UNITED STATES – ANTI-DUMPING MEASURES ON CERTAIN FROZEN WARMWATER SHRIMP FROM VIET NAM

(AB-2015-1 / DS429)

APPELLEE SUBMISSION OF THE UNITED STATES OF AMERICA

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SERVICE LIST

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I. INTRODUCTION AND EXECUTIVE SUMMARY

1. This dispute primarily involves antidumping determinations made by the U.S. Department of Commerce (Commerce) with respect to certain warmwater shrimp from Vietnam. The Panel conducted a thorough analysis of Vietnam's factual and legal arguments, ultimately upholding some of Vietnam's claims and rejecting others as to those determinations. Neither party has chosen to appeal any of those findings. In addition, Vietnam's case includes an additional, unusual claim: that a provision of U.S. law providing one administrative mechanism for compliance with Dispute Settlement Body (DSB) recommendations and rulings – namely, Section 129(c)(1) of the Uruguay Round Agreements Act (URAA) – is inconsistent "as such" with Articles 1, 9.2, 9.3, 11.1 and 18.1 in the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (AD Agreement). This claim is unusual in that Vietnam does not argue that this provision caused any WTO inconsistency with respect to the specific antidumping determinations at issue, and the dispute included no "as applied" claim with respect to Section 129(c)(1). Furthermore, over 12 years ago, the WTO-consistency of this same provision was the sole issue in a dispute, and the report adopted by the DSB found that Section 129(c)(1) did not breach WTO rules.[1] Yet, Vietnam chose to add into this dispute a second "as such" challenge to Section 129(c)(1) – fundamentally the same as that rejected by the DSB long ago.

2. In so doing, Vietnam misunderstands both the scope of Section 129(c)(1) – because it does not preclude the United States from taking any actions necessary to implement DSB recommendations and rulings – and the nature of an "as such" claim – which (as the Appellate Body and numerous panels have concluded) are founded on the notion that a measure may be inconsistent irrespective of its application if the measure requires WTO-inconsistent action or precludes a Member from taking WTO-consistent action.[2] The Panel, on the other hand, carefully considered Vietnam's arguments and properly found Vietnam's claim to be without merit. On appeal, Vietnam does not argue that that the Panel made incorrect legal interpretations in rejecting Vietnam's "as such" challenge to the U.S. statute. Instead, Vietnam's sole argument is that the Panel failed to make an "objective assessment of the matter before it" with respect to Section 129(c)(1) in finding that provision does not preclude the United States from taking actions to implement DSB recommendations and rulings. As will be explained in this submission, Vietnam has no basis for this claim under Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), and therefore the Appellate Body should uphold the Panel's finding.

3. The Panel thoroughly considered the evidence provided by Vietnam and made extensive and well-supported factual findings in concluding that Section 129(c)(1) does not – as Vietnam argued – preclude, or otherwise act as a bar to, implementing DSB recommendations and rulings as to what Vietnam deems "prior unliquidated entries."[3] Contrary to Vietnam's arguments to the

[1] *See generally US – Section 129(c)(1) URAA*.

[2] *Korea – Commercial Vessels*, para. 7.63; *US – Carbon Steel (India) (AB)*, para. 4.483.

[3] Panel Report, paras. 7.270-271. As explained by the Panel, Vietnam defines "prior unliquidated entries" as "imports made prior to the date on which the Section 129 determination takes effect (date of implementation) and for which there is no definitive assessment of anti-dumping duty liability (the final duty rate and duty have not yet been established) as of that date." Panel Report, para. 7.237 & n. 329.

Appellate Body, the Panel's conclusion was based on the record evidence, and rested upon proper sources under U.S. municipal law – the plain meaning of the text of Section 129(c)(1),[4] a correct understanding of the statutory scheme (*i.e.*, the context) in which Section 129(c)(1) operates,[5] as well as findings regarding the Statement of Administrative Action accompanying the Uruguay Round Agreements Act (SAA),[6] U.S. practice,[7] and decisions from U.S. domestic courts.[8] In all respects, the Panel properly concluded that Vietnam had failed to prove its claim as a matter of fact after reviewing the evidence on the record. The Panel's findings in this regard are well-supported and, of note, fully consistent with those adopted by the DSB in the panel report in *US – Section 129(c)(1) URAA*.[9] Vietnam's argument that the Panel's review of the evidence was not objective is wholly baseless.

4. Vietnam also asks the Appellate Body to "complete the analysis" in the event Vietnam's Article 11 claim is upheld. As the United States explains below, Vietnam presents no valid basis for any "as such" finding against Section 129(c)(1) because, *inter alia*, Articles 1, 9.2, 9.3, 11.1 and 18.1 of the AD Agreement do not speak to a Member's implementation obligations. In any event, under any possible reading of the statute, Section 129(c)(1) is not "as such" inconsistent with the AD Agreement because it does not mandate WTO-inconsistent action or preclude WTO-consistent action.

II. ARGUMENT

A. The Panel's Finding That Section 129(c)(1) Does Not Preclude Implementation of DSB Recommendations and Rulings is Fully Consistent with the Panel's Duty Under Article 11 of the DSU

5. Vietnam claims that the Panel breached its duty under Article 11 of the DSU in making the factual finding that Vietnam had "failed to establish that Section 129(c)(1) precludes implementation, with respect to prior unliquidated entries, of DSB recommendations and rulings."[10] Put another way, Vietnam argues that the Panel erred when it did not find that "Section 129(c)(1) as a factual matter acted as a legal bar – or precludes – implementation with respect to prior unliquidated entries."[11] Vietnam asks the Appellate Body to reverse the Panel's factual finding, complete the analysis, and find that Section 129(c)(1) breaches Articles 1, 9.2, 9.3, 11.1 and 18.1 of the AD Agreement.

6. For the reasons set forth below, Vietnam has failed to establish that the Panel breached its duty under Article 11 of the DSU (or for that matter committed any error whatsoever) when it

[4] Panel Report, paras. 7.259-260.

[5] Panel Report, para. 7.260.

[6] Panel Report, paras. 7.261-262.

[7] Panel Report, paras. 7.263-264.

[8] Panel Report, paras. 7.267-269.

[9] *US – Section 129(c)(1) URAA*, paras. 6.54-114.

[10] Vietnam's Appellant Submission, para. 6 (citing Panel Report, para. 8.1.h.); Vietnam's Notice of Appeal, para. 5.

[11] Vietnam's Appellant Submission, para. 45 (emphasis added).

found that Section 129(c)(1) does not prevent the United States from implementing recommendations and rulings by the DSB, including with regard to prior unliquidated entries. Vietnam's claim should, therefore, be rejected.

1. Vietnam Contests a Finding of Fact by the Panel Under Article 11 of the DSU

7. Article 11 of the DSU provides, in relevant part:

Function of Panels

> The function of panels is to assist the DSB in discharging its responsibilities under {the DSU} and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.

8. The Appellate Body in *China – Rare Earths (AB)* observed that "{a}llegations implicating a panel's appreciation of facts and evidence fall under Article 11 of the DSU."[12] Where claims relate to a panel's weighing of the evidence, they are primarily factual in nature and such claims are properly addressed under Article 11 of the DSU as challenges to the objectivity of the panel's assessment of the facts.[13]

9. The United States does agree with Vietnam that the interpretation of the scope of the measure at issue under U.S. municipal law (here, whether Vietnam is correct that Section 129 mandates or precludes that the United States take certain actions in the course of implementing DSB recommendations vis-à-vis prior unliquidated entries) is one of the facts to be assessed by the panel in the course of the proceeding. Having determined the facts, the panel must then proceed to employ those facts in addressing the legal issues of the applicability of and conformity of the measure at issue with the covered agreements (including any necessary interpretations of covered agreements).

10. This analytic approach is reflected in the structure of Vietnam's appeal, which firsts asks the Appellate Body, pursuant to a claim under Article 11 of the DSU, to reverse the Panel's factual finding as to whether Section 129(c)(1) mandates or precludes certain actions as to prior unliquidated entries. Vietnam then asks the Appellate Body to complete the analysis and find that Section 129(c)(1) is inconsistent with the AD Agreement because of what Vietnam argues is the impact on such entries.

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[12] *China – Rare Earths (AB)*, para. 5.173.

[13] *China – Rare Earths (AB)*, para. 5.174 (citing *EC – Seal Products (AB)*, para. 5.243).

11. The United States also takes note of the findings in *US – Section 301 Trade Act* that a panel's mandate is:

> to examine Sections 301-310 {the challenged U.S. measure} solely for the purpose of determining whether the US meets its WTO obligations. In doing so, we do not, as noted by the Appellate Body in *India – Patents (US)*, interpret US law "as such", the way we would, say, interpret provisions of the covered agreements. We are, instead, called upon to establish the meaning of Sections 301-310 as factual elements and to check whether these factual elements constitute conduct by the US contrary to its WTO obligations. The rules on burden of proof for the establishment of facts referred to above also apply in this respect.[14]

12. The Appellate Body has, in turn, observed that whether an examination by a panel of municipal law is a question of law or fact "depends on the circumstances of each case."[15] Under this approach, in light of the circumstances of this dispute and, in particular, Vietnam's specific claims (and alleged errors) and the types of evidence adduced by Vietnam, Vietnam's claims here are questions of fact.[16] In particular, Vietnam's argues before the Appellate Body that the Panel:

- failed "to perform an objective assessment of the matter before it;"[17]
- ignored or failed to address adequately evidence provided by Vietnam;[18]
- refused to "objectively seek to understand … through a close examination of context;"[19] and
- formed conclusions "not supported by the record before the Panel."[20]

In short, Vietnam claims that the Panel was not objective, ignored or failed to address relevant evidence, and made unsupported conclusions, which are all within the scope of Article 11 of the DSU.

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[14] *US – Section 301 Trade Act*, para. 7.18.

[15] *US – Countervailing and Anti-Dumping Measures (AB)*, para. 4.101.

[16] Given Vietnam's appeal and the nature of its claims of error, the United States will not address the issue generally whether the scope and meaning of a Member's measure is to be determined as an issue of fact under that Member's municipal law or as an issue of WTO law under the covered agreements for purposes of WTO dispute settlement. However, we do note that Vietnam's arguments on the effect of Section 129(c)(1) are allegations of action (or inaction) required of the United States under its law, and it is those actions (or inactions) that are alleged to breach a WTO obligation.

[17] Vietnam's Appellant Submission, paras. 15, 76-77.

[18] *E.g.*, Vietnam's Appellant Submission, paras. 25, 54.

[19] Vietnam's Appellant Submission, para. 43.

[20] Vietnam's Appellant Submission, para. 54.

13. In this regard, the Appellate Body report in *US – Carbon Steel (AB)* is especially informative. In that dispute, the European Communities (EC) appealed the panel's failure to accord weight to the SAA and failure to draw the correct inferences from the practice of Commerce in applying the U.S. measure at issue.[21] The Appellate Body analyzed these claims under the standard set forth in Article 11 of the DSU. Vietnam makes the same or similar claims in this appeal. In sum, Vietnam claims that the Panel failed to do the type of "further examination" into Section 129(c)(1) involving "factual elements" that, according to the Appellate Body in both *US – Carbon Steel (AB)* and *China – Auto Parts (AB),* are factual determinations.[22]

14. For these reasons, the United States agrees with Vietnam that the type of arguments raised by Vietnam involve a claim under Article 11 of the DSU. Of course, however, the United States disagrees with Vietnam's assertions that it has shown that the Panel breached its duty under Article 11.[23]

2. The Applicable Standard of Review Under Article 11 of the DSU

15. The Appellate Body has stated that an Article 11 claim is a "very serious allegation"[24] that requires the appellant to demonstrate "egregious error" by the panel.[25] To rise to the level of an Article 11 violation, a mistake on the part of the panel must constitute a deliberate disregard of evidence or gross negligence amounting to bad faith.[26] As the Appellate Body in *EC – Fasteners (China)* observed:

[21] *US – Carbon Steel (AB)*, paras. 143, 146.

