

Statement by the United States at the Meeting of the WTO Dispute Settlement Body

Geneva, September 26, 2016

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

A. UNITED STATES – ANTI-DUMPING MEASURES ON CERTAIN HOT-ROLLED STEEL PRODUCTS FROM JAPAN: STATUS REPORT BY THE UNITED STATES (WT/DS184/15/ADD.163)

- The United States provided a status report in this dispute on September 15, 2016, 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.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

B. UNITED STATES – SECTION 110(5) OF THE US COPYRIGHT ACT:
STATUS REPORT BY THE UNITED STATES (WT/DS160/24/ADD.138)

- The United States provided a status report in this dispute on September 15, 2016, 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

C. EUROPEAN COMMUNITIES - MEASURES AFFECTING THE APPROVAL AND MARKETING OF BIOTECH PRODUCTS: STATUS REPORT BY THE EUROPEAN UNION (WT/DS291/37/ADD.101)

- The United States thanks the European Union (“EU”) for its status report and its statement today.
- As the United States has noted repeatedly at past meetings of the DSB, EU measures affecting the approval and marketing of biotech products remain of substantial concern to the United States.
- The EU measures are characterized by lengthy, unpredictable, and unexplained delays in approvals, even after the EU’s scientific body has completed exhaustive and time-consuming safety reviews.
- The unwarranted delays between the mid-2015 scientific assessments and the final EU approvals of three soy products illustrate the ongoing problems with the EU measures. Indeed, those delays have already caused adverse effects on trade in soybeans, and similar delays continue to affect corn exports.
- The United States encourages the EU to ensure that products in the biotech approval pipeline move forward in a timely manner as required by EU regulations. For instance, many corn and soy products have now been under EFSA consideration for several years.
- The United States urges the EU to ensure that its biotech approval measures are consistent with its obligations under the SPS Agreement.

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 Deficit Reduction Act – which includes a provision repealing the Continued Dumping and Subsidy Offset Act of 2000 – was enacted into law in February 2006. Accordingly, the United States has taken all actions necessary to implement the DSB’s recommendations and rulings in these disputes.
- We recall, furthermore, that the EU, Japan, and other Members have acknowledged that the Deficit Reduction Act does not permit the distribution of duties collected on goods entered after October 1, 2007, nearly nine 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 in these disputes.
- Indeed, as these very WTO Members have demonstrated repeatedly when they have been a responding party in a dispute, 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, regardless of whether the complaining party disagrees about compliance.

3. CHINA – CERTAIN MEASURES AFFECTING ELECTRONIC PAYMENT SERVICES

A. STATEMENT BY THE UNITED STATES

- The United States recalls that the DSB adopted its recommendations and rulings in this dispute in August 2012, and the reasonable period of time expired in July 2013.
- In June, China issued a regulation that appears to set out a licensing application process for electronic payment service (EPS) suppliers to obtain authorization to do business in China.
- The United States expects that with these regulations, China will allow for the approval of foreign EPS suppliers without further delays, in accordance with China's WTO obligations. It continues to remain unclear whether China will in fact allow foreign EPS providers to operate in China.
- In the meantime, more than three years after the expiry of the RPT in this dispute, China's domestic supplier and national champion, China UnionPay, a business set up by the People's Bank of China and other Chinese Government-related entities, remains the only entity authorized to provide electronic payment services in China.

