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

(WT/DS221)

SECOND WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

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I. Introduction

1. After a round of submissions, a meeting before the Panel, and the submission of responses to a comprehensive set of Panel questions, the issues in this dispute have become increasingly clear.

2. First, 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 implementing adverse World Trade Organization recommendations and rulings in cases involving antidumping or countervailing duty measures, 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. Canada's alleged distinction finds no support in the text of the AD Agreement,[1] the SCM Agreement,[2] GATT 1994,[3] or the DSU.[4] The AD and SCM Agreements recognize both systems for duty assessment, and there is nothing in the Agreements indicating that the Agreements are intended to promote or create advantages or disadvantages for one approach over the other. Neither Agreement addresses the issue of implementation of adverse DSB recommendations and rulings, and Canada has abandoned any claims under the DSU.

3. Second, although Canada purports to agree that WTO remedies are prospective only, and that the only disagreement in this dispute is what constitutes a "prospective" remedy, 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 Agreement for such a requirement. Antidumping and countervailing duty measures are border measures; they affect trade at the border. If an antidumping or countervailing duty measure is successfully challenged in WTO dispute settlement, a Member can implement the adverse recommendations and rulings of the Dispute Settlement Body ("DSB") in a prospective manner by revising or withdrawing the border measure. By doing so, the Member will ensure that all entries that take place on or after the implementation date – the date the measure is modified or removed – will be unaffected by the WTO-inconsistent measure.

4. Third, and most important, 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. The United States explains below why Canada has failed to

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[1] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "AD Agreement")

[2] *Agreement on Subsidies and Countervailing Measures* (the "SCM Agreement")

[3] *General Agreement on Tariffs and Trade* ("GATT 1994").

[4] *Understanding on Rules and Procedures for the Settlement of Disputes* (the "DSU").

establish a *prima facie* case that section 129(c)(1) mandates a breach of any of the WTO provisions that form the basis for its claims.

5. The purpose of this submission is not to repeat all of the arguments made to date, although the United States continues to maintain all of the views that it has expressed in previous submissions. Rather, this submission will focus on a few key issues. The United States will begin by explaining how Canada has misinterpreted section 129(c)(1) and why its arguments fail to demonstrate that section 129(c)(1) mandates a breach of any of the WTO provisions that it has raised. The United States will then address the lack of any basis for Canada's assertion that the scope of a Member's implementation obligations in antidumping or countervailing duty disputes is determined by the date on which a Member makes a "definitive" or "final" determination of duty liability, and not by date of entry. The United States will conclude by explaining why Canada's responses to the Panel's questions demonstrate conclusively that it is, in fact, seeking to establish an obligation for Members with retrospective assessment systems to provide retroactive relief, despite the absence of any support for such a requirement in the text of the AD Agreement, the SCM Agreement, GATT 1994, or the DSU.

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 GATT 1994

6. Canada's decision to challenge section 129(c)(1) in the absence of any application of the provision to an actual fact pattern has made it difficult to understand the nature and extent of its claims and arguments. As Canada has continued to elaborate on its views, however, particularly in response to the Panel's written questions, it has become increasingly clear that Canada's entire case is based on a misinterpretation of what section 129(c)(1) actually requires. As the United States explains below, Canada's arguments fail to establish that section 129(c)(1) mandates action inconsistent with the AD Agreement, the SCM Agreement, or GATT 1994.

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

7. It is well established under GATT and WTO jurisprudence that legislation of a Member breaches 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 authorities to act in a WTO-consistent manner, the legislation, as such, does not violate a Member's WTO obligations.

8. The Appellate Body has explained that "the concept of mandatory as distinguished from discretionary legislation 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."[5] This doctrine has continued under the WTO system, as panels and the Appellate Body have continued to apply the mandatory/discretionary distinction in considering whether a Member's legislation is WTO-consistent.

9. Most recently, the panel in the *Export Restraints* case applied the doctrine in concluding that certain provisions of the U.S. countervailing duty law did not mandate action inconsistent with provisions of the *Agreement on Subsidies and Countervailing Measures*.[6] The Panel in *Export Restraints* described the mandatory/discretionary distinction as a "classical test" with longstanding historical support.[7]

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

10. The United States has argued at length in its first written submission, in its oral statement at the first Panel meeting, and in its answers to the Panel's questions, that section 129(c)(1) does not breach WTO rules because "prospective" implementation in WTO disputes involving antidumping and countervailing duty measures requires a Member to ensure that the new determination applies to all merchandise that enters for consumption on or after the date of implementation. However, 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. If it does not do so, then Canada's claims must fail, regardless of what it means to implement a new determination in a WTO-consistent manner.