[22] *E.g.*, Vietnam's Appellant Submission, para. 83 (arguing that "{t}here is no discussion of any of this context …, the specific SAA language, {or Commerce's} characterization of Section 129(c)(1)"); *China – Auto Parts (AB)*, para. 225.

[23] *E.g.*, Vietnam's Appellant Submission, para. 105 (arguing that "Vietnam was denied an objective and detailed examination, inconsistent with Article 11 of the DSU.").

[24] *E.g., US – Zeroing (EC) (AB)*, para. 253.

[25] *EC – Hormones (AB)*, para. 133.

[26] *EC – Hormones (AB)*, paras. 133 and 138.

> {N}ot every error allegedly committed by a panel amounts to a violation of Article 11 of the DSU. It is incumbent on a participant raising a claim under Article 11 on appeal to explain why the alleged error meets the standard of review under that provision. An attempt to make every error of a panel a violation of Article 11 of the DSU is an approach that is inconsistent with the scope of this provision. In particular, when alleging that a panel ignored a piece of evidence, the mere fact that a panel did not explicitly refer to that evidence in its reasoning is insufficient to support a claim of violation under Article 11. Rather, a participant must explain why such evidence is so material to its case that the panel's failure explicitly to address and rely upon the evidence has a bearing on the objectivity of the panel's factual assessment. It is also unacceptable for a participant effectively to recast its arguments before the panel under the guise of an Article 11 claim. Instead, a participant must identify specific errors regarding the objectivity of the panel's assessment.[27]

16. Panels enjoy discretion as to the relative weight assigned to a particular piece of evidence on the panel record, and the Appellate Body will not "interfere lightly" with the panel's fact-finding authority.[28] The Appellate Body in *EC – Hormones (AB)* observed that "it is generally within the discretion of the Panel to decide which evidence it chooses to utilize in making findings."[29] In particular, as noted by the Appellate Body in *China – Auto Part (AB)*, the Appellate Body "will not lightly interfere with a panel's finding" as to the relative weight to be given to various pieces of evidence as to the correct understanding of a Member's municipal law.[30] A review of Vietnam's claims shows that it has raised the types of arguments regarding a Member's municipal law that, as observed by the Appellate Body in *US – Countervailing and Anti-Dumping Measures (AB)*, are not subject to "full appellate review."[31]

17. For the reasons set forth below, the alleged errors claimed by Vietnam are simply not errors, let alone the type of "egregious errors" that undermine the objectivity of the Panel's assessment of Section 129(c)(1) vis-à-vis prior unliquidated entries. Vietnam has not, therefore, established a violation by the Panel of Article 11 of the DSU.[32] In fact, Vietnam's claims under Article 11 of the DSU are so poorly substantiated that we encourage the Appellate Body, as in *China – Rare Earths (AB)*, to remind Members again that they should:

[27] *EC – Fasteners (China) (AB)*, para. 442.

[28] *EC – Sardines (AB)*, para. 299.

[29] *EC – Hormones (AB)*, para. 135.

[30] *China – Auto Parts (AB)*, para. 225.

[31] *US – Countervailing and Anti-Dumping Measures (AB)*, para. 4.99.

[32] *China – Rare Earths (AB)*, para. 5.180.

> consider carefully when and to what extent to challenge a panel's assessment of a matter pursuant to Article 11, bearing in mind that an allegation of violation of Article 11 is a very serious allegation. This is in keeping with the objective of the prompt settlement of disputes, and the requirement in Article 3.7 of the DSU that Members exercise judgement in deciding whether action under the WTO dispute settlement procedures would be fruitful.[33]

18. Finally, the United States takes note that to the extent that Vietnam attempts to place new factual evidence on the record that was not before the Panel to support its appeal, those attempts must be rejected.[34] Vietnam cannot support a claim under Article 11 of the DSU – alleging a failure to make an objective assessment of the factual record – based on evidence that was not on the record in the panel proceeding.

3. Vietnam Has Not Shown That the Panel Failed to Make an Objective Assessment of Section 129(c)(1)

19. As set forth below, the Panel's conclusion that Section 129(c)(1) does not preclude WTO-consistent treatment of prior unliquidated entries rested upon the plain meaning of the text of Section 129(c)(1),[35] a proper understanding of the statutory scheme in which Section 129(c)(1) operates,[36] as well as findings regarding the SAA,[37] U.S. practice,[38] and decisions from U.S. domestic courts.[39] They were also consistent with the panel's report in *US – Section 129(c)(1) URAA.*

a. Background and History of Section 129(c)(1)

20. When the DSB adopts recommendations and rulings, a Member whose measure is found to be inconsistent with the covered agreement must decide how to respond and, if it chooses to implement the recommendations and rulings, determine how to do so. In many instances, the Member concerned may have no pre-established mechanism under municipal law specifically for this purpose and will, consequently, adapt some existing mechanism or adopt a new one for that purpose.[40]

21. The U.S. Congress is empowered to regulate trade and, as such, has extensive authority to take action to implement DSB recommendations and rulings.[41] In addition to more general

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[33] *China – Rare Earths (AB),* para. 5.228.

[34] *E.g.*, Vietnam's Appellant Submission, para. 18 & nn. 11 (citing a report on statutory interpretation that does not appear to be on the Panel record).

[35] Panel Report, paras. 7.259-260.

[36] Panel Report, para. 7.260.

[37] Panel Report, paras. 7.261-262.

[38] Panel Report, paras. 7.263-264.

[39] Panel Report, paras. 7.267-269.

[40] *China – GOES (Article 21.3(c))*, para. 3.26 (accepting China's argument that it did not have a pre-existing mechanism to implement DSB recommendations and rulings in that dispute).

[41] Panel Report, paras. 7.248,7.625.

sources of authority, the legislation passed in 1994 in response to the Uruguay Round Agreements added two new mechanisms explicitly for the purpose of implementing DSB recommendations and rulings: Sections 123 and 129 of the URAA,[42] the latter of which is the subject of this appeal. Importantly, Congress continues to retain all of its authority to act to bring the United States into compliance with WTO obligations.[43] Sections 123 and 129, while they are important mechanisms the United States may use to come into compliance with DSB recommendations and ruling, are not the exclusive means of doing so.

22. By way of background, Section 123(g)(1) establishes a mechanism for U.S. authorities to make changes in Commerce regulations or practice to render them consistent with DSB recommendations and rulings.[44] Under this provision, "the regulation or practice at issue may be amended, rescinded, or otherwise modified upon the fulfilment of a series of procedural steps, including consultations between the relevant agency, USTR, and the appropriate congressional committees."[45]

23. Section 129(c)(1) addresses the implementation of a determination *made under Section 129* in response to DSB recommendations and rulings to unliquidated entries of subject merchandise entered on or after the date that USTR directs implementation. Section 129(c)(1) states in its entirety:

> **(c) Effects of Determinations; Notice of Implementation.--**
>
> (1) **Effects of determinations**. – Determinations concerning title VII of the Tariff Act of 1930 *that are implemented under this section shall* apply with respect to unliquidated entries of the subject merchandise (as defined in section 771 of that Act) that are entered, or withdrawn from warehouse, for consumption on or after--
>
> (A) in the case of a determination by the Commission under subsection (a)(4), the date on which the Trade Representative directs the administering authority under subsection (a)(6) to revoke an order pursuant to that determination, and
>
> (B) in the case of a determination by the administering authority under subsection (b)(2), the date on which the Trade Representative directs the administering authority under subsection (b)(4) to implement that determination. (Emphasis added.)[46]

Section 129(c)(1) does not speak to other actions that the United States may take to comply with DSB recommendations and rulings.

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[42] *See* Section 123 of the URAA, 19 U.S.C. § 3533 (Exhibit US-10); Section 129 of the URAA, 19 U.S.C. § 3538 (Exhibit VN-31).

[43] Panel Report, paras. 7.248,7.625.

[44] *See* Section 123 of the URAA, 19 U.S.C. § 3533 (Exhibit US-10).

[45] Panel Report, para. 7.241.

[46] Section 129 of the URAA, 19 U.S.C. § 3538 (Exhibit VN-31).

24. The panel in *US – Section 129(c)(1) URAA* found that Section 129(c)(1) is not inconsistent, as such, with several provisions of the AD Agreement because Section 129 is not the exclusive means of implementing DSB recommendations and rulings and because Section 129(c)(1) does not mandate or preclude any particular treatment of prior unliquidated entries or have the effect thereof.[47] The panel in that dispute found that "only determinations made and implemented under section 129 are within the scope of section 129(c)(1)"[48] and that "section 129(c)(1) only addresses the application of section 129 determinations. It does not require or preclude any particular actions with respect to {other entries} in a separate segment of the same proceeding."[49] The panel further found that Section 129(c)(1) does not have *the effect* of requiring the United States to take action with respect to other entries subject to a separate segment of the same proceeding.[50]

25. With respect to prior unliquidated entries, the panel in *US – Section 129(c)(1) URAA* found that Commerce had the authority to conduct segments of administrative proceedings (*e.g.*, annual administrative reviews of prior entries) that impact those entries in a WTO-inconsistent manner. "However, it is clear to us that such actions, if taken, would not be taken because they were required by section 129(c)(1), but because they were required or allowed under other provisions of US law."[51] Indeed, the panel found that such action by Commerce would not come as a result of action taken pursuant to Section 129, but instead through "*separate determinations* made in *separate segments* of the same proceeding and *under separate provisions* of US antidumping or countervailing duty laws, such as administrative review determinations."[52] Thus, the panel in that dispute, in a finding echoed by the Panel in this dispute,[53] correctly determined

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[47] *See US – Section 129(c)(1) URAA*, paras. 6.54-114. Vietnam offered nearly identical claims to those raised by Canada in *U.S.—Section 129(c)(1) URAA*. *See* Vietnam Panel Request at 11-12 (where Vietnam asserts that Section 129(c)(1) necessarily results in a breach of United States obligations under Articles 1, 9.2., 9.3, 11.1, and 18.1 of the AD Agreement) (Exhibit VN-02); *US – Section 129(c)(1) URAA*, para. 6.27 (where Canada claims that Section 129(c)(1) necessarily results in a breach of United States obligations under Articles 1, 9.3, 11.1, and 18.1 of the AD Agreement, among other provisions).

[48] *US – Section 129(c)(1) URAA*, para. 6.53.

[49] *US – Section 129(c)(1) URAA*, para. 6.80. An administrative review is one segment of many that may be conducted within a single administrative proceeding. Commerce's regulations define a "segment" of a proceeding as follows:

> (i) *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 {Tariff Act of 1930, as amended}.
>
> (ii) *Examples.* An antidumping or countervailing duty investigation or a review of an order or suspended investigation, or a scope inquiry under § 351.225, each would constitute a segment of a proceeding.

19 C.F.R. § 351.102(47) (Exhibit US-01).

[50] *US – Section 129(c)(1) URAA*, paras. 6.68-69, 6.71-73, 6.76, 6.83-84; *see also ibid.* at paras. 6.105-06, 6.109-10, 6.114 (finding that the SAA supports these conclusions).

[51] *US – Section 129(c)(1) URAA*, para. 6.110.

[52] *US – Section 129(c)(1) URAA*, para. 6.71.

[53] Panel Report, para. 7.262 & nn. 378.

that Section 129(c)(1) does not govern the treatment of unliquidated entries of subject merchandise that are the subject of other segments of the same proceeding, such as in administrative reviews under the relevant antidumping or countervailing duty order.

