BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

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

(AB-2005-8)

APPELLANT SUBMISSION
OF THE UNITED STATES OF AMERICA

September 13, 2005

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Australia – Salmon (Article 21.5 – Canada) (Panel)	Panel Report, *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada*, WT/DS18/RW, adopted 20 March 2000
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US – Softwood Lumber Final CVD (Canada) (Panel) or "Original Panel Report"	Panel Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/R and Corr.1, adopted 17 February 2004, as modified by the Appellate Body Report, WT/DS257/AB/R
US – Softwood Lumber Final CVD (Canada) (AB) or "Appellate Body Report"	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. The United States is appealing the Panel's conclusion that the First Assessment Review falls within the scope of the review conducted by the Panel under Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") in *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada: Recourse to Article 21.5 of the DSU by Canada* (WT/DS257/RW) ("Panel Report").[1] This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations of DSU Article 21.5.

2. Proceedings under Article 21.5 of the DSU are limited to issues related to "measures taken to comply with the recommendations and rulings" of the Dispute Settlement Body ("DSB"). As detailed below, the Panel erroneously concluded that the required relationship existed between the First Assessment Review and the recommendations and rulings of the DSB in *United States - Final Countervailing Duty Determination With Respect to Certain Softwood Lumber From Canada*.

3. First, the recommendations and rulings of the DSB related solely to the actions of the U.S. Department of Commerce ("Commerce") regarding pass-through in the countervailing duty investigation that resulted in the Final Countervailing Duty Determination. The United States implemented these recommendations and rulings when it revised this Determination. There was no compliance obligation with respect to the First Assessment Review.

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[1] In this submission, "Panel" or "Article 21.5 Panel" refers to the panel established in the dispute *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada: Recourse to Article 21.5 of the DSU by Canada* (WT/DS257).

4. Second, the fundamental differences between investigations and assessment reviews – the first establishes the basis for the imposition of a countervailing duty measure, the second establishes the actual amount of countervailing duties to be levied on imports – demonstrates that the First Assessment Review is not a "measure[] taken to comply" with recommendations and rulings that are directed only at the Final Countervailing Duty Determination. In addition, the timing of the First Assessment Review, which was initiated eight months *before* the recommendations and rulings were even adopted, is inconsistent with its being a "measure[] taken to comply" with those later recommendations and rulings.

5. To justify including the First Assessment Review in this Article 21.5 proceeding, the Panel adopted a broad standard that has no basis in the text or context of Article 21.5 itself, and that is inconsistent with the object and purpose of the DSU. Indeed that standard is sufficiently broad to render the explicit jurisdictional limitations of Article 21.5 nearly meaningless. Further, it has no basis in the panel and Appellate Body reports on which the Panel relies.

6. Finally, although not relevant to the legal analysis, the Panel's erroneous inclusion of the First Assessment Review in this Article 21.5 proceeding is unfairly prejudicial to the United States. The United States justifiably implemented based on the DSB's explicit recommendations and rulings, which concerned Commerce's actions in the countervailing duty investigation and not any subsequent assessment reviews. The United States should not have been expected to defend its actions in an entirely separate assessment proceeding – with a wholly different administrative record – for the first time under the expedited time frames of an Article 21.5 review.

7. Because the Panel was not authorized under Article 21.5 of the DSU to review the consistency of the actions of the U.S. Department of Commerce in the First Assessment Review, the Appellate Body should reverse the Panel's conclusions with respect to that measure.

II. ARGUMENT

A. The Panel's Jurisdiction under Article 21.5 Is Limited to Those Measures Taken to Comply with the Recommendations and Rulings of the DSB, and the Recommendations and Rulings in this Dispute Related Solely to the Countervailing Duty Determination and Not to Any Assessment Review

8. Panel proceedings under Article 21.5 of the DSU are, as the heading of Article 21 indicates, part of the process of "Surveillance of Implementation of Recommendations and Rulings" of the DSB. The task of a panel under Article 21.5 is to examine the "existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB.[2] As discussed below, the DSB's recommendations and rulings are limited to bringing *Commerce's actions in the Final Countervailing Duty Determination* into compliance with WTO obligations. Consequently, the Panel's conclusion that the First Assessment Review is a measure taken to comply with those recommendations and rulings is in error.[3]

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[2] Moreover, that task is circumscribed by the specific claims made by the complainant when the matter is referred by the DSB for an Article 21.5 proceeding *See US – Shrimp (Article 21.5 – Malaysia) (AB)*, para. 87. Canada claimed in its Article 21.5 Panel Request that "the United States has failed to comply with the DSB's recommendations and rulings". WT/DS257/RW, page D-3, second paragraph. In other words, Canada's claims in this proceeding were based exclusively on the recommendations and rulings adopted by the DSB and the United States' alleged noncompliance with those recommendations and rulings. New "claims" and new "arguments" may be raised in an Article 21.5 process "because a 'measure taken to comply' may be inconsistent with WTO obligations in ways different from the original measure." *See, e.g., EC - Bed Linen (Article 21.5 – India) (AB)*, para. 79 (emphasis omitted). However, as discussed below, the question of whether a claim or argument is new is distinct from the question of whether a measure is taken to comply. New claims or arguments can only relate to "measures taken to comply."

[3] There is no dispute that Commerce's Section 129 Determination, which modified the Final Countervailing Duty Determination, is a measure taken to comply with the recommendations and rulings of the DSB. The United States has not appealed the Panel's findings regarding that measure.

9. In the original panel proceeding, Canada identified the specific measure at issue[4] as "Commerce's Final Countervailing Duty Determination."[5] According to Canada, *"In making the final determination,* the United States acted inconsistently with [certain Articles] of the SCM Agreement and Article VI of GATT 1994."[6] Canada also provided a brief summary of the specific legal bases of its complaint regarding pass-through.[7] In other words, in the original panel proceeding, Canada identified only *Commerce's actions* regarding pass-through *in "Commerce's Final Countervailing Duty Determination"* as the source of the alleged WTO-inconsistency.

