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

(WT/DS221)

EXECUTIVE SUMMARY OF THE SUBMISSIONS OF THE UNITED STATES OF AMERICA

APRIL 12, 2002

**FIRST WRITTEN SUBMISSION
OF THE UNITED STATES OF AMERICA, JANUARY 29, 2002**

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. Canada is seeking in this case to require the United States to provide retroactive relief in cases involving antidumping and countervailing duty measures, despite the widely accepted principle that the dispute settlement process established in the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("the DSU") provides for prospective remedies. 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. Regardless of whether a Member uses a retrospective or a prospective system of duty calculation, liability for antidumping and countervailing duties attaches at the time of entry.

3. 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. Canada would have this Panel curtail the reasonable period of time explicitly provided by the DSU to implement adverse WTO reports, and impose new and additional obligations only to Members that use retrospective systems for calculating the amount of antidumping and countervailing duties.

4. 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 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

5. The United States calculates both antidumping and countervailing duties on a retrospective basis. Liability for antidumping and countervailing duties attaches at the time merchandise subject to a preliminary or final antidumping or countervailing duty measure enters the United States. When such measures have been put into place, the United States will require upon entry that a security 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.

6. 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 at the time of entry correctly reflects the actual level of dumping or subsidization. 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

7. 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 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.

8. 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" the date on which the Trade Representative directs Commerce to revoke an antidumping or countervailing duty order or implement the new Commerce determination.

C. Procedural Background

9. 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.

10. 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.

11. This Panel was established on August 23, 2001 and constituted on October 30, 2001.

12. In its first written submission, Canada continued to claim that section 129(c)(1) of the URAA violates several provisions of the GATT, the AD Agreement, the SCM Agreement, and the WTO Agreement. Canada abandoned its claims that section 129(c)(1) of the URAA violates the DSU.

III. STANDARD OF REVIEW

13. 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. Pursuant to Article 31 of the *Vienna Convention*, which reflects a customary rule of interpretation, 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*."[1] However, a panel's role is limited to the words and concepts used in the treaty. The Appellate Body in *India – Patents* cautioned, "*[T]hese principles of interpretation neither require nor condone the*

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

imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended…"[2]

IV. ARGUMENT

A. Introduction

14. 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 of a Member's WTO obligations. 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. 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. 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. 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.

15. 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 and Article 10 of the SCM Agreement because section 129(c)(1) "precludes" 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 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" or "imposed" 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.

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[2] 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).

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

1. Textual Analysis of the DSU

16. 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, under Article 19.1 of the DSU, when it has found a measure to be inconsistent with a Member's WTO obligations a panel or the Appellate Body "shall recommend that the Member concerned *bring the measure into conformity with that Agreement*." The ordinary meaning of the term "bring" is to "[p]roduce as a consequence," or "cause to become."[3] These definitions give a clear indication of future action, supporting 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.

17. 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, "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." The focus of WTO dispute settlement is on withdrawal of the *measure*, and not on providing compensation for the measure's past existence.

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

19. 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 may continue to be liable for the payment of duties.

20. 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

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

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.

2. Panel and Appellate Body Clarification of the DSU

21. 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*[4], the panel discussed the prospective nature of the recommendations a panel or the Appellate Body can make under the DSU, stating, "we do not imply that the EC is under an obligation to remedy past discrimination." Rather, the principle of Article 3.7 of the DSU "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." In identifying three possible methods by which the European Communities could bring the measure into conformity, none of them involved providing a remedy for past transgressions.[5]

22. 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. 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.

23. Canada's views on prospective application have been consistent with this view that the DSU only provides for prospective relief. 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 . . . ."[6]

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[4] WT/DS27/RW, adopted 6 May 1999, para. 6.105 ("*EC -- Bananas*").

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

[6] *Australia – Subsidies Provided to Producers of and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by the United States,* WT/DS126/RW, adopted 11 February 2000; *Dispute Settlement Body, Minutes of Meeting Held at Centre William Rappard on 11 February 2000,* WT/DSB/M/75 , 7 March 2000, at 8.

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

24. 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.

25. 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.[7] 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 assessment shall not apply to imports **entered** before the violation of the undertaking."[8] 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...."[9] 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."[10] 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.

26. 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 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.

27. 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

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

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

[9] (Emphasis added.) *See also* SCM Agreement, Article 20.6.

