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## **UNITED STATES – ANTI-DUMPING MEASURES ON CERTAIN SHRIMP FROM VIET NAM**

AB-2015-1

*Report of the Appellate Body*

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**ABBREVIATIONS USED IN THIS REPORT**

Abbreviation	Description
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
<i>Corus Staal</i> opinion	United States Court of International Trade, <i>Corus Staal BV v. United States et al.</i> , 515 F.Supp.2d 1337, Slip Op. 07-140, Court No. 07-00270 (19 September 2007), Opinion of Judge Judith M. Barzilay (Panel Exhibit VN-36)
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
NAFTA	North American Free Trade Agreement
NME	non-market economy
NME-wide entity rate	an anti-dumping rate applied by the USDOC, which is assigned to certain producers/exporters who do not demonstrate sufficient independence from government control in anti-dumping proceedings involving imports from NMEs
Panel Report	Panel Report, <i>United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam</i> , WT/DS429/R
SAA	Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103-316 (1994), reprinted in 1994 USCAAN 3773, 4040; Public Law No. 103-465, 108 Stat. 4809 (1994), codified under <i>United States Code</i> , Title 19, Section 3501
Section 123 of the URAA	a mechanism for US authorities to make changes in USDOC (or other agency) regulations or practices to render them consistent with DSB recommendations and rulings, codified under <i>United States Code</i> , Title 19, Section 3533 (Panel Exhibit US-10)
Section 129 of the URAA	a mechanism used by US authorities to implement DSB recommendations and rulings concerning anti-dumping and countervailing duty actions, codified under <i>United States Code</i> , Title 19, Section 3538 (Panel Exhibit VN-31)
Section 129(c)(1)	Section 129(c)(1) of the Uruguay Round Agreements Act, codified under <i>United States Code</i> , Title 19, Section 3538
<i>Shrimp</i>	USDOC anti-dumping proceedings in <i>Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam</i> , Case No. A-522-802
SLA 2006	Softwood Lumber Agreement between the Government of Canada and the Government of the United States of America (12 October 2006), contained in documents WT/DS236/5, WT/DS247/2, WT/DS257/26, WT/DS264/29, WT/DS277/20, and WT/DS311/2
SLA 2006 Notification	United States – Reviews of Countervailing Duty on Softwood Lumber from Canada, Notification of Mutually Agreed Solution (12 October 2006), contained in documents WT/DS236/5, WT/DS247/2, WT/DS257/26, WT/DS264/29, WT/DS277/20, and WT/DS311/2
<i>Tembec</i> opinion	US Court of International Trade (USCIT) in <i>Tembec, Inc. et al. v. United States et al.</i> , 441 F. Supp. 2d 1302, Slip Op. 06-109, Court No. 05-00028 (21 July 2006), Opinion <i>per curiam</i> (Panel Exhibit VN-37)
URAA	Uruguay Round Agreements Act, Public Law No. 103-465, 108 Stat. 4838, codified under <i>United States Code</i> , Title 19, Section 3538
USCBP	US Customs and Border Protection

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Abbreviation	Description
USCIT	United States Court of International Trade
USDOC	United States Department of Commerce
USITC	United States International Trade Commission
USTR	United States Trade Representative
Viet Nam-wide entity rate	a single anti-dumping duty rate imposed on all companies within Viet Nam
Working Procedures	Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

## PANEL EXHIBITS CITED IN THIS REPORT

Exhibit No.	Description
US-10	Section 123 of the Uruguay Round Agreements Act, codified under <i>United States Code</i> , Title 19, Section 3533
US-18	USDOC, <i>Purified Carboxymethylcellulose from the Netherlands: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Intent to Rescind</i> , <i>United States Federal Register</i> , Vol. 77, No. 149 (2 August 2012), pp. 46024-46030
US-19	USDOC, <i>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</i> , <i>United States Federal Register</i> , Vol. 77, No. 150 (3 August 2012), pp. 46377-46385, unchanged in Vol. 78, No. 27 (8 February 2013), pp. 9364-9366
US-20	USDOC, <i>Purified Carboxymethylcellulose from Finland; Notice of Preliminary Results of Antidumping Duty Administrative Review</i> , <i>United States Federal Register</i> , Vol. 77, No. 152 (7 August 2012), pp. 47036-47043
US-80	Miscellaneous Trade and Technical Corrections Act of 2004, Public Law No. 108-429 (3 December 2004), Title II, Section 2006(a), 118 Stat. 2434, 2597 (partial document)
VN-05	USDOC, Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam, <i>United States Federal Register</i> , Vol. 70, No. 20 (1 February 2005)
VN-24	US Department of Commerce 2009 Antidumping Manual, Chapter 10, Non-Market Economies
VN-31	Section 129 of the Uruguay Round Agreements Act, codified under <i>United States Code</i> , Title 19, Section 3538
VN-32	Section 101(a)(2) of the Uruguay Round Agreements Act, codified under <i>United States Code</i> , Title 19, Section 3511(a)(2)
VN-33	Section 102(d) of the Uruguay Round Agreements Act, codified under <i>United States Code</i> , Title 19, Section 3512(d)
VN-34	Excerpts from Vol. 1 of the Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103-316 (1994)
VN-36	United States Court of International Trade, <i>Corus Staal BV v. United States et al.</i> , Slip Op. 07-140, Court No. 07-00270 (19 September 2007), Opinion of Judge Judith M. Barzilay
VN-37	United States Court of International Trade, <i>Tembec, Inc. et al. v. United States et al.</i> , Slip Op. 06-109, Court No. 05-00028 (21 July 2006), Opinion <i>per curiam</i>
VN-42	Summary chart of USDOC determinations issued under Section 129(c)(1) and certain <i>United States Federal Register</i> USDOC Section 129 determinations
VN-55	USDOC, <i>Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification</i> , <i>United States Federal Register</i> , Vol. 77, No. 30 (14 February 2012), pp. 8101-8114

**CASES CITED IN THIS REPORT**

<b>Short Title</b>	<b>Full Case title and citation</b>
<i>Brazil – Retreaded Tyres</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, p. 1527
<i>Canada – Wheat Exports and Grain Imports</i>	Appellate Body Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, p. 2739
<i>Chile – Price Band System (Article 21.5 – Argentina)</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina</i> , WT/DS207/AB/RW, adopted 22 May 2007, DSR 2007:II, p. 513
<i>China – Auto Parts</i>	Appellate Body Reports, <i>China – Measures Affecting Imports of Automobile Parts</i> , WT/DS339/AB/R / WT/DS340/AB/R/ WT/DS342/AB/R, adopted 12 January 2009, DSR 2009:I, p. 3
<i>China – Auto Parts</i>	Panel Reports, <i>China – Measures Affecting Imports of Automobile Parts</i> , WT/DS339/R / WT/DS340/R / WT/DS342/R / Add.1 and Add.2, adopted 12 January 2009, upheld (WT/DS339/R) and as modified (WT/DS340/R / WT/DS342/R) by Appellate Body Reports WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, DSR 2009:I, p. 119
<i>China – Rare Earths</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum</i> , WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, adopted 29 August 2014
<i>China – Raw Materials</i>	Panel Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/R / WT/DS395/R / WT/DS398/R / Add.1 and Corr.1, adopted 22 February 2012, as modified by Appellate Body Reports WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, DSR 2012:VII, p. 3501
<i>EC – Fasteners (China)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/AB/R, adopted 28 July 2011, DSR 2011:VII, p. 3995
<i>EC – IT Products</i>	Panel Reports, <i>European Communities and its member States – Tariff Treatment of Certain Information Technology Products</i> , WT/DS375/R / WT/DS376/R / WT/DS377/R, adopted 21 September 2010, DSR 2010:III, p. 933
<i>EC – Salmon (Norway)</i>	Panel Report, <i>European Communities – Anti-Dumping Measure on Farmed Salmon from Norway</i> , WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, p. 3
<i>EC and certain member States – Large Civil Aircraft</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
<i>India – Patents (US)</i>	Appellate Body Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, p. 9
<i>Japan – Apples</i>	Appellate Body Report, <i>Japan – Measures Affecting the Importation of Apples</i> , WT/DS245/AB/R, adopted 10 December 2003, DSR 2003:IX, p. 4391
<i>Korea – Commercial Vessels</i>	Panel Report, <i>Korea – Measures Affecting Trade in Commercial Vessels</i> , WT/DS273/R, adopted 11 April 2005, DSR 2005:VII, p. 2749
<i>US – 1916 Act (EC)</i>	Panel Report, <i>United States – Anti-Dumping Act of 1916, Complaint by the European Communities</i> , WT/DS136/R and Corr.1, adopted 26 September 2000, upheld by Appellate Body Report WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, p. 4593

Short Title	Full Case title and citation
<i>US – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
<i>US – Carbon Steel (India)</i>	Appellate Body Report, <i>United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India</i> , WT/DS436/AB/R, adopted 19 December 2014
<i>US – Continued Zeroing</i>	Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
<i>US – Corrosion-Resistant Steel Sunset Review</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, p. 3
<i>US – Countervailing and Anti-Dumping Measures (China)</i>	Appellate Body Report, <i>United States – Countervailing and Anti-Dumping Measures on Certain Products from China</i> , WT/DS449/AB/R and Corr.1, adopted 22 July 2014
<i>US – Countervailing Measures on Certain EC Products</i>	Appellate Body Report, <i>United States – Countervailing Measures Concerning Certain Products from the European Communities</i> , WT/DS212/AB/R, adopted 8 January 2003, DSR 2003:I, p. 5
<i>US – Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475)
<i>US – Hot-Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, p. 3257
<i>US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina</i> , WT/DS268/AB/RW, adopted 11 May 2007, DSR 2007:IX, p. 3523
<i>US – Section 129(c)(1) URAA</i>	Panel Report, <i>United States – Section 129(c)(1) of the Uruguay Round Agreements Act</i> , WT/DS221/R, adopted 30 August 2002, DSR 2002:VII, p. 2581
<i>US – Section 301 Trade Act</i>	Panel Report, <i>United States – Sections 301-310 of the Trade Act of 1974</i> , WT/DS152/R, adopted 27 January 2000, DSR 2000:II, p. 815
<i>US – Shrimp (Viet Nam)</i>	Panel Report, <i>United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam</i> , WT/DS404/R, adopted 2 September 2011, DSR 2011:X, p. 5301
<i>US – Shrimp II (Viet Nam)</i>	Panel Report, <i>United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam</i> , WT/DS429/R and Add.1, circulated to WTO Members 17 November 2014
<i>US – Softwood Lumber II</i>	<i>United States – Provisional Anti-Dumping Measures on Imports of Certain Softwood Lumber from Canada</i> , DS247
<i>US – Softwood Lumber III</i>	<i>United States – Preliminary Determinations with Respect to Certain Softwood Lumber from Canada</i> , DS236
<i>US – Softwood Lumber IV</i>	<i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , DS257
<i>US – Softwood Lumber V</i>	<i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , DS264
<i>US – Softwood Lumber VI</i>	<i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada</i> , DS277
<i>US – Softwood Lumber VII</i>	<i>United States – Reviews of Countervailing Duty on Softwood Lumber from Canada</i> , DS311

Short Title	Full Case title and citation
<i>US – Steel Safeguards</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, p. 3117
<i>US – Upland Cotton (Article 21.5 – Brazil)</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil</i> , WT/DS267/AB/RW, adopted 20 June 2008, DSR 2008:III, p. 809
<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, p. 717
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323
<i>US – Zeroing (EC) (Article 21.5 – EC)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS294/AB/RW and Corr.1, adopted 11 June 2009, DSR 2009:VII, p. 2911
<i>US – Zeroing (EC) (Article 21.5 – EC)</i>	Panel Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS294/RW, adopted 11 June 2009, as modified by Appellate Body Report WT/DS294/AB/RW, DSR 2009:VII, p. 3117
<i>US – Zeroing (Japan) (Article 21.5 – Japan)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan</i> , WT/DS322/AB/RW, adopted 31 August 2009, DSR 2009:VIII, p. 3441
<i>US – Zeroing (Japan) (Article 21.5 – Japan)</i>	Panel Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan</i> , WT/DS322/RW, adopted 31 August 2009, upheld by Appellate Body Report WT/DS322/AB/RW, DSR 2009:VIII, p. 3553

WORLD TRADE ORGANIZATION  
APPELLATE BODY

**United States – Anti-Dumping Measures on  
Certain Shrimp from Viet Nam**

Viet Nam, *Appellant*  
United States, *Appellee*

China, *Third Participant*  
Ecuador, *Third Participant*  
European Union, *Third Participant*  
Japan, *Third Participant*  
Norway, *Third Participant*  
Thailand, *Third Participant*

AB-2015-1

Appellate Body Division:

Graham, Presiding Member  
Bhatia, Member  
Van den Bossche, Member

## 1 INTRODUCTION

1.1. Viet Nam appeals certain issues of law and legal interpretations developed in the Panel Report, *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam*<sup>1</sup> (Panel Report). The Panel was established to consider a complaint by Viet Nam<sup>2</sup> with respect to certain anti-dumping measures imposed by the United States in the context of the US anti-dumping proceedings in *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*<sup>3</sup> (*Shrimp*), as well as with respect to certain US laws, and methodologies and practices of the US Department of Commerce (USDOC).

1.2. The USDOC initiated its *Shrimp* investigation in January 2004 and issued an anti-dumping order in February 2005.<sup>4</sup> At the time of the Panel proceedings, the USDOC had completed seven administrative reviews and conducted a first sunset review in which it determined that revocation of the anti-dumping duty order would likely lead to the continuation or recurrence of dumping.<sup>5</sup> In the *Shrimp* proceedings, the USDOC designated Viet Nam as a non-market economy (NME). For this reason, the USDOC applied a rebuttable presumption that all companies within Viet Nam are essentially operating units of a single government-wide entity and, thus, should receive a single anti-dumping duty rate (Viet Nam-wide entity rate). Vietnamese producers/exporters had to pass a "separate rate test" to receive a rate that was separate from the Viet Nam-wide entity rate. Those producers/exporters that did not establish that they were separate from the Viet Nam-wide entity received the Viet Nam-wide entity rate.<sup>6</sup>

1.3. The factual aspects of this dispute are set forth in greater detail in paragraphs 2.1 to 2.8 of the Panel Report.

1.4. Before the Panel, Viet Nam made claims with respect to the USDOC's final determinations in the fourth, fifth, and sixth administrative reviews under the *Shrimp* anti-dumping order. Viet Nam also made claims with respect to the USDOC's likelihood-of-dumping determination in the context of the sunset review.<sup>7</sup> Additionally, Viet Nam brought "as such" claims with respect to the following measures:

<sup>1</sup> WT/DS429/R, 17 November 2014.

<sup>2</sup> Request for the Establishment of a Panel by Viet Nam, WT/DS429/2, revised on 17 January 2013 in WT/DS429/2/Rev.1, and subsequently corrected in WT/DS429/Rev.1/Corr. 1 (in French) and Corr. 2 (in English and Spanish).

<sup>3</sup> USDOC Case No. A-552-802.

<sup>4</sup> USDOC, Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam, *United States Federal Register*, Vol. 70, No. 20 (1 February 2005) (Panel Exhibit VN-05).

<sup>5</sup> Panel Report, para. 2.4.

<sup>6</sup> Panel Report, para. 2.5.

<sup>7</sup> Panel Report, para. 2.9.

- a. the USDOC's "simple zeroing methodology"<sup>8</sup> as applied in administrative reviews;
- b. the USDOC's practice with respect to the rate that is assigned to certain producers/exporters that do not demonstrate sufficient independence from government control – the NME-wide entity rate – in anti-dumping proceedings involving imports from NMEs; and
- c. Section 129(c)(1) of the US Uruguay Round Agreements Act<sup>9</sup> (URAA).<sup>10</sup>

1.5. The Panel Report was circulated to Members of the World Trade Organization (WTO) on 17 November 2014.<sup>11</sup> In its Report, the Panel found that:

- a. Viet Nam had failed to establish that the simple zeroing methodology used by the USDOC in administrative reviews is a measure of general and prospective application that can be challenged "as such". Therefore, the Panel found that Viet Nam had not established that the USDOC's simple zeroing methodology in administrative reviews is inconsistent "as such" with Article 9.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) and Article VI:2 of the General Agreement on Tariffs and Trade 1994 (GATT 1994)<sup>12</sup>;
- b. the United States acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 as a result of the USDOC's application of the simple zeroing methodology to calculate the dumping margins of mandatory respondents in the fourth, fifth, and sixth administrative reviews under the *Shrimp* anti-dumping order<sup>13</sup>;
- c. the practice or policy whereby, in NME proceedings, the USDOC presumes that all producers/exporters in the NME country belong to a single, NME-wide entity and assigns a single rate to these producers/exporters is inconsistent "as such" with the United States' obligations under Articles 6.10 and 9.2 of the Anti-Dumping Agreement<sup>14</sup>;
- d. the United States acted inconsistently with Articles 6.10 and 9.2 of the Anti-Dumping Agreement as a result of the USDOC's application, in the fourth, fifth, and sixth administrative reviews under the *Shrimp* anti-dumping order, of a rebuttable presumption that all companies in Viet Nam belong to a single, Viet Nam-wide entity and the assignment of a single rate to that entity<sup>15</sup>;
- e. Viet Nam had failed to establish the existence of a measure with respect to the manner in which the USDOC determines the NME-wide entity rate, in particular, concerning the use of facts available. Therefore, the Panel found that Viet Nam had not established that the alleged measure is inconsistent "as such" with Articles 6.8 and 9.4 and Annex II to the Anti-Dumping Agreement<sup>16</sup>;
- f. the United States acted inconsistently with Article 9.4 of the Anti-Dumping Agreement as a result of the USDOC's application to the Viet Nam-wide entity of a duty rate exceeding

<sup>8</sup> The Panel noted Viet Nam's description of the "simple zeroing methodology" as the methodology by which the USDOC, when calculating dumping margins on the basis of a comparison of a weighted-average normal value to individual export transactions, disregards negative comparison results. (Panel Report, fn 19 to para. 2.10 (referring to Viet Nam's first written submission to the Panel, para. 54))

<sup>9</sup> Public Law No. 103-465, 108 Stat. 4838, codified under *United States Code*, Title 19, Section 3538 (2000).

<sup>10</sup> Panel Report, para. 2.10.

<sup>11</sup> The Panel Report included, as an integral part thereof, the Panel's Preliminary Ruling of 26 September 2013. In its Preliminary Ruling, the Panel addressed the United States' request of 31 July 2013 that the Panel find that certain measures and claims referenced in Viet Nam's panel request were not properly within the Panel's terms of reference. (See Panel Report, paras. 1.9-1.10) The Panel's Preliminary Ruling is included as Annex A-3 to the Panel Report.

<sup>12</sup> Panel Report, para. 8.1.a.

<sup>13</sup> Panel Report, para. 8.1.b.

<sup>14</sup> Panel Report, para. 8.1.c.

<sup>15</sup> Panel Report, para. 8.1.d.

