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UNITED STATES – SECTION 129(c)(1) OF THE URUGUAY ROUND AGREEMENTS ACT

Report of the Panel

The report of the Panel on *United States - Section 129(c)(1) of the Uruguay Round Agreements Act* is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 15 July 2002 pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/452). Members are reminded that in accordance with the DSU only parties to the dispute may appeal a panel report. An appeal shall be limited to issues of law covered in the Panel report and legal interpretations developed by the Panel. There shall be no *ex parte* communications with the Panel or Appellate Body concerning matters under consideration by the Panel or Appellate Body.

Note by the Secretariat: This Panel Report shall be adopted by the Dispute Settlement Body (DSB) within 60 days after the date of its circulation unless a party to the dispute decides to appeal or the DSB decides by consensus not to adopt the report. If the Panel Report is appealed to the Appellate Body, it shall not be considered for adoption by the DSB until after the completion of the appeal. Information on the current status of the Panel Report is available from the WTO Secretariat.

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I. PROCEDURAL BACKGROUND

1.1 On 17 January 2001 Canada requested consultations with the United States pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereafter the "DSU"), Article XXII of the General Agreement on Tariffs and Trade 1994 (hereafter the "GATT 1994"), Article 30 of the Agreement on Subsidies and Countervailing Measures (hereafter the "SCM Agreement") and Article 17 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (hereafter the "AD Agreement") regarding section 129(c)(1) of the US Uruguay Round Agreements Act (hereafter the "URAA")[1] and the Statement of Administrative Action (hereafter the "SAA")[2] accompanying the URAA.[3]

1.2 Consultations were held in Washington, D.C., on 1 March 2001, but did not lead to a mutually satisfactory resolution of the matter.

1.3 On 24 July 2001, Canada requested the Dispute Settlement Body (hereafter the "DSB") to establish a panel pursuant to Articles 4 and 6 of the DSU, Article XXIII of the the GATT 1994, Article 30 of the SCM Agreement and Article 17 of the AD Agreement. Canada's panel request referenced only section 129(c)(1) of the URAA as the measure at issue. Canada claimed that section 129(c)(1) of the URAA is inconsistent with Articles VI:2, VI:3 and VI:6(a) of the the GATT 1994; Articles 10, 19.4, 21.1, 32.1 and 32.5 of the SCM Agreement; Articles 1, 9.3, 11.1, 18.1 and 18.4 of the AD Agreement; Article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization (hereafter the "WTO Agreement"); and Articles 3.2, 3.7, 19.1, 21.1 and 21.3 of the DSU.[4]

1.4 At its meeting on 23 August 2001, the DSB established a panel pursuant to the request of Canada, in accordance with Article 6 of the DSU. The panel was established with standard terms of reference. The terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by Canada in document WT/DS221/4, the matter referred to the DSB by Canada in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[5]

1.5 On 30 October 2001 the Panel was constituted as follows:

Chairperson: Ms. Claudia Orozco

Members: Mr. Simon Farbenbloom
Mr. Edmond McGovern[6]

1.6 Chile, the European Communities, India and Japan reserved their rights to participate in the panel proceedings as a third party. The European Communities and Japan presented arguments to the Panel.

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[1] Uruguay Round Agreements Act, Pub. L. No. 103-465, section 129(c)(1), 108 Stat. 4838, also codified at 19 U.S.C. 3538 (1994).

[2] Statement of Administrative Action, in "Message from the President of the United States Transmitting the Uruguay Round Agreement, Texts of Agreements Implementing Bill, Statement of Administrative Action and Required Supporting Statements", H.R. Doc. No. 103-316, Vol. 1, pp. 656 *et seq.*

[3] WT/DS221/1.

[4] WT/DS221/4.

[5] WT/DS221/5 (referring to WT/DSB/M/108).

[6] *Ibid*.

1.7 The Panel met with the parties on 18 and 19 February 2002 as well as on 26 March 2002. It met with the third parties on 19 February 2002. The Panel issued its interim report to the parties on 22 May 2002. The Panel issued its final report to the parties on 12 June 2002.

II. FACTUAL ASPECTS

2.1 This dispute concerns section 129(c)(1) of the URAA (hereafter "section 129(c)(1)").

2.2 This part of the Panel report reproduces relevant portions of section 129 of the URAA and, because section 129(c)(1) operates in the context of the US system of retrospective assessment of antidumping or countervailing duties, provides a description of the basic features of that system.

A. SECTION 129 OF THE URAA

2.3 Section 129 of the URAA is entitled "Administrative Action Following WTO Panel Reports". It has five subsections, *viz.*, subsections (a) through (e). Subsections (a) through (d) are reproduced below in relevant part.[7]

> (a) ACTION BY UNITED STATES INTERNATIONAL TRADE COMMISSION.—
>
> (1) ADVISORY REPORT.— If a dispute settlement panel finds in an interim report under Article 15 of the Dispute Settlement Understanding, or the Appellate Body finds in a report under Article 17 of that Understanding, that an action by the International Trade Commission in connection with a particular proceeding is not in conformity with the obligations of the United States under the Antidumping Agreement, the Safeguards Agreement, or the Agreement on Subsidies and Countervailing Measures, the Trade Representative may request the Commission to issue an advisory report on whether title VII of the Tariff Act of 1930 or title II of the Trade Act of 1974, as the case may be, permits the Commission to take steps in connection with the particular proceeding that would render its action not inconsistent with the findings of the panel or the Appellate Body concerning those obligations. The Trade Representative shall notify the congressional committees of such request.
>
> […]
>
> (4) COMMISSION DETERMINATION.— Notwithstanding any provision of the Tariff Act of 1930 or title II of the Trade Act of 1974, if a majority of the Commissioners issues an affirmative report under paragraph (1), the Commission, upon the written request of the Trade Representative, shall issue a determination in connection with the particular proceeding that would render the Commission's action described in paragraph (1) not inconsistent with the findings of the panel or Appellate Body. The Commission shall issue its determination not later than 120 days after the request from the Trade Representative is made.

[7] Subsection (e) amends section 516A of the Tariff Act of 1930 to provide for judicial review by US courts and NAFTA binational panels of new Title VII determinations made by the US Department of Commerce or the International Trade Commission under section 129 that are implemented.

(5) CONSULTATIONS ON IMPLEMENTATION OF COMMISSION DETERMINATION.— The Trade Representative shall consult with the congressional committees before the Commission's determination under paragraph (4) is implemented.

(6) REVOCATION OF ORDER.— If, by virtue of the Commission's determination under paragraph (4), an antidumping or countervailing duty order with respect to some or all of the imports that are subject to the action of the Commission described in paragraph (1) is no longer supported by an affirmative Commission determination under title VII of the Tariff Act of 1930 or this subsection, the Trade Representative may, after consulting with the congressional committees under paragraph (5), direct the administering authority to revoke the antidumping or countervailing duty order in whole or in part.

[…]

(b) ACTION BY ADMINISTERING AUTHORITY.—

(1) CONSULTATIONS WITH ADMINISTERING AUTHORITY AND CONGRESSIONAL COMMITTEES.— Promptly after a report by a dispute settlement panel or the Appellate Body is issued that contains findings that an action by the administering authority in a proceeding under title VII of the Tariff Act of 1930 is not in conformity with the obligations of the United States under the Antidumping Agreement or the Agreement on Subsidies and Countervailing Measures, the Trade Representative shall consult with the administering authority and the congressional committees on the matter.

(2) DETERMINATION BY ADMINISTERING AUTHORITY.— Notwithstanding any provision of the Tariff Act of 1930, the administering authority shall, within 180 days after receipt of a written request from the Trade Representative, issue a determination in connection with the particular proceeding that would render the administering authority's action described in paragraph (1) not inconsistent with the findings of the panel or the Appellate Body.

(3) CONSULTATIONS BEFORE IMPLEMENTATION.— Before the administering authority implements any determination under paragraph (2), the Trade Representative shall consult with the administering authority and the congressional committees with respect to such determination.

(4) IMPLEMENTATION OF DETERMINATION.— The Trade Representative may, after consulting with the administering authority and the congressional committees under paragraph (3), direct the administering authority to implement, in whole or in part, the determination made under paragraph (2).

> (c) EFFECTS OF DETERMINATIONS; NOTICE OF IMPLEMENTATION.—
>
> (1) EFFECTS OF DETERMINATIONS.— Determinations concerning title VII of the Tariff Act of 1930 that are implemented under this section shall apply with respect to unliquidated entries of the subject merchandise (as defined in section 771 of that Act) that are entered, or withdrawn from warehouse, for consumption on or after—
>
> (A) in the case of a determination by the Commission under subsection (a)(4), the date on which the Trade Representative directs the administering authority under subsection (a)(6) to revoke an order pursuant to that determination, and
>
> (B) in the case of a determination by the administering authority under subsection (b)(2), the date on which the Trade Representative directs the administering authority under subsection (b)(4) to implement that determination.
>
> (2) NOTICE OF IMPLEMENTATION.—
>
> (A) The administering authority shall publish in the Federal Register notice of the implementation of any determination made under this section with respect to title VII of the Tariff Act of 1930.
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> (B) The Trade Representative shall publish in the Federal Register notice of the implementation of any determination made under this section with respect to title II of the Trade Act of 1974.
>
> (d) OPPORTUNITY FOR COMMENT BY INTERESTED PARTIES.— Prior to issuing a determination under this section, the administering authority or the Commission, as the case may be, shall provide interested parties with an opportunity to submit written comments and, in appropriate cases, may hold a hearing, with respect to the determination.[8]

2.4 Under Section 129, the United States Trade Representative (hereafter the "USTR") may request the US International Trade Commission (hereafter the "ITC") or the US Department of Commerce (hereafter the "Department of Commerce") to take action "not inconsistent" with a panel report only if such action is in accord with US antidumping or countervailing duty law.[9] Section 129 does not apply in cases where implementation of an adverse DSB ruling requires a change in US antidumping or countervailing duty statutes.

[8] Uruguay Round Agreements Act, Pub. L. No. 103-465, section 129(a)-(d), 108 Stat. 4836-4838.
[9] See section B.1.(c), third paragraph, of the Statement of Administrative Action, *supra*, p. 1023.

B. THE RETROSPECTIVE DUTY ASSESSMENT SYSTEM OF THE UNITED STATES

2.5 In a US antidumping or countervailing duty investigation, the Department of Commerce determines whether the imports under investigation are being dumped or subsidized and the ITC determines whether the dumped or subsidized imports cause or threaten to cause material injury. If the final determinations of the Department of Commerce and the ITC establish that the imports under investigation are being dumped or subsidized and are causing (or threatening to cause) injury, the Department of Commerce issues an antidumping or countervailing duty order instructing the US Customs Service to (i) assess antidumping or countervailing duties on completion of a future administrative review and (ii) require the payment of a cash deposit of estimated duties on all future entries of the relevant product.[10]

2.6 The United States employs a "retrospective" duty assessment system under which definitive liability for antidumping or countervailing duties is determined after merchandise subject to an antidumping or countervailing duty measure enters the United States. The determination of definitive duty liability is made at the end of "administrative reviews" which are initiated by the Department of Commerce each year on request by an interested party (such as the foreign exporter or the US importer of the imports), beginning one year from the date of the order. In addition to calculating an assessment rate in respect of the entries under review, administrative reviews also determine the cash deposit rates for estimated antidumping or countervailing duties that will be required as a security on future entries, until subsequent administrative reviews are conducted with respect to those entries.

2.7 An administrative review entails a substantive legal and factual analysis of whether imports of the product during the period of review were dumped or subsidized and, if so, to what extent.[11] The facts pertaining to entries during the period under review are investigated for the first time during an administrative review. The law applied in an administrative review is the law as interpreted by the Department of Commerce at the time that it makes its administrative review decision. The Department of Commerce's interpretation of the underlying antidumping or countervailing duty laws or regulations may be different from the interpretation it applied in the original investigation or in previous administrative reviews.

2.8 At the conclusion of the administrative review, the Department of Commerce instructs the US Customs Service to assess definitive antidumping and countervailing duties in accordance with the determination of the Department of Commerce. To the extent that the definitive duties owed are less than the level of the cash deposits paid as security, any excess plus interest is returned to the importer. To the extent that the definitive liability is greater than the cash deposits, the importer must pay that additional amount.

III. MAIN ARGUMENTS OF THE PARTIES

3.1 The main arguments, presented by the parties in their written submissions, oral statements, and in their written replies to written questions, are summarized below.

[10] See section 351.211 of the Antidumping and Countervailing Duties Regulations, 19 C.F.R. Part 351 (exhibit CDA-5). Normally, if an administrative review is not requested, the Department of Commerce will instruct the US Customs Service to assess antidumping or countervailing duties at rates equal to the cash deposit of estimated antidumping or countervailing duties required on the relevant entries.

[11] In administrative reviews, imports covered by the period under review are imports that entered the United States during the 12 to 18 months prior to the initiation of the review. The Department of Commerce does not issue its final determination in the administrative review until 12 to 18 months after the end of the review period.

A. CANADA

3.2 This section summarizes the main arguments of **Canada**, i.e., the complaining party in this case.

1. Introduction

3.3 Canada considers that the measure at issue in this dispute -- section 129(c)(1) of the URAA -- is inconsistent with the obligations of the United States under Article VI of the GATT 1994, the AD Agreement, the SCM Agreement, and the WTO Agreement.

3.4 The effect of section 129(c)(1) on imports subject to potential duty liability requires an understanding of certain procedural aspects of the US system of antidumping and countervailing duty assessment. Accordingly, Canada first discusses the US duty assessment system in order to provide context for understanding section 129(c)(1). Canada subsequently addresses the operation and substantive requirements of section 129(c)(1).

2. Description of Section 129(c)(1) of the URAA

3.5 Section 129 of the URAA sets forth procedures under US law for the United States to comply with adverse DSB rulings concerning its obligations under the Agreement on Safeguards, the AD Agreement and the SCM Agreement in cases in which implementation can be achieved by administrative action without the need for statutory amendment.

3.6 Where a DSB ruling finds that an action by the ITC contravenes the obligations of the United States under the AD Agreement or the SCM Agreement, the USTR, pursuant to section 129(a)(1), "may request the Commission to issue an advisory report on whether Title VII of the Tariff Act of 1930 […] permits the Commission to take steps […] that would render its action not inconsistent with the findings of the panel or the Appellate Body". If the ITC issues a report confirming that it can rectify its actions in accordance with US law, section 129 then authorizes the USTR to request that the ITC issue a new determination to bring its actions into conformity with the findings of the DSB ruling. Absent such direction from the USTR, the ITC has no independent authority to revise its determination to make it "not inconsistent with" an adverse DSB ruling. In making its new determination, the ITC could (i) issue a new affirmative injury finding, or (ii) issue a new negative injury determination (finding no injury to a domestic industry) depending on which result was required to achieve compliance with the DSB ruling. Where the ITC makes a negative injury finding, under section 129(a)(6) the USTR may direct the Department of Commerce "to revoke the antidumping or countervailing duty order in whole or in part".

3.7 Where the DSB ruling finds that an action by the Department of Commerce is not in conformity with the obligations of the United States under the AD Agreement or the SCM Agreement, the USTR, pursuant to section 129(b)(1), must consult with the Department of Commerce and the relevant congressional committees on the matter. Section 129(b)(2) requires that, upon the request of the USTR, the Department of Commerce shall issue a new, WTO-consistent determination. Thereafter, pursuant to section 129(b)(4), the USTR may direct the Department of Commerce to implement, in whole or in part, its new determination.

3.8 Implementation of the new Department of Commerce antidumping or countervailing duty determination could result in (i) a new affirmative determination, or (ii) revocation of the original order if the Department of Commerce made a finding that there was no dumping or subsidization to support the original order. A new affirmative determination would set a new cash deposit rate for future entries. Revocation of an order would occur where the new determination results in negative findings with respect to dumping or subsidies to be offset. A new order would reflect any new cash deposit rate established.

3.9 The effect of section 129(c)(1) is that an original order is revoked or amended with respect to new entries imported into the United States on or after the date USTR directs implementation of a new determination (hereafter the "Implementation Date") but not in respect of prior unliquidated entries (that is, imports that entered the United States prior to the date on which the USTR directs implementation of a new determination pursuant to section 129(a)(6) or section 129(b)(4) of the URAA and in respect of which the Department of Commerce has not made a definitive determination of liability for antidumping or countervailing duties and directed the US Customs Service to liquidate those entries). Furthermore, with respect to new affirmative determinations, the new cash deposit rate will only be applied to future entries.

3.10 The Statement of Administrative Action ("SAA"), which accompanies the URAA, explains the result in greater detail. It states:

> "[…] subsection 129(c)(1) provides that where determinations by the ITC or Commerce are implemented under subsections (a) or (b), such determinations have prospective effect only. That is, they apply to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption on or after the date on which the Trade Representative directs implementation. Thus, relief available under subsection 129(c)(1) is distinguishable from relief available in an action brought before a court or a NAFTA binational panel, where, depending on the circumstances of the case, retroactive relief may be available. Under 129(c)(1), if implementation of a WTO report should result in the revocation of an antidumping or countervailing duty order, entries made prior to the date of Trade Representative's direction would remain subject to potential duty liability."[12]

3.11 The SAA specifically addresses the situation where an antidumping or countervailing duty order is revoked based on a new determination by either the Department of Commerce or the ITC (i.e, based on negative injury, dumping or subsidy findings). It explains that "if implementation of a WTO report should result in the revocation of an […] order, [unliquidated] entries made prior to the date of [the USTR's] direction [to implement] would remain subject to potential duty liability."[13] Thus the SAA confirms that: (1) the administrative review procedure for prior unliquidated entries will continue pursuant to an order that was found not to have been supported by WTO-consistent affirmative determinations of injury, dumping or subsidization and has been revoked; and (2) duty liability for these entries will be determined by the Department of Commerce without regard to the new WTO-consistent determination.

3.12 In some circumstances, following an adverse DSB ruling, the new determination may reflect a revised methodology (e.g., for calculating dumping duties or measuring a subsidy) and a new margin of dumping or rate of subsidy. Unless the final results of an administrative review for prior unliquidated entries establish duty liability at or below the rate established in the new determination, the United States would subject importers to greater liability than would be due under the new determination.

3.13 This necessarily means that the US Customs Service will retain certain cash deposits made by an importer pending an administrative review and that prior unliquidated entries will remain subject to excessive liability in a subsequent administrative review notwithstanding that there is no basis under the AD Agreement or the SCM Agreement for the Department of Commerce to take action against entries based upon an order which has been revoked or amended.

[12] Statement of Administrative Action, *supra*, p. 1026 (emphasis added).
[13] *Ibid*.

3. Section 129(c)(1) is Inconsistent with the United States' Obligations Under the AD Agreement, the SCM Agreement, Article VI of the GATT 1994 and Article XVI:4 of the WTO Agreement

(a) Antidumping Cases

3.14 Section 129(c)(1) of the URAA violates Articles 1, 9.3, 11.1 and 18.1 of the AD Agreement and Articles VI:2 and VI:6(a) of the GATT 1994 by requiring the Department of Commerce to make administrative review determinations and to assess antidumping duties on prior unliquidated entries after the Implementation Date notwithstanding that the elements needed for the United States to make a finding of injurious dumping and to levy duties as provided in the original determination are no longer present.

3.15 Article VI:2 states that "[i]n order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product […]". Thus, the imposition of antidumping duties exceeding the margin of dumping is inconsistent with Article VI:2. Article VI:6(a) precludes the levying of antidumping duties absent a determination that the imports concerned cause or threaten to cause material injury or materially retard the establishment of a domestic industry.

3.16 Article 1 of the AD Agreement requires that antidumping measures must meet the dumping and injury conditions of Article VI of the GATT 1994 and must be applied "pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement." Consequently any antidumping duty must only be applied in those circumstances in which injury, dumping and causation determinations necessary to impose that duty are made in accordance with the AD Agreement. This requirement is supported by Article 9.1 of the AD Agreement which states that the "decision whether or not to impose an anti-dumping duty" and the "decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less" are left to the discretion of the Member. Article 18.1 states that "[n]o specific action against dumping of exports from another Member can be taken except in accordance with the provisions of the GATT 1994, as interpreted by this Agreement." As Article VI is the only provision in the GATT 1994 that specifically addresses dumping actions, both Articles 1 and 18.1 of the AD Agreement preclude a Member from taking action against dumping except in accordance with Article VI.

3.17 Accordingly, Articles 1 and 18.1 of the AD Agreement and Article VI:2 and VI:6(a) of the GATT 1994, read together with Article 9.1 of the AD Agreement, preclude a Member from (i) applying antidumping duties in the absence of a finding of injurious dumping in accordance with the provisions of the AD Agreement, and (ii) taking action against imports from another Member in an amount in excess of an amount equal to the margin of dumping determined in accordance with the AD Agreement. These provisions are violated by section 129(c)(1) by its requirement of the continued application (to prior unliquidated entries after the Implementation Date) of antidumping duty orders that have been either amended or revoked by the Department of Commerce. Where the Department of Commerce implements a new determination by revoking an order imposing potential duty liability on imports under section 129(a)(6) or under section 129(b)(4), it does so because the ITC made a negative injury determination or the Department of Commerce concluded that no dumping existed. In such circumstances, Articles 1 and 18.1 preclude the United States from applying a duty pursuant to the original determination because the requirements of Article VI:2 and VI:6(a) are not met. Similarly, if the Department of Commerce, in implementing a new determination pursuant to section 129(b)(4), were to amend an order imposing potential duty liability, it would do so because the new determination has established that the margin of dumping is lower or higher than the margin of dumping as established in the original determination. In such a situation, Articles 1 and 18.1 preclude the United States from taking "specific action against dumping" pursuant to the original determination because the requirement in Article VI:2 that the duty not exceed the margin of dumping is not met.

3.18 Article 9.3 states in part that "[t]he amount of anti-dumping duty shall not exceed the margin of dumping as established under Article 2" of the AD Agreement. Thus, Members may not impose duties that exceed the margin of dumping.

3.19 Article 11.1 states that "[a]n anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury". Accordingly, unless a Member can establish that the dumping in respect of which the antidumping duty was imposed continues to cause injury, there is no basis for that Member to continue to impose the duty.

(b) Subsidy Cases

3.20 Section 129(c)(1) of the URAA also violates Articles 10, 19.4, 21.1 and 32.1 of the SCM Agreement, as well as Articles VI:3 and VI:6(a) of the GATT 1994, by requiring the Department of Commerce to make determinations regarding subsidization and impose final countervailing duties on prior unliquidated entries after the Implementation Date notwithstanding that the elements needed for the United States to make a finding of injurious subsidization and to levy duties as provided for in the original determination are no longer present.

3.21 Article VI:3 of the GATT 1994 provides that "[n]o countervailing duty shall be levied on any product […] in excess of an amount equal to the estimated bounty or subsidy determined to have been granted." Pursuant to Article VI:6(a), a Member shall levy a countervailing duty on imports only if it determines "that the effect of the […] subsidization […] is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry".

3.22 Articles 10 and 32.1 of the SCM Agreement must be read together with Article VI of the GATT 1994. Article 10 of the SCM Agreement provides that "Members shall take all necessary steps to ensure that the imposition of a countervailing duty on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of the GATT 1994 and the terms of this Agreement […]". Article 32.1 of the SCM Agreement states that "[n]o specific action against a subsidy of another Member can be taken except in accordance with the provisions of the GATT 1994, as interpreted by this Agreement". Thus, Articles 10 and 32.1 of the SCM Agreement and Article VI of the GATT 1994, read together, provide that a Member (i) may only take action if it determines that the effect of subsidization of imports is to cause or threaten to cause material injury to its domestic industry; and (ii) may not take action against imports from another Member in an amount in excess of an amount equal to the subsidy granted to those imports.

3.23 After a Member makes determinations of subsidization and injury, that Member may not levy a countervailing duty in excess of the amount of the subsidy. Article 19.4 of the SCM Agreement states that "[n]o countervailing duty shall be levied on any imported product in excess of the amount of subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product".

3.24 The requirement that the Department of Commerce continue to levy duties pursuant to the original order in administrative reviews also violates Article 21.1 of the SCM Agreement, which provides that "a countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury" to a domestic industry. Accordingly, unless a Member can establish that injurious subsidization exists, there is no basis for that Member to continue to impose a duty. In circumstances in which the original order has been revoked, there is no basis on which the Department of Commerce could rule that the continued determinations of subsidization and the assessment of countervailing duties pursuant to that order is necessary, as is required pursuant to Article 21.1 of the SCM Agreement. In other cases, where the Department of Commerce has determined that there is a lower level of subsidization than originally established, section 129(c)(1)

prevents the Department of Commerce from taking this new determination into account in respect of prior unliquidated entries.

