United States – Section 129(c)(1) of the Uruguay Round Agreements Act

WT/DS221

Oral Statement of the United States
Second Meeting of the Panel

March 26, 2002

1. Madam Chairperson, members of the Panel, the United States appreciates this second opportunity to comment on certain issues that Canada has raised in its challenge to section 129(c)(1) of the Uruguay Round Agreements Act ("URAA"). The written submissions, the responses to the Panel's detailed questions, and the first Panel meeting have helped to narrow and focus the issues before the Panel. Accordingly, we do not intend to offer a lengthy statement. Instead, we will limit our comments to the key points in our submissions and new points that Canada has raised in its second submission. We will be pleased to receive any questions you may have at the conclusion of our statement.

A. Introduction

2. The United States will address three issues today. First, we will discuss the reasons why Canada has failed to meet its burden of demonstrating that section 129(c)(1) mandates WTO inconsistent action. Second, we will discuss Canada's failure to establish a legal basis for its assertion that the implementation obligations of Members with retrospective systems and prospective systems differ. Finally, we will elaborate on the basis for our belief that interpreting certain terms in the AD and SCM Agreements as creating distinct rights and obligations,

depending on when a Member assesses or levies duties, could lead to unintended results: results which would be inconsistent with the interpretations and expectations of the Members to date.

B. Section 129(c)(1) Does Not Mandate WTO-Inconsistent Action

3. Canada has challenged section 129(c)(1) "as such." Accordingly, under well-established WTO jurisprudence, the burden is on Canada to demonstrate that section 129(c)(1) mandates WTO inconsistent action. Canada has failed to do so.

4. Canada's failure to meet its burden arises from its misinterpretation of the term "determination" as that term is used in section 129(c)(1). As the United States has previously explained, when the term is properly understood, it becomes clear that section 129(c)(1) only addresses the application of the new, WTO-consistent determination to entries made after the date of implementation, and only with respect to that particular segment of the proceeding. Section 129(c)(1) does not address what Commerce may do in a *separate* determination in a *separate* segment of the proceeding. Section 129(c)(1) does not mandate that Commerce take, or preclude Commerce from taking, any particular action in any separate segment of the proceeding.

5. For example, if the challenged determination was an investigation, and if a company subsequently requests an administrative review of what Canada terms "prior unliquidated entries," Commerce would conduct the administrative review of those entries and issue a determination in that segment of the proceeding. Because the administrative review determination would not be the determination implemented under section 129(c)(1), nothing in section 129(c)(1) would preclude Commerce from applying its new, WTO-consistent methodology in that administrative review. Canada is simply wrong, as a matter of fact, to claim that section 129(c)(1) would preclude Commerce from doing so.

6. Similarly, if the United States were to implement an adverse WTO report by revoking an antidumping or countervailing duty order, section 129(c)(1) would ensure that the revocation would apply to all entries taking place on or after the date of implementation. Section 129(c)(1) would not, however, mandate the treatment of what Canada terms as "prior unliquidated entries." Even the Statement of Administrative Action (SAA) only states (at 1026) that such entries would "remain subject to potential duty liability." Neither section 129(c)(1) itself, nor as interpreted in light of the SAA, mandates any particular treatment of such entries in a separate segment of the proceeding.

7. Canada responded to these points in its second written submission by asserting (at para. 16) that the United States must specify why "section 129(c)(1) in no circumstances prevents it from complying with the obligations cited by Canada in this dispute." It also urged the Panel (at para. 13) to assume that the United States would not make determinations in a WTO-consistent manner. With respect, Canada is trying to avoid its burden of proof, and to have the Panel assume bad faith on the part of the United States. As the complainant in this dispute, Canada must establish a *prima facie* case that section 129(c)(1) mandates a violation of WTO rules. If Canada meets its burden, then the United States must rebut that *prima facie* case. Canada has failed to meet its burden of proof in this dispute because, as the United States explained in its second written submission (at paras. 17-20), neither of the scenarios that Canada identified mandates a violation of WTO rules. Moreover, the Appellate Body has made clear that panels may not assume that a Member will act in bad faith.[1]