10. The original panel and the Appellate Body agreed with Canada on its pass-through claim, in part. The original panel's conclusions reflect its finding that Commerce's failure to conduct a pass-through analysis for certain transactions was WTO-inconsistent and therefore upheld "Canada's claim that the United States' *imposition of countervailing duties* in respect of such transactions was inconsistent with [certain Articles]."[8] The Panel went on to state that, "[h]aving reached the conclusions set forth above that *the USDOC Final Countervailing Duty Determination* is inconsistent with [certain Articles], we apply judicial economy and do not rule on [certain additional claims]".[9] The Appellate Body similarly stated that the complaint by Canada concerned "countervailing duties imposed by the United States" and explicitly identified

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[4] Under Article 6.2 of the DSU, the complaining party is obligated to "identify the specific measures at issue" and provide a brief summary of the legal basis of the complaint, *i.e.*, the claims.

[5] *See* WT/DS257/3, page 2, item 2. Canada also separately identified "Initiation of the Investigation" and "Expedited and Administrative Reviews" as specific measures at issue; Canada did not make a pass-through claim with respect to these other measures. WT/DS257/3, items 1 and 3.

[6] *See* WT/DS257/3, page 2, item 2 chapeau.

[7] *See* WT/DS257/3, page 2, item, subparagraph (c).

[8] *US – Softwood Lumber Final CVD (Canada) (Panel)* ("Original Panel Report"), para. 8.1(c) (emphasis added).

[9] Original Panel Report, para. 8.2 (emphasis added).

Commerce's March 2002 final countervailing duty determination as the challenged measure.[10] The Appellate Body upheld the original panel's finding on the pass-through issue, in part,[11] and recommended that the DSB request the United States "to bring *its measure,* which has been found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the SCM Agreement and the GATT 1994, into conformity with its obligations under those Agreements."[12] The original panel report (as modified by the Appellate Body) and the Appellate Body report were subsequently adopted by the DSB.[13]

11. The Article 21.5 Panel had no authority to extend the obligations of the United States with respect to implementation beyond the adopted recommendations and rulings of the DSB. On the basis of the recommendations and rulings adopted by the DSB, the United States had an obligation to conduct a pass-through analysis in the context of its original countervailing duty investigation, the investigation that resulted in the Final Countervailing Duty Determination challenged by Canada.[14] The United States fully addressed that obligation in Commerce's Section 129 Determination, which revised the challenged Final Countervailing Duty Determination.[15] The Article 21.5 Panel erred when it concluded that a second measure, the First

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[10] Appellate Body Report, paras. 1 and 2.

[11] Appellate Body Report, para. 167(e).

[12] Appellate Body Report, para. 168 (emphasis added).

[13] *Minutes of Meeting*, WT/DSB/M/165, para. 49.

[14] As discussed in Section II.B.1 below, the investigation establishes the existence and amount of the subsidy which, in turn, determines whether imposition of a countervailing duty under Article 19.1 is appropriate.

[15] *Section 129 Determination: Final Countervailing Duty Determination, Certain Softwood Lumber From Canada*, December 6, 2004 ("Section 129 Determination")(Exhibit CDA-5). "Section 129" refers to the provision of the Uruguay Round Agreements Act that provides specific procedures for implementing certain DSB recommendations and rulings with respect to countervailing duty determinations. While the Article 21.5 Panel found that Commerce had failed to conduct the pass-through analysis in respect of particular sales in the Section 129 Determination, that finding does not obviate the fact that the Section 129 Determination was the sole "measure[] taken to comply with the recommendations and rulings" of the DSB. *See* Panel Report, para. 5.2 first subparagraph. The United States has not appealed that finding in respect of the Section 129 Determination.

Administrative Review, was also a measure taken to comply within the scope of Article 21.5 review.

12. The required relationship between the DSB's recommendations and rulings and the "measures taken to comply" with those recommendations and rulings means that not every measure taken by a Member is a "measure[] taken to comply" under Article 21.5 of the DSU. As the Appellate Body has recognized,

> Proceedings under Article 21.5 do not concern just *any* measure of a Member of the WTO; rather, Article 21.5 proceedings are limited to those "measures taken to comply *with the recommendations and rulings" of the DSB.* In our view, the 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.*[16]

In other words, measures taken to comply under Article 21.5 are those which have been or must be taken to address the WTO-inconsistencies identified in the recommendations and rulings adopted by the DSB.

13. While a panel has the authority to decide whether a measure is a "measure[] taken to comply",[17] the panel must make that finding based on whether the measure was taken "to comply with recommendations and rulings" of the DSB. In this Article 21.5 proceeding, the original dispute and the resulting recommendations and rulings related solely to Commerce's Final Countervailing Duty Determination, not to any assessment results. These recommendations and rulings did not, and could not, require the United States to take actions in the separate First Assessment Review, because that assessment review did not form part of the basis for the original panel and the Appellate Body's findings. Nor did those recommendations and rulings

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[16] *Canada - Aircraft (Article 21.5 – Brazil) (AB)*, para. 36 (emphasis added).
[17] *EC - Bed Linen (Article 21.5 – India) (Panel)*, para. 6.15.

call for the United States to undertake an assessment review. Rather they called for the United States to bring its Final Countervailing Duty Determination into conformity.[18]

14. In sum, an Article 21.5 panel can only consider the existence or consistency of "measures" that are "taken to comply with recommendations and rulings" of the DSB. Because the recommendations and rulings of the DSB related solely to Commerce's actions regarding pass through in Commerce's Final Countervailing Duty Determination, and the First Assessment Review was not taken to comply with those recommendations and rulings, Canada's challenge to Commerce's actions in the First Assessment Review should have been rejected by the Article 21.5 Panel as not within its jurisdiction. As articulated by the Appellate Body in *EC - Bed Linen (Article 21.5 – India)*, "[i]f a *claim* challenges a *measure* which is not a 'measure taken to comply', that claim cannot properly be raised in Article 21.5 proceedings."[19] Thus, Canada's claim concerning Commerce's actions regarding pass through in the First Assessment Review were not properly before the Article 21.5 Panel.