<sup>16</sup> Panel Report, para. 8.1.e.

the ceiling applicable under that provision in the fourth, fifth, and sixth administrative reviews under the *Shrimp* anti-dumping order<sup>17</sup>;

- g. Viet Nam had failed to establish that the rate applied by the USDOC to the Viet Nam-wide entity, in the fourth, fifth, and sixth administrative reviews under the *Shrimp* anti-dumping order, is inconsistent with Article 6.8 and Annex II to the Anti-Dumping Agreement<sup>18</sup>;
- h. Viet Nam had failed to establish that Section 129(c)(1) of the URAA (Section 129(c)(1)) precludes implementation of recommendations and rulings of the Dispute Settlement Body (DSB) with respect to prior unliquidated entries. Therefore, the Panel found that Viet Nam had not established that Section 129(c)(1) is inconsistent "as such" with Articles 1, 9.2, 9.3, 11.1, and 18.1 of the Anti-Dumping Agreement<sup>19</sup>;
- i. the United States acted inconsistently with Article 11.3 of the Anti-Dumping Agreement as a result of the USDOC's reliance on WTO-inconsistent margins of dumping or rates in its likelihood-of-dumping determination in the first sunset review under the *Shrimp* anti-dumping order<sup>20</sup>;
- j. the United States acted inconsistently with Article 11.2 of the Anti-Dumping Agreement, in the fourth and fifth administrative reviews under the *Shrimp* anti-dumping order, as a result of its treatment of requests for revocation made by certain Vietnamese producers/exporters that were not being individually examined. The Panel did not make any findings with respect to Viet Nam's corresponding claim under Article 11.1 of the Anti-Dumping Agreement<sup>21</sup>; and
- k. the United States acted inconsistently with Article 11.2 of the Anti-Dumping Agreement as a result of the USDOC's reliance on WTO-inconsistent margins of dumping in its determination, in the fourth administrative review, not to revoke the *Shrimp* anti-dumping order with respect to Minh Phu, and with respect to its determination, in the fifth administrative review, not to revoke the *Shrimp* anti-dumping order with respect to Camimex. The Panel did not make any findings with respect to Viet Nam's corresponding claim under Article 11.1 of the Anti-Dumping Agreement.<sup>22</sup>

1.6. On 6 January 2015, Viet Nam notified the DSB, pursuant to Articles 16.4 and 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), of its intention to appeal certain issues of law and certain legal interpretations developed by the Panel and filed a Notice of Appeal<sup>23</sup> and an appellant's submission pursuant to Rule 20 and Rule 21, respectively, of the Working Procedures for Appellate Review<sup>24</sup> (Working Procedures). Viet Nam's appeal is limited to the Panel's finding that Viet Nam had failed to establish that Section 129(c)(1) precludes implementation of recommendations and rulings of the DSB with respect to prior unliquidated entries, and the Panel's consequential finding that Viet Nam had not established that Section 129(c)(1) is inconsistent "as such" with Articles 1, 9.2, 9.3, 11.1, and 18.1 of the Anti-Dumping Agreement.<sup>25</sup> On 26 January 2015, the United States filed an appellee's submission.<sup>26</sup> On 29 January 2015, China, the European Union, and Japan each filed a third participant's submission.<sup>27</sup> On the same day, Norway notified its intention to appear at the oral hearing as a third participant.<sup>28</sup> On 26 February 2015, Ecuador and Thailand each notified its intention to appear at the oral hearing as a third participant.<sup>29</sup>

<sup>17</sup> Panel Report, para. 8.1.f.

<sup>18</sup> Panel Report, para. 8.1.g.

<sup>19</sup> Panel Report, para. 8.1.h.

<sup>20</sup> Panel Report, para. 8.1.i.

<sup>21</sup> Panel Report, para. 8.1.j.

<sup>22</sup> Panel Report, para. 8.1.k.

<sup>23</sup> WT/DS429/5 (attached as Annex 1 to this Report).

<sup>24</sup> WT/AB/WP/6, 16 August 2010.

<sup>25</sup> Panel Report, para. 8.1.h.

<sup>26</sup> Pursuant to Rule 22 of the Working Procedures.

<sup>27</sup> Pursuant to Rule 24(1) of the Working Procedures.

<sup>28</sup> Pursuant to Rule 24(2) of the Working Procedures.

<sup>29</sup> Pursuant to Rule 24(4) of the Working Procedures.

1.7. The oral hearing in this appeal was scheduled for 2 March 2015. On 27 January 2015, the Division received a letter from the United States requesting that the date of the oral hearing be changed due to certain logistical difficulties faced by the United States in securing reasonable hotel accommodation in Geneva during the week of 2 March 2015. On 29 January 2015, having considered the United States' request and comments received from Viet Nam and China, the Division informed the participants and third participants of its decision that the circumstances outlined by the United States did not, in this particular case, amount to "exceptional circumstances" that would result in "manifest unfairness" within the meaning of Rule 16(2) of the Working Procedures. Therefore, the Division decided not to change the date of the oral hearing. The Procedural Ruling is attached as Annex 2 to this Report.

1.8. The oral hearing in this appeal was held on 2 March 2015. The participants and third participants made oral statements and responded to questions posed by the Members of the Appellate Body Division hearing the appeal.

## 2 ARGUMENTS OF THE PARTICIPANTS AND THIRD PARTICIPANTS

### 2.1 Claims of error by Viet Nam – Appellant

2.1. Viet Nam claims that the Panel acted inconsistently with Article 11 of the DSU because its interpretation and analysis of Section 129(c)(1) was not based on an objective assessment of the provision and its broader statutory context. Therefore, Viet Nam requests the Appellate Body to reverse the Panel's conclusion and recommendation in paragraph 8.1.h of the Panel Report and to complete the legal analysis and find that Section 129(c)(1) is inconsistent "as such" with Articles 1, 9.2, 9.3, 11.1, and 18.1 of the Anti-Dumping Agreement.<sup>30</sup>

2.2. Viet Nam contends that the Panel did not commit a simple error that had no bearing on its assessment. Rather, the Panel's errors led the Panel wrongly to forgo any consideration of the applicability and conformity of the measure at issue – Section 129(c)(1) – with the relevant covered agreements. Viet Nam highlights two such alleged errors.

2.3. First, Viet Nam claims that the Panel adopted an incorrect standard of review and misinterpreted the operation of US law. In doing so, the Panel departed from established principles of interpretation. In particular, the Panel erred in determining that it would not consider whether Section 129(c)(1) is inconsistent with Articles 1, 9.2, 9.3, 11.1, and 18.1 of the Anti-Dumping Agreement unless Viet Nam could show that Section 129(c)(1) precludes WTO-consistent implementation "with respect to all prior unliquidated entries".<sup>31</sup> According to Viet Nam, the Panel's framework suggests that "as such" claims require that a measure result in WTO-inconsistent action not merely in some instances but, rather, in all instances in which it is applied. Therefore, the Panel was in error. Viet Nam adds that the Panel cited no legal basis for its analytical approach and, therefore, failed to offer "reasoned and adequate explanations and coherent reasoning" as required by Article 11 of the DSU.<sup>32</sup>

2.4. Viet Nam submits that the Panel's analytical framework also indicates that the Panel misunderstood operational aspects of the US retrospective duty assessment system, as well as the object and purpose of Section 129 of the URAA<sup>33</sup> as distinguished from other measures and actions that might result in WTO-consistent action in relation to some prior unliquidated entries. In Viet Nam's view, the Panel appears to have concluded that Section 129 redeterminations are available to address entries made after the implementation by the US Trade Representative (USTR), while other measures are available to address all other prior unliquidated entries. Viet Nam argues that, as a matter of WTO implementation, Section 129 sets forth the legal authority under US law for the USDOC to issue a new, second determination to replace a

<sup>30</sup> Viet Nam's appellant's submission, paras. 5 and 12.

<sup>31</sup> Viet Nam's appellant's submission, para. 42. (emphasis original) Before the Panel, Viet Nam used the term "prior unliquidated entries" to describe imports made prior to the date on which the relevant Section 129 determination takes effect *and* for which there is no definitive assessment of anti-dumping duty liability as of that date (i.e. the final duty rate and duty have not yet been established). (Panel Report, fn 329 to para. 7.237)

<sup>32</sup> See Viet Nam's appellant's submission, paras. 46-48 (referring to Appellate Body Reports, *US – Corrosion-Resistant Steel Sunset Review*, para. 82; and *US – Upland Cotton (Article 21.5 – Brazil)*, fn 618 to para. 293).

<sup>33</sup> Codified under *United States Code*, Title 19, Section 3538 (Panel Exhibit VN-31).

WTO-inconsistent determination. For Viet Nam, the question for the Panel should have been whether the other measures, 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. Viet Nam contends that the Panel's analysis reflects a misunderstanding concerning the operation of the US retrospective duty assessment system, as well as the role of Section 129 in relation to other provisions of US law.<sup>34</sup>

2.5. In making this argument, Viet Nam contends that there are three distinct categories of prior unliquidated entries under the US retrospective duty assessment system. Category 1 entries are those for which administrative determinations have been issued before the Section 129 implementation date. Category 2 entries are those for which no administrative determination has been issued prior to the Section 129 implementation date. Category 3 entries are those entered after the Section 129 implementation date. Viet Nam contends that the effect of Section 129 determinations is limited to Category 3 entries because of Section 129(c)(1). Viet Nam acknowledges that the other mechanisms put forward by the United States "might" have some bearing on Category 2 entries that have not yet been subject to a final administrative determination. However, in Viet Nam's view, the Panel disregarded the fact that Section 129 is the only provision of US law that addresses the situations in which a WTO determination of inconsistency requires a redetermination of an already issued determination. Hence, while it "might" be possible to render WTO-consistent results for prior unliquidated entries covered by Category 2 that still require an administrative determination, this does not address the fate of Category 1 entries. Viet Nam submits that the Panel ignored these distinctions.<sup>35</sup>

2.6. Viet Nam challenges the adequacy of the Panel's examination of the alternative means of implementing DSB recommendations and rulings put forward by the United States. In particular, Viet Nam disagrees with the Panel's acceptance of the argument by the United States that the US Congress may adopt new legislation or amend existing legislation in a manner that will mean prior unliquidated entries are liquidated pursuant to a WTO-consistent methodology.<sup>36</sup> For Viet Nam, 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. Viet Nam stresses that, under this rationale, no WTO-inconsistent practice could ever be found to be inconsistent "as such" because new legislation to eliminate the WTO-inconsistent practice would always be an available mechanism to cure the inconsistency. Hence, Viet Nam asserts that the Panel's reference to US legislation must be dismissed.

2.7. Viet Nam acknowledges that, depending on the effective date of the change in regulation or practice pursuant to Section 123 of the URAA<sup>37</sup>, prior unliquidated entries could benefit from the change in the regulation or practice if those prior unliquidated entries have not yet been subject to a final determination in an investigation or review. However, there is no authority under Section 123 for the USDOC to issue redeterminations applying the change in regulation or practice to entries that have already been subject to a final determination in an investigation or review. That is the sole domain of Section 129, which prohibits the application of a redetermination to prior unliquidated entries. Thus, while the USDOC might theoretically issue a redetermination under Section 123, the result is "meaningless" since Section 129(c)(1) prohibits application of the results of the redetermination to prior unliquidated entries.

2.8. Further, Viet Nam contends that, while there is the possibility of applying the new, changed WTO-consistent methodology to prior unliquidated entries that have not yet been subject to a review, prior unliquidated entries already subject to a final determination in an investigation or review are not eligible for a subsequent annual review. Rather, for these entries to benefit from a new WTO-consistent methodology, Viet Nam insists that it is necessary for the USDOC to make a redetermination, and the only authority for such a redetermination is the authority under Section 129 of the URAA.

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<sup>34</sup> Viet Nam's appellant's submission, paras. 51-54.

<sup>35</sup> Viet Nam's appellant's submission, paras. 55-57.

<sup>36</sup> Viet Nam's appellant's submission, paras. 57-58 (referring to Panel Report, para. 7.265).

<sup>37</sup> Section 123 of the URAA is a mechanism for US authorities to make changes in USDOC (or other agency) regulations or practices to render them consistent with DSB recommendations and rulings (codified under *United States Code*, Title 19, Section 3533 (Panel Exhibit US-10)).

2.9. In respect of the second alleged error, Viet Nam argues that the Panel erred because it failed to engage in a proper interpretive analysis of Section 129(c)(1) in the light of well-established principles of objective statutory interpretation. Had the Panel employed these principles, it may have viewed Section 129(c)(1) differently. Upon confronting silence in the statutory text with respect to prior unliquidated entries, the Panel effectively ended its analysis. In the view of Viet Nam, the Panel: (i) did not objectively seek to understand that silence through a closer examination of the context; (ii) applied the same flawed approach to that silence in reviewing authoritative guidance on the measure at issue; (iii) misconstrued USCIT judicial opinions; and (iv) did not undertake a holistic examination of the interpretive evidence before it. These errors prevented the Panel from appreciating the broader significance of Section 129(c)(1) in terms of how the USDOC treats prior unliquidated entries, as well as the overall intent and effect of Section 129(c)(1) on USDOC actions generally. Hence, according to Viet Nam, the Panel acted inconsistently with its obligations under Article 11 of the DSU.

2.10. Viet Nam acknowledges that the Panel took the correct interpretive approach of first considering the statutory text of Section 129(c)(1) to determine whether its meaning was clear on the face of the text itself. On its face, Section 129(c)(1) explicitly limits any legal effect given to a Section 129 determination in relation to unliquidated entries in existence at the time that the USTR directs implementation by the administering authority. However, the Panel found significance in what Section 129(c)(1) did not explicitly say, specifically, that it was silent as to the fate of prior unliquidated entries. Viet Nam contends that the Panel's analytical approach focused on discerning whether the text of Section 129(c)(1) requires or precludes any particular action with respect to prior unliquidated entries.<sup>38</sup> Viet Nam argues that the Panel's conclusion that "Section 129 does not, on its face, have any effect with respect to prior unliquidated entries" was the result of a faulty analytical approach and, therefore, was not objective.<sup>39</sup>

2.11. While Viet Nam accepts that "the statutory text of Section 129 'does not, by its express terms, require or preclude any particular action with respect to prior unliquidated entries,' it does not 'necessarily [follow] that Section 129(c)(1) cannot be found to preclude implementation of DSB recommendations and rulings with respect to such prior unliquidated entries.'"<sup>40</sup> For Viet Nam, silence or omission in a statute is not a basis, in and of itself, for finding a statute to be clear on its face. Viet Nam contends that the Panel found to the contrary, at the very outset of its analysis, and that this finding impaired what remained of its consideration of the meaning of Section 129(c)(1). Viet Nam submits that the Panel had already reached its conclusion as to the meaning of the provision, and, therefore, its continued examination of the context, judicial opinions, and the history of application of the provision at issue presented by Viet Nam was not conducted on the basis of informing a conclusion, but of reconfirming a conclusion already rendered. In Viet Nam's view, this approach to the text was not objective and, therefore, was inconsistent with Article 11 of the DSU.

2.12. Viet Nam adds that it presented the Panel with the broader context and limitations of the URAA under which Section 129 was enacted in terms of the relationship between US federal law and the United States' WTO obligations. In particular, Viet Nam put forward Section 102(a) of the URAA<sup>41</sup>, the Statement of Administrative Action<sup>42</sup> (SAA), the USDOC's characterization of Section 129 of the URAA<sup>43</sup>, the United States' *Charming Betsy* doctrine<sup>44</sup>, two US Court of International Trade (USCIT) judicial opinions addressing Section 129 determinations<sup>45</sup>, and documentation of administrative actions under Section 129.<sup>46</sup> According to Viet Nam, this evidence

<sup>38</sup> Viet Nam's appellant's submission, para. 74 (referring to Panel Report, paras. 7.257 and 7.259).

<sup>39</sup> Viet Nam's appellant's submission, para. 76 (quoting Panel Report, para. 7.259).

<sup>40</sup> Viet Nam's appellant's submission, para. 76 (quoting Panel Report, para. 7.259).

<sup>41</sup> Codified under *United States Code*, Title 19, Section 3512(d) (Panel Exhibit VN-33).

<sup>42</sup> Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103-316 (1994), reprinted in 1994 USCAAN 3773, 4040 (Public Law No. 103-465, 108 Stat. 4809 (1994), codified under *United States Code*, Title 19, Section 3501) (Panel Exhibit VN-34).

<sup>43</sup> Panel Exhibit VN-42, p. 71937.

<sup>44</sup> Viet Nam's first written submission to the Panel, para. 226 (referring to Panel Report, *US – Section 129(c)(1) URAA*, para. 3.79 and fn 32 thereto, in turn referring to *Murray v. Schooner Charming Betsy*, 6 US (2 Cranch) 64, 118 (1804)).

<sup>45</sup> USCIT, *Corus Staal BV v. United States et al.*, Slip Op. 07-140, Court No. 07-00270 (19 September 2007), Opinion of Judge Judith M. Barzilay (Panel Exhibit VN-36); USCIT, *Tembec, Inc. et al. v. United States et al.*, Slip Op. 06-109, Court No. 05-00028 (21 July 2006), Opinion *per curiam* (Panel Exhibit VN-37).

<sup>46</sup> Panel Exhibit VN-42.

illustrated a consistent pattern of failure to extend the effects of implementation to prior unliquidated entries. For Viet Nam, this context should have informed the Panel's analysis, consistent with accepted interpretive practices, but it did not.

