

52. Canada's view of introductory economics does not amount to a WTO obligation. Canada's argument glosses over the reality of the system created by these mandates and conditions. By way of example, where a subsidy is provided to an input producer who can only sell to a particular purchaser, the purchaser is in a position substantially to dictate the price. Consequently, such a sale would not be at arm's length. The same result obtains where local processing requirements exist.

53. As noted above, these government mandates and other conditions are imposed as a condition of the tenures. Consequently, they go to the very heart of the issue Commerce is investigating. Contrary to Canada's assertion, as evidenced by the fact that Commerce has found arm's-length transactions in Canada's regulated market, Commerce is not requiring a marketplace free from regulation as a prerequisite for finding transactions to be at arm's length. However, because these mandates and conditions substantially control timber transactions in Canada, they were fundamental to Commerce's arm's-length analysis.

54. Finally, Commerce identified two additional factors – that are not exclusively arm's-length issues – that affected its pass-through analysis. Notably, for those transactions in which the purchasing mill paid the Crown stumpage fees directly to the government for logs obtained from the independent harvester, Commerce determined that no pass-through issue arose. Because the stumpage fee is the vehicle through which the Crown bestows the subsidy the purchasing sawmill *directly receives the benefit*. Canada misses the point when it argues that

"[a]lthough the party writing the check may affect the observed log price, it will never affect the *value paid* by the sawmill for the logs."[14] Unlike the transactions identified by the DSB, in these transactions the sawmill is the direct recipient of the subsidy and thus there is no need to examine whether the benefit passed through to the purchasing mill. Moreover, because the very essence of the pass-through analysis is determining with whom the benefit resides, Canada's analogy to a situation in which a party generally satisfies an outstanding lien on behalf of another is irrelevant.[15]

55. Additionally, Commerce properly excluded from its analysis fiber exchange agreements between Crown tenure holders, which often involved, by way of example, exchanges of logs for chips, to meet appurtenancy and other harvesting requirements. These exchange agreements are not log sales but rather are tools by which tenured sawmills satisfy their appurtenancy and local processing requirements. Because such exchanges are not "sales" at all, there was no need for Commerce to conduct an arm's-length analysis of the transactions.

56. In sum, Canada has not established that Commerce's arm's-length analysis is in any way contrary to the SCM Agreement, the GATT 1994 or the DSB's recommendations and rulings.

The Panel Should Decline to Consider Canada's Challenge to Commerce's Benchmarks and in Any Event, Commerce Used Appropriate Market-Determined Benchmarks

57. Canada criticizes Commerce's benchmarks as not reflecting "market" conditions, but has thus far failed in its written submissions to specify in what way the benchmarks were inconsistent with the SCM Agreement, the GATT 1994, or the DSB's recommendations and rulings. More significantly, Canada failed to even identify its challenge to the pass-through benchmarks in its panel request. Consequently, not only has Canada failed to make a *prima facie* case that there is a WTO inconsistency, this claim is outside the Panel's terms of reference.

58. In terms of the substance, and as explained in the second written submission of the United States, a subsidy provided to the producer of an input product confers a competitive benefit on a downstream purchaser of the input when the price paid for the subsidized input is lower than a market-determined benchmark price for the same product. Thus, to determine whether a benefit "passed through" to the purchasing mill, that is, whether there was a competitive benefit to the purchasing mill, Commerce required market-determined benchmarks. Canada does not dispute the necessity for such benchmarks but rather, argues that because Commerce's benchmarks include import prices, the benchmarks are not representative of market conditions in Canada.

59. In selecting market-determined benchmarks, Commerce used, where possible, the actual company-specific prices that the purchasing mill paid for logs harvested from private lands and for imported logs. Commerce requested in its supplemental pass-through questionnaires and

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[14] Canada Second Written Submission, para. 41 (emphasis in original).