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

A. STATEMENT BY INDIA

- As we have explained at prior DSB meetings, the United States has completed implementation with respect to the DSB recommendations and rulings in this dispute.
- As we have also previously remarked, we remain willing to discuss with India any questions it may have. India, however, has not contacted us to do so.
- As the United States has consistently explained to the DSB, and again today under item 2, 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, regardless of whether the complaining party disagrees about compliance.
- Based on its own decision not to provide a status report in DS430, India would appear to share the U.S. view, at least when it is India that is in the position of the responding party.
- Therefore, it is not clear on what basis India continues to press this erroneous point.
- With respect to the “as such” finding on Section 1677(7)(G)(i)(III) of the Tariff Act of 1930, we have explained both to India and to the DSB that no further U.S. action is needed.
- As we explained before, under U.S. law, the U.S. Department of Commerce has discretion with respect to the timing of a self-initiated investigation. And, to reiterate, Commerce has confirmed its commitment to exercise this discretion in a manner that is consistent with the international obligations of the United States.
- Therefore, no further action is needed and India has no basis for its insistence that U.S. law must be changed in order for the United States to comply with the DSB recommendations in this dispute.
- India is incorrect that the U.S. claim of compliance is based on the statute never having been applied. While it is true that the statutory provision at issue has never been applied, as just noted, that is not the reason a change to the statute is not necessary.

Given that the United States has fully complied in this dispute, the United States is not required to submit further status reports in this matter.

5. INDIA – MEASURES CONCERNING THE IMPORTATION OF CERTAIN AGRICULTURAL PRODUCTS (WT/DS430)

A. STATEMENT OF THE UNITED STATES

- Members will recall that this dispute was discussed at three recent meetings of the DSB.
- India has objected to the level of suspension requested by the United States, referring the matter to arbitration, and that arbitration is currently in progress. Nonetheless, the United States remains open to working with India on a mutually agreed resolution to this dispute and has been engaging with India to this end.
- In late July, India adopted a measure that revises certain aspects of the measure at issue in the dispute.
- Unfortunately, the revised measure appeared to retain many of the features of India’s prior measure that the DSB has already found to be inconsistent with India’s obligations under the SPS Agreement. At the last DSB meeting, the United States provided several examples.
- Last Thursday, September 22, India notified an amendment to the measure that it notified in July. We are studying this amendment carefully. As we have had it for only 1 full business day prior to this meeting, we are not prepared to comment on it.
- With respect to India’s claim in its communication of 22 September that its measures are now in compliance with the DSB’s recommendations, we note that India has made three different claims of compliance to the DSB now in this dispute.
 - First, in India’s status report of 10 June, India claimed that finalization of its draft measure “would bring India into full compliance.”¹
 - Second, in India’s communication of 19 July, India claimed that, due to the final measure it published on 8 July, which was different from its draft measure, India had fully complied with the DSB recommendations and rulings.²

¹ WT/DS430/15.

² WT/DS430/18.

- Third, as noted, India has now amended the measure that it notified on 19 July and made a third compliance claim.
- Given the number of measures India has pointed to, one wonders which of those compliance claims India considers correct?
- The United States will continue to preserve and enforce U.S. rights under the DSU. Despite the fact that India did not engage with the United States on the substance of any changes to its measure until after both the expiry of the RPT and the U.S. submission of a request under Article 22.2 of the DSU, we are actively engaging with India to seek the resolution of this dispute. We hope that India will come into compliance with its WTO obligations without need for further proceedings under the DSU.

Second Intervention

- Under Article 22.6 of the DSU, the negative consensus rule applies within 30 days of the end of the period for compliance.
- By submitting the Article 22.2 request, the United States preserved its negative consensus rights.
- Taking this step was neither surprising nor unusual. Similar actions have been taken in other disputes.
- The United States notes that as of the end of the reasonable period of time, and indeed as of the time of the U.S. request under Article 22.2 of the DSU, India was not even claiming that the measures that were the subject of the DSB's recommendations and rulings had been withdrawn or modified.
- As we have noted, we remain prepared to engage with the Government of India to facilitate its coming into compliance with the DSB's recommendations and rulings in DS430.
- Regarding India's point on sequencing agreements, there is nothing in the DSU that requires Members to enter into a sequencing agreement. Members have found it appropriate to do so in many circumstances. But India had taken no steps to address the DSB's recommendations as of the time when the United States took procedural action to preserve its rights under Article 22.

- Members have often agreed through sequencing agreements or otherwise to conduct proceedings in such an order, but as Members are well aware, this is not required under the DSU.

