

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

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.139)

- The United States provided a status report in this dispute on July 10, 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 recommendations and rulings in this dispute, some of which would repeal Section 211 while others would modify it. At last month's meeting of the DSB, the United States described the status of each of these bills.
- The U.S. Administration will continue to work on solutions to implement the DSB's recommendations and rulings.

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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.139)

- The United States provided a status report in this dispute on July 10, 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 anti-dumping margins in the hot-rolled steel anti-dumping duty investigation at issue.
- 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 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.114)

- The United States provided a status report in this dispute on July 10, 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.

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D. EUROPEAN COMMUNITIES - MEASURES AFFECTING THE APPROVAL AND MARKETING OF BIOTECH PRODUCTS: STATUS REPORT BY THE EUROPEAN UNION (WT/DS291/37/ADD.77)

- The United States thanks the EU for its status report and for its statement today.
- As the United States has explained at past meetings of the DSB, the United States has substantial concerns regarding EU measures affecting the approval of biotech products.
- At the June meeting, we noted that the EU has not approved a single new biotech product in 2014. At the moment, at least nine products are awaiting final action by the EU Commission. Each of these products has received a positive safety assessment by the EU's own safety authority.
- Following the positive safety assessments, each of these nine products have been considered by the relevant EU regulatory committee, and then subsequently by the EU appeals committee. However, due to opposition from certain EU member States, these EU committees have failed to make decisions. In fact we heard the EU in their statement today describe a couple of instances where their committees failed to make decisions.
- Under the EU's own legislation, the European Commission is to act without delay to approve biotech products in the event that votes in the regulatory committee and the appeals committee do not result in a decision. But not once this year has the EU undertaken its responsibility and approved a pending application.
- These failures by the EU regulatory committee, by the EU appeals committee, and by the EU Commission result in delays for all pending biotech applications.
- The EU measures, including such delays in the processing of specific applications and product bans adopted by EU member States, are causing serious disruption in trade in agricultural products. Indeed, EU feed manufacturers have expressed concern about the impact of these delays on the availability of protein feeds for European livestock industries.
- We urge the EU to take steps to address these matters.

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E. UNITED STATES - ANTI-DUMPING MEASURES ON CERTAIN SHRIMP FROM VIET NAM (WT/DS404/11/ADD.25)

- The United States provided a status report in this dispute on July 10, 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 anti-dumping 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.

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F. CHINA – ANTI-DUMPING AND COUNTERVAILING DUTY MEASURES ON BROILER PRODUCTS FROM THE UNITED STATES: STATUS REPORT BY CHINA (WT/DS427/8)

- The United States takes note of China’s statement that it has taken measures to comply with the recommendations and rulings of the DSB.
- The measures that China has taken are re-determinations that maintain anti-dumping duties (ADs) and countervailing duties (CVDs) on broiler products from the United States. The United States is not in a position to accept China’s assertion that these measures result in compliance with the DSB’s recommendations and rulings. Based on our review to date, the United States has serious concerns with China’s re-determinations.
- In particular, the re-determinations appear to have many of the same flaws that the DSB identified in the original AD and CVD determinations. For example, in making the re-determinations, China adopted procedures that do not appear to have provided the respondents with an opportunity to defend their interests. Similarly, the reasoning used in the re-determinations with respect to cost allocations and injury to the domestic industry seems to have many of the same problems as identified by the DSB in the original determinations.
- The United States will continue to review the re-determinations and consider how to best address its concerns.
- Finally, the United States would note that the parties have reached an understanding regarding procedures under Articles 21 and 22 of the DSU in order to facilitate the resolution of this dispute. The understanding has been circulated as WT/DS427/9.

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 noted at previous DSB meetings, the President signed the Deficit Reduction Act into law on February 8, 2006, which includes a provision repealing the Continued Dumping and Subsidy Offset Act of 2000. Accordingly, 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 that are entered after October 1, 2007, which is nearly seven years ago.
- 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, as we have already explained at previous DSB meetings, the United States fails to see what purpose would be served by further submission of status reports which would repeat, again, that the United States has taken all actions necessary to implement the DSB's recommendations and rulings.
- Indeed, as we have expressed at past DSB meetings, there is no obligation under the DSU to provide further status reports once a Member announces that it has implemented those DSB recommendations and rulings. And we have noted in the past that Members speaking under this item have followed the same approach in disputes where they have been the responding party and have not continued to provide status reports where the complaining party has disagreed over compliance. We disagree with the statements we heard today from some of these parties attempting to distinguish the situations under Article 21.6 and 22.8. We do not find their logic persuasive.
- Generally speaking we agree, and that for the same reason the status reports are not required in other disputes, the United States is not required to provide status reports here where the necessary action was taken many years ago.