B. The First Assessment Review Was Not A "Measure[] Taken to Comply With the Recommendations and Rulings"

15. As discussed above, the recommendations and rulings of the DSB were limited to the conduct of a pass-through analysis in the context of the identified measure, the Final Countervailing Duty Determination. Given the recommendations and rulings of the DSB, the United States was under no obligation to conduct the First Assessment Review, nor were there

[18] The fundamental differences between investigations and assessment reviews, detailed in Section II.B.1 below, as well as the timing assessment reviews, detailed in Section II.B.2 below, underscore the fact that the First Assessment Review is not a "measure[] taken to comply with recommendations and rulings" directed at the Final Countervailing Duty Determination.

[19] *EC - Bed Linen (Article 21.5 – India) (AB)*, para. 78 (emphasis omitted).

any recommendations or rulings concerning the conformity of the First Assessment Review. Nor did the United States conduct the First Assessment Review to comply with the DSB recommendations and rulings. The First Assessment Review, therefore, cannot be considered a "measure[] taken to comply" under Article 21.5.

16. The ordinary meaning of "measures taken to comply" implies a limitation on the measures that may be analyzed by the Panel, a limitation emphasized by the Appellate Body: "[p]roceedings under Article 21.5 do not concern just any measure of a Member of the WTO; rather Article 21.5 proceedings are limited to those 'measures *taken to comply* with the recommendations and rulings' of the DSB."[20] As discussed further below, the limitation in Article 21.5 excludes the First Assessment Review.

1. Qualitative Differences Between Investigations and Assessment Reviews Establish That the First Assessment Review Was Not a "Measure[] Taken to Comply" in this Dispute

17. The Panel in this dispute conflated the Final Countervailing Duty Determination and the First Assessment Review primarily on the basis of the fact that both the investigation and the assessment review involve duties on subject merchandise.[21] This overly simplistic approach fails to take into account fundamental differences between investigations and assessment proceedings prescribed by the SCM Agreement. Moreover, it is these fundamental differences that define the parameters of the term "measures taken to comply" in the context of this dispute. Most significantly, it is only through revisions to the Final Countervailing Duty Determination – achieved solely by means of the Section 129 Determination – that Commerce can revisit its

[20] *Canada – Aircraft (Article 21.5 – Brazil) (AB)*, para. 36.
[21] Panel Report, para. 4.41.

determination concerning imposition of the duty, as recommended by the DSB. The First Assessment Review is not a mechanism through which Commerce can affect the Final Countervailing Duty Determination – the sole focus of the recommendations and rulings – and consequently, it is not a "measure[] taken to comply" with the DSB's recommendations and rulings.

18. The DSB's recommendations and rulings encompassed only the Final Countervailing Duty Determination resulting from the countervailing duty investigation – a determination that *established the existence and amount of the subsidy* under Article 19.1 of the *Agreement on Subsidies and Countervailing Measures (*"SCM Agreement"). The recommendations and rulings mirror Canada's original panel request: in prevailing on certain of the pass-through claims, Canada received from the DSB the recommendations and rulings that it requested, *i.e.*, recommendations and rulings with respect to the Final Countervailing Duty Determination.

19. The United States implemented the recommendations and rulings with respect to the Final Countervailing Duty Determination when Commerce issued its Section 129 Determination. That Section 129 Determination confirmed the existence of the subsidy. The recommendations and rulings did not concern the assessment of countervailing duties; nor could they, because at the time the original Panel and the Appellate Body issued their reports, Commerce had not yet completed any assessment proceedings. Despite this, the Panel found that the First Assessment Review – the basis for Commerce's *assessment* of countervailing duties – was a "measure[] taken to comply" and, thus, was within the Panel's jurisdiction under Article 21.5 of the DSU.

20. As explicitly recognized in the SCM Agreement, the purpose of an investigation is to "determine the existence, degree, and effect of any alleged subsidy";[22] the purpose of an assessment review, by contrast, is to levy the duty,[23] *i.e.*, to determine the definitive or final legal assessment of duties. Specifically, Article 10 of the SCM Agreement provides that countervailing duties may only be imposed pursuant to an investigation initiated under Article 11 and conducted in accordance with the SCM Agreement. Indeed, as set forth in Article 19.1 of the SCM Agreement, a Member may impose a countervailing duty only if that Member makes a final determination in the investigation of the "existence and amount of the subsidy and that, through the effects of the subsidy, the subsidized imports are causing injury."

21. Under the U.S. retrospective duty assessment system,[24] although liability for payment of countervailing duties attaches at the time merchandise subject to a preliminary or final countervailing duty measure enters the United States,[25] the actual amount of countervailing duties to be paid will not be calculated until an assessment review covering that entry is conducted or the time passes to request a review of the entry without a request from any party for such a review.[26] When such a review is conducted, Commerce examines previous imports of subject merchandise to determine the assessment rate, which also establishes the estimated countervailing duty rate to be applied to future imports. At the conclusion of the assessment

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[22] *See* SCM Agreement, Article 11.1.

[23] *See, e.g.*, SCM Agreement, fn. 52.

[24] Footnote 52 of the SCM Agreement contains provisions that acknowledge that countervailing duties may be assessed on a retrospective basis and clarify certain obligations with respect to retrospective duty assessment proceedings.

[25] The only exception applies with respect to entries made up to 90 days prior to a preliminary determination in an investigation. SCM Agreement, Article 20.