26. These findings remain as true today as they were when the panel examined the U.S. system for implementing DSB recommendations and rulings in *US – Section 129(c)(1) URAA.* Section 129 remains the same and has not been amended.

b. Vietnam Misconstrues the Plain Text of Section 129(c)(1) as Well as the Panel's Analysis

27. Vietnam argues that Section 129 is the "exclusive authority to implement adverse WTO determinations by means of a new administrative determination."[54] Vietnam further claims that because Section 129(c)(1) "{o}n its face, … explicitly limits any legal effect given a Section 129 determination in relation to {prior} unliquidated entries" Section 129(c)(1) is inconsistent with Articles 1, 9.2, 9.3, 11.1, and 18.1 of the AD Agreement.[55] As shown below, the Panel properly found that the text of Section 129(c)(1) does not support Vietnam's claim.

28. The text of Section 129(c)(1) states that it applies only to determinations "implemented under this section".[56] The plain text shows that Section 129(c)(1) addresses the implementation of determinations *made under Section 129* in response to DSB recommendations and rulings to unliquidated entries of subject merchandise entered on or after the date USTR directs implementation.[57] That is all. Section 129(c)(1) simply does not speak to other actions that may be taken consistent with DSB recommendations and rulings.

29. The Panel properly reached the same conclusion. According to the Panel, "Section 129(c)(1) sets out when revised determinations made pursuant to the Section 129 mechanism take effect"; however, "on its face, {it does not} have any effect with respect to prior unliquidated entries."[58] Similar to the panel in *US – Section 129(c)(1) URAA*, the Panel found that "it is clear . . . that prior unliquidated entries are unaffected by a Section 129 determination" and that "Section 129(c)(1) does not, by its express terms, require or preclude any particular action with respect to prior unliquidated entries."[59] As a result, the Panel concluded that "Section 129(c)(1) cannot be found to preclude implementation of DSB recommendations and rulings with respect to such prior unliquidated entries."[60]

30. The Panel also correctly rejected Vietnam's argument that, in establishing an effective date for Section 129 determinations, Section 129(c)(1) precludes WTO-consistent treatment of

[54] Vietnam's Appellant Submission, para. 82 (emphasis added).

[55] Vietnam's Appellant Submission, para. 73.

[56] Section 129(c)(1) of the URAA (19 U.S.C. § 3538) (Exhibit VN-31).

[57] Section 129(c)(1) of the URAA (19 U.S.C. § 3538) (Exhibit VN-31).

[58] Panel Report, para. 7.259.

[59] Panel Report, para. 7.259 (citing *US – Section 129(c)(1) URAA*, para. 6.55).

[60] Panel Report, para. 7.259.

prior unliquidated entries. For the Panel, "{t}he fact that . . . Section 129 may be the only explicit statutory provision governing the effective date of US Government determinations to implement DSB recommendations and rulings in our view cannot justify an interpretation of the statute {(*i.e.*, that Section 129(c)(1) precludes WTO-consistent treatment of prior unliquidated entries via other mechanisms)} that is unsupported by its terms."[61]

31. Vietnam "accepts that the statutory text of Section 129" supports such a finding, but nevertheless disagrees with it.[62] However, in so doing, Vietnam offers no reason for its disagreement. Instead, Vietnam offers a conclusion without accompanying analysis. Vietnam's conclusory argument is unconvincing, and most certainly does not support a finding that the panel breached its duty under Article 11 of the DSU by making an egregious error.

32. In the same vein, the fact that Section 129 permits Commerce to make new, WTO-consistent determinations that replace the original, WTO-inconsistent determinations does not transform Section 129 into the exclusive mechanism for implementing DSB recommendations and rulings.[63] To the contrary, as the Panel properly concluded, "Section 129(c)(1) 'does not, by its express terms, require or preclude any particular action with respect to prior unliquidated entries."[64] Still less does the text indicate that it is the exclusive mechanism for implementing DSB recommendations and rulings. And Vietnam has pointed to nothing in the text of Section 129 to the contrary.

33. Like the panel in *US – Section 129(c)(1) URAA*, the Panel also found that other provisions of U.S. law, not Section 129(c)(1), would be the source of any WTO-inconsistent treatment of prior unliquidated entries on an "as applied" basis, such as those governing annual administrative reviews.[65] Indeed, the Panel noted that although Commerce may assess dumping duties on prior unliquidated entries in a WTO-inconsistent, "as applied" manner, "it would not be because of Section 129(c)(1) that {Commerce} would be required to take, or be precluded from taking, such actions, but because of those other provisions of US law."[66]

34. Vietnam claims that the Panel committed egregious error when it purportedly ended its analysis after finding "silence" in Section 129(c)(1) regarding prior unliquidated entries. The Panel did no such thing; to the contrary, the Panel found that the United States could address (and, in fact, has addressed) prior unliquidated entries though other mechanisms, thereby negating Vietnam's claim that Section 129(c)(1) precludes the United States from implementing DSB recommendations and rulings with respect to prior unliquidated entries.[67] As explained in more detail below, specifically, the Panel found that the United States had:

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[61] Panel Report, para. 7.259 (emphasis added).

[62] Vietnam's Appellant Submission, para. 76.

[63] Vietnam's Appellant Submission, para. 50.

[64] Panel Report, para. 7.259 (citing *US – Section 129(c)(1) URAA*, para. 6.55).

[65] Panel Report, para. 262 & nn. 378.

[66] Panel Report, para. 7.260 (citing *US – Section 129(c)(1) URAA*, nn. 112, 123, and 126).

[67] Panel Report, para. 7.265-66.

> effectively demonstrated that in a situation in which a Section 129 determination is implemented with respect to entries made after that determination, and an administrative review is conducted with respect to prior unliquidated entries, the relevant authority (USDOC or USITC) may, in that subsequent administrative review, act in accordance with the relevant DSB recommendations and rulings.[68]

35. The Panel further found that the SAA "confirms that which is readily apparent from the text of Section 129(c)(1), i.e., that implementation through Section 129 determinations only has effects with respect to entries that are made after the implementation date.[69] Thus, the Panel did not end its analysis with the text of Section 129(c)(1) as alleged by Vietnam, and its claims to the contrary should be rejected.

36. Vietnam also misconstrues the Panel's findings when it (incorrectly) asserts that the Panel relied on "silence" vis-à-vis Section 129(c)(1) and prior unliquidated entries. The Panel did not, as Vietnam asserts, rely on silence in interpreting the text of Section 129(c)(1). Rather, the Panel noted that Section 129(c)(1) sets out explicitly when revised determinations made pursuant to the Section 129 mechanism take effect.[70] That is not silence, but rather the fact that Section 129(c)(1) is limited, by the plain meaning of the text, only to determinations "implemented under this section" (*i.e.*, Section 129).[71]

37. In sum, the Panel did not commit egregious error in its analysis of the text of Section 129(c)(1). Vietnam's arguments that the Panel failed to make an objective assessment under Article 11 of the DSU therefore fail.

c. The Panel Properly Found That Other U.S. Measures Confirmed Its Understanding of the Plain Text of Section 129(c)(1)

38. Vietnam is also incorrect when it argues that the Panel failed to conduct a "holistic" analysis of Section 129(c)(1).[72] As discussed below, the Panel did conduct a holistic analysis and properly considered other U.S. measures in its analysis.[73]

39. In particular, and apart from Section 129, there are other mechanisms by which the United States could comply, and has complied, with DSB recommendations and rulings with respect to prior unliquidated entries, further disproving Vietnam's claim that Section 129(c)(1) is a legal bar to the WTO-consistent treatment of prior unliquidated entries.[74] One example is

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[68] Panel Report, para. 7.266.

[69] Panel Report, para. 7.262.

[70] Panel Report, para. 7.259.

[71] Section 129(c)(1) of the URAA (19 U.S.C. § 3538) (Exhibit VN-31).

[72] Vietnam's Appellant Submission, para. 43.

[73] Panel Report, para. 7.265.

[74] *US – Section 129(c)(1) URAA*, para. 6.71.

Section 123 of the URAA.[75] As previously mentioned, Section 123(g) addresses changes in agency regulations or practice to render them consistent with DSB recommendations and rulings.

40. The adoption of a change pursuant to Section 123 could result in WTO-consistent determinations in administrative reviews covering prior unliquidated entries. For example, the date on which a change is implemented under Section 123 could be before the implementation date of a determination made under Section 129. The Panel properly recognized that the United States could avail itself of this mechanism and afford WTO-consistent treatment to prior unliquidated entries.[76]

41. Indeed, the United States has afforded WTO-consistent treatment to prior unliquidated entries, as the Panel found and Vietnam's own evidence in this dispute demonstrates. For example, in response to DSB recommendations and rulings, Commerce made new, WTO-consistent determinations and implemented them at USTR's direction under Section 129.[77] The new determinations made pursuant to Section 129 affected entries "entered or withdrawn from warehouse, for consumption, on or after June 8, 2012."[78] Meanwhile, Commerce conducted administrative reviews of these antidumping duty orders[79] and applied to prior unliquidated entries (*i.e.*, entries that entered between July 1, 2010, and June 30, 2011) a methodology

[75] *See* Section 123 of the URAA, 19 U.S.C. § 3533 (Ex. US-10).

[76] Panel Report, paras. 7.265-266.

[77] *See Notice of Implementation of Determination Under Section 129 of the Uruguay Round Agreements Act: Stainless Steel Plate in Coils From Belgium, Steel Concrete Reinforcing Bars From Latvia, Purified Carboxymethylcellulose From Finland, Certain Pasta From Italy, Purified Carboxymethylcellulose From the Netherlands, Stainless Steel Wire Rod From Spain, Granular Polytetrafluoroethylene Resin From Italy, Stainless Steel Sheet and Strip in Coils From Japan*, 77 Fed. Reg. 36,257 (June 18, 2012) ("*Section 129 Notice*") (Exhibit VN-42, Determination 19-1). Vietnam argues that in this notice Commerce describes Section 129 as the exclusive mechanism for implementing DSB recommendations and rulings. Vietnam's Appellant Submission, para. 24. Vietnam places too much emphasis on the article "the" in the cited passage and omits relevant context. It is unremarkable that Commerce cited the statutory provision governing its determination in that notice (given it was a Section 129 determination), and reliance upon Section 129 does not mean that other mechanisms were not available. As we discuss below, Commerce afforded WTO-consistent treatment to prior unliquidated entries in administrative reviews for which the agency also issued Section 129 determinations, and what an agency may have said in a particular determination does not change the scope of possible action for complying with DSB recommendations and rulings under U.S. law.

[78] *See Section 129 Notice*, p. 36,260 (Exhibit VN-42, Determination 19-1).

[79] *See, e.g., Purified Carboxymethylcellulose from the Netherlands: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Intent to Rescind*, 77 Fed. Reg. 46,024 (Aug. 2, 2012) (in which Commerce applied new methodology for calculating weighted-average dumping margins and assessment rates for entries entered or withdrawn from warehouse, for consumption, between July 1, 2010, and June 30, 2011) (Exhibit US-18); *Certain Pasta from Italy: Notice of Preliminary Results of Antidumping Duty Administrative Review, Preliminary No Shipment Determination and Preliminary Intent to Revoke Order, in Part*, 77 Fed. Reg. 46,377 (Aug. 3, 2012) (in which Commerce applied new methodology for calculating weighted-average dumping margins and assessment rates for entries entered or withdrawn from warehouse, for consumption, between July 1, 2010, and June 30, 2011) (Exhibit US-19), unchanged in 78 Fed. Reg. 9,364 (Feb. 8, 2013) (Exhibit US-19); and *Purified Carboxymethylcellulose from Finland; Notice of Preliminary Results of Antidumping Duty Administrative Review*, 77 Fed. Reg. 47,036 (Aug. 7, 2012) (in which Commerce applied new methodology for calculating weighted-average dumping margins and assessment rates for entries entered or withdrawn from warehouse, for consumption, between July 1, 2010, and June 30, 2011) (Exhibit US-20).

specifically developed under Section 123 to address DSB recommendations and rulings.[80] The Panel explained that these instances "effectively demonstrated" that the United States "is not precluded from implementing DSB recommendations and rulings with respect to prior unliquidated entries."[81]

42. Regarding this evidence, Vietnam concedes on appeal that it:

> agreed with the United States that under certain factual scenarios, actions under these distinct provisions of U.S. law may intersect between the amendment of a regulation or practice under Section 123 on the one hand, and the application of the amended regulation or practice in the context of a Section 129 proceeding on the other.[82]

Thus, Vietnam undermines the basis for its claimed error as it recognizes Section 129(c)(1) does not "serve as an absolute legal bar" vis-à-vis prior unliquidated entries – one means for addressing these entries is an administrative review utilizing a modified methodology as a result of a Section 123 determination, which is wholly unaffected (let alone precluded) by Section 129(c)(1).