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 failed to bring its measures into conformity with its WTO obligations.
- The situation has not changed since last month or since the United States first began raising this matter in the DSB.
- China continues to maintain a ban on foreign suppliers of electronic payment services (“EPS”) by imposing a licensing requirement on them while providing no procedures for them to obtain that license.
- As a result, China’s own domestic champion China Union Pay remains the only EPS supplier that can operate in China’s domestic market.
- China’s measures cannot be reconciled with the DSB’s findings that China’s WTO obligations include both market access and national treatment commitments concerning Mode 3 for EPS.¹
- China’s statements in prior DSB meetings that it is working on the necessary regulations to allow for the licensing of foreign EPS suppliers which would be necessary to provide the market access and national treatment set out in its Schedule. The United States continues to engage with China at many levels to seek the timely issuance of these regulations, which have still not been issued nearly one year after the expiry of the RPT in this dispute.
- As such, the United States urges China to move forward with these regulations and to allow the licensing of foreign EPS suppliers in China, consistent with its WTO obligations.

¹ *China – Certain Measures Affecting Electronic Payment Services*, WT/DS413/R (adopted Aug. 31, 2012), paras. 7.575, 7.678.

4. CANADA – CERTAIN MEASURES AFFECTING THE RENEWABLE ENERGY GENERATION SECTOR/CANADA – MEASURES RELATING TO THE FEED-IN TARIFF PROGRAM: IMPLEMENTATION OF THE RECOMMENDATIONS ADOPTED BY THE DSB

A. STATEMENTS BY JAPAN AND THE EUROPEAN UNION

- We appreciate that Japan and the European Union have inscribed this item on today’s agenda to permit Members to become aware of their concerns relating to implementation in this dispute.
- As the United States has stated previously at past DSB meetings and just a few agenda items ago, we agree with Canada on the systemic issue that it is not required to continue providing status reports to the DSB if it has informed the DSB that it has taken the necessary steps to comply. That systemic position, of course, does not apply just to Canada, but also to other Members making the same claim; were it otherwise, Canada’s position could not be described as “systemic.”
- At the same time, while the matter is not subject to another WTO proceeding, the complaining parties are of course free to bring the item to the attention of the DSB.
- Given the concerns that Japan and the EU expressed today, we encourage Canada to engage in a dialogue with them to seek ways to address their concerns.

7. UNITED STATES – COUNTERVAILING AND ANTI-DUMPING MEASURES ON CERTAIN PRODUCTS FROM CHINA

A. REPORT OF THE APPELLATE BODY (WT/DS449/AB/R) AND REPORT OF THE PANEL (WT/DS449/R AND WT/DS449/R/ADD.1)

- The United States would first like to thank the Panel, the Appellate Body, and the Secretariat staff assisting them for their work in this proceeding.
- We recall that there were two main issues in this dispute. First, a challenge to Public Law 112-99, the so-called “GPX legislation”, enacted in 2012; second, a challenge to the alleged failure to affirmatively investigate an overlap of remedies with respect to 25 countervailing duty proceedings.
- On the first issue, China has obtained *no WTO findings* of inconsistency in two WTO reports. On the second, the very legislation challenged by China had already directed the U.S. Department of Commerce to look at the overlapping remedies issue. And so, at the end of what has been an intensive litigation process, the United States is left wondering why China considered it fruitful to bring this dispute in the first place.

