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

(WT/DS221)

FIRST WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

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I. INTRODUCTION

1. In this dispute, Canada challenges section 129(c)(1) of the Uruguay Round Agreements Act ("URAA") as inconsistent with the WTO obligations of the United States. This provision of U.S. law was enacted with the specific purpose of enabling the United States to implement WTO panel or Appellate Body decisions which find that the United States has taken actions inconsistent with the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") or the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"). Consistent with well-established GATT and WTO practice, section 129(c)(1) provides for such implementation on a prospective basis.

2. It is widely accepted that the dispute settlement process established in the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("the DSU") provides for prospective remedies in dispute settlement cases, and that there is no basis in the text of the DSU for requiring WTO Members to provide retroactive relief when their measures are found to be inconsistent with WTO rules. Canada, for example, has described the concept of retroactivity in WTO dispute settlement as "contrary to GATT/WTO custom and practice."[1] Nevertheless, Canada is seeking in this case to require the United States to provide retroactive relief in cases involving antidumping and countervailing duty measures. It is doing so by attempting to exploit the fact that the United States uses a "retrospective" system for calculating the amount of liability that an importer must pay when it imports merchandise that, at the time of entry, is subject to an antidumping or countervailing duty order. It is clear, however, that regardless of whether a

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[1] *Dispute Settlement Body, Minutes of Meeting Held on 11 February 2000*, WT/DSB/M/75, 7 March 2000, at 7.

Member uses a retrospective or a prospective system of duty calculation, liability for antidumping and countervailing duties attaches at the time of entry and the calculation of the amount of any antidumping or countervailing duty liability is based on conditions in effect at the time of entry.

3. Interestingly, while Canada is challenging the method by which the United States implements adverse WTO panel or Appellate Body reports ("adverse WTO reports"), it has chosen to ignore the provisions of the DSU which address implementation of adverse WTO reports and, in particular, the time lines for effecting that implementation.[2]

4. As we discuss below, the obligation that WTO Members have assumed with respect to implementing adverse WTO reports is to bring the offending measure into conformity with the agreement in question.[3] It is well established that the nature of this obligation is prospective, seeking as the first objective to obtain the withdrawal of the measure found to be inconsistent with the agreement in question.[4] Prospective implementation of WTO reports ensures that entries of merchandise into the implementing country will, as of the date of implementation, not be restricted or impaired by the WTO-inconsistent measure. Section 129(c)(1) of the URAA ensures that the United States will meet this obligation in cases involving the revocation or

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[2] In its entire first written submission, Canada mentions the DSU only twice. To be specific, Canada indicated that consultations in this dispute were held, *inter alia*, pursuant to DSU Article 4, and that the establishment of this panel was requested pursuant to DSU Article 6.1. Canada's First Written Submission, paras. 10-11.

[3] *See* Article 19.1 of the DSU.

[4] *See* Article 3.7 of the DSU.

modification of antidumping and countervailing duty measures by implementing any adverse WTO report with respect to all entries that take place on or after the date of implementation.

5. It is equally important to bear in mind that the provisions of the DSU do not simply permit, but explicitly provide, that Members have a reasonable period of time to implement adverse WTO reports and that, in the interim, there is no obligation to cease or otherwise suspend the measure with respect to its impact on entries that take place during the reasonable period of time. Canada would have this panel curtail that right and impose new and additional obligations only to Members that use retrospective systems for calculating the amount of antidumping and countervailing duties.

6. Section 129(c)(1) of the URAA treats exporters to the United States in the same manner that Members with prospective systems treat exporters to their countries. For example, Canada, which uses a prospective system, would appear to continue to collect antidumping or countervailing duties on entries which occur during any reasonable period of time Canada had to implement an adverse WTO report resulting in revocation of a measure. Entries occurring after implementation would be treated in accordance with the WTO decision – just as in the United States pursuant to section 129(c)(1) of the URAA.

7. In essence, Canada asks the panel to ignore the United States' rights under the DSU and address the issue of pre-implementation entries under the provisions of the AD and SCM Agreements. This is the foundation for Canada's claims that section 129(c)(1) of the URAA results in (1) duties being levied at rates higher than the level of dumping or subsidization found or in the absence of the requisite injury finding; (2) the retention of an order longer than

necessary to offset dumping; and (3) action generally taken inconsistent with obligations assumed under the AD and SCM Agreements.

8. As the United States will demonstrate below, nothing in the text of the WTO Agreements requires anything other than prospective implementation of adverse WTO reports. Just as importantly, nothing in the Agreements establishes a rule that requires Members to apply adverse WTO reports not only to entries that take place after implementation, but also to entries that took place prior to implementation. Without a basis to assert that implementation decisions must apply in any way but prospectively – *i.e.*, to new entries only – Canada's specific claims of violation under the AD and SCM Agreements as well as GATT 1994 and the WTO Agreement are inapposite. Section 129(c)(1) is fully consistent with the WTO obligations of the United States. It ensures implementation of adverse WTO reports on a prospective basis, consistently with the United States' WTO obligations.