[10] (Emphasis added.)

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 regarding antidumping or countervailing duty measures with respect to entries that have occurred prior to the conclusion of the reasonable period of time for implementation.

28. 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. 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.

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

29. 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. They did not do so. 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 above, no consequences for maintaining the inconsistent measures in the interim period. Adopting Canada's position and thereby modifying this agreement 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

30. 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

31. It is important to recognize that prospective and retrospective assessment systems operate in a similar manner. Under the Canadian prospective 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.[11] 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 duties incurred on entries that took place before the date of implementation.[12] The outcomes under the two systems are essentially the same.

ORAL STATEMENT OF THE UNITED STATES OF AMERICA FROM THE FIRST MEETING OF THE PANEL, FEBRUARY 18, 2002

32. Section 129 of the URAA provides the basic legal provisions through which the United States would make and implement new antidumping or countervailing duty determinations consistent with an adverse WTO report. The specific provision at issue here, section 129(c)(1), simply specifies that a new determination which the USTR directs Commerce to implement will be effective as to all entries that occur on or after the date of implementation.

33. This case revolves around what it means to implement an adverse WTO report in a prospective manner. In the view of the United States, "prospective" implementation in a case involving an antidumping or countervailing duty measure requires a Member to ensure that the new determination applies to all merchandise that enters for consumption on or after the date of implementation.

34. Using the date of entry as the basis for implementation is consistent with the basic manner in which the AD and SCM Agreements operate. Throughout those agreements, the critical factor for determining whether particular entries are subject to the assessment of antidumping or countervailing duties is the date of entry.

35. Consistent with this structure, section 129(c)(1) of the URAA links the implementation of a WTO-consistent determination to entries which occur on or after the date of implementation. As of the date of implementation, the United States will have brought the border measure, that is, the antidumping or countervailing duty measure, into compliance with its WTO obligations.

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[11] Special Import Measures Act ("SIMA"), Art. 76.1(5)(b).

[12] *See* SIMA, Arts. 9.21, 76.1.

36. A recent Appellate Body report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea,*[13] also provides support for the idea that the critical issue is date of entry. In the aptly numbered paragraph 129 of that report, the Appellate Body stated that "a duty [...] does not need actually to be enforced and collected to be 'applied' to a product. In our view, duties are 'applied against a *product*' when a Member imposes conditions under which that product can enter that Member's market [...]." Thus, when the Appellate Body analyzed when a duty is "applied," it focused not on what might occur at the time of enforcement or collection, but on the conditions that imports would face at the border.

37. By making an issue of the effect that implementation has on prior unliquidated entries, Canada is ignoring the international obligation – which is to bring the border measure into conformity with the agreement – and instead, is trying to create a new obligation for Members to provide redress or compensation to private parties within their own jurisdictions. There is no basis in the agreements for such an obligation.

38. Moreover, to read such an obligation into the agreements could have serious consequences for other Members. In the *Guatemala Cement* dispute, Guatemala argued that the panel should not order the refund of past duties, stating, "[I]f a panel were to suggest a retroactive remedy, this could interfere directly with the sovereignty of a Member by establishing a domestic right of action where there had been none previously."[14]

39. Because Canada's claim relates to prior entries, and because Canada is attempting to have a subsequent WTO report apply to those prior entries, Canada is seeking a retroactive remedy.

40. Canada has apparently abandoned any claim that section 129(c)(1) of the URAA is inconsistent with Members' obligations pursuant to the DSU. Canada's decision to abandon these claims is consistent with the widely accepted view that the dispute settlement process established in the DSU provides for prospective remedies in dispute settlement cases, and provides no textual basis for requiring WTO Members to provide retroactive relief when their measures are found to be inconsistent with WTO rules.

41. Furthermore, when the Members negotiated the DSU, they recognized that it may not be feasible for a Member to immediately bring its measure into conformity. Thus, in Article 21.3 of the DSU, Members provided for a reasonable period of time to implement adverse WTO decisions.

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[13] WT/DS202/AB/R (issued 15 February 2002).

[14] Panel Report on *Guatemala – Antidumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/R, 19 June 1998 (modified by the Appellate Body in other respects in WT/DS60/AB/R, adopted 25 November 1998).