2012 U.S. Legislation and GATT 1994 Article X:2

- The 2012 legislation was enacted to confirm that the U.S. countervailing duty law could be applied to countries considered non-market economies for purposes of antidumping duty proceedings. Indeed, the U.S. Department of Commerce had been applying the U.S. countervailing duty law to China since 2006, consistent with China’s Protocol of Accession.
- China challenged that democratically and openly enacted U.S. law as contrary to GATT obligations on transparency and fair enforcement. We invite Members to consider how extraordinary those claims were.
- It is uncontested that the U.S. Department of Commerce applied the U.S. countervailing duty law to Chinese imports following notice and comment to all interested parties, including China; that the Department was never ordered by a U.S. court to change its interpretation and application of the countervailing duty law to China; that the U.S. Congress and President enacted the 2012 legislation before any court decision to the contrary; and that, in fact, no change in the actual tariff treatment of any Chinese import resulted from the enactment of the 2012 legislation.
- Given all of these uncontested facts, it is no surprise that *almost all* of China’s claims in relation to the legislation were rejected by the panel or abandoned by China during the panel

proceeding or on appeal. China abandoned the claim in its panel request under Article X:3(a) of the GATT 1994, which relates to uniform, impartial, and reasonable administration; the Panel rejected, and China did not appeal, a claim under Article X:1 of the GATT 1994, which relates to prompt publication; and the Panel rejected, and China did not appeal, its claim under Article X:3(b), which relates to the establishment of mechanisms to ensure the prompt review and correction of administrative decisions on customs matters.

- The only claim on the 2012 legislation that remained on appeal was under GATT 1994 Article X:2. While the United States recognizes both the Panel’s and the Appellate Body’s efforts analyzing numerous legal and factual issues in relation to this claim, respectfully, the Panel appears to have set out a legal analysis that makes better sense of the text of the GATT 1994 and better reflects the appropriate task for a WTO adjudicative body.
- Fundamentally, the Panel understood Article X:2 as being concerned with enforcement of an unpublished change in a trade regime to the detriment of imports. And when the Panel compared the 2012 legislation at issue with the pre-existing rates, requirements, or restrictions on Chinese imports, it found no “advance in a rate of duty or other charge on imports under an established and uniform practice” and no “new or more burdensome requirement, restriction or prohibition on imports.” That is no surprise since the Panel found that, since 2006, the United States had exercised its WTO right to apply CVDs to China and therefore had an “established and uniform practice” of applying the countervailing duty law to Chinese imports.
- On appeal, the Appellate Body reversed the Panel’s legal interpretation of Article X:2 and its approach to how a Member’s municipal law should be understood for purposes of the comparison under Article X:2.
- A number of aspects of the Appellate Body’s interpretation could be discussed, and indeed we recognize that its examination of some aspects of U.S. law was quite detailed. But today we wish to focus on two issues that we consider would merit further thought in future proceedings.
- First, the Appellate Body faults the Panel for allegedly failing to ascertain “the meaning of the U.S. countervailing duty law prior to Section 1 of PL 112-99 directly through its objective assessment” and as a matter of law.² And the Appellate Body asserts that this assessment, pursuant to its own findings in *US – Carbon Steel*, entails examining “the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized

² Appellate Body Report, paras. 4.100-4.101, 4.104-4.108.

scholars.”³ But as the United States and third participants noted in this appeal, when a WTO adjudicative body examines a Member’s municipal law, the meaning must be that which would be given by the municipal law system using the interpretive tools of *that* system – not the generalized tools described by the Appellate Body without reference to the U.S. legal system itself.

- It is striking that in 61 paragraphs of analysis of the meaning of the 2012 U.S. legislation and the pre-existing countervailing duty law, the Appellate Body does not once refer to U.S. constitutional law principles applicable to statutory interpretation, despite the extensive reference to those principles in the Panel Report. This is a critical omission because, as the Panel had found, under principles of U.S. constitutional law, an agency interpretation of legislation is lawful and governs unless it is overturned in a binding court decision applying the standard of review articulated by the U.S. Supreme Court.⁴
- And, therefore, the Panel had also concluded *objectively* that, under U.S. municipal law, the administering agency’s interpretation and application of the U.S. countervailing duty law *was* valid U.S. law as “nothing in the record indicates, that in relation to any of the court decisions submitted to us by the parties, USDOC received an order from a United States court to either change or discontinue its practice of applying United States CVD law to imports from NME countries, or to give a different interpretation to United States CVD law.”⁵
- Regrettably, the Appellate Body’s interpretative approach under Article X:2 ignored a key facet of the municipal legal system of the Member whose domestic law was being examined. This cannot produce a valid comparison under Article X:2.
- A second difficulty with the Appellate Body’s approach is that it could lead to the negative consequence of allowing and encouraging WTO Members to bring disputed domestic law issues for resolution in the WTO rather than in another Member’s domestic courts. In other words, this approach would seem to charge the WTO dispute settlement system with determining what is to be deemed “lawful” under a Member’s domestic legal system using the interpretive tools endorsed by the Appellate Body in *US – Carbon Steel*. Such a

