

**Statements by the United States at the Meeting of the WTO Dispute Settlement Body
Geneva, January 22, 2014**

AGENDA ADOPTION: REQUEST BY THE EUROPEAN UNION TO MAKE A
STATEMENT UNDER “OTHER BUSINESS” IN RELATION TO THE *US – CLOVE
CIGARETTES (INDONESIA)* DISPUTE

- The United States does appreciate the fact that the EU did provide us with some advance notice and perhaps they even provided some other Members notice of their intentions to make a statement under “Other Business” in relation to the *US – Cloves* dispute.
- While we have taken note of the information that EU has provided we nonetheless, must register our concerns with this course of action.
- In particular, it is our view that this request does not comport with the DSB rules of procedure, Rules 2, 3, and 4 in particular. Rules 2, 3, and 4 require that a Member make a request to have an item inscribed on the agenda at least 10 days before the meeting. This 10 day rule ensures that Members have sufficient time to consider the item, confer with capital, and to prepare and receive instructions.
- By not inscribing the item in the regular way, the EU has deprived other Members of the ability to participate in the discussion. Even the parties to the dispute only learned of the EU’s intentions this week.
- I would also point to Rule 25, which states that substantive issues cannot be discussed under “Other Business.” It would appear that a statement by the EU followed by reactions from other parties would be tantamount to substantive discussion by other Members.
- Therefore, before we are able to react in full to this request, we welcome further clarification from the EU as to why it was not possible to inscribe this item on the agenda with respect to the requirement for 10 days notice and why it was not preferable to inscribe the item on the agenda of the next meeting instead.

Second Intervention

- I appreciate the further clarification that we have received from the EU. We are still in a difficult position here because it is hard for us to gauge the nature of what is going to be said under “Other Business” by the EU. Additionally, we understand that other Members may speak, which, in our mind seems to be a debate of issues, which is prohibited under Rule 25.
- We have been quite clear on our systemic viewpoint; however, in the circumstances of the present situation—and without prejudice to how this should operate and the fact that

we should receive 10 days notice so that all Members may be prepared—in these narrow circumstances, we will permit the agenda to be adopted as amended and proposed by the EU.

- We also will be making a statement under “Other Business” in reaction to the EU’s statement but it is unfortunate that other Members may not be able to do so.

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.133)

- The United States provided a status report in this dispute on January 9, 2014, in accordance with Article 21.6 of the DSU.
- At least six bills have been introduced in the current Congress in relation to the DSB's recommendations and rulings in this dispute. These include H.R. 214, H.R. 778, H.R. 872, H.R. 873, H.R. 1917, and S. 647.
- The U.S. Administration will continue to work on solutions to implement the DSB's recommendations and rulings.

Second Intervention

- We heard, in particular, the delegate from Cuba expressing concerns about the U.S. compliance record. I don't have the report that Cuba referenced in front of me, in which Cuba stated that 12 of pending cases of non-compliance involve the United States. But I can say that we have submitted a total of only four status report for the meeting today, and I wonder what the other disputes to which Cuba is referring might be.
- Cuba's statement that the U.S. compliance record is poor, simply is incorrect. If you look at the facts of the disputes you will see this for yourself. You will see that the facts do not support this assertion.
- There are a few instances—the four status reports—in which the U.S. is continuing to work actively toward compliance. But the instances of non-compliance are not representative of the whole. The United States has complied in the vast majority of disputes in which it is a party.
- We've also heard statements today from Cuba and other Members about how the U.S. record of non-compliance undermines the WTO and dispute settlement system. The dispute settlement system is working very well, as evidenced by statements from Members, including those delivered in the context of Bali. Suggesting otherwise is a clear overstatement. It is an inaccurate overstatement to suggest that the U.S. record of non-compliance in a few instances has undermined the entire system.
- The last point I want to make is with respect to comments by Cuba and at least one other delegation, that we've moved references to specific legislation from the status report into

our comments here today. There is no material difference in the manner in which we inform the DSB about this pending legislation. However I would highlight one difference between the information we provided last time and today: the addition of a new bill this month, H.R. 1917.