42. Just as the DSU provides for a reasonable period of time to achieve compliance, the DSU does not provide a remedy for past breaches of WTO agreements. Canada would have this Panel re-balance the obligations of Members, imposing a new and additional obligation that would apply only to Members that use retrospective systems for calculating the amount of antidumping and countervailing duties.

43. Whether a Member maintains a prospective or retrospective system of assessing antidumping or countervailing duties does not change the extent of that Member's obligations under the WTO Agreements. With respect to antidumping and countervailing duty measures, a Member's obligation is to remove or modify the border measure (the antidumping or countervailing duty measure) with respect to all entries made on or after the date set for implementation.

44. If Canada is correct in arguing that the Member's obligation depends upon the legal rights in effect on the date that the final duty liability is determined (and not on the date of entry), then a Member that has received DSB authorization to suspend concessions would be permitted to do so with respect to unliquidated, pre-authorization entries. On this point, however, Canada's argument conflicts with the reasoning of the panel in the *United States – Import Measures* dispute.[15] The *Import Measures* panel stated that suspending concessions on pre-authorization entries would constitute a retroactive remedy at odds with GATT and WTO practice. Further, the panel stated, "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."[16] For the panel, the date of entry controlled whether the remedy was prospective or retroactive.

45. This case is about the dispute settlement system. The fact that Canada has made no claim under the DSU is very telling; it highlights Canada's desire to avoid the well-accepted principle that the DSU does not require retroactive remedies. Moreover, as the United States' first written submission demonstrates, section 129(c)(1) of the URAA ensures that adverse WTO decisions will be implemented, in a prospective manner, in accordance with the requirements of the DSU.

ANSWERS OF THE UNITED STATES OF AMERICA TO THE PANEL'S 19 FEBRUARY 2002 QUESTIONS, MARCH 4, 2002

46. There is no evidence in the text of the AD Agreement or the SCM Agreement that the rules are intended to promote or create advantages or disadvantages for one type of system over the other. The DSU provides only for prospective remedies. Regardless of whether a Member utilizes a retrospective or prospective system of duty assessment, the date of entry is the

[15] Report on *United States – Import Measures on Certain Products for the European Communities*, WT/DS165/R, adopted 10 January 2001, as modified by the Appellate Body.

[16] *Id.*, para. 6.77.

controlling issue for determining whether the implementation obligations apply to a particular entry.

47. At the first Panel meeting, Canada's position appeared to be that even though the completion of the refund proceeding or judicial review might occur as long as two or more years after the end of the reasonable period of time, Members with prospective systems would not be obligated to apply the new, WTO-consistent methodology in that refund proceeding because the entry occurred prior to the end of the reasonable period of time. Canada was unable to point to any textual basis for its belief that the implementation obligations of Members with prospective systems differ from those of Members with retrospective systems.

48. Prospective implementation in WTO disputes requires a Member to implement with respect to entries that take place on or after the date of implementation. The fact that pre-implementation entries may remain unliquidated after the expiry of the reasonable period of time – due to domestic litigation or any other reason – does not overcome the fact that a Member is under no obligation to implement with respect to entries that took place <u>before</u> the end of the reasonable period of time.

49. To the extent that Canada is arguing that any cash deposits collected in respect of "prior unliquidated entries" must be refunded by the United States, there is no legal basis for that argument. To require refunds of cash deposits collected on entries prior to the end of the reasonable period of time would be to require retroactive relief, inconsistent with GATT/WTO practice.

50. Section 129(c)(1) has a limited scope. It provides the effective date of new, WTO-consistent determinations by Commerce or the International Trade Commission that USTR directs Commerce to implement. Section 129(c)(1) does not contain any language addressing what Canada has defined as "prior unliquidated entries." The terms of section 129(c)(1) of the URAA are rather limited. They apply only to "determinations concerning title VII of the Tariff Act of 1930 that are implemented under" section 129. Thus, a determination made in a distinct "segment of the proceeding," as defined in Commerce's regulations, would not be subject to section 129(c)(1).[17]

51. If a challenge to the final determination in an antidumping investigation were successful, Commerce would make the necessary changes in its methodologies and issue a new, WTO-consistent determination. It would then apply that new determination to all entries that took place on or after the implementation date by setting a new cash deposit rate. It is this new determination that is the "determination" referenced in section 129(c)(1).

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[17] *See* 19 C.F.R. § 351.102.