3.25 Given the violations demonstrated by Canada of GATT Article VI and the provisions cited in the AD Agreement and the SCM Agreement, section 129(c)(1) is also inconsistent with Article 18.4 of the AD Agreement, Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement. These provisions require that a Member's laws be in conformity with its WTO obligations as of the entry into force of the WTO Agreement.

4. Section 129(c)(1) Mandates a Violation of the WTO Obligations of the United States

3.26 In its Second Submission, the United States raised a new defence. The United States claimed that section 129(c)(1) does not mandate a violation of the provisions of the AD Agreement, the SCM Agreement, the GATT 1994 and the WTO Agreement cited by Canada.

3.27 Canada suggests that, even if the Panel were to accept the United States' description of its laws, section 129(c)(1) would continue to mandate that the United States violate its WTO obligations in certain significant circumstances.

3.28 There are four key points that are relevant to the mandatory/discretionary doctrine in WTO and GATT jurisprudence and practice:

(a) first, a member may challenge another Member's measure "as such", independent of any particular application of that measure;

(b) second, a measure that is challenged "as such" is not inconsistent with a Member's WTO obligations unless it mandates that the Member take action inconsistent with those obligations;

(c) third, a Member's measure need not mandate a violation in all circumstances to be inconsistent, as such, with that Member's WTO obligations; rather, it is sufficient that the measure mandate a violation in some circumstances; and

(d) fourth, where the parties have disputed whether a measure mandates a violation of WTO rules, the practice of WTO panels has been to first determine the Member's obligations under the WTO Agreement and thereafter to determine whether the measure at issue contains sufficient discretion such that a violation of the Member's WTO obligations is not mandated in any circumstances.[14]

3.29 The mandatory nature of section 129(c)(1) can be demonstrated by considering two classes of cases – that is, methodology cases (those cases in which the implementation by the United States of an adverse DSB ruling does not require that the Department of Commerce revoke an antidumping or countervailing duty order but instead requires the Department of Commerce to make some change or amendment, such as a change in its methodology) and revocation cases (cases in which implementation of an adverse DSB ruling requires the Department of Commerce to revoke an antidumping or countervailing duty order).

3.30 Canada notes that the United States has not claimed that section 129(c)(1) would in no circumstances have the effect of precluding its implementation of the DSB ruling with respect to prior unliquidated entries. Indeed, the United States has conceded that prior unliquidated entries are subject

[14] See, for example, Panel Report, *United States - Measures Treating Export Restraints as Subsidies* ("*US - Export Restraints*"), WT/DS194/R, adopted 23 August 2001.

to "potential duty liability" notwithstanding the revocation of an antidumping or countervailing duty order with respect to future entries.

3.31 The United States argues that section 129(c)(1) would not preclude the Department of Commerce from making final duty liability determinations in an administrative review on a basis consistent with a DSB ruling in *methodology cases*, even insofar as the determinations would apply to prior unliquidated entries. However, the US claim that the Department of Commerce has "administrative discretion" to change its interpretation is inconsistent with US principles of statutory construction, as well as the wording of the SAA.

3.32 As Canada understands US principles of statutory construction, the issue of whether the limitation in section 129(c)(1) could be nullified or ignored by the Department of Commerce in a subsequent administrative review would ultimately be decided by the US courts, and not by the Department of Commerce. As US courts have explained, a court "cannot presume that Congress intended [one result] with one hand, while reducing it to a veritable nullity with the other".[15] For this reason, US courts would be unlikely to afford deference to the Department of Commerce's interpretation of section 129(c)(1) in a subsequent administrative review. Although "[j]udicial deference to agency [Department of Commerce] interpretation is normally justified by the agency's expertise in the regulated subject matter [if the] issue is a pure question of statutory construction [it is an issue] for the courts to decide".[16]

3.33 The United States also argues that section 129(c)(1) has no effect with regard to any determinations made in another "segment" of the proceeding, particularly the definitive determination of duty liability made following an administrative review. However, this argument is contrary to the US principles of statutory construction.. Section 129(c)(1) states that determinations under section 129 shall apply with respect to entries on or after the Implementation Date. This would appear to preclude the Department of Commerce from taking action after the Implementation Date under section 129 consistent with a new determination in a subsequent separate segment of the proceeding with respect to prior unliquidated entries. Further, this argument is inconsistent with the SAA which states clearly, at page 1026, that the DSB ruling will not be implemented with regard to prior unliquidated entries.

3.34 The Department of Commerce, by complying with an adverse DSB ruling with respect to definitive duty determinations made after the Implementation Date for prior unliquidated entries, would materially undermine the wording in section 129(c)(1) and the SAA, which affirms that determinations to implement DSB rulings have prospective effect only. It seems unlikely that the US Congress would have created the limitation in section 129(c)(1) merely to permit the temporary retention of excess cash deposits that would be returned at the end of the administrative review process. Finally, the US assertion that the Department of Commerce could circumvent the limitation in section 129(c)(1) by using its 'administrative discretion' has not been tested in the US courts or in the Department of Commerce's administrative practice.

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[15] *Katie John* v. *United States*, 247 F.3d 1032, 1038 (9th Cir. 2001) ("*Katie John*") citing *Johnson* v. *United States R.R. Retirement Board*, 969 F.2d 1082, 1089 (D.C. Cir. 1992), which found that it was "unreasonable to conclude that Congress meant to create an entitlement with one hand and snatch it away with the other". See also *American Tobacco Co.* v. *Patterson*, 456 US 63, 71 (April 5, 1982) which stated that "[s]tatutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible".

[16] *Katie John* at 1038 citing *Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 US 633, 651-2 (1990) which stated that "[a]gency expertise is one of the principal justifications behind Chevron defence"; *INS* v. *Cardoza-Fonseca* 480 US 421, 446 (1987), which stated that the issue "is a pure question of statutory construction for the courts to decide"; *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 US 837, 843 n. 9, which stated "[t]he judiciary is the final authority on issues of statutory construction; *Magana-Pizano* v. *INS*, 200 F.3d 603, 611 n. 11 (9th Cir. 1999), which stated that "[b]ecause the issue presented is a question of pure law and does not implicate agency expertise in any meaningful way, we need not defer under Chevron […]."

3.35 In *revocation cases*, a revocation of an order pursuant to section 129 will apply only to entries imported on or after the Implementation Date. The United States will retain the cash deposits with respect to the prior unliquidated entries, which will continue to be the subject of an administrative review. In conceding these points, the United States nevertheless argued that while the treatment to be accorded to prior unliquidated entries in a subsequent administrative review is uncertain, section 129(c)(1) nonetheless does not mandate treatment inconsistent with the United States' WTO obligations.

3.36 In cases in which compliance with a DSB ruling requires the Department of Commerce to revoke an order, the United States will be acting inconsistently with its WTO obligations by retaining cash deposits and holding administrative reviews of prior unliquidated entries. Further, even if the Department of Commerce, at the conclusion of the administrative review, were to terminate the order and return the cash deposits for entries (which is not provided for under US law), the United States will have acted inconsistently with its obligations under the AD Agreement and the SCM Agreement.

3.37 The United States has effectively conceded that, in cases in which compliance with a DSB ruling results in a new negative injury determination by the ITC, section 129(c)(1) precludes all but the occasional possibility of "accidental compliance". In a negative injury case, the antidumping or countervailing duty order would be revoked for all entries on or after the Implementation Date, but not for prior unliquidated entries. Based on the ITC determination, the Department of Commerce would terminate the order and issue instruction ending the requirement for cash deposits and bonds with respect to future entries but, because of section 129(c)(1), cash deposits for prior unliquidated entries would be retained. The United States provided no justification for making this distinction in a determination made by the Department of Commerce after the Implementation Date.

3.38 Further, the United States did not claim that section 129(c)(1) would never preclude the Department of Commerce from making determinations in administrative reviews consistently with the DSB ruling. Rather, the United States made a narrower claim that it is not obliged to implement a DSB ruling with respect to substantive duty determinations made after the Implementation Date with respect to prior unliquidated entries and, further, that section 129(c)(1) does not mandate a violation of its WTO obligations.

3.39 However, the US argument that section 129(c)(1) does not mandate violations of its WTO obligations is based on the United States' erroneous interpretation of its WTO obligations. The AD Agreement, the SCM Agreement, the GATT 1994, the WTO Agreement and the DSU do not authorize violations of the sort to which the United States tries to claim a right in defence of section 129(c)(1). Neither the DSU nor the principle of prospective compliance excuse the United States from complying with an adverse DSB ruling in determining duty liability after the Implementation Date with respect to prior unliquidated entries.

3.40 At most, the United States has asserted that the Department of Commerce might have some flexibility in circumventing the limitation in section 129(c)(1) in certain cases (for example, a change of interpretation of US law for other reasons, such as a direction from a US court). However, even if the Panel were to accept this US argument, section 129(c)(1) still mandates violations of the WTO obligations of the United States by (i) requiring the Department of Commerce to retain cash deposits and to conduct administrative reviews in circumstances inconsistent with the obligations of the United States under the AD Agreement and the SCM Agreement; and (ii) precluding the Department of Commerce from making final duty determinations consistent with the United States' WTO obligations as found by the DSB with respect to prior unliquidated entries.

5. The Principle of Prospective Compliance

3.41 The fundamental issue in this case is what constitutes prospective compliance. Canada and the United States agree on the principle of prospective implementation of DSB rulings, but disagree

on the meaning and application of prospective implementation in this case. In particular, Canada and the United States disagree whether the principle permits a Member to take WTO-inconsistent actions after the Implementation Date.

3.42 Canada is *not* seeking to have the Department of Commerce apply new section 129 determinations to liquidated entries.[17] This would be asking the United States to undo definitive duty determinations; clearly, this would be the retroactive application of an adverse DSB ruling. Rather, Canada considers that the principle of prospective implementation requires that definitive duty determinations made by a Member after the date established under the DSU for implementation of an adverse DSB ruling must be consistent with that ruling.

3.43 The United States argued that it is entitled to make determinations after the Implementation Date on a basis inconsistent with an adverse DSB ruling if those determinations affect prior unliquidated entries. By maintaining that the date of entry governs the application of the new WTO-consistent determinations of the ITC or the Department of Commerce, the United States claims the right to conduct administrative reviews and to make final legal determinations of duty liability for prior unliquidated entries on a WTO-inconsistent basis for months, and perhaps years, after the Implementation Date.

3.44 Canada sees no basis for this in the DSU or in the GATT/WTO tradition of prospective implementation. Section 129(c)(1) prevents the Department of Commerce from applying new section 129 determinations to prior unliquidated entries, which, as discussed above, violates the United States' obligations under Article VI of the the GATT 1994, the AD Agreement and the SCM Agreement, as well as Article XVI:4 of the WTO Agreement.

3.45 In support of its position, the United States relied on various DSU provisions, cases and statements. However, none of these support the US proposition that prospective compliance is defined in terms of date of entry of imports, or the US argument that determinations made by the Department of Commerce after the Implementation Date are excused from compliance with an adverse DSB ruling with respect to prior unliquidated entries.

3.46 The principles enunciated in the report of the Appellate Body in *Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU*[18] are relevant. In that proceeding, Brazil argued that it should be free to continue to provide export subsidies on exports of aircraft made after the Implementation Date to the extent that it was implementing legal commitments entered into before the Implementation Date to provide subsidies on exports after the Implementation Date. The Appellate Body clearly stated that the issuance of bonds after the end of the reasonable period of time, on the same terms and conditions which had been previously found inconsistent with the SCM Agreement, was not consistent with Brazil's obligation to withdraw the illegal subsidies.[19]

3.47 In this case, the United States is trying to justify WTO-inconsistent action that it will take after the Implementation Date on grounds that the trade affected by its actions (namely, the prior unliquidated entries) occurs before the Implementation Date. Canada submits that this dispute presents a more serious case of infringement of WTO obligations than in *Brazil –*

[17] That is, entries for which, prior to the Implementation Date, the Department of Commerce made definitive duty determinations and instructed the US Customs Service to liquidate.

[18] Appellate Body Report, *Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU* ("*Brazil – Aircraft* (*Article 21.5 – Canada*)"), WT/DS46/AB/RW, adopted 4 August 2000, para. 46.

[19] The Panel report is also relevant. The Panel stated that "[i]n our view, the obligation to cease performing illegal acts in the future is a fundamentally prospective remedy". See Panel Report, *Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU* ("*Brazil – Aircraft (Article 21.5 – Canada)*"), WT/DS46/RW, adopted 4 August 2000, as modified by the Appellate Body Report, WT/DS46/AB/RW, para. 6.15.

Aircraft (*Article 21.5 – Canada*) because new legal acts by the Department of Commerce and the ITC are at issue. Canada also submits that the reasoning in *Brazil – Aircraft* (*Article 21.5 – Canada*) applies in this case, and that the right claimed by the United States to conduct administrative reviews and make definitive legal determinations after the Implementation Date with respect to prior unliquidated entries has no basis in the WTO Agreement or any of the covered agreements.

3.48 In Canada's view, the principle of prospective implementation does not justify the United States making legal determinations after the Implementation Date on a WTO-inconsistent basis. The logical outcome of prospective implementation of an adverse DSB ruling in a retrospective duty assessment system is for the United States to apply new section 129 determinations to all prior unliquidated entries as well as future entries.

3.49 The principle of prospective implementation does not justify the United States continuing to make definitive duty determinations after the Implementation Date in respect of prior unliquidated entries on a WTO-inconsistent bases for months, or perhaps years, after the date on which it purportedly brought its measure into conformity with its WTO obligations. The United States has attempted to portray itself as the victim in this case. However, the United States is not being deprived of a right under the DSU or any other WTO agreement. Instead, the United States is seeking additional rights not provided in the WTO Agreement or the covered agreements, including the DSU.

3.50 In response to question 71 from the Panel, Canada suggested that the United States cannot apply a WTO-consistent methodology to prior unliquidated entries after the Implementation Date without refunding excess cash deposits. If the United States were to fail to refund excess cash deposits, the United States would violate both its domestic law and its WTO obligations.

3.51 First, under US law, cash deposits are considered as security against the final determination of liability. Where the final duty liability is less than the cash deposit, the difference must be refunded under US law. Sections 1671f and 1673f of the Tariff Act of 1930 provide for the refund of estimated antidumping and countervailing duty deposits which are in excess of the final determined duty liability.

3.52 Second, if the Department of Commerce was able to apply a new, WTO-consistent methodology to prior unliquidated entries which resulted in a final antidumping or countervailing duty that is lower than the cash deposits collected on the prior unliquidated entries, the United States would be required under WTO law to refund the excess cash deposits.[20] If the United States did not refund the excess cash deposits, the United States would violate its WTO obligations, in particular Article VI:2 and Article VI:3 of the GATT 1994, Articles 1 and 18.1 of the AD Agreement and Articles 10, 19.4 and 32.1 of the SCM Agreement.

3.53 Canada recalls that, in its view, the final legal determinations of duty liability established by the Department of Commerce after the Implementation Date must be in conformity with the adverse DSB ruling. The consequence of this is that, once the final amount of duty liability of entries has been established in an administrative review, any excess cash deposits collected in respect of those entries must be refunded by the United States. This is also consistent with the principle of prospective implementation of DSB rulings as applied by the Appellate Body in *Brazil – Aircraft* (*Article 21.5 – Canada*).

3.54 In response to question 74 from the Panel, Canada expressed the view that in certain situations section 129(c)(1) results in the retention by the Department of Commerce of cash deposits for prior unliquidated entries in circumstances in which such retention is not justified in whole or in

[20] Canada recalls that it is not persuaded that the Department of Commerce could apply a new, WTO-consistent methodology to prior unliquidated entries in an administrative review held after the Implementation Date.

part. That is, the operation of section 129(c)(1) results in the retention by the Department of Commerce of cash deposits for prior unliquidated entries notwithstanding that (i) the ITC or the Department of Commerce makes a new determination which results in a revocation of the original antidumping or countervailing duty order, or (ii) the Department of Commerce makes a new determination amending the original antidumping or countervailing duty determination, which may result in a lower final antidumping duty or countervailing duty being assessed against those entries.

6. Differences Between Prospective and Retrospective Duty Assessment Systems

3.55 The United States argued that "[r]ecognizing the date of entry as the controlling date for determining the scope of a Member's implementation obligations in all cases avoids creating differences [between prospective and retrospective duty assessment systems] that are not contemplated in the Agreements".[21] However, Canada notes that the fact that the date of entry is the relevant date under a prospective duty assessment system for the purposes of determining final duty assessment is irrelevant to this case. Under the US retrospective duty assessment system, the end of the administrative review process is the relevant date for the purposes of determining final duty assessment.

3.56 Prospective and retrospective duty assessment systems are different approaches to determining antidumping and countervailing duty liability under the AD Agreement and the SCM Agreement. These differences give rise to certain advantages and disadvantages unique to each system. However, regardless of whether a Member chooses a retrospective or prospective duty assessment system, the Member must abide by its WTO obligations. The provisions of the AD Agreement, the SCM Agreement and the GATT 1994 are equally applicable to retrospective and prospective duty assessment systems. A Member must accept the consequences of whichever duty assessment system it chooses to adopt. A Member cannot argue, as the United States has done, that its retrospective duty assessment system permits it to make final duty determinations without regard to an adverse DSB ruling, in violation of its WTO obligations.

3.57 The United States asserted that Canada was advocating that Members with retrospective duty assessment systems be treated less favourably than Members with prospective duty assessment systems. The United States also stated that Canada was arguing that, unlike Members with retrospective duty assessment systems, "Members with prospective systems do not have an obligation to apply adverse DSB recommendations and rulings when conducting […] reviews of pre-implementation entries."[22]

3.58 However, the United States has deliberately misconstrued Canada's argument. Canada is not arguing for a "special rule" in which only a Member with a retrospective duty assessment system must make determinations after the Implementation Date consistent with its WTO obligations. Canada accepts that a Member with a prospective duty assessment system has the same obligation. It is Canada's position that, notwithstanding the temporal differences in the making of substantive duty determinations under a retrospective or a prospective duty assessment system, where a Member has agreed to implement an adverse DSB ruling, it must make all subsequent substantive duty determinations in accordance with that ruling following the expiration of the reasonable period of time.[23]

[21] US reply to Panel Question 17.

[22] US Second Submission, para. 27.

[23] Section 76.1 of Canada's Special Import Measures Act (the "SIMA") which provides the authority and procedure for the implementation of adverse DSB rulings, is the Canadian counterpart to section 129 of the URAA. Where section 76.1 of the SIMA has been invoked by Canada to implement a DSB ruling, substantive duty determinations after the expiration of the reasonable period of time would be made in compliance with that ruling.

3.59 The United States also incorrectly implied that Canada would not implement an adverse DSB ruling in making a duty determination after the expiration of the reasonable period of time.[24] Canada considers that a Member, whether employing a prospective or retrospective duty assessment system, is not required to undo final duty determinations made before the expiration of the reasonable period of time. However, a redetermination made after the Implementation Date must be made in conformity with the DSB ruling notwithstanding that the redetermination would affect entries subject to a final determination made prior to the expiration of the reasonable period of time.[25]

7. Date of Definitive Duty Determination and Not Date of Entry of Imports is the Operative Date for Determining Compliance

3.60 The United States argues that the date of entry of imports -- and not the date of the definitive duty determination -- is the operative date for determining prospective compliance. In essence, the United States argues that, having been found by the DSB to have violated its WTO obligations, it should be allowed to make duty determinations after the Implementation Date in a WTO-inconsistent manner.

3.61 The United States appeared to imply that the Department of Commerce's final determination of duty liability on imports was akin to a clerical act. This argument, however, disregards the importance of the administrative review process, which involves hearings, briefs and legal determinations. First, the law applied by the Department of Commerce in the administrative review process will reflect changes in policies and legal principles between the time of the original entry of imports and the time that the Department of Commerce makes its final definitive duty determination for those imports. Second, the substantive methodology used by the Department of Commerce in making its final definitive duty determination may be quite different from that applied in the original investigation or in previous administrative reviews.

3.62 The United States also attempted to minimize the significance of the legal and factual distinctions between cash deposits and definitive duty determinations.[26] However, under US law, the publication of an antidumping or countervailing duty order is merely the first step toward the final assessment of duties to be collected; the final assessment of those duties takes place in a subsequent administrative review where the final liability for payment of duties is determined and liquidation is carried out. Accordingly, the date of the definitive duty determination -- and not the date of entry of imports -- is the operative date for determining whether a Member with a retrospective duty assessment system has complied with its WTO obligations.

8. Conclusion

3.63 Therefore, for the reasons set out above, Canada requests that the Panel:

(a) find that section 129(c)(1) of the URAA is inconsistent with:

(i) Article VI:2, VI:3 and VI:6(a) of the GATT 1994,

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[24] US Second Submission, para. 26.

[25] Canada's obligation under Article 9.3.2 of the AD Agreement to make provision for "prompt refund, upon request, of any duty paid in excess of the margin of dumping" is implemented in sections 57 to 59 of the SIMA. These sections provide for a redetermination of final duty liability so as to ensure that any antidumping or countervailing duty collected on goods does not exceed the actual margin of dumping or amount of subsidization for those goods. Section 60 of the SIMA provides that the "excessive" duty is to be returned forthwith to the importer. Unlike section 129(c)(1) of the URAA, there is nothing in section 76.1 or section 57 to 60 of SIMA to prevent Canada from making a redetermination after the expiration of the reasonable period of time which affects entries that occurred before that date.

[26] US reply to Panel Question 15.

(ii) Articles 1, 9.3, 11.1 and 18.1 and 18.4 of the AD Agreement,

(iii) Articles 10, 19.4, 21.1, 32.1 and 32.5 of the SCM Agreement, and

(iv) Article XVI:4 of the WTO Agreement, and

(b) recommend that the United States bring section 129(c)(1) of the URAA into conformity with the SCM Agreement, the AD Agreement, the GATT 1994, and the WTO Agreement.

B. UNITED STATES

3.64 This section summarizes the main arguments of the **United States**, i.e., the responding party in this case.

1. Introduction

3.65 In this dispute, Canada challenges section 129(c)(1) of the URAA as inconsistent with the WTO obligations of the United States. This provision of US law was enacted with the specific purpose of enabling the United States to implement WTO panel or Appellate Body decisions which find that the United States has taken antidumping or countervailing duty actions inconsistent with the AD Agreement or the SCM Agreement. Consistent with well-established GATT and WTO practice, section 129(c)(1) provides for such implementation on a prospective basis.

3.66 Canada is seeking to require the United States to provide retroactive relief in cases involving antidumping and countervailing duty measures, despite the widely accepted principle that the dispute settlement process established in the DSU provides for prospective remedies. It is doing so by attempting to exploit the fact that the United States uses a "retrospective" system for calculating the amount of liability that an importer must pay when it imports merchandise that, at the time of entry, is subject to an antidumping or countervailing duty order.

3.67 Nothing in the text of the WTO agreements requires anything other than prospective implementation of adverse WTO panel or Appellate Body reports (hereafter "adverse WTO reports"). Just as importantly, nothing in the Agreements requires Members to apply adverse WTO reports not only to entries that take place after implementation, but also to entries that took place prior to implementation. Section 129(c)(1) is fully consistent with the WTO obligations of the United States. It ensures implementation of adverse WTO reports on a prospective basis, consistently with the United States' WTO obligations.

3.68 In any event, there is no need for the Panel to determine what constitutes "prospective" implementation in disputes involving antidumping and countervailing duty measures. Regardless of whether there is an obligation to implement adverse WTO reports with respect to entries that occurred prior to implementation, Canada, as the complaining party in this dispute, must establish that section 129(c)(1) would preclude the United States from doing so. Canada has failed to meet its burden of proof.

2. Description of Section 129(c)(1) of the URAA

3.69 As previously noted, section 129 was enacted with the specific purpose of enabling the United States to implement WTO panel or Appellate Body decisions which find that the United States has taken actions inconsistent with the AD Agreement or the SCM Agreement. Section 129 provides the basic legal provisions through which the United States would make and implement new antidumping or countervailing duty determinations consistent with an adverse WTO report.

1.70 Section 129(c)(1), the specific provision that Canada is challenging, provides an effective date for new determinations by the Department of Commerce or the ITC which implement adverse WTO reports. Specifically, section 129(c)(1) provides that such determinations "shall apply with respect to unliquidated entries of the subject merchandise […] that are entered, or withdrawn from warehouse, for consumption on or after" the date on which the USTR directs the Department of Commerce to revoke an antidumping or countervailing duty order or implement the new Department of Commerce determination.