[26] 19 U.S.C. 1675 (Exhibit US-2); *see also* 19 C.F.R. 351.212(c).

review, Commerce instructs Customs to assess definitive countervailing duties in accordance with the final results of its assessment review.[27]

22. There can be no dispute that the SCM Agreement expressly distinguishes between the "investigation" of subsidies and injury initiated under Article 11 (and the consequent provisional measures and "final determination" of the existence and amount of subsidy that may result from that investigation),[28] and subsequent "assessment proceedings" that establish, retrospectively, the actual amount of countervailing duties to be levied.[29]

23. The importance of this distinction is evident in footnote 52 of the SCM Agreement, which provides that, if there is a finding in an assessment proceeding that no countervailing duties should be levied – *e.g.*, based on the absence of subsidies during the period for which duty assessment is being considered – there is no requirement to terminate the definitive duty, *i.e.*, the order remains valid but no duties are assessed for that period and the cash deposit rate will be zero. By contrast, if the *investigation* final determination results in a finding of no (or *de*

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[27] 19 U.S.C. 1675(a)(3)(B) (Exhibit US-2).

[28] *E.g.*, Articles 11, 15, 17, 19 of the SCM Agreement.

[29] In various contexts, the Appellate Body has emphasized that the SCM and the Antidumping Agreements distinguish between investigations, which satisfy the prerequisites for imposing antidumping and countervailing duties, and subsequent phases or stages of antidumping or countervailing duty proceedings, such as duty assessment and sunset reviews. It has also emphasized that these subsequent proceedings may differ in purpose and nature from investigations, such that obligations that apply to the investigation do not necessarily apply to the subsequent proceedings. *E.g., United States – Carbon Steel*, para. 68 (*de minimis* standard only applies in investigations, and not in reviews); *EC – Bed Linen (India) (AB)*, para. 62, footnote 30 ("Article 2.4.2 is not concerned with the collection of antidumping duties, but rather with the determination of 'the existence of margins of dumping'. Rules related to the 'prospective' and 'retrospective' collection of anti-dumping duties are set forth in Article 9 of the *Anti-dumping Agreement.* The European Communities has not shown how and to what extent these rules on the 'prospective' and 'retrospective' collection of anti-dumping duties bear on the issue of the establishment of 'the existence of dumping margins' under Article 2.4.2."); *US – Corrosion-Resistant Steel AD Sunset Review (Japan) (AB)*, para. 107, and *United States – Oil Country Tubular Goods Sunset Review (Argentina) (AB)*, para. 279 (contrasting the purpose of original investigations and sunset reviews).

minimis) subsidies, no countervailing duty can be imposed, under Article 19.1 of the SCM Agreement.

24. The Panel bolsters its position by relying on a misinterpretation of the U.S. Statement of Administrative Action ("SAA"). Specifically, to support its treatment of the First Assessment Review as a "measure[] taken to comply" the Panel claims "that US law allows DSB rulings and recommendations to be implemented through administrative reviews in certain circumstances . . . This undermines the US argument that assessment reviews should be excluded from the scope of DSU Article 21.5 proceedings."[30]

25. As an initial matter, it is irrelevant that Commerce might be able to implement recommendations and rulings in an assessment review in lieu of in a separate Section 129 proceeding: in this dispute, the recommendations and rulings *were* implemented through such a separate Section 129 proceeding.[31] The circumstance described by the SAA is not present here.

26. Additionally, contrary to the Panel's assertion, the SAA is consistent with the position of the United States. Assessment reviews may indeed be a mechanism through which the United States implements recommendations and rulings, but, as recognized in the SAA, that situation would likely arise in situations <u>not</u> involving investigation final determinations. It is only in

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[30] Panel Report, fn. 42, referring to Exhibit CDA-1. That provision states, in relevant part:

> Furthermore, while subsection 129(b) 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 the 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.

[31] Panel Report, fn. 42. Moreover, the argument of the United States was limited to this particular situation, *i.e.*, that the First Assessment Review was not encompassed within the scope of this DSU Article 21.5 proceeding. Despite the Panel's implication, at no point did the United States claim that assessment reviews could never be considered within the scope of an Article 21.5 proceeding.

implementing a new determination relating to an investigation that a decision as to whether a determination is "affirmative or negative" could be made.

27. Indeed the logical consequence of the Panel's view of the SAA language as applied to this dispute is that in the future Commerce would be acting consistently with its WTO obligations if it were to implement recommendations and rulings arising from investigation final determinations in a subsequent assessment review without recalculating the investigation rate. Such a result could deprive a party of the opportunity to have an order revoked. Having failed to acknowledge the legal distinctions between investigations and assessment reviews, the Panel failed to address this consequence of its finding.

28. The qualitative differences between investigations and assessment reviews, *i.e.*, between imposition and assessment, recognized by the SCM Agreement show that the First Assessment Review is not a "measure[] taken to comply" and require reversal of the Panel's conclusion that the First Assessment Review should be included in the scope of the Article 21.5 proceeding.

2. The Timing of the First Assessment Review Demonstrates That it Is Not a Measure Taken to Comply

29. In addition to the qualitative differences between investigations and assessment reviews that demonstrate that the First Assessment Review could not have been a "measure[] taken to comply with the recommendations and rulings", the timing of the adoption of the recommendations and rulings and the initiation of the First Assessment Review also demonstrate that the First Assessment Review does not satisfy the requirements of Article 21.5.

30. The phrase "measures taken to comply with the recommendations and rulings" presupposes that there are, in fact, recommendations and rulings with which to comply at the

time a Member initiates action to take a measure. Specifically, "comply" when followed by the preposition "with" is defined as "accommodate oneself to (a person, circumstances, customs, etc.) . . . Act in accordance with or *with* a request, command, etc. . . . Consent or agree *to, to do* . . ."[32] The logical construct is that a "measure[] taken to comply with recommendations and rulings" presupposes the existence of adopted recommendations and rulings. If no recommendations and rulings exist when a Member initiates such action, it would follow that the measure is not taken "to comply with" any recommendations and rulings. Quite simply, in such a circumstance, at the time of initiation there was nothing for the Member to "act in accordance with" or "accommodate" itself to.