II. FACTUAL BACKGROUND

A. The U.S. Duty Assessment System

9. Article 9.3 of the AD Agreement and footnote 52 of Article 21 of the SCM Agreement recognize that Members may use either a retrospective or a prospective system to determine the final amount of antidumping or countervailing duty to be assessed. The United States calculates both antidumping and countervailing duties on a retrospective basis.[5]

10. Pursuant to its retrospective system, liability for antidumping and countervailing duties attaches at the time merchandise subject to a preliminary or final antidumping or countervailing

[5] *See, e.g.,* 19 C.F.R. § 351.212(a) (2000).

duty measure enters the United States.[6] When such measures have been put into place, the United States will require upon entry that a security (cash deposit)[7] be provided to the U.S. Customs Service and that collection of the actual duty amount be delayed pending calculation of the amount of the liability. Thus, the date of entry of merchandise subject to an antidumping or countervailing duty measure triggers application of the antidumping or countervailing duty to that merchandise. However, the ultimate amount of antidumping or countervailing duties to be paid will not be calculated until an administrative review covering that entry is conducted or the time passes to request a review of the entry and no party has requested such a review.[8]

11. The retrospective system that is employed by the United States is different from the prospective system that is used by some other countries, including Canada. As the United States understands the Canadian system, Canada uses values determined in the original antidumping or countervailing duty investigation[9] to assess duties owed on future shipments of subject

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[6] The only exception may occur with respect to entries occurring up to 90 days prior to a preliminary determination in an investigation. Article 10 of the AD Agreement and Article 20 of the SCM Agreement contain specific provisions explicitly permitting retroactive liability for antidumping and/or countervailing duties when certain conditions have been met. This possibility of retroactive application of antidumping or countervailing duties is not at issue in this case.

[7] If the entry occurs during an antidumping or countervailing duty investigation, after preliminary determinations of injury and dumping and prior to an antidumping or countervailing duty order, the United States typically permits the security to take the form of cash deposits or bonds, at the preference of the importer.

[8] If no party requests a review of an entry, final liability for antidumping or countervailing duties will be set at the amount of the cash deposit or bond deposited at the time of entry.

[9] If a "re-investigation" is conducted, values determined in the re-investigation then become the basis for assessment of antidumping or countervailing duties owed on future shipments of subject merchandise. Canadian Customs and Revenue Agency, *Memorandum on Regulation D14-1-7, Assessment of Anti-Dumping and Countervailing Duties Under the Special Import Measures Act* (May 15, 2000), ("*Memorandum D14-1-7*") para. 6 (Exhibit US-1); Canadian Customs and Revenue Agency,

(continued...)

merchandise.[10] Liability for antidumping or countervailing duties is established at the time of entry,[11] with refunds made only pursuant to a "re-determination" or a Canadian court proceeding or a proceeding under Chapter 19 of the North American Free Trade Agreement ("NAFTA").[12]

12. Retrospective and prospective systems have two things in common. First, the date of entry of the subject merchandise determines whether antidumping or countervailing duties will apply, regardless of whether the amount of that duty is calculated immediately upon entry or after an administrative review. Second, the administering authority in either system may conduct a review to determine if the duty/deposit levied correctly reflects the actual level of dumping or subsidization at the time of entry. In cases of overpayment, the government issues refunds, whether of cash deposits or final duty assessments, pursuant to the results reached in the review.

B. Section 129 of the Uruguay Round Agreements Act

13. Section 129 of the URAA addresses instances in which a WTO panel or the Appellate Body has found that an action taken by the International Trade Commission ("ITC") or the U.S. Department of Commerce ("Commerce") in an antidumping or countervailing duty proceeding is

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[9](...continued)
Memorandum on Regulation D14-1-6, Liability and Payment of Provisional Duty, Anti-Dumping Duty, and Countervailing Duty Under the Special Import Measures Act (May 16, 2000)("*Memorandum D14-1-6*"), para. 18 (Exhibit US-2); *see generally*, Canadian Customs and Revenue Agency, *Memorandum on Regulation D14-1-8, Re-Investigation Policy under the Special Import Measures Act* (May 15, 2000)(Exhibit US-3); Canadian Customs and Revenue Agency, *Statement of Administrative Practices for the Special Import Measures Act* (Apr. 2000) at 19 (Exhibit US-4).

[10] *Memorandum D14-1-7,* paras. 4 and 7 (Exhibit US-1).

[11] *See* Special Import Measures Act ("SIMA"), § 3(1) (R.S. 1985, c. S-15) (Canada), available as WTO document G/ADP/N/1/CAN/1* and G/SCM/N/1/CAN/1*; *Memorandum D14-1-6 (Exhibit US-2*) (liability for payment of antidumping or countervailing duty arises upon exportation).