2.13. Viet Nam further contends that the Panel misconstrued the USCIT's judicial opinions upon which Viet Nam relied. With respect to the opinion in *Corus Staal BV v. United States*<sup>47</sup> (*Corus Staal* opinion), Viet Nam contends that, under Section 129, any implementation is prospective, and a Section 129 determination is not a basis for relief from WTO-inconsistent duties on entries made before that implementation date, even for those entries that have not yet been liquidated.<sup>48</sup> Thus, in Viet Nam's view, the USCIT expressly confirmed that Section 129 requires the United States to engage in precisely the type of implementation that the Appellate Body criticized in *US – Zeroing (Japan)* (*Article 21.5 – Japan*). Viet Nam recalls the Appellate Body's explanation that "WTO-inconsistent conduct must cease completely, even if it is related to imports that entered the implementing Member's territory before the reasonable period of time expired. Otherwise, full compliance with the DSB's recommendations and rulings cannot be said to have occurred."<sup>49</sup> Yet, according to Viet Nam, the Panel dismissed the probative value of the *Corus Staal* opinion, not for the significance of what the USCIT expressly said, but for the purported significance of what it did not expressly say. In this regard, Viet Nam highlights that the Panel found it "'noteworthy' that in Viet Nam's 'description of these US court rulings it purports to rely on, Viet Nam does not actually assert that Section 129 precludes refunds of duties with respect to prior unliquidated entries.'"<sup>50</sup>

2.14. As regards the opinion in *Tembec v. United States*<sup>51</sup> (*Tembec* opinion), Viet Nam noted the USCIT's finding that "section 129 cannot be read to imply authority for the USTR to order the implementation of a section 129(a) determination that does not result in at least partial revocation of a related [anti-dumping], [countervailing duty], or safeguards order."<sup>52</sup> Viet Nam argues that the Panel incorrectly declined to accept the textual and contextual guidance Viet Nam claimed was present in *Tembec v. United States* because "[t]he Court 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."<sup>53</sup> For Viet Nam, this was not an objective examination consistent with Article 11 of the DSU, but a "tailored analysis" to support the Panel's conclusion at the outset that the meaning of Section 129(c)(1) was clear on its face.<sup>54</sup>

2.15. In the light of the foregoing, Viet Nam submits that the Panel addressed the contextual evidence put forward by Viet Nam, if at all, by means of individual elimination. According to Viet Nam, the Panel's conclusion that "the pattern of Section 129 decisions could not 'in and of itself' demonstrate that USDOC legally cannot 'extend the benefits of implementation' (to use Viet Nam's formulation) to prior unliquidated entries, or that 'it does not establish' that Section 129(c)(1) has that effect", is not objective.<sup>55</sup> Viet Nam alleges that the Panel's approach is not based on a holistic assessment of all of the evidence presented to it and is, therefore, not consistent with the objective principles of statutory interpretation. Viet Nam contends that the Panel examined individual pieces of evidence, finding that they failed to contradict its prior conclusion, rather than examining the evidence as a whole and assessing how each piece reinforced the other. Had the Panel considered the contextual elements before it in unison, or holistically, it might have reached a different conclusion as to the meaning of Section 129(c)(1). Viet Nam claims that the Panel acted inconsistently with its obligations under Article 11 of the DSU by failing to do so.

2.16. Viet Nam explains that, given the erroneous analysis by the Panel of the application and effect of Section 129(c)(1), the Panel did not address whether Section 129(c)(1), as properly understood and interpreted, is WTO-inconsistent "as such". Viet Nam suggests that the

<sup>47</sup> Panel Exhibit VN-36.

<sup>48</sup> Viet Nam's appellant's submission, para. 91 (referring to *Corus Staal* opinion (Panel Exhibit VN-36), p. 17).

<sup>49</sup> Viet Nam's appellant's submission, para. 91 (quoting Appellate Body Report, *US – Zeroing (Japan)* (*Article 21.5 – Japan*), para. 161).

<sup>50</sup> Viet Nam's appellant's submission, para. 92 (quoting Panel Report, para. 7.268).

<sup>51</sup> Panel Exhibit VN-37.

<sup>52</sup> Viet Nam's appellant's submission, para. 94 (quoting *Tembec* opinion (Panel Exhibit VN-37), p. 13).

<sup>53</sup> Viet Nam's appellant's submission, para. 97 (quoting Panel Report, fn 398 to para. 7.269).

<sup>54</sup> Viet Nam's appellant's submission, para. 98.

<sup>55</sup> Viet Nam's appellant's submission, para. 105 (quoting Panel Report, para. 7.264).

Appellate Body has the information necessary to complete the legal analysis based on a correct understanding and interpretation of Section 129(c)(1). Therefore, Viet Nam requests the Appellate Body to complete the legal analysis and find that, in specific circumstances, prior unliquidated entries will always be denied the benefits of WTO implementation because of Section 129(c)(1), and not because of the operation of other provisions of US law. Based on this finding, Viet Nam requests the Appellate Body to find further that Section 129(c)(1) is inconsistent "as such" with Articles 1, 9.2, 9.3, 11.1, and 18.1 of the Anti-Dumping Agreement by requiring the USDOC to make administrative review determinations and to assess anti-dumping duties on prior unliquidated entries after the USTR directs implementation, notwithstanding that the elements needed for the United States to make a finding of injurious dumping and to levy duties against those entries as provided in the original determination are no longer present.

2.17. More specifically, Viet Nam claims that Section 129(c)(1) is inconsistent "as such" with Article 9.2 of the Anti-Dumping Agreement because it prohibits the imposition and collection of the appropriate amount of anti-dumping duties on prior unliquidated entries and only permits the imposition and collection of the appropriate amount of anti-dumping duties on entries made after the USTR implementation date.<sup>56</sup>

2.18. Viet Nam further claims that Section 129(c)(1) is inconsistent "as such" with Article 9.3 of the Anti-Dumping Agreement because it precludes the USDOC from pursuing a refund action for prior unliquidated entries, even though such refund action is mandated by Article 9.3. According to Viet Nam, any Section 129 determination is effective only from the USTR implementation date, which excludes prior unliquidated entries.

2.19. In addition, Viet Nam alleges that Section 129(c)(1) is inconsistent "as such" with Article 11.1 of the Anti-Dumping Agreement because it requires continued application (to prior unliquidated entries) of anti-dumping duties even though the anti-dumping order has been revoked as a result of a USDOC finding of no dumping or subsidization, or a finding by the US International Trade Commission (USITC) of no injury. Yet, pursuant to Article 11.1, anti-dumping duties may not be imposed in the absence of positive evidence of dumping or injury, the objective conditions required to impose an anti-dumping duty.

2.20. Finally, Viet Nam suggests that, consistent with the findings of prior panel findings, any violation of Article VI of the GATT 1994 or other provisions of the Anti-Dumping Agreement results in a violation of Article 1 of the Anti-Dumping Agreement.<sup>57</sup> Similarly, Article 18.1 of the Anti-Dumping Agreement prevents WTO Members from taking any specific action against dumping of exports from another Member except in accordance with the provisions of the GATT 1994, as interpreted by the Anti-Dumping Agreement. Hence, Viet Nam argues that, as Section 129(c)(1) is inconsistent "as such" with Articles 9.2, 9.3, and 11.1 of the Anti-Dumping Agreement, it is also inconsistent "as such" with Articles 1 and 18.1 of the Anti-Dumping Agreement.

## **2.2 Arguments of the United States – Appellee**

2.21. The United States argues that Viet Nam has failed to establish that the Panel breached its duty under Article 11 of the DSU when it 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.

2.22. As regards the nature of Viet Nam's claim under Article 11 of the DSU, the United States considers that the interpretation of the scope of the measure at issue under US municipal law is one of the facts to be assessed by a panel in the course of the proceedings. Having determined the facts, the panel must then proceed to employ those facts in addressing the legal issues of the applicability and conformity of the measure at issue with the covered agreements, including any necessary interpretations of the covered agreements. For these reasons, the United States agrees

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<sup>56</sup> Viet Nam's appellant's submission, para. 115 (referring to Panel Report, *EC – Salmon (Norway)*, para. 7.704).

<sup>57</sup> Viet Nam's appellant's submission, para. 120 (referring to Panel Report, *US – 1916 Act (EC)*, para. 6.208).

with Viet Nam that the type of arguments raised by Viet Nam involve a claim under Article 11 of the DSU.<sup>58</sup>

2.23. However, the United States disagrees with Viet Nam's assertion that it has shown that the Panel breached its duty under Article 11 of the DSU.<sup>59</sup> According to the United States, Viet Nam 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 proceedings.<sup>60</sup>

2.24. The United States adds that the mere fact that the Panel did not explicitly refer to Viet Nam's evidence of Category 1 entries in its reasoning is insufficient to support Viet Nam's claim of a violation under Article 11 of the DSU.<sup>61</sup> In any event, the United States notes that the distinction between Category 1 entries and other entries was not made before the Panel. Hence, Viet Nam cannot contend that the Panel breached Article 11 of the DSU by not considering new arguments on facts that were never presented to the Panel.

2.25. The United States also disagrees with Viet Nam's argument that the Panel applied an incorrect legal standard for the assessment of an "as such" claim, suggesting that Viet Nam takes the Panel's statements out of context. According to the United States, the Panel did not purport to set out a general standard of review for an "as such" claim. Rather, the Panel was properly engaged in a careful examination of Viet Nam's own theory, namely, that Section 129(c)(1) prevented the WTO-consistent treatment of prior unliquidated entries. Thus, in order to address Viet Nam's claim that Section 129(c)(1) "serves as an absolute legal bar to any refund of duties"<sup>62</sup> for prior unliquidated entries, the United States stresses that the Panel was within its discretion to rely on the impact of Section 123 of the URAA on certain types of entries (i.e. prior unliquidated entries for which no administrative review determination has been issued), which is wholly unaffected by Section 129(c)(1). This, combined with the fact that Viet Nam presented "no rationale" to the Panel as to why Section 129(c)(1) would serve as an "express prohibition" of WTO-consistent action to only a unique subset of prior unliquidated entries, disproves Viet Nam's theory and provides the proper context for the section of the Panel Report highlighted by Viet Nam. The United States also highlights that Viet Nam challenged only Section 129(c)(1), and not other provisions of US law and their impact on the ability of the United States to implement DSB recommendations and rulings. As such, the United States contends that Viet Nam cannot seek, on appeal, to expand the Panel's terms of reference to include an examination of other means that might allow WTO-consistent action in relation to prior unliquidated entries and their alleged shortcomings.

2.26. The United States disputes Viet Nam's contention that Section 129 of the URAA is the "exclusive authority to implement adverse WTO determinations by means of a new administrative determination".<sup>63</sup> The United States also disagrees with Viet Nam's claim 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 [Anti-Dumping] Agreement."<sup>64</sup> Instead, 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 the subject merchandise entered on or after the date that the USTR directs implementation. According to the United States, Section 129(c)(1) does not speak to other actions that the United States may take to comply with DSB recommendations and rulings.

<sup>58</sup> United States' appellee's submission, paras. 8-14 (referring to Appellate Body Reports, *China – Rare Earths*, paras. 5.173-5.174; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.101; *US – Carbon Steel*, paras. 143 and 146; *China – Auto Parts*, para. 225; and Panel Report, *US – Section 301 Trade Act*, para. 7.18).

<sup>59</sup> United States' appellee's submission, paras. 14 and 17.

<sup>60</sup> United States' appellee's submission, para. 18 (referring to Viet Nam's appellant's submission, para. 18 and fn 11 thereto (quoting Yule Kim, *Statutory Interpretation: General Principles and Recent Trends*, Congressional Research Service (31 August 2008), p. 2)).

<sup>61</sup> United States' appellee's submission, para. 51 (referring to Appellate Body Report, *EC – Fasteners (China)*, para. 442).

<sup>62</sup> United States' appellee's submission, para. 91 (quoting Panel Report, fn 348 to para. 7.243). (emphasis added by the United States)

<sup>63</sup> United States' appellee's submission, para. 27 (quoting Viet Nam's appellant's submission, para. 82).

<sup>64</sup> United States' appellee's submission, para. 27 (quoting Viet Nam's appellant's submission, para. 73).

2.27. The United States also points out that Viet Nam accepts that the statutory text of Section 129 supports the Panel's finding that the 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 ... that is unsupported by its terms."<sup>65</sup> Nor does the text indicate that Section 129 is the exclusive mechanism for implementing DSB recommendations and rulings. Hence, for the United States, Viet Nam's conclusory argument does not support a finding that the Panel made an egregious error, breaching its duty under Article 11 of the DSU.

2.28. In sum, the United States argues that the Panel's conclusion that Section 129(c)(1) does not preclude WTO-consistent treatment of prior unliquidated entries rests upon the plain meaning of the text of Section 129(c)(1), a proper understanding of the statutory scheme in which Section 129(c)(1) operates, as well as findings regarding the SAA, US practice, and decisions from US domestic courts. The Panel's conclusion was also consistent with the panel report in *US – Section 129(c)(1) URAA*.

2.29. Hence, the United States refutes Viet Nam's claim that the Panel committed egregious error when it purportedly ended its analysis after finding "silence" in Section 129(c)(1) regarding prior unliquidated entries. To the contrary, the Panel found that the United States could address (and, in fact, has addressed) prior unliquidated entries through other mechanisms, thereby negating Viet Nam's claim that Section 129(c)(1) precludes the United States from implementing DSB recommendations and rulings with respect to prior unliquidated entries.<sup>66</sup> Thus, Viet Nam's arguments that the Panel failed to make an objective assessment under Article 11 of the DSU should fail.

2.30. In further support of its position, the United States contends that the phrase in the SAA – "relief available under subsection 129(c)(1)" – that Viet Nam relies on does not indicate that this relief would be exclusive. Rather, the SAA "plainly" indicates that relief under Section 129 is not necessarily exclusive, acknowledging that there may be ways to implement DSB recommendations and rulings besides through Section 129, such as through an administrative review.<sup>67</sup> The United States, therefore, submits that the Panel was correct in concluding 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."<sup>68</sup>

2.31. According to the United States, the fact that, in the SAA, Congress explained that Section 129 provides the USDOC 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. Moreover, the fact that only Congress and the executive branch of the US Government can implement DSB recommendations and rulings does not provide support for Viet Nam's claim that Section 129(c)(1) precludes WTO-consistent action as to prior unliquidated entries.

2.32. The United States contends further that US practice does not support Viet Nam's claim. First, Viet Nam's examples show only how Section 129 has been applied and do not reflect the other options that the United States may have to implement DSB recommendations and rulings. Second, the USDOC has modified its treatment of prior unliquidated entries in "numerous instances".<sup>69</sup> The United States emphasizes that the Panel objectively assessed this information and correctly concluded that US practice does not establish that the US Government is precluded from affording WTO-consistent treatment to prior unliquidated entries.<sup>70</sup>

2.33. The United States also avers that the Panel properly found that Viet Nam misrepresented the decisions of the USCIT, adding that these decisions do not support Viet Nam's claim that the Panel committed egregious error. The United States points out that the passages cited by

<sup>65</sup> United States' appellee's submission, para. 30 (quoting Panel Report, para. 7.259). (underlining added by the United States)

<sup>66</sup> United States' appellee's submission, paras. 34-35 (referring to Panel Report, paras. 7.255 and 7.266).

<sup>67</sup> United States' appellee's submission, paras. 59-62 (referring to SAA (Panel Exhibit VN-34), pp. 1025-1026).

<sup>68</sup> United States' appellee's submission, para. 64 (quoting Panel Report, para. 7.262).

<sup>69</sup> United States' appellee's submission, para. 70 (referring to Panel Exhibits US-18, US-19, and US-20).

<sup>70</sup> United States' appellee's submission, paras. 71-72 (referring to Panel Report, paras. 7.263-7.264).

Viet Nam from the USCIT's *Corus Staal* opinion and, in particular, the statement that "revocation of an anti-dumping order [under Section 129] applies prospectively on a date specified by the USTR", does not say that Section 129(c)(1) prevents WTO-consistent liquidation of prior unliquidated entries.<sup>71</sup> Similarly, the United States contends that Viet Nam's reliance on the USCIT's *Tembec* opinion is based on a "fundamental misunderstanding" of the scope of determinations implemented pursuant to Section 129.<sup>72</sup> The United States asserts that the Panel correctly found that only determinations made and implemented under Section 129 are within the scope of Section 129(c)(1). In the view of the United States, the Panel correctly recognized that the USCIT's *Tembec* opinion merely confirms that Section 129 has limited effects and does not suggest that Section 129(c)(1) precludes US authorities from implementing with respect to prior unliquidated entries.<sup>73</sup>

2.34. The United States submits that the Panel conducted a holistic analysis and properly considered other US measures in its analysis. In particular, the United States points to the other mechanisms by which it could comply, and has complied, with DSB recommendations and rulings with respect to prior unliquidated entries. According to the United States, this disproves Viet Nam's claim that Section 129(c)(1) is a "legal bar" to the WTO-consistent treatment of prior unliquidated entries.<sup>74</sup> In this respect, and in response to questioning at the oral hearing, the United States observed that there is an inherent tension between Viet Nam's focus on the need for the United States to do a redetermination and the DSU, which states that the withdrawal of the WTO-inconsistent measure is the preferred outcome.

2.35. Additionally, the United States highlights Section 123 of the URAA, explaining that Section 123(g) addresses changes in agency regulations or practice to render them consistent with DSB recommendations and rulings. The United States argues that 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 United States insists that it has afforded WTO-consistent treatment to prior unliquidated entries, as the Panel found, and as Viet Nam's own evidence in this dispute demonstrates.<sup>75</sup> The United States points out that Viet Nam concedes on appeal that, "under certain factual scenarios, actions under ... 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."<sup>76</sup> According to the United States, this undermines the basis for Viet Nam's claimed error, as it recognizes that Section 129(c)(1) does not "serve as an absolute legal bar" vis-à-vis prior unliquidated entries.<sup>77</sup>

2.36. The United States disagrees with Viet Nam's assertion that Section 123 and administrative reviews cannot reach prior unliquidated entries for which an administrative determination has already been issued, i.e. Category 1 entries. The United States also contests Viet Nam's argument that the existence of Category 1 entries proves the WTO-inconsistency of Section 129(c)(1), highlighting that Section 129(c)(1) makes no distinction between what Viet Nam calls Category 1 and Category 2 entries.

2.37. The United States further opposes the premise of Viet Nam's distinction between Category 1 and Category 2 entries. The United States submits that, while Viet Nam considers Category 1 entries to be entries for which the administrative review process is completed, it 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. The

<sup>71</sup> United States' appellee's submission, para.79 (quoting Viet Nam's appellant's submission, para. 90, in turn quoting *Corus Staal* opinion (Panel Exhibit VN-36), p. 17).

<sup>72</sup> United States' appellee's submission, para. 86.

<sup>73</sup> United States' appellee's submission, para. 86 (referring to Panel Report, paras. 7.259, 7.262, and 7.269, in turn referring to Panel Report, *US – Section 129(c)(1) URAA*, paras. 6.53 and 6.80).

<sup>74</sup> United States' appellee's submission, paras. 38-39 (referring to Viet Nam's appellant's submission, para. 45).

<sup>75</sup> United States' appellee's submission, paras. 39-41 (referring to Panel Report, paras. 7.265-7.266; and Panel Exhibits US-10, US-18, US-19, US-20, VN-42, and VN-55).

<sup>76</sup> United States' appellee's submission, para. 42 (quoting Viet Nam's appellant's submission, para. 25).

<sup>77</sup> United States' appellee's submission, para. 42.

United States explains that, under the US system, courts generally do not modify administrative determinations but, rather, if a challenge is successful, remand the matter for further administrative proceedings. The United States asserts that Viet Nam's acknowledgement of the availability of WTO-consistent treatment "in the context of a judicial remand" is fatal to Viet Nam's "artificial" category distinctions, and provides no basis for a finding that the Panel somehow erred in not finding such distinctions within the ambit of Section 129(c)(1).<sup>78</sup>

2.38. Even so, with respect to alternative means of implementation of DSB recommendations and rulings, the United States contends that it may afford WTO-consistent treatment to prior unliquidated entries through legislation. The US Congress may enact legislation that achieves compliance with respect to prior unliquidated entries, either through an act aimed directly at specific unliquidated entries, or through a change in the anti-dumping law that would impact unliquidated entries, for example, through the administrative review process, much like a Section 123 determination. The United States asserts that the fact that legislation can and has brought the United States into compliance with DSB recommendations and rulings is directly at odds with Viet Nam's central assertion, 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. The United States clarifies that its argument is not that Section 129(c)(1) is WTO-consistent because Congress can change Section 129 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. The United States highlights that it did in fact take this route for implementation in the *US – 1916 Act* disputes.<sup>79</sup>

2.39. The United States submits that Section 123 and congressional action are only 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. Thus, Viet Nam's attempts to have the Appellate Body analyse Section 129(c)(1) in isolation from other parts of this domestic scheme should be rejected. For the United States, the insistence by Viet Nam that the Panel should have engaged in a limited inquiry and ignored other relevant US laws is a position that is inconsistent with the basic principles under which the DSB examines "as such" challenges to Members' measures.