3. Canada Has Failed to Establish that Section 129(c)(1) Mandates Action Inconsistent with WTO Rules

(a) Canada Must Establish that Section 129(c)(1) Mandates Action that is Inconsistent with the United States' WTO Obligations

3.71 Canada has challenged section 129(c)(1) "as such." Accordingly, the burden is on Canada to demonstrate that section 129(c)(1) mandates WTO-inconsistent action. If section 129(c)(1) does not mandate such action or preclude WTO-consistent action, there is no need for the Panel to determine the meaning of "prospective" implementation in WTO disputes involving antidumping and countervailing duty measures, because even if Canada is correct in asserting that the legal situation in effect at the time of the "final" determination controls, section 129(c)(1) does not mandate how the Department of Commerce must make such determinations.

3.72 It is well established under GATT and WTO jurisprudence that legislation of a Member violates that Member's WTO obligations only if the legislation *mandates* action that is inconsistent with those obligations or *precludes* action that is consistent with those obligations. If the legislation provides discretion to administrative authorities to act in a WTO-consistent manner, the legislation, as such, does not violate a Member's WTO obligations. The Appellate Body has explained that this concept "was developed by a number of GATT panels as a threshold consideration in determining when legislation as such -- rather than a specific application of that legislation -- was inconsistent with a Contracting Party's GATT 1947 obligations."[27]

3.73 Canada has not identified a scenario, and the United States is not aware of a scenario, particularly in light of this abstract case, in which section 129(c)(1) would mandate WTO-inconsistent action or preclude the United States from acting in a WTO-consistent manner.

(b) The Meaning of Section 129(c)(1) Is a Factual Question That Must Be Answered by Applying US Principles of Statutory Interpretation

3.74 The meaning of section 129(c)(1) as a matter of US law is a factual question that must be answered by applying US principles of statutory construction. In this regard, US courts and agencies must recognize the longstanding and elementary principle of US statutory construction that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains".[28] While international obligations cannot override inconsistent requirements of domestic law, "ambiguous statutory provisions […][should] be construed, where possible, to be consistent with international obligations of the United States."[29]

[27] Appellate Body Report, *United States - Anti-Dumping Act of 1916* ("*US – 1916 Act*"), WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, para. 88.

[28] *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

[29] Restatement (Third) of the Foreign Relations Law of the United States, § 114 (1987).

(c) Canada Misinterprets What Section 129(c)(1) Actually Requires

3.75 Canada has failed to establish a *prima facie* case that section 129(c)(1) mandates action inconsistent with the AD Agreement, the SCM Agreement, or the GATT 1994, or precludes action consistent with those provisions.

3.76 Canada's failure to meet its burden of proof arises from its misinterpretation of the term "determination" as that term is used in section 129(c)(1). When the term is properly understood, it becomes clear that section 129(c)(1) only addresses the application of the *particular determination issued under the authority of section 129(c)(1)* to entries made after the date of implementation, and only with respect to that particular segment of the proceeding.[30] Section 129(c)(1) does not address what actions the Department of Commerce may or may not take in a *separate* determination in a *separate* segment of the proceeding, and thus does not mandate that the Department of Commerce take (or preclude it from taking) any particular action in any separate segment of the proceeding. This point applies in both of the scenarios that Canada has identified -- "methodology" cases and "revocation" cases.

3.77 This point can be illustrated in "*methodology*" cases by considering a situation where a Member challenges a final dumping determination in an investigation. If a challenge to such a determination were successful, the Department of Commerce would make the necessary changes in its methodologies and issue a new, WTO-consistent determination. It would then apply that new determination by setting a new cash deposit rate, which would apply to all entries that took place on or after the implementation date. It is this new determination that is the "determination" referenced in section 129(c)(1).

3.78 If a company were then to request an administrative review of what Canada terms "prior unliquidated entries," the Department of Commerce would conduct the administrative review and issue a new determination in that segment of the proceeding. Since the administrative review determination would not be the "determination implemented under section 129(c)(1)," nothing in section 129(c)(1) would preclude the Department of Commerce from applying its new, WTO-consistent methodologies in the administrative review. Canada is simply wrong, as a matter of fact, to claim that section 129(c)(1) would preclude the Department of Commerce from doing so.

3.79 The Department of Commerce has the authority to alter its statutory interpretations or its methodologies used to implement those interpretations, provided that it gives a reasonable explanation for doing so.[31] In an administrative review, the Department of Commerce would have the authority to alter its statutory interpretation or methodology from one announced prior to the implementation of the WTO panel report, and use the same, WTO-consistent interpretation or methodology adopted in the section 129 determination.[32] This would not, however, be an application of the section 129 determination to what Canada has termed "prior unliquidated entries."

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[30] Section 351.102 of the Department of Commerce's regulations defines a segment of a proceeding as follows:

> (1) *In general.* An antidumping or countervailing duty proceeding consists of one or more *segments*. "Segment of a proceeding" or "segment of the proceeding" refers to a portion of the proceeding that is reviewable under section 516A of the Act.
>
> (2) *Examples.* An antidumping or countervailing duty investigation or a review of an order or suspended investigation, or a scope inquiry under § 351.225, each would constitute a segment of a proceeding.

[31] See *INS v. Yang*, 519 U.S. 26, 32 (1996); *Atchison, Topeka & Santa Fe Ry v. Wichita Board of Trade*, 412 U.S. 800, 808 (1973); *British Steel, PLC v. United States*, 127 F.3d 1471, 1475 (Fed. Cir. 1997).

[32] Where the international obligations of the United States have been clarified, for example through the adoption by the DSB of rulings and recommendations in a WTO panel or Appellate Body report involving a US methodology, the *Charming Betsy* principle, that "an act of Congress ought never to be construed to violate the

3.80 Canada concedes that US administering authorities have the legal ability to change their interpretations or applications of statutes and regulations from one review to another and even that the Department of Commerce could do so in response to a WTO report that did not involve the United States as a party. Canada concludes, however, by stating that the Department of Commerce's ability to alter its interpretations "cannot override a statutory limitation such as section 129(c)(1)."[33] Canada did not identify any statutory or other basis in support of its assertions that a determination implemented under section 129(c)(1) limits the Department of Commerce's discretion in any other segment of the proceeding.

3.81 Indeed, section B.1.c.(2) of the SAA specifically notes that "it may be possible to implement the WTO report recommendations *in a future administrative review* under section 751 of the Tariff Act [...]". (emphasis added.) This language demonstrates the error in Canada's assertions that section 129(c)(1) would preclude the Department of Commerce from applying a WTO-consistent methodology to what they term "prior unliquidated entries" in a subsequent administrative review.

3.82 Similarly, if the United States were to implement an adverse WTO report by *revoking* an antidumping or countervailing duty order, section 129(c)(1) would ensure that the revocation would apply to all entries which took place on or after the date of revocation of the order, so the Department of Commerce would instruct the US Customs Service to stop requiring cash deposits as of that date. In any subsequent administrative review, the Department of Commerce would need to decide what to do with respect to entries that took place prior to the date of revocation.

3.83 Canada has not challenged an actual application of section 129(c)(1) in such a scenario, and the Department of Commerce has not addressed such a scenario to date. The only impact of section 129(c)(1), however, is that the Department of Commerce would not determine the fate of those entries *in the revocation determination itself*. Section 129(c)(1) does not require the Department of Commerce to apply duties to those entries, it does not limit the Department of Commerce's discretion in deciding how to administer the law in separate proceedings with respect to those entries, it does not limit judicial review of the results of those separate proceedings, and it does not limit the Department of Commerce's obligation to implement the results of any such judicial proceedings. Even taking into account the language in the SAA, the most that can be said is that such entries would "remain subject to potential duty liability." Neither section 129(c)(1) itself, nor the provision as interpreted in light of the SAA, mandates any particular treatment of such entries in a separate segment of the proceeding.

(d) Conclusion

3.84 In view of the above, the United States considers that Canada has failed to establish that section 129(c)(1) mandates a breach of any of the provisions of the AD Agreement, the SCM Agreement, or the GATT 1994 that Canada cites or precludes the United States from acting consistently with those provisions.

4. Section 129(c)(1) Is Consistent with the DSU, Which Requires Prospective Remedies When a Measure is Found Inconsistent with WTO Obligations

3.85 Even if section 129(c)(1) did mandate how the Department of Commerce is to treat what Canada terms "prior unliquidated entries," section 129(c)(1) would not breach the WTO obligations of the United States, because the DSU provides for prospective implementation of adverse WTO reports,

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law of nations if any other possible construction remains," might be relied upon by the Department of Commerce as a reasonable explanation for a change in its methodology in an administrative review determination distinct from a section 129 determination.

[33] Canada's reply to Panel Question 70.

and Members are under no obligation to implement such reports with respect to pre-implementation entries.

(a) The Principle of Prospective Remedies in the Dispute Settlement Process

3.86 Canada fails to address the obligations imposed by the DSU, having abandoned all DSU claims raised in its panel request. Canada's decision to abandon these claims is not surprising, given that an examination of these provisions reinforces the prospective nature of WTO remedies. The fact that Canada has made no claim under the DSU should be sufficient for the Panel to find that they have failed to make a *prima facie* case.

(i) Textual Analysis of the DSU

3.87 Language used throughout the DSU demonstrates that when a Member's measure has been found to be inconsistent with a WTO Agreement, the Member's obligation extends only to providing prospective relief, and not to remedying past transgressions. For example, under Article 19.1 of the DSU, when it has found a measure to be inconsistent with a Member's WTO obligations a panel or the Appellate Body "shall recommend that the Member concerned *bring the measure into conformity with that Agreement*." The ordinary meaning of the term "bring" is to "[p]roduce as a consequence," or "cause to become."[34] These definitions give a clear indication of future action, supporting the conclusion that the obligation of a Member whose measure has been found inconsistent with a WTO agreement is to ensure that the measure is removed or altered in a prospective manner, not to provide retroactive relief.

3.88 Article 3.7 of the DSU also supports the conclusion that the obligation to implement DSB recommendations is prospective in nature. Article 3.7 states, "In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements." The focus of WTO dispute settlement is on withdrawal of the *measure*, and not on providing compensation for the measure's past existence.

3.89 In a WTO case challenging an antidumping or countervailing duty measure, the measure in question is a border measure. Accordingly, revoking a WTO-inconsistent antidumping or countervailing duty measure prospectively will constitute "withdrawal" of the measure within the meaning of Article 3.7 of the DSU.

3.90 Article 21.3 of the DSU provides further support for this conclusion. Under Article 21.3, when immediate compliance is impracticable, Members shall have a reasonable period of time in which to bring their measure into conformity with their WTO obligations. Nothing in Article 21.3 suggests that Members are obliged, during the course of the reasonable period of time, to suspend application of the offending measure, much less to provide relief for past effects. Rather, in the case of antidumping and countervailing duty measures, entries that take place during the reasonable period of time may continue to be liable for the payment of duties.

3.91 Articles 22.1 and 22.2 of the DSU confirm not only that a Member may maintain the WTO-inconsistent measure until the end of the reasonable period of time for implementation, but also that neither compensation nor the suspension of concessions or other obligations are available to the complaining Member until the conclusion of that reasonable period of time. Thus, the DSU imposes no obligation on Members to cease application of the WTO-inconsistent measure on entries occurring prior to the end of the reasonable period of time.

[34] The New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993.

(ii) Panel and Appellate Body Clarification of the DSU

3.92 WTO panel reports addressing the implementation obligations of Members following an adverse WTO report confirm that such decisions be implemented in a prospective manner. In *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by Ecuador*[35], the panel discussed the prospective nature of the recommendations a panel or the Appellate Body can make under the DSU, stating, "we do not imply that the EC is under an obligation to remedy past discrimination." Rather, the principle of Article 3.7 of the DSU "requires compliance *ex nunc* as of the expiry of the reasonable period of time for compliance with the recommendations and rulings adopted by the DSB." In identifying three possible methods by which the European Communities could bring the measure into conformity, none of them involved providing a remedy for past transgressions.[36]

3.93 When panels and the Appellate Body have been asked to make recommendations for retroactive relief, they have rejected those requests, recognizing that a Member's obligation under the DSU is to provide prospective relief in the form of withdrawing a measure inconsistent with a WTO agreement, or bringing that measure into conformity with the agreement by the end of the reasonable period of time. In the six years of dispute settlement under the WTO agreements, no panel or the Appellate Body has ever suggested that bringing a WTO-inconsistent antidumping or countervailing duty measure into conformity with a Member's WTO obligations requires the refund of antidumping or countervailing duties collected on merchandise that entered prior to the date of implementation.

3.94 Canada's views on prospective application have been consistent with this view that the DSU only provides for prospective relief. Consistent with the concerns raised by many other Members, Canada has asserted that if Members' obligations under the DSU were to be retroactive, the language would have been explicit because "it was a significant departure from previous practice […]."[37]

3.95 This case is about the dispute settlement system. The fact that Canada has made no claim under the DSU is very telling; it highlights Canada's desire to avoid the well-accepted principle that the DSU does not require retroactive remedies. Section 129(c)(1) ensures that adverse WTO decisions will be implemented, in a prospective manner, in accordance with the requirements of the DSU.

(b) The Date of Entry is the Operative Date for Determining whether Relief is "Prospective" or "Retroactive"

(i) Using the Date of Entry as the Basis for Implementation is Consistent with the AD and SCM Agreements

3.96 This case revolves around what it means to implement an adverse WTO report in a prospective manner. In the context of an antidumping or countervailing duty measure, "prospective" implementation requires a Member to ensure that the new determination applies to all merchandise that enters for consumption on or after the date of implementation. This conclusion flows from the fact that it is the legal regime in effect on the date of entry which determines whether particular entries are liable for antidumping and countervailing duties. The fact that pre-implementation entries may remain unliquidated after the date of implementation -- due to domestic litigation or any other reason -- does not overcome the fact that a Member is under no obligation to implement with respect to such entries.

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[35] Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by Ecuador* ("*EC – Bananas III* (*Article 21.5 – Ecuador*)"), WT/DS27/RW/ECU, adopted 6 May 1999, para. 6.105.

[36] *Ibid.*, paras. 6.155-6.158.

[37] Minutes of DSB Meeting of 11 February 2000, WT/DSB/M/75, p. 8.

3.97 Using the date of entry as the basis for implementation is consistent with the basic manner in which the AD and SCM Agreements operate. Throughout those agreements, the critical factor for determining whether particular entries are subject to the assessment of antidumping or countervailing duties is the date of entry.

3.98 For example, Article 10.1 of the AD Agreement states that provisional measures and antidumping duties shall only be applied to "products which **enter for consumption** after the time" when the provisional or final decision enters into force, subject to certain exceptions.[38] Similarly, Article 8.6 of the AD Agreement states that if an exporter violates an undertaking, duties may be assessed on products "**entered for consumption** not more than 90 days before the application of ... provisional measures, except that any such retroactive assessment shall not apply to imports **entered** before the violation of the undertaking."[39] In addition, Article 10.6 of the AD Agreement states that when certain criteria are met, "[a] definitive anti-dumping duty may be levied on products which were **entered for consumption** not more than 90 days prior to the date of application of provisional measures [...]."[40] However, under Article 10.8, "[n]o duties shall be levied retroactively pursuant to paragraph 6 on products **entered for consumption** prior to the date of initiation of the investigation."[41] Whenever the AD Agreement specifies an applicable date for an action, the scope of applicability is based on entries occurring on or after that date.

3.99 Canada has not identified anything in Articles 1, 9.3 and 18.1 of the AD Agreement, or Articles VI:2 and VI:6(a) of GATT 1994, that requires the implementation of adverse WTO reports with respect to entries that occurred prior to the end of the reasonable period of time and the date on which the measure was brought into conformity with the WTO.

3.100 Furthermore, section 129(c)(1) of the URAA implements adverse WTO reports in a way that ensures compliance with Articles 10 and 32.1 of the SCM Agreement, and Articles VI:3 and VI:6(a) of GATT 1994. First, where the implementation of an adverse WTO report results in a determination that the amount of the subsidy is less than originally determined, section 129(c)(1) of the URAA ensures that all entries that take place on or after the date of implementation will be subject to the revised cash deposit rate established in the new determination. Similarly, when the implementation of an adverse WTO report results in a negative injury determination or a finding that there was no subsidization during the original period of investigation, the countervailing duty order will be revoked with respect to all entries that take place on or after the date of implementation. Section 129(c)(1) of the URAA ensures that such adverse WTO reports will be implemented, in a prospective manner, in accordance with the requirements of the DSU. Canada has failed to make even a *prima facie* case that the WTO Agreements require Members to implement adverse WTO reports regarding antidumping or countervailing duty measures with respect to entries that have occurred prior to the conclusion of the reasonable period of time for implementation.

3.101 Canada's claim that section 129(c)(1) is inconsistent with Article 11.1 of the AD Agreement and Article 21.1 of the SCM Agreement is similarly without basis. As their titles and context make clear, the purpose of the two articles is to provide for the periodic review of antidumping and countervailing duty orders and price undertakings to determine whether they remain necessary to offset injurious dumping or subsidization. They do not cover administrative reviews conducted to determine the amount of final antidumping or countervailing duty liability on past entries. Footnote 21 of the AD Agreement makes this point clear by specifically differentiating between reviews to determine the amount of final antidumping liability, which are conducted pursuant to Article 9.3 of the AD Agreement, and reviews conducted pursuant to Article 11. Neither Article 11 of the

[38] Emphasis added. See also Article 20.1 of the SCM Agreement, containing virtually identical language which applies to countervailing duty investigations.
[39] Emphasis added. The equivalent provision in the SCM Agreement is Article 18.6.
[40] Emphasis added. See also Article 20.6 of the SCM Agreement.
[41] Emphasis added.

AD Agreement nor Article 21.1 of the SCM Agreement has any bearing whatsoever on the extent of a Member's obligation to bring a WTO-inconsistent measure into conformity with an adverse WTO report.

3.102 A recent Appellate Body report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*,[42] also provides support for the idea that the critical issue is date of entry. In the aptly numbered paragraph 129 of that report, the Appellate Body stated that "a duty [...] does not need actually to be enforced and collected to be 'applied' to a product. In our view, duties are 'applied against a *product*' when a Member imposes conditions under which that product can enter that Member's market [...]." Thus, when the Appellate Body analyzed when a duty is "applied," it focused not on what might occur at the time of enforcement or collection, but on the conditions that imports would face at the border.

(ii) Using the Date of Definitive Duty Determination as the Basis for Implementation Could Lead to Unexpected Results

3.103 The United States considers that the scope of a Member's implementation obligations is governed by the situation in effect at the time of entry. If Canada is correct in arguing that the Member's obligation depends upon the legal rights in effect on the date that the final duty liability is determined (and not on the date of entry), then a Member that has received DSB authorization to suspend concessions would be permitted to do so with respect to unliquidated, pre-authorization entries.

3.104 On this point, however, Canada's argument conflicts with the reasoning of the panel in the *United States – Import Measures on Certain Products from the European Communities* case.[43] That panel stated that suspending concessions on pre-authorization entries would constitute a retroactive remedy at odds with GATT and WTO practice. Further, the panel stated, "the applicable tariff (the applicable WTO obligation, the applicable law for that purpose), must be the one in force on the day of importation, the day the tariff is applied."[44] For the panel, the date of entry controlled whether the remedy was prospective or retroactive. Canada's attempt to distinguish the panel report on *US – Certain EC Products* on the basis of when the "rate of duty is fixed" misses the point,[45] since its argument implies that a Member that "fixes" the rate of duty at some point after the date of entry could, in fact, suspend concessions on unliquidated, pre-authorization entries.

3.105 Moreover, Canada's position makes it necessary to define when a Member "imposes" or "assesses" or "levies" duties. But interpreting the Agreements as creating distinct rights and obligations depending on when a Member "assesses" or "levies" duties could lead to unexpected results.

3.106 For example, Article 17.4 of the AD Agreement states that a matter may be referred to the DSB only when "final action has been taken by the administering authority of the importing Member to levy definitive anti-dumping duties or accept price undertakings [...]." Canada has argued at various points in this dispute that the term "levy" does not apply "to the imposition of potential liability in a Member using a retrospective system" and that the Department of Commerce does not make its final duty determinations until the end of administrative reviews. If the Panel were to adopt Canada's interpretation, then under the terms of Article 17.4, a panel would not have jurisdiction to review the final results of an antidumping investigation conducted by a Member with a retrospective

[42] Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* ("*US – Line Pipe*"), WT/DS202/AB/R, adopted 8 March 2002.

[43] Panel Report, *United States – Import Measures on Certain Products from the European Communities* ("*US – Certain EC Products*"), WT/DS165/R and Add.1, adopted 10 January 2001, as modified by the Appellate Body Report, WT/DS165/AB/R.

[44] Panel Report, *US – Certain EC Products*, *supra*, para. 6.77.

[45] Canada's reply to Panel Question 37.

system. If a Member believed that its exporters were subject to a WTO-inconsistent antidumping investigation, the Member would need to wait to bring a challenge until the end of an administrative review, normally more than two years after the completion of the investigation.

3.107 The need to precisely define when a Member "imposes" or "assesses" or "levies" duties arises from Canada's attempt to make the time of the "final" determination relevant to determining the scope of a Member's implementation obligations. When it is properly recognized that date of entry controls under both prospective and retrospective systems, these terms, and the distinctions between them, become irrelevant to this dispute.

(c) There Should be No Distinction Between Members with Retrospective Duty Assessment Systems and Members with Prospective Duty Assessment Systems

(i) Canada's Position is Based on Artificial Distinctions Between Retrospective Duty Systems and Prospective Duty Systems

3.108 Canada and the United States agree that for Members with prospective systems, the date of entry controls for purposes of determining what constitutes "prospective" implementation of an adverse WTO report. Canada and the United States disagree, however, on whether that same date also controls for Members with retrospective systems. Although the United States believes the date of entry controls in all situations, Canada claims the date of entry is irrelevant in determining "prospective" implementation in retrospective systems. Canada's position is premised on a false factual distinction between retrospective and prospective systems, and Canada has failed to provide a textual basis for its position.

3.109 Canada attempts to build its legal arguments around the concept of "finality"; however, Canada employs inconsistent definitions of finality in order to create artificial distinctions between retrospective and prospective systems. When Canada's labels are set aside, the similarities between the two duty assessment systems are striking and in both cases, the liability for antidumping or countervailing duties arises at the border, at the time of entry.

3.110 For instance, under the Canadian prospective system, if an adverse WTO report results in a determination that there was no dumping or subsidization in a particular case, the determination implementing the adverse WTO report is deemed by law to be a termination of the investigation.[46] While Canadian law allows for the cessation of the collection of duties if this occurs, it does not appear to provide for the refund of duties incurred on entries that took place before the date of implementation.[47] Thus, the outcomes under the two systems are essentially the same.

3.111 Furthermore, even under Canada's prospective duty assessment system, the determination of duty liability is not final on the date of entry. Assessment does not occur until 30 days after the date of entry. Further, the duty on the entry is subject to redetermination based upon an importer's request within 90 days of the entry. In addition, for up to two years after the date of entry, Canada may redetermine the normal value, the export price, or the amount of subsidy associated with any imported product. Judicial review may further extend these periods. Consequently, even under Canada's prospective system, a number of determinations may be made after implementation regarding pre-implementation entries.

[46] Article 76.1(5)(b) of Canada's Special Import Measures Act ("SIMA").
[47] Articles 9.21 and 76.1 of the SIMA.

(ii) The WTO Obligations that Apply to Members with Retrospective and Prospective Systems are the Same

3.112 There is no evidence in the text of the AD Agreement or the SCM Agreement that the rules are intended to promote or create advantages or disadvantages for one type of system over the other. The DSU provides only for prospective remedies. Regardless of whether a Member utilizes a retrospective or prospective system of duty assessment, the date of entry is the controlling issue for determining whether the implementation obligations apply to a particular entry. A Member's obligation is to remove or modify the border measure (the antidumping or countervailing duty measure) with respect to all entries made on or after the date set for implementation.

3.113 Notwithstanding this, Canada is attempting to establish a different and higher level of obligation for Members with retrospective duty assessment systems than for Members with prospective duty assessment systems, based on nothing more than an arbitrary, form over substance, description of when duties are purportedly "final" under the two systems.

3.114 More specifically, Canada is seeking to draw a line between reviews conducted pursuant to Article 9.3.1 of the AD Agreement (in retrospective systems) and reviews conducted pursuant to Article 9.3.2 of the AD Agreement (in prospective systems). In essence, Canada is arguing that Members with retrospective duty assessment systems have an obligation to apply adverse DSB recommendations and rulings when conducting Article 9.3.1 reviews of pre-implementation entries, while Members with prospective systems do not have an obligation to apply adverse DSB recommendations and rulings when conducting Article 9.3.2 reviews of pre-implementation entries. In actuality, neither Member has such an obligation, because the date of entry determines what constitutes "prospective" implementation in both systems.