43. Apart from Section 123, the United States also may afford WTO-consistent treatment to prior unliquidated entries through legislation. Congress may enact legislation that achieves compliance with respect to prior unliquidated entries, either through an act aimed directly at specific unliquidated entries or a change in the antidumping law that would impact unliquidated entries, for example, through the administrative review process (much like a Section 123 determination). The fact that legislation can (and has) brought the United States into compliance with DSB recommendations and rulings is directly at odds with Vietnam's central assertion – *i.e.*, that Section 129(c)(1) is the sole mechanism by which the United States can come into compliance with DSB recommendations and rulings and, therefore, precludes the United States from bringing a measure into compliance with some future DSB recommendation and ruling vis-à-vis prior unliquidated entries.[83]

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[80] *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings; Final Modification*, 77 Fed. Reg. 8,101 (Feb. 14, 2012) (Exhibit VN-55). Commerce developed this methodology pursuant to Section 123 of the URAA. *See ibid.*, p. 8102 (Exhibit VN-55).

[81] Panel Report, para. 7.266. The Panel went further, explaining that

> Vietnam does not dispute the accuracy of the examples cited by the United States, but merely contests their relevance. That the United States authorities proceed in this fashion in our review disproves Viet Nam's argument that the United States Government is in some general way precluded from "implementing" DSB recommendations and rulings with respect to prior unliquidated entries. Moreover, it further confirms our view that Section 129 does not itself preclude the United States from implementing adverse DSB recommendations and rulings with respect to prior unliquidated entries.

Ibid., para. 7.266.

[82] Vietnam's Appellant Submission, para. 25.

[83] Pursuant to legislative action, the U.S. Congress has implemented DSB recommendations and rulings by passing new laws related to trade remedies. For example, in March 2012, Congress passed a law commonly known as the "*GPX* legislation" partly in response to DSB recommendations and rulings on alleged double remedies in the context of countervailing duty proceedings. *See* Pub. L. No. 112-99, § 2, 126 Stat. 265, 265-66 (2012) (Exhibit US-

44. In this vein, Vietnam attempts, without success, to undermine the significance of the fact that legislative action can afford WTO-consistent treatment to prior unliquidated entries.[84] Vietnam asserts that such action does not prevent Section 129(c)(1) from being found to be WTO-inconsistent because:

> the fact that a WTO-inconsistency can be remedied through future legislation does not in any way address the issue of whether existing legislation is WTO-inconsistent. Under this rationale, no WTO-inconsistent practice could ever be found to be "as such" inconsistent because new legislation to eliminate the WTO-inconsistent practice is always an available mechanism to cure the inconsistency.[85]

45. Vietnam's argument is facile, and misses the point. Recall that Vietnam's argument is that Section 129(c)(1) *precludes* certain actions necessary to achieve compliance. If Vietnam were correct, then any new legislation that accomplished these actions would have to amend or over-ride Section 129(c)(1)'s supposed legal bar as to the WTO-consistent treatment of prior unliquidated entries. But specific legislation addressed to certain unliquidated entries would in no way result in any change, explicit or implicit, in the statute challenged by Vietnam (*i.e.*, Section 129(c)(1)). Rather, Section 129 is just a tool that provides certain authority to the Executive Branch, and Section 129(c)(1) precludes no actions by any branch of the U.S. Government.

46. As explained to the Panel,[86] the United States does not argue that Section 129(c)(1) is WTO-consistent because Congress can change Section 129 *itself* so that it applies to prior unliquidated entries. Rather, the United States submits that where action is to be taken in relation to prior unliquidated entries that are not addressed by action taken pursuant to administrative or other mechanisms, such action could be taken by means of legislation.[87] In other words, legislation represents another tool by which the United States, or any other WTO Member, can implement DSB recommendations and rulings. The United States has in fact taken this route for implementation in, for example, the *US – 1916 Act* dispute.[88]

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57). Moreover, in October 2005, Congress passed a law to repeal the U.S. law affecting antidumping and countervailing duty proceedings commonly known as the "Continued Dumping and Subsidy Offset Act," which the DSB had found to be WTO-inconsistent. *See* Pub. L. No. 109-171, § 7601, 120 Stat. 4, 154 (2005) (Exhibit US-58).

[84] Vietnam's Appellant Submission, para. 58.

[85] Vietnam's Appellant Submission, para. 58.

[86] U.S. Responses to First Panel Questions, para. 96.

[87] For example, and to address the hypothetical set forth in paragraph 66 of Vietnam's Appellant Submission, Congress could simply pass a law stating that "Commerce shall conduct a redetermination in the fourth, fifth, sixth, seventh and eight administrative reviews of the antidumping duty order on shrimp from Vietnam and apply such a redetermination to any unliquidated entries as of date X" or, similarly, that "unliquidated entries in the fourth, fifth, sixth, seventh and eight administrative reviews of the antidumping duty order on shrimp from Vietnam shall be liquidated at a rate of zero."

[88] *See* Miscellaneous Trade and Technical Corrections Act of 2004, Title II, § 2006(a), 118 Stat. 2434, 2597 (Exhibit US-80) (where Congress repealed the Act of September 8, 1916).

47. In addition, Vietnam alleges that mechanisms apart from Section 129 are "irrelevant" because implementation through those other means is not "automatic."[89] Vietnam cites no provision of any covered agreement to support its proposition that implementation must be automatic. Moreover, as we explain below, the question before the Panel was whether Section 129(c)(1) mandates or precludes particular action, not whether other mechanisms do so.

48. Vietnam alleges that, notwithstanding these examples, Section 123 and administrative reviews cannot reach prior unliquidated entries for which an administrative determination already has been issued (entries that Vietnam labels "Category 1" in its submission).[90] For Vietnam, the existence of Category 1 entries proves the WTO-inconsistency of Section 129(c)(1).[91]

49. Vietnam's argument is a complete *non sequitor*. To recall, Vietnam argues that the Panel made an egregious error in examining the factual record when the Panel rejected Vietnam's argument that Section 129(c)(1) precludes WTO-consistent treatment with respect to prior unliquidated entries. Recall further that Section 129(c)(1) makes no distinction between what Vietnam now calls Category 1 and Category 2 entities. Vietnam completely fails to explain how Section 129(c)(1) – the provision at issue – could mandate or preclude actions with respect to some entries and not others, when nothing in that provision makes the distinction upon which Vietnam now relies.

50. Indeed, as demonstrated above, there are a number of examples in which the United States has treated prior unliquidated entries in a WTO-consistent manner. That evidence alone disproves Vietnam's claim, which was based on the theory that Section 129(c)(1) mandated or precluded action vis-à-vis prior unliquidated entries. And, Vietnam presented no theory or evidence to the Panel (or, for that matter, to the Appellate Body) as to why Section 129(c)(1), the only challenged measure, would mandate or preclude action vis-à-vis certain unliquidated entries (*i.e.*, what Vietnam now calls Category 1 entries) but not others (*i.e.*, what Vietnam now calls Category 2 entries). This fact is reflected in the Panel's completely accurate characterization of Vietnam's claim:

> {i}n para. 213 of its first written submission, Viet Nam argues that Section 129(c)(1) "serves as an absolute legal bar to any refund of duties as prior unliquidated entries". In para. 223 of its first written submission, Viet Nam characterized Section 129(c)(1) as an "express prohibition against duty refunds for prior unliquidated entries" and a "rule with no discretion at all" established by Congress.[92]

51. Thus, in order to address Vietnam's theory that Section 129(c)(1) was an "absolute legal bar" or an "express prohibition," the Panel was well within its discretion to highlight the impact of Section 123 on so-called Category 2 entries (*i.e.*, prior unliquidated entries for which no final

[89] Vietnam's Appellant Submission, para.28.

[90] Vietnam's Appellant Submission, paras. 54-57 (discussing what Vietnam describes as "Category 1" entries), 61 (same).

[91] *Ibid.*

[92] Panel Report, para. 7.243 & nn. 348.

administrative determination has been issued),[93] which is wholly unaffected by Section 129(c)(1). This fact alone disproved Vietnam's understanding of Section 129(c)(1), as shown by the fact that when confronted with such evidence, Vietnam could only reply that such actions by the United States were "WTO-consistent action by coincidence."[94] But such alleged "coincidences" invalidate Vietnam's theory. The United States also notes that "the mere fact that a panel did not explicitly refer to that evidence in its reasoning {here, Category 1 entries} is insufficient to support a claim of violation under Article 11."[95]

52. The United States further notes that it does not accept the premise of Vietnam's distinction between Category 1 and Category 2 entries. Vietnam considers Category 1 entries to be entries for which the administrative review process is completed. But Vietnam fails to acknowledge that where there has been an initial administrative determination, the prior unliquidated entries remain unliquidated for the very reason that the entries are subject to domestic litigation, and domestic litigation may result in further administrative proceedings. Indeed, as Vietnam acknowledges, this very scenario occurred in some of the administrative proceedings that were in dispute in DS404.[96]

53. Under the U.S. system, courts generally do not modify administrative determinations, but – if a challenge is successful – remand the matter for further administrative proceedings. Indeed, Vietnam acknowledges[97] that Commerce could provide any such entries with WTO-consistent treatment "in the context of a judicial remand." Ironically, Vietnam disproves the significance of its own (new) theory. This is fatal to Vietnam's artificial category distinctions, and certainly provides no basis for a finding that the Panel somehow erred in not finding such artificial distinctions within the ambit of Section 129(c)(1).

54. To elaborate further, "in the context of a judicial remand," Commerce has the discretion to modify the applicable margins or even revoke an antidumping or countervailing duty order.[98] Based in part on this authority as well as the ability of the United States to enter into agreements with Members to settle WTO disputes, the United States liquidated so-called Category 1 entries without duties in the Softwood Lumber Agreement (circulated to Members as a mutually agreed solution) and revoked the orders at issue in that dispute retroactively.[99] As mentioned above, Vietnam also concedes that entries that were subject to administrative proceedings in dispute in

[93] Vietnam's Appellant Submission, para. 55.

[94] Panel Report, para. 7.266 & nn. 390.

[95] *EC – Fasteners (China) (AB)*, para. 442.

[96] Vietnam's Appellant Submission, para. 1.

[97] Vietnam's Appellant Submission, para. 66.

[98] This fact was offered in the U.S. Answers to Panel Questions Following the Second Meeting at para. 64, when the United States stated that such entries "shall be liquidated in accordance with the final court decision in the action." *See also* Vietnam's Appellant Submission, para. 63. There is nothing in Section 129(c)(1) to prevent Commerce from moving the CIT for a remand so as to revisit its final determination in an administrative review. Indeed, Commerce enjoys wide discretion to request that its determinations be voluntarily remanded.