[12] *See* SIMA, §§ 12, 13, 60 (R.S. 1985, c. S-15) (Canada)(refunds made as a result of court and NAFTA proceedings and re-determinations, respectively).

inconsistent with U.S. obligations under the AD or SCM Agreement. In such instances, sections 129(a)(4) and (b)(2) of the URAA provide that, upon written request from the United States Trade Representative ("USTR"), the ITC or Commerce, as the case may be, shall issue a "determination in connection with the particular proceeding that would render [the ITC's or Commerce's] action … not inconsistent with the findings of the panel or Appellate Body." Section 129(a)(6) of the URAA provides that USTR, after appropriate consultation with congressional committees, may then instruct Commerce to revoke an antidumping or countervailing duty order in cases in which the ITC's new determination no longer supports an affirmative injury determination. Section 129(b)(4) of the URAA similarly provides that, after consultation with Commerce and congressional committees, USTR may direct Commerce to implement its new determination.

14. Section 129(c)(1) of the URAA, the specific provision that Canada is challenging, provides an effective date for new determinations implementing adverse WTO reports. Specifically, it provides that such determinations:

> shall apply with respect to unliquidated entries of the subject merchandise … that are entered, or withdrawn from warehouse, for consumption on or after –
>
> > (A) in the case of a determination by the [ITC] under subsection (a)(4), the date on which the Trade Representative directs [Commerce] under subsection (a)(6) to revoke an order pursuant to that determination, and
> >
> > (B) in the case of a determination by [Commerce] under subsection (b)(2), the date on which the Trade Representative directs [Commerce]

> under subsection (b)(4) to implement that determination.

Section 129(c)(1) of the URAA thus provides that any ITC or Commerce determination made and implemented pursuant to direction from USTR in response to an adverse WTO report will apply to all unliquidated entries which enter on or after the date that USTR directs Commerce to revoke an antidumping or countervailing duty order[13] or implement a new Commerce determination.

15. By applying the new determination with respect to all entries which occur on or after the date that USTR directs Commerce to implement the ITC or Commerce determination, the United States will have, in the case of a revocation, withdrawn the measure which was the subject of the dispute or, in the case of a new Commerce determination, brought that measure into conformity with the adverse WTO report. No entries of merchandise occurring on or after the date of implementation will be subject to the WTO-inconsistent determination.

16. In the six years since section 129(c)(1) entered into force, the United States has applied the provision to two antidumping or countervailing duty investigations. Both involved the recent implementation of the DSB's report in *United States – Antidumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*.[14] In that case, pursuant to a request from USTR, Commerce made new WTO-consistent final determinations for the two investigations covered by the panel report. USTR then requested Commerce to implement those

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[13] Under U.S. law, Commerce is responsible for imposing antidumping and countervailing duty orders. As a result, Commerce would perform the ministerial task of revoking an order, even if the revocation is the result of an ITC negative injury determination.

[14] WT/DS179/R, adopted February 1, 2001.

determinations and Commerce did so, establishing new cash deposit rates that applied to all entries taking place on or after the date of implementation.[15]

C. Procedural Background

17. Canada requested consultations with the United States on January 17, 2001, pursuant to Article 4 of the DSU, Article XXII of GATT 1994, Article 30 of the SCM Agreement, and Article 17 of the AD Agreement. Canada's consultation request claimed that section 129(c)(1) of the URAA is inconsistent with DSU Article 21.3, in the context of DSU Articles 3.1, 3.2, 3.7, and 21.1. Canada also cited provisions of GATT 1994, the SCM Agreement, the AD Agreement, and the WTO Agreement.

18. On July 12, 2001, Canada requested that a panel be established in this dispute pursuant to Articles 4 and 6 of the DSU, Article XXIII of GATT 1994, Article 30 of the SCM Agreement, and Article 17 of the AD Agreement. Once again, in its request, Canada indicated that the panel should consider whether section 129(c)(1) of the URAA is consistent with the United States' obligations under Articles 3.2, 3.7, 19.1, 21.1 and 21.3 of the DSU, along with various provisions of GATT 1994, the SCM Agreement, the AD Agreement, and the WTO Agreement.

19. This panel was established on August 23, 2001 and constituted on October 30, 2001.

20. In its first written submission, Canada continues to claim that section 129(c)(1) of the URAA violates several provisions of the GATT, the AD Agreement, the SCM Agreement, and

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[15] *Notice of Amendment of Final Determinations of Sales at Less Than Fair Value: Stainless Steel Plate in Coils From the Republic of Korea; and Stainless Steel Sheet and Strip in Coils From the Republic of Korea*, 66 Fed. Reg. 45279 (August 28, 2001).

the WTO Agreement.[16] It has abandoned its claims that section 129(c)(1) of the URAA violates the DSU.

III. STANDARD OF REVIEW

21. The purpose of dispute settlement is to ensure the implementation of existing commitments in the WTO Agreement.[17] This is reflected in the text of Articles 3.2 and 19.2 of the DSU. Both articles provide that neither the Dispute Settlement Body's recommendations and rulings, nor a panel, nor the Appellate Body, can add to or diminish existing WTO rights and obligations. Consistent with this, DSU Article 3.4 requires the DSB to make recommendations and rulings in accordance with those rights and obligations:

> Recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter *in accordance with the rights and obligations* under this Understanding and under the covered agreements.[18]

Thus, panels must respect the carefully-drawn balance between Members' rights and obligations in the WTO Agreement.[19]

22. DSU Article 3.2 directs panels to "clarify" WTO provisions "in accordance with customary rules of interpretation of public international law." The Appellate Body has

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[16] *See* Canada's First Submission, para. 9.