6. COLOMBIA – MEASURES CONCERNING IMPORTED SPIRITS

A. REQUEST FOR THE ESTABLISHMENT OF A PANEL BY THE EUROPEAN UNION (WT/DS502/6)

- The United States participated as a third party in the consultations in this dispute, in light of our substantial trade interest in the matter.
- The United States has repeatedly expressed concerns to Colombia regarding the taxation of alcoholic beverages and certain practices of departmental level alcohol monopolies.
- The United States urges Colombia to address this matter expeditiously.

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

A. REPORT OF THE APPELLATE BODY (WT/DS464/AB/R AND WT/DS464/AB/R/ADD.1) AND REPORT OF THE PANEL (WT/DS464/R AND WT/DS464/R/ADD.1)

- The United States thanks the Panel, the Appellate Body, and the Secretariat staff assisting them for their hard work in this dispute.
- The reports cover numerous issues under the AD Agreement³ and the SCM Agreement.⁴ In this statement, the United States will draw Members’ attention to certain aspects of the Appellate Body report that are of serious concern. These issues relate to the Appellate Body’s approach to substantive claims under the AD Agreement and the SCM Agreement as well as the proper role of the Appellate Body reviewing claims by a party and findings by a panel.
- Important aspects of the Appellate Body report appear to be at odds with the basic purpose of dispute settlement, as set out in the DSU and as understood by the Appellate Body in prior reports. As contemplated by Article 3.7 of the DSU, “[t]he aim of the dispute settlement system is to secure a positive solution to a dispute.” Findings on claims or issues not raised by the parties to the dispute are, by necessity, not necessary to secure a positive solution their dispute. Indeed, in *US – Wool Shirts and Blouses*, the Appellate Body stated that it “do[es] not consider that Article 3.2 of the *DSU* is meant to encourage either panels or the Appellate Body to ‘make law’ by clarifying existing provisions of the *WTO Agreement* outside the context of resolving a particular dispute.”⁵
- The Appellate Body report here, however, goes beyond the resolution of the issues raised by the disputing parties to prescribe particular methodological approaches to the application of the AD Agreement. The Appellate Body report also adopts an interpretive approach this is not – as required under Articles 3.2, 11, and 19.2 of the DSU – based on the text of the covered agreements, but rather is focused on the application of language from prior Appellate Body reports addressing different legal issues. Regrettably, a majority of the Appellate Body Division hearing this appeal has effectively read the

3 Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

4 Agreement on Subsidies and Countervailing Measures.

5 *US – Wool Shirts and Blouses (AB)*, p. 19.

methodology in the second sentence of Article 2.4.2 out of the AD Agreement, a result which a dissenting Appellate Body member could not join.

- This is the first dispute involving a Member’s application of the alternative comparison methodology that is set forth in the second sentence of Article 2.4.2 of the AD Agreement – the so-called “targeted dumping” provision. The Appellate Body’s finding has little basis in the plain text of Article 2.4.2, and essentially rewrites the provision by prescribing a wholly new methodology for addressing “targeted dumping.” The methodology created by the Appellate Body was never contemplated at the time the AD Agreement was negotiated and adopted. That methodology has never, to our knowledge, been used by any Member at any time in the 20-plus years since. And no party in the dispute advocated the methodology ultimately prescribed by the Appellate Body.
- Before discussing our concerns with specific Appellate Body findings, the United States would like to note that it appreciates that the Appellate Body rejected Korea’s most extreme legal theories. In particular, Korea had argued for an interpretation of Article 2.4.2 that would have resulted in the alternative, average-to-transaction comparison methodology yielding precisely the same result as the normal, average-to-average comparison methodology in all cases. The Appellate Body correctly recognized the exceptional nature of the second sentence of Article 2.4.2, and acknowledged that it must be possible for Members, in some way, to use that provision to address “targeted dumping.”
- However, in elaborating its vision of the “targeted dumping” methodology provided for under the second sentence of Article 2.4.2, the Appellate Body found that the AD Agreement prohibits the combined application of the average-to-transaction and average-to-average comparison methodologies.⁶ Nothing in the text of the second sentence of Article 2.4.2, nor elsewhere in the AD Agreement, addresses such a combined application. The parties and third parties never disputed that a combined application may be necessary and appropriate in certain situations.
- The Appellate Body’s finding that a combined application is not permitted, together with its finding that the second sentence of Article 2.4.2 requires that the alternative comparison methodology be applied only to a subset of transactions – the so-called “pattern transactions” – also conflicts with the Appellate Body’s prior finding in at least three reports that margins of dumping must be determined for the “product as a whole,”

