Statements by the United States at the Meeting of the WTO Dispute Settlement Body
July 23, 2012

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

   A. UNITED STATES - SECTION 211 OMNIBUS APPROPRIATIONS ACT OF 1998: STATUS REPORT BY THE UNITED STATES (WT/DS176/11/ADD.116)

- The United States provided a status report in this dispute on July 12, 2012, in accordance with Article 21.6 of the DSU.

- Legislative proposals have been introduced in the current 112th Congress to implement the recommendations and rulings of the DSB.

- The U.S. Administration will continue to work on solutions to implement the DSB's recommendations and rulings.

[Second intervention]

- The United States would like to respond briefly to some of the comments made in the preceding interventions.

- In response to the comments about "systemic" concerns about the dispute settlement system, as we have noted on previous occasions, the facts simply do not support Members' assertions or justify such systemic concerns. The record is clear: the United States has come into compliance, fully and promptly, in the vast majority of its disputes.

- As for the remaining few instances where our efforts to do so have not yet been entirely successful, the United States has been working actively towards compliance, such as in this dispute.

- We would note that several Members speaking under this item have brought disputes against the United States even over the last year, which reflects their confidence that the United States would comply with any resulting DSB recommendations and rulings.

- Finally, we would like to recall that Section 211 addresses the uncompensated expropriation of assets or businesses. As explained previously, the DSB held that when a WTO Member chooses not to recognize intellectual property rights in its own territory relating to a confiscation of rights in another territory, its measures must comport with the national treatment and most-favored nation (MFN) obligations of the TRIPS Agreement. We continue to make efforts to address these inconsistencies.

- We have not been made aware of another situation in which intellectual property rights have been expropriated or confiscated in another Member's territory without compensation, but if Members are aware of such a situation, we would appreciate receiving that information, which could be quite useful for our discussions.

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B. UNITED STATES - ANTI-DUMPING MEASURES ON CERTAIN HOT-ROLLED STEEL PRODUCTS FROM JAPAN: STATUS REPORT BY THE UNITED STATES (WT/DS184/15/ADD.116)

- The United States provided a status report in this dispute on July 12, 2012, in accordance with Article 21.6 of the DSU.

- As of November 2002, the U.S. authorities had addressed the DSB's recommendations and rulings with respect to the calculation of antidumping margins in the hot-rolled steel antidumping duty investigation at issue in this dispute.

- With respect to the recommendations and rulings of the DSB that were not already addressed by the U.S. authorities, the U.S. Administration will work with the U.S. Congress with respect to appropriate statutory measures that would resolve this matter.

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C. UNITED STATES - SECTION 110(5) OF THE US COPYRIGHT ACT: STATUS REPORT BY THE UNITED STATES (WT/DS160/24/ADD.91)

- The United States provided a status report in this dispute on July 12, 2012, in accordance with Article 21.6 of the DSU.

- The U.S. Administration will continue to confer with the European Union, and to work closely with the U.S. Congress, in order to reach a mutually satisfactory resolution of this matter.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

D. EUROPEAN COMMUNITIES - MEASURES AFFECTING THE APPROVAL AND MARKETING OF BIOTECH PRODUCTS: STATUS REPORT BY THE EUROPEAN UNION (WT/DS291/37/ADD.54)

- The United States thanks the EU for its status report and for the information in its statement today.

- As explained at past meetings of the DSB, the United States remains greatly concerned about the effects of EU delays on U.S. exports of agricultural commodities and food products.

- At the end of June 2012, the EU did approve a new variety of biotech soybean. That approval is welcome, but we note that this approval had been delayed due to the failure of the EU's Standing Committee on the Food Chain and Animal Health to act following the issuance of a positive risk assessment issued by the EU's own scientific authority, the European Food Safety Authority.

- These delays are the rule, not the exception. In fact, not once in the last ten years has the EU's regulatory committee approved a biotech product. Instead, products have only been approved through the invocation of additional steps in the EU process.

- This month, the European Food Safety Authority issued a favorable opinion on an insect resistant variety of maize. In accordance with that opinion, the United States hopes that the EU will be able to approve this application without further delays.

- The United States would further note that drought conditions in the United States and other growing areas are affecting worldwide supplies of maize and other feed products. As a result, it should be particularly important to the EU's own interests that the approval of this variety of maize not be subject to delay.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

E. UNITED STATES - ANTI-DUMPING ADMINISTRATIVE REVIEWS AND OTHER MEASURES RELATED TO IMPORTS OF CERTAIN ORANGE JUICE FROM BRAZIL: STATUS REPORT BY THE UNITED STATES (WT/DS382/11/ADD.7)

- The United States provided a status report in this dispute on July 12, 2012.

- Pursuant to the sequencing agreement between Brazil and the United States,[1] the United States is ready to engage with Brazil should it have any further questions regarding this matter.