11. It is well-established that municipal law consists not only of the provisions being examined, but also domestic legal principles that govern the interpretation of those provisions.[8] While the Panel is not bound to accept the interpretation presented by the United States, the United States believes that the Panel should give considerable deference to the United States' views on the meaning of its own law.[9]

12. 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.

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[5]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*").

[6]Panel Report on *United States – Measures Treating Export Restraints as Subsidies*, WT/DS194/R, adopted 23 August 2001, paras. 8.4 – 8.131.

[7]*Id.* at para. 8.9.

[8]*See, e.g.,* Panel Report on *United States – Section 301–310 of the Trade Act of 1974,* WT/DS152/R, adopted 27 January 2000, para. 7.108 & n. 681 ("*U.S. 301*").

[9]*U.S. 301*, para. 7.19.

statutory 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."[10]

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

13. Canada makes a number of arguments regarding why section 129(c)(1) allegedly breaches various provisions of the AD Agreement, the SCM Agreement, and GATT 1994. Each of the arguments is a variant on a common theme, and each arises from a common assumption. To quote Canada's response to a question from the Panel:

> The language of section 129(c)(1), by limiting compliance to future entries, has the effect of precluding the Department of Commerce from taking action to comply with the DSB ruling with respect to prior unliquidated entries. As Canada understands U.S. law, section 129(c)(1) would be interpreted this way because otherwise the express limitation to future entries contained in that section would be meaningless. The language of section 129(c)(1) precludes the Department of Commerce from applying the determination to prior unliquidated entries.
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> Since Section 129(c)(1) directs the Department to apply a new WTO-consistent determination to all unliquidated entries entered on or after a particular date, section 129(c)(1) precludes the Department of Commerce from applying the new determination to unliquidated duties made prior to the particular date. That is, 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. Thus, by virtue of U.S. statutory interpretation and administrative law principles, the Department is precluded from applying the new determination to prior unliquidated entries.[11]

14. 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). As the United States explains below, when the term is properly understood, it becomes clear that Canada's claims and arguments do not establish that section 129(c)(1) mandates WTO-inconsistent action.

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[10] *Restatement (Third) of the Foreign Relations Law of the United States*, § 114 (1987) (Exhibit U.S.–11); and *U.S. 301*, note 681, in which the panel recognized the existence of what is known in the United States as "the *Charming Betsy* doctrine".

[11] Canada's Responses to Questions, paras. 48, 49.

15. Section 129(c)(1) states in its entirety:

> (c) **Effects of Determinations; Notice of Implementation**.--
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> (1) **Effects of determinations**.-- Determinations concerning title VII of the Tariff Act of 1930 that are implemented under this section shall apply with respect to unliquidated entries of the subject merchandise (as defined in section 771 of that Act) that are entered, or withdrawn from warehouse, for consumption on or after--
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> (A) in the case of a determination by the Commission under subsection (a)(4), the date on which the Trade Representative directs the administering authority under subsection (a)(6) to revoke an order pursuant to that determination, and
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> (B) in the case of a determination by the administering authority under subsection (b)(2), the date on which the Trade Representative directs the administering authority under subsection (b)(4) to implement that determination.

16. 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 (*i.e.*, any separate review of the order), and thus does not mandate that Commerce take (or preclude Commerce from taking) any particular action in any separate segment of the proceeding.[12]

17. As the United States discussed in response to question 46 from the Panel, this point can be illustrated by considering the case of a challenge to a Commerce Department final dumping determination in an investigation. If the challenge were successful, Commerce would make the necessary changes in its methodologies and issue a new, WTO-consistent determination.[13] It

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[12]Section 351.102 of Commerce's regulations defines a segment of a proceeding as follows:

> (1) *In general.* An antidumping or countervailing duty proceeding consists of one or more *segments*. "Segment of a proceeding" or "segment of the proceeding" refers to a portion of the proceeding that is reviewable under section 516A of the Act.
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> (2) *Examples.* An antidumping or countervailing duty investigation or a review of an order or suspended investigation, or a scope inquiry under § 351.225, each would constitute a segment of a proceeding.