⁶ Appellate Body Report, para. 5.120.

and the failure to “take into account the *entirety* of the *prices* of *some* export transactions” is inconsistent with the AD Agreement.⁷

- To be sure, if the Appellate Body report had acknowledged this tension and had gone on to state that its prior findings related to determining dumping margins only for a “product as whole” were incorrect, this would have been a positive development.⁸ But to the contrary, elsewhere in this very same report, the Appellate Body majority continues to rely on the flawed “product as a whole” theory to find that “zeroing” is impermissible with respect to targeted sales.
- The result is that the Appellate Body’s view of the proper interpretation of the AD Agreement is internally inconsistent; what *is* consistent is that a flawed interpretation has once again led to findings against the use of trade remedies.
- The Appellate Body found that the combined application of the average-to-transaction and average-to-average comparison methodologies is inconsistent with the AD Agreement even though Korea never advanced any claim against the use of such a combined application. Indeed, neither of the disputing parties appealed the panel report’s brief reference to this issue. The panel “assume[d] that the combined application of methodologies is not excluded,” noting, appropriately, that “Korea ha[d] not advanced any claim” against such a combined application, and thus “there [was] no need for [the panel] to rule on [the] matter.”⁹
- In contrast to the panel’s restrained, and correct, approach of not making findings on an issue not raised by the complaining party, the Appellate Body announced a prohibition on the use of a combined application, even though it had not even been asked to consider the issue on appeal.
- In rewriting the second sentence of Article 2.4.2, the Appellate Body majority also incorrectly expanded its prior findings against the use of “zeroing.” In particular, the

⁷ *US – Softwood Lumber V (AB)*, para. 101 (emphasis in original). See also, e.g., *EC – Bed Linen (AB)*, para. 53, *US – Softwood Lumber V (AB)*, paras. 97-102; *US – Zeroing (EC) (AB)*, para. 132.

⁸ In previous communications to the DSB, the United States has explained in detail its concerns about the Appellate Body’s findings related to “zeroing” and the Appellate Body’s elaboration of its concept of “product as a whole.” See *United States – Laws, Regulations and Methodology For Calculating Dumping Margins (“Zeroing”)*, Communication from the United States, WT/DS294/16 (May 17, 2006), *United States – Laws, Regulations and Methodology For Calculating Dumping Margins (“Zeroing”)*, Communication from the United States, WT/DS294/18 (June 19, 2006), *United States – Measures Relating to Zeroing and Sunset Reviews*, Communication from the United States, WT/DS322/16 (February 26, 2007).

⁹ Panel Report, para. 7.161.

majority finds that the use of “zeroing” in connection with the application of the average-to-transaction comparison methodology to so-called “pattern transactions”¹⁰ is inconsistent with the AD Agreement. As one Appellate Body member explained in dissent, this finding cannot be supported under the rules of interpretation provided for under the DSU.

- Given the importance of this issue, the United States calls the DSB’s attention to the cogent explanation in the dissenting opinion:

The majority’s interpretation would permit investigating authorities to deal with “targeted dumping” only partially, and possibly ineffectively. Within the “pattern”, prices above normal value will cancel out – or “re-mask” – partly or completely, the “targeted dumping” that results from prices below normal value. ... [S]uch an incomplete approach is not required by the text of the second sentence read in the context of the entire Article 2.4.2 and in light of the object and purpose of the Anti-Dumping Agreement, and it unduly restricts the regulatory leeway that should be accorded to investigating authorities to deal with “targeted dumping”.¹¹