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[1] Appellate Body Report on *Chile -- Taxes on Alcoholic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000, para. 74

8. Furthermore, Canada has admitted that even under its erroneous interpretation of section 129(c)(1), the statute does not necessarily mandate WTO-inconsistent action.[2] It has agreed that section 129(c)(1) would not mandate a violation in situations where "the Department of Commerce changes its interpretation of U.S. law for other reasons, notably as a result of a direction from a U.S. court."[3] It has also admitted that a changed circumstances review could result in WTO-consistent treatment of what it terms "prior unliquidated entries."[4] Canada characterizes these scenarios as "accidental compliance." The United States does not agree with Canada's characterization of these scenarios as "accidental." In any event, the scenarios illustrate the point that section 129(c)(1) does not preclude the United States from applying WTO consistent methodologies in separate segments of a proceeding.

9. In sum, Canada has failed to meet its burden of demonstrating that section 129(c)(1) mandates action inconsistent with the United States' WTO obligations. If section 129(c)(1) does not mandate WTO inconsistent action, there is no need for the Panel to determine the meaning of "prospective" implementation in WTO disputes involving antidumping and countervailing duty measures, because even if the legal situation in effect at the time of the "final" determination controls, section 129(c)(1) does not mandate how Commerce must make such determinations.

C. The WTO Obligations That Apply to Members with Retrospective and Prospective Systems Are the Same

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[2] Canada's response to questions, para. 54; Canada's second written submission, para. 8.

[3] Canada's response to questions, para. 54.

[4] *Id.*

10. I would like to turn now to discuss Canada's failure to establish a legal basis for its assertion that the implementation obligations of Members with retrospective systems and prospective systems differ.

11. Canada and the United States agree on at least one point in this dispute. We agree that for Members with prospective systems, the date of entry controls for purposes of determining what constitutes "prospective" implementation of an adverse WTO report. We disagree, however, on whether that same date also controls for Members with retrospective systems. Although the United States believes the date of entry controls in all situations, Canada claims the date of entry is irrelevant in determining "prospective" implementation in retrospective systems. Canada's position is premised on a false factual distinction between retrospective and prospective systems, and Canada has failed to provide a textual basis for its position.

12. Focusing first on the facts, as the United States noted in its second written submission, even under Canada's prospective duty assessment system, the determination of duty liability is not final on the date of entry. Assessment does not occur until 30 days after the date of entry. Further, the duty on the entry is subject to redetermination based upon an importer's request within 90 days of the entry. In addition, for up to two years after the date of entry, Canada may redetermine the normal value, the export price, or the amount of subsidy associated with any imported product.[5] Judicial review may further extend these periods. Consequently, even under Canada's prospective system, a number of determinations may be made after implementation regarding pre-implementation entries.

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[5] *See* United States' second written submission, para. 26 and citations therein.

13. Turning to the law, Canada's argument lacks any textual basis in the WTO Agreements. Article 9.3.1 of the AD Agreement addresses reviews in retrospective systems, and Article 9.3.2 of the AD Agreement addresses reviews in prospective systems. Nothing in these provisions suggests that a Member with a retrospective system has an obligation to apply an adverse WTO report when conducting an Article 9.3.1 review of pre-implementation entries, while a Member with a prospective system does not have an obligation to apply an adverse WTO report when conducting an Article 9.3.2 review of pre-implementation entries.

14. In actuality, neither Member has such an obligation, because the date of entry determines what constitutes "prospective" implementation in both systems. An antidumping or countervailing duty measure is a border measure; it affects trade at the border. When a Member implements an adverse WTO report with respect to all entries that take place on or after the implementation date, it is ensuring that -- under prospective and retrospective systems -- all trade that crosses the border on or after the implementation date will be treated in a WTO-consistent manner.