3.115 The inconsistency in Canada's claims is further evidenced in Canada's position with respect to judicial review. As the United States has noted, Members are obligated to maintain judicial, arbitral or administrative tribunals to review administrative actions. Canada would appear to be arguing that an administrative determination by a Member with a retrospective system of duty assessment is somehow less final, when subject to judicial review, than a comparable administrative determination by a Member with a prospective system of duty assessment, when subject to judicial review. Canada has not explained how the same terms regarding judicial review in Article 13 of the AD Agreement and Article 23 of the SCM Agreement must be read to create such disparate results between Members with retrospective duty assessment systems and Members with prospective duty assessment systems.

(iii) Canada is Seeking to Create an Obligation for Members with Retrospective Systems to Provide a Retroactive Remedy in Cases Involving Antidumping and Countervailing Duty Measures

3.116 Canada has argued repeatedly during this dispute that its arguments do not amount to a claim for retroactive relief in cases involving antidumping and countervailing duty measures because it is only asking the United States to make its decisions *after* the implementation date in accordance with adverse WTO reports, even if those decisions relate to pre-implementation entries. Canada has sought to distinguish the obligations applying to Members with prospective systems by claiming that those Members assess and collect duties at the time of entry, so that there are no decisions "after" the reasonable period of time that need to be made.[48] In Canada's view, a Member would only violate WTO rules if it were to make a WTO-inconsistent decision *after* the reasonable period of time.

[48] Canada's position appears to be that even though the completion of the refund proceeding or judicial review might occur as long as two or more years after the end of the reasonable period of time, Members with prospective systems would not be obligated to apply the new, WTO-consistent methodology in that refund proceeding because the entry occurred prior to the end of the reasonable period of time. Canada was unable to

3.117 However, in the United States' view, by attempting to have adverse DSB recommendations and rulings apply to pre-implementation entries, Canada *is* seeking a retroactive remedy. If the Members had wanted to provide for the applicability of implementation actions to pre-implementation entries, they would have explicitly provided for that in the DSU or elsewhere in the WTO Agreements -- through language explicitly providing for either retroactive or injunctive relief. They did not do so. Instead, what the Members agreed to was a reasonable period of time in which to bring inconsistent measures into conformity with a Member's WTO obligations, and, as discussed above, no consequences for maintaining the inconsistent measures in the interim period. Adopting Canada's position and thereby modifying this agreement would be inconsistent with Article 3.2 of the DSU since it would add to the rights and obligations provided in the WTO Agreements.

3.118 What is more, Canada has argued that the United States would be required to return cash deposits collected in respect of what Canada terms "prior unliquidated entries."[49] Thus, Canada believes that Members with retrospective systems are not only under an obligation to ensure that all future (post-implementation) actions conform to WTO rules; they are also under an obligation to undo *past* (pre-implementation) actions.

3.119 By making an issue of the effect that implementation has on prior unliquidated entries, Canada is ignoring the international obligation -- which is to bring the border measure into conformity with the agreement -- and instead, is trying to create a new obligation for Members to provide redress or compensation to private parties within their own jurisdictions. There is no basis in the WTO agreements for such an obligation. To require refunds of cash deposits collected on entries prior to the end of the reasonable period of time would be to require retroactive relief, inconsistent with GATT/WTO practice.

3.120 In addition, under the logic that Canada has applied to prospective systems, if a Member with a retrospective system took *no* action with respect to cash deposits after the implementation date, there would be no possibility of a WTO violation. Canada has failed even to attempt to explain how an obligation not to take WTO-inconsistent action after the implementation date can somehow be transformed into an affirmative obligation to *take* a certain action -- namely, refunding cash deposits collected before the implementation date -- when that "obligation" appears nowhere in the AD Agreement, the SCM Agreement, the GATT 1994, or the DSU.

3.121 Moreover, to read such an obligation into the agreements could have serious consequences for other Members. In the *Guatemala Cement* dispute, Guatemala argued that the panel should not order the refund of past duties, stating, "[I]f a panel were to suggest a retroactive remedy, this could interfere directly with the sovereignty of a Member by establishing a domestic right of action where there had been none previously."[50]

(d) Conclusion

3.122 Nothing in the text of the WTO agreements requires anything other than prospective implementation of adverse WTO reports. Just as importantly, nothing in the agreements requires Members to apply adverse WTO reports not only to entries that take place after implementation, but also to entries that took place prior to implementation. Without a basis to assert that implementation decisions must apply in any way but prospectively -- i.e., to new entries only -- Canada's specific claims of violation under Articles 1, 9.3, 11.1 and 18.1 of the AD Agreement; Articles 10, 19.4, 21.1

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point to any textual basis for its belief that the implementation obligations of Members with prospective systems differ from those of Members with retrospective systems.

[49] Canada's reply to Panel Question 32.

[50] Panel Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico* ("*Guatemala – Cement I*"), WT/DS60/R, adopted 25 November 1998, as modified by the Appellate Body Report, WT/DS60/AB/R, DSR 1998:IX, 3797.

and 32.1 of the SCM Agreement; and Articles VI:2, VI:3 and VI:6(a) of the GATT 1994 are inapposite. Section 129(c)(1) is fully consistent with the aforementioned WTO obligations of the United States. It ensures implementation of adverse WTO reports on a prospective basis, consistently with the United States' aforementioned WTO obligations.

3.123 Canada can only establish that the United States has breached the obligations of Article 18.4 of the AD Agreement, Article 32.5 of the SCM Agreement, and Article XVI:4 of the WTO Agreement to the extent that it establishes that section 129(c)(1) is inconsistent with the other WTO obligations that it invokes in support of its complaint. For the reasons described above, section 129(c)(1) is consistent with those other WTO obligations of the United States and, therefore, there is no breach of Article 18.4 of the AD Agreement, Article 32.5 of the SCM Agreement, or Article XVI:4 of the WTO Agreement.

5. Conclusion

3.124 For the foregoing reasons, the United States requests that the Panel find that Canada has failed to establish that section 129(c)(1) is inconsistent with Articles VI:2, VI:3, VI:6(a) of the GATT 1994, Articles 1, 9.3, 11.1, 18.1 and 18.4 of the AD Agreement, Articles 10, 19.4, 21.1, 32.1 and 32.5 of the SCM Agreement, and Article XVI:4 of the WTO Agreement.

IV. MAIN ARGUMENTS OF THE THIRD PARTIES

4.1 The main arguments of those third parties to these proceedings which have made submissions to the Panel, i.e., the European Communities and Japan, are as follows:

A. EUROPEAN COMMUNITIES

4.2 This section summarizes the main arguments of the **European Communities**.

1. The principle of prospective compliance

4.3 Canada's claim is based on the assumption that WTO Members have to apply compliance measures to all subsequent legal acts irrespective of the date of importation. In this context, the European Communities recalls that in the past numerous GATT and WTO panels were faced with requests by the complainant to recommend a reimbursement of anti-dumping and countervailing duties. This was never granted. What is more, Article 19.1 of the DSU does not contain an obligation of WTO Members to apply compliance measures to entries before the implementation date.

4.4 The WTO dispute settlement system follows the principle of non-retroactivity of remedies. Thus, the DSU does not impose an obligation of Members to remedy past or consummated violations, but requires prospective compliance. This is clearly reflected in the wording of Article 19.1 of the DSU which imposes an obligation to "*bring* the measure into conformity with" the covered agreements. Several panels have confirmed this principle.[51]

4.5 Moreover, Articles 19 and 21 of the DSU reflect the principle of "minimum interference" in the choice of compliance measures by Members concerned.

4.6 The principle of prospective compliance is further corroborated by the concept of a reasonable period of time for implementation. Article 21.3 of the DSU implies that the obligation to comply does not embrace goods that entered before the expiry of the reasonable period of time. This is also clearly reflected in the wording of Article 22.2 of the DSU, which refers to the obligation of a

[51] Panel Report, *US – Certain EC Products*, *supra*, para. 6.106; Panel Report, *EC – Bananas III* (*Article 21.5 – Ecuador*), *supra*, para 6.105.

Member "to bring the measure found to be inconsistent with a covered agreement into compliance therewith […] within the reasonable period of time."

4.7 In addition, Article 3.2 of the DSU clarifies that the fundamental purpose of the WTO dispute settlement system is to provide "security and predictability to the multilateral trading system". Thus, WTO remedies shall ensure market opportunities for the future rather than providing reparation or compensation in the public international law sense. Members are not required to erase the consequences of an illegal measure occurring before the end of the reasonable period of time.

2. The temporal scope of the principle of prospective compliance

4.8 The European Communities notes that the date of entry serves as reference point for most of the substantive obligations of WTO Members. Thus, the obligation not to subject imported products to duties and other charges in excess of the bound rates under the relevant Schedule of tariff concessions relates to the time of importation, Articles II:1(b) and II:1(c) of the GATT 1994. This is further supported by the *Kyoto International Convention on the Simplification and Harmonization of Customs Procedures* and the *tempus regit actum* rule under public international law.

4.9 Similarly, the text of Article VI of the GATT 1994 suggests that the obligation not to impose an anti-dumping or countervailing duty contrary to the conditions set by WTO law, relates to the date of entry. Article VI:6(a) of the GATT 1994 clarifies the *ratione temporis* of this rule by stating in relevant part "no contracting party shall levy any anti-dumping or countervailing duty on the importation of any product […]."

4.10 The preposition "on" textually implies not only a local but also a temporal element. Thus, Article VI:6(a) of the GATT 1994 does not simply refer to a "border measure". This can be derived from the Appellate Body report in *United States – Anti-Dumping Act of 1916* where the Appellate Body decided that criminal and civil remedies constitute "specific action against dumping" and fall, therefore, within the scope of Article VI of the GATT 1994.

4.11 This understanding would not be contradicted by the term "levy" in Article VI:6(a) of the GATT 1994. Even if the term "levy" were to be interpreted according to footnote 12 of the AD Agreement and footnote 51 of the SCM Agreement this does not entail that the duty must be levied, i.e. assessed and collected, at the time of importation. Rather, it means that the dutiable event is the moment of importation. The relevant point in time is when the obligation to pay a duty arises and not when the duty is levied. In this regard Article 10.1 of the Anti-Dumping Agreement provides that an anti-dumping duty shall only be applied to products, which enter for consumption after the imposition of the measure.

4.12 In this context, the European Communities would also refer to the transparency provisions under WTO law, which provide that a measure must be published in advance before the importation date. This demonstrates that the WTO obligations relate to the point of importation. The transparency provisions would be undermined if the temporal aspect were disregarded.

4.13 On the basis of these fundamental principles of WTO law the date of entry should be the general reference point to determine the temporal scope of the obligation to comply with a DSB ruling under Article 19.1 of the DSU.

4.14 The European Communities notes Canada's argument that Article 9.3 of the AD Agreement would require the United States to apply its revised methodology during administrative reviews following implementation whatever the date of importation. The European Communities does not take a position on this argument.

B. JAPAN

4.15 This section summarizes the main arguments of **Japan**.

4.16 Japan generally agrees with Canada that section 129(c)(1) raises significant systemic concerns. AD and CVD measures (as well as safeguard measures) should be temporary measures, applied to provide domestic industries relief from imports under specifically defined circumstances. Although these measures are permitted under the WTO Agreements, these measures also stand the greatest chance of being abused by overzealous authorities. As such, the application of such measures must be carefully supervised by the Members, through such mechanism as the Dispute Settlement Body so as to ensure that sanctioned forms of trade protection, like AD and CVD measures, are applied only when authorized by the relevant WTO agreements.

4.17 For the dispute settlement system to work effectively, recommendations or rulings of the DSB must be given effect. Once the DSB ruling is adopted by the Dispute Settlement Body, it is final and must be observed per Article 21.3 of the DSU. Either immediately following the DSB ruling or following the expiry date of the reasonable period of time decided in accordance with Article 21.3 of the DSU, any imposition by the United States of AD and CVD duties -- including those on entries that are yet to be liquidated after the United States Trade Representative directs implementation of a new determination pursuant to section 129(a)(6) and section 129(b)(4) of the URAA -- must be consistent with the DSB ruling.

4.18 In this case, the unique features of the US AD and CVD laws create an unusual situation. By using a retrospective system that allows entries to take place based on estimated duties, and only later determining the actual duties owed, the United States effectively defers its decision on the application of duties. Section 129(c)(1) singled out DSB rulings for different treatment from the ordinary liquidation procedures. If a DSB ruling declares the duties to be improper, section 129(c)(1) requires that WTO-inconsistent treatment be applied to prior unliquidated entries even after the United States Trade Representative directs the administering authority to apply revised anti-dumping or countervailing duty.

4.19 The United States may not hide behind the unique legal system it has adopted. Under the US system, the US authorities can change the estimated duties however they want -- after all, they are not yet final under the US legal system -- but they must ignore any decision by the WTO with regard to prior unliquidated entries. Section 129(c)(1) affirmatively bars the authorities from considering at all such decisions.

4.20 At great length the United States argues that the remedy under the WTO dispute settlement system should be of prospective nature and not retrospective, in its attempt to mis-characterise Canada's argument. Canada's argument, however, does not go that far as making any general statement about retrospective remedy, nor does Japan's. More specifically, Canada clarifies in footnote 25 of its submission that "the actions at issue in this dispute are those taken by the United States after the date it implements any measure to bring itself into conformity with the findings in a WTO Report." Hence it is clear that neither Canada nor Japan argues for retroactive application, or reversal of past actions.

4.21 In this connection, the United States misunderstands Japan's statement on the *Australia – Automotive Leather II* (*Article 21.5 – US*) case at the Dispute Settlement Body.[52] The issue at the

[52] US First Submission, para.39 and footnote 38. Japan stated at the meeting of the Dispute Settlement Body on 11 February 2000:

> "The representative of Japan said that the Panel Report had dealt with very important legal issues. The most important issue was the interpretation of the phrase "withdraw the subsidy" in Article 4.7 of the SCM Agreement. Although the parties concerned had argued that an

DSB meeting was the Panel report recommending repayment of a WTO-inconsistent subsidy. Japan opposed to the report because the Panel recommended the reversal of past actions that had already been finalised, as against the actions yet to be finalised. The prior unliquidated entries that Canada identified in this dispute are those that are pending the finalisation of dumping duty, to be collected at the time of liquidation. Thus, it is inapposite to draw an analogy between the two cases.

4.22 The Unites States also dismisses as irrelevant a reference Canada makes to the system of applying revised anti-dumping margins under the US domestic judicial review and NAFTA. In Japan's view, however, the legal significance of Canada's reference lies not in the difference in time periods for which the revised dumping margins are to be applied under respective regimes, but in the very fact that the United States deliberately chose to frame the language of section 129(c)(1) so as to exclude the application of revised dumping margin to the entries of subject imports that remain unliquidated even after the issuance of a directive by the Untied States Trade Representative when those entries entered the United States before the issuance of the directive. Canada's claim is on the applicability of DSB rulings to liquidation decisions taking place after the United States Trade Representative has issued the directive, after the reasonable period of time during which the United States is entitled to maintaining WTO-inconsistent measure, has expired. The question of retroactive application could arise only with regard to an action that has already taken place prior to the expiry of the reasonable period of time, which is not at issue here.

4.23 Japan believes Canada has raised serious questions about the consistency of section 129(c)(1) with US obligations under the WTO Agreements. Japan urges the Panel to give this important dispute the detailed attention it deserves. To the extent section 129(c)(1) violates US WTO obligations, the Panel should not hesitate to so find and to urge the United States to repeal the WTO-inconsistent aspects of section 129(c)(1).

V. INTERIM REVIEW[53]

A. BACKGROUND

5.1 In letters dated 29 May 2002, Canada and the United States requested an interim review by the Panel of certain aspects of the interim report issued to the parties on 22 May 2002. Neither party requested an interim review meeting. As agreed by the Panel, both parties were permitted to submit further comments on the other party's interim review requests. The United States submitted further comments on 4 June 2002.

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interpretation of Article 4.7 of the SCM Agreement which would allow a retroactive remedy was inconsistent with the relevant DSU provisions and customary practice under the GATT 1947 and the WTO, the Panel had rejected this argument and had concluded that the recommendation to "withdraw the subsidy" was not limited to prospective action only but might **encompass repayment of the prohibited subsidy**. It had further concluded that full repayment in this case was necessary in order to resolve this dispute. This interpretation developed by the Panel would have a significant impact on implementation of other subsidy-related disputes. Japan shared the view that the retroactive remedy was inconsistent with the relevant provisions of the DSU and the customary practice under the GATT 1947 and the WTO." (emphasis added)
Minutes of DSB Meeting of 11 February 2000, WT/DSB/M/75, p. 7.

[53] Pursuant to Article 15.3 of the DSU, the findings of the final panel report shall include a discussion of the arguments made at the interim review stage. This Section of the Panel report is therefore part of the Panel's findings.

B. COMMENTS BY CANADA

1. Terms of reference

5.2 **Canada** considers that the Panel misconstrued its terms of reference. Canada argues that, in interpreting its terms of reference, the Panel unduly restricted its analysis of the effect of section 129(c)(1) to preclude any analysis of other provisions of US law.[54] In Canada's view, the terms of reference do not preclude the Panel from considering the provisions of title VII of the Tariff Act of 1930. According to Canada, the United States argued before the Panel that, notwithstanding that section 129 determinations cannot apply to "prior unliquidated entries", the Department of Commerce has other authority under title VII of the Tariff Act of 1930 to take any necessary actions with respect to such entries. Canada considers that this argument was raised by the United States as an affirmative defence and that it is, therefore, not relevant whether the authority relied on by the United States was within the Panel's terms of reference. Canada further submits that it was unnecessary, as a matter of WTO law, for Canada to have included the provisions of title VII of the Tariff Act of 1930 in the terms of reference of the Panel since Canada identified the provision of US law -- namely, section 129(c)(1) -- that prevents the Department of Commerce from taking the actions needed to apply section 129 determinations to "prior unliquidated entries" in accordance with the WTO obligations of the United States.

5.3 The **United States** responds that Canada's objections rest on a faulty premise. According to the United States, Canada incorrectly assumes that it had met its initial burden of demonstrating that section 129(c)(1) operated in the manner it had alleged. The United States considers that since the Panel found that, as a matter of US law, section 129(c)(1) does not have the effect of requiring or precluding any of the actions identified by Canada, Canada failed to meet its initial burden. In the view of the United States, the issue of whether the United States relied on an "affirmative defence" does not, therefore, arise. The United States also notes that the Panel acted properly in not examining other potential "measures" that Canada did not include in its panel request.

5.4 The **Panel** does not agree with Canada that it has misconstrued its terms of reference. Indeed, in its interim review comments, Canada itself acknowledges that it has included section 129(c)(1) in the Panel's terms of reference, but not the provisions of title VII of the Tariff Act of 1930.[55] We see no need, therefore, to reconsider our finding that the only measure that is within our terms of reference is section 129(c)(1).[56]

5.5 Canada argues that the Panel's terms of reference do not preclude the Panel from "considering" or "analysing" the provisions of title VII of the Tariff Act of 1930 as part of its assessment of the WTO-consistency of section 129(c)(1). We agree and note that neither in footnote 123 nor elsewhere in our findings did we state that our terms of reference preclude us from doing so. As a matter of avoiding any misunderstanding in this regard, we made minor drafting changes to the last sentence of footnote 123, and also the last sentence of the similar footnote 112.

5.6 As an additional matter, we note that neither footnote 123 nor any other statement in our findings should be taken to mean that we somehow failed to "consider" or "analyse" title VII of the Tariff Act of 1930 or other relevant provisions of US law in determining the WTO-consistency of section 129(c)(1). In fact, we have carefully considered and analysed all relevant provisions of US law brought to the attention of the Panel by Canada and the United States. As part of that analysis, we

[54] Canada cites footnote 123, *infra*, as an example.
[55] See, *supra*, para. 5.2 (last sentence).
[56] See, *infra*, para. 6.5.

have also considered the relationship between title VII of the Tariff Act of 1930 and section 129(c)(1). This is apparent both from the questions we put to the parties[57] and from our findings[58].

5.7 Our analysis of section 129(c)(1) -- including its effect -- was done taking into account all provisions of US law referred to by the parties. This allowed us to understand the meaning and operation of section 129(c)(1). Nonetheless, it does not follow that all the provisions of US law that are relevant to the Panel's analysis of section 129 become part of the terms of reference of the Panel. The only measure included in our terms of reference is section 129(c)(1). Consequently, we can only determine the WTO-consistency of *that* measure.

5.8 Accordingly, with the exception of the minor changes we made to footnotes 123 and 112, we did not modify our findings in response to Canada's arguments regarding our interpretation of the terms of reference.

2. Burden of proof

5.9 **Canada** asserts that the Panel misapplied the burden of proof. According to Canada, once Canada had shown that section 129 prevents the Department of Commerce from applying determinations implemented under section 129 to "prior unliquidated entries", it was for the United States to claim and demonstrate that it had some other authority whereby it could take any necessary actions with respect to "prior unliquidated entries". Although Canada accepts that it was up to Canada to demonstrate that section 129 mandates the United States to take WTO-inconsistent action or not to take action which is required by its WTO obligations, in Canada's view, this obligation cannot extend so far as to require it to carry the burden of disproving the effect of measures other than the measure about which it has complained. Canada notes, in this regard, that since the United States raised the affirmative defence that measures other than section 129 would permit the Department of Commerce to take the necessary actions with regard to "prior unliquidated entries", it was for the United States -- and not Canada -- to discharge the burden of proving the effect of those measures.

5.10 The **United States** responds that if Canada believes that a particular measure of a WTO Member "as such" fails to meet an alleged obligation to implement adverse WTO reports with respect to what Canada terms "prior unliquidated entries", the burden is on Canada to establish that the measure mandates action inconsistent with that alleged obligation. According to the United States, Canada failed to meet this burden with respect to section 129(c)(1). In the view of the United States, the issue of whether the United States relied on an "affirmative defence" and whether the Panel misapplied the burden of proof does not, therefore, arise.

5.11 The **Panel** is unable to agree with Canada's assertion that it has misapplied the burden of proof in this case. As we have stated at para. 6.23 below, it was for Canada to demonstrate, *inter alia*, that section 129(c)(1) mandates the United States to take or not take the action identified by Canada. Contrary to what Canada would have the Panel believe, however, Canada cannot discharge that burden merely by demonstrating that determinations made and implemented under section 129 are not applicable to "prior unliquidated entries". As is clear from our findings, the fact that section 129 determinations do not apply to "prior unliquidated entries" does not, in itself, establish that section 129(c)(1) requires (or has the effect of requiring) any of the actions listed in para. 6.31 or precludes (or has the effect of precluding) any of the actions listed in para. 6.32.[59] As a result, on a correct application of the burden of proof, the burden of proof did *not* shift to the United States, as Canada suggests, once Canada had shown that section 129 determinations do not apply to "prior unliquidated entries".

[57] E.g., Panel Questions 3, 5, 6, 20, 21, 42, 84, 91, 93 and 94.

[58] See, e.g., paras. 2.5-2.8, 6.50 and accompanying footnote, 6.69 and accompanying footnote, 6.70-6.71 and 6.84 and accompanying footnote.

[59] See, *infra*, in particular paras. 6.55, 6.68-6.69 and 6.83-6.84.

5.12 Canada's additional argument that the Panel inappropriately required Canada to carry the burden of disproving the effect of measures about which Canada did not complain is misplaced. Canada did not identify a single paragraph in our findings to support this assertion. In fact, it could not do so, as our findings make it clear that we required Canada to prove the effect of section 129(c)(1), and not to disprove the effect of measures about which Canada did not complain.[60]

5.13 In the light of the foregoing considerations, we are not convinced that there is a need to change our findings in response to Canada's arguments regarding our application of the burden of proof. We should note, however, that our review of the relevant parts of our findings resulted in a minor drafting change at para. 6.73.