[17] Article 3.2 of the DSU.

[18] Article 3.4 of the DSU (emphasis added).

[19] *See* Appellate Body Report on *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, at 16.

recognized that Article 31 of the *Vienna Convention* reflects a customary rule of interpretation.[20] Article 31 provides that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the *terms* of the treaty in their *context* and in the light of its *object and purpose*."[21] In applying this rule, however, the Appellate Body in *India – Patents* cautioned that the panel's role is limited to the words and concepts used in the treaty:

> The legitimate expectations of the parties to a treaty are reflected in the language of the treaty itself. The duty of a treaty interpreter is to examine the words of the treaty to determine the interpretation set out in Article 31 of the *Vienna Convention*. *But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended*… Both panels and the Appellate Body must be guided by the rules of treaty interpretation set out in the *Vienna Convention*, and must not add to or diminish the rights and obligations provided in the *WTO Agreement*.[22]

Application of this standard of review will demonstrate, as discussed below, that section 129(c)(1) of the URAA is consistent with the United States' WTO obligations.

IV. ARGUMENT

A. Introduction

23. It is well-established that the complaining party in a WTO dispute bears the burden of coming forward with argument and evidence sufficient to establish a *prima facie* case of breach

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[20] *See* Appellate Body Report on *Canada - Patent Protection Term*, WT/DS170/AB/R, adopted 12 October 2000, para. 53.

[21] *Vienna Convention* Article 31.1 (emphasis added).

[22] Appellate Body Report on *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, paras. 45-46 (emphasis added).

of a Member's WTO obligations.[23] If the balance of evidence and argument is inconclusive with respect to a particular claim, Canada, as the complaining party, must be found to have failed to establish that claim.[24]

24. We explain below why Canada has failed to meet its burden to establish a *prima facie* case. However, in the event the Panel should find to the contrary, we have also rebutted Canada's claims.

25. Section 129(c)(1) of the URAA establishes a method of implementing adverse WTO reports concerning the AD and SCM agreements. Therefore, any discussion of whether section 129(c)(1) is inconsistent with the United States' WTO obligations must start with an understanding of the obligations that the DSU imposes with respect to implementing adverse WTO reports. As discussed below, the DSU creates an obligation on the part of a Member whose measure has been found to be inconsistent with a WTO agreement to bring that measure into conformity in a prospective manner. Canada fails to address the obligations imposed by the DSU, having abandoned all DSU claims raised in its panel request. Canada's decision to abandon these claims is not surprising, given that an examination of these provisions reinforces the prospective nature of WTO remedies.

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[23] *See, e.g.,* Appellate Body Report on *United States - Measures Affecting Imports of Woven Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, page 14; Appellate Body Report on *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, para. 104; Panel Report on *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/R, as modified by the Appellate Body, adopted 12 January 2000, para. 7.24.

[24] *See, e.g.,* Panel Report on *India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R, as affirmed by the Appellate Body, adopted 22 September 1999, para. 5.120.

26. Canada would have the Panel believe that this case has nothing to do with the dispute settlement system. Why? Because what they ask the Panel to do is fundamentally inconsistent with the rights and obligations of Members under the DSU. In essence, Canada is using the provisions of the AD and SCM Agreements and GATT 1994 to disguise a claim for retroactive relief as a result of an adverse WTO report.

27. In reality, this case is about the dispute settlement system, specifically, what it means to bring a measure into conformity with the WTO rules governing antidumping and countervailing duties, and the entries to which that obligation applies. Therefore, the fact that Canada has made no claim under the DSU should be sufficient for the Panel to find that they have failed to make a *prima facie* case. However, Canada's claim would fail on the merits as well because it is well established that the obligation under the DSU to bring a measure into conformity is prospective only and Section 129(c)(1) of the URAA is consistent with that obligation.

28. Rather than challenge section 129(c)(1) of the URAA under the DSU, Canada argues that section 129(c)(1) of the URAA violates Article 1 of the AD Agreement[25] and Article 10 of the SCM Agreement[26] because section 129(c)(1) "precludes"[27] Commerce from applying determinations made pursuant to implementation of adverse WTO reports to pre-implementation entries which remain unliquidated. Neither Article 1 of the AD Agreement nor Article 10 of the SCM Agreement, however, addresses the timing of implementation decisions, nor do they

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[25] Canada's First Submission, paras. 35-37.

[26] Canada's First Submission, paras. 55-60.

[27] Canada's First Submission, paras. 37, 60.

identify the entries to which those decisions must apply. Instead, Article 1 of the AD Agreement and Article 10 of the SCM Agreement simply articulate the principle that antidumping and countervailing measures shall be "applied"[28] or "imposed"[29] only in accordance with "investigations initiated and conducted" in a manner consistent with the provisions of Article VI of GATT 1994 and the AD and SCM Agreements. Nothing about section 129(c)(1) of the URAA runs contrary to this principle.