2.40. The United States stresses that the Panel properly found that Viet Nam had failed to establish its factual allegation that Section 129(c)(1) precludes implementation with respect to prior unliquidated entries. Thus, Viet Nam has no basis for any claim that the Panel committed egregious error in its objective assessment of Viet Nam's factual assertions. Accordingly, the United States posits that there is no occasion for the Appellate Body to complete the legal analysis with respect to Viet Nam'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 Anti-Dumping Agreement.

2.41. In any event, the United States considers that Viet Nam's argument regarding completion of the legal analysis fails for three reasons. First, although Viet Nam contends that Section 129(c)(1) is inconsistent "as such" with the Anti-Dumping Agreement, that 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. Third, Viet Nam's argument impermissibly speculates as to how the United States will respond in the future to DSB recommendations and rulings.

2.42. With respect to the first reason, the United States asserts that Section 129 governs certain procedures for implementation of DSB recommendations and rulings, while the provisions of the Anti-Dumping Agreement cited by Viet Nam do not contain any affirmative obligations with respect to implementation of DSB recommendations and rulings. According to the United States, in the

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<sup>78</sup> United States' appellee's submission, paras. 52-54 (referring to Viet Nam's appellant's submission, paras. 1 and 66; and United States' response to Panel question No. 68).

<sup>79</sup> United States' appellee's submission, para. 46 and fn 88 thereto (quoting Miscellaneous Trade and Technical Corrections Act of 2004, Public Law No. 108-429 (3 December 2004), Title II, Section 2006(a), 118 Stat. 2434, p. 2597 (Panel Exhibit US-80), where the US Congress repealed the Act of 8 September 1916).

anti-dumping context, the DSU is the only WTO agreement that addresses Members' obligations regarding implementation. Hence, Viet Nam'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.<sup>80</sup> Consequently, the United States requests the Appellate Body to reject Viet Nam's argument that Section 129(c)(1) breaches obligations under the Anti-Dumping Agreement.

2.43. Secondly, the United States points out that panels and the Appellate Body have determined 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.<sup>81</sup> 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 unliquidated entries, the United States emphasizes that nothing in Section 129(c)(1) requires a breach of the covered agreements. Rather, the discretion afforded to the USTR not to request that a Section 129 determination be initiated or not 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 US 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 DSB recommendations and rulings. Citing past panel and Appellate Body reports<sup>82</sup>, the United States submits that the analytical approach underlying the mandatory/discretionary distinction illustrates that Section 129(c)(1) is not inconsistent "as such" with the Anti-Dumping Agreement because the USTR has the discretion: (i) not to use Section 129 to implement DSB recommendations and rulings; and (ii) not to implement Section 129 determinations (for example, if there happen to be so-called Category 1 entries).

2.44. As regards the third reason, the United States argues that Viet Nam speculates that the United States will choose to undertake any future implementation exclusively by means of Section 129 of the URAA. The United States highlights that 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. Although the United States has established in advance two mechanisms (i.e. Sections 123 and 129) 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. For the United States, Viet Nam's position is "incoherent and untenable", as it would require the Appellate Body to make a finding now as to precisely how the United States will implement DSB recommendations and rulings in the future.<sup>83</sup>

## 2.3 Arguments of the third participants

### 2.3.1 China

2.45. With respect to Viet Nam's claim that the Panel breached its duty under Article 11 of the DSU, China submits that the Panel overlooked the context in which Section 129(c)(1) operates, which, in turn, affected its treatment of the interpretative guidance provided in the SAA and the application of Section 129 of the URAA.

2.46. China posits that Article 11 of the DSU requires a panel to conduct an objective and detailed examination of the content and meaning of the statutory provisions at issue and, for this purpose, undertake a holistic assessment of all relevant elements, including, *inter alia*, the text and context of the statutory provisions, consistent application of such provisions, and relevant legal interpretation given by domestic courts. A panel is also required to base its finding with respect to

<sup>80</sup> United States' appellee's submission, para. 101.

<sup>81</sup> United States' appellee's submission, para. 102 (referring to Appellate Body Report, *US – Carbon Steel (India)*, para. 4.483; and Panel Report, *Korea – Commercial Vessels*, para. 7.63).

<sup>82</sup> United States' appellee's submission, paras. 103-104 (quoting Appellate Body Report, *US – Carbon Steel (India)*, para. 4.483; and referring to Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 121; and Panel Reports, *China – Raw Materials*, paras. 7.776, 7.783, 7.786, and 7.796; and *EC – IT Products*, paras. 7.113-7.115).

<sup>83</sup> United States' appellee's submission, para. 113.

the meaning of municipal law on a sufficient evidentiary basis, and to provide reasoned and adequate explanations.<sup>84</sup>

2.47. China contends that, while the Panel conducted an examination of most of the evidence put forward by Viet Nam, as well as the relevant arguments of the United States, the Panel isolated Section 129(c)(1) from its context. China acknowledges that the Panel was correct in indicating that Viet Nam challenged only Section 129(c)(1) in this dispute. However, the meaning and legal effect of this provision should be ascertained in its context. In this regard, China recalls that Viet Nam presented to the Panel Sections 102(a)(1) and 102(a)(2) of the URAA, and argued that these provisions confirm that Section 129 is the exclusive authority under US law for the United States to comply with adverse DSB rulings concerning trade remedy measures. China asserts that the Panel should have examined the meaning of these provisions as well as their relation to Section 129. However, China notes that there is no discussion of these two provisions in the Panel Report. China considers that the Panel's overlooking of the context and, in particular, Sections 102(a)(1) and 102(a)(2) significantly undermines its conclusion regarding the meaning and effect of Section 129(c)(1).<sup>85</sup> Likewise, China is of the view that the Panel's reading of the SAA and its views regarding the application of Section 129 were affected by the Panel's overlooking of the context of Section 129(c)(1).

2.48. According to China, it may be sufficient for a complainant to establish that the measures under an "as such" challenge will necessarily lead to WTO-inconsistent conduct in certain instances. Given that it is undisputed that Section 129(c)(1) forecloses implementation of Section 129 determinations with respect to prior unliquidated entries, and Viet Nam appears to have demonstrated that there are certain prior unliquidated entries for which the DSB recommendations and rulings can only be implemented under Section 129, China considers that Viet Nam has established the preclusive effect of Section 129(c)(1) and discharged its burden of proof.

2.49. China opines that the Panel appeared to have required Viet Nam, in order to succeed in its "as such" claims, to demonstrate that Section 129(c)(1) precludes implementation of DSB recommendations and rulings with respect to the entirety of prior unliquidated entries.<sup>86</sup> China relies on past Appellate Body reports to assert that it is not necessary for a complainant to establish that the measures under an "as such" challenge necessarily lead to WTO-inconsistent conduct in all instances or in every case.<sup>87</sup> Rather, it may be sufficient if the complainant can establish that such measures will necessarily lead to WTO-inconsistent conduct in certain future instances. For China, given that Section 129(c)(1) precludes implementation in respect of prior unliquidated entries, the answer to the question of whether Section 129(c)(1) necessarily precludes implementation of DSB recommendations and rulings in respect of some prior unliquidated entries depends on the answer to the question of whether Section 129 is the sole legal authority for the United States to implement DSB recommendations and rulings for all prior unliquidated entries. It appears to China that the answer to the latter question is "yes" based on its reading of Section 123 of the URAA, its understanding of the mandate of the USDOC to conduct a subsequent administrative review with respect to prior unliquidated entries in accordance with DSB recommendations and rulings, and its consideration that the United States' arguments that it may implement DSB recommendations and rulings through legislation and judicial remand are "unpersuasive".<sup>88</sup> Therefore, since Section 129(c)(1) forecloses implementation of Section 129 determinations as to prior unliquidated entries, China submits that this provision precludes implementation of DSB recommendations and rulings with respect to Category 1 entries. This, in China's view, suffices to discharge the burden of proof for an "as such" claim.

<sup>84</sup> China's third participant's submission, paras. 7-9 (referring to Appellate Body Reports, *US – Carbon Steel (India)*, para. 4.445; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.101; *US – Carbon Steel*, para. 157; and *US – Hot-Rolled Steel*, para. 200).

<sup>85</sup> China's third participant's submission, paras. 11-13 (referring to Panel Report, paras. 7.258-7.259; Viet Nam's first written submission to the Panel, paras. 224-226; and Section 102(d) of the URAA (Panel Exhibit VN-33)).

<sup>86</sup> China's third participant's submission, para. 16 (referring to Panel Report, para. 7.266).

<sup>87</sup> China's third participant's submission, paras. 17-18 (referring to Appellate Body Reports, *US – Oil Country Tubular Goods Sunset Reviews*, para. 172; *US – Corrosion-Resistant Steel Sunset Review*, para. 93; and *US – Countervailing Measures on Certain EC Products*, fn 334 to para. 159).

<sup>88</sup> China's third participant's submission, paras. 23-24.

2.50. China disagrees with the United States' argument that the Anti-Dumping Agreement does not contain any implementation obligations, and that any claims vis-à-vis the DSU would be outside the terms of reference applicable to this dispute. Instead, China considers that "it is not inappropriate" to invoke the Anti-Dumping Agreement as a legal basis to challenge Section 129(c)(1).<sup>89</sup>

2.51. China submits that there are two levels of obligations under the WTO legal system. First, in accordance with Articles II:2 and XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) and Article 3.3 of the DSU, the WTO Agreement and the Multilateral Trade Agreements annexed thereto are binding on all WTO Members, and each Member has the obligation to ensure the conformity of its laws, regulations, administrative procedures, and other measures with the covered agreements. Second, as required by Articles 19.1, 21.1, and 21.3 of the DSU, when the DSB adopts a panel or Appellate Body report that has found a measure to be inconsistent with a covered agreement and has recommended that the Member concerned bring the measure into conformity with that agreement, the Member concerned has the obligation to comply with the recommendations and rulings of the DSB. China posits that these two obligations are not mutually exclusive, but overlap in certain circumstances. The obligation to conform to the covered agreements is a fundamental obligation applying to all WTO Members all the time, while the obligation to comply with the DSB recommendations and rulings is a derived obligation applying to a Member concerned when the DSB recommends it to do so. In other words, the Member concerned bears both obligations simultaneously. In China's view, by failing to comply with DSB recommendations and rulings immediately or within a reasonable period of time, the Member concerned not only violates the obligation under the provisions of the DSU, but also remains in violation of the obligation under the relevant covered agreement, such as the Anti-Dumping Agreement.<sup>90</sup>

### 2.3.2 European Union

2.52. The European Union considers that the underlying substantive issue in this case concerns the manner in which Members must comply with a DSB ruling that a measure imposing anti-dumping duties is WTO-inconsistent, and a DSB recommendation that the measure be brought into conformity with the Anti-Dumping Agreement. Specifically, the issue relates to the temporal aspects of compliance. For the European Union, this question was already decided by the Appellate Body in the compliance proceedings brought by the European Union and Japan against the United States in the zeroing cases.<sup>91</sup>

2.53. The European Union observes that WTO law does not require Members to enact general measures pertaining to implementation, nor does it require the putting in place of a mechanism to comply with DSB recommendations and rulings, or to bring a measure into conformity with WTO obligations. According to the European Union, the only obligation on Members is to ensure the conformity of their laws, regulations, and administrative procedures with their obligations as provided in the WTO Agreement, and, in principle, this can be achieved with or without such a general measure. However, if a Member chooses to enact such a general measure, then it must be WTO-consistent. In particular, it must "ensure" conformity and compliance with respect to all the relevant compliance parameters: the territories of the exporting and importing Members; the measures at issue; the products at issue; the enterprises at issue; the duties at issue; and, of particular relevance in this case, the temporal scope of compliance.<sup>92</sup>

2.54. In the view of the European Union, Section 129(c)(1) is not a measure that ensures "conformity and compliance" with the United States' WTO obligations as provided under the covered agreements.<sup>93</sup> This is because Section 129(c)(1) does not identify "final liquidation" as the relevant event that governs its application; instead, it identifies the relevant event as

<sup>89</sup> China's third participant's submission, para. 4.

<sup>90</sup> China's third participant's submission, paras. 27-29 (referring to Appellate Body Report, *US – Zeroing (Japan)* (Article 21.5 – Japan), para. 213(b); and Panel Report, *US – Zeroing (Japan)* (Article 21.5 – Japan), paras. 7.154-7.155 and 7.188-7.190).

<sup>91</sup> European Union's third participant's submission, paras. 10-14 (referring to Appellate Body Reports, *US – Zeroing (EC)* (Article 21.5 – EC); and *US – Zeroing (Japan)* (Article 21.5 – Japan), paras. 154-187).

<sup>92</sup> European Union's third participant's submission, paras. 21 and 26 (referring to Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement).

<sup>93</sup> European Union's third participant's submission, para. 23.

"import[ation]".<sup>94</sup> For Section 129(c)(1) to ensure "conformity and compliance", importation would have to be a proxy for final liquidation. For example, if final liquidation would always occur one month after importation, then importation could be a proxy for final liquidation, provided that the date fixed by the USTR would always be one month prior to the end of the reasonable period of time. However, it appears to the European Union that Section 129(c)(1) provides for no such relationship, the period during which final liquidation may be delayed and/or suspended by "municipal [court] injunction"<sup>95</sup> being variable and uncertain. Therefore, the measure at issue does not ensure conformity and compliance.

2.55. The European Union provides the following scenario to further illustrate its point. On 31 December 2014, the DSB finds that US law providing for zeroing in each of the five types of anti-dumping investigations foreseen in the Anti-Dumping Agreement (original, newcomer, interim, sunset, assessment, or refund) is WTO-inconsistent, as well as instances of the application of such law. The United States decides to comply immediately, with effect from 1 January 2015, as regards to both "as such" and "as applied" findings. The date fixed by the USTR is 1 January 2015. All imports entering after that date are not subject to zeroing. Compliance is ensured for these imports. But what about imports prior to 1 January 2015? Absent any other compliance measure, they will be liquidated with zeroing, even when final liquidation occurs after 1 January 2015. In this event, the European Union considers that compliance will not have been achieved.

2.56. The European Union considers that the way in which the Panel framed the question, following the arguments of Viet Nam, is not the most appropriate. Rather than asking whether or not the measure requires WTO-inconsistent action or precludes WTO-consistent action, a more appropriate question would have been whether or not the measure ensures conformity in the specific context of compliance. Referring to past Appellate Body reports, the European Union suggests that, while the so-called mandatory/discretionary distinction is a useful analytical tool, it is not to be mechanistically applied.<sup>96</sup> The same is true for the "as such"/"as applied" distinction. The European Union asserts that the question of "as such" consistency or inconsistency is better assessed by taking into account the precise wording of the relevant WTO obligation – here, the obligation to ensure conformity in the specific context of compliance.

2.57. The European Union also considers that the Panel's approach of reasoning that the measure at issue simply does not speak to the fate of prior unliquidated entries is "unsatisfactory".<sup>97</sup> The European Union suggests that "a more reasonable and balanced approach would entail looking at the whole system, and understanding the role that the measure at issue has to play, in the real world, when it comes to the US approach to this specific temporal compliance issue."<sup>98</sup> In the view of the European Union, a better question to ask would be whether or not the measure at issue, in taking the date of import as the date of reference, ensures conformity and compliance.

2.58. The European Union adds that the issue of an "interpretation in conformity rule" – in US municipal law, the *Charming Betsy* doctrine – is relevant to the question of the reception of WTO law into the municipal law of any WTO Member, and, specifically, to the way in which the so-called mandatory/discretionary analytical tool is to be applied – that is, in a non-mechanistic way. The European Union opines that, because, in US municipal law, the URAA is considered to override the *Charming Betsy* doctrine, this should have been a pertinent consideration for the Panel. For the European Union, absent an "interpretation in conformity rule" in US law, Section 129(c)(1) cannot escape a finding of "as such" inconsistency, based on a mechanistic application of the so-called mandatory/discretionary analytical tool.

2.59. While the European Union requests the Appellate Body to address the reasoning employed by the Panel, the European Union nevertheless invites the Appellate Body to reject Viet Nam's appeal, because Viet Nam did not make claims under either Article XVI:4 of the WTO Agreement or Article 18.4 of the Anti-Dumping Agreement.

<sup>94</sup> European Union's third participant's submission, para. 23.

<sup>95</sup> European Union's third participant's submission, para. 23.

<sup>96</sup> European Union's third participant's submission, para. 27 (referring to Appellate Body Reports, *US – Corrosion-Resistant Steel Sunset Review*, para. 93; and *US – Continued Zeroing*, para. 179).

<sup>97</sup> European Union's third participant's submission, para. 28.

<sup>98</sup> European Union's third participant's submission, para. 28.

### 2.3.3 Japan

2.60. Japan observes that the Panel appears to have taken the position that a complainant would not establish a *prima facie* case for its "as such" claim when the measure can be applied in a WTO-consistent manner in some cases, irrespective of its application in other cases, that could result in a WTO-inconsistency. However, Japan agrees with Viet Nam's argument that evidence showing that the United States may apply its implementation measures to "some prior unliquidated entries" does not provide a sufficient basis to reject Viet Nam's "as such" claim. Referring to prior panel and Appellate Body reports, Japan notes that, by definition, an "as such" claim challenges laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member's conduct, not only in a particular instance that has occurred but in future situations as well, will necessarily be inconsistent with that Member's WTO obligations.<sup>99</sup> Thus, in Japan's view, when a panel is confronted with an "as such" challenge to a measure adopted by a Member, the panel is required to examine whether a certain aspect of the challenged measure would necessarily lead to a conduct that is inconsistent with the Member's WTO obligations.

2.61. For Japan, an analysis based on the three different categories of unliquidated entries put forward by Viet Nam appears to indicate that a WTO-inconsistency related to a certain category of unliquidated entries would not be relieved by Section 129(c)(1). Japan also takes note of the three routes that the Panel considered could implement DSB recommendations and rulings with respect to prior unliquidated entries.<sup>100</sup> However, Japan does not understand how these routes relieve the prior unliquidated entries in Category 1. Japan emphasizes that the mere fact that the United States applied the implementation measure to some unliquidated entries under other provisions of US law does not deny Viet Nam's "as such" claim. A measure against which an "as such" claim is made does not need to mandate a Member to take, or not to take, certain action in all cases in order to answer the substantive question of whether the measure is inconsistent "as such" with particular obligations under a covered agreement.<sup>101</sup> In this case, the issue is whether or not Section 129(c)(1) would necessarily produce WTO-inconsistent results with regard to a certain category of prior unliquidated entries. As such, Japan does not understand why the Panel concluded that Viet Nam had failed to establish the "as such" claim that Section 129(c)(1) precludes implementation with respect to those entries.