C. COMMENTS BY THE UNITED STATES

5.14 All of the comments submitted by the **United States** related to typographical errors.

5.15 The **Panel** made appropriate corrections.

VI. FINDINGS

A. MEASURE AT ISSUE

6.1 The **Panel** recalls that its terms of reference are as follows:

> To examine, in the light of the relevant provisions of the covered agreements cited by Canada in document WT/DS221/4, the matter referred to the DSB by Canada in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[61]

6.2 Document WT/DS221/4 is Canada's request for the establishment of a panel in this case. It states that "[t]he measure at issue is section 129(c)(1) of the URAA (19 USC §3538(c)(1))". Document WT/DS221/4 does not "specifically identify" any other measure.[62]

6.3 Throughout these proceedings, Canada never argued that it was making legal claims in respect of a measure or measures other than section 129(c)(1). Indeed, in its very first submission to the Panel, Canada confirmed that "[a]t issue in this dispute is section 129(c)(1) of the *Uruguay Round Agreements Act* […]".[63]

6.4 We note that, in the course of these proceedings, Canada made numerous references to the provisions of title VII of the United States Tariff Act of 1930, as amended.[64] However, Canada has not argued that title VII of the Tariff Act of 1930 or any of its sections was itself a measure within this Panel's terms of reference. As a result, we need not examine whether the relationship between title

[60] See, *infra*, paras. 6.23, 6.70 and 6.85.

[61] WT/DS221/5 (referring to WT/DSB/M/108).

[62] Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico* ("*Guatemala – Cement I*"), WT/DS60/AB/R, adopted 25 November 1998, para. 86.

[63] Canada's First Submission, para. 1. We note that, in its request for consultations, Canada stated that "[t]hese consultations concern Section 129(c)(1) of the Uruguay Round Agreements Act (the URAA) and the Statement of Administrative Action accompanying the URAA (at page 1026)". See WT/DS221/1. However, Canada's subsequent panel request does not reference the Statement of Administrative Action as a measure which is being challenged in addition to section 129(c)(1).

[64] Title VII of the Tariff Act of 1930, codified at 19 U.S.C. §§ 1671 *et seq*.

VII of the Tariff Act of 1930 and section 129(c)(1) is such that title VII, or any of its individual sections, could be considered to be "included" in our terms of reference.[65]

6.5 In the light of the above, we conclude that the only measure that is within this Panel's terms of reference is section 129(c)(1). Accordingly, we will examine whether section 129(c)(1), taken alone, is inconsistent with the WTO provisions invoked by Canada.

B. CLAIMS AND ARGUMENTS OF THE PARTIES AND ANALYTICAL APPROACH OF THE PANEL

1. Arguments of the parties

6.6 According to **Canada**, section 129(c)(1) provides that a new antidumping or countervailing duty determination made by the Department of Commerce or the ITC to bring a previous antidumping, countervailing duty or injury determination into conformity with an adverse WTO panel or Appellate Body report applies only to imports that enter the United States on or after the date that the USTR directs implementation of the new determination. In Canada's view, section 129(c)(1) implies that imports that entered the United States *prior to* that date, and that are subject to an order imposing potential liability for the payment of antidumping or countervailing duties, remain subject to future administrative review determinations and definitive duty assessment without regard to the new determination made by the Department of Commerce or the ITC and any consequent revocation or amendment of the original order.

6.7 Canada refers to the latter type of imports as "*prior unliquidated entries*", since those imports entered the United States prior to the date on which the USTR directs implementation of a new determination pursuant to section 129(a)(6) and section 129(b)(4) and remain unliquidated (that is, the definitive duty, if any, to be levied on the imports remains undetermined) on that date. For the purposes of this dispute, Canada is assuming that the USTR directs the Department of Commerce or the ITC to implement an adverse DSB ruling at the end of the reasonable period of time accorded to a Member pursuant to Article 21.3 of the DSU. Canada refers to that date as the "*implementation date*".

6.8 Canada considers that where an order imposing duty liability on imports has been revoked or amended under section 129(c)(1) in response to an adverse WTO ruling, there is no legal basis in the AD Agreement, the SCM Agreement or the GATT 1994 for the United States to conduct administrative reviews and to assess definitive antidumping or countervailing duties with respect to "prior unliquidated entries" without regard to the new determination made by the ITC or the Department of Commerce pursuant to section 129 and the revocation or amendment of the original order. Canada further argues that there is no legal basis in the AD Agreement, the SCM Agreement or the GATT 1994 for the United States to retain cash deposits collected in respect of "prior unliquidated entries" pending the determination of definitive duty liability for those entries, to the extent that these cash deposits were made pursuant to the original order, which has been revoked or amended only with respect to entries that entered the United States on or after the implementation date.

6.9 Canada asserts that section 129(c)(1) requires the Department of Commerce, in determining whether to retain cash deposits previously collected on "prior unliquidated entries" and whether to conduct administrative reviews and assess duties with respect to such entries, to disregard (i) the new

[65] We note that there may be circumstances in which a measure that is not specifically identified in a panel request may nevertheless be considered to be "included" in a measure that *is* specifically identified, if such a measure is "subsidiary or closely related" to the measure that is referenced in the panel request. See Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper* ("*Japan – Film*"), WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, 1179, para. 10.8. However, as already pointed out, Canada did not assert before us that title VII of the Tariff Act of 1930 or any of its sections should be considered to be "included" in Canada's references, in its panel request and elsewhere, to section 129(c)(1).

determination made by the ITC or the Department of Commerce pursuant to paragraphs (a)(6) and (b)(4) of section 129, and (ii) any revocation or amendment of the original order. Canada submits that where a new determination results in a negative finding of injury, a negative finding of dumping or subsidization, or a reduction in the dumping or subsidization margin, and the Department of Commerce, as a result of section 129(c)(1), subsequently retains cash deposits previously collected in respect of "prior unliquidated entries", conducts an administrative review of "prior unliquidated entries" or assesses definitive antidumping or countervailing duties with respect to such entries without taking into account the new determination and the adverse DSB ruling, the Department of Commerce is acting inconsistently with the obligations of the United States under the AD Agreement, the SCM Agreement or the GATT 1994.

6.10 Specifically, Canada claims that section 129(c)(1) is inconsistent with:

(a) Article VI:2, VI:3 and VI:6(a) of the GATT 1994;

(b) Articles 1, 9.3, 11.1 and 18.1 of the AD Agreement; and

(c) Articles 10, 19.4, 21.1 and 32.1 of the SCM Agreement.

6.11 Canada further submits that, in view of the fact that section 129(c)(1) is inconsistent, in its view, with the aforementioned provisions of the AD Agreement, the SCM Agreement and the GATT 1994, section 129(c)(1) is also inconsistent with Article 18.4 of the AD Agreement, Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement, because these provisions require that a Member's laws be in conformity with its WTO obligations as of the entry into force of the WTO Agreement.

6.12 Canada considers that, in making the above claims, Canada is not seeking retroactive application of adverse DSB rulings. Whereas Canada considers that the DSU contemplates prospective implementation of adverse DSB rulings, in its view, the principle of prospective implementation does not justify the United States making legal determinations with respect to "prior unliquidated entries" after the implementation date on a WTO-inconsistent basis. Canada submits that the logical outcome of prospective implementation of an adverse DSB ruling in a retrospective duty assessment system is for the United States to apply new determinations implemented under section 129 to "prior unliquidated entries" as well as future entries. Canada emphasizes that it is not seeking to have the United States apply such determinations to entries which were liquidated *before* the implementation date. In Canada's view, to do so would amount to a retroactive application of an adverse DSB ruling.

6.13 The **United States** argues that Canada has failed to establish that section 129(c)(1) is inconsistent with Articles VI:2, VI:3, and VI:6(a) of the GATT 1994, Articles 1, 9.3, 11.1, 18.1 and 18.4 of the AD Agreement, Articles 10, 19.4, 21.1, 32.1 and 32.5 of the SCM Agreement, and Article XVI:4 of the WTO Agreement.

6.14 The United States considers that any discussion of whether section 129(c)(1) is inconsistent with the WTO obligations of the United States must start with an understanding of the obligations that the DSU imposes with respect to implementing adverse WTO reports. The United States submits, in this regard, that the DSU creates an obligation on the part of a Member whose measure has been found to be WTO-inconsistent to bring that measure into conformity in a prospective manner. In the view of the United States, prospective implementation in a case involving an antidumping or countervailing duty measure requires a Member to ensure that a new, WTO-consistent antidumping or countervailing duty determination applies to all merchandise that enters for consumption on or after the date of implementation.

6.15 The United States asserts that there is no requirement to apply a new, WTO-consistent antidumping or countervailing duty determination to "prior unliquidated entries". The United States submits that, pursuant to Article 21 of the DSU, there is no obligation to cease or otherwise suspend a WTO-inconsistent measure with respect to its impact on entries that take place during the reasonable period of time. In the view of the United States, neither the AD Agreement, nor the SCM Agreement or the GATT 1994 addresses the timing of the implementation of adverse WTO reports. The United States adds that, to the extent that those agreements refer to effective dates for any purpose, those effective dates are based on the date of entry. The United States submits that using the date of entry as the basis for implementation is, therefore, consistent with the basic manner in which the AD Agreement and the SCM Agreement operate.

6.16 Regarding section 129(c)(1), the United States argues that that provision specifies that a new, WTO-consistent determination which the USTR directs the Department of Commerce to implement will be effective as to all entries that occur on or after the date of implementation. The United States submits that, with that action, the United States will have met its obligations in respect of the implementation of an adverse WTO report, because all entries occurring on or after the date of implementation would enter and be treated in accordance with the WTO report. The United States considers, therefore, that section 129(c)(1) is not inconsistent with Articles VI:2, VI:3, and VI:6(a) of the GATT 1994, Articles 1, 9.3, 11.1 and 18.1 of the AD Agreement, Articles 10, 19.4, 21.1 and 32.1 of the SCM Agreement.

6.17 The United States contends that Canada can only establish that section 129(c)(1) is inconsistent with Article 18.4 of the AD Agreement, Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement to the extent that it establishes that section 129(c)(1) is inconsistent with the other WTO obligations relied on by Canada. Since the United States is of the view that section 129(c)(1) does not contravene any of those other WTO obligations, it considers that section 129(c)(1) does not infringe Article 18.4 of the AD Agreement, Article 32.5 of the SCM Agreement or Article XVI:4 of the WTO Agreement.

6.18 The United States further argues that, in any event, Canada must establish that section 129(c)(1) mandates action that is inconsistent with the WTO obligations of the United States or that it precludes action that is consistent with those obligations. The United States submits that if section 129(c)(1) does not mandate or preclude any of the actions identified by Canada, then Canada's claims must fail, regardless of what it means to implement a new antidumping or countervailing duty determination in a WTO-consistent manner.

6.19 According to the United States, section 129(c)(1) only addresses the application of a new, WTO-consistent determination to entries made on or after the date of implementation. In the view of the United States, section 129(c)(1) does not mandate that the Department of Commerce take, or preclude Commerce from taking, any particular action with respect to "prior unliquidated entries" in a separate segment of an antidumping or countervailing duty proceeding, such as in a separate administrative review. The United States submits that Canada has, therefore, failed to demonstrate that section 129(c)(1) mandates WTO-inconsistent action or precludes WTO-consistent action and that, as a consequence, Canada's claims must fail.

2. Evaluation by the Panel

6.20 The **Panel** notes that Canada has made claims of violation under Articles VI:2, VI:3 and VI:6(a) of the GATT 1994; Articles 1, 9.3, 11.1 and 18.1 of the AD Agreement; and Articles 10, 19.4, 21.1 and 32.1 of the SCM Agreement. It has also made claims under Article 18.4 of the AD Agreement, Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement.[66]

[66] Canada has not pursued its claims under the DSU before the Panel.

6.21 Canada argues that section 129(c)(1) is inconsistent with Article 18.4 of the AD Agreement, Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement because it is inconsistent with the other WTO provisions invoked by Canada.[67] Accordingly, it is clear from Canada's arguments that the success of these claims depends on that of its first group of claims. For this reason, we will refer to the first group of claims as "principal claims" and to the second as "consequential claims".[68] Our findings will address Canada's principal claims first.

6.22 As concerns Canada's principal claims, we note that Canada in this case is challenging section 129(c)(1) "as such", that is to say independently of a particular application of section 129(c)(1). It is clear to us that a Member may challenge, and a WTO panel rule against, a statutory provision of another Member "as such" (for example, section 129(c)(1)), provided the statutory provision "mandates" the Member either to take action which is inconsistent with its WTO obligations[69] or not take action which is required by its WTO obligations[70]. In accordance with the normal WTO rules on the allocation of the burden of proof, it is up to the complaining Member to demonstrate that a challenged measure mandates another Member to take WTO-inconsistent action or not to take action which is required by its WTO obligations.[71]

6.23 In the light of the foregoing, it will be clear that Canada's principal claims will be sustained only if Canada succeeds in establishing that section 129(c)(1) mandates the United States to take action which is inconsistent with the WTO provisions which form the basis for those claims or mandates the United States not to take action which is required by those WTO provisions. In other words, for Canada to discharge its burden with respect to its principal claims, it must demonstrate both of two elements: *first*, that section 129(c)(1) mandates that the United States take or not take the action identified by Canada, and *second* that this mandated behaviour is inconsistent with the WTO provisions that it has invoked.

6.24 We consider that the issue of whether section 129(c)(1) mandates the United States to take certain action or not to take certain action is distinct from the issue of whether such behaviour would be inconsistent with the WTO provisions relied on by Canada. As a result, those two issues appear to us to be capable of independent examination.

6.25 We think that we need not address both of the aforementioned issues if we find that Canada has failed to meet its burden with respect to either one of them. As for the sequence in which we will

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[67] Canada's First Submission, paras. 80 and 84; Canada's First Oral Statement, paras. 28-29.

[68] We note that the explicit characterization of Canada's claims as either "principal" or "consequential" is ours and that Canada has not used these terms.

[69] Appellate Body Report, *United States – Anti-Dumping Act of 1916* ("*US – 1916 Act*"), WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, paras. 88-89. We note that both parties agree that the issue of whether section 129(c)(1) is a mandatory or discretionary provision is relevant to this dispute.

[70] Both parties agree that a statutory provision may be challenged "as such" not only if it mandates WTO-inconsistent action, but also if it "precludes" action that is required by WTO rules. Canada's Second Oral Statement, para. 17; US Second Submission, para. 7. We understand the parties to this dispute to use the term "preclude" in the sense of "mandate not to". Whereas we are aware that another panel spoke of statutory provisions "precluding WTO-consistency" which could, as such, violate WTO provisions (see Panel Report, *United States – Sections 301-310 of the Trade Act of 1974* ("*US – Section 301 Trade Act*"), WT/DS152/R, adopted 27 January 2000, footnote 675), we will, in the interests of clarity, use the expression "mandate not to" rather than "preclude".

[71] Appellate Body Report, *US – 1916 Act*, *supra*, paras. 96-97; Panel Report, *Brazil – Export Financing Programme for Aircraft – Second Recourse by Canada to Article 21.5 of the DSU* ("*Brazil – Aircraft (Article 21.5 – Canada II)*"), WT/DS46/RW/2, adopted 23 August 2001, para. 5.50.

address those issues, we find it appropriate, in the circumstances of this case, to analyse first whether section 129(c)(1) mandates the United States to take specified action or not to take specified action.[72]

6.26 With these considerations in mind, we now turn to analyse Canada's principal claims.

C. CANADA'S PRINCIPAL CLAIMS

6.27 In this Section, the **Panel** will address Canada's principal claims in respect of section 129(c)(1), i.e., Canada's claims under Articles VI:2, VI:3 and VI:6(a) of the GATT 1994; Articles 1, 9.3, 11.1 and 18.1 of the AD Agreement; and Articles 10, 19.4, 21.1 and 32.1 of the SCM Agreement.

6.28 As a preliminary matter, we note that an assessment of whether section 129(c)(1) is inconsistent with any of the aforementioned WTO provisions will inevitably involve us in a close examination of the meaning and scope of that section. It should be recalled, in this regard, that panels are entitled (indeed, even obliged) to conduct a detailed examination of the domestic law of a Member, to the extent that doing so is necessary for the purposes of determining the WTO-conformity of that Member's domestic law.[73] For the purposes of such an examination, the meaning and scope of relevant provisions of domestic law are questions of fact.[74]

6.29 Our analysis of Canada's principal claims is structured in accordance with these principles governing a panel's assessment of a Member's domestic law. We first identify the various actions which, in Canada's view, are "required" or "precluded" by section 129(c)(1) and, if taken (in cases where they are required) or not taken (in cases where they are precluded), would result in violations of the WTO provisions invoked by Canada. We will then turn to ascertain the meaning and scope of section 129(c)(1). Next, we will examine, based on our understanding of section 129(c)(1), whether Canada has established, as a matter of US law, that section 129(c)(1) requires and/or precludes any of the actions it has identified. Thereafter, we will proceed to assess whether Canada has established, as a matter of WTO law, that section 129(c)(1) "mandates" the United States to take any of the actions identified by Canada and/or "mandates" the United States not to take any of the actions identified by

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[72] We note that the Panel in *United States - Measures Treating Exports Restraints as Subsidies* first considered whether certain action was in conformity with WTO requirements and only then addressed whether the measure at issue mandated such action. See Panel Report, *United States – Measures Treating Export Restraints as Subsidies* ("*US – Export Restraints*"), WT/DS194/R and Corr.2, adopted 23 August 2001, para. 8.14. In the circumstances of the case at hand, where there is a major *factual* dispute regarding whether section 129(c)(1) requires and/or precludes certain action, we think that a panel is of most assistance to the DSB if it examines the factual issues first. Moreover, we do not see how addressing first whether certain actions identified by Canada would contravene particular WTO provisions would facilitate our assessment of whether section 129(c)(1) mandates the United States to take certain action or not to take certain action. Finally, we have taken into account the fact that, in the present case, our ultimate conclusions with respect to Canada's claims would not differ depending on the order of analysis we decided to follow.

[73] Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998* ("*US – Section 211 Appropriations Act*"), WT/DS176/AB/R, adopted 1 February 2002, para. 105; Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ("*US – Hot-Rolled Steel*"), WT/DS184/AB/R, adopted 23 August 2001, para. 200; Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* ("*India – Patents (US)*"), WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9, para. 66; Panel Report, *United States – Anti-Dumping Act of 1916 – Complaint by the European Communities* ("*US – 1916 Act (EC)*"), WT/DS136/R and Corr.1, adopted 26 September 2000, as upheld by the Appellate Body Report, WT/DS136/AB/R, WT/DS162/AB/R, para. 6.51; *United States – Anti-Dumping Act of 1916 – Complaint by Japan* ("*US – 1916 Act (Japan)*"), WT/DS162/R and Add.1, adopted 26 September 2000, as upheld by the Appellate Body Report, WT/DS136/AB/R, WT/DS162/AB/R, para. 6.50.

[74] Panel Report, *US - Section 301 Trade Act*, *supra*, para. 7.18.

Canada.[75] Finally, if section 129(c)(1) mandates the United States to take any of the actions identified by Canada and/or mandates the United States not to take any of those actions, we will examine whether the United States would be in breach of the WTO provisions invoked by Canada if it were to take any of those actions (in cases where it is mandated to do so) or were not to take any of them (in cases where it is mandated not to do so).

1. Actions identified by Canada as required and/or precluded by section 129(c)(1)

6.30 As noted, the **Panel** begins its analysis of Canada's principal claims by identifying first the actions which Canada alleges are "required" or "precluded" by section 129(c)(1) and which, in its view, would give rise to violations of the WTO provisions it has identified.

6.31 First of all, Canada asserts that section 129(c)(1) "requires", or has the effect of "requiring", the Department of Commerce:

(a) to *conduct administrative reviews* with respect to "prior unliquidated entries"[76] after the implementation date pursuant to an antidumping or countervailing duty order found by the DSB to be WTO-inconsistent[77];

(b) to *make administrative review determinations regarding dumping or subsidization* with respect to "prior unliquidated entries" after the implementation date pursuant to an antidumping or countervailing duty order found by the DSB to be WTO-inconsistent[78];

(c) to *assess definitive antidumping or countervailing duties* with respect to "prior unliquidated entries" after the implementation date pursuant to an antidumping or countervailing duty order found by the DSB to be WTO-inconsistent[79]; and

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[75] We consider, in the circumstances of this case, that if Canada does not succeed in demonstrating, as a factual matter, that section 129(c)(1) "requires" (or has the effect of requiring) or "precludes" (or has the effect of precluding) any of the actions identified by it, Canada will not have established, as a matter of WTO law, that section 129(c)(1) "mandates" the United States to take any of those actions or "mandates" the United States not to take any of those actions.

[76] Here and hereafter, we will use the term "prior unliquidated entries" in the sense ascribed to it by Canada. See, *supra*, para. 6.7. Unlike Canada, however, we will put the term in inverted commas to reflect the fact that it is not used in relevant US laws or regulations. See US replies to Panel Questions 5 and 20.

[77] E.g., Canada's reply to Panel Question 74(b); Canada's Second Oral Statement, paras. 35 and 53; Canada's Second Submission, para. 32; Canada's reply to Panel Question 31. Canada considers that, after the implementation date, administrative reviews for "prior unliquidated entries" are, under WTO law, either: (i) not to be conducted in cases in which the ITC or the Department of Commerce makes a section 129 determination which results in the revocation of the original antidumping or countervailing duty order, or (ii) to be conducted on the basis of a section 129 determination by the Department of Commerce in cases in which such a determination does not result in the revocation of the original antidumping or countervailing duty order but may result in a lower definitive antidumping or countervailing duty being assessed on "prior unliquidated entries".

[78] E.g., Canada's First Submission, paras. 33, 42 and 54.

[79] E.g., Canada's First Submission, paras. 33, 42 and 54. We note that Canada also asserts that section 129(c)(1) requires the Department of Commerce to "make definitive duty determinations" with respect to "prior unliquidated entries". See Canada's Second Submission, para. 4. It appears to us that Canada's reference to the "making of definitive duty determinations" is a reference to the levying or assessment of definitive antidumping or countervailing duties. See Canada's reply to Panel Question 7. We further note that Canada has used, but not explained, the expression "definitive legal determinations of duty liability". See Canada's Second Submission, paras. 42 and 44. In the absence of any elaboration by Canada, we will not assume that the expression "definitive legal determinations of duty liability" covers any aspect of section 129(c)(1) that would not already be covered by Canada's broad reference to the actions identified in subparagraphs 6.31(b) and (c) above.

(d) to *retain cash deposits* in respect of "prior unliquidated entries" after the implementation date at a level found by the DSB to be WTO-inconsistent.[80]

6.32 Canada alleges, furthermore, that section 129(c)(1), by "precluding" particular actions, infringes the WTO provisions identified by Canada. Specifically, Canada asserts that section 129(c)(1) "precludes", or has the effect of "precluding", the Department of Commerce from:

(a) *making administrative review determinations regarding dumping or subsidization* with respect to "prior unliquidated entries" after the implementation date in a manner that is consistent with an adverse DSB ruling[81];

(b) *assessing definitive antidumping or countervailing duties* with respect to "prior unliquidated entries" after the implementation date in a manner that is consistent with an adverse DSB ruling[82]; and

(c) *refunding*, after the implementation date, *cash deposits* collected on "prior unliquidated entries" pursuant to an antidumping or countervailing duty order found by the DSB to be WTO-inconsistent.[83]

6.33 Having identified the actions which Canada alleges are either required or precluded by section 129(c)(1), we can now proceed to examine whether section 129(c)(1) in fact requires (or has the effect of requiring) and/or precludes (or has the effect of precluding) any of those actions.[84]

2. Meaning and scope of section 129(c)(1)

6.34 In order to determine whether section 129(c)(1) requires (or has the effect of requiring) and/or precludes (or has the effect of precluding) any of the actions specified by Canada, the **Panel** must first make a detailed examination of the meaning and scope of section 129(c)(1).

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[80] E.g., Canada's reply to Panel Question 74(a); Canada's Second Oral Statement, para. 35; Canada's Second Submission, para. 32. In Canada's view, the retention, after the implementation date, of cash deposits collected on "prior unliquidated entries" is not justified in whole or in part in cases in which: (i) the ITC or the Department of Commerce makes a section 129 determination which results in the revocation of the original antidumping or countervailing duty order, or (ii) the Department of Commerce makes a section 129 determination which may result in a lower definitive antidumping or countervailing duty being assessed on "prior unliquidated entries".

[81] E.g., Canada's Second Oral Statement, para. 34; Canada's First Oral Statement, paras. 20-21.

[82] E.g., Canada's Second Oral Statement, paras. 34-35; Canada's Second Submission, paras. 8 and 14; Canada's First Oral Statement, paras. 20-21.

[83] E.g., Canada's replies to Panel Questions 71 and 80. According to Canada, after the implementation date, cash deposits collected on "prior unliquidated entries" must be refunded in whole or in part in cases in which: (i) the ITC or the Department of Commerce makes a section 129 determination which results in the revocation of the original antidumping or countervailing duty order, or (ii) the Department of Commerce makes a section 129 determination which may result in a lower definitive antidumping or countervailing duty being assessed on "prior unliquidated entries".