31. In this dispute, Commerce initiated the First Assessment Review on July 1, 2003, *eight months* before the February 19, 2004 adoption of the DSB's recommendations and rulings. The assessment review, which was finalized on December 20, 2004, resulted from an affirmative request by Canada, among others,[33] that Commerce review *new* sales and subsidies data for the purposes of assessing countervailing duties for imports during the review period[34] and of setting a new estimated countervailing duty rate for subsequent imports. As a purely temporal matter, interpreting the language of Article 21.5, the assessment proceeding was not nor could it have

[32] New Shorter Oxford English Dictionary, at 461. Exhibit US-15.

[33] In May 2003, Canada (among other interested parties) requested such an assessment review, covering entries of subject merchandise during the period May 22, 2002, through March 31, 2003. U.S. law required Commerce to conduct this assessment review once proper parties requested it. *See* 19 USC 1675(a). Exhibit US-2. Consistent with the SCM Agreement, under the retrospective assessment system used by the United States, the assessment rate determined in the First Assessment Review applied to those entries made after December 20, 2004.

[34] The data Commerce examined in the Final Determination and resulting Section 129 Determination was data for the original period of investigation – April 1, 2000 through March 31, 2001. By way of contrast, for the First Assessment Review, data was examined for the period of review, *i.e.*, May 22, 2002, through March 31, 2003.

been taken to comply with the DSB's recommendations and rulings. Consequently, the Panel erred in not excluding the First Assessment Review from its jurisdiction.[35]

3. The Panel Articulated and Adopted a Broad Standard for Including Measures That is Inconsistent with Article 21.5

32. The Panel articulated a standard for including measures in Article 21.5 proceedings that is sufficiently broad to render the jurisdictional limitations of Article 21.5 nearly meaningless. The Panel's entire analysis was guided by dispute settlement panel reports regarding the scope of Article 21.5, and not by customary rules of interpretation of public international law.[36] In particular, the Panel found that the First Assessment Review is "clearly connected" to the panel and Appellate Body reports concerning the Final Countervailing Duty Determination and "inextricably linked" to the Section 129 Determination. The Panel concludes, therefore, that the First Assessment Review falls within the scope of these Article 21.5 proceedings, because it "*could . . . have an impact on*", and "*could possibly undermine*", the Section 129 Determination (the measure actually taken to comply).[37]

33. The universe of measures that have some connection with measures taken to comply and that "could have an impact on" or could "possibly undermine" those measures is so broad as to render meaningless the strict requirement of the text of Article 21.5 that the Panel examine only "measures taken to comply with recommendations and rulings" of the DSB. Article 21.5 directs

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[35] Measures can be "taken to comply" even if the Member taking them does not specifically designate them as "measures taken to comply". It is the panel, and not the Member taking the measures and not the complaining party, that decides whether a measure is in fact a "measure[] taken to comply". However, the panel must make that finding based on whether the measure was taken "to comply with the recommendations and rulings" of the DSB (regardless of whether that Member characterized it as a measure taken "to comply"). *EC – Bed Linen (Article 21.5 – India) (Panel)*, para. 6.15.

[36] Panel Report, para. 4.38.

[37] Panel Report, para. 4.41.

panels to examine the existence or consistency of measures taken to comply. It does not direct panels to examine any "connected" measures that "could have an impact on" or "possibly undermine" the measures taken to comply.

34. As discussed both above and below, the First Assessment Review did not nor could it (i) have had an impact on, or (ii) possibly undermine, the Section 129 Determination: the Section 129 Determination confirmed the existence of a subsidy that justified the imposition of countervailing duties; the assessment review could have no impact on this. Indeed, the very facts upon which the Panel relies to support its conclusion that these administrative determinations are "inextricably linked" and "closely connected" demonstrate the exact opposite, *i.e.*, that the Section 129 Determination and the First Assessment Review are separate and distinct proceedings with differing legal consequences.

35. Specifically, the Panel's erroneous finding hinges on two aspects of an ancillary relationship among the Final Countervailing Duty Determination, the Section 129 Determination, and the First Assessment Review.[38] First, the Panel notes that some imports that were subject to a cash deposit rate set by the Final Countervailing Duty Determination were subsequently assessed duties based on the First Assessment Review. Second, the Panel notes that the cash deposit rate set by the Final Countervailing Duty Determination (later amended as a consequence of the Section 129 Determination), was also affected (prospectively) by the First Assessment Review. The Panel used these findings to support its conclusion that the "First Assessment Review is also covered by these proceedings, because it is clearly connected to the

[38] Panel Report, para. 4.41.

panel and Appellate Body reports concerning the Final Determination, and because it is inextricably linked to the treatment of pass-through in the Section 129 Determination".[39]

36. Notwithstanding the Panel's acknowledgment that the period of investigation examined in both the Final Countervailing Duty Determination and the Section 129 Determination differed from the period of review examined in the First Assessment Review and its acknowledgment that the First Assessment Review "was initiated before the DSB adopted any rulings or recommendations regarding this matter", the Panel concluded that there is "considerable overlap in the effect of these various measures."[40]

37. But, in fact, the "effects" for which the Panel perceived "considerable overlap" are nothing more than the natural consequence of the U.S. system of retrospective assessment. With respect to the Panel's first point, because of the U.S. retrospective system of countervailing duty assessment, only cash deposits are required after a countervailing duty measure is imposed. The actual levy, or assessment, of countervailing duties on imports occurs as a result of a later assessment review of those entries.[41] As explained in more detail in section II.B.1 above, this is not an overlap, but a separate effect of two distinct proceedings (proceedings recognized by the SCM Agreement as separate and distinct), which is an inevitable consequence of having a retrospective system of duty assessment.

38. With respect to the Panel's second point, the cash deposit rate for imports subsequent to the First Assessment Review is adjusted to account for the more recent information reviewed in

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[39] Panel Report, para. 4.41.

[40] Panel Report, para. 4.41.