- Finally, with respect to the notion that we are not providing the actual status of pending bills, the U.S. is highly transparent. You can look online and find where in the process each of these bills are, in what subcommittee, how many co-sponsors each bill has – some of them have 15 or 16 – we have all of this online. I am happy to provide the link to this information in another forum. We are highly transparent and I encourage everyone to look at this information.

Third Intervention

- I just wanted to make clear that this dispute involves the United States and the European Union, and not Cuba. The statement just made, which alleges otherwise, is incorrect.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

B. UNITED STATES - ANTI-DUMPING MEASURES ON CERTAIN HOT-ROLLED STEEL PRODUCTS FROM JAPAN: STATUS REPORT BY THE UNITED STATES (WT/DS184/15/ADD.133)

- The United States provided a status report in this dispute on January 9, 2014, in accordance with Article 21.6 of the DSU.
- The United States has 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 have yet to be addressed, the U.S. Administration will work with the U.S. Congress with respect to the appropriate statutory measures that would resolve this matter.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

C. UNITED STATES - SECTION 110(5) OF THE US COPYRIGHT ACT:
STATUS REPORT BY THE UNITED STATES (WT/DS160/24/ADD.108)

- The United States provided a status report in this dispute on January 9, 2014, 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.71)

- The United States thanks the EU for its status report and its statement today, in which it did provide additional information. We hope that the EU will continue to make progress on this item.
- As the United States recalled most recently at the October 2013 DSB meeting, the EU has yet to address the product-specific DSB recommendation and ruling with respect to a variety of biotech corn that is known as BT-1507. The application for approval of this product has been pending all the way back from 2001. In 2006, the DSB found that the EU had breached its WTO obligations with respect to this product by not undertaking and not completing approval procedures without undue delay.¹
- The United States would also recal that an EU judicial body has issued a decision finding that EU delays with respect to the BT-1507 application breach the EU's own laws as well as the WTO.²
- The United States also takes note that the EU's own scientific authority has issued positive opinions on this application for approval at least six times between 2005 and 2012.
- In light of these facts we remain hopeful that the EU will finally take action with respect to the BT-1507 application in accordance with the findings of the EU's scientific authority.
- Indeed, the United States understands that the EU Commission has prepared a draft EU Council Decision authorizing the cultivation of BT-1507, and the EU Council may vote on the matter in the upcoming weeks.
- We would certainly welcome an approval of this longstanding application.

¹ *European Communities — Measures Affecting the Approval and Marketing of Biotech Products* (WT/DS291/R), adopted Nov. 21, 2006, at para. 8.18(a)(xi).

² *Pioneer Hi-Bred International, Inc. v. European Commission*, Case T-164/10, Judgment of the General Court (Seventh Chamber) (26 September 2013).

- At the same time, this application exemplifies the problems with EU measures affecting the approval of biotech products. If the EU Council does take a decision on BT-1507, this vote will take place five years after the Commission previously submitted a proposal for a Council decision. There are many other pending applications that are facing similar delays.
- We urge the EU, as we have in the past, to take steps to address these matters.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

F. UNITED STATES - ANTI-DUMPING MEASURES ON CERTAIN SHRIMP FROM VIET NAM (WT/DS404/11/ADD.19)

- The United States provided a status report in this dispute on January 9, 2014, in accordance with Article 21.6 of the DSU.
- As we have noted at past DSB meetings, the U.S. Department of Commerce published a modification to its procedures in February 2012 in order to implement the DSB's recommendations and rulings regarding the use of "zeroing" in antidumping reviews. This modification addresses certain findings 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. 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 we have noted at previous DSB meetings, the President signed the Deficit Reduction Act into law in 2006. This includes a provision repealing the Continued Dumping and Subsidy Offset Act of 2000. Accordingly, we have taken all actions necessary to implement the DSB's recommendations and rulings in these disputes.
- We further note that some Members who spoke today, including the EU and Japan, have said that the 2006 Deficit Reduction Act does not permit the distribution of duties collected on goods entered after October 1, 2007, which is more than six years ago.
- Accordingly, we do not understand the purpose for which this issue has come up again today.
- With respect to comments regarding further status reports in this matter, we fail to see what purpose would be served by further submission of status reports.