- The dissenting Appellate Body member further reasoned that “allowing an investigating authority to zero within the ‘pattern’ under the second sentence of Article 2.4.2 not only is a permissible interpretation within the meaning of the second sentence of Article 17.6(ii) of the Anti-Dumping Agreement, but ... it is a more defensible interpretation within the meaning of the first sentence of that provision.”¹²
- The majority’s prescribed approach for addressing “targeted dumping” simply is not the average-to-transaction comparison to which Members agreed in Article 2.4.2. The United States definitively established that applying the average-to-transaction comparison methodology (without zeroing) will, as a mathematical certainty, always yield the same result as applying the average-to-average comparison methodology (without zeroing). This is true whether these comparison methodologies are applied to all export sales or to a subset of export sales. The Appellate Body majority itself acknowledged as a “fact” that “the application of the [average-to-transaction] comparison methodology to [a]

¹⁰ Appellate Body Report, paras. 5.141-5.171.

¹¹ Appellate Body Report, paras. 5.195-196.

¹² Appellate Body Report, para. 5.202.

pattern of export prices leads to equivalent results as the application of the [average-to-average] comparison methodology to the same pattern.”¹³

- Yet, the Appellate Body majority ignored this key “fact.”¹⁴ In doing so, it effectively rewrote the second sentence of Article 2.4.2, changing it from permitting Members to apply an average-to-transaction comparison methodology under certain circumstances to permitting Members to apply the average-to-average comparison methodology to a subset of transactions under certain circumstances. Ultimately, the majority read the specific reference to the average-to-transaction comparison methodology out of the second sentence of Article 2.4.2 of the AD Agreement altogether, which is contrary to the customary rules of interpretation of public international law.
- As the Appellate Body has explained in prior reports, “a fundamental tenet of treaty interpretation flowing from the general rule of interpretation set out in Article 31 [of the Vienna Convention] is the principle of effectiveness.”¹⁵ “One of the corollaries of ‘the general rule of interpretation’ in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.”¹⁶ It is troubling that a majority of the Appellate Body Division hearing this appeal chose not to abide by established customary rules of interpretation that the Appellate Body has recognized previously, though the United States appreciates one dissenting Appellate Body member decided not to join the majority in doing so.
- Turning to the CVD issues in this dispute, the United States agrees with certain findings of the Appellate Body. In particular, the United States finds persuasive the rejection of Korea’s assertion that subsidies limited to a designated geographical region somehow are not regionally specific under the SCM Agreement.¹⁷ The Appellate Body found, among other things, that the size of a designated region is irrelevant to the specificity inquiry.¹⁸
- The United States also agrees with aspects of the Appellate Body’s findings regarding the calculation of subsidy margins. The United States agrees that the SCM Agreement does not dictate any particular methodology for calculating subsidy ratios, leaving the

¹³ Appellate Body Report, para. 5.165.

¹⁴ Appellate Body Report, para. 5.165.

¹⁵ *Japan – Alcoholic Beverages II (AB)*, p. 12.

¹⁶ *US – Gasoline (AB)*, p. 23 (emphasis added).

¹⁷ See Appellate Body Report, paras. 5.204-5.246.

¹⁸ Appellate Body Report, para. 5.236.

investigating authority with discretion to choose the most appropriate methodology.¹⁹ In particular, the SCM Agreement does not expressly set forth a method for determining whether a given subsidy is “tied” to a particular product.²⁰ As the Appellate Body observed, any “tying” determination will depend on the specific circumstances of each case, focusing on the “design, structure, and operation of the measure granting the subsidy.”²¹

- The United States has concerns, however, with respect to the Appellate Body’s findings that these principles were not adequately addressed and applied in the subsidy determinations made by the U.S. Department of Commerce.
- The United States thanks the DSB for its attention to the important issues covered in our statement today.

¹⁹ See Appellate Body Report, para. 5.269.

²⁰ See Appellate Body Report, para. 5.269.

²¹ Appellate Body Report, para. 5.270.