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

29. Customary rules of interpretation of public international law, as reflected in Article 31(1) of the *Vienna Convention*, provide that a treaty "shall be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The purpose of treaty interpretation is, as stated in Article 31 of the *Vienna Convention*, to give effect to the intention of the parties to the treaty as expressed by their words read in context.

1. Textual Analysis of the DSU

30. Language used throughout the DSU demonstrates that when a Member's measure has been found to be inconsistent with a WTO Agreement, the Member's obligation extends only to providing prospective relief, and not to remedying past transgressions. For example, Article 19.1

[28] Art. 1, AD Agreement.

[29] Art. 10, SCM Agreement.

of the DSU establishes the role of a panel or the Appellate Body when it has found a measure to be inconsistent with a Member's WTO obligations:

> Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned *bring the measure into conformity with that Agreement*. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.

(Emphasis added) (footnotes omitted).

31. This article provides that the panel or the Appellate Body shall recommend that a Member bring its measure into conformity with the WTO Agreement in question. The ordinary meaning of the term "bring" is to "[p]roduce as a consequence," or "cause to become."[30] These definitions give a clear indication of future action. Therefore, the ordinary meaning of Article 19.1 supports the conclusion that the obligation of a Member whose measure has been found inconsistent with a WTO agreement is to ensure that the measure is removed or altered in a prospective manner, not to provide retroactive relief.

32. Article 3.7 of the DSU also supports the conclusion that the obligation to implement DSB recommendations is prospective in nature. Article 3.7 states that:

> In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements.

As Article 3.7 demonstrates, the focus of WTO dispute settlement is on withdrawal of the *measure*, and not on providing compensation for the measure's past existence.

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

33. In a WTO case challenging an antidumping or countervailing duty measure, the measure in question is a border measure.[31] Accordingly, revoking a WTO-inconsistent antidumping or countervailing duty measure prospectively will constitute "withdrawal" of the measure within the meaning of Article 3.7.

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

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

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[31] Antidumping and countervailing measures are border measures. That is, they are applied to counteract the dumping or subsidization of the goods at the national border. *See* GATT 1994, Arts. VI:2 and VI:3; SCM Agreement, Art. 10, note 36. Thus, when a good is being sold at less than normal value and causes injury to domestic producers, the importing country may apply an antidumping duty at the time and place of entry. Similarly, when an exporting country grants a countervailable subsidy that causes injury to domestic producers, the importing country may apply a countervailing duty at the time and place of entry. Thus, liability for antidumping and countervailing duties attaches at the time of entry.

2. Panel and Appellate Body Clarification of the DSU

36. WTO panel reports addressing the implementation obligations of Members following an adverse WTO report confirm that such decisions be implemented in a prospective manner. In *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 by Ecuador*[32], the panel discussed the prospective nature of the recommendations a panel or the Appellate Body can make under the DSU:

> In framing this issue for consideration, we do not imply that the EC is under an obligation to remedy past discrimination. Article 3.7 of the DSU provides that "… the first objective of the dispute settlement [system] is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements." This principle requires compliance *ex nunc* as of the expiry of the reasonable period of time for compliance with the recommendations and rulings adopted by the DSB. If we were to rule that the licence allocation to service suppliers of third-country origin were to be "corrected" for the years 1994 to 1996, we would create a retroactive effect of remedies *ex tunc*. However, in our view, what the EC is required to ensure is to terminate discriminatory patterns of licence allocation with *prospective* effect as of the beginning of the year 1999 [the date fixed by the arbitrator as the end-date for compliance within a reasonable period of time].[33]

The panel then identified three possible methods by which the European Communities could bring the measure into conformity, all of which involved future actions. None of them involved providing a remedy for past transgressions.[34]

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[32] WT/DS27/RW, adopted 6 May 1999 ("*EC -- Bananas*").

[33] *Id*. para. 6.105 (emphasis in original).

[34] *Id*. para. 6.155-6.158.

37. When panels and the Appellate Body have been asked to make recommendations for retroactive relief, they have rejected those requests, recognizing that a Member's obligation under the DSU is to provide prospective relief in the form of withdrawing a measure inconsistent with a WTO agreement, or bringing that measure into conformity with the agreement by the end of the reasonable period of time.[35]

38. A Member has no obligation under the DSU to provide a remedy for past violations of WTO agreements, nor to cease or otherwise suspend application of the WTO-inconsistent measure during the reasonable period of time for implementation. Furthermore, in the six years of dispute settlement under the WTO Agreements, no panel or the Appellate Body has ever suggested that bringing a WTO-inconsistent antidumping or countervailing duty measure into conformity with a Member's WTO obligations requires the refund of antidumping or countervailing duties collected on merchandise that entered prior to the date of implementation.[36]

39. Canada's views on prospective application have been consistent with this view that the DSU only provides for prospective relief. For example, at a February 11, 2000 meeting of the Dispute Settlement Body discussing the adoption of the panel report in the case of *Australia* –

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[35] *See, e.g.,* Panel Report on *United States -- Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, 28 February 2001, paras. 8.7, 8.11, as modified by the Appellate Body, adopted 23 August 2001 ("*US -- Hot-Rolled Steel*"); Panel Report on *United States -- Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R, adopted 1 February 2001, para. 7.9; *EC -- Bananas*, para. 6.154.