D. Adopting Canada's Position Could Lead to Unintended Results

15. Finally, I would like to briefly elaborate on the basis for our belief that interpreting certain terms in the AD and SCM Agreements as creating distinct rights and obligations, depending on when a Member assesses or levies duties, could lead to unintended results.

16. The United States noted at the first Panel meeting (at paras. 16-17) that Canada's argument ignores the consequences for scenarios in which implementation has not yet occurred. If the controlling issue is the legal rights in effect on the date that a Member "finally" determines duty liability, then a Member that has received DSB authorization to suspend concessions would

be permitted to do so with respect to any entries that were not yet "final," even if the entries took place prior to the date of the DSB authorization. The Member's ability to suspend in this manner would not depend on the text of the WTO Agreement but on its own choices regarding when a determination is treated as "final" under its domestic law. Adopting Canada's approach would (1) conflict with the reasoning of the *Customs Bonding* panel;[6] and (2) create additional rights and obligations for Members, contrary to Article 3.2 of the DSU.

17. In addition, when the Panel asked the United States and Canada to address the meaning of particular terms in the Agreement, such as "applied," "imposed," and "levy," Canada responded that:

> while the AD Agreement and the SCM Agreement expressly apply to both prospective and retrospective duty assessment systems, the drafters did not attempt to make precise textual distinctions between the two systems in every provision – an undertaking that would have been extremely difficult, if not impossible. . . ."[7]

18. It then referred to the "general intent" of the provisions, which Canada described (at para. 27) as "commonly understood and accepted by Members."

19. In spite of the complete absence in the text of any suggestion that the drafters "intended" that retrospective and prospective systems create different results for Members, Canada appears to be asking the Panel to rely on the "general intent" of the provisions in order to avoid the consequences of adopting the distinctions that it asserts. Those consequences, however, are real, and cannot be ignored.

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[6] Panel Report on *United States -- Import Measures on Certain Products of the European Communities*, WT/DS165/R, adopted 10 January 2001, para. 6.77 (stating that "the applicable tariff (the applicable WTO obligation, the applicable law for that purpose), must be the one in force on the day of importation, the day the tariff is applied").

[7] Canada's response to questions, para. 27.

20. For example, Article 17.4 of the AD Agreement states that a matter may be referred to the DSB only when "final action has been taken by the administering authority of the importing Member to levy definitive anti-dumping duties or accept price undertakings . . . ." Canada has argued at various points in this dispute that the term "levy" does not apply "to the imposition of potential liability in a Member using a retrospective system" and that Commerce does not make its final duty determinations until the end of administrative reviews.[8] If the Panel were to adopt Canada's interpretation, then under the terms of Article 17.4, a panel would not have jurisdiction to review the final results of an antidumping investigation conducted by a Member with a retrospective system. If a Member believed that its exporters were subject to a WTO-inconsistent antidumping investigation, the Member would need to wait to bring a challenge until the end of an administrative review, normally more than two years after the completion of the investigation.

21. The need to precisely define when a Member "imposes" or "assesses" or "levies" duties arises from Canada's attempt to make the time of the "final" determination relevant to determining the scope of a Member's implementation obligations. When it is properly recognized that date of entry controls under both prospective and retrospective systems, these terms, and the distinctions between them, become irrelevant to this dispute. To date, the AD and SCM Agreements have not been read by panels to provide different levels of obligation, or different consequences arising from those obligations, depending on a Member's decision to use

[8] *See, e.g.*, Canada's response to questions, paras. 20-21.

a prospective or a retrospective duty assessment system. The United States respectfully submits that there is no basis in the text of the agreements to do so now.

E. Conclusion

22. The United States thanks the Panel and the Secretariat for their efforts in this dispute. We would be happy to answer any questions you may have.