[99] *See* United States – Reviews of Countervailing Duty on Softwood Lumber from Canada – Notification of Mutually Agreed Solution, Article III, WT/DS311/2 (16 November 2006).

DS404 were liquidated in a WTO-consistent manner in the context of a judicial remand.[100] These facts disprove Vietnam's claim as to Category 1 entries. It should also be noted that Congress could pass legislation that would impact prior unliquidated entries, notwithstanding a finished administrative review.

55. Although the main response of the United States to this argument by Vietnam is that the United States does not accept the Category 1 distinction and that the argument is otherwise incorrect, the United States also notes that the distinction between Category 1 entries and other entries (*e.g.*, Category 2) was not made to the panel during the panel proceeding. In particular, Vietnam's submissions make no mention of so-called Category 1 entries. Vietnam cannot seriously contend that a panel breaches Article 11 of the DSU – by failing to make an objective assessment of the matter – by not considering new arguments on facts never presented to the panel.

56. Vietnam's remaining arguments on the relevancy of Section 123 are also not persuasive. Vietnam contends that there are scenarios in which a Section 129 determination has been issued in the absence of a Section 123 determination;[101] however, that does not mean that Section 129(c)(1) would have required any particular treatment of prior unliquidated entries in those situations. Indeed, the panel in *US – Section 129(c)(1) URAA* found that Section 129(c)(1) did *not* require any particular treatment of prior unliquidated entries, concluding "that only determinations made and implemented under section 129 are within the scope of section 129(c)(1) and that such determinations are not applicable to 'prior unliquidated entries'."[102] The Panel in this dispute reached the same conclusion.[103]

57. In sum, Section 123 and congressional action are but two mechanisms within a larger domestic scheme by which the United States maintains the discretion to bring itself into compliance with DSB recommendations and rulings. Vietnam's attempts to have the Appellate Body analyze Section 129(c)(1) in isolation from other parts of this domestic scheme should be rejected. Section 129 is but one tool in a toolbox by which the United States can implement DSB recommendations and rulings, a point that Vietnam ultimately conceded before the Panel.[104] To insist, as Vietnam does, that the Panel should have engaged in a limited inquiry and

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[100] Vietnam's Appellant Submission, para. 1.

[101] Vietnam's Appellant Submission, para. 28.

[102] *US – Section 129(c)(1) URAA*, para. 6.53 and 6.80.

[103] Panel Report, para. 7.259.

[104] Vietnam's Answers to First Panel Questions, para. 69 ("In cases where the DSB has issued adverse findings with respect to 'actions' taken by U.S. administering authorities in the context of specific 'proceedings' under U.S. AD/CVD and safeguards law, Section 129 of the URAA is the immediate point of inquiry under U.S. law. Implementation under Section 129 is therefore distinguished from other forms of administrative implementation, including situations in which 'a dispute settlement panel or the Appellate Body finds in its report that a regulation or practice of a department or agency of the United States is inconsistent with any of the Uruguay Round Agreements . . .', which is the province of Section 123 of the URAA. … While the United States points out that it is possible for Section 123 and Section 129 to operate in sequence where a regulation or practice is first amended under Section 123 before it is applied to correct a specific action under Section 129, that is a fact specific scenario that is neither automatic nor in any way diminishes Viet Nam's claim regarding the legal effect given Section 129 determinations.").

ignore other relevant U.S. laws is a position that is inconsistent with the basic principles under which the DSB examines "as such" challenges to Members' measures.[105]

58. Accordingly, because Vietnam cannot rebut the fact that the United States has other options available under its domestic legal system to implement DSB recommendations and rulings with respect to prior unliquidated entries, the Panel correctly held that Vietnam failed to prove its claim as a matter of fact. Vietnam's claims that the Panel committed egregious error that calls into question its objectivity are baseless.

d. Vietnam Misinterprets the SAA

59. Vietnam argues that the SAA supports its claim that Section 129(c)(1) is the exclusive mechanism under which the United States complies with DSB recommendations and rulings.[106] Vietnam's argument fails, however, because the Panel addressed the relevance of the SAA and found that it did not support Vietnam's claim.[107]

60. In particular, Vietnam relies upon a passage from the SAA that states that "relief available under subsection 129(c)(1) is distinguishable from relief available in an action brought before a court or a NAFTA binational panel, where, depending on the circumstances of the case, retroactive relief may be available."[108] Vietnam's reliance is misplaced because this excerpt from the SAA does not in fact support Vietnam's assertion that Section 129(c)(1) bars any other acts (outside Section 129) that would impact prior unliquidated entries.

61. The language from the SAA on which Vietnam relies expressly addresses "relief available under subsection 129(c)(1)."[109] But that does not indicate in any way that this relief would be exclusive. Rather, the SAA plainly indicates that relief under Section 129 is *not* necessarily exclusive. The paragraph of the SAA immediately preceding the paragraph cited by Vietnam, factual evidence wholly ignored by Vietnam, acknowledges that there may be ways to implement DSB recommendations and rulings besides Section 129, such as through an administrative review.[110]

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[105] *See, e.g., US – Section 129(c)(1) URAA*, paras. 6.54-6.114 (comparing action taken pursuant to Section 129 with action taken pursuant to other U.S. measures to determine whether the former is WTO-consistent).

[106] *E.g.*, Vietnam's Appellant Submission, para. 80. Of note, we agree with Vietnam that the SAA is an authoritative interpretive tool. *See* Section 102(d) of the URAA, 19 U.S.C. § 3512(d) (explaining that Congress regards the SAA "as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and {the URAA} in any judicial proceeding in which a question arises concerning such interpretation or application") (Exhibit VN-33). The panels in both *US – Export Restraints* and in *US – Section 129(c)(1) URAA* accepted the legal status of the SAA as an authoritative interpretive tool of the URAA. *See US – Export Restraints*, paras. 8.93-98, 8.100; *US – Section 129(c)(1) URAA*, paras. 6.35-38.

[107] Panel Report, para. 7.262.

[108] Vietnam's Appellant Submission, para. 85; SAA, p. 1026 (Exhibit VN-34).

[109] SAA, p. 1026 (Exhibit VN-34).

[110] SAA, pp. 1025-1026 ("{f}urthermore, while subsection 129(b) creates a mechanism for making *new determination in response to a WTO report, new determinations may not be necessary in all situations.* In many instances, such as those in which a WTO report merely implicates the size of a dumping margin or countervailable subsidy rate (as opposed to whether a determination is affirmative or negative), *it may be possible to implement the*

62. In fact, the SAA plainly envisions scenarios such as the following: (1) an adverse WTO report finds that Commerce has applied a WTO-inconsistent methodology in an antidumping or countervailing duty proceeding, resulting in a rate of duty in excess of what would have been determined consistent with WTO rules; (2) the date that USTR directs implementation is (for example) January 1, 2008; (3) on January 1, 2008, as a consequence of the United States' retrospective assessment system, many entries under the relevant antidumping or countervailing duty order remain unliquidated (*e.g.*, entries during 2007 would be subject to an administrative review that would be initiated in early 2008 and not completed until late-2008 and would cover those 2007 entries).

63. Section 129(c)(1) does not prevent Commerce from changing the methodology to be applied in that review or from rendering determinations on prior unliquidated entries in that administrative review consistent with DSB recommendations and rulings. Indeed, as discussed above, Section 123 expressly provides for such changes.[111] The revised methodology could be applied to unliquidated entries that entered the United States during 2007, well before the implementation date under Section 129 (*i.e.*, January 1, 2008).[112] And as explained above, this very scenario – *i.e.*, in which Commerce developed a new methodology under Section 123 and applied it to prior unliquidated entries in an administrative review – has occurred in various proceedings. Indeed, Commerce has used Section 123 to implement DSB recommendations and rulings with regard to prior unliquidated entries, and neither Congress nor the Courts have voiced an objection to the agency's approach.

64. The Panel accurately confirmed this interpretation of the SAA, explaining that the text cited by Vietnam "merely confirms that which is readily apparent from the text of Section 129(c)(1), *i.e.*, that implementation through Section 129 determinations only has effects with respect to entries that are made after the implementation date."[113] Indeed, the Panel correctly concluded that "{n}othing in the SAA suggests that Section 129(c)(1) concerns itself with in any way, or itself has any effect on, prior unliquidated entries."[114]

65. Vietnam's remaining claims as to the SAA are similarly unfounded. Vietnam argues that the SAA was written with Congressional understanding that relief did not extend to prior unliquidated entries.[115] That statement is in error. The fact that Congress in the SAA explained that Section 129 provides Commerce with authority to ensure compliance as to a particular set of entries does not mean that Congress sought to preclude WTO-consistent action with respect to prior unliquidated entries. Indeed, the panel recognized this point in *US – Section 129(c)(1)*

WTO report recommendation in a future administrative review under section 751 of the Tariff Act.") (emphasis added) (Exhibit VN-34).

[111] *See* Section 123(g) of the URAA, 19 U.S.C. § 3533 (Ex. US-10).

[112] Because the potential to apply revised methodologies was well-understood, the SAA recognized that "new determinations {(under section 129)} may not be necessary in all situations." SAA, p. 1025 (Exhibit VN-34).

[113] Panel Report, para. 7.262.

[114] Panel Report, para. 7.262.

[115] Vietnam's Appellant Submission, para. 86.

URAA.[116] The Panel in this dispute also addressed Vietnam's arguments as to Congressional intent and found that Vietnam had failed to establish that Congress meant to preclude the WTO-consistent treatment of prior unliquidated entries through the enactment of Section 129(c)(1).[117]

66. Vietnam also argues that the provision in the SAA that states that only Congress and the Executive Branch can decide when and how to implement DSB recommendations and rulings support its claim.[118] The fact that two branches of the U.S. government can implement DSB recommendations and rulings does not provide any support whatsoever for Vietnam's claim that Section 129(c)(1) precludes WTO-consistent action as to prior unliquidated entries. In fact, the acknowledgement that Congress can implement DSB recommendations and rulings wholly undercuts Vietnam's argument.

67. Thus, the SAA text cited by Vietnam does not support its claim, and the Panel did not commit an error (still less, an egregious error) in its analysis.

e. U.S. Practice Does Not Support Vietnam's Claim

68. Vietnam argues that numerous Section 129 determinations implemented by Commerce reveal a consistent pattern of not applying such determinations to prior unliquidated entries and that this evidence was seemingly ignored by the Panel.[119] Vietnam's argument fails for at least two reasons.

69. First, the examples cited by Vietnam only show how Section 129 has been applied. Vietnam's argument assumes, without any evidentiary support, that these examples demonstrate that Section 129 will be applied in a similar fashion in the future. These examples do not show what other options the United States may have to implement DSB recommendations and reports or what the United States may do in the future. This is a fatal flaw in Vietnam's argument.

70. Second, Vietnam's claim finds no support in past implementation situations or in Section 129(c)(1). As previously explained, Commerce has modified its treatment of prior unliquidated

[116] *US – Section 129(c)(1) URAA*, para. 676.

[117] Panel Report, paras. 7.261 & nn. 373, 7.269 & nn. 398.

[118] Vietnam's Appellant Submission, para. 80.

[119] *See* Vietnam's Appellant Submission, paras. 99-102.

entries in numerous instances.[120] Moreover, as demonstrated above, Vietnam's interpretation is simply not, and has never been, the correct interpretation of Section 129(c)(1).