[84] We note that the United States has argued, in response to a question from the Panel, that the issue of the conduct, after the implementation date, of administrative reviews concerning "prior unliquidated entries" and the issue of the retention, after the implementation date, of cash deposits collected on such entries are not within the Panel's terms of reference. In support of this view, the United States states that section 129(c)(1) does not address either of these issues and that Canada's misunderstanding of what section 129(c)(1) allegedly requires cannot bring within the Panel's terms of reference measures which Canada did not identify in its panel request. See US reply to Panel Question 74. We do not consider that the issues in question are outside our terms of reference. Canada's assertions regarding the conduct of administrative reviews and the retention of cash deposits are clearly related to section 129(c)(1), i.e., the measure at issue in this case. In such circumstances, we do not think that the mere fact that Canada may be mistaken in its understanding of what action section 129(c)(1) requires bars us from addressing Canada's assertions.

(a) Examination of the URAA

6.35 Consistently with the parties' submissions, our examination of section 129(c)(1) will address both the text of section 129(c)(1) and relevant portions of the Statement of Administrative Action (the "SAA") accompanying the URAA.[85]

6.36 With respect to the relationship between section 129(c)(1) and the SAA, we note Canada's statement that:

> The SAA sets forth the authoritative interpretation of the URAA and the US Administration's obligations in implementing the URAA, as agreed between the US Administration and the US Congress. Congress approved the SAA in section 101 of the URAA and provided, in section 102 of the URAA, that "[t]he statement of administrative action approved by the Congress under section 101(a) shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application".[86]

6.37 The United States has raised no objections to Canada's statement on the relationship between the SAA and the URAA.[87] We therefore adopt it for the purposes of our analysis in this case.[88]

6.38 Accordingly, in our examination of section 129(c)(1), we must be mindful of the legal status of the SAA in US law and take account of its content. This said, two caveats should be noted. *First*, it should be remembered that section 129(c)(1) is to be interpreted in the light of the SAA, and not the other way round.[89] *Second*, it should be recalled that, even though the SAA is intended to shed light on the meaning of the various provisions of the URAA, the statements contained in the SAA may, themselves, be open to interpretation.

(b) Examination of section 129(c)(1) as interpreted by the SAA

6.39 Section 129(c)(1) reads:

> (1) EFFECTS OF DETERMINATIONS.—Determinations concerning title VII of the Tariff Act of 1930 that are implemented under this section shall apply with respect to unliquidated entries of the subject merchandise (as defined in section 771 of that Act) that are entered, or withdrawn from warehouse, for consumption on or after—
>
> > (A) in the case of a determination by the Commission under subsection (a)(4), the date on which the Trade Representative directs the administering authority

[85] We note that, in addition to being consistent with the parties' submissions, our approach to examining US statutory law is consistent with that of previous panels. See Panel Reports on *US – 1916 Act (EC)*, *supra*, para. 6.101; *US – 1916 Act (Japan)*, *supra*, para. 6.112; *US - Export Restraints*, *supra*, paras. 8.88 *et seq.*; *US - Section 301 Trade Act*, *supra*, paras. 7.31 and 7.98.

[86] Uruguay Round Agreements Act, Pub. L. No. 103-465, sections 101 and 102, 108 Stat. 4814-4819.

[87] US reply to Panel Question 45.

[88] Canada's statement on the legal status of the SAA is consistent with the findings of the Panel in *US - Export Restraints*. See Panel Report, *US - Export Restraints*, *supra*, paras. 8.93-8.100.

[89] The Panel in *US - Export Restraints* found that the SAA has no operational life or status independently of the statute. See Panel Report, *US - Export Restraints*, *supra*, para. 8.99.

> under subsection (a)(6) to revoke an order pursuant to that determination, and
>
> (B) in the case of a determination by the administering authority under subsection (b)(2), the date on which the Trade Representative directs the administering authority under subsection (b)(4) to implement that determination.

6.40 The SAA, in the first paragraph of section B.1.c.(3), contains the following statement regarding section 129(c)(1):

> Consistent with the principle that GATT panel recommendations apply only prospectively, subsection 129(c)(1) provides that where determinations by the ITC or Commerce are implemented under subsections (a) or (b), such determinations have prospective effect only. That is, they apply to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption on or after the date on which the Trade Representative directs implementation. Thus, relief available under subsection 129(c)(1) is distinguishable from relief available in an action brought before a court or a NAFTA binational panel, where, depending on the circumstances of the case, retroactive relief may be available. Under 129(c)(1), if implementation of a WTO report should result in the revocation of an antidumping or countervailing duty order, entries made prior to the date of Trade Representative's direction would remain subject to potential duty liability.[90]

(i) Arguments of the parties

6.41 **Canada** argues that, pursuant to section 129(c)(1), the Department of Commerce can only apply a new WTO-consistent determination made by the Department under section 129(b)(4) or the ITC under section 129(a)(6) to imports that enter the United States after the Implementation date. Canada considers that the words of section 129(c)(1) that limit application of a new, WTO-consistent determination to future entries, have the effect of precluding such application to "prior unliquidated entries". According to Canada, the use of the word "after" in section 129(c)(1) excludes any interpretation that would allow the Department of Commerce to apply the new determination to "prior unliquidated entries". Thus, in Canada's view, section 129(c)(1) directs itself to "prior unliquidated entries" by negative implication.

6.42 The **United States** points out that section 129(c)(1) does not contain any language addressing what Canada terms "prior unliquidated entries". The United States argues that section 129(c)(1) only addresses the treatment of entries that take place on or after the date of implementation, and even then, only addresses the application of the particular determination issued under section 129 to those entries. The United States states that the consequence of this is that the treatment of "prior unliquidated entries" would not be determined in a section 129 determination. Rather, the United States argues, the treatment of "prior unliquidated entries" would be determined in a separate proceeding.

[90] SAA, section B.1.c.(3), first paragraph, p. 1026.

(ii) Evaluation by the Panel

6.43 The **Panel** recalls that section 129(c)(1) provides that "[d]eterminations concerning title VII of the Tariff Act of 1930" that are "implemented" under "this section" "shall apply with respect to unliquidated entries of the subject merchandise […] that are entered […] on or after" the date on which the USTR (i) directs revocation of an antidumping or countervailing duty order pursuant to such determinations or (ii) directs implementation of such determinations in cases where those determinations result in the setting of a new cash deposit rate.

6.44 We begin our examination of section 129(c)(1) by considering the phrase "[d]eterminations concerning title VII of the Tariff Act of 1930 that are implemented under this section". First of all, like the parties, we understand the term "this section" as used in the aforementioned phrase to refer to section 129 as a whole. The context of section 129(c)(1) supports this reading. As Canada points out, when a reference in section 129 is not to the section as a whole, but to a section within section 129, the terms "subsection" or "paragraph" are normally used.[91]

6.45 As concerns the term "[d]eterminations concerning title VII of the Tariff Act of 1930", we concur with the parties that it limits the scope of section 129(c)(1) to determinations which are made under section 129 and pertain to dumping, subsidization and injury. As an initial matter, we note that title VII of the Tariff Act of 1930 contains the antidumping and countervailing duty provisions of US law. Further, it appears to us that the qualifying words "concerning title VII of the Tariff Act of 1930" are used in section 129(c)(1) in order to make it clear that section 129(c)(1) applies to antidumping and countervailing duty determinations, but not to safeguards determinations, which are contemplated in subsection 129(a). Since the issuance of antidumping and countervailing duty determinations is dealt with in subsections 129(a)(4) and 129(b)(2), we consider that the term "[d]eterminations concerning title VII of the Tariff Act of 1930" as it appears in section 129(c)(1) should be understood to refer to antidumping and countervailing duty determinations which have been made under those subsections.

6.46 Finally, with respect to the term "implemented", we agree with the parties that this term limits the application of section 129(c)(1) to those determinations which are given legal effect. As the United States has explained, in instances where a new determination under section 129 would not change the antidumping or countervailing duty measure in place, it may not be necessary to give a new determination legal effect. Subsections 129(a)(6) and 129(b)(4) would appear to confirm that the USTR has the authority, but is not obligated to implement determinations made under section 129.[92]

6.47 In the light of the above, we find that the phrase "[d]eterminations concerning title VII of the Tariff Act of 1930 that are implemented under this section" refers to antidumping and countervailing duty determinations made under subsections 129(a)(4) and 129(b)(2) (hereafter "section 129 determinations") and implemented under subsections 129(a)(6) and 129(b)(4). With this in mind, we now turn to examine the remainder of section 129(c)(1).

6.48 Pursuant to section 129(c)(1), a section 129 determination that is implemented "shall apply with respect to unliquidated entries of the subject merchandise […] that are entered […] on or after" the date on which the USTR directs revocation of an antidumping or countervailing duty order pursuant to the section 129 determination (as contemplated in section 129(c)(1)(A)) or directs implementation of the section 129 determination (as contemplated in section 129(c)(1)(B)). Thus, it

[91] E.g., section 129(c)(1)(A) ("subsection") and section 129(a)(2) ("paragraph").

[92] We find confirmation for our reading of the term "implemented" in the first paragraph of section B.1.c.(2) of the SAA ("The Trade Representative may decline to request implementation of [a section 129] determination.") and section B.1.c.(5) of the SAA ("Section 129 determinations that are not implemented will not be subject to judicial or binational panel review […]"). See SAA, *supra*, pp. 1025 and 1026.

is clear to us that whenever a section 129 determination is implemented, it applies to entries[93] that take place *on or after* the date of implementation.[94]

6.49 We further find, and the parties agree, that the language of section 129(c)(1) -- "shall apply to […] entries […] that are entered […] *on or after* [the date of implementation]" (emphasis added) -- necessarily implies that a section 129 determination that is implemented does not apply to entries that took place *before* the date of implementation, i.e., to what Canada terms "prior unliquidated entries".[95]

6.50 Our reading of the text of section 129(c)(1) is not contradicted by either the context or purpose of section 129(c)(1). As regards the context of section 129(c)(1), we are not aware of anything in the provisions of section 129 as a whole, the URAA or title VII of the Tariff Act of 1930 which would support a different reading of the terms of section 129(c)(1).[96]

6.51 Regarding the purpose of section 129(c)(1), the United States submits, and Canada does not dispute, that section 129(c)(1) has the "purpose of providing the effective date for new, WTO-consistent [Department of] Commerce or ITC determinations that USTR directs [the Department of] Commerce to implement".[97] We agree and note that, on our reading, section 129(c)(1) fully effects that purpose.[98]

6.52 As for the purpose of section 129 as a whole, we share the US view that section 129 as a whole is intended "to provide a basis in domestic law for [the Department of] Commerce and the International Trade Commission to reconsider and revise final determinations so as to be consistent

[93] Here and hereafter, we employ the term "entries" as a shorthand expression for "entries of the subject merchandise", as stated in section 129(c)(1). In other words, the term "entries", as used in our findings, refers to entries which are subject to a particular antidumping or countervailing duty order. We understand the term "entries" as it appears in Canada's term "prior unliquidated entries" in the same sense.

[94] Under the terms of section 129(c)(1), a section 129 determination that is implemented also applies to entries that are "withdrawn from warehouse" for consumption on or after the date on which the USTR directs implementation of that determination. The parties' submissions did not specifically address this aspect of section 129(c)(1). See Canada's First Submission, paras. 5 and 26; US First Submission, para. 14. Consistently with the parties' submissions, in our examination of section 129(c)(1) we will make no further mention of the fact that section 129(c)(1) covers entries that are withdrawn from warehouse on or after the implementation date.

[95] This is consistent with the first paragraph of section B.1.c.(3) of the SAA ("[Section 129 determinations] have prospective effect only. That is, they apply to unliquidated entries of merchandise entered […] for consumption on or after the date on which the Trade Representative directs implementation."). See SAA, *supra*, p. 1026.

[96] Canada has contrasted section 129(c)(1) with section 516a of the Tariff Act of 1930. According to Canada, section 516a provides that in instances where a final decision by a US court or NAFTA Chapter Nineteen Binational Panel overturns a decision of the Department of Commerce or ITC in whole or in part, "prior unliquidated entries" are liquidated in accordance with the court or panel decision. See Canada's reply to Panel Question 3; 19 U.S.C. § 1516a(c)(1) of the Tariff Act of 1930. We see no need to examine section 516a further, as Canada does not argue that, in view of section 516a, section 129(c)(1) should be read in such a way that section 129 determinations would apply also to "prior unliquidated entries". Indeed, the first paragraph of section B.1.c.(3) of the SAA confirms that section 129(c)(1) is intended to provide for a different result from the one envisaged in cases of judicial review by US courts or NAFTA panels ("[Section 129] determinations have prospective effect only. […] Thus, relief available under subsection 129(c)(1) is distinguishable from relief available in an action brought before a court or a NAFTA binational panel, where, depending on the circumstances of the case, retroactive relief may be available."). See SAA, *supra*, p. 1026.

[97] US reply to Panel Question 7.

[98] We find support for the United States' view in the title of section 129(c)(1) ("Effects of Determinations") as well as the second paragraph of section B.1.c.(3) of the SAA, which talks about the "effective date of an implemented [section 129] determination". See SAA, *supra*, p. 1025.

with adverse WTO reports and for USTR to direct implementation of those determinations".[99] It should be recalled, in this regard, that, in the view of the United States, there is no obligation under WTO law to implement adverse DSB rulings with respect to "prior unliquidated entries".[100] Section 129(c)(1), as we understand it, is consistent with this view, inasmuch as it does not provide for the application of section 129 determinations to "prior unliquidated entries". In that sense, we think that our reading of section 129(c)(1) is not contradicted by the purpose of section 129 as a whole.

6.53 Based on the foregoing considerations, we conclude that only determinations made and implemented under section 129 are within the scope of section 129(c)(1) and that such determinations are not applicable to "prior unliquidated entries".

3. Whether section 129(c)(1) requires and/or precludes any of the actions identified by Canada

6.54 The **Panel** will now proceed to assess whether section 129(c)(1), as understood by the Panel, supports Canada's assertions that, with respect to "prior unliquidated entries", section 129(c)(1) "requires" the United States to take the actions listed in para. 6.31 and that it "precludes" the United States from taking the actions listed in para. 6.32.

6.55 We recall, in this regard, that section 129(c)(1), on its face, does not address entries that took place *before* the implementation date, i.e., "prior unliquidated entries". Section 129(c)(1) only speaks to entries that take place *on or after* the implementation date. It is clear to us, therefore, that section 129(c)(1) does not, by its express terms, require or preclude any particular action with respect to "prior unliquidated entries". We consider that the above-quoted paragraph of the SAA -- i.e., the first paragraph of section B.1.c.(3) -- supports our view.[101]

6.56 Therefore, we conclude that Canada has not succeeded in establishing that, with respect to "prior unliquidated entries", the express terms of section 129(c)(1), read in the light of the SAA,

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[99] US reply to Panel Question 4. We note that Canada has stated along very similar lines that "[s]ection 129 provides for the issuance of a new antidumping or countervailing duty determination by the Department of Commerce or a new injury determination by the ITC to ensure that the new determination is 'not inconsistent with' the United States' obligations under the AD Agreement or the SCM Agreement". See Canada's First Submission, para. 4. We further note that these statements are supported by the provisions of subsections (a)(1), (a)(4), (a)(6), (b)(1), (b)(2) and (b)(4) of section 129. Finally, we note that the first paragraph of section B.1.c. of the SAA confirms our understanding of the purpose of section 129 ("Section 129 […] establishes a procedure by which the Administration may obtain advice it requires to determine its response to an adverse WTO panel or Appellate Body report concerning U.S. obligations under the Agreement on Safeguards, Antidumping, or Subsidies and Countervailing Measures. Section 129 also establishes a mechanism that permits the agencies concerned […] to issue a second determination, where such action is appropriate, to respond to the recommendations in a WTO panel or Appellate Body report."). See SAA, *supra*, p. 1022.

[100] We have no reason to doubt that the United States adhered to the same interpretation of WTO law when section 129 was enacted. The first paragraph of section B.1.c.(3) of the SAA in fact confirms that the United States did not consider that it was obligated to implement with respect to "prior unliquidated entries" ("Consistent with the principle that GATT panel recommendations apply only prospectively, subsection 129(c)(1) provides that where determinations by the ITC or Commerce are implemented under subsections (a) or (b), such determinations have prospective effect only. That is, they apply to unliquidated merchandise entered […] for consumption on or after the date on which the [USTR] directs implementation [of a section 129 determination]."). See SAA, *supra*, p. 1025.

[101] The SAA paragraph in question is reproduced at para. 6.40 above. Since we will provide a detailed analysis of the first paragraph of section B.1.c.(3) of the SAA in Subsection C.4.(b) below, we do not offer any discussion of the relevant SAA paragraph at this point. We further note that the evidence before us relating to the application of section 129(c)(1) to date does not support Canada's view that section 129(c)(1) requires and/or precludes any of the actions which it has identified. See, *infra*, Subsection C.4.(c).

require the Department of Commerce to take any of the actions listed in para. 6.31 above or preclude the Department of Commerce from taking any of the actions listed in para. 6.32 above.

4. Whether section 129(c)(1) has the effect of requiring and/or precluding any of the actions identified by Canada

6.57 The **Panel** next turns to consider Canada's additional assertions that section 129(c)(1) has the *effect* of requiring the Department of Commerce to take specified actions with respect to "prior unliquidated entries" and that section 129(c)(1) has the *effect* of precluding the Department of Commerce from taking specified actions with respect to such entries.[102]

6.58 We will first examine the arguments of the parties relating to section 129(c)(1) as enacted. After that, we will consider the parties' arguments concerning relevant portions of the SAA. We wish to be clear that we assess these arguments separately for convenience of analysis only. As we have noted, section 129(c)(1) must be read together with the SAA.[103] Accordingly, we will not reach any conclusions regarding Canada's assertions that section 129(c)(1) has the effect of requiring and precluding certain actions until after we have taken into account relevant parts of the SAA. Our conclusions regarding the assertions in question will, as a result, be based on section 129(c)(1) as interpreted by the SAA, rather than on section 129(c)(1) read in isolation. Moreover, before reaching any conclusions regarding Canada's assertions, we will also address the application of section 129(c)(1) to date.

(a) Section 129(c)(1) as enacted

6.59 As noted above, under this subheading, the **Panel** will describe and analyse the arguments of the parties which relate to section 129(c)(1) as enacted. For the reasons set forth in the previous paragraph, our findings under this subheading will be provisional.

(i) Arguments of the parties

6.60 **Canada** considers that the effect of section 129(c)(1) is broader than just the immediate determinations made under section 129. Canada submits that a US court would find that the language of section 129(c)(1) has the effect of precluding the Department of Commerce from applying a new, WTO-consistent determination to "prior unliquidated entries" because otherwise the express limitation to future entries contained in section 129(c)(1) would be meaningless. Canada argues that the wording in section 129(c)(1) would be materially undermined if section 129(c)(1) were interpreted to allow the Department of Commerce to take action to comply with an adverse DSB ruling with respect to "prior unliquidated entries".

6.61 The **United States** argues that section 129(c)(1) does not address what actions the Department of Commerce may or may not take in a *separate* determination in a *separate* "segment" of the same proceeding (e.g., any separate administrative review of the same antidumping or countervailing duty order).[104] According to the United States, a determination made in a distinct segment of the same proceeding would not, therefore, be subject to section 129(c)(1).

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[102] For a description of the actions specified by Canada see, *supra*, paras. 6.31 and 6.32.

[103] See, *supra*, para. 6.38.

[104] The United States notes that section 351.102 of the regulations of the Department of Commerce defines a "segment" of a proceeding as follows:

> (1) *In general.* An antidumping or countervailing duty proceeding consists of one or more segments. "Segment of a proceeding" or "segment of the proceeding" refers to a portion of the proceeding that is reviewable under section 516A of the Act.

6.62 This can be illustrated, in the view of the United States, by considering two scenarios identified by Canada in the course of the proceedings. Under the *first scenario* (which concerns what Canada terms "*methodology cases*"), the challenged determination is a final dumping determination in an investigation. The United States notes that if the challenge were successful, the Department of Commerce may be able to implement the adverse DSB ruling by making changes in its methodologies and issue a new, WTO-consistent determination under section 129. That determination would be applied to all entries that took place on or after the implementation date. The United States further notes that, if a company subsequently requested an administrative review of "prior unliquidated entries", the Department of Commerce would conduct the administrative review of those entries and issue a determination in that segment of the proceeding. According to the United States, because the administrative review determination would not be the determination implemented under section 129, nothing in section 129(c)(1) would preclude Commerce from applying a WTO-consistent methodology developed in the section 129 determination in that administrative review (i.e., in another segment of the same proceeding). [105]

6.63 The *second scenario* addressed by the United States involves what Canada describes as a "*revocation case*", i.e., a situation where a WTO challenge results in the revocation of an antidumping or countervailing duty order because the new, WTO-consistent determination issued under section 129 results in a finding of no injury, no dumping or no subsidization. The United States notes that, under the terms of section 129(c)(1), the revocation would apply to all entries taking place on or after the date of implementation. With respect to the treatment of "prior unliquidated entries" in such a situation, the United States notes that it is not clear which of a number of options the Department of Commerce would pursue, as the Department has not faced such a situation to date. The United States submits, however, that section 129(c)(1) would not mandate any particular treatment of "prior unliquidated entries" in such situations. The United States points out, in particular, that section 129(c)(1) does not require the United States to apply duties to those entries, does not limit the discretion of the Department of Commerce in deciding how to interpret and apply the antidumping and countervailing duty laws in separate segments of the proceedings with respect to those entries, does not limit judicial review of the results of those separate proceedings, and does not limit the obligation of the Department of Commerce to implement the results of any such judicial proceedings.

6.64 **Canada** submits that the US assertion that, in *methodology cases*, the Department of Commerce could "circumvent" the limitation in section 129(c)(1) with respect to "prior unliquidated entries" in cases where implementation of a DSB ruling requires the Department of Commerce to change its interpretation of the law or its methodology is untested in the administrative practice of the Department of Commerce or in US courts. Canada further argues that the US assertion goes against US principles of statutory construction. Canada notes, in this respect, that the US assertion implies that section 129(c)(1) would have no effect other than to prevent the refund of unjustifiable cash deposits on "prior unliquidated entries" while leaving the Department of Commerce free to make definitive duty determinations for such entries in administrative reviews in a WTO-consistent manner. Canada considers it unlikely that the US Congress would have created the limitation in section 129(c)(1) merely to permit temporary retention of excessive cash deposits that would be

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(2) *Examples*. An antidumping or countervailing duty investigation or a review of an order or suspended investigation, or a scope inquiry under § 351.225, each would constitute a segment of a proceeding. (19 C.F.R. 351.102 (2000))

[105] The United States points out, in this regard, that, in the administrative review pursuant to section 751 of the Tariff Act of 1930, the Department of Commerce would have the legal authority to alter its statutory interpretation or methodology from one announced prior to the implementation of the DSB ruling, provided that it gives a reasonable explanation for doing so. In support of this contention, the United States refers to *INS v. Yang*, 519 U.S. 26, 32 (1996); *Atchison, Topeka & Santa Fe Ry v. Wichita Board of Trade*, 412 U.S. 800, 808 (1973); *British Steel, PLC v. United States*, 127 F.3d 1471, 1475 (Fed. Cir. 1997). According to the United States, the so-called *Charming Betsy* doctrine could be relied on by the Department of Commerce as a reasonable explanation for its change in interpretation or methodology in the administrative review determination.

returned at the end of the administrative reviews. Canada points out, in this regard, that US jurisprudence establishes that a court "cannot presume that Congress intended [one result] with one hand, while reducing it to a veritable nullity with the other".[106]

6.65 Regarding *revocation cases*, Canada argues that, at least with respect to cases in which an antidumping or countervailing duty order was revoked as a result of a new no-injury determination by the ITC, the Department of Commerce, because of section 129(c)(1), would have to retain cash deposits on "prior unliquidated entries", conduct an administrative review and levy definitive duties with regard to such entries. In Canada's view, the Department of Commerce would have no legal authority or administrative discretion to decline to assess definitive duties on such entries, as it could not disregard the original injury finding, which would remain in effect as a matter of US law with respect to "prior unliquidated entries" notwithstanding the new no-injury determination by the ITC.[107] For Canada it is clear that it is because of section 129(c)(1) that the Department of Commerce would retain cash deposits, conduct administrative reviews and assess definitive duties in such situations. Canada submits, in this respect, that if there were no section 129(c)(1), then a negative injury finding by the ITC and the revocation of an antidumping or countervailing duty order under section 129 would apply to all unliquidated entries, including "prior unliquidated entries". Canada notes that, in such circumstances, cash deposits would be returned to importers, and the Department of Commerce would neither conduct an administrative review nor assess definitive duties.

