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

(WT/DS221)

Comments of the United States of America on Canada's 5 April 2002 Responses to the Panel's 28 March 2002 Questions

April 10, 2002

1. The United States appreciates the opportunity which the Panel has provided for the United States to comment on Canada's responses to the questions posed by the Panel on March 28, 2002. The United States offers the following brief comments on Canada's responses, dated April 5, 2002. To facilitate the Panel's review of these comments, the United States has provided its comments based on the numeric order of the questions.

Question 67

2. Canada's response indicates that the United States and Canada agree as a general matter that Members may challenge re-determinations made under Article 9.3.2 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement").

3. With respect to the Panel's specific example in the parenthetical, however, Canada appears to have reversed its previous position. In the initial set of questions to the Parties, the Panel asked, in question 2, whether a Member with a prospective assessment system would be required to apply a WTO-consistent determination to the calculation of any refund due on entries that took place before the end of the reasonable period of time. At that time, Canada responded that it would not be required to do so:

> In such circumstances, the Member is not required to apply a WTO-consistent determination to the calculation of any refunds due. Under this scenario, a Member with a prospective duty assessment system has assessed and collected the duty before the expiration of the reasonable period of time. The subsequent revocation or amendment of the order pursuant to which that duty was collected after the expiry of the reasonable period of time has no effect on the assessment and collection of that duty.
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> Irrespective of whether a Member has a prospective or retrospective duty assessment system, where the Member has made definitive duty determinations prior to the expiration of the reasonable period of time, those determinations are excused from compliance with an adverse DSB ruling and refunds need not be granted.[1]

4. Canada also argued that, for Members with prospective systems, the date of entry controls the scope of a Member's implementation obligations.[2]

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[1] Canada's March 4, 2002 Response to Questions, paras. 5 and 6.

[2] Canada's Second Written Submission, para. 22.

5. Canada asserted that its position in this dispute with respect to the obligations of the United States is a consequence of applying the same obligations to a different system, rather than an effort to achieve retroactive relief:

> Canada has made it abundantly clear that it is not seeking to have the Department of Commerce apply new determinations made pursuant to section 129(c)(1) to entries for which, prior to the Implementation Date, the Department of Commerce made definitive duty determinations and instructed the U.S. Customs Service to liquidate accordingly. This would be asking the United States to undo definitive duty determinations which, clearly, would be the retroactive application of an adverse DSB ruling.[3]

6. The United States has responded to Canada's arguments by noting that Canada's position was based on an arbitrary and fictitious description of when duties were purportedly "final" under the two systems, and that Canada's theory lacked a textual basis in the Agreements. Canada's decision to reverse its position on these issues is likely due to its growing realization that there is no tenable legal or factual basis for its attempt to create a new and higher level of implementation obligations that would apply solely to Members with retrospective systems.

7. Throughout this dispute, the United States has emphasized that there is no requirement to apply a WTO-consistent determination regarding antidumping or countervailing duty measures to pre-implementation entries under either type of system, because the scope of a Member's implementation obligations under both systems is determined by the date of entry. Canada has failed to explain why its previous belief that the date of entry controls for Members with prospective systems (but not retrospective systems) is no longer correct. Moreover, when Canada's response to question 67 is examined in light of the statement from its second written submission cited above in paragraph 5, it appears that Canada's current position would require it, and other Members with prospective systems, to provide what Canada previously described as retroactive application of a WTO report relating to antidumping or countervailing duty measures.

8. The United States respectfully suggests that Canada's inconsistency on these issues reflects the infirmity of its legal position, and we urge the Panel to take these points into account when evaluating the merits of Canada's arguments.

Question 68(b)

9. Canada correctly defines the term "determinations concerning title VII of the Tariff Act of 1930" used in section 129(c)(1) of the URAA as limited to determinations made under section

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[3] *Id.*, para. 28.

129 pertaining to dumping, subsidization and injury.[4] Having correctly defined the term, Canada, without providing any legal authority or explanation, then asserts that the U.S. argument (which is that section 129(c)(1) speaks only to the application of determinations made under section 129 pertaining to dumping, subsidization and injury) is "inconsistent with U.S. principles of statutory construction."[5]

10. Canada's argument in fact ignores the plain language of section 129(c)(1), which indisputably refers to determinations that are "implemented under" section 129. Determinations made in separate segments of a proceeding, such as in a separate administrative review, would not be "implemented under" section 129. Accordingly, section 129 does not apply to those determinations, and it neither mandates nor precludes any particular treatment of entries reviewed in such determinations.

11. Canada's subsequent attempts to rely on the Statement of Administrative Action ("SAA") to support its assertions are ill-founded.[6] In referencing the SAA at page 1026, Canada mis-characterizes that portion of the SAA, claiming that it states "that the DSB ruling will not be implemented with regard to prior unliquidated entries."[7] In fact, the referenced portion of the SAA refers to the effect of the section 129 determination, stating that "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... ."[8] Thus, the SAA is consistent with the language of section 129(c)(1) itself, providing only that the section 129 determination will have prospective effect and saying nothing about Commerce's treatment of what Canada calls "prior unliquidated entries" in any other segment of the proceeding. Canada has failed to identify any statutory or other basis in support of its assertions that a determination implemented under section 129(c)(1) limits Commerce's discretion in any other segment of the proceeding.