71. The Panel objectively assessed this information, and properly concluded that Vietnam's evidence of alleged U.S. practice did not support Vietnam's proposed interpretation of Section 129(c)(1).[121] After observing that the application of Section 129(c)(1) has not affected prior unliquidated entries, the Panel recognized that the pattern alleged by Vietnam, does not "demonstrate that {Commerce} legally *cannot* 'extend the benefits of implementation' (to use Viet Nam's formulation) to prior unliquidated entries."[122] Instead, the Panel reasoned that "the treatment of prior unliquidated entries is merely a result of other provisions of US law and of the prior determinations continuing to produce effects with respect to those entries."[123]

72. Thus, the Panel correctly concluded that the alleged pattern "does not establish that the United States Government is precluded from" affording WTO-consistent treatment to prior unliquidated entries "*by Section 129(c)(1)*, which is the only provision of US law challenged by Viet Nam."[124] Vietnam provides no basis to conclude that an alleged "practice" under Section 129 could overcome the evidence of actual instances of action by the United States which disprove Vietnam's contention that Section 129(c)(1) precludes implementation as to prior unliquidated entries.

73. The evidence of other instances of action by the United States also rebuts the alleged "practice." The Panel's analysis of practice mirrors the analysis conducted by the Appellate Body in *US – Carbon Steel (India) (AB)*. Reviewing evidence of U.S. practice put on the record by India, the Appellate Body found that it is "not clear to us why a number of instances of the application of the measure should, in this case, conclusively establish the meaning of the measure at issue in general … especially in light of the fact that the United States had placed a number of the cases on the Panel record that were opposite to the alleged practice submitted by

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[120] *See, e.g.*, *Purified Carboxymethylcellulose from the Netherlands: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Intent to Rescind*, 77 Fed. Reg. 46,024 (Aug. 2, 2012) (in which Commerce applied new methodology for calculating weighted-average dumping margins and assessment rates for entries entered or withdrawn from warehouse, for consumption, between July 1, 2010, and June 30, 2011) (Exhibit US-18); *Certain Pasta from Italy: Notice of Preliminary Results of Antidumping Duty Administrative Review, Preliminary No Shipment Determination and Preliminary Intent to Revoke Order, in Part*, 77 Fed. Reg. 46,377 (Aug. 3, 2012) (in which Commerce applied new methodology for calculating weighted-average dumping margins and assessment rates for entries entered or withdrawn from warehouse, for consumption, between July 1, 2010, and June 30, 2011) (Exhibit US-19), unchanged in 78 Fed. Reg. 9,364 (Feb. 8, 2013) (Exhibit US-19); and *Purified Carboxymethylcellulose from Finland; Notice of Preliminary Results of Antidumping Duty Administrative Review*, 77 Fed. Reg. 47,036 (Aug. 7, 2012) (in which Commerce applied new methodology for calculating weighted-average dumping margins and assessment rates for entries entered or withdrawn from warehouse, for consumption, between July 1, 2010, and June 30, 2011) (Exhibit US-20).

[121] Following the Panel's lead, "{f}or the sake of clarity, we recall that Viet Nam challenges Section 129(c)(1) 'as such', i.e. independently of any application of that provision in any particular case." Panel Report, para. 7.263 & n. 379.

[122] Panel Report, para. 7.264 (emphasis in original).

[123] Panel Report, para. 7.264 & n. 384.

[124] Panel Report, para. 7.264.

India."[125] Here, the United States produced a number of instances (*i.e.*, the use of Section 123 to reach prior unliquidated entries) that contradicted the alleged practice set forth by Vietnam.

74. Vietnam also argues that Panel erred when it observed that evidence of Commerce's practice did not "in and of itself" demonstrate that Section 129(c)(1) precludes WTO-consistent treatment of prior unliquidated entries.[126] Vietnam's argument that the "in and of itself" language is evidence of a non-holistic analysis is baseless. The Appellate Body used similar language in *US – Carbon Steel (India) (AB)* when it found that Commerce's practice did not "conclusively establish the meaning of the measure at issue."[127]

75. In addition, Vietnam argues on appeal that the Panel committed egregious error when it found that the United States did not "typically" afford WTO-consistent treatment to prior unliquidated entries.[128] Vietnam asserts that such a pattern of action by the United States as to prior unliquidated entries was "systemic and consistent" rather than "typical."[129] Vietnam's argument fails, as the Panel's findings were supported by the examples cited by the United States, and discussed above, involving the use of Section 123 and administrative reviews to reach prior unliquidated entries.

76. For these reasons, the Panel did not err (let alone commit egregious error) in its treatment of practice in making a factual finding as to the preclusive impact of Section 129(c)(1).

f. Vietnam Misrepresents U.S. Court Decisions

77. Vietnam also contends that decisions of the U.S. Court of International Trade (CIT) support its interpretation of Section 129(c)(1) as precluding implementation of DSB recommendations and rulings with respect to prior unliquidated entries. The Panel properly found that Vietnam misrepresented these CIT holdings and, consequently, that these decisions provided no support for Vietnam's claim that the Panel committed egregious error.

78. Vietnam first cites the CIT's decision in *Corus Staal, BV v. United States (Corus Staal)* for the proposition that Section 129(c)(1) precludes implementation of DSB recommendations and rulings with respect to prior unliquidated entries.[130] That decision, however, provides no support whatsoever for Vietnam's argument.

79. The cited passages in *Corus Staal* do not say that Section 129(c)(1) prevents WTO-consistent liquidation of prior unliquidated entries. Vietnam relies on the CIT's statement that "revocation of an antidumping order {under Section 129} applies prospectively on a date

[125] *US – Carbon Steel (India) (AB)*, para. 4.480.

[126] Vietnam's Appellant Submission, para. 105 (citing Panel Report, para. 105).

[127] *US – Carbon Steel (India) (AB)*, para. 4.480.

[128] Vietnam's Appellant Submission, paras. 99-102.

[129] Vietnam's Appellant Submission, para. 102.

[130] Vietnam's Appellant Submission, paras. 90-93 (quoting *Corus Staal BV v. United States*, 515 F. Supp. 2d 1337, 1347 (Ct. Int'l Trade 2007) (Exhibit VN-36)).

specified by the USTR."[131] But, as discussed above, revocation through Section 129 is only one of many possible ways in which DSB recommendations and rulings might be implemented; many other options might exist depending on the facts of the particular case,[132] and Section 129(c)(1) does not preclude the United States from pursuing them. This statement simply clarifies that, if USTR directed Commerce to implement the determination under Section 129 by revoking the order, that revocation would become effective as of the date that USTR directs implementation. This would not prevent prior unliquidated entries being reviewed by Commerce in other segments of the same proceeding from being liquidated at lower rates in response to DSB recommendations and rulings or from Congress taking action vis-à-vis prior unliquidated entries.

80. Vietnam also relies heavily on the CIT's statement that Section 129(c)(1) "supercede{s} the broad requirement of {the U.S. AD law} for imposing antidumping duties."[133] This statement stands for the unremarkable proposition that determinations made pursuant to Section 129(a) or (b) and implemented pursuant to Section 129(c)(1) supersede the previous determinations found to be WTO-inconsistent by the DSB. This observation is unavoidable; if Section 129 determinations did not supersede the prior, WTO-inconsistent determinations, they could not bring the measure in question into conformity with the DSB recommendations and rulings. Because Section 129(c)(1) applies only to entries of subject merchandise that entered on or after the implementation date, however, this does not mean that Section 129(c)(1) prevents WTO-consistent action on prior unliquidated entries.

81. The limited meaning of the two *Corus Staal* passages quoted by Vietnam becomes more obvious when their context, which was presented to the Panel, is considered. In the administrative segment under review in that case (*i.e.*, the first administrative review), Corus Staal entered subject merchandise that was subject to an antidumping duty order on certain steel products from the Netherlands.[134] Commerce calculated the dumping margin for Corus Staal's entries using the zeroing methodology.[135] Meanwhile, Commerce's use of this methodology in the underlying antidumping duty investigation was found to be WTO-inconsistent.[136] In the context of a Section 129 determination, Commerce re-calculated the dumping margin assessed on Corus Staal's entries made during the investigation without zeroing, which eliminated the margins.[137] In light of these re-calculations, and because Corus Staal was the only respondent subject to the order, USTR directed Commerce to revoke the order as of April 23, 2007, pursuant to Section 129(c)(1).[138] However, after the implementation date, Commerce instructed Customs to collect antidumping duties on unliquidated entries prior to April 23, 2007.

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[131] Vietnam's Appellant Submission, para. 90.

[132] *See generally* Section 129(a)-(b) of the URAA (19 U.S.C. § 3538(a)-(b)) (Exhibit VN-31).

[133] Vietnam's Appellant Submission, para. 91 & nn. 111.

[134] *See Corus Staal*, 515 F. Supp. 2d, pp. 1339-40 & n.15 (Exhibit VN-36).

[135] *See ibid.*

[136] *See ibid*.

[137] *See ibid*, p. 1341.

[138] *See ibid.*

82. Corus Staal asked the CIT to rule that Commerce could not instruct U.S. Customs and Border Protection ("CBP") to assess antidumping duties on prior unliquidated entries (*i.e.*, entries that entered before April 23, 2007), because the antidumping duty order was not valid under U.S. law at the time that Commerce sent the instructions.[139] The CIT denied the request, ruling that the antidumping duty order had been valid under United States law until April 23, 2007, such that the assessment of antidumping duties on prior unliquidated entries was not prohibited.[140] Neither the sequence of events under review in that case nor the CIT's holding establishes that Section 129(c)(1) prevented Commerce from revising the antidumping duty margins calculated in the first administrative review; rather, it demonstrates only that Commerce did not make such a revision in that particular instance.

83. Commerce did not argue in *Corus Staal* that it had no authority to change those margins, only that that the implementation of the DSB recommendations and rulings under Section 129(c)(1) did not itself require that antidumping duties assessed on prior unliquidated entries be refunded. This was the only issue that the CIT was required to resolve in order to reach a decision in *Corus Staal* and the only issue that the CIT, in fact, decided.

84. In light of this evidence, the Panel reasoned that the CIT's decision in *Corus Staal* did not stand for the proposition asserted by Vietnam. According to the Panel, the CIT's opinion in *Corus Staal* is "consistent with {the Panel's} reading of Section 129(c) as having no effect on prior unliquidated entries."[141] Indeed, the Panel found that the "gist of the {CIT's} ruling in *Corus Staal* is that Section 129(c) does not *mandate* the refund of duties on prior unliquidated entries. . . . {N}owhere does the {CIT} suggest that Section 129 itself *precludes* the refund of prior unliquidated entries."[142]

85. Vietnam next relies on the CIT's decision in *Tembec v. United States (Tembec)* for the proposition that Section 129(c)(1) precludes implementation of DSB recommendations and rulings with respect to prior unliquidated entries. But similar to *Corus Staal*, the CIT's decision in *Tembec* provides no support for Vietnam's claim.

86. Vietnam's reliance upon *Tembec* is based on a fundamental misunderstanding of the scope of determinations implemented pursuant to Section 129. As the panels explained in both this dispute and *US – Section 129(c)(1) URAA*, "only determinations made and implemented under section 129 are within the scope of section 129(c)(1)"[143] and "section 129(c)(1) only addresses the application of section 129 determinations. It does not require or preclude any particular actions with respect to {other entries} in a separate segment of the same proceeding."[144] Vietnam's characterization of the mechanism provided under Section 129 for implementation of DSB recommendations and rulings with respect to the U.S. International Trade Commission (ITC), the U.S. agency responsible for making injury determinations, simply

[139] *See ibid*, pp. 1343-44.

[140] *See ibid.*, p. 1347.

[141] Panel Report, para. 7.268.

[142] Panel Report, para. 7.268 (footnote omitted) (emphasis in original).

[143] *See US – Section 129(c)(1) URAA*, para. 6.53.

[144] *US – Section 129(c)(1) URAA*, para. 6.80; Panel Report, paras. 7.259, 7.262.

misses the point. The provisions applicable to the ITC speak only to determinations made under Section 129. They say nothing about what the United States may decide to do with respect to prior unliquidated entries in other segments of the same proceeding.