(ii) Evaluation by the Panel

6.66 Since the parties have discussed the issue of whether section 129(c)(1) has the effect of requiring and/or precluding certain actions with respect to "prior unliquidated entries" on the basis of two scenarios identified by Canada, the **Panel**, too, will conduct its analysis on that basis. For ease of reference, we will adopt Canada's terminology and refer to those scenarios as the "methodology cases" and the "revocation cases", respectively.[108]

Methodology cases

6.67 We first consider the operation of section 129(c)(1) in methodology cases. Methodology cases are cases in which the section 129 determination does not result in the revocation of the original antidumping or countervailing duty order, but instead results in a new margin of dumping or a new countervailable subsidy rate. Such an outcome may be due, for instance, to the application of a new, WTO-consistent methodology or a new, WTO-consistent interpretation of US antidumping or countervailing duty laws.[109] If the USTR directs implementation of a section 129 determination of the aforementioned type, that determination would be applied, pursuant to section 129(c)(1), to all entries

[106] Canada's quotation is taken from *Katie John* v. *United States*, 247 F.3d 1032, 1038 (9th Cir. 2001) citing *Johnson* v. *United States R.R. Retirement Board*, 969 F.2d 1082, 1089 (D.C. Cir. 1992), which found that it was "unreasonable to conclude that Congress meant to create an entitlement with one hand and snatch it away with the other". Canada further references *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 71 (April 5, 1982) which stated that "[s]tatutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible".

[107] Canada notes that it could be different only where a decision by a US court resulted in the revocation of the original antidumping or countervailing duty order for reasons of US law.

[108] Canada's Second Oral Statement, para. 19; Canada's reply to Panel Question 81(a).

[109] In their argumentation, the parties have primarily discussed cases in which a section 129 determination is based on a new methodology rather than on a revised statutory interpretation. Accordingly, our analysis similarly focuses on methodology cases.

that take place on or after the implementation date.[110] As a practical matter, the section 129 determination would be applied by setting a new cash deposit rate for such entries.[111]

6.68 Turning now to Canada's assertions regarding the "effect" of section 129(c)(1) *vis-à-vis* "prior unliquidated entries", we begin our analysis by considering what would be the impact on "prior unliquidated entries" of a section 129 determination which establishes a new dumping margin or a new countervailable subsidy rate. As we understand it, since a section 129 determination of this type would not be applicable to "prior unliquidated entries", that determination, as such, would not have an impact on such entries. In other words, we think it can be inferred from the fact that a section 129 determination which establishes a new dumping margin or a new countervailable subsidy rate is inapplicable to "prior unliquidated entries" that the Department of Commerce would *not* be required, because of section 129(c)(1), to refund excessive cash deposits previously collected on "prior unliquidated entries" or to make determinations regarding dumping or subsidization and assess definitive antidumping or countervailing duties with respect to such entries on the basis of the new, WTO-consistent methodology.

6.69 Conversely, we think it can *not* be inferred from the mere fact that a section 129 determination which establishes a new dumping margin or a new countervailable subsidy rate is inapplicable to "prior unliquidated entries" that the Department of Commerce would be required to retain excessive cash deposits collected on such entries or would be precluded from refunding such cash deposits. Nor does it follow from the fact that a section 129 determination does not apply to "prior unliquidated entries" that the Department of Commerce would be required to make administrative review determinations regarding dumping or subsidization and assess definitive antidumping or countervailing duties with respect to "prior unliquidated entries" on the basis of the previous, WTO-inconsistent methodology, or would be precluded from making such determinations and assessing definitive duties with respect to such entries on the basis of the new, WTO-consistent methodology.[112]

6.70 Canada nevertheless seeks to convince us that section 129(c)(1), by itself, has the effect, in methodology cases, of requiring or precluding the above-mentioned actions with respect to "prior unliquidated entries". Canada's arguments in support of its position on this point are explained most clearly in response to an assertion made by the United States. Accordingly, our analysis of Canada's arguments will focus on the evidence and arguments presented by Canada in response to the US assertion.[113] The assertion in question is to the effect that, notwithstanding section 129(c)(1), the Department of Commerce would have the legal authority, in methodology cases, to make determinations regarding dumping or subsidization and assess definitive antidumping or

[110] We recall that we have found at para. 6.53, *supra*, that, pursuant to section 129(c)(1), section 129 determinations do not apply to "prior unliquidated entries".

[111] US Second Submission, para. 17.

[112] It might of course be the case that, because section 129(c)(1) limits the application of section 129 determinations to entries that take place on or after the implementation date, "prior unliquidated entries" would remain subject to other provisions of US antidumping or countervailing duty laws which might, for instance, *require* the Department of Commerce to assess definitive antidumping or countervailing duties with respect to "prior unliquidated entries" on the basis of the old, WTO-inconsistent methodology or might *preclude* the Department of Commerce from assessing such duties with respect to such entries on the basis of the new, WTO-consistent methodology. However, in such instances, it would not be because of section 129(c)(1) that the Department of Commerce would be required to take, or be precluded from taking, such action with respect to "prior unliquidated entries", but because of those other provisions of US law. Since the only measure before us is section 129(c)(1), we are not called on to make findings regarding whether any other provisions of US law would require the United States to take any of the actions which Canada has identified and considers contrary to WTO law.

[113] This should not be construed to mean that the Panel has not carefully considered all arguments presented by Canada in the course of these proceedings.

countervailing duties with respect to "prior unliquidated entries" in an administrative review on the basis of a new, WTO-consistent methodology developed in a section 129 determination.[114]

6.71 Canada argues, first of all, that if the Department of Commerce were to make definitive duty determinations with respect to "prior unliquidated entries" in an administrative review on the basis of a new, WTO-consistent methodology, it would "circumvent" the limitation in section 129(c)(1) or "materially undermine" the effect of the wording in section 129(c)(1). We are not persuaded by this argument. As we have stated above, by its terms, section 129(c)(1) only addresses the application of section 129 determinations. Section 129(c)(1) does not speak to the application to "prior unliquidated entries" of *separate determinations* made in *separate segments* of the same proceeding[115] and *under separate provisions* of US antidumping or countervailing duty laws, such as administrative review determinations. Accordingly, we see no basis for concluding that the language used in section 129(c)(1), by itself, has the effect of precluding the Department of Commerce from making definitive duty determinations in an administrative review with respect to "prior unliquidated entries" on the basis of a methodology developed in a section 129 determination.

6.72 What is more, we find convincing the argument of the United States that a distinction is to be drawn between the section 129 determination, which, e.g., establishes a particular dumping margin or countervailable subsidy rate, and the methodologies developed and applied in a section 129 determination.[116] As we understand the terms of section 129(c)(1), they limit the application of section 129 determinations to entries that take place on or after the implementation date. We see nothing in section 129(c)(1) which would similarly limit the use of methodologies developed and applied in a section 129 determination to such entries. Thus, section 129(c)(1) does not have the effect of precluding the application of methodologies developed in a section 129 determination in administrative reviews of "prior unliquidated entries".

6.73 Finally, we note that, in the hypothetical circumstances under consideration, what the Department of Commerce would be applying in an administrative review of "prior unliquidated entries" is a methodology developed in a section 129 determination, and not the section 129 determination *itself*. As a consequence, we are not convinced that, in such a situation, the Department of Commerce would be considered by a US court to be applying a section 129 determination to "prior unliquidated entries" in circumvention of the provisions of section 129(c)(1). Nor do we think that the Department of Commerce could be said to be applying a section 129 determination *in effect*. As the United States has pointed out, the Department of Commerce would be applying the section 129 methodology to the facts established in the administrative review proceedings. It would not be applying the section 129 methodology to the facts developed in the original segment of the proceedings which was challenged at the WTO.[117] We are not persuaded, therefore, that section 129(c)(1) has the effect of precluding the Department of Commerce from utilizing a methodology adopted in a section 129 determination in a separate segment of the proceeding, i.e., in an administrative review concerning "prior unliquidated entries".

6.74 Canada further argues that section 129(c)(1) has the effect of precluding the Department of Commerce from making definitive duty determinations with respect to "prior unliquidated entries" in an administrative review on the basis of a WTO-consistent methodology, because, under US principles of statutory construction, it must not be presumed that the US Congress intended for the

[114] Consistently with our terms of reference, we refrain from making findings regarding whether the United States is correct in asserting that the Department of Commerce would, as a matter of US law, have the legal authority to make administrative review determinations with respect to "prior unliquidated entries" on the basis of a new, WTO-consistent methodology.

[115] For an explanation of the concept of "segment", see, *supra*, footnote 104.

[116] US reply to Panel Question 92(b).

[117] US reply to Panel Question 92(c).

results which it sought to achieve to be reduced to a veritable nullity.[118] More specifically, Canada submits that it is unlikely that the US Congress enacted the limitation in section 129(c)(1) merely to permit the Department of Commerce to retain excessive cash deposits collected on "prior unliquidated entries" and to return them at the end of the administrative review proceedings concerning those entries.

6.75 We do not find this argument on statutory construction convincing. Section 129(c)(1) fulfils its limited purpose of providing an effective date for the application of section 129 determinations that are implemented regardless of whether a methodology developed in a section 129 determination is used in an administrative review of "prior unliquidated entries". Moreover, regardless of whether a methodology developed in a section 129 determination is used in an administrative review of "prior unliquidated entries", section 129(c)(1) ensures that section 129 determinations are only applied to entries that occur on or after the implementation date. We are, therefore, not persuaded that a US court would interpret section 129(c)(1) to preclude the Department of Commerce from using a methodology developed in a section 129 determination in an administrative review of "prior unliquidated entries" on the grounds that, on any other interpretation, it would become meaningless and devoid of any useful effect.

6.76 As regards Canada's reliance on the likely intent of the US Congress, it would seem to be reasonable to assume, as Canada does, that the US Congress did *not* enact section 129(c)(1) "to permit temporary retention of excessive cash deposits" collected on "prior unliquidated entries". In our view, the US Congress enacted section 129(c)(1) to ensure compliance with adverse DSB rulings only with respect to entries that take place *on or after* the implementation date. It did so apparently in the belief that there was no requirement under WTO law to implement an adverse DSB ruling with respect to "prior unliquidated entries". Contrary to what Canada's argument suggests, however, the fact that the US Congress sought to ensure compliance only with respect to post-implementation entries does not necessarily imply that the US Congress sought to *preclude* compliance with respect to "prior unliquidated entries". Indeed, such an assumption strikes us as rather implausible. We think it more likely that the US Congress simply did not seek to *ensure* compliance with respect to "prior unliquidated entries". In any event, we note that, other than the SAA (which, as we will see below, does not support Canada's position), Canada has provided no evidence regarding the legislative history of section 129. For these reasons, we do not consider that a US court would interpret section 129(c)(1) to preclude the Department of Commerce from making administrative review determinations with respect to "prior unliquidated entries" consistently with an adverse DSB ruling.

6.77 In the light of the above considerations, we provisionally find that Canada has not succeeded in establishing that, in methodology cases, section 129(c)(1), by itself, has the effect of precluding the Department of Commerce from making administrative review determinations regarding dumping or subsidization and assessing definitive antidumping or countervailing duties with respect to "prior unliquidated entries" on the basis of a new, WTO-consistent methodology developed in a section 129 determination. Based also on the above considerations, we provisionally find that the evidence and arguments presented by Canada are, likewise, insufficient to establish that, in methodology cases, section 129(c)(1), by itself, has the effect of requiring the Department of Commerce to make administrative review determinations regarding dumping or subsidization and assess definitive antidumping or countervailing duties with respect to "prior unliquidated entries" on the basis of a methodology found by the DSB to be WTO-inconsistent.[119]

[118] For Canada's references to relevant US jurisprudence, see, *supra*, footnote 106.

[119] We note Canada's assertion that, in cases where a section 129 determination is based on a revised statutory interpretation rather than a new methodology, section 129(c)(1) constrains the discretion the Department of Commerce would otherwise have to interpret the law in a manner consistent with an adverse DSB ruling. We do not find this assertion persuasive. There is no need to address this issue at length, as our

6.78 We consider, next, whether Canada has succeeded in establishing any of its other assertions regarding the effect of section 129(c)(1) in methodology cases, i.e., Canada's assertion that section 129(c)(1), by itself, has the effect (i) of requiring the Department of Commerce to retain excessive cash deposits collected on "prior unliquidated entries", (ii) of precluding the Department of Commerce from returning such cash deposits and (iii) of requiring the Department of Commerce to conduct administrative reviews with respect to such entries on the basis of a methodology found by the DSB to be WTO-inconsistent.

6.79 In support of these assertions, Canada has not offered evidence or arguments different from, or additional to, the evidence and arguments adduced by it in connection with its assertions regarding administrative review determinations. We have found the evidence and arguments adduced by Canada in connection with its assertions regarding administrative review determinations to be insufficient to sustain those assertions. In our assessment, the evidence and arguments in question are also insufficient to sustain Canada's assertions in respect of cash deposits and the conduct of administrative reviews.

6.80 In particular, we do not think that if the Department of Commerce did *not* retain excessive cash deposits collected on "prior unliquidated entries" or did *not* conduct administrative reviews with respect to such entries on the basis of the methodology found by the DSB to be WTO-inconsistent, it would be "circumventing" the limitation in section 129(c)(1) or "materially undermining" the effect of the wording in section 129(c)(1).[120] As we have pointed out above, section 129(c)(1) only addresses the application of section 129 determinations. It does not require or preclude any particular actions with respect to "prior unliquidated entries" in a separate segment of the same proceeding. Nor do we consider that if the Department of Commerce did *not* retain excessive cash deposits collected on "prior unliquidated entries" or did *not* conduct administrative reviews with respect to such entries based on the WTO-inconsistent methodology, it would render section 129(c)(1) ineffective or would be acting inconsistently with the likely intent of the US Congress. The return of excessive cash deposits collected on "prior unliquidated entries" or the conduct of administrative reviews with respect to such entries on the basis of a WTO-consistent methodology developed in a section 129 determination would not make the provisions of section 129(c)(1) meaningless. Moreover, such actions would not, in our view, be inconsistent with the likely intent of the US Congress in enacting section 129(c)(1), *viz*., to ensure implementation of an adverse DSB ruling only with respect to post-implementation entries.

6.81 Accordingly, we provisionally find that Canada has failed to demonstrate that section 129(c)(1), by itself, has the effect, in methodology cases, of requiring the Department of Commerce to retain excessive cash deposits collected on "prior unliquidated entries" or of precluding the Department of Commerce from returning such cash deposits, or of requiring the Department of Commerce to conduct administrative reviews for "prior unliquidated entries" on the basis of a methodology found by the DSB to be WTO-inconsistent.

Revocation cases

6.82 As stated above, as part of our assessment of Canada's reading of section 129(c)(1), we also need to consider the other cases specifically addressed by Canada, i.e., revocation cases. Revocation cases are cases in which the section 129 determination results in the revocation of the original antidumping or countervailing duty order. An antidumping or countervailing duty order would be

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findings regarding "methodology cases" and the reasoning supporting them are applicable, *mutatis mutandis*, also to "interpretation cases". We refer, in particular, to paras. 6.69 and 6.71-6.76 above.

[120] It should be recalled here that we are not called on, in this case, to make findings regarding whether provisions of US law other than section 129(c)(1) would preclude the Department of Commerce from returning excessive cash deposits collected on "prior unliquidated entries" or require it to conduct administrative reviews with respect to such entries on a basis found by the DSB to be WTO-inconsistent.

revoked if a section 129 determination established that there was no dumping, no subsidization or no injury. Pursuant to section 129(c)(1), the revocation of a WTO-inconsistent antidumping or countervailing duty order would apply to all entries that take place on or after the implementation date.[121] We are led to understand that, in practice, this would mean that, as of the implementation date, cash deposits would no longer be required on new entries.[122]

6.83 Turning now to Canada's assertions regarding the "effect" of section 129(c)(1) *vis-à-vis* "prior unliquidated entries", we begin our analysis by considering what would be the impact on "prior unliquidated entries" of a section 129 determination which results in the revocation of an antidumping or countervailing duty order. As we see it, since, pursuant to section 129(c)(1), a section 129 determination of this type would not be applicable to "prior unliquidated entries", that determination, as such, would not have an impact on "prior unliquidated entries". In other words, we think it can be inferred from the fact that a revocation of an antidumping or countervailing duty order would apply only with respect to post-implementation entries that the Department of Commerce would *not* be required, because of section 129(c)(1), to refund cash deposits previously collected on "prior unliquidated entries" on the basis of the WTO-inconsistent antidumping or countervailing duty order, to decline to conduct administrative reviews for such entries, to decline to make determinations regarding dumping or subsidization with respect such entries on the basis of the WTO-inconsistent antidumping or countervailing duty order or to decline to assess definitive antidumping or countervailing duties with respect to such entries on the basis of the WTO-inconsistent antidumping or countervailing duty order.

6.84 Conversely, we think it can *not* be inferred from the mere fact that a revocation is inapplicable to "prior unliquidated entries" that the Department of Commerce would be required to retain cash deposits collected on such entries on the basis of the WTO-inconsistent antidumping or countervailing duty order or would be precluded from refunding such cash deposits. Nor does it follow from the fact that a revocation does not apply to "prior unliquidated entries" that the Department of Commerce would be required to conduct administrative reviews for such entries. Nor does the non-application of a revocation to "prior unliquidated entries" necessarily imply that the Department of Commerce would be required to make administrative review determinations regarding dumping or subsidization and assess definitive antidumping or countervailing duties with respect to "prior unliquidated entries" on the basis of the WTO-inconsistent antidumping or countervailing duty order, or would be precluded from making such determinations and assessing definitive duties with respect to such entries in a manner consistent with WTO requirements. [123]

6.85 Canada nevertheless seeks to convince us that section 129(c)(1), by itself, has the effect, in revocation cases, of precluding the Department of Commerce from (i) returning cash deposits collected on "prior unliquidated entries" on the basis of the WTO-inconsistent antidumping or countervailing duty order, (ii) declining to conduct an administrative review for such entries and (iii)

[121] We note that it is not in dispute that a revocation would not apply to "prior unliquidated entries". See Canada's Second Oral Statement, para. 26; US Second Submission, para. 19; US reply to Panel Question 46.

[122] US Second Submission, para. 19.

[123] As we have noted above with respect to methodology cases, it might be the case that, because section 129(c)(1) limits the application of a revocation to entries that take place after the implementation date, "prior unliquidated entries" would remain subject to other provisions of US antidumping or countervailing duty laws which might, for instance, *require* the Department of Commerce to assess definitive antidumping or countervailing duties with respect to "prior unliquidated entries" on the basis of the old, WTO-inconsistent antidumping or countervailing duty order or might *preclude* the Department of Commerce from declining to assess such duties with respect to such entries. However, in such instances, it would not be because of section 129(c)(1) that the Department of Commerce would be required to take, or be precluded from taking, such action with respect to "prior unliquidated entries", but because of those other provisions of US law. Since the measure before us is section 129(c)(1), we are not called on to make findings regarding whether any other provisions of US law would require the United States to take any of the actions which Canada has identified and considers contrary to WTO law.

declining to make administrative review determinations with respect to such entries on the basis of the WTO-inconsistent antidumping or countervailing duty order. In support of this assertion, Canada argues that, but for the existence of section 129(c)(1), the revocation of an antidumping or countervailing duty order would apply not only to entries that occur on or after the implementation date, but also to "prior unliquidated entries". According to Canada, the Department of Commerce would then be required to return cash deposits collected on "prior unliquidated entries" on the basis of the WTO-inconsistent order, and could neither conduct administrative reviews for such entries nor assess duties on such entries.

6.86 The premise of Canada's argument, as we understand it, is that, if there were no section 129(c)(1), a section 129 determination which was implemented, including one which results in the revocation of an antidumping or countervailing duty order, would apply to all unliquidated entries, i.e., "prior unliquidated entries" and future entries.[124] We are not convinced of the validity and relevance of Canada's premise. Indeed, if there were no section 129(c)(1), there would be no effective date for the application of section 129 determinations which the USTR directs to implement. In this regard, it seems to us that the very existence of section 129(c)(1) suggests that it may be necessary, for the purposes of US law, to provide for an effective date for the application of section 129 determinations. In fact, the United States has specifically stated that, in the absence of section 129(c)(1), it would be necessary to establish an effective date for determinations implemented under section 129.[125] Canada has offered nothing in rebuttal of this argument.

6.87 Even disregarding the issue of the effective date and accepting that, in the absence of section 129(c)(1), a revocation would apply to "prior unliquidated entries" as well, we fail to see how this would demonstrate that section 129(c)(1) has the effect of precluding the Department of Commerce from returning cash deposits on "prior unliquidated entries", declining to hold administrative reviews for such entries and declining to assess duties with respect to such entries.

6.88 Indeed, if there were no section 129(c)(1) and a provision like section 129(c)(1) was subsequently enacted, the consequence of this would be that section 129 determinations would not apply to "prior unliquidated entries". As we have said, this would mean that the Department of Commerce would then not be required, as a matter of US law, to return cash deposits collected on such entries based on the WTO-inconsistent antidumping or countervailing duty order, to decline to hold administrative reviews for such entries and to decline to assess duties with respect to such entries on the basis of the WTO-inconsistent order. Moreover, as we have also observed, it would not follow from the fact that a revocation would then be inapplicable to "prior unliquidated entries" that the Department of Commerce could not return cash deposits collected on "prior unliquidated entries", could not decline to hold administrative reviews with respect to such entries and could not decline to assess duties with respect to such entries.

6.89 Other than the evidence and arguments we have previously considered in the context of methodology cases, Canada has offered no specific arguments or evidence in support of its assertion that the enactment of section 129(c)(1) would nevertheless have the effect, in revocation cases, of precluding any of the actions mentioned in the previous paragraph. Whilst we consider that the evidence and arguments adduced by Canada in the context of methodology cases are applicable, *mutatis mutandis*, in the context of revocation cases as well, it should be recalled that we have found the evidence and arguments in question to be insufficient to sustain Canada's assertions in the context of methodology cases. We see no basis for considering that, notwithstanding this finding, the same evidence and arguments support Canada's assertions in the context of revocation cases.

6.90 In particular, if the Department of Commerce, in revocation cases, did *not* retain cash deposits collected on "prior unliquidated entries" on the basis of the WTO-inconsistent antidumping or

[124] Canada's reply to Panel Question 6.
[125] US reply to Panel Question 6.

countervailing duty order, did *not* conduct administrative reviews with respect to such entries or did *not* assess definitive antidumping or countervailing duties with respect to such entries, it would not, in our view, be "circumventing" the limitation in section 129(c)(1) or "materially undermining" the effect of the wording in section 129(c)(1).[126] Section 129(c)(1) only addresses the application of section 129 determinations. It does not require or preclude any particular actions with respect to "prior unliquidated entries" in a separate segment of the same proceeding. Nor do we consider that if the Department of Commerce did *not* retain cash deposits collected on "prior unliquidated entries" on the basis of the WTO-inconsistent order, did *not* conduct administrative reviews with respect to such entries or did *not* assess duties with respect to such entries, it would render section 129(c)(1) ineffective or meaningless. Furthermore, the return of cash deposits collected on "prior unliquidated entries", the absence of administrative reviews with respect to such entries or the non-assessment of definitive duties with respect to such entries would not, in our view, be inconsistent with the likely intent of the US Congress in enacting section 129(c)(1), *viz*., to ensure implementation of an adverse DSB ruling only with respect to post-implementation entries.

6.91 In the light of the foregoing considerations, we provisionally find that Canada has failed to establish that, in revocation cases, section 129(c)(1), by itself, has the effect of precluding the Department of Commerce from returning cash deposits collected on "prior unliquidated entries" based on the WTO-inconsistent antidumping or countervailing duty order, declining to hold administrative reviews for such entries or declining to assess duties with respect to such entries. Based also on the above considerations, we provisionally find that the evidence and arguments presented by Canada are, likewise, insufficient to establish that, in revocation cases, section 129(c)(1) has the effect of requiring the Department of Commerce to retain cash deposits collected on "prior unliquidated entries" based on the WTO-inconsistent antidumping or countervailing duty order, conduct an administrative review for such entries or make administrative review determinations with respect to such entries on the basis of the WTO-inconsistent order.

Conclusion

6.92 As we have noted at para. 6.59, our findings at this stage of our examination are provisional. As a result, we do not, at this point, offer any conclusions regarding whether Canada has succeeded in demonstrating that, with respect to "prior unliquidated entries", section 129(c)(1) has the effect of requiring and/or precluding any of the actions identified by Canada.

6.93 With the above provisional findings in mind, we can proceed to consider whether the SAA supports Canada's assertions regarding the "effects" of section 129(c)(1).