52. Subsequently, if a company were to request an administrative review of what Canada terms "prior unliquidated entries," the administrative review would constitute a new segment of the proceeding, and it would result in a new and distinct determination. Since this new 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 methodologies in the administrative review.

53. Section B.1.c.(2) of the SAA specifically notes that "it may be possible to implement the WTO report recommendations in a future administrative review under section 751 of the Tariff Act. . . ." (Emphasis added.) This language demonstrates the error in Canada's assertions that section 129(c)(1) would preclude Commerce from applying a WTO-consistent methodology to what they term "prior unliquidated entries" in a subsequent administrative review.

54. If the implementation of an adverse WTO report resulted in a finding of no injury and revocation of an antidumping or countervailing duty order, section 129(c)(1) would require Commerce to revoke the order with respect to all entries that take place on or after the date of implementation. Section 129(c)(1) does not address what Canada terms "prior unliquidated entries," and Commerce has never addressed how it would treat such entries if it were faced with such an issue. Even taking into account the language in the SAA, however, the most that can be said is that such entries "would remain subject to potential duty liability."

SECOND WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA, MARCH 7, 2002

I. Introduction

55. Although it continues to state otherwise, Canada is in fact trying to use the dispute settlement system to establish a difference in the rights and obligations that apply to Members, based entirely on whether a Member uses a prospective or a retrospective system to determine liability for antidumping and countervailing duties. It is doing so on the basis of an arbitrary and fictitious distinction regarding when a determination is allegedly "final" or "definitive" under either system. Its alleged distinction finds no support in the text of the AD Agreement, the SCM Agreement, GATT 1994, or the DSU. The AD and SCM Agreements recognize both approaches, and there is no evidence that the rules in the Agreements are intended to promote or create advantages or disadvantages for one approach over the other.

56. Although Canada purports to agree that WTO remedies are prospective only, Canada is in fact seeking to establish an obligation for Members with retrospective systems to provide retroactive remedies in cases involving antidumping and countervailing duty measures. There is no basis in the text of the WTO Agreements for such a requirement. Antidumping and countervailing duty measures are border measures. If an antidumping or countervailing duty

measure is successfully challenged, a Member can implement the adverse Panel report in a prospective manner by revising or withdrawing the border measure.

57. As Canada has continued to refine and articulate its legal arguments, it has become increasingly clear that Canada has fundamentally misinterpreted what section 129(c)(1) actually requires. Canada has failed to establish a *prima facie* case that section 129(c)(1) mandates a violation of any of the WTO provisions that form the basis for its claims.

II. Canada Has Failed to Establish that Section 129(c)(1) of the URAA Mandates a Breach of U.S. Obligations Under the AD Agreement, the SCM Agreement, or the GATT 1994

58. Canada's entire case is based on a misinterpretation of what section 129(c)(1) actually requires. Canada's arguments fail to establish that section 129(c)(1) mandates action inconsistent with the AD Agreement, the SCM Agreement, or the GATT 1994.

A. Under Established WTO Jurisprudence, the Legislation of a Member Violates That Member's WTO Obligations Only If the Legislation Mandates Action That Is Inconsistent With Those Obligations

59. It is well established under GATT and WTO jurisprudence that legislation of a Member violates that Member's WTO obligations only if the legislation *mandates* action that is inconsistent with those obligations or precludes action that is consistent with those obligations. If the legislation provides discretion to administrative authorities to act in a WTO-consistent manner, the legislation, as such, does not violate a Member's WTO obligations. The Appellate Body has explained that this concept "was developed by a number of GATT panels as a threshold consideration in determining when legislation as such – rather than a specific application of that legislation – was inconsistent with a Contracting Party's GATT 1947 obligations."[18]

B. The Meaning of Section 129(c)(1) Is a Factual Question That Must Be Answered by Applying U.S. Principles of Statutory Interpretation

60. Even if Canada were correct in arguing that date of entry is not the controlling issue, section 129(c)(1) can violate WTO rules only if it mandates the actions that Canada alleges. For purposes of ascertaining the meaning of section 129(c)(1) as a matter of U.S. law, U.S. courts and agencies must recognize the longstanding and elementary principle of U.S. statutory

[18] Appellate Body Report on *United States - Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, para. 88 ("*U.S. 1916 Act AB Report*").

construction that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains". *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). While international obligations cannot override inconsistent requirements of domestic law, "ambiguous statutory provisions . . . [should] be construed, where possible, to be consistent with international obligations of the United States."[19]

C. Canada's Arguments Fail to Establish that Section 129(c)(1) Mandates Action Inconsistent with WTO Rules

61. Canada assumes that "the use of the word 'after' in section 129(c)(1) excludes any interpretation that would allow the Department of Commerce to apply the new determination to prior entries."[20] Canada's assumption, however, is not correct. Canada's error arises from a mistaken interpretation of the term "determination" as that term is used in section 129(c)(1).