[41] As previously noted, assessment may also occur if no assessment review is requested on the anniversary month of the countervailing duty order, in which case the cash deposits are collected as the final countervailing duties.

the assessment proceeding. This, too, is not an "overlap", but is similarly a consequence of the U.S. retrospective system of countervailing duty assessment. The prospective up-dating of the cash deposit rate is not a redetermination of the "amount" of the subsidy determined during the investigation. Under the U.S. system, the cash deposit rate established in an investigation is *always* subject to change for subsequent imports if an assessment review is requested – this administrative function occurs regardless of whether there is a WTO proceeding or an intervening Section 129 determination. In light of the qualitative differences between imposition and assessment, the results of an assessment review do not "supercede" the investigation determination (or Section 129 determination) establishing the existence of above *de minimis* subsidies.[42]

39. The Panel correctly stated that it would be inappropriate to interpret Article 21.5 broadly based on the "peculiarities" of the U.S. retrospective duty assessment system, "because the interpretation and application of Article 21.5 must accommodate both prospective and retrospective duty assessment systems."[43] Yet the Panel has done just that. It reasons – incorrectly – that incidental consequences of the retrospective system of duty collection constitute a "considerable overlap in effect" that justifies a broad interpretation of Article 21.5. This so-called "overlap in effect" would not exist in a prospective system; consequently, the effect of the Panel's finding is disparate treatment of those Members with retrospective assessment systems.

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[42] Panel Report, para. 4.41.
[43] Panel Report, para. 4.49.

40. Nor is an "effects" test based on the text of Article 21.5. Nowhere in Article 21.5 does it refer to measures "taken to comply or having a similar effect to a measure taken to comply." The "effect" of a measure does not indicate whether the measure was "taken to comply." Indeed, under the Panel's approach, measures that were adopted years before the DSB adopted its recommendations and rulings could be "measures taken to comply" so long as they had similar or overlapping effects as a measure taken to respond to the DSB recommendations and rulings.

4. The Panel's Only Use of the Customary Rules of Interpretation of Public International Law Was to Misinterpret and Misapply the "Object and Purpose" of the DSU

41. In the Panel's sole nod to customary rules of treaty interpretation, the Panel noted that the Appellate Body in *EC – Bed Linen (Article 21.5 – India)* "had regard to 'the object and purpose of the DSU'" and quoted the Appellate Body's note that "the prompt settlement of disputes" is "essential to the effective functioning of the WTO."[44] The Panel uses this "object and purpose" to support including the First Assessment Review in the Article 21.5 proceeding, on the wholly speculative ground that, because of the supposed "overlap", Canada and the United States would otherwise have to dispute the same issue again.[45] The Panel uses similar reasoning in footnote 42, when it states – as support for including the assessment review in this proceeding – that the Article 21.5 procedures are accelerated, not because implementation measures are more straightforward, but "in order to ensure that justice is delivered swiftly."

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[44] Panel Report, para. 4.48.
[45] Panel Report, para. 4.48.

42. But this supposed purpose – to ensure the swift delivery of justice – can not justify sweeping into the limited expedited Article 21.5 procedures measures that are not "taken to comply". Presumably, disputes on any measure would be more swiftly resolved under a 90-day time frame than a 6-month time frame; speed alone, however, cannot override the express language of Article 21.5.

43. Indeed, as the United States pointed out to the Panel, an assessment review is not only different from the Final Countervailing Duty Determination in terms of its purpose and legal significance. An assessment review is based on an entirely new administrative record from the investigation, consisting of new sales, new imports, and, potentially, new respondents and new subsidy programs.[46] If a Member has a complaint about how countervailing duties are assessed as a result of such an assessment review, the object and purpose of the DSU is fully served through the normal dispute procedures, which permits a full airing of the issues, including through consultations and two panel meetings.

44. Ironically, the Panel's sole reference to "object and purpose", cited above, was to the Appellate Body report in *EC – Bed Linen (Article 21.5 – India*).[47] In that dispute, however, the Appellate Body cited both the goal of swiftly resolving disputes and the expedited 90-day time frame for Article 21.5 proceedings – the same reasons used by this Panel to include a wholly separate measure in this proceeding – as reasons not to include a new claim in that Article 21.5 proceeding.[48] Further, in drawing the opposite conclusion from that of the Appellate Body, the

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[46] *E.g.*, Panel Report, para. 4.7.
[47] Panel Report, para. 4.48.
[48] *EC – Bed Linen (Article 21.5 – India*) (AB), para. 98.

Panel contradicts the Appellate Body's reasoning that the 90-day time frame supports a narrower, not a broader, scope for Article 21.5 proceedings.

5. The Error in the Panel's Findings Is Evident in its Misapplication of Certain Panel Reports

45. An examination of the disputes that the Panel used as the sole legal justification for its ruling emphasizes just how far the Panel wandered from the ordinary meaning of the actual text of Article 21.5, in context, and in light of the object and purpose of the DSU. The Article 21.5 panels in *Australia – Automotive Leather (Article 21.5 – US)* and *Australia – Salmon (Article 21.5 – Canada)*, upon which the Panel relies, found that the measures at issue *were* "taken to comply". Therefore, the Panel tries to create non-existent parallels between those disputes and this dispute. The *EC – Bed Linen (Article 21.5 – India)* panel, by contrast, found that the results of a separate subsequent phase of an antidumping duty proceeding were *not* measures taken to comply with recommendations related to a final determination, so the Panel distinguished that dispute. As set forth below, a thorough reading of these reports reveals that the reports the Panel relied on present different situations, while the report it distinguished does offer useful parallels.

i. *Australia – Automotive Leather (Article 21.5 – US)*

46. As noted above, the Panel supports its conclusion by stating that the First Assessment Review is "inextricably linked" to the treatment of pass-through in the Section 129 Determination.[49] The phrase "inextricably linked" is taken from the panel report in *Australia – Automotive Leather (Article 21.5 – US)*, where it was used to describe the relationship between the repayment of a subsidy by a subsidy recipient (the "withdrawal of the subsidy" which was

[49] Panel Report, para. 4.41.

required to comply), and a new subsidy simultaneously granted to that recipient in the form of a non-commercial loan. In that dispute, the grant repayment and the new non-commercial loan were announced on the same day in the same press release, and the repayment was specifically conditioned on the new loan – there would have been no repayment without the new loan. Under these facts, the *Australia – Automotive Leather (Article 21.5 – US)* panel correctly concluded that, despite the repayment, the subsidy had not been withdrawn.