(b) Statement of Administrative Action

6.94 For the purposes of examining whether the SAA supports Canada's assertions regarding the "effects" of section 129(c)(1), it is well once again to set out in full the portion of the SAA which both parties consider to be relevant to the Panel's examination of section 129(c)(1). The portion in question -- the first paragraph of section B.1.c.(3) of the SAA -- reads as follows:

> Consistent with the principle that GATT panel recommendations apply only prospectively, subsection 129(c)(1) provides that where determinations by the ITC or Commerce are implemented under subsections (a) or (b), such determinations have

[126] We once again note that we are not called on, in this case, to make findings regarding whether provisions of US law other than section 129(c)(1) would preclude the Department of Commerce from returning cash deposits collected on "prior unliquidated entries" on the basis of the WTO-inconsistent antidumping or countervailing duty order, from declining to conduct administrative reviews with respect to such entries or from declining to assess duties with respect to such entries on the basis of the WTO-inconsistent order.

> prospective effect only. That is, they apply to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption on or after the date on which the Trade Representative directs implementation. Thus, relief available under subsection 129(c)(1) is distinguishable from relief available in an action brought before a court or a NAFTA binational panel, where, depending on the circumstances of the case, retroactive relief may be available. Under 129(c)(1), if implementation of a WTO report should result in the revocation of an antidumping or countervailing duty order, entries made prior to the date of Trade Representative's direction would remain subject to potential duty liability.[127]

(i) Arguments of the parties

6.95 **Canada** submits that this statement confirms its interpretation of section 129(c)(1). Canada notes that the SAA specifically addresses the situation where an antidumping or countervailing duty order is revoked based on a new determination by the Department of Commerce or the ITC. Canada recalls that the SAA specifically states that, in such situations, "[unliquidated] entries made prior to the date of [USTR's] direction [to implement] would remain subject to potential duty liability". Canada further recalls that, in the US duty assessment system, definitive duty liability for imports subject to an antidumping or countervailing duty order is determined in an administrative review proceeding. In Canada's view, the aforementioned sentence therefore confirms that (1) the administrative review procedure for "prior unliquidated entries" will continue pursuant to an order that was found to be WTO-inconsistent and (2) the definitive duty liability for such entries will be determined by the Department of Commerce without regard to the new, WTO-consistent determination.

6.96 Canada also argues that it is clear from the SAA that implementation of an adverse DSB ruling is contemplated exclusively with respect to entries after the Implementation date. Canada recalls that the referenced passage of the SAA specifically states that determinations to implement DSB rulings apply to "unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption on or after the date on which the Trade Representative directs implementation". Canada further points out that the SAA, in the portion at issue, states that "relief available under subsection 129(c)(1) is distinguishable from relief available in an action brought before a court or a NAFTA binational panel, where, depending on the circumstances of the case, retroactive relief may be available". Canada notes, in this regard, that there is no mention in the SAA that such "retroactive relief" would be available in conjunction with administrative review determinations. Indeed, according to Canada, it would be inconsistent with the SAA if the Department of Commerce were to implement an adverse DSB ruling in respect of "prior unliquidated entries" in subsequent administrative reviews. In Canada's view, section 129(c)(1) is, therefore, intended to have legal effect in administrative reviews of "prior unliquidated entries".

6.97 The **United States** disagrees with Canada regarding its interpretation of the language in the SAA to the effect that "prior unliquidated entries" would "remain subject to potential duty liability" in cases where an antidumping or countervailing duty order is revoked based on a new section 129 determination. The United States does not consider that this language supports Canada's assertion that section 129(c)(1) mandates WTO-inconsistent action. The United States argues that section 129(c)(1) does not mandate or preclude any particular treatment of "prior unliquidated entries". According to the United States, the aforementioned language in the SAA does not change this fact. The United States considers that the language in question simply reflects the fact that a section 129 determination itself would not resolve whether "prior unliquidated entries" would be subject to definitive duty liability. Moreover, the United States notes that, in any event, all that the

[127] SAA, section B.1.c.(3), first paragraph, p. 1026.

SAA states is that "prior unliquidated entries" would "remain subject to potential duty liability". The United States points out that the SAA does not say that the Department of Commerce is required to apply duties to such entries.

6.98 With respect to Canada's argument that it would be inconsistent with the SAA if the Department of Commerce were to implement a DSB ruling in respect of "prior unliquidated entries" in subsequent administrative reviews, the United States notes that the SAA does not say, as Canada suggests, that a DSB ruling will not be implemented with regard to "prior unliquidated entries". Rather, the United States argues, what the SAA actually states is that a *section 129 determination* will have prospective effect only. In the view of the United States, the SAA is therefore consistent with the language of section 129(c)(1) itself. The United States further submits that the SAA says nothing about the treatment to be accorded to "prior unliquidated entries" in any other segment of the proceeding. Therefore, the United States does not agree with Canada that the SAA supports the view that section 129(c)(1) is intended to have legal effect in administrative reviews of "prior unliquidated entries". The United States adds, in this respect, that this view is, in any event, contradicted by the text of section 129(c)(1) itself.

(ii) Evaluation by the Panel

6.99 The **Panel** considers that, for the purposes of analysis, the first paragraph of section B.1.c.(3) of the SAA can usefully be broken up into three parts. The Panel will discuss those in turn, conscious that it is dealing with one single paragraph.

6.100 The *first* part which we single out for separate analysis reads:

> Consistent with the principle that GATT panel recommendations apply only prospectively, subsection 129(c)(1) provides that where determinations by the ITC or Commerce are implemented under subsections (a) or (b), such determinations have prospective effect only. That is, they apply to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption on or after the date on which the Trade Representative directs implementation.

6.101 We understand the logic and structure of these two sentences to be as follows: In the first sentence, the assertion is made that GATT panel recommendations have prospective effect and that, therefore, section 129(c)(1) provides that section 129 determinations, too, "have prospective effect only". The second sentence then explains what is meant by the statement that section 129 determinations "have prospective effect only". That explanation is provided in terms of the language actually used in section 129(c)(1) itself. Although it is not explicitly stated, it is implied in the two sentences that if a section 129 determination were applied to "prior unliquidated entries", this would, in the terminology of the SAA, be viewed as a "retroactive" application.

6.102 We think that our understanding of the effect of section 129(c)(1) is consistent with these two sentences. The first sentence makes it quite clear that it is "such determinations", i.e., section 129 determinations, that have prospective effect only. There is no reference in the two sentences to anything other than section 129 determinations. Specifically, nothing in these sentences indicates that section 129(c)(1) is intended to have the effect of precluding the Department of Commerce from making administrative review determinations with respect to "prior unliquidated entries" on the basis of a WTO-consistent methodology developed in a section 129 determination.[128] We do not, therefore,

[128] In our view, the fact that there is no mention in the two sentences, or elsewhere in the portion in question, of the possibility of making administrative review determinations with respect to "prior unliquidated entries" on the basis of a WTO-consistent methodology developed in a section 129 determination does not, in itself, support the conclusion that section 129(c)(1) is intended to preclude that possibility.

agree with Canada that it would be inconsistent with the SAA if the Department of Commerce were to make such administrative review determinations.

6.103 Moving on, then, to the *second* part of the relevant passage of the SAA, we note that that part consists of only one sentence, which provides:

> Thus, relief available under subsection 129(c)(1) is distinguishable from relief available in an action brought before a court or a NAFTA binational panel, where, depending on the circumstances of the case, retroactive relief may be available.

6.104 This sentence contrasts relief available under section 129(c)(1), which it characterizes as "prospective", with relief available in an action brought before a US court or a NAFTA binational panel, which it characterizes as (potentially) "retroactive". Canada has stated, in this regard, that if the US Court of International Trade or a NAFTA Chapter Nineteen panel finds that a determination of the Department of Commerce or the ITC is inconsistent with US domestic law, all entries of the subject merchandise would be liquidated in accordance with the adverse decision, including unliquidated entries that took place before the adverse decision.[129]

6.105 As we read it, the above-quoted sentence simply confirms that relief available *under section 129(c)(1)* is different from relief available under certain other provisions of US law and that *section 129(c)(1)*, unlike those other provisions of US law, is intended to provide relief only for post-implementation entries. The sentence does not state, explicitly or by implication, that section 129(c)(1) is intended to have the effect of precluding the Department of Commerce from providing relief for "prior unliquidated entries" through a mechanism other than the section 129 mechanism. More specifically, the sentence does not say that section 129(c)(1) is intended to have the effect of precluding the Department of Commerce from making administrative review determinations with respect to "prior unliquidated entries" on the basis of a WTO-consistent methodology developed in a section 129 determination.

6.106 We would agree with Canada that the sentence at issue tends to support the view that implementation of an adverse DSB ruling was "contemplated exclusively with respect to entries after the Implementation date".[130] However, as we have stated above, we consider that the fact that the United States may have sought, via section 129(c)(1), to ensure implementation only with respect to post-implementation entries does not mean that it intended to *preclude* implementation with respect to "prior unliquidated entries".[131] In any event, the sentence in question does not suggest to us that section 129(c)(1) was intended to have that effect.

6.107 Finally, we need to examine the *third* part of the relevant passage of the SAA, which, again, consists of only one sentence. It reads:

> Under 129(c)(1), if implementation of a WTO report should result in the revocation of an antidumping or countervailing duty order, entries made prior to the date of Trade Representative's direction would remain subject to potential duty liability.

6.108 The first thing that should be noted regarding this sentence is that it directs itself exclusively to situations where a section 129 determination results in the revocation of an antidumping or countervailing duty order. This noted, we understand the sentence to provide confirmation that if, pursuant to section 129(c)(1), an antidumping or countervailing duty order is revoked, the revocation

[129] In support of its statement, Canada refers to 19 U.S.C. § 1516a(c)(1) and (e) (1994). The United States has not contested Canada's statement.

[130] Canada's reply to Panel Question 79(b).

[131] As we have said, the intention of the US Congress may simply have been not to take any *particular* steps to ensure implementation with respect to "prior unliquidated entries".

would apply only to post-implementation entries and that, as a result, the relevant antidumping or countervailing duty order would continue to apply to "prior unliquidated entries". The statement in the above-quoted sentence to the effect that "prior unliqudated entries" "would remain subject to potential duty liability" supports our understanding. Indeed, as Canada itself has stated, a final antidumping or countervailing duty order "imposes potential duty liability on entries subject to that order".[132] Thus, in our understanding, the sentence is intended to indicate that, notwithstanding the fact that an antidumping or countervailing duty order may have been revoked, under section 129(c)(1), with respect to post-implementation entries, the relevant order would continue to apply to "prior unliquidated entries".

6.109 In Canada's view, the sentence in question confirms that, *because of section 129(c)(1)*, the administrative review process "will" continue with respect to "prior unliquidated entries" and administrative review determinations "will" be made with respect to such entries without regard to the fact that the order has been found to be WTO-inconsistent. We are not persuaded by Canada's reading of the sentence in question. As we have said, the sentence at issue simply clarifies that a revocation determination that is implemented under section 129 would not have any impact on "prior unliquidated entries".

6.110 To be sure, the above-quoted sentence affirmatively states that "prior unliquidated entries" would remain subject to potential duty liability. It is conceivable, therefore, that administrative reviews would be conducted with respect to "prior unliquidated entries" and that administrative review determinations would be made with respect to such entries on the basis of a WTO-inconsistent antidumping or countervailing duty order. However, it is clear to us that such actions, if taken, would not be taken because they were required by section 129(c)(1), but because they were required or allowed under other provisions of US law. At any rate, we see nothing in the above-quoted sentence which would suggest that section 129(c)(1) is intended to have the effect of requiring such actions.

6.111 Having regard to the foregoing considerations, we find that our reading of section 129(c)(1) is fully consistent with the first paragraph of section B.1.c.(3) of the SAA. Based on the same considerations, we further find that Canada has failed to establish that, in view of section B.1.c.(3) of the SAA, a US court would interpret section 129(c)(1) as having the effect of requiring and/or precluding any particular treatment of "prior unliquidated entries" after the implementation date.[133]

6.112 We note that Canada has also referred us to the third paragraph of section B.1.c.(5) of the SAA, which states:

> Since implemented determinations under section 129 may be appealed, it is possible that Commerce or the ITC may be in a position of simultaneously defending determinations in which the agency reached different conclusions. In such situations, the Administration expects that courts and [NAFTA] binational panels will be sensitive to the fact that under the applicable standard of review, as set forth in statute and case law, multiple permissible interpretations of the law and the facts may be legally permissible in any particular case, and the issuance of a different determination under section 129 does not signify that the initial determination was unlawful.

6.113 According to Canada, this paragraph makes clear that more than one interpretation of US antidumping or countervailing duty laws may be permissible and that multiple permissible interpretations would, in fact, be expected in the light of section 129(c)(1). Canada appears to infer from this that section 129(c)(1) must be read to preclude the Department of Commerce from making

[132] Canada's Second Submission, footnote 13.

[133] We recall that section 129(c)(1) implies that a section 129 determination can only be applied to post-implementation entries.

administrative review determinations with respect to "prior unliquidated entries" consistently with a WTO-consistent interpretation or methodology adopted in a section 129 determination.[134]

6.114 Canada has not explained to our satisfaction how the above-quoted paragraph of the SAA supports its reading of section 129(c)(1). Even assuming that the paragraph in question established, as Canada seems to suggest, that, because of the operation of section 129(c)(1), the Department of Commerce could apply one interpretation of US laws to post-implementation entries and, at the same time, apply another to "prior unliquidated entries", we do not think that it would necessarily follow from this that the Department of Commerce could not apply a uniform interpretation to all entries. Even if at the time the SAA was agreed multiple statutory interpretations were expected in the light of section 129, as Canada appears to argue, this does not, in our view, support the conclusion that section 129(c)(1) is intended to have the effect of precluding the Department of Commerce from making administrative review determinations with respect to "prior unliquidated entries" on the basis of interpretations developed in a section 129 determination. We are, therefore, not persuaded that, in view of the third paragraph of section B.1.c.(5) of the SAA, we should adopt a different reading of section 129(c)(1).

(c) Application of section 129(c)(1) to date

6.115 As the **Panel** has noted above, before reaching any conclusions on Canada's assertions regarding the "effect" of section 129(c)(1), it will briefly consider the application of section 129(c)(1) to date, thus taking due account of the evidence submitted on this point by the United States.

(i) Arguments of the parties

6.116 The **United States** recalls that in the six years since section 129(c)(1) entered into force, it has been applied to two antidumping or countervailing duty investigations. The United States points out that both instances involved the DSB ruling in *United States – Antidumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*[135]. In that case, the Department of Commerce made new, WTO-consistent final determinations for the two investigations covered by the DSB ruling. Those determinations were then implemented with respect to all entries taking place on or after the date of implementation. According to the United States, the Department of Commerce has since completed the first administrative reviews of the antidumping orders covering the products in question. The United States notes that some of the issues raised in the WTO dispute were no longer relevant in the administrative reviews. The United States points out, however, that as far as currency conversions are concerned, the Department of Commerce examined the same types of transactions that were at issue in the WTO dispute. The United States asserts that, with respect to the issue of currency conversions, the Department of Commerce acted consistently with the DSB ruling.

6.117 **Canada** did not specifically discuss the application of section 129(c)(1).

(ii) Evaluation by the Panel

6.118 The **Panel** begins by noting that it is not aware, and has not been made aware, of any judicial interpretations of section 129(c)(1).

6.119 As for administrative practice under section 129(c)(1), the Panel notes that it is not in dispute that, to date, the Department of Commerce has applied section 129(c)(1) on only two occasions, both involving implementation of the DSB ruling in *US – Stainless Steel.*

[134] Canada's reply to Panel Question 68(b).

[135] Panel Report, *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea* ("*US – Stainless Steel*"), WT/DS179/R, adopted 1 February 2001.

6.120 In this context, it seems that, in a recent administrative review of the US antidumping order on stainless steel plate in coils from Korea, the Department of Commerce made administrative review determinations with respect to "prior unliquidated entries" after the implementation date.[136] According to the United States, the issues addressed in the DSB ruling were either not relevant to the administrative review in question or else were resolved in a manner consistent with the DSB ruling. Canada has not contested the US statement regarding compliance with the DSB ruling in *US – Stainless Steel*.

6.121 In view of the foregoing, we find that the evidence before us relating to the application of section 129(c)(1) to date does not support Canada's view that section 129(c)(1) has the effect of requiring and/or precluding any of the actions which it has identified.

(d) Conclusion

6.122 The **Panel** recalls that it has considered relevant portions of the SAA and the evidence relating to the application of section 129(c)(1) to date and that it has found that both elements support its provisional findings at paras. 6.67-6.91 regarding the "effects" of section 129(c)(1) as enacted.

6.123 Thus, having regard to its detailed examination of section 129(c)(1) as enacted, of relevant portions of the SAA and of the application of section 129(c)(1) to date, the Panel concludes that Canada has failed to establish that section 129(c)(1), read in the light of the SAA:

(a) has the effect of requiring the Department of Commerce:

(i) to conduct administrative reviews with respect to "prior unliquidated entries" after the implementation date pursuant to an antidumping or countervailing duty order found by the DSB to be WTO-inconsistent;

(ii) to make administrative review determinations regarding dumping or subsidization with respect to "prior unliquidated entries" after the implementation date pursuant to an antidumping or countervailing duty order found by the DSB to be WTO-inconsistent;

(iii) to assess definitive antidumping or countervailing duties with respect to "prior unliquidated entries" after the implementation date pursuant to an antidumping or countervailing duty order found by the DSB to be WTO-inconsistent; or

(iv) to retain cash deposits in respect of "prior unliquidated entries" after the implementation date at a level found by the DSB to be WTO-inconsistent; or

(b) has the effect of precluding the Department of Commerce from:

(i) making administrative review determinations regarding dumping or subsidization with respect to "prior unliquidated entries" after the implementation date in a manner that is consistent with an adverse DSB ruling;

(ii) assessing definitive antidumping or countervailing duties with respect to "prior unliquidated entries" after the implementation date in a manner that is consistent with an adverse DSB ruling; or

[136] *Stainless Steel Plate in Coils From the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 66 Fed. Reg. 64017 (Dec. 11, 2001) (exhibit US-10)

(iii) refunding, after the implementation date, cash deposits collected on "prior unliquidated entries" pursuant to an antidumping or countervailing duty order found by the DSB to be WTO-inconsistent.

5. Whether section 129(c)(1) mandates the United States to take any of the actions and/or not to take any of the actions identified by Canada

6.124 The **Panel** has concluded in Subsections C.3 and C.4 above that, as a matter of US law, section 129(c)(1) does not require (or have the effect of requiring) or preclude (or have the effect of precluding) any of the actions identified by Canada.[137] On the basis of these factual conclusions, we must now assess whether Canada has established that, as a matter of WTO law, section 129(c)(1) mandates the United States to take any of the actions identified by Canada and/or mandates the United States not to take any of the actions identified by Canada.

6.125 We have previously stated that, in the circumstances of this case, if Canada does not succeed in demonstrating, as a matter of US law, that section 129(c)(1) requires (or has the effect of requiring) or precludes (or has the effect of precluding) any of the actions identified by Canada, it will not have established, as a matter of WTO law, that section 129(c)(1) "mandates" the United States to take any of those actions or "mandates" the United States not to take any of those actions.[138]

6.126 Accordingly, since we have concluded that Canada has failed to demonstrate that, as a factual matter, section 129(c)(1) requires (or has the effect of requiring) or precludes (or has the effect of precluding) any of the actions identified by it, we further conclude that Canada has failed to establish that, as a matter of WTO law, section 129(c)(1) mandates the United States to take any of those actions or mandates the United States not to take any of those actions.

6. Whether the actions identified by Canada, if taken or not taken, would infringe the WTO provisions that it has invoked

6.127 Since the **Panel** has concluded in Subsection C.5 that Canada has not succeeded in establishing that section 129(c)(1) mandates the United States to take any of the actions specified by Canada and/or mandates the United States not to take any of the actions specified by Canada, the Panel, consistently with its analytical approach outlined in Section B, considers it unnecessary to proceed with its analysis of Canada's principal claims.

6.128 As a consequence, we do not assess whether Canada's principal claims are based on a correct interpretation of the WTO provisions which Canada invokes in support of those claims.[139] Nor do we assess whether Canada has met its burden of establishing that the actions which Canada alleges the United States, under section 129(c)(1), is mandated to take or mandated not to take are inconsistent with the relevant WTO provisions.

7. Overall conclusion with respect to Canada's principal claims

6.129 In the light of all its findings and conclusions in Section C, the **Panel** concludes that Canada has failed to establish that section 129(c)(1) is inconsistent with Articles VI:2, VI:3 and VI:6(a) of the

[137] For a description of the actions identified by Canada see, *supra*, paras. 6.31 and 6.32.

[138] See *supra*, footnote 75.

[139] We realize that our decision to examine first whether section 129(c)(1) mandates the United States to take any of the actions identified by Canada and/or mandates the United States not to take any of the actions identified by Canada could be construed to imply acceptance of Canada's premise that such actions, if taken or not taken, would be contrary to the WTO provisions invoked by Canada. However, no conclusions should be drawn from the structure and sequence of our findings as to whether we agree or disagree with Canada's premise.

GATT 1994; Articles 1, 9.3, 11.1 and 18.1 of the AD Agreement; or Articles 10, 19.4, 21.1 and 32.1 of the SCM Agreement.

6.130 In reaching this conclusion, we note that Canada has requested us to make a specific finding in response to a statement made by the United States. Canada's request stems from the US statement that the Department of Commerce has the legal authority to implement an adverse DSB ruling with respect to "prior unliquidated entries" by applying a WTO-consistent methodology to such entries in the context of an administrative review which concludes after the implementation date.[140] Canada requests that if the Panel accepts that such action is consistent with section 129(c)(1), it find that the relevant statement of the United States (i) expresses the official position of the United States in a manner that can be relied on by all Members, and (ii) is an undertaking that the United States will interpret its domestic laws and regulations to apply an adverse DSB ruling to "prior unliquidated entries".[141]

6.131 We understand the United States to have made the statement in question by way of an argument in the alternative, to be considered in the event that we find that the United States is obligated, as a matter of WTO law, to implement adverse DSB rulings with respect to "prior unliquidated entries".[142] As noted in Subsection C.6 above, we do not, in this case, make any findings on this issue. Consequently, we cannot address Canada's request for an additional finding.

D. CANADA'S CONSEQUENTIAL CLAIMS

6.132 The **Panel** recalls that Canada has made consequential claims under Article 18.4 of the AD Agreement, Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement.

6.133 As we have observed in Section B above, Canada argues that section 129(c)(1) is inconsistent with Article 18.4 of the AD Agreement, Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement because it is inconsistent with the WTO provisions invoked by Canada in support of its principal claims. Since we have concluded in Section C that Canada has not succeeded in demonstrating that section 129(c)(1) contravenes any of the WTO provisions relied on by Canada, we must, therefore, find that Canada has not succeeded in establishing its consequential claims under Article 18.4 of the AD Agreement, Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement.

6.134 In the light of this, we conclude that Canada has failed to establish that section 129(c)(1) is inconsistent with Article 18.4 of the AD Agreement, Article 32.5 of the SCM Agreement or Article XVI:4 of the WTO Agreement.

VII. CONCLUSION

7.1 For the reasons set forth in this report, the **Panel** concludes that Canada has failed to establish that section 129(c)(1) of the Uruguay Round Agreements Act is inconsistent with:

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[140] Canada's request is based on the US reply to Panel Question 84(a). We see nothing in that reply which would indicate that the United States "will" act in a particular way. To the contrary, the United States simply states what it "might" do in hypothetical circumstances. Moreover, we note that the US reply to Panel Question 84(a) addresses a situation where section 129(c)(1) would not be implicated. This said, it is correct that the United States has stated that the Department of Commerce has the legal authority to implement an adverse DSB ruling with respect to "prior unliquidated entries" by applying a WTO-consistent methodology to such entries in the context of an administrative review which concludes after the implementation date. See US reply to Panel Question 91.

[141] Canada's comments on the US reply to Panel Question 84.

[142] US Second Submission, para. 10; US Second Oral Statement, para. 9; US Second Closing Statement, para. 4.

(a) Article VI:2, VI:3 and VI:6(a) of the GATT 1994;

(b) Articles 1, 9.3, 11.1 and 18.1 and 18.4 of the AD Agreement;

(c) Articles 10, 19.4, 21.1, 32.1 and 32.5 of the SCM Agreement; and

(d) Article XVI:4 of the WTO Agreement.

7.2 In the light of its conclusion, the Panel makes no recommendations under Article 19.1 of the DSU.