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

WT/DS221

Oral Statement of the United States
First Meeting of the Panel

February 18, 2002

1. Madam Chair, members of the Panel, the United States appreciates this opportunity to comment on certain issues raised by Canada in its First Written Submission. We do not intend to offer a lengthy statement today; you have our written submission, and, in accordance with your request earlier today, we will not repeat all of the comments that we made there. We will be pleased to receive any questions you may have at the conclusion of our statement.

2. This case involves a dispute over how the United States implements WTO panel and Appellate Body reports finding that the United States has taken actions inconsistent with its obligations under the Antidumping Agreement ("AD") or the Agreement on Subsidies and Countervailing Measures ("SCM"). Section 129 of the Uruguay Round Agreements Act, or 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 United States Trade Representative ("USTR") directs the Department of Commerce ("Commerce") to implement will be effective as to all entries that occur on or after the date of implementation. With that action, the United States will have fully implemented the new determination.

3. As the Panel is well aware, 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. There is no requirement to apply such a determination to pre-implementation entries.

4. 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. Most notably, Article 10.1 of the AD Agreement and Article 20.1 of the SCM Agreement limit the application of provisional measures, antidumping duties and countervailing duties to "products which **enter for consumption** after the time" when the provisional or final decision enters into force, subject to limited and specific exceptions.

5. Of course, any provisional or final decision to impose an antidumping or countervailing duty measure will have been based on an examination of sales of entries that took place prior to that decision and their effects on the domestic industry. But for the obligations contained in Articles 10.1 of the AD Agreement and 20.1 of the SCM Agreement, Members with retrospective duty systems could be in a position to impose such provisional measures, antidumping duties or countervailing duties to those prior entries. These entries are the very entries specifically found to have been dumped or subsidized and to have caused injury to the

domestic industry. Nevertheless, these articles make it clear that products which entered for consumption prior to the imposition of the provisional or final measure are not subject to the measure by virtue of their date of entry.

6. Articles 10.6 and 10.8 of the AD Agreement and Article 20.6 of the SCM Agreement similarly use the date of entry as the basis for determining liability for antidumping and countervailing duties. These provisions relate to the ability of Members to apply liability for antidumping and countervailing duties retroactively under particular circumstances. In each case, the reach of the retroactive liability is defined in terms of date of entry. For example, Articles 10.6 of the AD Agreement and 20.6 of the SCM Agreement permit retroactive liability on "products which were entered for consumption not more than 90 days prior to the date of application of provisional measures." Similarly, Article 10.8 of the AD Agreement provides that "products entered for consumption prior to the date of initiation of the investigation" may not be liable for antidumping duties. In each case, date of entry is the determinative factor.

7. 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. All entries occurring on or after the date of implementation would enter and be treated in accordance with the WTO report.

8. A recent Appellate Body report also provides support for the idea that the critical issue is date of entry. Just this past Friday, the Appellate Body issued a report on *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*.[1] 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 [...]."[2] 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.

9. 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.

10. 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. In Guatemala's view, "A retroactive remedy could give rise to domestic grounds for action, particularly in countries where the WTO

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

[2]Id. at para. 129 (original emphasis).

agreements have direct effect. Thus, if 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."[3] The panel declined to recommend a retroactive remedy in that case.

11. Canada may assert, and has in fact asserted this morning, that, unlike Mexico in the *Guatemala Cement* case, Canada is not seeking retroactive relief. However, 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, in fact, seeking a retroactive remedy.

12. It is also interesting to note that 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. Pursuant to the DSU, Members have agreed that when a measure has been found to be inconsistent with a covered agreement, Members should bring the measure into conformity with the agreement.

[3]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).

13. 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. Pursuant to Article 21 of the DSU, there is no obligation to cease or otherwise suspend the inconsistent measure with respect to its impact on entries that take place during this reasonable period of time. While the DSU provides for compensation or the suspension of concessions if a Member fails to implement a WTO decision, pursuant to Article 22.1, compensation or the suspension of concessions cannot occur unless compliance has not been achieved by the end of the reasonable period of time.

14. 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. To this end, the relief Canada seeks would be inconsistent with Articles 3.2 and 19.2 of the DSU, which provide that recommendations and rulings of panels or the Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.

15. 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. As we have explained in our written submission and here today, a Member's obligation is to bring a measure found to be inconsistent with a WTO Agreement into

conformity with that agreement within a reasonable period of time. With respect to antidumping and countervailing duty measures, consistent with the structure of the AD and SCM Agreements, this means that 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.

16. There is one final point that we would like to make about Canada's reasoning in this dispute, as it relates to DSU provisions relevant to the question of retroactive remedies. Just as Canada ignores the DSU and WTO practice concerning the timing of implementation of DSB recommendations and rulings, so too does it ignore the significance of its arguments for scenarios in which implementation has *not* occurred. Article 22 of the DSU provides for WTO Members to request DSB authorization to suspend concessions or other obligations under the covered agreements, and Article 23.2(c) states that a Member must obtain such authorization prior to suspending concessions. This leaves the question of which entries may be subject to the suspension of concessions. If Canada is correct in arguing that the answer 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.

17. On this point, however, Canada's argument conflicts with the reasoning of the panel in the *United States – Import Measures* dispute.[4] The *Import Measures* panel stated that

[4]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.

suspending concessions on pre-authorization entries would constitute a retroactive remedy at odds with GATT and WTO practice.[5] 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."[6] For the panel, the date of entry controlled whether the remedy was prospective or retroactive.

18. Madam Chair, our purpose today has been to focus on the primary and fundamental issue before the Panel: specifically, what it means to bring a measure into conformity with the WTO rules governing antidumping and countervailing duties. 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 our 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. As we have demonstrated, section 129(c)(1) of the URAA is fully consistent with the United States' obligations under the AD Agreement, the SCM Agreement, GATT 1994 and the WTO Agreement. None of these agreements addresses the timing of the implementation of adverse WTO reports and, to the extent that they refer to effective dates for any purpose, those effective dates are based on the date of entry. Canada has failed to identify any contrary language.

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[5] *Id.*, para. 6.106.

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

19. Thank you for your attention. We would be pleased to receive any questions you may have.