3. CHINA - CERTAIN MEASURES AFFECTING ELECTRONIC PAYMENT

SERVICES

A. STATEMENT BY THE UNITED STATES

- The United States continues to have serious concerns that China has not implemented the DSB's recommendations and rulings in this dispute.
- China continues to prevent foreign suppliers of electronic payment services from doing business in China by imposing a licensing requirement that does not set out any criteria or procedures under which a foreign supplier could be licensed.
- As a result, China Union Pay – which is China's own domestic champion – is still the only authorized supplier in all of China.
- This is not consistent with the DSB findings that China has both market access and national treatment commitments concerning Mode 3 for electronic payment services.³
- China appears to recognize the need to take regulatory action to comply with the recommendations and ruling in this dispute. In particular, China recently stated publicly that it is working on the necessary regulation, which presumably would set out the missing licensing criteria and procedures that I just referred to.
- The United States notes, however, the reasonable period of time for compliance expired almost six months ago. Accordingly, the United States calls upon China to meet its WTO obligations promptly and to permit foreign suppliers of electronic payment services to do business on fair and open terms on a Mode 3 basis.

Second Intervention

- We thank China for responding to our remarks and for providing some information on the regulatory process going on in China. We appreciate this information and will continue to dialogue on a bilateral basis.
- We do, however, have to disagree quite strongly with China's statement that it has fully complied. The DSB adopted findings that could not be more clear. I would like to quote from the Panel report. If you look at paragraph 7.575, it says that "China has made a commitment on market access concerning mode 3." If you then look at paragraph 7.678, it states that "China has made a commitment on national treatment concerning mode 3."

³ *China — Certain Measures Affecting Electronic Payment Services*, WT/DS413/R (adopted Aug. 31, 2012), paras. 7.575, 7.678.

- China currently does not allow foreign EPS suppliers access to the market under Mode 3 due to a licensing restriction that sets forth no criteria and no procedure under which to obtain a license. As a result of this, China Union Pay, China's domestic champion, the only domestic supplier, continues to operate while foreign EPS suppliers cannot.
- We cannot agree with China that a WTO obligation for market access and national treatment means that China can set forth a restriction under which no foreign supplier of EPS can do business in China, while it's own preferred domestic supplier can do so. Therefore we urge China to come into compliance by fully implementing its WTO commitments.

4. UNITED STATES - ANTI-DUMPING AND COUNTERVAILING MEASURES ON LARGE RESIDENTIAL WASHERS FROM KOREA

A. REQUEST FOR THE ESTABLISHMENT OF A PANEL BY KOREA
(WT/DS464/4)

- Accordingly, the United States is disappointed that Korea has chosen for a second time to request the establishment of a panel with regard to this matter.
- As we have explained both to Korea and to the DSB, the measures identified in Korea's request are fully consistent with U.S. obligations under the WTO Agreement. Further, Korea's request purports to address matters – such as possible future determinations under U.S. law – that are not measures and not subject to WTO dispute settlement.
- The United States is prepared to engage in these proceedings, and to explain to the Panel that Korea has no legal basis for its claims.

6. UNITED STATES - MEASURES CONCERNING THE IMPORTATION,
MARKETING AND SALE OF TUNA AND TUNA PRODUCTS

A. RECOURSE TO ARTICLE 21.5 OF THE DSU BY MEXICO: REQUEST FOR
THE ESTABLISHMENT OF A PANEL (WT/DS381/20)

- As the United States has discussed at length with Mexico, and as we have previously informed the DSB, the United States published a final rule on July 9, 2013, that brings the United States into compliance with the DSB recommendations and rulings.⁴
- More specifically, the final rule enhances the documentary requirements for dolphin-safe labeling by extending the requirement for certification that no dolphins were killed or seriously injured in the harvesting of the tuna in question to tuna caught in oceans other than the eastern tropical Pacific Ocean (ETP).
- These changes ensure that consumers are not misled or deceived about whether the tuna in a product labeled “dolphin safe” was caught in a manner that caused harm to dolphins.
- The United States is thus disappointed that Mexico has made a second request for the establishment of a panel in this matter. The United States is prepared to defend the amended dolphin-safe labeling requirements and looks forward to explaining to the panel that these regulations are fully consistent with our WTO obligations.