[13]Section 129(c)(1) does not preclude USTR from directing implementation prior to the end of the reasonable period of time, and it does not preclude Commerce from implementing within the reasonable period of time. In both applications of section 129(c)(1) to date, USTR has directed implementation, and Commerce has

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).

18. 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.[14] Canada is simply wrong to claim that section 129(c)(1) would preclude Commerce from doing so.

19. 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, no dumping, or no subsidization. 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 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.

20. 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 pre-implementation entries in the revocation determination itself. Section 129(c)(1) does not require Commerce to apply duties

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implemented, before the end of the reasonable period of time. *See United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, *Status Report by the United States*, WT/DS99/6, 17 January 2000, paras. 4, 8, 10 (explaining that USTR issued its request in the *DRAMS* case on August 2, 1999, that Commerce issued its new determination on November 4, 1999, and that the reasonable period of time expired on November 19, 1999) (Exhibit US-12); *see also* Exhibit US-9 (explaining that USTR issued its request in the *Stainless Steel* case on April 18, 2001 and that Commerce issued its new determination on August 28, 2001); *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, *Agreement Under Article 21.3(b) of the DSU,* WT/DS179/5, 1 May 2001 (explaining that the reasonable period of time in the *Stainless Steel* case expired on September 1, 2001) (Exhibit US-13).

[14] As Canada argued in the first Panel meeting:

> [t]he law applied [in an administrative review] is the law as interpreted by the Department of Commerce at the time that it makes its administrative review decision. The Department of Commerce's interpretation may be quite different from the interpretation it originally applied in the original investigation or in previous administrative reviews. Examples are instances in which a U.S. court has held that the Department of Commerce's interpretation of the law is incorrect or where the Department of Commerce has decided that a different interpretation of the law is more appropriate.

See Canada's Oral Statement at the first Panel meeting, para. 11 (emphasis added).

to those entries,[15] it does not limit Commerce's discretion in deciding how to administer the law in separate segments of the proceeding 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.[16] 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.

21. Since section 129(c)(1) does not mandate any particular treatment of what Canada terms "prior unliquidated entries" in any determination other than the particular one that is issued under its terms, section 129(c)(1) could mandate a breach of WTO rules only if the AD Agreement, the SCM Agreement, or GATT 1994 contained an affirmative obligation for Members to ensure that any implementation of adverse DSB recommendations and rulings applied to both pre- and post-implementation entries. None of the Agreements contains such an obligation; none of the Agreements even addresses what constitutes proper implementation in WTO disputes. The only agreement that does address a Member's implementation obligations is the DSU, and Canada has declined to pursue any DSU claims. Under the DSU, a Member's implementation obligations are prospective only.[17]

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

22. In its first written submission, the United States demonstrated that, when a Member is implementing adverse DSB recommendations and rulings, the obligation of that Member is to bring its measure into compliance on a prospective basis.[18] Canada does not dispute this.[19] What is in dispute in this case is what it means to implement adverse DSB recommendations and rulings on a prospective basis when the measure in question is an antidumping or countervailing duty measure.

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[15]Even the SAA states only that the entries "would remain subject to potential duty liability." SAA at 1026.

[16] In response to the Panel's questions, Canada admitted that section 129(c)(1) would not violate WTO rules if Commerce "change[d] its interpretation of U.S. law for other reasons, notably as a result of a direction from a U.S. court." *See* Canada's Responses to Questions, para. 54. It also admitted that section 129(c)(1) "would not prevent a U.S. court from directing the Department of Commerce to change the basis on which it made definitive determinations . . . ." *See id.*, para. 51.

[17] The United States discusses below why, contrary to Canada's repeated assertions, it is in fact seeking through this dispute to establish a right of retroactive relief in cases involving antidumping and countervailing measures.

[18]United States' first written submission, paras. 29-39.

[19]Canada's Oral Statement at the first Panel meeting, paras. 32-33.

23. The United States has explained that prospective implementation of adverse DSB recommendations and rulings involving an antidumping or countervailing duty measure means that the border measure in question must be brought into compliance with the DSB recommendations and rulings and that all entries on or after the date of implementation must be treated consistently with the Member's WTO obligations.[20] In other words, prospective implementation is based on the date of entry.

