

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

Report of the Panel WT/DS221/R

*Adopted by the Dispute Settlement Body
on 30 August 2002*

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I. PROCEDURAL BACKGROUND

1.1 On 17 January 2001 Canada requested consultations with the United States pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereafter the "DSU"), Article XXII of the General Agreement on Tariffs and Trade 1994 (hereafter the "GATT 1994"), Article 30 of the Agreement on Subsidies and Countervailing Measures (hereafter the "SCM Agreement") and Article 17 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (hereafter the

"AD Agreement") regarding section 129(c)(1) of the US Uruguay Round Agreements Act (hereafter the "URAA")¹ and the Statement of Administrative Action (hereafter the "SAA")² accompanying the URAA.³

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

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

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

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

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

Chairperson: Ms. Claudia Orozco

Members: Mr. Simon Farbenbloom
 Mr. Edmond McGovern⁶

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

1.7 The Panel met with the parties on 18 and 19 February 2002 as well as on 26 March 2002. It met with the third parties on 19 February 2002. The Panel

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

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

³ WT/DS221/1.

⁴ WT/DS221/4.

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

⁶ *Ibid.*

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issued its interim report to the parties on 22 May 2002. The Panel issued its final report to the parties on 12 June 2002.

II. FACTUAL ASPECTS

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

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

A. *Section 129 of the URAA*

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

(a) ACTION BY UNITED STATES INTERNATIONAL TRADE COMMISSION.—

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

[...]

(4) COMMISSION DETERMINATION.— Notwithstanding any provision of the Tariff Act of 1930 or title II of the Trade Act of 1974, if a majority of the Commissioners issues an affirmative report under paragraph (1), the Commission, upon the written request of the Trade Representative, shall issue a de-

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

termination 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.

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

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

[...]

(b) **ACTION BY ADMINISTERING AUTHORITY.**—

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

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

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

(4) IMPLEMENTATION OF DETERMINATION.—

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

(c) EFFECTS OF DETERMINATIONS; NOTICE OF IMPLEMENTATION.—

(1) EFFECTS OF DETERMINATIONS.— Determinations concerning title VII of the Tariff Act of 1930 that are implemented under this section shall apply with respect to unliquidated entries of the subject merchandise (as defined in section 771 of that Act) that are entered, or withdrawn from warehouse, for consumption on or after—

(A) in the case of a determination by the Commission under subsection (a)(4), the date on which the Trade Representative directs the administering authority under subsection (a)(6) to revoke an order pursuant to that determination, and

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

(2) NOTICE OF IMPLEMENTATION.—

(A) The administering authority shall publish in the Federal Register notice of the implementation of any determination made under this section with respect to title VII of the Tariff Act of 1930.

(B) The Trade Representative shall publish in the Federal Register notice of the implementation of any determination made under this section with respect to title II of the Trade Act of 1974.

(d) OPPORTUNITY FOR COMMENT BY INTERESTED PARTIES.— Prior to issuing a determination under this section, the administering authority or the Commission, as the case may be, shall provide interested parties with an opportunity to submit written comments and, in appropriate cases, may hold a hearing, with respect to the determination.⁸

2.4 Under Section 129, the United States Trade Representative (hereafter the "USTR") may request the US International Trade Commission (hereafter the "ITC") or the US Department of Commerce (hereafter the "Department of Commerce") to take action "not inconsistent" with a panel report only if such action is

⁸ Uruguay Round Agreements Act, Pub. L. No. 103-465, section 129(a)-(d), 108 Stat. 4836-4838.

in accord with US antidumping or countervailing duty law.⁹ Section 129 does not apply in cases where implementation of an adverse DSB ruling requires a change in US antidumping or countervailing duty statutes.

B. The Retrospective Duty Assessment System of the United States

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

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

2.7 An administrative review entails a substantive legal and factual analysis of whether imports of the product during the period of review were dumped or subsidized and, if so, to what extent.¹¹ The facts pertaining to entries during the period under review are investigated for the first time during an administrative review. The law applied in an administrative review is the law as interpreted by the Department of Commerce at the time that it makes its administrative review decision. The Department of Commerce's interpretation of the underlying anti-

⁹ See section B.1.(c), third paragraph, of the Statement of Administrative Action, *supra*, p. 1023.

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

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

dumping or countervailing duty laws or regulations may be different from the interpretation it applied in the original investigation or in previous administrative reviews.

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

III. MAIN ARGUMENTS OF THE PARTIES

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

A. *Canada*

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

1. *Introduction*

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

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

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

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

3.6 Where a DSB ruling finds that an action by the ITC contravenes the obligations of the United States under the AD Agreement or the SCM Agreement, the USTR, pursuant to section 129(a)(1), "may request the Commission to issue