62. As the text demonstrates, the scope of section 129(c)(1) is actually quite limited. It only addresses the treatment of entries that take place on or after the date of implementation, and even then, it only addresses the application of the particular determination issued under the authority of section 129(c)(1) to those entries. It does not address what actions Commerce may or may not take in a separate determination in a separate segment of the proceeding, and thus does not mandate that Commerce take (or preclude Commerce from taking) any particular action in such a proceeding.

63. If a challenge to a final dumping determination in an investigation were successful, Commerce would make the necessary changes in its methodologies and issue a new, WTO-consistent determination. It would then apply that new determination by setting a new cash deposit rate, which would apply to all entries that took place on or after the implementation date. It is this new determination that is the "determination" referenced in section 129(c)(1).

64. If a company were then to request an administrative review of what Canada terms "prior unliquidated entries," Commerce would conduct the administrative review and issue a new determination. Since 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 methodologies in the administrative review.

65. The second scenario that Canada has raised is a situation where the WTO challenge results in the revocation of an antidumping or countervailing duty order because the new, WTO-consistent determination results in a finding of no injury or no dumping. Under the terms of section 129(c)(1), the revocation would apply to all entries which took place on or after the date of revocation of the order, so Commerce would instruct the U.S. Customs Service to stop

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[19] *Restatement (Third) of the Foreign Relations Law of the United States*, § 114 (1987) (Exhibit U.S.–11).
[20] Canada Responses to Panel Questions, paras. 48, 49.

requiring cash deposits as of that date. In any subsequent administrative review, Commerce would need to decide what to do with respect to entries that took place prior to the date of revocation.

66. Canada has not challenged an actual application of section 129(c)(1) in such a scenario, and Commerce has not addressed such a scenario to date. The only impact of section 129(c)(1), however, is that Commerce would not determine the fate of those entries in the revocation determination itself. Section 129(c)(1) does not require Commerce to apply duties to those entries, it does not limit Commerce's discretion in deciding how to administer the law in separate proceedings with respect to those entries, it does not limit judicial review of the results of those separate proceedings, and it does not limit Commerce's obligation to implement the results of any such judicial proceedings. Accordingly, section 129(c)(1) does not mandate a breach of any of the provisions of the AD Agreement, the SCM Agreement, or GATT 1994 that Canada cites.

III. Canada Has No Principled Basis for its Efforts to Create Distinctions Between Members with Retrospective Duty Assessment Systems and Members with Prospective Duty Assessment Systems

67. Canada's claims are based on arbitrary and unsubstantiated efforts to distinguish when a final determination of duties exists between retrospective duty assessment systems, and prospective duty assessment systems. While Canada might wish to create the impression that antidumping or countervailing duties collected at the time of entry under its prospective system are somehow "final" or "determinative," such an impression would be inconsistent with reality. Canada's own Memoranda describing its antidumping and countervailing duty system indicate that assessment does not occur until 30 days after entry, that the duty is subject to redetermination based on a request from the importer within 90 days of entry, and Canada may redetermine the normal value, export price or the amount of subsidy associated with any imported product **within two years** of the original determination.

68. Canada is seeking to draw a line between reviews conducted pursuant to Article 9.3.1 of the AD Agreement (in retrospective systems) and reviews conducted pursuant to Article 9.3.2 of the AD Agreement (in prospective systems). In essence, Canada is arguing that Members with retrospective duty assessment systems have an obligation to apply adverse DSB recommendations and rulings when conducting Article 9.3.1 reviews of pre-implementation entries, while Members with prospective systems do not have an obligation to apply adverse DSB recommendations and rulings when conducting Article 9.3.2 reviews of pre-implementation entries.