2.62. Japan contends that, to the extent that Viet Nam demonstrated that Section 129(c)(1) precludes the USDOC from implementing appropriate measures to a certain category of prior unliquidated entries to comply with DSB recommendations and rulings, and, thus, necessarily leads to non-compliance with respect to those entries, Viet Nam appears to have satisfied its obligation to establish its *prima facie* case that Section 129(c)(1) is inconsistent "as such" with the United States' obligation to comply fully with DSB recommendations and rulings. However, Japan notes that Viet Nam claims that Section 129(c)(1) is inconsistent "as such" with Articles 1, 9.2, 9.3, 11.1, and 18.1 of the Anti-Dumping Agreement. Japan suggests a careful scrutiny of Viet Nam's claim, especially because Section 129 of the URAA does not itself impose any anti-dumping duties or otherwise constitute administrative agencies' redeterminations. In Japan's view, Section 129 simply authorizes the USDOC to undertake a redetermination to render its previous actions consistent with DSB recommendations and rulings.<sup>102</sup>

2.63. For Japan, based on the evidence on record, Section 129 is the exclusive avenue pursuant to which the USDOC may bring its anti-dumping measures into conformity with the Anti-Dumping Agreement. Japan further submits that Section 129 does not allow the USDOC to bring its treatment of Category 1 prior unliquidated entries into conformity with the Anti-Dumping Agreement. Thus, Japan considers that Section 129(c)(1) precludes the USDOC from implementing a measure to comply with DSB recommendations and rulings with respect to

<sup>99</sup> Japan's third participant's submission, para. 5 (referring to Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 172; and Panel Reports, *China – Auto-Parts*, para. 7.540; and *EC – IT Products*, para. 7.113).

<sup>100</sup> Japan's third participant's submission, para. 8 (referring to Panel Report, para. 7.265, in turn referring to United States' response to Panel question No. 29, paras. 100-106).

<sup>101</sup> Japan's third participant's submission, para. 10 (referring to Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 89).

<sup>102</sup> Japan's third participant's submission, para. 13 and fn 22 thereto.

Category 1 prior unliquidated entries, from which anti-dumping duties found to be WTO-inconsistent and subject to DSB recommendations and rulings may not be collected.<sup>103</sup>

2.64. In Japan's view, the United States' arguments concerning three alternative means available in the United States to implement DSB recommendations and rulings are either irrelevant to or insufficient for the examination of the WTO-consistency of Section 129 "as such". The question is whether the provisions of Section 129 will necessarily be inconsistent with the United States' WTO obligations. According to Japan, new legislation in the future is a different and separate measure from the measure in question. Japan points out that the possibility of the enactment of a new law upon request of the USTR, instead of the application of the existing law, does not preclude the use of the dispute settlement mechanism to examine the WTO-consistency of the existing law. Indeed, such future legislative actions would be equivalent to implementation actions to bring Section 129 into compliance with the United States' WTO obligations. If such further legislative actions are admitted as an effective defence against "as such" claims, no "as such" claims could be reviewed in dispute settlement proceedings, because any measure would be justified on such a basis. Such a result is against the very aim of the dispute settlement mechanism "to secure a positive solution to a dispute", as set out in Article 3.7 of the DSU. Japan adds that neither Section 123 of the URAA, nor subsequent administrative reviews, would allow the USDOC to implement its WTO-consistent measure with respect to Category 1 entries. Accordingly, actions taken pursuant to Section 123 would not mitigate the WTO-inconsistency of Section 129 because they cannot be used to implement DSB recommendations and rulings with respect to Category 1 entries.

### 2.3.4 Norway

2.65. At the oral hearing, Norway opined that the Appellate Body should complete the legal analysis and find that Section 129(c)(1) is inconsistent "as such" with the United States' WTO obligations. Norway recalled that Article 21.3 of the DSU requires Members to comply with DSB recommendations and rulings immediately, or, if immediate compliance is impracticable, within a reasonable period of time. Referring to the Appellate Body report in *US – Zeroing (Japan)* (Article 21.5 – Japan), Norway argued that WTO-inconsistent conduct must cease completely by the end of the reasonable period of time at the latest, irrespective of the date on which the imports at issue entered the territory of the implementing Member.

2.66. Norway suggested that, even if Section 129(c)(1) is a general measure, it must be in conformity with WTO law. Norway is not certain how Section 129(c)(1) can ensure conformity and compliance with regard to imports entering prior to the expiration of the reasonable period of time, given that the provision focuses on the date of importation rather than the date of final liquidation, which, according to Norway, is the relevant reference according to WTO jurisprudence. Furthermore, Norway understands that Section 129(c)(1) establishes no relationship between importation and final liquidation, which, in Norway's view, could have made the situation different. For Norway, these factors suggest that Section 129(c)(1) could be "as such" WTO-inconsistent.

### 2.3.5 Thailand

2.67. At the oral hearing, Thailand pointed out that Article 21.3 of the DSU requires Members to comply with DSB recommendations and rulings immediately, or, if immediate compliance is impracticable, within a reasonable period of time. Thailand added that all conduct that is found to be WTO-inconsistent by the panel and the Appellate Body must cease by the end of the reasonable period of time at the latest, irrespective of the date on which the imports at issue entered the territory of the implementing Member. In the specific context of anti-dumping measures, Thailand requested the Appellate Body to give full effect to the principle that implementing Members may not continue to collect WTO-inconsistent dumping duties on entries that are liquidated after the end of the reasonable period of time.

<sup>103</sup> Japan's third participant's submission, paras. 15-17 (referring to Appellate Body Report, *US – Zeroing (Japan)* (Article 21.5 – Japan), para. 169).

### 3 ISSUES RAISED IN THIS APPEAL

3.1. The following issues are raised in this appeal:

- a. whether the Panel acted inconsistently with Article 11 of the DSU in finding that Viet Nam had not established that Section 129(c)(1) of the US Uruguay Round Agreements Act<sup>104</sup> (URAA) is inconsistent "as such" with Articles 1, 9.2, 9.3, 11.1, and 18.1 of the Anti-Dumping Agreement;
- b. if the Appellate Body reverses the Panel's finding that Viet Nam has not established that Section 129(c)(1) of the URAA is inconsistent "as such" with Articles 1, 9.2, 9.3, 11.1, and 18.1 of the Anti-Dumping Agreement, whether the Appellate Body should complete the legal analysis; and
- c. if the Appellate Body completes the legal analysis, whether the Appellate Body should find that Section 129(c)(1) of the URAA is inconsistent "as such" with the United States' obligations under the provisions identified by Viet Nam.

### 4 ANALYSIS OF THE APPELLATE BODY

#### 4.1 Introduction

4.1. As an initial matter, we note that Viet Nam's appeal of the Panel Report is limited in scope, focusing on the Panel's analysis of Section 129(c)(1) of the URAA (Section 129(c)(1)). Before addressing Viet Nam's claims of error, we provide a brief overview of the United States' system for the assessment and collection of anti-dumping duties, and of Section 129(c)(1), the measure at issue in these appellate proceedings.<sup>105</sup>

4.2. As noted by the Panel, the United States operates a "retrospective" system for the assessment of anti-dumping duties.<sup>106</sup> In general terms, under that system, there is a time lag between calculations of estimated anti-dumping duty rates, the collection of cash deposits on imports on the basis of those estimated rates, and the liquidation (final settlement) of the anti-dumping duties actually owed on imports for which the deposits have been collected. The process begins with an anti-dumping investigation and continues after the US Department of Commerce (USDOC) has found imports to be dumped and the US International Trade Commission (USITC) has found the relevant US industry to be injured because of dumped imports. At this point, the USDOC issues an "anti-dumping order" directing the US Customs and Border Protection (USCBP) to collect, from importers, cash deposits at rates equal to the margin of dumping calculated during the investigation, for subject imports that enter on or after the date of the order.<sup>107</sup> Since the margins of dumping (and the injury) found during the investigation are based on imports during a past period, the cash deposits serve as estimates of what actual dumping will be during the period following the anti-dumping order. At the end of the first year following the issuance of the anti-dumping order, and at the end of each year thereafter, interested parties may request the USDOC to conduct an "administrative review" of their imports during each particular year. In these reviews, the USDOC recalculates the margins of dumping for imports (for which a review has been requested) that entered during the year under review. The dumping margins calculated during each review, which are based on actual imports during the 12-month period reviewed, become the "final" duty rates for those imports.<sup>108</sup>

4.3. As noted by the Panel, liquidation of imports subject to final duty rates may be delayed by challenges before US courts where "parties may obtain an injunction against liquidation for the

<sup>104</sup> Public Law No. 103-465, 108 Stat. 4838, codified under *United States Code*, Title 19, Section 3538.

<sup>105</sup> Further details in this regard are provided in the Panel Report, paras. 2.1-2.10 and 7.238-7.240.

<sup>106</sup> Panel Report, para. 2.2.

<sup>107</sup> Margins of dumping may differ among individual exporters, according to whether they participated in the investigation and information provided about their prices and costs.

<sup>108</sup> In the case of the first administrative review, this period of time may extend to up to 18 months in order to cover all entries that may have been subject to provisional measures.

duration of the court proceeding."<sup>109</sup> As we understand it, either side may appeal findings made in an anti-dumping investigation or an administrative review to the US Court of International Trade (USCIT). The findings of that court may, in turn, be appealed to higher courts. The courts may, *inter alia*, remand the investigation or administrative review to the USDOC for further findings. Also, the USDOC may, after litigation has begun, request that an investigation or review be remanded to it for further findings. Thus, a period of a few months to several years may pass between issuance of the anti-dumping order and liquidation, depending on whether administrative reviews are requested and whether litigation is pursued.

4.4. In the present case, in February 2005, the USDOC issued an anti-dumping order regarding imports of certain frozen and canned warmwater shrimp from Viet Nam.<sup>110</sup> The order, *inter alia*, provided the USCBP with the authority to collect anti-dumping duty deposits for all such shrimp from Viet Nam at the time of importation. At the time of the Panel proceedings in the present case, the USDOC had completed seven administrative reviews in which it had calculated the total amount of duties owed for imports (entries) of the subject merchandise during each review period.<sup>111</sup> According to Viet Nam, some of these entries remain unliquidated.<sup>112</sup>

4.5. Regarding the measure at issue in these appellate proceedings, the Panel noted that Section 129 of the URAA sets forth a mechanism with respect to the implementation of DSB recommendations and rulings concerning anti-dumping and countervailing duty actions. Section 129(c)(1), the specific subparagraph challenged by Viet Nam, addresses the question of when revised determinations made pursuant to that mechanism (Section 129 determinations) take effect.<sup>113</sup> Section 129(c)(1) provides that Section 129 determinations apply to entries made *on or after* the date on which the US Trade Representative (USTR) directs the USDOC to revoke the order in totality or in part (in the case of a USITC Section 129 determination), or the date on which the USTR directs the USDOC to implement a Section 129 determination (in the case of a USDOC Section 129 determination).<sup>114</sup> Section 129 of the URAA stipulates, in relevant part:

### **§ 3538 Administrative action following WTO panel reports**

#### **(a) Action by the United States International Trade Commission**

##### **(1) Advisory report**

If a dispute settlement panel finds in an interim report under Article 15 of the Dispute Settlement Understanding, or the Appellate Body finds in a report under Article 17 of that Understanding, that an action by the International Trade Commission in connection with a particular proceeding is not in conformity with the obligations of the United States under the Antidumping Agreement, the Safeguards Agreement, or the Agreement on Subsidies and Countervailing Measures, the Trade Representative may request the Commission to issue an advisory report on whether title VII of the Tariff Act of 1930 or title II of the Trade Act of 1974, as the case may be, permits the Commission to take steps in connection with the particular proceeding that would render its action not inconsistent with the findings of the panel or the Appellate Body

<sup>109</sup> Panel Report, para. 2.3 (referring to Viet Nam's first written submission to the Panel, paras. 30-33 and 215-216, in turn referring to Panel Report, *US – Section 129(c)(1) URAA*, paras. 2.5-2.8 and fns 10 and 11; United States' first written submission to the Panel, paras. 8-10; and United States' response to Panel question No. 68).

<sup>110</sup> USDOC, Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam, *United States Federal Register*, Vol. 70, No. 20 (1 February 2005) (Panel Exhibit VN-05).

<sup>111</sup> Panel Report, para. 2.4.

<sup>112</sup> Viet Nam's appellant's submission, para. 64.

<sup>113</sup> Panel Report, para. 7.238.

<sup>114</sup> For ease of reference, the Panel referred to these dates as the "implementation date". (Panel Report, para. 7.238) At footnote 334 to this paragraph, the Panel noted that the USTR has the authority to order implementation of all USDOC Section 129 determinations and to direct the USDOC to implement a revised USITC Section 129 determination by revoking the order in whole or in part. However, the USTR does not have the authority to order implementation of a USITC Section 129 determination that does not result in at least partial revocation of the order. (Panel Report, fn 334 to para. 7.238 (referring to the discussion of the decision of the USCIT in *Tembec, Inc. et al. v. United States et al.*, 441 F. Supp. 2d 1302, Slip Op. 06-109, Court No. 05-00028 (21 July 2006), Opinion *per curiam* (Panel Exhibit VN-37)))

concerning those obligations. The Trade Representative shall notify the congressional committees of such request.

...

#### **(4) Commission determination**

Notwithstanding any provision of the Tariff Act of 1930 ... or title II of the Trade Act of 1974 ... if a majority of the Commissioners issues an affirmative report under paragraph (1), the Commission, upon the written request of the Trade Representative, shall issue a determination in connection with the particular proceeding that would render the Commission's action described in paragraph (1) not inconsistent with the findings of the panel or Appellate Body. The Commission shall issue its determination not later than 120 days after the request from the Trade Representative is made.

...

#### **(6) Revocation of order**

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

#### **(b) Action by administering authority**

##### **(1) Consultations with administering authority and congressional committees**

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

##### **(2) Determination by administering authority**

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

##### **(3) Consultations before implementation**

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

##### **(4) Implementation of determination**

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

**(c) Effects of determinations; notice of implementation****(1) Effects of determinations**

Determinations concerning title VII of the Tariff Act of 1930 [19 U.S.C. 1671 et seq.] ... 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 [19 U.S.C. 1677]) 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.<sup>115</sup>

**4.2 Arguments before the Panel and the Panel's findings**

4.6. Before the Panel, Viet Nam argued that Section 129 of the URAA is the "exclusive authority" under US law for implementation of DSB recommendations and rulings "where implementation can be achieved by a new administrative determination without the need for statutory or regulatory amendment."<sup>116</sup> According to Viet Nam, "by providing that the determination takes effect only with respect to unliquidated entries made on or after the implementation date, Section 129(c)(1) prohibits the refund of duties" with respect to what Viet Nam described as "prior unliquidated entries".<sup>117</sup> On this basis, Viet Nam asserted that Section 129(c)(1) is inconsistent "as such" with Articles 1, 9.2, 9.3, 11.1, and 18.1 of the Anti-Dumping Agreement.<sup>118</sup>

4.7. The United States countered that Viet Nam's claims are based on the assumption that implementation of DSB recommendations and rulings would necessarily be effectuated through Section 129, to the exclusion of other means of implementation. The United States further pointed out that US authorities have in the past assessed and liquidated prior unliquidated entries in a WTO-consistent manner by using other implementation mechanisms available to the United States.<sup>119</sup>

4.8. The Panel began by examining whether Viet Nam had established that Section 129(c)(1) precludes implementation of DSB recommendations and rulings with respect to "prior unliquidated entries"<sup>120</sup>, before considering whether Section 129(c)(1) is inconsistent "as such" with Articles 1, 9.2, 9.3, 11.1, and 18.1 of the Anti-Dumping Agreement. The Panel recalled, with respect to the latter, that Viet Nam had relied on the finding of the Appellate Body in *US – Zeroing (Japan) (Article 21.5 – Japan)* to argue that "the relevant date to assess implementation of DSB recommendations and rulings is the date on which the duty is assessed or collected, and that any action for the assessment or collection of duties after the expiry of the reasonable period of time must conform to the DSB's recommendations and rulings, irrespective of the date of

<sup>115</sup> Section 129 of the URAA, codified under *United States Code*, Title 19, Section 3538 (Panel Exhibit VN-31). The Panel noted that the USDOC is the "administering authority" referred to in Section 129. (Panel Report, fn 335 to para. 7.239)

<sup>116</sup> Panel Report, para. 7.243 (referring to Viet Nam's first written submission to the Panel, paras. 211 and 224-225; and opening statement at the first Panel meeting, para. 28).

<sup>117</sup> Panel Report, para. 7.243 (referring to Viet Nam's first written submission to the Panel, paras. 211-252). Before the Panel, Viet Nam used the term "prior unliquidated entries" to describe imports made prior to the date on which the relevant Section 129 determination takes effect *and* for which there is no definitive assessment of anti-dumping duty liability as of that date (i.e. the final duty rate and duty have not yet been established). (Panel Report, fn 329 to para. 7.237)

<sup>118</sup> Panel Report, para. 7.243 (referring to Viet Nam's first written submission to the Panel, paras. 211-252).

<sup>119</sup> Panel Report, para. 7.248 (referring to United States' first written submission to the Panel, paras. 96-97 and 109-112).