[36] *See, e.g., US -- Hot-Rolled Steel*, at para. 8.5; Panel Report on *Guatemala -- Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, para. 9.4; Panel Report on *Guatemala -- Anti-Dumping Investigation Regarding Portland Cement from Mexico,* WT/DS60/R, 19 June 1998, para. 8.3 ("*Cement I*"). The Appellate Body reversed the decision of the panel in *Cement I*, finding that Mexico's panel request did not identify the specific antidumping measure at issue. Appellate Body Report on *Guatemala -- Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted November 25, 1998.

Subsidies Provided to Producers of and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by the United States,[37] Canada argued that "the customary practice under GATT and the WTO, as established in a number of cases, was to interpret the appropriate remedy *to be prospective action*."[38] The Canadian representative described retroactivity as "contrary to GATT/WTO custom and practice" and claimed that the concept conflicted with Article 28 of the *Vienna Convention*.[39] The Canadian representative also asserted that "[r]etroactivity should only be inferred where the language of the treaty clearly indicate[s] that it ha[s] to be inferred."[40] Consistent with the concerns raised by many other Members, Canada asserted that if Members' obligations under the DSU were to be retroactive, the language would have been explicit because "it was a significant departure from previous practice . . . ."[41] We agree.

C. Section 129(c)(1) of the URAA is Consistent with the United States' Obligations Under the AD Agreement Because it Makes the Border Measure Consistent with the WTO Agreements

40. Canada argues that section 129(c)(1) of the URAA violates numerous provisions of the AD and SCM Agreements because it does not affect unliquidated entries that occurred prior to

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[37] WT/DS126/RW, adopted 11 February 2000.

[38] *Dispute Settlement Body, Minutes of Meeting Held at Centre William Rappard on 11 February 2000*, WT/DSB/M/75 , 7 March 2000, at 7.

[39] *Id*. at 7-8. Article 28 of the *Vienna Convention* states, "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party." This article supports the principle that a retroactive application of obligations under a treaty should only be inferred from the clear language of the treaty.

[40] *Id*. at 8.

[41] *Id*. at 8. Similar concerns with retroactive remedies were expressed by, *inter alia*, Brazil, Japan and Malaysia. *Id*. at 8-9.

implementation. However, as demonstrated above, the obligation of the United States, as with all Members, is to implement any adverse WTO report prospectively.

41. In the context of an antidumping or countervailing duty measure, determining whether relief is "prospective" or "retroactive" can only be determined by reference to date of entry. This conclusion flows from the fact that it is the legal regime which is in effect on the date of entry which determines whether particular entries are liable for antidumping and countervailing duties. Several provisions of the AD and SCM Agreements demonstrate this point.

42. For example, Article 10.1 of the AD Agreement states that provisional measures and antidumping duties shall only be applied to "products which **enter for consumption** after the time" when the provisional or final decision enters into force, subject to certain exceptions.[42] This limitation applies even though the dumping activity that forms the basis for the dumping and injury findings necessarily occurs prior to the time that the decision enters into force, and even though Members using a retrospective duty assessment system would be in a position to review such entries at a time when the decision has already entered into force. As Article 10.1 demonstrates, the critical factor for determining whether particular entries are liable for the assessment of antidumping or countervailing duties is the legal regime in existence on the date of entry.

43. Similarly, Article 8.6 of the AD Agreement states that if an exporter violates an undertaking, duties may be assessed on products "**entered for consumption** not more than 90 days before the application of ... provisional measures, except that any such retroactive

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[42] (Emphasis added.) *See also*, Article 20.1 of the SCM Agreement, containing virtually identical language which applies to countervailing duty investigations.

assessment shall not apply to imports **entered** before the violation of the undertaking."[43] Once again, the critical factor for determining the applicability of the provision is the date of entry.

44. In addition, Article 10.6 of the AD Agreement states that when certain criteria are met, "[a] definitive anti-dumping duty may be levied on products which were **entered for consumption** not more than 90 days prior to the date of application of provisional measures...."[44] However, under Article 10.8, "[n]o duties shall be levied retroactively pursuant to paragraph 6 on products **entered for consumption** prior to the date of initiation of the investigation." (Emphasis added.) As with Articles 8.6 and 10.1, whenever the AD Agreement specifies an applicable date for an action, the scope of applicability is based on entries occurring on or after that date.