69. As the complainant in this dispute, Canada has the burden of demonstrating the legal basis for its claim. That legal basis must be rooted in the text of the WTO provisions that Canada has cited. Instead, Canada is attempting to establish a different and higher level of obligation for Members with retrospective duty assessment systems than for Members with

prospective duty assessment systems, based on nothing more than an arbitrary, form over substance, description of when duties are purportedly "final" under the two systems.

70. The inconsistency in Canada's claims is further evidenced in Canada's position with respect to judicial review. As the United States noted in the first Panel meeting, Members are obligated to maintain judicial, arbitral or administrative tribunals to review administrative actions. Canada would appear to be arguing that an administrative determination by a Member with a retrospective system of duty assessment is somehow less final, when subject to judicial review, than a comparable administrative determination by a Member with a prospective system of duty assessment, when subject to judicial review. Canada has not explained how the same terms regarding judicial review in Article 13 of the AD Agreement and Article 23 of the SCM Agreement must be read to create such disparate results between Members with retrospective duty assessment systems and Members with prospective duty assessment systems.

71. Canada attempts to build its legal arguments around the concept of "finality;" however, Canada employs inconsistent definitions of finality in order to create artificial distinctions between retrospective and prospective systems. When Canada's labels are set aside, the similarities between the two duty assessment systems are striking and in both cases, the liability for antidumping or countervailing duties arises at the border, at the time of entry. Canada's claims are without foundation in the Agreements, would elevate form over substance, and create rights and obligations not provided for in the Agreements.

IV. Canada's Answers to the Panel's Questions Confirm That Canada Is Seeking a Retroactive Remedy in Cases Involving Antidumping and Countervailing Duty Measures

72. Canada's answers to the Panel's questions have conclusively demonstrated that Canada is in fact seeking to establish an obligation for Members with retrospective systems to provide retroactive remedies in cases involving antidumping and countervailing duty measures. In response to a question asking Canada whether it was arguing that the United States was obliged to refund any cash deposits collected in respect of what Canada terms "prior unliquidated entries,"Canada replied that the United States would in fact be required to return such cash deposits.[21] Thus, Canada believes that Members with retrospective systems are not only under an obligation to ensure that all future (post-implementation) actions conform to WTO rules; they are also under an obligation to undo past (pre-implementation) actions.

73. Canada has argued repeatedly during this dispute that its arguments do not amount to a claim for retroactive relief because it is only asking the United States to make its decisions after the implementation date in accordance with adverse WTO reports, even if those decisions relate

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[21] *See* Canada's Response to Panel Questions, para. 67.

to pre-implementation entries. Canada has sought to distinguish the obligations applying to Members with prospective systems by claiming that those Members assess and collect duties at the time of entry, so that there are no decisions "after" the reasonable period of time that need to be made. In Canada's view, a Member would only violate WTO rules if were to make a WTO-inconsistent decision after the reasonable period of time.

74. When a Member with a retrospective system collects cash deposits, however, it does so pursuant to a determination made prior to the date of entry that the conditions for requiring such deposits were met. In this sense, the situation of the Member with a retrospective system is identical to the situation of the Member with a prospective system.

75. In addition, under the logic that Canada has applied to prospective systems, if a Member with a retrospective system took no action with respect to cash deposits after the implementation date, there would be no possibility of a WTO violation. Canada has failed even to attempt to explain how an obligation not to take WTO-inconsistent action after the implementation date can somehow be transformed into an affirmative obligation to take a certain action – namely, refunding cash deposits collected before the implementation date – when that "obligation" appears nowhere in the AD Agreement, the SCM Agreement, GATT 1994, or the DSU.

76. The United States has argued repeatedly that the scope of a Member's implementation obligations is governed by the situation in effect at the time of entry. If Canada is correct in arguing that the critical issue is the legal situation in effect when a Member determines final duty liability, then a Member that has received DSB authorization to suspend concessions may do so with respect to unliquidated, pre-authorization entries. Canada's attempt to distinguish the *Customs Bonding* case on the basis of when the "rate of duty is fixed" misses the point,[22] since its argument implies that a Member that "fixes" the rate of duty at some point after the date of entry could, in fact, suspend concessions on unliquidated, pre-authorization entries.

ORAL STATEMENT OF THE UNITED STATES OF AMERICA FROM THE SECOND MEETING OF THE PANEL, MARCH 26, 2002

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

77. Canada has failed to meet its burden to demonstrate that section 129(c)(1) mandates WTO inconsistent action. 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). 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

[22] *See* Canada's Response to Panel Questions, para. 80.