Questions 69 and 70

12. In response to the Panel's questions 69 and 70, Canada all but concedes the mandatory/discretionary issue. Canada concedes that U.S. administering authorities have the legal ability to change their interpretations or applications of statutes and regulations from one review to another and even that Commerce could do so in response to a WTO report that did not involve the United States as a party. Canada concludes, however, by stating that Commerce's ability to alter its interpretations "cannot override a statutory limitation such as section

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[4] Canada's April 5, 2002 Response to Questions, para. 10.

[5] *Id.*

[6] *Id.*, para. 11.

[7] *Id.*

[8] Statement of Administrative Action, p.1026.

129(c)(1)."[9] As noted above, however, Canada has agreed[10] that, by its terms, section 129(c)(1) only applies to determinations made and implemented under section 129. Canada did not identify any statutory or other basis in support of its assertions that a determination implemented under section 129(c)(1) limits Commerce's discretion in any other segment of the proceeding.

Question 72

13. In response to question 72, Canada asserts that the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") excuses a Member from complying "in respect of WTO-inconsistent actions it takes before the Implementation Date."[11] What Articles 21 and 22 of the DSU establish, however, is that when it is impracticable to comply immediately with an adverse WTO report, the Member may have a reasonable period of time to bring into compliance "the measure found to be inconsistent with a covered agreement."[12]

14. As the United States explained in its first written submission, in the case of antidumping and countervailing duty measures, the measure in question refers to the border measure.[13] Canada has failed to refute these arguments or otherwise explain, based on the text of the agreements, why the DSU would require a Member to apply the WTO-consistent border measure retroactively to entries that occur prior to the end of the reasonable period of time.

Question 74 and 80

15. In paragraph 26, Canada asserts that "the operation of section 129(c)(1) results in the retention by the Department of Commerce of cash deposits for prior unliquidated entries," notwithstanding the fact that the United States will have made a WTO-consistent determination. As the United States explained in response, *inter alia*, to questions 6, 20 and 46 from the Panel, section 129(c)(1) merely sets an effective date for the new determination made pursuant to section 129 in order to implement an adverse WTO report. It does not speak to what Canada refers to as "prior unliquidated entries" and, to that end, it is not the operation of section 129(c)(1) that results in the retention of cash deposits. Moreover, as the United States discussed in response to question 32 from the Panel, to the extent that Canada is now suggesting that the implementation obligations of Members include correcting the extent of or existence of cash deposits on entries which occurred prior to the implementation date, Canada is, in fact, seeking retroactive application of the adverse WTO report.

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[9] Canada's April 5, 2002 Response to Questions, para. 16.

[10] Canada's April 5, 2002 Response to Questions, para. 10.

[11] Canada's April 5, 2002 Response to Questions, para. 22.

[12] DSU Article 22.2.

[13] United States' First Written Submission, paras. 40-48.

Question 78

16. Canada asserts that U.S. statements regarding the Canadian system reflect a "misunderstanding of Canada's prospective duty assessment system."[14] With respect, the U.S. statements on the Canadian system reflect the arguments that Canada had made in this dispute – before Canada reversed its position on the obligations of a Member with a prospective system to apply an adverse WTO report in a review of pre-implementation entries. For further discussion on this topic, the United States refers the Panel to the U.S. discussion of question 67 above.

17. The United States notes that, even now, Canada has not been forthcoming as to how its interpretations of Members' implementation obligations would apply in Canada's prospective system. For example, while Canada offers that any redetermination made after the reasonable period of time would have to be made in a WTO-consistent manner, its references to such redeterminations refer to proceedings "*e.g.*, to reflect new costing information, or to correct arithmetic errors."[15] Thus, it is not clear whether, in the absence of an issue such as new costing information or an arithmetic error, Canada would indeed perform the redetermination and treat the entry in a WTO-consistent manner.[16] In this respect, the most that Canada offers is that "such redeterminations can be made in a WTO-consistent manner."[17] As the United States has explained in its second written submission, the same is true with respect to the U.S. retrospective duty assessment system, regardless of whether the date of entry or the date of the determination determines a Member's implementation obligations with respect to antidumping or countervailing duty measures.[18]

Question 79(a)

18. Canada's response to Question 79(a) again reflects Canada's attempt to shift the burden of proof from itself to the United States. Canada's inability to demonstrate that section 129(c)(1) mandates WTO-inconsistent action or precludes WTO-consistent action does not shift the burden to the United States to demonstrate how it would exercise its discretion in any particular

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[14] Canada's April 5, 2002 Response to Questions, para. 33.

[15] *Id.*, paras. 31 and 34.

[16] The United States again notes that it is not arguing that Canada is obligated to implement rulings and recommendations of the Dispute Settlement Body with respect to entries that occurred prior to the end of the reasonable period of time. United States' March 4, 2002 Response to Questions, paras. 7-9. The United States has offered its comments on Canada's prospective system in an effort to better understand the positions being asserted by Canada and how those positions might be reflected in the agreements. As the United States' comments with respect to Canada's response to Question 67, above, reflect, Canada's inconsistency on these issues reflects the infirmity of its legal position.

[17] Canada's April 5, 2002 Response to Questions, para. 34.

[18] United States' March 4, 2002 Response to Questions, para. 71-75.

situation. The United States is not required to prove the negative, contrary to Canada's suggestion.[19]

19. Canada's unsupported contentions continue in paragraph 36 of its responses. Therein, it makes the assertion that "section 129(c)(1) is intended to have legal effect in subsequent administrative reviews conducted by the Department of Commerce in respect of prior unliquidated entries." Again, Canada offers no support for this assertion, which is flatly contradicted by the text of section 129(c)(1), even as reflected in Canada's response to Question 68 and its sub-parts.

[19] Canada's April 5, 2002 Response to Questions, para. 35.