87. Thus, the Panel correctly recognized in this dispute that *Tembec* "merely confirms that Section 129 has limited effects" and "does not suggest that Section 129(c)(1) precludes the US authorities from 'implementing' with respect to prior unliquidated entries."[145] According to the Panel:

> the {CIT} held that Section 129 does not grant the USTR the authority to order {Commerce} to "implement" revised affirmative {U.S. International Trade Commission (ITC)} injury determinations made pursuant to Section 129(a) unless it results in the revocation of the order, in whole or in part. In that case, the USTR had ordered the implementation of a Section 129 affirmative threat of injury determination to replace a prior threat of injury determination that had been found WTO-inconsistent. The {CIT} found that the USTR's order to {Commerce} to implement the Section 129 determination was *ultra vires* and void. In arriving at this conclusion, the {CIT} distinguished between the narrower authority granted to the USTR under Section 129(a) with respect to {ITC} Section 129 determinations, pursuant to which the USTR can only order {Commerce} to "revoke" the underlying order in whole or in part, and the broader authority granted to the USTR under Section 129(b), under which the USTR may order {Commerce} to "implement" a revised determination. The {CIT} considered that the United States Congress had used narrower "revocation" language in Section 129(a) to reflect the "yes-or-no" nature of {ITC} determinations, given that implementation of WTO recommendations and rulings with respect to a {ITC} determination would necessarily result in revoking all or part of an existing order, if implementation were necessary at all. Adoption of WTO recommendations with respect to an affirmative {Commerce} determination, in contrast, might lead to changes in the applicable anti-dumping or countervailing duty margins, thereby necessitating the broader "implementation" language contained in Section 129(b). The {CIT} expressly avoided deciding the issue of whether relief in the form of refunds of cash deposits would be available following issuance of a Section 129 determination containing a finding of threat of material injury replacing a prior, WTO-inconsistent, finding of present injury. The reasoning of the {CIT} however indicates that, assuming *arguendo* that such a relief would be permissible under US law (the {CIT} posits that it might be construed as a form of retrospective relief unavailable under Section 129), the USTR's power to direct {Commerce} to revoke an order "*in part*" could allow it to order such refunds: the {CIT} reasons that {Commerce} "could implement the determination by revoking the portion of the outstanding order requiring retention of cash deposits collected during the investigation period". Hence, the {CIT's} decision does not support – and could even be read as contradicting – Viet Nam's argument that in situations where the {ITC} modified an affirmative injury determination, such as altering its theory

[145] Panel Report, para. 7.269 (footnote omitted).

> from one of present material injury to threat of material injury, the USTR has no authority to direct any action under Section 129.[146]

88. Vietnam's reliance upon *Tembec* also fails for other reasons. As Vietnam acknowledges, the CIT's discussion regarding the potential refund of cash deposits was not in dispute in *Tembec*.[147] In any event, the circumstances described in *Tembec* do not demonstrate that Section 129(c)(1) precludes a party from obtaining refunds for those deposits. Specifically, and as reflected in the facts of this dispute, if a party requested an administrative review of the order, all entries for which Commerce had collected deposits could be subject to WTO-consistent review and action. Thus, this example further demonstrates that *Tembec* does not support Vietnam's claim.

B. The Panel Applied the Correct Standard for an "As Such" Claim

89. In addition to its claim that the Panel made an incorrect factual finding as to relationship between Section 129(c)(1) and prior unliquidated entries, Vietnam argues that the Panel erred by applying the wrong standard to Vietnam's "as such" claim. Specifically, Vietnam contends that the "Panel's framework {for analyzing "as such" claims} effectively posits that "as such" claims require that a measure result in WTO-inconsistent action in all instances in which it is applied, rather than those specific circumstances where a WTO inconsistency necessarily arises, and is therefore in error."[148] Vietnam appears to argue that the standard applied by the Panel is inconsistent with the standard set forth by the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*.[149]

90. According to Vietnam, the following section of the Panel report (with highlighted language) reflects the Panel's use of an incorrect standard for an "as such" challenge:

> The evidence submitted by the United States satisfies us that the United States Government is not precluded from implementing DSB recommendations and rulings with respect to prior unliquidated entries. In particular, the United States effectively demonstrated that in a situation in which a Section 129 determination is implemented with respect to entries made after that determination, and an administrative review is conducted with respect to prior unliquidated entries, the relevant authority (USDOC or USITC) may, in that subsequent administrative review, act in accordance with the relevant DSB recommendations and rulings. This would be possible whenever a WTO-consistent approach suggested by the relevant DSB recommendations and rulings is permitted by the relevant applicable law or regulation, or where the United States Government modifies the regulation or practice pursuant to Section 123. The United States identifies instances in which a modification to USDOC practice (with respect to the USDOC's use of the zeroing methodology) was effected through a Section 129 determination as well as a Section 123 rule modification, which itself was applied in

[146] Panel Report, para. 7.269 & nn. 398.

[147] Vietnam's Appellant Submission, para. 97.

[148] Vietnam's Appellant Submission, para. 42.

[149] Vietnam's Appellant Submission, para. 48.

> subsequent administrative reviews with respect to **some** prior unliquidated entries. Viet Nam does not dispute the accuracy of the examples cited by the United States, but merely contests their relevance. That the United States authorities proceeded in this fashion in our view disproves Viet Nam's argument that the United States Government is in some **general way** precluded from "implementing" DSB recommendations and rulings with respect to prior unliquidated entries. Moreover, it further confirms our view that Section 129 does not itself preclude the United States from implementing adverse DSB recommendations and rulings with respect to prior unliquidated entries.[150]

Vietnam highlights the Panel's use of the term "some" and "general way" to argue that the Panel's incorrect standard was that WTO-inconsistent action had to result in all circumstances from Section 129(c)(1). The result of this error, according to Vietnam, is that the Panel failed to consider the impact of Section 129(c)(1) on Category 1 entries, discussed above, because it found that Section 129(c)(1) did not preclude WTO-inconsistent action as to Category 2 entries.[151]

91. Vietnam's argument takes this section of the Panel report out of context – the Panel does not, as Vietnam now argues, in any way purport to be setting out some general standard of review for an "as such" claim. To the contrary, the Panel properly was engaged in a very careful and considered examination of Vietnam's own theory: namely, that Section 129(c)(1) prevented the WTO-consistent treatment *of prior unliquidated entries*. And recall, as discussed above, that Vietnam presented no theory or evidence to the Panel (or, for that matter, to the Appellate Body) as to why Section 129(c)(1), the only measure at issue, would mandate or preclude action toward certain unliquidated entries (*i.e.*, so-called Category 1 entries) but not others (*i.e.*, so-called Category 2 entries). This fact is reflected in the Panel's correct description of Vietnam's claim that Section 129(c)(1) "serves as an absolute legal bar to any refund of duties as prior unliquidated entries" and that Section 129(c)(1) is an "express prohibition against duty refunds for prior unliquidated entries" and a "rule with no discretion at all" established by Congress.[152]

92. In order to address Vietnam's theory that Section 129(c)(1) was an "absolute legal bar," the Panel was within its discretion to rely on the impact of Section 123 on certain types of entries (*i.e.*, prior unliquidated entries for which no administrative review determination has been issued),[153] which is wholly unaffected by Section 129(c)(1). This fact, combined with the fact that Vietnam presented no rationale to the Panel as to why Section 129(c)(1) would serve as an "express prohibition" of WTO-consistent action as to only a unique sub-set of prior unliquidated entries, disproved Vietnam's theory and provides the proper context for the section of the Panel report highlighted by Vietnam.

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[150] Vietnam's Appellant Submission, para. 97 (citing Panel Report, para. 7.266) (emphasis added).

[151] Vietnam's Appellant Submission, paras. 55-56.

[152] Panel Report, para. 7.243 & nn. 348 (emphasis added).

[153] Vietnam's Appellant Submission, para. 55.

93. It is also important to note that Vietnam challenged only Section 129(c)(1), not other provisions of U.S. law and their impact on the ability of the United States to implement DSB recommendations and rulings. The Panel noted that:

> Viet Nam's challenge is limited to Section 129(c)(1). Viet Nam does not challenge any other provision of US law. As a result, we are not asked to consider whether other provisions of US law, by themselves or in combination with Section 129(c)(1), preclude US authorities from taking actions to comply with DSB recommendations and rulings with respect to prior unliquidated entries; we are only tasked with considering Viet Nam's contention that Section 129(c)(1) itself precludes such actions.[154]

94. Vietnam's confusion with the Panel's terms of reference is reflected in this section of Vietnam's appellant submission:

> {t}he fact that there may be other means of WTO implementation under U.S. law, whether explicit or practical, and that these other means might allow the USDOC to apply a WTO-consistent action to prior unliquidated entries, does not necessarily trump the meaning and effect of Section 129(c)(1). The Panel appears to believe that a menu of overlapping options exists for USDOC to address all prior unliquidated entries, apart from Section 129, ...
>
> The question for the Panel should have been whether or not these other means which "might" allow WTO-consistent action in relation to prior unliquidated entries, may be applied in all circumstances with respect to such entries, or whether certain unliquidated entries may only be reached by a redetermination – i.e., the type of redetermination authorized by Section 129.[155]

But the other "means which 'might' allow WTO-consistent action in relation to prior unliquidated entries," and their alleged shortcomings, were not themselves challenged by Vietnam as causing any breach of a WTO obligation. Section 129(c)(1) was the only measure challenged by Vietnam. Its alleged role as an "express prohibition" and "absolute legal bar" as to the WTO-consistent treatment of prior unliquidated entries was the question before the Panel. And Section 129(c)(1) simply has no impact on such entries as shown by Vietnam's concession that "Implementation Relief {is} Possible" for Category 2 entries.[156]

95. In fact, in other parts of its submission, Vietnam notes that the Panel's inquiry was limited to Section 129(c)(1):

> Establishing an "as such" violation is not dependent on demonstrating Section 129(c)(1)'s preclusive effects in all circumstances dealing with prior unliquidated entries,

[154] Panel Report, para. 7.258.

[155] Vietnam's Appellant Submission, paras. 50-51.

[156] Vietnam's Appellant Submission, para. 55.

but only those circumstances where preclusion necessarily follows because of Section 129(c)(1).[157]

96. For these reasons, the Panel did not apply the wrong standard for addressing Vietnam's "as such" claim. Vietnam's arguments to the contrary are without merit.

C. Vietnam's Arguments Regarding Completion of the Analysis Have No Merit

97. The Panel properly found that Vietnam failed to establish its factual allegation that Section 129(c)(1) precludes implementation with respect to prior unliquidated entries, and Vietnam has no basis for any claim that the Panel made egregious errors in its objective assessment of Vietnam's factual assertions. Accordingly, there is no occasion for the Appellate Body, as Vietnam requests, to complete the analysis with respect to Vietnam's claim that Section 129(c)(1) is inconsistent "as such" with Articles 1, 9.2, 9.3, 11.1 and 18.1 of the AD Agreement.[158]

98. The United States nonetheless notes that Vietnam's legal argument regarding completion of the analysis fails for a number of reasons. First, Vietnam contends that Section 129(c)(1) is inconsistent, "as such," with the AD Agreement; however, the AD Agreement does not contain any implementation obligations, and any claims vis-à-vis the DSU would be outside the terms of reference applicable to this dispute. Second, the application of the correct standard for "as such" claims demonstrates that Section 129(c)(1) does not mandate WTO-inconsistent action. Finally, Vietnam's argument impermissibly speculates as to how the United States will respond in the future to DSB recommendations and rulings.

