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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 J4t 0 TD -0.2854 Tc 082.1les 10, h 2001, er

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 1pu5323 T3connecnti5 of the Do6

129(c)(1) operates in the context of the US system of retrospective assessment of

(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

> (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—
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> (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
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> (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.
>
> (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.
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> (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.

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.

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[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

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

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

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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

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

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

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(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

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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

3.97 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

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[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

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)

(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.

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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

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

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 Dagl has ade thrmi342tgthey are not
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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

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

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

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.

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

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

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

(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 167 Tw (129(c)(1).) Tj
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(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

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?

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.

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]

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*

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]

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

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[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

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

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

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

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"

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

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 .15rtions(129(csh.1773 Tc 1.7711 0c 0 h TD baes, the i-0.10 TDis easues addrlig370 TDl7,3lTc 3 248.25

(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 cons89 .f -0.tes"0 -12.75 TDit, we further conclude that Canada has failed to establish

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

(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.