45. Pursuant to Articles 1, 9.3 and 18.1 of the AD Agreement, and Articles VI:2 and VI:6(a) of GATT 1994, no Member may impose antidumping duties absent a finding of injury or in excess of the margin of dumping. Should the implementation of an adverse WTO report result in a finding of no injury, then pursuant to section 129(c)(1) of the URAA, upon receiving direction from USTR, Commerce will revoke the antidumping duty order with respect to all entries from the date of USTR's direction in order to implement the new determination. This is consistent with the United States' obligation to provide a prospective remedy pursuant to Articles 19.1, 21.3, 22.1, and 22.2 of the DSU. Canada has not identified anything in Articles 1, 9.3 and 18.1 of the AD Agreement, or Articles VI:2 and VI:6(a) of GATT 1994 that requires the

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[43] (Emphasis added.) The equivalent provision in the SCM Agreement is Article 18.6.

[44] (Emphasis added.) *See also* SCM Agreement, Art. 20.6.

implementation of adverse WTO reports with respect to entries that occurred prior to the end of the reasonable period of time and the date on which the measure was brought into conformity with the WTO.

46. Canada further argues that Article 10 of the SCM Agreement requires Members to impose countervailing duties "in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement." Article 32.1 of the SCM Agreement states that "[n]o specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement." Thus, Canada argues, these articles, read in conjunction with Article VI:3 and Article VI:6(a) of GATT 1994, prohibit Members from imposing countervailing duties "in excess of an amount equal to the estimated bounty or subsidy determined to have been granted," and until the Member has determined "that the effect of the . . . subsidization is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry." Section 129(c)(1) of the URAA, however, is not inconsistent with these requirements because it provides for implementation of adverse WTO reports on a prospective basis.

47. Section 129(c)(1) of the URAA implements adverse WTO reports in a way that ensures compliance with Articles 10 and 32.1 of the SCM Agreement, and Articles VI:3 and VI:6(a) of GATT 1994. First, where the implementation of an adverse WTO report results in a determination that the amount of the subsidy is less than originally determined, section 129(c)(1) of the URAA ensures that all entries that take place on or after the date of implementation will be subject to the revised cash deposit rate established in the new determination. Similarly, when the

implementation of an adverse WTO report results in a negative injury determination or a finding that there was no subsidization during the original period of investigation, the countervailing duty order will be revoked with respect to all entries that take place on or after the date of implementation. Section 129(c)(1) of the URAA ensures that such adverse WTO reports will be implemented, in a prospective manner, in accordance with the requirements of the DSU. Canada has failed to make even a *prima facie* case that the WTO Agreements require Members to implement adverse WTO reports with respect to entries that have occurred prior to the conclusion of the reasonable period of time for implementation.

48. Canada's claim that section 129(c)(1) is inconsistent with Article 11.1 of the AD Agreement and Article 21.1 of the SCM Agreement is similarly without basis. Article 11 of the AD Agreement is entitled "Duration and Review of Anti-Dumping Duties and Price Undertakings." Similarly, Article 21 of the SCM Agreement is entitled "Duration and Review of Countervailing Duties and Price Undertakings." Read in context,[45] Article 11.1 of the AD Agreement is implemented through Articles 11.2 and 11.3 of the AD Agreement. Similarly, Article 21.1 of the SCM Agreement is implemented through Articles 21.2 and 21.3 of the SCM Agreement. As their titles and context make clear, the purpose of the two articles is to provide for the periodic review of antidumping and countervailing duty orders and price undertakings to determine whether they remain necessary to offset injurious dumping or subsidization. Neither provision has any bearing whatsoever on the extent of a Member's obligation to bring a WTO-inconsistent measure into conformity with an adverse WTO report.

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[45] *See Vienna Convention*, Art. 31(2).

D. Requiring the Reimbursement of Antidumping and Countervailing Duties on Entries Prior to the Implementation of an Adverse WTO Report Would Grant Canada Additional Rights Not Contained in the WTO Agreements

49. Canada compares the result of an implementation of an adverse WTO report under section 129(c)(1) of the URAA to the result of an adverse domestic judicial decision in the United States or an adverse NAFTA panel ruling.[46] This comparison, however, has no bearing on the interpretation of the rights and obligations of the Members under the WTO Agreements. If the Members had wanted to provide for the applicability of implementation actions to prior entries, they would have explicitly provided for that in the DSU or elsewhere in the WTO Agreements – through language explicitly providing for either retroactive or injunctive relief.[47] They did not do so.

50. Instead, what the Members agreed to was a reasonable period of time in which to bring inconsistent measures into conformity with a Member's WTO obligations, and, as discussed

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[46] Canada's First Submission, para. 8, 42. A NAFTA panel replaces judicial review of an antidumping or countervailing duty proceeding under the domestic laws of the NAFTA parties, and is not meant to interpret the rights of the NAFTA parties under the NAFTA itself. NAFTA, Art. 1904(1).

[47] Had the Uruguay Round negotiators wanted to require the application of adverse WTO reports to pre-implementation entries, they could have used Article 1904(15) of NAFTA as a model. Article 1904(15) of NAFTA specifically requires the NAFTA Parties to amend their antidumping and countervailing duty laws to allow the refund of duties, with interest, upon a final panel decision:

> In particular, without limiting the generality of the foregoing, each Party shall:
>
> > (a) amend its statutes or regulations to ensure that existing procedures concerning the refund, with interest, of antidumping or countervailing duties operate to give effect to a final panel decision that a refund is due . . . .