1. The AD Agreement Does Not Contain Implementation Obligations; and Section 129 Does Not Determine Antidumping Duty Rates

99. Vietnam argues that Section 129(c)(1) is inconsistent "as such" with Articles 1, 9.2, 9.3, 11.1 and 18.1 of the AD Agreement because it precludes WTO-consistent treatment of prior unliquidated entries. Vietnam's claim suffers the basic and fundamental flaw that Section 129 governs certain procedures for implementation of DSB recommendations and rulings, while the provisions of the AD Agreement cited by Vietnam do not contain any affirmative obligations with respect to the implementation of DSB recommendations and rulings. Rather, in the antidumping context, the DSU is the only WTO agreement that addresses Members' obligations in regards to implementation. It is undisputed that Vietnam has not pursued any claims under the DSU.[159]

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[157] Vietnam's Appellant Submission, para. 47.

[158] The United States observes that each of Vietnam's claims regarding these provisions uses a verb of action. Vietnam's Appellant Submission, para. 9 (stating "applied despite imposition of" in discussing Article 1; "continue to collect" in discussing Articles 9.2 and 9.3; "continue to be collected" in discussing Article 11.1; and "amounts to an action" in discussing Article 18.1 of the AD Agreement). In constructing its claims in this manner, Vietnam uses language traditionally associated with "as applied" not "as such" claims.

[159] *See* Vietnam's Panel Request, pp 11-12; *see also* Vietnam's Appellant Submission, paras. 113-21.

100. Conversely, the WTO provisions upon which Vietnam does rely (Articles 1, 9.2, 9.3, 11.1 and 18.1 of the AD Agreement) provide obligations with respect to antidumping duty rates, while the provision at issue (Section 129(c)(1) of the URAA) does not require any particular methodology or outcome with respect to antidumping duty rates. Looking at the face of the statute, as well as based on an examination of all the facts on the record in this dispute, there is no basis for finding that Section 129(c)(1) could "as such" breach these substantive provisions of the AD Agreement.

101. In short, Vietnam's "as such" claim with regard to Section 129(c)(1) involves a fundamental mismatch between the content of Section 129(c)(1), and the types of obligations cited as the basis for the asserted "as such" WTO breach. Accordingly, Vietnam's argument that Section 129(c)(1) somehow breaches obligations under the AD Agreement must be rejected.[160]

2. The Application of the Standard for "As Such" Claims Shows That Section 129(c)(1) is Not Inconsistent with the AD Agreement

102. Whether or not identified as a mandatory/discretionary distinction, panels and the Appellate Body frequently determine whether a measure is inconsistent "as such" with a Member's obligations by examining whether the measure in question either necessitates a breach of those obligations or precludes a Member from operating in a WTO-consistent manner.[161] Applying such an analytical approach to the facts and measure at issue in this dispute, and assuming *arguendo* that Section 129(c)(1) is the exclusive means of implementation with respect to certain prior entries, nothing in Section 129(c)(1) requires a breach of the U.S. obligations under the covered agreements. Rather, the discretion afforded to the USTR not to request that a Section 129 determination be initiated or to direct that a Section 129 determination be implemented itself presupposes that the USTR could select another means for implementation in a particular dispute, such as seeking action by the Congress. If the USTR were not to seek such alternative action in a particular dispute, it is that action (or inaction) that would potentially result in a failure to implement the DSB's recommendations.

103. Recently, in *US – Carbon Steel (India) (AB)*, the Appellate Body rejected an "as such" challenge on the grounds that:

> the text of the measure on its face reveals its discretionary nature and does not identify elements *requiring* an investigating authority to engage in conduct inconsistent with Article 12.7 of the SCM Agreement. Further, in the absence of any consideration or findings by the Panel, having reviewed the judicial decisions, the Statement of Administrative Action, the legislative history of the measure, and quantitative and qualitative material on the application of the measure, we find that they do not establish conclusively that the measure *requires* an investigating authority to consistently apply

[160] The absence of any claims by Vietnam under the DSU is not surprising. The DSU does not prescribe, nor even address, the internal mechanisms (*e.g.*, administrative or legislative) by which Members may implement adverse DSB recommendations and rulings. In fact, the DSU does not obligate the United States, or any Member, to provide any particular form of remedy whether administrative or legislative.

[161] *Korea – Commercial Vessels*, para. 7.63 (noting that the Appellate Body continues to use the mandatory/discretionary distinction); *US – Carbon Steel (India) (AB)*, para. 4.483.

> inferences in a manner that would not comport with Article 12.7 in all cases of non-cooperation.[162]

In *China – Raw Materials (Panel)*, the panel rejected an "as such" claim regarding Article X:3(a) of the GATT 1994 on the grounds that the measure in question did not "necessarily result in" a breach of China's obligations.[163] Similarly, in *EC – IT Products*, the panel (citing the panel in *China – Auto Parts)* examined whether the measure in question "necessarily" denied products duty-free treatment, in breach of the EC's WTO commitments.[164]

104. The distinction has also been used in disputes involving antidumping measures. For example, the Appellate Body applied such an approach (without identifying it as a mandatory/discretionary distinction) in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)* to find that the United States did not breach the AD Agreement because the measure in question did not "preclude" Commerce from considering relevant evidence under Article 11.3 of the AD Agreement.[165]

105. Application of the analytical approach underlying the mandatory/discretionary distinction illustrates that Section 129(c)(1) is not inconsistent, as such, with the AD Agreement because the USTR has the discretion (1) to not use Section 129 to implement DSB recommendations and rulings and, in addition, (2) to not implement Section 129 determinations (for example, if there happen to be so-called Category 1 entries). Regarding the first point, Section 129(b)(2) states that Commerce will only issue a determination under Section 129 pursuant to a request by USTR.[166] USTR need not make such a request under U.S. law. Indeed, Vietnam alludes to this point in the opening of its appellant submission when it asserts that Commerce "did not implement any of the adverse recommendations and conclusions of the Panel in DS404."[167]

106. As to the second point, Section 129(b)(4) states that USTR "may, after consulting with the administering authority and the {applicable} congressional committees" direct Commerce to implement a Section 129 determination.[168] The use of the word "may" makes clear that USTR has the discretion not to direct Commerce to implement such a determination. Consequently, to the extent that Vietnam's erroneous understanding of the impact of Section 129(c)(1) on so-called Category 1 entries were credited, USTR could simply not direct Commerce to implement its Section 129 determination. In such circumstances, the United States would need to find a different way to implement any DSB recommendations it could not reach through the existing Section 129 mechanism. Whether the United States availed itself of another mechanism, such as legislative action following consultation between the Executive and Legislative Branches, would

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[162] *US – Carbon Steel (India) (AB)*, para. 4.483.

[163] *China – Raw Materials (Panel)*, paras. 7.776, 7.783, 7.786, 7.796.

[164] *EC – IT Products (Panel)*, paras. 7.113-7.115.

[165] *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina) (AB)*, para. 121.

[166] Section 129 of the URAA, 19 U.S.C. § 3538 (Exhibit VN-31); Panel Report, para. 7.239.

[167] Vietnam's Appellant Submission, para. 1.

[168] Section 129 of the URAA, 19 U.S.C. § 3538 (Exhibit VN-31); Panel Report, para. 7.239.

determine whether the United States had come into compliance in a particular dispute, not Section 129(c)(1).

107. In light of the fact that USTR has discretion not to request the initiation of a Section 129 proceeding and not to direct Commerce to implement a Section 129 determination, Vietnam's "as such" claim necessarily fails.

3. Vietnam's Argument is Based on Impermissible Speculation

108. Vietnam's claim also fails because it is based on a presumption of what means the United States will choose *in the future* to respond to DSB recommendations and rulings. Vietnam speculates that the United States will choose to undertake any future implementation exclusively by means of Section 129.[169] And Vietnam further speculates how any U.S. measure taken to comply will address prior unliquidated entries.[170]

109. A claim based on a prediction of how a Member will operate in the future in response to DSB recommendations and rulings is a claim that is based on speculation and, thus, fails. The United States may respond to any DSB recommendations and rulings in any manner it deems appropriate.[171] Although the United States has established in advance two mechanisms (*i.e.*, Section 123 and 129 of the URAA) that it may utilize to comply with DSB recommendations and rulings, that does not in any way diminish the ability of the United States to choose another means, or create another mechanism, at such time as there are relevant DSB recommendations and rulings.

110. As discussed above, when the DSB adopts recommendations and rulings, each Member concerned will need to decide how to respond to those recommendations and rulings and will need to choose the means by which to achieve compliance. In many instances, the Member concerned will have no pre-established mechanism specifically for this purpose under municipal law and will therefore choose some mechanism, either one already in existence that could be used for that purpose or by adopting a new mechanism. Indeed, one implication of Vietnam's argument would appear to be that any WTO Member that does not have an express statutory mechanism to "automatically" bring any measure found to be WTO-inconsistent into compliance is necessarily in breach of its substantive obligations under the covered agreements. Given its experience seeking implementation of DSB recommendations by other WTO Members, the United States does not consider this to be even remotely a shared understanding by Members of their WTO obligations.

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[169] *E.g.*, Vietnam's Appellant Submission, para. 70.

[170] *E.g.*, Vietnam's Appellant Submission, para. 70.

[171] *E.g., US – COOL (21.3(c))*, para. 98 (acknowledging that "the United States has a measure of discretion in selecting the means of implementation that it deems most appropriate."); *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina) (AB)*, para. 143 (noting that "to comply with the original panel's finding, as adopted by the DSB, the United States had to bring its determination of likelihood of dumping into conformity with Article 11.3 of the Anti-Dumping Agreement. How it chose to do so was, in principle, a matter for the United States to decide.").

111. There is no basis to predict with certainty today how a Member concerned will implement in the future. By definition, the measure taken to comply in that situation does not yet exist, and there is no basis for a panel to make findings with respect to the precise content, let alone WTO-consistency, of a non-existent measure.

112. Yet Vietnam's entire argument would require the Appellate Body to make a finding now as to precisely how the United States would implement DSB recommendations and rulings in the future. In particular, Vietnam asks the Appellate Body to make findings as to precisely how the United States would comply with DSB recommendations and rulings implicating entries that remained unliquidated at the end of any reasonable period of time provided under Article 21.3 of the DSU. And, Vietnam asks the Appellate Body to find that the United States will choose to utilize Section 129 and no other means available under the U.S. domestic legal system. Because it is not possible to make any such finding, Vietnam's claim fails.

113. The speculative nature of Vietnam's claim is captured in Vietnam's opening paragraph regarding implementation of DS404:

> The first proceeding, DS404, also involved antidumping duties imposed by the United States on frozen warmwater shrimp and involved a number of the same issues as DS429. Except for a change in the United States Department of Commerce ("USDOC") practice of applying zeroing in the determination of the margins of dumping in reviews applicable to all reviews and effective as of April 16, 2012, the USDOC did not implement any of the adverse recommendations and conclusions of the Panel in DS404. … Because of decisions by the U.S. Court of International Trade ("USCIT"), the individually investigated and so-called separate rate companies in the reviews subject to DS404 obtained zero or *de minimis* margins, eliminating any benefit to Viet Nam of pursuing implementation by the United States.[172]

According to Vietnam, there is no need for the United States to implement DS404 because there is no benefit to Vietnam of implementation based on the circumstances of that dispute – *i.e.*, the fact that the Vietnamese companies obtained zero or *de minimis* margins following judicial review of the applicable administrative reviews. At the same time, Vietnam claims that Section 129(c)(1) necessarily results in a WTO violation, notwithstanding the fact that Vietnam concedes that the United States need do nothing to implement DS404 and, in addition, has not used Section 129 to implement DSB recommendations and rulings in that dispute. Vietnam's two positions are incoherent and untenable and show the true speculative nature of Vietnam's claim in this appeal.

III. Conclusion

114. For the reasons given in this submission, the United States respectfully request the Appellate Body to reject Vietnam's appeal in its entirety.

[172] Vietnam's Appellant Submission, para. 1 (emphasis added).