47. It might be true, as this Panel speculates at paragraph 4.42, that the *Australia – Automotive Leather (Article 21.5 – US)* panel was concerned "more generally with the 'timing and nature'" of the subsequent loan than with the specific factual link between the loan and the subsidy repayment (the latter was 100% contingent on the former). But in that dispute, the "timing" was virtually simultaneous, and the "nature" was that it was an obvious and direct reimbursement of the repayment, without which the subsidy recipient would not have repaid the subsidy.

48. The non-commercial loan in *Australia – Automotive Leather (Article 21.5 – US)*, and its "inextricable link" to the repayment, cannot therefore meaningfully be compared to the Section 129 Determination and the First Assessment Review in this dispute. As addressed in section II.B.1 above, the distinctively different "natures"of the Section 129 Determination and the First Assessment Review and the concomitant legal consequences arising from these different proceedings are recognized by the SCM Agreement – establishing the existence of subsidies is separate and distinct from the assessment of final definitive duties. Significantly, a decision with respect to the latter cannot supercede the former, unlike the situation in *Australia – Automotive Leather (Article 21.5 – US).*

49. In addition, with respect to the "timing" of the assessment review, as discussed above, the First Assessment Review was initiated upon request *eight months before* the recommendations and rulings were even adopted. Further, because separate assessment reviews can be initiated every year after a countervailing duty is imposed, future assessment review results may be issued *years after* "measures taken to comply" with DSB recommendations and rulings related to final determinations of subsidization. Unlike the loan in *Australia – Automotive Leather (Article 21.5 – US)*, the timing of the First Assessment Review is not consistent with its being a "measure[] taken to comply."

ii. *Australia – Salmon (Article 21.5 – Canada)*

50. The Panel also supports its finding by stating that the First Assessment Review is "clearly connected" to the panel and Appellate Body Reports concerning the Final Determination.[50] This finding refers to *Australia – Salmon (Article 21.5 – Canada)*, in which the panel stated that allowing the responding Member to decide whether a measure is "taken to comply" would allow the Member to avoid scrutiny of measures,

> even where such measures would be *so clearly connected* to the panel and Appellate Body reports concerned, both in terms of time and in respect of the subject-matter, that any impartial observer would consider them to be measures "taken to comply."[51]

For all of the reasons described above, no "impartial observer" would consider the First Assessment Review to be "so clearly connected" to the reports as to be measures taken to comply.

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[50] Panel Report, para. 4.41.

[51] Panel Report, para. 4.38, quoting *Australia – Salmon (Article 21.5 – Canada) (Panel)*, page 106.

51. In the *Australia – Salmon (Article 21.5 – Canada)* dispute, by contrast, Australia had implemented an adverse DSB ruling by removing its ban on salmon imports; Tasmania responded shortly thereafter by imposing a ban of its own. The new ban was – both by its timing and its nature – an obvious response by Tasmania to counter Australia's removal of the ban to comply with the DSB recommendations and rulings: there was a "clear connection" both in timing and subject matter and a clear connection to the DSB recommendations and rulings that the ban be removed (which it was not, by virtue of the Tasmanian ban). No such clear connection exists in this dispute, particularly considering that the First Assessment Review was not a response to DSB recommendations and rulings or to measures taken to comply with those recommendations and rulings, but 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, and not to respond to any recommendations or rulings.

52. The Panel notes that the *Australia – Salmon (Article 21.5 – Canada)* panel did not specifically mention the "*ad hoc*" nature of the Tasmanian ban and therefore dismisses that key distinguishing feature of the dispute out of hand. The point, however, is that the new Tasmanian ban was an obvious specific response to Australia's removal of the ban. The United States characterized it as "*ad hoc*" to distinguish it from the First Assessment Review, which is a recurring established statutory proceeding that occurs upon request of a party regardless of any WTO dispute or measures taken to comply as a result of DSB recommendations and rulings in

that dispute. The "clear connection" in the *Australia – Salmon (Article 21.5 – Canada)* dispute simply does not exist in this dispute.

iii. *EC – Bed Linen (Article 21.5 – India)*

53. Because the First Assessment Review is a separate subsequent phase of a countervailing duty proceeding, the parallels between the present dispute and *EC – Bed Linen (Article 21.5 – India)* are obvious. The Panel, however, distinguishes *EC – Bed Linen (Article 21.5 – India)* on several bases, none of which dictates a different result in this dispute.

54. First, the Panel states that the First Assessment Review "is concerned with the same substantive issue as the Section 129 determination, *i.e.*, pass-through."[52] But the fact that there is a pass-through issue in the separate assessment review cannot serve as a basis for including a measure not taken to comply within Article 21.5 proceedings. The First Assessment Review involves an entirely new set of subsidy and sales information, including potentially different responding companies, during a different time period from the original investigation.[53] So the underlying facts are not only different, they were not before the original panel and were not before this Panel. Further, as discussed above, the assessment proceeding involves an entirely different context and a different set of obligations from those of the Final Countervailing Duty Determination: the assessment proceeding determines the amount of countervailing duties to be levied, or assessed, on previous imports, and not the existence of subsidies that supports the imposition of countervailing duties. In addition, as discussed above, the recommendations and

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[52] Panel Report, para. 4.47.

[53] The data Commerce examined in the Final Countervailing Duty Determination and the resulting Section 129 Determination were data for the original period of investigation – April 1, 2000 through March 31, 2001. By contrast, for the First Assessment Review, data was examined for the period of review, *i.e.*, May 22, 2002, through March 31, 2003.

rulings of the DSB are limited to bringing Commerce's actions in the Final Countervailing Duty Determination into compliance with WTO obligations.