24. Canada agrees that the date of entry is the relevant date for prospective implementation, provided that the Member in question has a prospective system of duty assessment.[21] In fact, Canada appears to agree that date of entry is an appropriate basis for considering prospective implementation for customs valuation issues as well.[22] Canada asserts, however, that the same obligations undertaken by Members with prospective systems create different consequences for Members with retrospective systems[23] and that for Members with retrospective systems any determination made after the date of implementation must be consistent with the implementation, even if the determination involves pre-implementation entries.

25. Canada is the complainant in this dispute. As the complainant, Canada must make a *prima facie* case that the measure about which it complains constitutes a breach of WTO obligations. Making that *prima facie* case requires that Canada properly identify the measure about which it complains, and properly explain how that measure breaches the WTO obligations at issue. In this case, Canada has failed to identify how section 129(c)(1) breaches the United States' WTO obligations. As discussed above, Canada has failed to demonstrate that section 129(c)(1) mandates action inconsistent with Agreement obligations. As demonstrated herein, Canada also has failed to demonstrate either that retrospective and prospective systems are sufficiently distinct as to create the starkly different consequences Canada alleges or that there is a textual basis in the WTO Agreement for these distinct consequences.

26. In response to Question 2 from the Panel, Canada set forth its position that date of entry should be the basis for implementation in prospective systems. Therein, Canada claimed that after implementation:

> the Member [with a prospective system] is not required to apply a WTO-consistent determination to the calculation of any refunds due. Under this scenario, a Member with a prospective duty assessment system has assessed and collected the duty before the expiration of the reasonable period of time. The subsequent revocation or amendment of the order

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[20] *See, e.g.,* United States' first written submission, paras. 40-48; United States' Oral Statement at the first Panel meeting, paras. 3-8.

[21] Canada's Oral Statement at the first Panel meeting, para. 38.

[22] *See* Canada's Responses to Questions, paras. 38-39.

[23] *Id.*, paras. 39-40.

> pursuant to which that duty was collected after the expiry of the reasonable period of time has no effect on the assessment and collection of that duty.[24]

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," and are, thereby, different from retrospective systems, 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,[25] that the duty is subject to redetermination based on a request from the importer within 90 days of entry,[26] and that 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.[27]

27. 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.

28. 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.

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[24]Canada's Responses to Questions, para. 5.

[25] Canadian Customs and Revenue Agency, *Memorandum on Regulation D14-1-7, Assessment of Anti-Dumping and Countervailing Duties Under the Special Import Measures Act* (May 15, 2000) para. 4 (Exhibit US-1); *see also, Paper by Canada*, G/ADP/AHG/W/30, 15 October 1997, at Topic 10, footnote **** (Exhibit US-14)(wherein Canada indicated that pursuant to its prospective system, assessment of antidumping duties may occur up to 30 days after entry and that this assessment is "subject to re-determination or appeal.").

[26]Canadian Customs and Revenue Agency, *Memorandum on Regulation D14-1-3, Procedures for Making a Request for a Re-determination (An Appeal) of Goods Under the Special Import Measures Act* (December 15, 2000) para. 7 (Exhibit US-15).

[27]Canadian Customs and Revenue Agency, *Memorandum on Regulation D14-1-6, Liability and Payment of Provisional Duty, Anti-Dumping Duty, and Countervailing Duty Under the Special Import Measures Act* (May 16, 2000) para. 22 (Exhibit US-2); Canadian Customs and Revenue Agency, *Memorandum on Regulation D14-1-7, Assessment of Anti-Dumping and Countervailing Duties Under the Special Import Measures Act* (May 15, 2000) para. 5 (Exhibit US-1).

29. The inconsistency in Canada's claims is further evidenced in Canada's position with respect to judicial review. In response to question 63 from the Panel, Canada stated:

> The date of the definitive duty assessment is the date the Department of Commerce, **following judicial review**, makes its final determination consistent with the decision of the reviewing court. [...] Assuming liquidation is enjoined pending the results of judicial review, the Department of Commerce determination does not take effect unless and until affirmed by the court. In the event the court disagrees with the Department of Commerce determination under review the court will remand the issue to the Department of Commerce to make its definitive determination not inconsistent with the court's decision.[28]

Canada's statement appears to imply that for Members with retrospective systems, an administrative determination subject to judicial review is not final until the completion of that judicial review. Canada suggested as much at the first Panel meeting, when its representative appeared to claim that an administrative determination made under a retrospective system would need to comply with adverse DSB recommendations and rulings if judicial review of that determination is not completed until after the implementation date. But Canada's determinations under its prospective system are also 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 can be read to create such disparate results between Members with retrospective duty assessment systems and Members with prospective duty assessment systems.