3 Appellate Body Report, para. 4.123.

4 Panel Report, para. 7.163 (citing to the U.S. Supreme Court decisions in *United States v. Eurodif S.A.*, 555 U.S. 305 (2009), at 316, and *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), at 843) (“[U]nder United States law, even when a court reviews the interpretation of a law that underlies action taken by an agency administering that law, the agency’s interpretation of the law ‘governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous’. This means that, within these limits, a reviewing United States court must defer to the agency’s interpretation rather than impose its own interpretation.”).

5 Panel Report, para. 7.172.

determination could presumably be made in advance of, and perhaps even contrary to, a municipal court decision on the same issue.

- If the WTO dispute system can be used to resolve contested issues of municipal law contrary to that Member's understanding and application of its own law, this could raise unsettling questions on when a Member could be deemed to breach its obligations and would be difficult to reconcile with GATT 1994 Article X:3(b), which requires a Member to establish *domestic* procedures for the prompt review and correction of administrative actions. For this reason, previous panels and this Panel had found that "it is the role of domestic 'judicial, arbitral or administrative tribunals', and not WTO panels, to determine whether agency practices relating to customs matters are unlawful under domestic law."⁶
- The Appellate Body ultimately did not make any findings with respect with the 2012 legislation because it could not complete the analysis under its approach. The United States welcomes the lack of findings on the 2012 legislation because, as the Panel correctly found, as a matter U.S. municipal law, both before and after the 2012 legislation U.S. law has always been that the U.S. Department of Commerce is *not* prohibited from applying the U.S. countervailing duty law to China.

"Double Remedies"

- With respect to the so-called "double remedies" issue, which was also at issue in this dispute, the United States is disappointed with the findings in the Panel report on China's claims relating to the concurrent application of countervailing duties and antidumping duties calculated using a nonmarket economy methodology. The United States considers that the Panel's findings do not reflect a correct legal analysis of Article 19.3 of the SCM Agreement, and we have previously expressed concerns with the interpretation underlying this issue.
- Nonetheless, the United States has implemented the WTO's recommendations in an earlier dispute relating to this issue. Because the United States already looks at this issue and makes any necessary adjustments in any determination undertaken after March 13, 2012, the United States chose not to appeal this issue in this dispute, in part to help simplify the dispute and ease burdens on the dispute settlement system.

DSU Article 6.2

⁶ Panel Report, para. 7.164. *See also US – Stainless Steel (Korea)*, para. 6.50 (stating that "the WTO dispute settlement system ... was not in our view intended to function as a mechanism to test the consistency of a Member's particular decisions or rulings with the Member's own domestic law and practice; that is a function reserved for each Member's domestic judicial system, and a function WTO panels would be particularly ill-suited to perform. An incautious adoption of the approach advocated by Korea could however effectively convert every claim that an action is inconsistent with domestic law or practice into a claim under the *WTO Agreement*.").

- Finally, while the United States regrets the Appellate Body's conclusion that China's panel request complied with Article 6.2 of the DSU, we recognize the Appellate Body's efforts in grappling with China's vague and imprecise panel request.
- We appreciate the Appellate Body's rejection of relying on an external source beyond the face of the panel request, in this case another WTO report, to determine whether the request provided a sufficient summary of the legal basis of the complaint.

Conclusion

- In conclusion, in this statement the United States has highlighted some issues of concern in the reports, particularly in relation to Article X:2, that may have unintended consequences for Members and the dispute settlement system and should be considered further. We also would note that none of the findings in this dispute go to the root issue: the provision of subsidies by a WTO Member that are causing material injury to another Member's domestic industries. Those are issues that would, indeed, be worth resolving for the benefit of the world trading system.