[1] WT/DS382/11.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

F. UNITED STATES - DEFINITIVE ANTI-DUMPING AND COUNTERVAILING DUTIES ON CERTAIN PRODUCTS FROM CHINA: STATUS REPORT BY THE UNITED STATES (WT/DS379/12/ADD.6)

- The United States provided a status report in this dispute on July 12, 2012, in accordance with Article 21.6 of the DSU.

- As noted at prior meetings of the DSB, in April and May of this year, the U.S. Department of Commerce issued preliminary determinations with respect to issues in this dispute

- The Department of Commerce has provided an opportunity for interested parties to provide comments on those preliminary determinations, and to provide rebuttal comments on any comments submitted by other interested parties.

- The Department is taking these comments into account as it works on preparing the final determinations.

[Second intervention]

- We are aware that the reasonable period of time to which China and the United States agreed has expired. We have discussed this matter with China bilaterally. As a result of these discussions, the United States and China have reached an agreement on procedures under Articles 21 and 22 of the Dispute Settlement Understanding.

- We are working to bring the relevant measures into conformity with the recommendations and rulings of the DSB as quickly as possible. However, we assume that China appreciated the opportunity to provide full comments on the preliminary determinations and the opportunity to fully defend its interests in the Section 129 proceeding.

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H. UNITED STATES - ANTI-DUMPING MEASURES ON CERTAIN SHRIMP FROM VIET NAM (WT/DS404/11/ADD.2)

- The United States provided a status report in this dispute on July 12, 2012, in accordance with Article 21.6 of the DSU.

- In October 2011, the United States and Vietnam jointly notified the DSB of their agreement that the reasonable period of time for the United States to implement the recommendations and rulings of the DSB would end on July 2, 2012.[2]

- In February 2012, the U.S. Department of Commerce published a modification to its procedures in order to implement DSB recommendations and rulings regarding the use of "zeroing" in antidumping reviews. This modification addresses certain findings in this dispute.

- On June 28, 2012, the United States Trade Representative requested pursuant to section 129 of the Uruguay Round Agreements Act that the Department of Commerce take action necessary to implement the DSB recommendations and rulings in this dispute.

- The United States will continue to consult with interested parties as it works to address the recommendations and rulings of the DSB.

[2] WT/DS404/10.

2. UNITED STATES - CONTINUED DUMPING AND SUBSIDY OFFSET ACT OF 2000: IMPLEMENTATION OF THE RECOMMENDATIONS ADOPTED BY THE DSB

A. STATEMENTS BY THE EUROPEAN UNION AND JAPAN

- As the United States has already explained at some previous DSB meetings, the President signed the Deficit Reduction Act into law on February 8, 2006. That Act includes a provision repealing the Continued Dumping and Subsidy Offset Act of 2000. Thus, the United States has taken all actions necessary to implement the DSB's recommendations and rulings in these disputes.

- We recall, furthermore, that Members, including the EU and Japan, have acknowledged during previous DSB meetings that the 2006 Deficit Reduction Act does not permit the distribution of duties collected on goods entered after October 1, 2007.

- We therefore do not understand the purpose for which the EU and Japan have inscribed this item today.

- With respect to comments regarding further status reports in this matter, the United States fails to see what purpose would be served by further submission of status reports repeating, again, that the United States has taken all actions necessary to implement the DSB's recommendations and rulings in these disputes.

3. CHINA - MEASURES RELATED TO THE EXPORTATION OF RARE EARTHS, TUNGSTEN AND MOLYBDENUM

A. REQUEST FOR THE ESTABLISHMENT OF A PANEL BY THE UNITED STATES (WT/DS431/6)

B. REQUEST FOR THE ESTABLISHMENT OF A PANEL BY THE EUROPEAN UNION (WT/DS432/6)

C. REQUEST FOR THE ESTABLISHMENT OF A PANEL BY JAPAN (WT/DS433/6)

- As explained at the July 10 DSB meeting, the United States is concerned with Chinese export restraints on certain raw materials – i.e., rare earths, tungsten and molybdenum – that are critical to manufacturing industries in the United States and in other Members.

- The export restraints at issue include export quotas, export duties, various restrictions on the right to export, as well as administrative requirements that limit exports of these materials from China by increasing the burdens and costs for exporting.

- As the United States explained at the July 10 meeting, China's export restraints are similar to the policies that the United States, the EU, and Mexico successfully challenged in the *China – Raw Materials* dispute as inconsistent with China's obligation under the GATT 1994 and China's Protocol of Accession.

- Therefore, the United States requests that the DSB establish a panel to examine the matter set out in the U.S. panel request with standard terms of reference. As the panel requests of our co-complainants, the EU and Japan, relate to the same matter, the United States requests pursuant to DSU Article 9.1 that a single panel be established to examine these complaints.