<sup>120</sup> Panel Report, para. 7.257.

importation."<sup>121</sup> Viet Nam had relied on this finding to argue that, when a US anti-dumping determination is found to be WTO-inconsistent, the United States must implement the resulting DSB recommendations and rulings with respect to any entries that remain unliquidated as of the expiration of the reasonable period of time.<sup>122</sup>

4.9. Beginning with the text of Section 129(c)(1), the Panel observed that Section 129(c)(1) sets out when revised determinations made pursuant to Section 129 take effect. The Panel noted that Section 129(c)(1) defines those determinations in terms of which entries are affected, providing that a Section 129 determination "shall apply with respect to unliquidated entries of the subject merchandise ... that are entered, or withdrawn from warehouse, for consumption *on or after*" the date on which the USTR directs the USDOC to implement the determination.<sup>123</sup> Noting that "Section 129 does not, on its face," address prior unliquidated entries, the Panel considered that it "necessarily follows that Section 129(c)(1) cannot be found to preclude implementation of DSB recommendations and rulings with respect to such prior unliquidated entries."<sup>124</sup> The Panel added that the 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 ... cannot justify an interpretation of the statute that is unsupported by its terms."<sup>125</sup>

4.10. In this respect, the Panel recalled the view of the panel in *US – Section 129(c)(1) URAA* that:

... it may well be the case that because Section 129(c)(1) limits the application of Section 129 determinations to entries that take place on or after the implementation date, prior unliquidated entries would remain subject to other provisions of US anti-dumping or countervailing duty laws which might, for instance, require the USDOC to assess definitive duties with respect to these prior unliquidated entries on the basis of an old, WTO-inconsistent methodology, or might preclude the USDOC from assessing duties with respect to such entries on the basis of the new, WTO-consistent methodology, but that, in such instances, it would not be because of Section 129(c)(1) that the USDOC would be required to take, or be precluded from taking, such actions, but because of those other provisions of US law.<sup>126</sup>

The Panel agreed with the view of the panel in *US – Section 129(c)(1) URAA*, and recalled that its mandate in this dispute is limited to examining the WTO-consistency of Section 129(c)(1).<sup>127</sup>

4.11. Looking at elements beyond the text of Section 129(c)(1), the Panel noted Viet Nam's reliance on a sentence in the Statement of Administrative Action<sup>128</sup> (SAA) that, "[u]nder 129(c)(1), if implementation of a WTO report should result in the revocation of an antidumping or countervailing duty order, entries made prior to the date of the USTR's direction would remain subject to potential duty liability."<sup>129</sup> In this regard, the Panel considered that the SAA "does not contradict" the Panel's reading of Section 129(c)(1)<sup>130</sup>; rather, "it merely confirms ... that implementation through Section 129 determinations only has effects with respect to entries that

<sup>121</sup> Panel Report, para. 7.257 (referring to Appellate Body Reports, *US – Zeroing (EC) (Article 21.5 – EC)*, paras. 286-355; *US – Zeroing (Japan) (Article 21.5 – Japan)*, paras. 153-197; and Panel Reports, *US – Zeroing (EC) (Article 21.5 – EC)*, paras. 8.164-8.218; *US – Zeroing (Japan) (Article 21.5 – Japan)*, paras. 7.139-7.155).

<sup>122</sup> Panel Report, para. 7.257.

<sup>123</sup> Panel Report, para. 7.259 (quoting Section 129 of the URAA (Panel Exhibit VN-31)). (emphasis added by the Panel)

<sup>124</sup> Panel Report, para. 7.259. In this respect, the Panel agreed with the conclusion reached by the panel in *US – Section 129(c)(1) URAA* that Section 129(c)(1) "does not, by its express terms, require or preclude any particular action with respect to prior unliquidated entries". (Panel Report, para. 7.259 (quoting Panel Report, *US – Section 129(c)(1) URAA*, para. 6.55))

<sup>125</sup> Panel Report, para. 7.259. (fn omitted)

<sup>126</sup> Panel Report, para. 7.260 (referring to Panel Report, *US – Section 129(c)(1) URAA*, fn 112 to para. 6.69, fn 123 to para. 6.84, and fn 126 to para. 6.90). (emphasis original)

<sup>127</sup> Panel Report, para. 7.260.

<sup>128</sup> Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103-316 (1994), reprinted in 1994 USCAAN 3773, 4040 (Public Law No. 103-465, 108 Stat. 4809 (1994), codified under *United States Code*, Title 19, Section 3501) (Panel Exhibit VN-34).

<sup>129</sup> Panel Report, para. 7.261 (quoting Viet Nam's second written submission to the Panel, para. 66, in turn referring to SAA (Panel Exhibit VN-34)).

<sup>130</sup> Panel Report, para. 7.262.

are made after the implementation date."<sup>131</sup> Therefore, the Panel found that nothing in the SAA suggests that Section 129(c)(1) concerns itself with, or has any effect on, prior unliquidated entries.<sup>132</sup>

4.12. As regards Viet Nam's argument that the application of Section 129 by the US authorities to date "reveals a systematic and consistent refusal by the USDOC to issue liquidation instructions that would extend the results of its Section 129 determinations to prior unliquidated entries"<sup>133</sup>, the Panel considered that the application of Section 129(c)(1) to date suggests that the US Government, "following a Section 129 proceeding resulting in a determination to revoke or modify an anti-dumping order, typically has not extended the effect of that decision to prior unliquidated entries".<sup>134</sup> Nevertheless, the Panel failed to see how the "pattern" alleged by Viet Nam would, in and of itself, demonstrate that the USDOC "legally *cannot* 'extend the benefits of implementation' ... to prior unliquidated entries".<sup>135</sup> The Panel emphasized, in particular, that the "pattern" alleged by Viet Nam does not establish that the US Government is precluded from implementing DSB recommendations and rulings by Section 129(c)(1), which was the only provision of US law challenged by Viet Nam. For this reason, the Panel disagreed with Viet Nam's assertion that the "consistent pattern" of the US Government not extending the effect of Section 129 determinations to prior unliquidated entries suggests "recognition that Section 129 demands such treatment as a matter of U.S. law".<sup>136</sup>

4.13. Moreover, the Panel noted the United States' explanation that "the USDOC can 'implement' DSB recommendations and rulings with respect to prior unliquidated entries."<sup>137</sup> In particular, the Panel noted the United States' argument that: (i) the US Congress may adopt new legislation or amend existing legislation such that prior unliquidated entries are liquidated pursuant to a WTO-consistent methodology; (ii) the US Administration can use Section 123 of the URAA<sup>138</sup> to amend a WTO-inconsistent USDOC practice, and, in setting the effective date of the modification, can effectively "implement" with respect to prior unliquidated entries; and (iii) the USDOC can adopt a WTO-consistent methodology in a subsequent administrative review to "implement" with respect to prior unliquidated entries.<sup>139</sup> The Panel also noted that the United States had identified instances in which the US Government has used certain of the above-mentioned approaches to "implement" DSB recommendations and rulings with respect to prior unliquidated entries.<sup>140</sup> In the light of the arguments and evidence put forward by the United States, the Panel considered that the United States had effectively demonstrated that, where 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 appropriate authority (the USDOC or the USITC) may, in that subsequent administrative review, act in accordance with the relevant DSB recommendations and rulings. In the view of the Panel, the fact that the US authorities have proceeded in this manner "disproves" Viet Nam's argument that the United States is generally

<sup>131</sup> Panel Report, para. 7.262.

<sup>132</sup> Panel Report, para. 7.262. Like the panel in *US – Section 129(c)(1) URAA*, the Panel noted that the SAA affirmatively states that "prior unliquidated entries" would remain subject to potential duty liability and that it is conceivable that administrative reviews would be conducted with respect to "prior unliquidated entries", as well as that administrative reviews would be made with respect to such entries on the basis of a WTO-inconsistent determination. Also like that panel, the Panel considered 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. (Panel Report, fn 378 to para. 7.262 (referring to Panel Report, *US – Section 129(c)(1) URAA*, para. 6.110))

<sup>133</sup> Panel Report, para. 7.263 (quoting Viet Nam's first written submission to the Panel, para. 257).

<sup>134</sup> Panel Report, para. 7.264.

<sup>135</sup> Panel Report, para. 7.264. (emphasis original)

<sup>136</sup> Panel Report, para. 7.264 (quoting Viet Nam's first written submission to the Panel, para. 264; and referring to Viet Nam's opening statement at the first Panel meeting, para. 34).

<sup>137</sup> Panel Report, para. 7.265 (referring to United States' response to Panel question No. 29, paras. 100-106).

<sup>138</sup> Section 123(g)(1) establishes a mechanism for US authorities to make changes in USDOC (or other agency) regulations or practice in order to render them consistent with DSB recommendations and rulings. Under that provision, the regulation or practice at issue may be amended, rescinded, or otherwise modified upon the fulfilment of a series of procedural steps. (Panel Report, para. 7.241 and fn 338 thereto) As the Panel noted, pursuant to Section 123(g)(4), Section 123(g) does not apply to any regulations or practices of the USITC.

<sup>139</sup> Panel Report, para. 7.265 (referring to United States' response to Panel question No. 29, paras. 100-106).

<sup>140</sup> Panel Report, para. 7.266 (referring to United States' first written submission to the Panel, para. 120).

precluded from implementing DSB recommendations and rulings with respect to prior unliquidated entries.<sup>141</sup>

4.14. Finally, referring to the opinion of the USCIT in *Corus Staal BV v. United States*<sup>142</sup> (*Corus Staal* opinion), the Panel said it did not understand the USCIT in that case to have suggested that Section 129 of the URAA, itself, *precludes* the refund of prior unliquidated duties. The Panel added that it does not follow from the fact that Section 129 does not provide for such refunds that it therefore operates to preclude them, as Viet Nam had alleged. For the Panel, in the absence of Section 129(c)(1), Section 129 would simply be without any definition of the temporal scope of application of Section 129 determinations. In the view of the Panel, this does not demonstrate that Section 129(c)(1) prohibits the refund of cash deposits on prior unliquidated entries.<sup>143</sup> Similarly, the Panel found that the opinion of the USCIT in *Tembec v. United States*<sup>144</sup> (*Tembec* opinion), to which Viet Nam had referred, does not suggest that Section 129(c)(1) precludes the US authorities from "implementing" with respect to prior unliquidated entries.<sup>145</sup>

4.15. On the basis of its analysis, the Panel found that Viet Nam had failed to establish that Section 129(c)(1) precludes "extending the benefits of implementation" to prior unliquidated entries.<sup>146</sup> The Panel explained that, in reaching this conclusion, it had taken into consideration the text of Section 129(c)(1), the SAA, the US Government's application of Section 129(c)(1) in the years since it was adopted, and the USCIT's opinions cited by Viet Nam.<sup>147</sup>

4.16. In the light of the above, the Panel found that Viet Nam had failed to establish that Section 129(c)(1) precludes "extending the benefits of implementation" to prior unliquidated entries, and concluded, therefore, that Viet Nam had not established that Section 129(c)(1) is inconsistent "as such" with Articles 1, 9.2, 9.3, 11.1, and 18.1 of the Anti-Dumping Agreement.<sup>148</sup>

### 4.3 Review of the Panel's analysis of Viet Nam's claims concerning Section 129(c)(1)

4.17. Viet Nam claims that the Panel acted inconsistently with its obligations under Article 11 of the DSU on two grounds. First, Viet Nam contends that the Panel erred by applying an incorrect analytical framework whereby it determined that it would not consider whether Section 129(c)(1) is inconsistent "as such" with Articles 1, 9.2, 9.3, 11.1, and 18.1 of the Anti-Dumping Agreement unless Viet Nam could establish that Section 129(c)(1) precludes implementation of DSB recommendations and rulings with respect to *all* prior unliquidated entries.<sup>149</sup> Second, Viet Nam asserts that the Panel failed to conduct a holistic assessment in ascertaining the meaning of Section 129(c)(1).<sup>150</sup> We consider Viet Nam's arguments in turn.

#### 4.3.1 Whether the Panel applied an incorrect analytical framework

4.18. As noted above, Viet Nam claims that the Panel required it to demonstrate that Section 129(c)(1) precludes implementation of DSB recommendations and rulings with respect to *all* prior unliquidated entries of the subject merchandise.<sup>151</sup> For Viet Nam, the Panel's approach was flawed because the fact that the United States might apply a different mechanism to implement DSB recommendations and rulings in *some* circumstances does not answer the question of whether Section 129(c)(1) precludes implementation in *other* circumstances.<sup>152</sup> Further, Viet Nam posits that the approach adopted by the Panel reflects an erroneous understanding of the United States' duty assessment system and the statutory context in which Section 129(c)(1)

<sup>141</sup> Panel Report, para. 7.266.

<sup>142</sup> USCIT, *Corus Staal BV v. United States et al.*, 515 F.Supp.2d 1337, Slip Op. 07-140, Court No. 07-00270 (19 September 2007), Opinion of Judge Judith M. Barzilay (Panel Exhibit VN-36).

<sup>143</sup> Panel Report, para. 7.268.

<sup>144</sup> USCIT, *Tembec, Inc. et al. v. United States et al.*, 441 F. Supp. 2d 1302, Slip Op. 06-109, Court No. 05-00028 (21 July 2006), Opinion *per curiam* (Panel Exhibit VN-37).

<sup>145</sup> Panel Report, para. 7.269 (referring to *Tembec* opinion (Panel Exhibit VN-37)).

<sup>146</sup> Panel Report, para. 7.270.

<sup>147</sup> Panel Report, para. 7.270.

<sup>148</sup> Panel Report, paras. 7.271-7.272.

<sup>149</sup> Viet Nam's appellant's submission, paras. 41-42 and 47-48 (referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82).

<sup>150</sup> Viet Nam's appellant's submission, paras. 43 and 105.

<sup>151</sup> Viet Nam's appellant's submission, para. 42.

<sup>152</sup> Viet Nam's appellant's submission, para. 51.

operates. Viet Nam criticizes, in particular, the Panel's alleged failure to appreciate that there is a subset of prior unliquidated entries that "might only be addressed" by a Section 129 determination.<sup>153</sup> On appeal, Viet Nam refers to this subset of prior unliquidated entries that have been subject to a final determination in an investigation or review as "Category 1 entries".<sup>154</sup>

4.19. We disagree with Viet Nam to the extent that it argues that the Panel rejected Viet Nam's claims on the basis that Viet Nam had not demonstrated that Section 129(c)(1) precludes implementation of DSB recommendations and rulings with respect to *all* prior unliquidated entries. Instead, as we see it, the Panel responded to the argument that Viet Nam had made, that is, that Section 129(c)(1) "serves as an absolute legal bar to any refund of duties [for] prior unliquidated entries" and sets out an "express prohibition against duty refunds for prior unliquidated entries".<sup>155</sup> Thus, the Panel examined whether Viet Nam had established that Section 129(c)(1), in and of itself, precludes implementation of DSB recommendations and rulings with respect to prior unliquidated entries, rather than requiring Viet Nam to show that Section 129(c)(1) precludes implementation of DSB recommendations and rulings in *all* circumstances.

4.20. Viet Nam suggests that the Panel held the view that, in order to demonstrate that a measure is WTO-inconsistent "as such", a complainant is required to show that the measure results in WTO-inconsistent action not merely in some instances but, rather, in all instances in which it is applied. In support of its contention, Viet Nam refers to paragraph 7.266 of the Panel Report, where the Panel found that "[t]he United States identifies instances in which a modification to USDOC practice ... was effected through a Section 129 determination as well as a Section 123 rule modification, which itself was applied in subsequent administrative reviews with respect to some prior unliquidated entries."<sup>156</sup> The Panel found further that the fact "[t]hat the United States authorities proceeded in this fashion in [the Panel's] 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."<sup>157</sup> According to Viet Nam, the Panel cited no legal basis for its approach in terms of how "as such" challenges must be framed or analysed and, consequently, the Panel's reasoning, in this regard, lacks coherence to a degree that falls short of the standard required under Article 11 of the DSU.<sup>158</sup>

4.21. We recall that the Panel's assessment focused on whether Section 129(c)(1), itself, precludes implementation of DSB recommendations and rulings with respect to prior unliquidated entries. Contrary to what Viet Nam argues, we do not view the above statements of the Panel as articulating a general legal standard for the establishment of an "as such" claim. Rather, we read the Panel's analysis in paragraph 7.266 of the Panel Report to focus on the evidence produced by the United States regarding alternative means of implementing DSB recommendations and rulings in respect of some prior unliquidated entries. As we understand it, the Panel found this evidence to undermine Viet Nam's assertion that Section 129(c)(1) "in some general way" serves as a legal bar precluding implementation of DSB recommendations and rulings in respect of prior unliquidated entries.<sup>159</sup> While Viet Nam may not agree with the Panel's assessment of the relevance of such evidence, this, in itself, does not mean that the Panel committed legal error amounting to a violation under Article 11 of the DSU.<sup>160</sup> In any event, evidence that the United States can implement DSB recommendations and rulings by using different means of implementation, and has done so<sup>161</sup>, would appear to have been sufficient for the Panel to conclude that, contrary to what Viet Nam had argued, Section 129(c)(1) does not, itself, preclude implementation of DSB recommendations and rulings with respect to prior unliquidated entries.

<sup>153</sup> Viet Nam's appellant's submission, para. 54.

<sup>154</sup> Viet Nam's appellant's submission, paras. 56-57. Conversely, Viet Nam appears to accept that "other measures and actions" might result in WTO-consistent action in relation to some prior unliquidated entries. (Viet Nam's appellant's submission, para. 42)

<sup>155</sup> Panel Report, para. 7.243 and fn 348 thereto (quoting Viet Nam's first written submission to the Panel, paras. 213 and 233).

<sup>156</sup> Viet Nam's appellant's submission, para. 46 (quoting Panel Report, para. 7.266 (fns omitted)). (emphasis added by Viet Nam)

<sup>157</sup> Viet Nam's appellant's submission, para. 46 (quoting Panel Report, para. 7.266). (emphasis added by Viet Nam)

<sup>158</sup> Viet Nam's appellant's submission, para. 46 (quoting Panel Report, para. 7.266).

<sup>159</sup> Panel Report, para. 7.266.

<sup>160</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.226; *EC – Fasteners (China)*, para. 442.

<sup>161</sup> Panel Report, para. 7.266.

4.22. Further, we note that the United States, in its response to Viet Nam's arguments on appeal, asserts that Viet Nam's submissions to the Panel made "no mention of so-called Category 1 entries", and that "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."<sup>162</sup>

4.23. We recall that an appellant must identify specific errors regarding the objectivity of the panel's assessment, and that "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."<sup>163</sup> Moreover, a *prima facie* case must be based on evidence and legal arguments put forward by the complaining party in relation to *each* of the elements of the claim. A complaining party may not "simply submit evidence and expect the panel to divine from it a claim of WTO-inconsistency".<sup>164</sup> Nor may a complaining party simply allege facts without relating them to its legal arguments.<sup>165</sup> That being the case, we recall that a WTO panel generally enjoys discretion freely to use arguments submitted by the parties, or to develop its own legal reasoning to support its findings.<sup>166</sup>

4.24. Bearing this in mind, we note that Viet Nam did not specifically argue before the Panel that Section 129(c)(1) precludes implementation of DSB recommendations and rulings in respect of "Category 1 entries". Nonetheless, it claimed that Section 129(c)(1) precludes implementation with respect to prior unliquidated entries and is, therefore, inconsistent "as such" with Articles 1, 9.2, 9.3, 11.1, and 18.1 of the Anti-Dumping Agreement. Hence, in order to make an objective assessment of the matter before it, the Panel was required to examine whether Viet Nam had demonstrated that Section 129(c)(1) *necessarily operates*, at least in certain circumstances, to *preclude* implementation of DSB recommendations and rulings.

4.25. Our reading of the Panel Report suggests that the Panel was not persuaded that Viet Nam had demonstrated that Section 129(c)(1) precludes implementation of DSB recommendations and rulings in any circumstance. For example, the Panel found that:

[t]he 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 subsequent administrative reviews with respect to some prior unliquidated entries.<sup>167</sup>

4.26. The Panel added that Viet Nam "does not dispute the accuracy of the examples cited by the United States, but merely contests their relevance".<sup>168</sup> The Panel also noted Viet Nam's argument that the examples cited by the United States are "WTO-consistent action by coincidence" and a mere "consequence of the normal operation of US law in that the rule had been changed through Section 123 action, and the USDOC only followed the modified rule in administrative reviews subsequent to the date of implementation of the Section 129 determination, thereby affecting prior unliquidated entries."<sup>169</sup> Although not challenged by Viet Nam, the Panel considered Section 123 of the URAA also to be relevant to its examination of Viet Nam's claims.<sup>170</sup> We note, in this regard, as did the Panel, that Section 123(g)(1) establishes a mechanism for US authorities to make changes in USDOC (or other agency) regulations or practice in order to render them consistent with DSB

<sup>162</sup> United States' appellee's submission, para. 55.