8. OTHER BUSINESS

⁴ *Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products: Final Rule*, 78 Fed. Reg. 40997 (July 9, 2013) (to be codified at 50 CFR pt. 216).

A. UNITED STATES - MEASURES AFFECTING THE PRODUCTION AND SALE OF CLOVE CIGARETTES: STATEMENT BY THE EUROPEAN UNION

- I fear that precisely what we discussed when the EU requested to add this item to the agenda has occurred and that we are having a substantive discussion under other business in violation of Rule 25. In the future, to avoid this, the EU should have requested that this item be put on the agenda 10 days in advance.
- We note that a lot of Members have read prepared statements, which they were able to prepare in advance. There are other Members, however, who were not given adequate notice or time to prepare a statement. They also may have very strong views on these important systemic issues but may not have been comfortable stating these views off the cuff. In the interests of fairness and transparency, these Members also should have been given the same opportunity to prepare.
- Putting all this aside, I feel compelled to respond to some of the points raised by Members for both systemic reasons and in the context of this dispute, as they are important to the U.S.
- As a primary matter, I want to address the sequencing issues. This is a situation where the U.S. originally received a proposal from Indonesia to enter into a sequencing agreement and then Indonesia said that it wasn't interested in sequencing and backed out. Entering into a sequencing agreement would have been the preferred situation for us, especially in a situation where it was clear that the Members disagreed with whether the United States brought itself into conformity with the DSB's recommendations and rulings. It is unfortunate that we are where we are but we do have to respond to what was said by other Members. Even though we do disagree with what Indonesia did, we do believe that it is permissible to do so under the DSU, contrary to what some other Members have said today.
- We also disagree with the notion that once a proceeding is brought under Article 22.6 you cannot look at issues of compliance. The *EC – Bananas III* report is instructive on this point. I encourage delegates to look at paragraph 4.8, in which the report states that in order to make a determination, is important to look at the nature and extent of compliance before considering the level of nullification and impairment. There is no reason why we cannot structure an Article 22.6 proceeding in this way.
- On the question of third party participation, we are glad that the EU recognized that the Arbitrator's decision is confidential. I think that it is unfortunate that we are having a conversation about the substance on that. In trying to respect the confidentiality of that ruling, I will note that we believe that comments from the EU regarding third party rights are inappropriate. There is no textual basis for this.

- On the substance of the dispute and as to what Indonesia said in its statement—that the U.S. conceded that it has not taken measures to comply—nothing could be further from the truth. We encourage all Members to look at our statement from August where we state that we have come into compliance. It is quite clear from the record.

Second Intervention

- In response to the EU, if a Member puts an item on the agenda any interested Member will have 10 days to get in touch with that Member. They will have 10 days to learn what the intervention will be about and then to get in touch with capital and draft instructions if it is an issue that they care about. The problem here is that there are many Members today who did not have the time or opportunity to do so and we believe that such an opportunity should be afforded to all.

8. OTHER BUSINESS

A. PROCESS FOR APPOINTING APPELLATE BODY MEMBER

- We share the views expressed by others today that it is regrettable that this process has not resulted in a selection to date but support the Selection Committee in its ongoing difficult task ahead. What was suggested in the fax to reopen the nomination period has been done before and it appears to us that this may be a reasonable way forward.
- That said, the delegate from India raised an important question. Japan also raised an important comment on language and Australia raised important comments. This shows that we need time to consider and look at the draft decision closely. We understand that the Chair will provide us that opportunity and we thank the Chair for that.