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.

78. For example, if a company 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.

79. 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." 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.

80. In its second written submission, Canada tried 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. 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.

81. 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.

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

82. Canada and the United States 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.

83. 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. 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.

84. Canada's argument lacks any textual basis in the WTO Agreements. Nothing in the text of the AD Agreement 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. In actuality, neither Member has such an obligation, because the date of entry determines what constitutes "prospective" implementation in both systems.

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

85. 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 <u>any</u> entries that were not yet "final," even if the entries took place prior to the date of the DSB authorization. Adopting Canada's approach would (1) conflict with the reasoning of the *Customs Bonding* panel; and (2) create additional rights and obligations for Members, contrary to Article 3.2 of the DSU.

86. 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.

87. 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. 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.

88. 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 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.

ANSWERS OF THE UNITED STATES OF AMERICA TO THE PANEL'S 28 MARCH 2002 QUESTIONS, APRIL 5, 2002

89. Section 129 of the URAA provides the legal mechanism for Commerce to make a new determination to implement an adverse WTO report. Section 129(c)(1) provides an effective date for the application of such new determinations. Section 129(c)(1) does not, however, address Commerce's use of any WTO-consistent methodologies developed in a section 129 determination in any other segments of the same proceeding (i.e., any other administrative review of the same antidumping or countervailing duty order), nor does it speak to the application of such methodologies in other proceedings (i.e., with respect to other antidumping or countervailing duty orders). Accordingly, section 129(c)(1) does not constrain Commerce's ability to utilize those methodologies in another segment of the same proceeding.

90. Under the U.S. legal system, where Congress has not spoken on the precise question at issue, Congress has delegated to the administrative agency the authority to fill the gap by creating a rule.[23] The U.S. Supreme Court has held, "In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[24]

91. Commerce has the authority to alter its statutory interpretations or its methodologies used to implement those interpretations, provided that it gives a reasonable explanation for doing so.[25]

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[23] *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984) (Exhibit US-17).

[24] *Id.* at 844.

[25] *See INS v. Yang*, 519 U.S. 26, 32 (1996) (Exhibit US-18); *Atchison, Topeka & Santa Fe Ry v. Wichita Board of Trade*, 412 U.S. 800, 808 (1973) (Exhibit US-19); *British Steel, PLC v. United States*, 127 F.3d 1471, 1475 (Fed. Cir. 1997) (Exhibit US-20).

In an administrative review, Commerce would have the authority to alter its statutory interpretation or methodology from one announced prior to the implementation of the WTO panel report, and use the same, WTO-consistent interpretation or methodology adopted in the section 129 determination. This would not, however, be an application of the section 129 determination to what Canada has termed "prior unliquidated entries."

92. Where the international obligations of the United States have been clarified, for example through the adoption by the DSB of rulings and recommendations in a WTO panel or Appellate Body report involving a U.S. methodology, the *Charming Betsy* principle, that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains,"[26] might be relied upon by Commerce as a reasonable explanation for a change in its methodology in an administrative review determination distinct from a section 129 determination.

93. Canada has not identified a scenario, and the United States is not aware of a scenario, particularly in light of this abstract case, in which section 129(c)(1) would mandate WTO-inconsistent action or preclude the United States from acting in a WTO-consistent manner. This point is particularly true since, as the United States has noted repeatedly throughout this dispute, there is no obligation to implement an adverse WTO report with respect to pre-implementation entries.

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

94. Canada's response to question 67 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"). With respect to the Panel's specific example in the parenthetical, however, Canada appears to have reversed its previous position.

95. 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.

96. Canada argued that, for Members with prospective systems, the date of entry controls the scope of a Member's implementation obligations.[27]

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[26] *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Exhibit US-21).
[27] Canada's Second Written Submission, para. 22.

97. 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.

98. 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.

99. 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.

100. In response to question 68, 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 129 pertaining to dumping, subsidization and injury. Canada's assertion 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," however, ignores the plain language of section 129(c)(1). This language 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.

101. In response to the Panel's questions, 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 129(c)(1)."[28] As noted above, however, Canada has agreed[29] 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.

102. 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, 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, 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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[28] Canada's April 5, 2002 Response to Questions, para. 16.
[29] Canada's April 5, 2002 Response to Questions, para. 10.