Despite this precedent, of which Canada is obviously well aware, the WTO Agreements do not include language even remotely analogous to Article 1904(15) of NAFTA.

above, no consequences for maintaining the inconsistent measures in the interim period. Adopting Canada's position and thereby modifying this agreement – by requiring Members with retrospective duty assessment systems to apply adverse WTO reports to pre-implementation entries – would be inconsistent with Article 3.2 of the DSU since it would add to the rights and obligations provided in the WTO Agreements.

E. Section 129(c)(1) of the URAA Ensures that Antidumping and Countervailing Duty Determinations May Be Brought Into Conformity with the United States' WTO Obligations

51. Canada also argues that section 129(c)(1) of the URAA is inconsistent with Article 18.4 of the AD Agreement, Article 32.5 of the SCM Agreement, and Article XVI:4 of the WTO Agreement. Article 18.4 of the AD Agreement provides:

> Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question.

Article 32.5 of the SCM Agreement provides:

> Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply to the Member in question.

Article XVI:4 of the WTO Agreement provides, "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements."

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

F. Canada Provides a Prospective Remedy When One of Its Measures is Found Inconsistent with its WTO Obligations

53. Finally, it is important to recognize that prospective and retrospective assessment systems operate in a similar manner. Canada's prospective system is a case in point. Under the Canadian system, if an adverse WTO report results in a determination that there was no dumping or subsidization in a particular case, the determination implementing the adverse WTO report is deemed by law to be a termination of the investigation.[48] While Canadian law allows for the cessation of the collection of duties if this occurs, it does not appear to provide for the refund of

[48] SIMA, Art. 76.1(5)(b).

duties incurred on entries that took place before the date of implementation.[49] The outcomes under the two systems are essentially the same:

	United States	Canada[50]
January 1, 2001	AD/CVD measure adopted	AD/CVD measure adopted
Subject Goods Enter June 1, 2001	subject to AD/CVD measure	subject to AD/CVD measure
September 1, 2001	adverse WTO decision	adverse WTO decision
Subject Goods Enter December 15, 2001	subject to AD/CVD measure	subject to AD/CVD measure
January 1, 2002	AD/CVD measure revoked	AD/CVD measure terminated
Subject Goods Enter January 2, 2002	not subject to AD/CVD measure	not subject to AD/CVD measure

[49] *See* SIMA, Arts. 9.21, 76.1. Like the United States, Canada does provide for refunds when its measures are challenged in its domestic court system or under the NAFTA. SIMA, Art. 12

[50] Similarly, the European Communities have adopted a regulation providing for implementation of adverse WTO reports on a prospective basis only, that is, with respect to post-implementation entries. The Council of the European Union expressed this interpretation of Members' obligations under the DSU in the preamble to Regulation 1515/2001:

> Recourse to the DSU is not subject to time limits. The recommendations in the reports adopted by the DSB only have prospective effect. Consequently, it is appropriate to specify that any measures taken under this Regulation will take effect from the date of their entry into force, unless otherwise specified, and, therefore, *do not provide any basis for the reimbursement of the duties collected prior to that date* . . . .

Council Regulation (EC) 1515/2001 of 23 July 2001, *On the Measures that May be Taken by the Community Following a Report Adopted by the WTO Dispute Settlement Body Concerning Anti-Dumping and Anti-Subsidy Matters*, 2001 O.J. (L 201) 10 (emphasis added)(Exhibit US-5). Article 3 of Regulation 1515/2001 provides that "[a]ny measure adopted pursuant to this Regulation shall take effect from the date of their [sic] entry into force and shall not serve as basis for the reimbursement of the duties collected prior to that date, unless otherwise provided for."

IV. CONCLUSION

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

TABLE OF EXHIBITS

US-1 Canadian Customs and Revenue Agency, *Memorandum on Regulation D14-1-7, Assessment of Anti-Dumping and Countervailing Duties Under the Special Import Measures Act* (May 15, 2000).

US-2 Canadian Customs and Revenue Agency, *Memorandum on Regulation D14-1-6, Liability and Payment of Provisional Duty, Anti-Dumping Duty, and Countervailing Duty Under the Special Import Measures Act* (May 16, 2000).

US-3 Canadian Customs and Revenue Agency, *Memorandum on Regulation D14-1-8, Re-Investigation Policy under the Special Import Measures Act* (May 15, 2000).

US-4 Canadian Customs and Revenue Agency, *Statement of Administrative Practices for the Special Import Measures Act* (Apr. 2000).

US-5 Council Regulation (EC) 1515/2001 of 23 July 2001, *On the Measures that May be Taken by the Community Following a Report Adopted by the WTO Dispute Settlement Body Concerning Anti-Dumping and Anti-Subsidy Matters*, 2001 O.J. (L 201) 10.