4. UNITED STATES - COUNTERVAILING MEASURES ON CERTAIN HOT-ROLLED CARBON STEEL FLAT PRODUCTS FROM INDIA

A. REQUEST FOR THE ESTABLISHMENT OF A PANEL BY INDIA (WT/DS436/3)

- The United States is disappointed that India has requested the establishment of a panel on this matter.

- Members have the right to levy a countervailing duty in order to offset subsidies bestowed by another Member on the manufacture, production or export of goods in or from that other Member's jurisdiction.

- India, at both the national and state levels, provides subsidies that benefit domestic manufacturers of certain hot-rolled carbon steel flat products and that cause material injury to the industry of other Members. In this regard, we note that the United States is not the only WTO Member to have found that India's domestic steel industry receives subsidies from national and state governmental entities and that these subsidies cause injury.

- With respect to the countervailing duty order at issue in this dispute, the United States conducted the initial investigation and subsequent reviews transparently and with all necessary procedural safeguards. And we consider that U.S. procedures compare very favorably to those of certain other Members subject to multiple WTO challenges to their investigations recently. Nevertheless, many of the very issues that India now raises in its panel request arise from the failure of the Government of India and the relevant Indian companies to avail themselves of the opportunity to fully participate in those proceedings.

- We also have a number of concerns with the way in which India has framed its panel request. For example, the request appears to include provisions of U.S. law about which consultations were neither requested nor held.

- For all of these reasons, the United States is not in a position to agree to the establishment of a panel today.

6. UNITED STATES - ANTI-DUMPING MEASURES ON CERTAIN SHRIMP AND DIAMOND SAWBLADES FROM CHINA

A. REPORT OF THE PANEL (WT/DS422/R AND WT/DS422/R/ADD.1)

- Mr. Chairman, we would like to also thank the members of the Panel and the Secretariat for their work on this dispute.

- With regard to the specific methodology challenged by China in this dispute – i.e., zeroing in the context of average-to-average comparisons in anti-dumping duty investigations – the U.S. Department of Commerce announced years ago that it would discontinue zeroing in this context as a result of earlier DSB recommendations and rulings.

- Accordingly, in the present dispute, the United States and China reached a procedural agreement that provides an efficient means of addressing China's claims with reduced burdens on the resources of the parties and the dispute settlement system.

- As agreed with China and consistent with the procedural agreement, the United States would like to state that it intends to implement the recommendations and rulings of the DSB in this dispute in a manner that respects U.S. WTO obligations. The United States will need a reasonable period of time in which to do so, and China and the United States have agreed that the reasonable period of time in this dispute will be 8 months.

7. UNITED STATES - CERTAIN COUNTRY OF ORIGIN LABELLING (COOL) REQUIREMENTS

A. REPORT OF THE APPELLATE BODY (WT/DS384/AB/R) AND REPORT OF THE PANEL (WT/DS384/R)

B. REPORT OF THE APPELLATE BODY (WT/DS386/AB/R) AND REPORT OF THE PANEL (WT/DS386/R)

- The United States would like to thank the members of the Panel, the Appellate Body, and the Secretariat assisting them for their work on this dispute.

- This dispute involved U.S. country of origin labeling (COOL) requirements for beef and pork products sold at the retail level. These requirements apply equally to products, whether imported or domestic. As is the case with country of origin labeling provisions in many Members, they allow consumers to make more informed purchasing decisions about the food they buy.

- The United States is pleased that the Panel and the Appellate Body both agreed that the objective of the COOL measure is to provide consumers information on origin and that they further confirmed that the provision of consumer information on the origin of food products is a legitimate objective.

- The United States is also pleased that the Appellate Body reversed the Panel's finding that the COOL measure is "more trade restrictive than necessary" under Article 2.2 of the TBT Agreement. In so doing, the Appellate Body appropriately concluded that whether a measure is "more trade restrictive than necessary" in this case requires a comparison of the measure at issue with another measure that a complaining party asserts would fulfill the Member's objective at the level the Member considers appropriate, but in a less trade restrictive manner.

- With respect to the appeal under Article 2.1 of the TBT Agreement, concerning whether the COOL measure treats imports less favorably than domestic products, the Panel and Appellate Body's findings and approach raise a number of significant concerns.

- The Panel and Appellate Body found that the COOL measure modified the conditions of competition to the detriment of imported products without ever identifying any <u>different</u> treatment under the COOL measure of imported livestock from domestic livestock in <u>either</u> a *de jure* or *de facto* sense. Instead, the Panel and Appellate Body, unlike in any prior GATT or WTO dispute relating to national treatment, took an approach where a difference in <u>market impact</u> was sufficient to establish a breach of national treatment obligations.[3] In other words, the <u>identical</u> treatment of like imported and domestic

[3] *See* Panel Report, para. 7.372.

products under a measure can nonetheless be found to discriminate against imported products if there is a different market impact.