As Delivered

United States – Section 129(c)(1) of the Uruguay Round Agreements Act

WT/DS221

Closing Statement of the United States Second Meeting of the Panel

March 26, 2002

1. Madam Chairperson, members of the Panel, today's meeting has served to further confirm that Canada has failed to meet its burden of presenting a *prima facie* case that section 129(c)(1) violates the WTO obligations of the United States. I have a few brief comments on this point, which will focus on Canada's failure to meet its burden of demonstrating that section 129(c)(1) either mandates WTO-inconsistent action, or that it precludes the United States from acting in a WTO inconsistent manner.

2. Canada argued today that section 129(c)(1) does mandate WTO inconsistent action. It addressed two scenarios, which it described as "methodology" cases and "revocation" cases. On the issue of "methodology" cases, Canada argued that the U.S. interpretation of section 129(c)(1) would "materially undermine" or "circumvent" the statutory provision. But Canada's argument ignores the plain text of section 129(c)(1), which addresses only the particular determination issued under that section, and the application of that determination to post-implementation entries. The consequence of this limitation is that the treatment of pre-implementation entries will not be determined under section 129(c)(1). Rather, that treatment will be determined in a separate proceeding. Canada asserts that a U.S. court would be unlikely to accept our interpretation. We respectfully disagree.

3. On the issue of "revocation" cases, Canada argues (at para. 27) that the United States would violate the AD and SCM Agreements by retaining cash deposits made before the end of the reasonable period of time pending an administrative review. But Canada has failed to provide any textual basis for its argument. It has made generalized references to a few provisions of the AD and SCM Agreements, but it has not even attempted to demonstrate how the text of those provisions creates the obligation that it asserts. Similarly, it argued (at para. 27) that the alleged "violation" in this case is analogous to the "violation" in the *Customs Bonding* case. But the *Customs Bonding* case involved alleged violations of Articles 22 and 23 of the DSU. Canada has abandoned its DSU claims.

4. Canada also mischaracterizes our position (at paras. 29 et seq.) by asserting that the U.S. mandatory/discretionary argument is premised on the belief that there is no obligation to implement an adverse WTO report with respect to pre-implementation entries. It is true that we believe there is no such obligation, because date of entry controls. But even if a Member were under an obligation to apply an adverse WTO report to pre-implementation entries, section 129(c)(1) would not mandate WTO-inconsistent action, because section 129(c)(1) does not mandate how Commerce is to make determinations with respect to pre-implementation entries. This point would apply regardless of whether Commerce was addressing what Canada describes as a "methodology" case or a "revocation" case.

5. Canada also criticizes the United States for not demonstrating that section 129(c)(1) would "never" preclude Commerce from acting in a WTO consistent manner. As we noted this morning, Canada is trying to avoid its burden of proof. As the defendant in this proceeding, the United States is not required to prove a negative. Canada has failed to demonstrate that section

129(c)(1) would mandate WTO-inconsistent action or preclude WTO-consistent action. Accordingly, its claims must fail.

6. One final point on the mandatory/discretionary issue. In paragraphs 14 - 18 of its oral statement this morning, Canada set out what it described as the "key" points relevant to applying the doctrine. It then cited with approval the approach of the *Export Restraints* panel. As this Panel may be aware, the United States thoroughly disagreed with the *Export Restraint* panel's extraordinary approach in that case. Rather than recite our views here, I invite the Panel to review the statement that the United States delivered at the DSB meeting which adopted the panel's report. Those comments are contained in the minutes of the DSB meeting, paragraphs 43 through 51, in WTO document WT/DSB/M/108, of 2 October, 2001.

7. I will not attempt today to respond to the numerous other ways in which the United States disagrees with Canada's oral statement. Suffice it to say that we do not concede the points that Canada says we concede. Canada has failed to demonstrate that section 129(c)(1) violates U.S. WTO obligations in any respect.

8. Madam Chairperson, members of the Panel, this concludes my closing statement. On behalf of the U.S. delegation, I thank you for your attention.