[15] Canada Second Written Submission, para. 41.

accompanying pass-through appendices that Canada provide such data to assist Commerce in developing market benchmarks. As evidenced by Commerce's calculations, where those company-specific purchase data were available, Commerce used them. Where such data were not available, Commerce used publicly available prices for logs harvested from private lands and for imported logs.

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

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

62. Moreover, Canada's claim that the import data are taken from an excessively broad tariff classification is misplaced. Canada collects data on several categories of imports of "wood in the rough . . . Other, coniferous" - "Poles," "Piles and fence posts," "Logs for pulping," and "Other," (the "Other" category is broken down by species).[16] Logs used for lumber production thus fall into this last category, which was the only category Commerce included in its benchmarks. Although Canada speculates that other higher value products may also have been included in this last category, the evidence is to the contrary. For example, Canada states that imports of high-value veneer logs would also fall into this category. But Quebec - the province with by far the largest value of log imports - reported that veneer mills in Quebec used zero imported softwood logs during the period of investigation.[17] Additionally, contrary to Canada's statement in paragraph 46 of its second submission, pulp log imports were reported separately by Statistics Canada and were not included in Commerce's calculation.

63. With respect to Saskatchewan, Canada provided no data regarding prices of private log sales in the province, and – as Canada notes – only very limited data on log imports. Accordingly, there was insufficient data on prices for logs purchased by sawmills in Saskatchewan. Commerce therefore developed a proxy based on prices paid by mills in Canada for logs of the same species as found in Saskatchewan. As elsewhere, Commerce treated all log purchases consistently, irrespective of whether they were purchased from domestic or imported

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[16] GOC October 17, 2003, Questionnaire Response at Exh. GOC-GEN-51 (relevant pages). Exhibit US – 11.

[17] GOC June 28, 2001, Questionnaire Response, Exhibit QC-S-5, at QC-11, and Quebec Exhibit 5. Exhibit US – 12.

sources.

64. In sum, the United States developed market-determined benchmarks which included import prices, where available, for use in its pass-through analysis. As previously noted, Canada has failed to allege any WTO inconsistency in Commerce's development of the benchmark.

65. As a final point, there is an error in paragraph 39 of the second written submission of the United States. Specifically, the word "unsubsidized" should be deleted from the first sentence of that paragraph.

Commerce Properly Investigated Categories of Sales Identified by the DSB

66. As discussed in both our first and second written submissions, the two transaction categories subject to Commerce's pass-through analysis were the transactions identified in the DSB's recommendations and rulings. Consistent with those recommendations and rulings, Commerce properly conducted a pass-through analysis with respect to transactions between unrelated (i) independent harvesters and sawmills, and (ii) tenured timber harvesters/sawmills and non-tenured sawmills. Canada alleges that Commerce's investigation of the second of these categories was nothing more than a "creative way" for the United States to avoid its obligation to conduct the pass-through analysis contained in the DSB's recommendations and rulings.

67. Canada is wrong. The Appellate Body specifically defined the second category of transactions for which it recommended a pass-through analysis. The term "sawmill", the purchasing mill in the second category, was defined as "an enterprise that processes logs into softwood lumber *and does not hold a stumpage contract*."[18] The seller in the second category was specifically identified as a "*tenured* timber harvester/sawmill."[19]

68. Canada, in effect, asks this Panel to find that in evaluating whether there is compliance with the DSB's recommendations and rulings, the Panel should ignore the express language used in those recommendations and rulings. Canada's approach makes no sense. Instead, consistent with the DSB's recommendations and rulings, Commerce accorded those terms the definitions established by the DSB. This Panel should do the same.

Conclusion

69. In conclusion, we want to thank the Panel again for this opportunity to respond to Canada's arguments in its written submissions, and we look forward to responding to any questions that the Panel may have.

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[18] Appellate Body Report, fn. 151 (emphasis added).

[19] Appellate Body Report, fn. 150 (emphasis added).