<sup>163</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.178 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 442 (emphasis original)).

<sup>164</sup> Appellate Body Report, *US – Gambling*, para. 140 (referring to Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 191).

<sup>165</sup> Appellate Body Report, *US – Gambling*, para. 140 (referring to Appellate Body Report, *Japan – Apples*, para. 159, in turn quoting Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, p. 335).

<sup>166</sup> See Appellate Body Report, *US – Gambling*, para. 282.

<sup>167</sup> Panel Report, para. 7.266. (fn omitted)

<sup>168</sup> Panel Report, para. 7.266. (fn omitted)

<sup>169</sup> Panel Report, fn 390 to para. 7.266.

<sup>170</sup> Panel Report, para. 7.241 (referring to Section 123 of the URAA, codified under the *United States Code*, Title 19, Section 3533 (Panel Exhibit US-10)).

recommendations and rulings. Under that provision, the regulation or practice at issue may be amended, rescinded, or otherwise modified upon the fulfilment of a series of procedural steps.<sup>171</sup>

4.27. To us, there appears to be a tension between Viet Nam's assertion that Section 129(c)(1) precludes implementation of DSB recommendations and rulings with respect to prior unliquidated entries, on the one hand, and Viet Nam's recognition that alternative mechanisms available to the United States may result in WTO-consistent action, on the other hand. Indeed, Viet Nam does not dispute that the United States can liquidate entries of the subject merchandise consistently with its WTO obligations, and that it has done so.<sup>172</sup> This would appear to undermine Viet Nam's argument that Section 129(c)(1), in itself, precludes implementation of DSB recommendations and rulings.

4.28. The United States has explained that "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", and that "Section 129 is but one tool in a toolbox by which the United States can implement DSB recommendations and rulings."<sup>173</sup> By way of example, the United States refers to its authority to "enter into agreements with Members to settle WTO disputes".<sup>174</sup> The United States refers specifically to its negotiation of the Softwood Lumber Agreement with Canada<sup>175</sup> (SLA 2006), as well as to the resulting liquidation of "so-called Category 1 entries without duties" and the retroactive revocation of certain orders at issue.<sup>176</sup> The notification of a mutually agreed solution<sup>177</sup> indicates that Canada and the United States "reached a mutually agreed solution to the matters raised by Canada in the above-referenced disputes", referring to six WTO disputes between Canada and the United States regarding trade in softwood lumber, as well as disputes adjudicated by North American Free Trade Agreement (NAFTA) panels.<sup>178</sup> Additionally, we note the United States' clarification that it can liquidate Category 1 entries through the mechanism of a judicial remand. The United States explains that, in the context of a judicial remand, the USDOC has the discretion to modify the applicable margins or even revoke an anti-dumping or countervailing duty order.<sup>179</sup> The United States further argues that the USDOC enjoys wide discretion to request that its determinations be voluntarily remanded.<sup>180</sup> In addition, at the oral hearing, the United States highlighted that the Category 1 entries that were subject to administrative proceedings in the *US – Shrimp (Viet Nam)* dispute<sup>181</sup> were liquidated in a WTO-consistent manner in the context of a judicial remand.

4.29. In the light of the above, we do not agree with Viet Nam that the Panel applied an incorrect analytical framework that required Viet Nam to show that Section 129(c)(1) precludes implementation of DSB recommendations and rulings with respect to *all* prior unliquidated entries.

<sup>171</sup> Panel Report, para. 7.241. As the Panel noted, pursuant to Section 123(g)(4), Section 123(g) does not apply to any regulations or practices of the USITC. See *supra*, fn 138.

<sup>172</sup> Panel Report, para. 7.266.

<sup>173</sup> United States' appellee's submission, para. 57.

<sup>174</sup> United States' appellee's submission, para. 54.

<sup>175</sup> Softwood Lumber Agreement between the Government of Canada and the Government of the United States of America (12 October 2006) (SLA 2006), contained in documents WT/DS236/5, WT/DS247/2, WT/DS257/26, WT/DS264/29, WT/DS277/20, and WT/DS311/2.

<sup>176</sup> United States' appellee's submission, para. 54 (referring to SLA 2006, contained in documents WT/DS236/5, WT/DS247/2, WT/DS257/26, WT/DS264/29, WT/DS277/20, and WT/DS311/2).

<sup>177</sup> United States' appellee's submission, para. 54 (referring to United States – Reviews of Countervailing Duty on Softwood Lumber from Canada, Notification of Mutually Agreed Solution (12 October 2006) (SLA 2006 Notification), contained in documents WT/DS236/5, WT/DS247/2, WT/DS257/26, WT/DS264/29, WT/DS277/20, and WT/DS311/2).

<sup>178</sup> SLA 2006 Notification, p. 1. The six above-referenced disputes are: *US – Preliminary Determinations with respect to Certain Softwood Lumber from Canada* (DS236); *US – Provisional Anti-Dumping Measures on Imports of Certain Softwood Lumber from Canada* (DS247); *US – Final Countervailing Duty Determination with respect to Certain Softwood Lumber from Canada* (DS257); *US – Final Dumping Determination on Softwood Lumber from Canada* (DS264); *US – Investigation of the International Trade Commission in Softwood Lumber from Canada* (DS277); and *US – Reviews of Countervailing Duty on Softwood Lumber from Canada* (DS311). Moreover, the Termination of Litigation Agreement under Annex 2A to the SLA 2006 refers to the settlement of the issues raised in "the following actions", among them a "NAFTA Chapter 11 claim of *Tembec Inc., Tembec Industries Inc.* and *Tembec Industries Inc. v. United States of America* (collectively "Tembec")".

<sup>179</sup> See also United States' appellee's submission, para. 54 (referring to United States' response to Panel question No. 68, para. 64).

<sup>180</sup> United States' appellee's submission, fn 98 to para. 54.

<sup>181</sup> WT/DS404/R.

### 4.3.2 Whether the Panel conducted a holistic assessment of Section 129(c)(1)

4.30. Viet Nam's second contention under Article 11 of the DSU is that the Panel failed to conduct a holistic assessment in ascertaining the meaning of Section 129(c)(1).

4.31. With regard to a panel's duties in construing the meaning of municipal law, the Appellate Body has explained that, "[a]lthough it is not the role of panels or the Appellate Body to interpret a Member's domestic legislation as such, it is permissible, indeed essential, to conduct a detailed examination of that legislation in assessing its consistency with WTO law."<sup>182</sup> The Appellate Body has also found that, "[a]s part of their duties under Article 11 of the DSU, panels have the obligation to examine the meaning and scope of the municipal law at issue in order to make an objective assessment of the matter before it."<sup>183</sup>

4.32. In respect of the types of elements that are required to be considered in order to establish the content and meaning of municipal law, the Appellate Body has clarified that, in some cases, the text of the relevant legislation may suffice. In other cases, the complainant will also need to support its understanding of the content and meaning of the measure at issue with evidence beyond the text, such as evidence of consistent application of the measure, pronouncements of domestic courts, and the writings of recognized scholars.<sup>184</sup> Furthermore, the Appellate Body has held that, "in ascertaining the meaning of municipal law, a panel should undertake a holistic assessment of all relevant elements, starting with the text of the law and including, but not limited to, relevant practices of administering agencies."<sup>185</sup> An examination of such elements, including legal interpretations given by domestic courts or domestic administering authorities, may inform the question of whether a measure is consistent with a WTO Member's obligations under the covered agreements. In respect of the burden of proof, the Appellate Body has clarified that "[t]he party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion."<sup>186</sup>

4.33. The Panel began its assessment of whether Section 129(c)(1) precludes implementation of DSB recommendations and rulings with respect to prior unliquidated entries by examining the text of that provision. Thereafter, the Panel examined the SAA, evidence put forward by Viet Nam regarding the application of Section 129(c)(1) by the USDOC, alternative means of implementing DSB recommendations and rulings with respect to prior unliquidated entries put forward by the United States, and USCIT judicial opinions relied on by Viet Nam. We address Viet Nam's arguments in respect of each of these elements in turn.

<sup>182</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.445 (quoting Appellate Body Report, *US – Hot-Rolled Steel*, para. 200, in turn referring to Appellate Body Report, *India – Patents (US)*, paras. 66-67).

<sup>183</sup> Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.98.

<sup>184</sup> Appellate Body Reports, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.101; *US – Carbon Steel*, para. 157; *US – Carbon Steel (India)*, para. 4.446.

<sup>185</sup> Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.101.

<sup>186</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.446 (quoting Appellate Body Report, *US – Carbon Steel*, para. 157, in turn referring to Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, p. 335). More generally, with regard to a panel's duties under Article 11 of the DSU concerning the examination of evidence, the Appellate Body has found that, "in view of the distinction between the respective roles of the Appellate Body and panels", "we will not interfere lightly with the panel's exercise of its discretion." (Appellate Body Report, *US – Carbon Steel (India)*, para. 4.447 (quoting Appellate Body Report, *US – Wheat Gluten*, para. 151 (fn omitted))) In other words, not every error allegedly committed by a panel amounts to a violation of Article 11 of the DSU (Appellate Body Reports, *EC – Fasteners (China)*, para. 442; *US – Carbon Steel (India)*, para. 4.447), but only those that are so material that, taken together or singly, they undermine the objectivity of the panel's assessment of the matter before it. (Appellate Body Reports, *EC – Fasteners (China)*, para. 499; *EC and certain member States – Large Civil Aircraft*, para. 1318; *US – Carbon Steel (India)*, para. 4.447) Accordingly, it is insufficient for an appellant simply to disagree with a statement or to assert that it is not supported by evidence. As the initial trier of facts, a panel must provide reasoned and adequate explanations and coherent reasoning (Appellate Body Reports, *US – Upland Cotton (Article 21.5 – Brazil)*, fn 618 to para. 293; *US – Carbon Steel (India)*, para. 4.448), and must base its finding on a sufficient evidentiary basis. (Appellate Body Reports, *US – Carbon Steel*, para. 142; *US – Hot-Rolled Steel*, para. 4.448) In *Brazil – Retreaded Tyres*, the Appellate Body further clarified that "[a] panel enjoys discretion in assessing whether a given piece of evidence is relevant for its reasoning, and is not required to discuss, in its report, each and every piece of evidence." (Appellate Body Report, *US – Carbon Steel (India)*, para. 4.448 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 202 (fns omitted)))

4.34. First, regarding the language in Section 129 of the URAA, we understand Viet Nam to accept that Section 129(c)(1) does not, *by its express terms*, preclude implementation of DSB recommendations and rulings with respect to prior unliquidated entries of the subject merchandise.<sup>187</sup> Viet Nam argues, however, that, in paragraph 7.259 of the Panel Report, the Panel reached a final conclusion regarding the meaning and scope of Section 129(c)(1) on the basis of the text of that provision taken alone, prior to examining elements going beyond the text of Section 129(c)(1).<sup>188</sup>

4.35. The first sentence of paragraph 7.259 reads: "We begin our analysis of Viet Nam's claim with the text of Section 129(c)(1)." In the same paragraph, the Panel goes on to state:

... We agree with the conclusion reached by the *US – Section 129(c)(1) URAA* panel that Section 129(c)(1) "does not, by its express terms, require or preclude any particular action with respect to prior unliquidated entries". It necessarily follows that Section 129(c)(1) cannot be found to preclude implementation of DSB recommendations and rulings with respect to such prior unliquidated entries. The fact that, as alleged by Viet Nam, 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 that is unsupported by its terms.<sup>189</sup>

4.36. These statements, read in isolation, might unfortunately give the impression that the Panel was drawing a conclusion regarding the meaning and effect of Section 129(c)(1) on the basis of the text of that provision, taken alone. Yet, as noted above, these statements form part of a paragraph that clearly indicates at the outset that, at this step of its analysis, the Panel was examining the text of Section 129(c)(1). In subsequent paragraphs, the Panel proceeded to examine the relevance and import of argumentation and elements – beyond the text of Section 129(c)(1) – submitted by the parties regarding the meaning and effect of Section 129(c)(1).

4.37. Viet Nam argues that the Panel disregarded the broader statutory context into which Section 129(c)(1) fits.<sup>190</sup> Contrary to what Viet Nam suggests, the Panel appears to have addressed the statutory context of Section 129, including Sections 101(a)(2) and 102(d) of the URAA.<sup>191</sup> The Panel found that the SAA accompanying the URAA "merely confirms ... that implementation through Section 129 determinations only has effects with respect to entries that are made after the implementation date", and that nothing in the SAA suggests that Section 129(c)(1) concerns itself with, or has any effect on, prior unliquidated entries.<sup>192</sup> Viet Nam complains that the Panel merely used the SAA to "test its already rendered conclusion", rather than allowing it to inform its reading of the meaning and effect of Section 129(c)(1).<sup>193</sup> Viet Nam relies, in particular, on the following language in the SAA:

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

<sup>187</sup> Viet Nam's appellant's submission, para. 76 (referring to Panel Report, para. 7.259, in turn quoting Panel Report, *US – Section 129(c)(1) URAA*, para. 6.55).

<sup>188</sup> Viet Nam's appellant's submission, para. 77 (referring to Panel Report, para. 7.259).

<sup>189</sup> Panel Report, para. 7.259. (fns omitted)

<sup>190</sup> Viet Nam's appellant's submission, paras. 78-84.

<sup>191</sup> Section 101(a)(2) of the URAA, codified under *United States Code*, Title 19, Section 3511(a)(2) (Panel Exhibit VN-32); Section 102(d) of the URAA, codified under *United States Code*, Title 19, Section 3512(d) (Panel Exhibit VN-33).

<sup>192</sup> Panel Report, para. 7.262.

<sup>193</sup> Viet Nam's appellant's submission, para. 88.

order, entries made prior to the date of Trade Representative's direction would remain subject to potential duty liability.<sup>194</sup>

4.38. According to Viet Nam, this passage of the SAA is "extremely probative in as much as it outlines not only the limited effect of Section 129, but also the limited effect of adverse DSB rulings and recommendations on U.S. trade remedy measures generally."<sup>195</sup> Viet Nam notes that "the SAA expressly refers to Section 129 allowing only prospective effect after the USTR implementation date, and specifically distinguishing Section 129 from other legal remedies that might have retroactive effect."<sup>196</sup> Viet Nam adds further that the SAA "provides the specific example of revocation, which under normal conditions would result in duty refunds for prior unliquidated entries, but in the context of Section 129 would leave such entries 'subject to potential duty liability'."<sup>197</sup>

4.39. Viet Nam's claim of error appears to relate to the fact that the Panel did not attribute to the SAA the meaning that Viet Nam ascribes to it. We recall that the Appellate Body has found that the fact that a panel does not agree with arguments or evidence proffered by a party is not sufficient, in itself, to establish a breach of Article 11.<sup>198</sup> In this vein, the fact that the Panel did not attach the same significance to the SAA that Viet Nam does is not, in and of itself, a failure on the Panel's part to undertake a holistic assessment in ascertaining the meaning of Section 129(c)(1). Rather, as we understand it, the Panel directed its analysis to Viet Nam's claim that was before it, and which Viet Nam reiterates on appeal, namely, that Section 129(c)(1), itself, precludes implementation of DSB recommendations and rulings with respect to prior unliquidated entries. In any event, it is not clear to us why the limitation found in Section 129(c)(1) would necessarily mean that the United States is precluded from implementing DSB recommendations and rulings by using *other* mechanisms that may be available under US law.

4.40. Having examined the broader statutory context of Section 129(c)(1), the Panel then addressed Viet Nam's contention that USDOC "practice" since Section 129(c)(1) came into effect supports Viet Nam's view regarding the meaning and effect of Section 129(c)(1). This entailed a review of Exhibit VN-42<sup>199</sup>, which the Panel noted provides "extensive examples of how the United States has applied Section 129 since 2001".<sup>200</sup> The Panel recalled that Viet Nam had challenged Section 129(c)(1) "as such", independently of any application of that provision in any particular case. Thus, the Panel understood Viet Nam's reliance on the USDOC practice in Exhibit VN-42 as evidence supporting its reading of Section 129(c)(1).<sup>201</sup> On the basis of this evidence, the Panel found that "[t]he application of Section 129(c)(1) to date does suggest that the United States Government, following a Section 129 proceeding resulting in a determination to revoke or modify an anti-dumping order, typically has not extended the effect of that decision to prior unliquidated entries."<sup>202</sup> We recall that the Panel's examination was aimed at a determination of whether Section 129(c)(1), itself, precludes implementation of DSB recommendations and rulings with respect to prior unliquidated entries. Hence, even if the Panel's finding were read to suggest that implementation of DSB recommendations and rulings is not possible *under Section 129(c)(1)* in respect of prior unliquidated entries, this would still not answer the question of whether Section 129(c)(1) *precludes* implementation of DSB recommendations and rulings with respect to such entries.

4.41. Viet Nam asserts that the Panel ought to have taken into account the language in Exhibit VN-42 that speaks to "the USDOC's own description of Section 129 as it exists" within the US statutory framework.<sup>203</sup> Specifically, Viet Nam refers to a sentence in the Notice of Implementation of Determination under Section 129 of the URAA concerning the DSB

<sup>194</sup> Viet Nam's appellant's submission, para. 85 (quoting SAA (Panel Exhibit VN-34), pp. 1025-1026).

<sup>195</sup> Viet Nam's appellant's submission, para. 86.

<sup>196</sup> Viet Nam's appellant's submission, para. 86.

<sup>197</sup> Viet Nam's appellant's submission, para. 86.

<sup>198</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.227 (referring to Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 238).

<sup>199</sup> Panel Exhibit VN-42 consists of a summary chart of USDOC determinations issued under Section 129(c)(1) and certain *United States Federal Register* USDOC Section 129 determinations.

<sup>200</sup> Panel Report, fn 383 to para. 7.263.

<sup>201</sup> Panel Report, fn 379 to para. 7.263. In the same vein, we note that Viet Nam's claim does not encompass a challenge to USDOC practice or ongoing conduct.

<sup>202</sup> Panel Report, para. 7.264.

<sup>203</sup> Viet Nam's appellant's submission, para. 24.

recommendations and rulings in *US – Zeroing (EC)*, *US – Continued Zeroing*, and *US – Zeroing (Japan)*, that reads as follows:

Section 129 of the URAA is the applicable provision governing the nature and effect of determinations issued by [USDOC] to implement findings by WTO panels and the Appellate Body.<sup>204</sup>

4.42. This sentence is repeated several times throughout the USDOC notices contained in Exhibit VN-42.<sup>205</sup> This lends credence to Viet Nam's assertion that this sentence illustrates the USDOC's understanding of Section 129. However, contrary to what Viet Nam argues, we do not read this sentence to imply that "Section 129 was created as the *exclusive* authority to implement adverse WTO determinations by means of a new administrative determination."<sup>206</sup> Indeed, as discussed above, the fact that the United States can liquidate entries of the subject merchandise consistently with its WTO obligations undermines Viet Nam's position regarding the alleged exclusive and preclusive nature of Section 129 of the URAA.