30. Canada attempts to build its legal arguments around the concept of "finality;"[29] however, Canada employs inconsistent definitions of finality in order to create artificial distinctions between retrospective and prospective systems. The reality is that under either system, merchandise enters the customs territory of the Member and the importer transfers a sum of money to the Member because of the antidumping or countervailing measure in place. That sum might be called a definitive duty or it might be called a cash deposit. In either case, it may or may not be the final word on the amount to be paid because of the dumping or subsidization. In either case, a review may be requested and the importer may get money back. In either case, that review may be subjected to judicial review.

31. 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

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[28]Canada's Responses to Questions, para. 83 (emphasis added).

[29]*See* Canada's Responses to Questions, paras. 38-39 (seeking to introduce the concept of "finality" in response to the Panel's hypothetical facts in Question 17 and thereby basing whether a Member must treat an entry consistent with DSB recommendations and rulings on whether a domestic court, applying domestic legal principles, finds the initial action consistent with domestic law).

arises at the border, at the time of entry. Canada argues that a Member's WTO obligations are driven not by the text of the Agreements, but by the manner in which a Member establishes its domestic law, and that a Member can change its WTO obligations by arbitrarily designating an action as "final." Canada's claims seek to elevate the words used in domestic legislation over the substance of the obligations undertaken by Members, despite the fact that Canada has previously recognized that the AD Agreement, at least, does not provide detailed rules regarding how retrospective and prospective duty assessment systems are to be applied.[30] 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. By contrast, recognizing the date of entry as the controlling date for implementation avoids creating these differences that are not contemplated 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

32. The United States has argued throughout this case that the DSU provides for prospective remedies in dispute settlement cases, and that there is no basis in the text of the DSU for requiring WTO Members to provide retroactive relief when their measures are found to be inconsistent with WTO rules.[31] Canada has claimed to support this concept.[32] Its answers to the Panel's questions, however, 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.

33. Canada clearly establishes this point in response to question 32 from the Panel. The question asked whether Canada was arguing that the United States was obliged to refund cash deposits collected on what Canada terms "prior unliquidated entries." Canada replied that the United States would in fact be required to return such cash deposits.[33] 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.

34. The United States appreciates Canada's candor, since it crystallizes for the Panel what this case is actually about. The United States fails, however, to see the legal basis for Canada's assertion. 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

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[30] *Paper by Canada*, G/ADP/AHG/W/30, 15 October 1997, at Topic 10, Part I (Prospective and Retrospective Duty Assessment)(Exhibit US-14).

[31] *See, e.g.,* United States' first written submission, para. 2.

[32] *See, e.g.*, Canada's Oral Statement at First Panel Meeting, paras. 32-33.

[33] *See* Canada's Responses to Questions, para. 67.

the implementation date in accordance with adverse DSB recommendations and rulings, even if those decisions relate to pre-implementation entries. And it 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.

35. 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.

36. 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 breach. Canada has failed even to attempt to explain how its asserted 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.

37. Finally, the United States notes one additional point on the subject of retroactive remedies. 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. As the United States noted at the first Panel meeting, however, 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,[34] 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.

V. Conclusion

38. For the foregoing reasons, and for the reasons set out in previous submissions, the United States respectfully requests the Panel to find that Canada has failed to establish that section 129(c)(1) breaches any of the provisions that Canada cited in its request for a panel. Canada's arguments to the contrary are without a legal basis and the Panel should reject them.

[34] *See* Canada's Responses to Panel Questions, para. 80.

TABLE OF EXHIBITS

U.S. Exhibit	Description
11	*Restatement (Third) of the Foreign Relations Law of the United States*, §114 (1986)
12	*United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea, Status Report by the United States*, WT/DS99/6, 17 January 2000
13	*United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea, Agreement Under Article 21.3(b) of the DSU*, WT/DS179/5, 1 May 2001
14	*Paper by Canada*, G/ADP/AHG/W/30, 15 October 1997
15	Canadian Customs and Revenue Agency, *Memorandum on Regulation D14-1-3, Procedures for Making a Request for a Re-determination (An Appeal) of Goods Under the Special Import Measures Act* (December 15, 2000)