55. Second, the Panel repeats its earlier assertion that some imports that were subject to a cash deposit rate set by the Final Countervailing Duty Determination were subsequently assessed duties based on the assessment review.[54] As discussed, above, however, this is part of the mechanics of how the United States assesses countervailing duties in its retrospective system, and does not make the assessment results, which concern how much duty to assess, part of the measures taken to comply, which concern the existence and amount of subsidy.

56. Indeed, this pretext for including the First Assessment Review in the Article 21.5 proceeding directly contradicts the Panel's correct and firm rejection of Canadian and EC arguments that Article 21.5 "should be interpreted broadly in the present dispute because of the peculiarities of the system of retrospective duty assessment applied by the United States."[55] The Panel has, in fact, erroneously adopted a broader interpretation of Article 21.5 than is justified under the customary rules of treaty interpretation, because of certain ancillary consequences of the U.S. retrospective system of duty collection.

57. Third, to distinguish *EC – Bed Linen (Article 21.5 – India)*, the Panel restates that panel's observation that India did not argue that the subsequent measures "undo the compliance effectuated by the first measure."[56] The Panel speculates that "[w]e can only assume that the panel would have reached a different conclusion" if India had made such an argument. There is no basis for assuming how that panel would have responded to an argument not presented to it.

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[54] Panel Report, para. 4.47.
[55] Panel Report, para. 4.49.
[56] Panel Report, para. 4.47, citing *EC – Bed Linen (Article 21.5 – India) (Panel)*, para. 6.21.

More to the point, however, this Panel has not found – nor could it – that the First Assessment Review "undoes" compliance in this dispute. The Panel's speculation, therefore, has no relevance to this dispute.

58. Finally, in introducing its views on the *EC – Bed Linen (Article 21.5 – India)* dispute, the Panel states that the new determination at issue in *EC – Bed Linen (Article 21.5 – India)*, unlike the First Assessment Review, concerned events subsequent to the Final Countervailing Duty Determination and the Section 129 Determination, making the First Assessment Review "far more closely connected" to the measure taken to comply than the determination in *EC – Bed Linen (Article 21.5 – India)*. But, as the Panel itself explains, the measure at issue in *EC – Bed Linen (Article 21.5 – India)* was triggered by the measures taken to comply: (1) the EC corrected its antidumping duty calculation for India; (2) because the injury assessment had involved dumped imports from India, Egypt and Pakistan, the EC similarly corrected its dumping calculation for Egypt and Pakistan, resulting in a finding of no dumping for those countries; and (3) because there were no longer dumped imports from Egypt and Pakistan, the EC made a new determination of injury due to imports from India alone. It was this new injury determination, undeniably triggered by the measures taken to comply, that the panel found was not itself a "measure[] taken to comply."

59. By contrast, and as discussed above, the First Assessment Review in this dispute was in no sense triggered or was a consequence of the actual measure taken to comply, but was entirely independent of that measure. So, in this sense, the First Assessment Review is far *less* closely connected to the measure taken to comply than was the case in *EC – Bed Linen (Article 21.5 – India)*. And contrary to the Panel's claims, the assessment review *was* a result of events

subsequent to the final investigation determination that was the subject of the original panel findings. Specifically, over a year after that determination, Canada, among others – presumably based on changes after the investigation period that could affect the assessment of duties – requested a review of the sales and subsidies for the period *after* the period of investigation. That subsequent request to examine a subsequent period gave rise to the First Assessment Review.

60. In sum, the Panel's misinterpretation of these Article 21.5 panel reports resulted in its erroneous inclusion of the First Assessment Review in this Article 21.5 proceeding. Moreover, by ruling that the First Assessment Review fell within the scope of the Panel's jurisdiction as a measure taken to comply, the Article 21.5 Panel contravened the express terms of Article 21.5 by erroneously concluding that the required relationship existed between the First Assessment Review and the DSB's recommendations and rulings.

61. Members did not agree, and the context does not support, that the Article 21.5 expedited procedures would be available as a mechanism to challenge measures not "taken to comply". For those measures, the normal, already expeditious dispute settlement procedures are available.

C. The Panel's Conclusions With Respect to the First Assessment Review Should Be Reversed

62. In sum, the Appellate Body should reverse the Panel's erroneous conclusion that the First Assessment Review falls within the jurisdiction of the Article 21.5 Panel in this dispute.[57] Moreover, the Panel's erroneous inclusion of the First Assessment Review in this Article 21.5

[57] Panel Report, paras. 4.36-4.50, and 5.1, first subparagraph.

proceeding led the Panel to erroneously conclude that, with respect to the First Assessment Review:

1. The United States has failed to properly implement the rulings and recommendations of the DSB by not conducting a pass-through analysis with respect to sales, found not to be at arm's length, of logs by tenured timber harvesters, whether or not they also produce lumber, to unrelated timber producers, whether or not they hold a stumpage contract;[58]

2. The United States included in its subsidy numerator transactions for which it had not demonstrated that the benefit of subsidized log inputs had passed through to the processed product;[59]

3. The United States remains in violation of Articles 10 and 32.1 of the SCM Agreement, and Article VI:3 of the GATT 1994;[60] and

4. The United States has nullified or impaired benefits accruing to Canada under the SCM Agreement and GATT 1994.[61]

Because the Panel only made these conclusions as a result of the erroneous legal conclusion that the First Assessment Review falls within the scope of the DSU Article 21.5 proceeding, the Appellate Body should reverse these Panel conclusions as well.

[58] Panel Report, paras. 4.58-4.82, 4.104-4.106, and 5.2, first subparagraph.
[59] Panel Report, paras. 4.114-4.115, and 5.2, second subparagraph.
[60] Panel Report, paras. 4.114-4.115 and 5.4.
[61] Panel Report, para. 5.5.

III. CONCLUSION

63. For the foregoing reasons, the United States respectfully requests that the Appellate Body find that the legal conclusions of the Panel set forth in the U.S. Notice of Appeal and further discussed herein are in error, and that the Appellate Body reverse those conclusions.

Exhibit List

Exhibit US-15	New Shorter Oxford English Dictionary, at 461