4.43. The Panel then addressed the United States' assertion that the USDOC has alternative means with which to implement DSB recommendations and rulings in respect of prior unliquidated entries. In its arguments before the Panel, the United States highlighted three such alternative means: (i) the ability of the US Congress to adopt new legislation or amend existing legislation; (ii) the authority under Section 123 of the URAA for the US Administration to amend a WTO-inconsistent practice; and (iii) the authority of the USDOC to adopt a WTO-consistent methodology in a subsequent administrative review.<sup>207</sup> On appeal, Viet Nam challenges the adequacy of the Panel's examination of the alternative means of implementing DSB recommendations and rulings put forward by the United States. First, Viet Nam contends that "the existence of these three mechanisms as potential avenues for correcting WTO inconsistencies does not address ... the inconsistency that always arises under Section 129(c)(1)."<sup>208</sup> Viet Nam explains that 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. Viet Nam further argues that there is no authority under Section 123 for the USDOC to issue redeterminations applying a change in regulation or practice to entries that have already been subject to a final determination in an investigation or review, and that Section 129(c)(1) prohibits application of the results of any redetermination under that provision to prior unliquidated entries. Finally, Viet Nam submits that, while there is the possibility of applying a new, changed WTO-consistent methodology to prior unliquidated entries that have not yet been subject to a review, prior unliquidated entries already subject to a final determination in an investigation or review are not eligible for a subsequent annual review. Rather, for these entries to benefit from a new WTO-consistent methodology, Viet Nam insists that it is necessary for the USDOC to make a redetermination, and the only authority for such a redetermination is the authority under Section 129 of the URAA.

4.44. As noted above, we understand the Panel to have set out to examine whether, as Viet Nam had claimed, Section 129(c)(1), in and of itself, precludes implementation of DSB recommendations and rulings with respect to prior unliquidated entries. It was in this context that the Panel, at paragraph 7.266 of the Panel Report, considered the relevance of the alternative means of implementation referred to by the United States, in particular, the authority under Section 123 of the URAA for the United States to amend a WTO-inconsistent practice and to use such new practice to implement DSB recommendations and rulings, including in respect of prior

<sup>204</sup> Viet Nam's appellant's submission, paras. 24 and 82 (quoting USDOC, 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, *United States Federal Register*, Vol. 77, No. 117 (18 June 2012), pp. 36257-36260, at p. 36258 (contained in Panel Exhibit VN-42)).

<sup>205</sup> E.g. USDOC, Notice of Determination under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan, *United States Federal Register*, Vol. 67, No. 232 (3 December 2002), pp. 71936-71939, at p. 71937; and Notice of Implementation under Section 129 of the Uruguay Round Agreements Act; Countervailing Measures Concerning Certain Steel Products from the European Communities, *United States Federal Register*, Vol. 68, No. 221 (17 November 2003), pp. 64858-64859, at p. 64858 (contained in Panel Exhibit VN-42)).

<sup>206</sup> Viet Nam's appellant's submission, para. 82. (emphasis added)

<sup>207</sup> Panel Report, para. 7.265.

<sup>208</sup> Viet Nam's appellant's submission, para. 57.

unliquidated entries. It may have been helpful if the Panel had engaged in a more detailed examination of these alternative means of implementation; however, as noted above<sup>209</sup>, even if paragraph 7.266 of the Panel Report were read to suggest that the implementation of DSB recommendations and rulings is not possible *under Section 129(c)(1)* in respect of prior unliquidated entries, this would still not answer the question of whether Section 129(c)(1) *precludes* implementation of DSB recommendations and rulings with respect to such entries.

4.45. Turning to the USCIT *Corus Staal* opinion, Viet Nam argues that the Panel erred in finding that "eliminating Section 129(c)(1) would not demonstrate that refunds of cash deposits on prior unliquidated entries would then be available as a result of Section 129 determinations."<sup>210</sup> Instead, Viet Nam asserts that it was because of the limited effective date of Section 129 determinations set out in Section 129(c)(1) that the USCIT held that "Corus cannot obtain relief under the current statutory scheme."<sup>211</sup> For Viet Nam, the Panel's logic regarding *Corus Staal* is "wrong on its face" and, to the extent that "the Panel relied on this misconstruction of *Corus* in interpreting Section 129", its analysis "cannot be considered objective or reasonable".<sup>212</sup> The passage that Viet Nam relies on from the *Corus Staal* opinion reads as follows:

As a general rule, Commerce cannot impose antidumping duties without a valid determination of dumping. However, the statute that governs implementation of a WTO panel report explicitly states that *revocation of an antidumping order applies prospectively* on a date specified by the USTR.

In this case, there existed a valid determination of dumping that was subsequently revoked. Taken together, the Section 129 Determination and § 3538(c) clearly mandate that HRCS "that are entered, or withdrawn from warehouse, for consumption on or after" April 23, 2007 are not subject to antidumping duties. Since Corus entered the subject HRCS between May 3, 2001 and October 31, 2002, they *remain bound by the AD Order*. It is indisputable that the guidelines for implementing a WTO decision outlined in §§ 3538(c) supersede the broad requirements of § 1673 for imposing antidumping duties. Therefore, Corus *cannot obtain relief under the current statutory scheme*.<sup>213</sup>

4.46. Contrary to what Viet Nam suggests, we do not understand the *Corus Staal* opinion to support the proposition that Section 129(c)(1), in and of itself, precludes implementation of DSB recommendations and rulings with respect to prior unliquidated entries. Rather, as the Panel acknowledged, this language cited by Viet Nam recognizes "a difference between the general operation of US law, where revocation of an order by a domestic court provides a legal basis to seek a refund with respect to prior unliquidated entries, and the operation of Section 129, which provides no legal basis for such action."<sup>214</sup> We further recall the Panel's finding that "implementation through Section 129 determinations only has effects with respect to entries that are made *after* the implementation date"<sup>215</sup>, and the passage from the SAA cited above explaining that "section 129(c)(1) provides that where determinations by the [USITC] or [USDOC] are implemented under subsections (a) or (b), such determinations have prospective effect only."<sup>216</sup> For these reasons, we are not persuaded that the Panel misconstrued the meaning of the USCIT's ruling in *Corus Staal BV v. United States* as Viet Nam asserts.

4.47. As regards the *Tembec* opinion<sup>217</sup>, Viet Nam refers, in particular, to the USCIT's statement that "section 129 cannot be read to imply authority for the USTR to order the implementation of a section 129(a) determination that does not result in at least partial revocation of a related AD, CVD, or safeguards order."<sup>218</sup> Viet Nam relies on this statement to argue that the Panel acted

<sup>209</sup> *Supra*, para. 4.40.

<sup>210</sup> Viet Nam's appellant's submission, para. 93.

<sup>211</sup> Viet Nam's appellant's submission, para. 93 (quoting *Corus Staal* opinion (Panel Exhibit VN-36), p. 17).

<sup>212</sup> Viet Nam's appellant's submission, para. 93. (fn omitted)

<sup>213</sup> *Corus Staal* opinion (Panel Exhibit VN-36), internal p. 5. (emphasis added; internal citations omitted)

<sup>214</sup> Panel Report, para. 7.268. (fn omitted)

<sup>215</sup> Panel Report, para. 7.262.

<sup>216</sup> SAA (Panel Exhibit VN-34), pp. 1025-1026.

<sup>217</sup> Viet Nam provided the full text of the *Tembec* opinion in Panel Exhibit VN-37.

<sup>218</sup> Viet Nam's appellant's submission, para. 94 (quoting *Tembec* opinion (Panel Exhibit VN-37), internal pp. 13-14).

inconsistently with Article 11 of the DSU by declining to accept the textual and contextual guidance that was present in *Tembec v. United States*. Instead, according to Viet Nam, the Panel conducted a "tailored analysis" of Section 129(c)(1) to support the conclusion, that it had reached on the basis of the text of that provision, that the meaning of Section 129(c)(1) is "clear on its face".<sup>219</sup> The Panel described the USCIT's reasoning in the following terms:

In its decision in *Tembec v. United States*, the Court of International Trade held that Section 129 does not grant the USTR the authority to order the USDOC to "implement" revised affirmative USITC 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 Court found that the USTR's order to the USDOC to implement the Section 129 determination was *ultra vires* and void. ... The Court 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 Court however indicates that, assuming *arguendo* that such a relief would be permissible under US law (the Court posits that it might be construed as a form of retrospective relief unavailable under Section 129), the USTR's power to direct the USDOC to revoke an order "*in part*" could allow it to order such refunds: the Court reasons that the USDOC "could implement the determination by revoking the portion of the outstanding order requiring retention of cash deposits collected during the investigation period". Hence, the Court's decision does not support – and could even be read as contradicting – Viet Nam's argument that in situations where the USITC modified an affirmative injury determination, such as altering its theory from one of present material injury to threat of material injury, the USTR has no authority to direct any action under Section 129.<sup>220</sup>

4.48. As noted by the Panel, the USCIT did not expressly rule on 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."<sup>221</sup> We are not convinced that the holding by the USCIT in *Tembec v. United States* suggests that Section 129 is the only means available to the United States to implement DSB recommendations and rulings with respect to prior unliquidated entries.

4.49. On the basis of its analysis, the Panel found that Viet Nam had failed to establish that Section 129(c)(1) precludes "extending the benefits of implementation" to prior unliquidated entries<sup>222</sup>, and concluded, therefore, that Viet Nam had not established that Section 129(c)(1) is inconsistent "as such" with Articles 1, 9.2, 9.3, 11.1, and 18.1 of the Anti-Dumping Agreement.<sup>223</sup> The Panel explained that, in reaching this conclusion, it had taken into consideration the text of Section 129(c)(1), the SAA, the US Government's application of Section 129(c)(1) in the years since it was adopted, and the USCIT's opinions cited by Viet Nam.<sup>224</sup>

4.50. Based on our review of the Panel Report, we consider that the Panel properly relied on the various elements that it examined to inform its understanding of the meaning and effect of Section 129(c)(1). We, therefore, do not agree with Viet Nam that the Panel failed to conduct a holistic assessment in ascertaining the meaning of Section 129(c)(1).

4.51. In sum, for all these reasons, we find that Viet Nam has not established that the Panel acted inconsistently with Article 11 of the DSU. It follows that we need not, and do not, address Viet Nam's request that we complete the legal analysis in order to determine whether Section 129(c)(1) of the URAA is inconsistent "as such" with Articles 1, 9.2, 9.3, 11.1, and 18.1 of the Anti-Dumping Agreement.

<sup>219</sup> Viet Nam's appellant's submission, para. 98.

<sup>220</sup> Panel Report, fn 398 to para. 7.269. (emphasis original)

<sup>221</sup> Panel Report, fn 398 to para. 7.269.

<sup>222</sup> Panel Report, para. 7.270.

<sup>223</sup> Panel Report, paras. 7.271-7.272.

<sup>224</sup> Panel Report, para. 7.270.

## 5 FINDINGS AND CONCLUSION

5.1. For the reasons set out in this Report, the Appellate Body:

- a. rejects Viet Nam's claim that the Panel acted inconsistently with Article 11 of the DSU; and
- b. upholds the Panel's finding, in paragraph 8.1.h. of the Panel Report, that Viet Nam has not established that Section 129(c)(1) of the URAA is inconsistent "as such" with Articles 1, 9.2, 9.3, 11.1, and 18.1 of the Anti-Dumping Agreement.

5.2. We recall that Viet Nam's appeal is limited to the Panel's finding in paragraph 8.1.h. of the Panel Report.<sup>225</sup> Given that we have not found in this Report that the United States has acted inconsistently with any of its WTO obligations, we make no recommendation to the DSB pursuant to Article 19.1 of the DSU.

Signed in the original in Geneva this 25th day of March 2015 by:

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Thomas R. Graham  
Presiding Member

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Ujal Singh Bhatia  
Member

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Peter Van den Bossche  
Member

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<sup>225</sup> We note that other findings in the Panel Report have not been appealed. These findings and the subsequent recommendations by the Panel, therefore, remain unchanged.

**ANNEX 1****WORLD TRADE  
ORGANIZATION****WT/DS429/5**

9 January 2015

(15-0155)

Page: 1/2

Original: English

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

NOTIFICATION OF AN APPEAL BY VIET NAM  
UNDER ARTICLE 16.4 AND ARTICLE 17 OF THE UNDERSTANDING ON RULES  
AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU),  
AND UNDER RULE 20(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW

The following notification, dated 6 January 2015, from the Delegation of Viet Nam, is being circulated to Members.

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At the instruction of my authorities, the Government of the Socialist Republic of Viet Nam hereby notifies the Dispute Settlement Body of its appeal of certain conclusions and recommendations of the panel in *United States – Anti-Dumping Measures on Certain Shrimp from Vietnam* (DS429). This notification of appeal is also being filed with the Appellate Body Secretariat, with the United States, and with third party participants in the panel proceeding. The specifics of the appeal are as follows:

1. Pursuant to Article 16.4 and Article 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the *Working Procedures for Appellate Review*, the Socialist Republic of Viet Nam ("Viet Nam") hereby notifies the Dispute Settlement Body ("DSB") of its decision to appeal to the Appellate Body certain issues of law and legal interpretation covered in the Panel Report in *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam* (WT/DS429) ("Panel Report"). Pursuant to Rule 20(1) of the Working Procedures for Appellate Review, Viet Nam is simultaneously filing this Notice of Appeal with the Appellate Body Secretariat.
2. Pursuant to rules 20(1) and 21(1) of the Working Procedures, Viet Nam files this Notice of Appeal together with its Appellant's Submission with the Appellate Body Secretariat.
3. Viet Nam seeks review of the failure of the Panel to find that section 129(c)(1) of the Uruguay Round Agreements Act ("URAA") constitutes an "as such" inconsistency with Articles 1, 9.2, 9.3, 11.1, and 18.1 of the Agreement on Implementation of Article VI of GATT 1994 ("Anti-Dumping Agreement") by limiting administrative redeterminations made to implement adverse DSB recommendations and rulings, as provided for under Section 129 of the URAA, to "entries" (imports) of subject merchandise made on or after the effective date of the determination to implement the adverse WTO ruling.
4. The conclusion and recommendation regarding section 129(c)(1) is in paragraph 8.1.h of the Panel Report. The discussion of Vietnam's claims, the defenses presented by the United States, and the evaluation of the Panel are in section 7.5 of the Panel Report.

5. The conclusion and recommendation regarding Section 129(c)(1) constitutes egregious error by the Panel in its examination, understanding, and application of the evidence before it and in its interpretation of this provision of U.S. law. As such, Viet Nam was denied an objective examination as required by Article 11 of the DSU of the meaning of Section 129(c)(1). The examination by the Panel was neither rigorous nor comprehensive as required by WTO jurisprudence. In particular, the Panel erred because:
- its analytical framework for determining whether it would consider the consistency of Section 129(c)(1) with U.S. WTO obligations applied an erroneous burden of proof that flowed from a gross misunderstanding of the U.S. retrospective duty assessment system and the operation of Section 129 relative to other mechanisms that might address certain entries made before a Section 129 redetermination's effective date; and
  - it failed to apply objective principles of statutory interpretation in its consideration (or lack thereof) of the statutory text of Section 129(c)(1), the broader context surrounding the operation of Section 129, authoritative guidance on Section 129(c)(1), judicial interpretation of the provision, and its application.
6. Viet Nam seeks to have the Appellate Body reverse the Panel's conclusion with respect to section 129(c)(1). In reversing the Panel's conclusion, Vietnam also requests the Appellate Body to complete the analysis and find Section 129(c)(1) "as such" inconsistent with U.S. WTO obligations under Articles 1, 9.2, 9.3, 11.1, and 18.1 of the Agreement on Implementation of Article VI of GATT 1994 ("Anti-Dumping Agreement"), and recommend that this provision be brought into conformity with those obligations.
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## **ANNEX 2**

**ORGANISATION MONDIALE  
DU COMMERCE**

**ORGANIZACIÓN MUNDIAL  
DEL COMERCIO**

### **WORLD TRADE ORGANIZATION**

#### **APPELLATE BODY**

*United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam*

AB-2015-1

#### **Procedural Ruling**

1. On 27 January 2015, we received a letter from the United States requesting that we change the date for the oral hearing in the above appellate proceedings due to certain logistical difficulties faced by the United States in securing reasonable hotel accommodation in Geneva during the week of 2 March 2015. The United States indicated that, if the Appellate Body were to grant its request, the United States would be prepared to participate in an oral hearing scheduled earlier or later than the week of 2 March 2015.

2. We invited Viet Nam and the third participants to comment in writing on the United States' request by 3 p.m. on 28 January 2015. By that deadline, we received responses from Viet Nam and China. For Viet Nam, advancing the date for the oral hearing to the week prior to 2 March was not possible, but it could agree to postpone the hearing to the week of 9 March. Viet Nam expressed its concern, however, over possible delays in the circulation of the Appellate Body report in this dispute that might result. China, for its part, indicated that it would prefer to have the oral hearing scheduled for 27 February, or for the week of 9 March, or later, should the Appellate Body grant the United States' request. No other third participant submitted comments.

3. The Division has carefully considered the United States' request, and the comments provided by Viet Nam and China. According to Rule 16(2) of the Working Procedures for Appellate Review, the date fixed by the Division for an oral hearing may be changed at the request of a participant only if there are "exceptional circumstances" where strict adherence to the date set by the Division would result in "manifest unfairness". While we empathize with the United States over the difficulties it faces, we are not satisfied that the circumstances it has outlined in its request amount to "exceptional circumstances" that would result in "manifest unfairness" within the meaning of Rule 16(2). We note that this appeal is of limited size. Therefore, the oral hearing in this appeal has been scheduled for one day, rather than multiple days. In our view, the brevity of the hearing mitigates, somewhat, the burden of finding accommodation in the area around Geneva. We also note that, while Viet Nam does not object to postponing the oral hearing, it has expressed concern regarding possible delays in the circulation of the Appellate Body report in this dispute. Postponing the oral hearing by a week or more would make it impossible to circulate the Appellate Body report within the 90-day timeframe provided for in Article 17.5 of the DSU. Finally, several appellate proceedings are currently pending before the Appellate Body. A change of the hearing date in this appeal would create scheduling difficulties in respect of those other proceedings.

4. For these reasons, we have decided not to change the date of the oral hearing, which has been fixed in the Working Schedule for this appeal for Monday, 2 March 2015.

Signed in Geneva this 29th day of January 2015 by:

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Thomas Graham  
Presiding Member

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Ujal Singh Bhatia  
Member

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Peter Van den Bossche  
Member

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