The Panel and Appellate Body did not in their reports identify the textual or other basis for this novel approach, its implications, or how this approach would account for the fact that there are often, if not always, will be different market impacts on products from different entities from any measure. Further, and as third parties pointed out during the appellate proceedings, it is inappropriate to fashion a national treatment analysis that determines whether a measure is WTO inconsistent solely based on the market in which it was enacted, for example, whether the Member taking the measures has a big or small market or is a big or small producer.

- The Appellate Body also did not acknowledge that this was a novel and unprecedented approach. The previous reports cited by the Appellate Body to support its approach[4] – such as *Korea - Beef* and *China - Auto Parts* – all involve measures that explicitly treat imported and domestic products differently on their face. In these prior reports, only after this different treatment was established did the Appellate Body turn to the question of market impact.[5] By contrast, the Appellate Body in this dispute jumped immediately to market impact without finding any different treatment.

- This approach would shift the analysis from whether a measure differentiates between products in a manner adverse to imports to whether a measure that does not differentiate between products has the same market impact on imports compared to domestic products. The national treatment inquiry then becomes a trade effects test that could open to challenge any number of origin-neutral measures. As a result, legislators and regulators would not only need to consider whether a measure treats imports differently and less favorably, but they may also need to conduct a market impact analysis of the measures on imports. That would be a new, significant obligation nowhere agreed to by WTO Members.

- The Appellate Body added an additional step to the Panel's analysis and ultimately concluded that the U.S. measure was inconsistent with Article 2.1 of the TBT Agreement because the amount of information the labels convey is out of proportion to the administrative requirements imposed on upstream producers. It appears to the United States that this issue is far attenuated from a national treatment analysis under Article 2.1.

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[4] Appellate Body Report, paras. 286-294.

[5] *Korea – Beef (AB)*, paras. 130-151; *US – FSC (Article 21.5 – EC) (AB)*, para. 217; *China – Auto Parts (AB)*, paras. 192-197.

- In particular, whether or not the COOL measure's administrative requirements are commensurate with the level of information ultimately provided to consumers, it is unclear what this has to do with the question the panel and Appellate Body were called to examine – whether the measure reflects discrimination.

- Rather, we are greatly concerned that the Appellate Body's approach to Article 2.1 asks adjudicators to review the calibration of a measure to risk, cost, and benefit, even if in the end the difference in treatment is not related to origin. Article 2.1 does not create the need or the authority to conduct such an analysis. Instead, it could set up panels and the Appellate Body to be the ultimate arbiters of a range of important regulatory questions, a role that Members have not agreed to provide to them under the WTO.

- Further, the United States understands that panels and the Appellate Body are not equipped to conduct such an inquiry and to second-guess the myriad regulatory issues involved in many technical regulations. A far preferable approach to reviewing national treatment claims under Article 2.1 would be a return to determining whether a measure at issue accords less favorable treatment that is related to the origin of the product.

- Finally, in relation to the circulation of these reports beyond the 90-day time limit set out in Article 17.5 of the DSU, the United States would like to recall for Members the communications circulated by Canada, Mexico, and the United States in which they confirmed that they, like the Appellate Body,[6] each consider the Appellate Body Report in their respective dispute to be an Appellate Body Report circulated pursuant to Article 17.5 of the DSU.[7] In those communications, the 3 parties jointly stated as follows:

> "The parties note that the Division hearing this appeal did not consult with them on its need to exceed the 90-day time limit. We consider that, consistent with the practice of Members and the Appellate Body until 2011, the Appellate Body should consult with the parties and obtain their agreement to receive reports that are to be circulated after the deadline provided for in the DSU.

[6]WT/DS384/16 (3 July 2012); WT/DS384/15 (3 July 2012)

[7]Joint Communication from Canada and the United States, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/17 (3 July 2012); Joint Communication from Mexico and the United States, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS386/16 (3 July 2012).

> "We particularly regret the lack of consultation with the Division hearing this appeal given that the parties would have been willing to positively consider a communication from the Division of its need for additional time. While we note our understanding that further delays will not be required in upcoming disputes given the anticipated workload of the Appellate Body in the immediate future, should delays in the circulation of reports beyond the 90-day deadline be again considered necessary, we would expect a return to the Appellate Body's pre-2011 practice."[8]

- Members will recall that at the DSB meeting on July 10 Canada, Mexico, and the United States expressed their concerns relating to the situation in these appeals, including only being informed towards the end of the appeal period that the reports would be delayed beyond 90 days, and put forward some ideas on how Members could begin to address the issues raised. We look forward to continuing our discussions with any interested delegations on how to find solutions to the problems raised by the recent practice in appeals.

- Thank you.

[8]WT/DS384/17; WT/DS386/16 (footnotes omitted).