

**Statements by the United States at the Meeting of the WTO Dispute Settlement Body**

**Geneva, October 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.165)**

- The United States provided a status report in this dispute on October 13, 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.140)
    - The United States provided a status report in this dispute on October 13, 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.103)

- The United States thanks the European Union (“EU”) for its status report and its statement today.
- As the United States has noted 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.
- We note that the EU’s scientific review process seems to have slowed in recent years. For instance, many corn and soy products have now been under consideration by the EU’s scientific authority for several years.
- Further, the United States is concerned that products that have received positive scientific evaluations continue to languish without approval by the relevant EU bodies.
- The delays in approvals cause adverse effects on trade, particularly with respect to soybeans and corn.
- 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 and WTO rules.
- The United States urges the EU to ensure that its biotech approval measures are consistent with its obligations under the SPS Agreement.

2. IMPLEMENTATION OF THE RECOMMENDATIONS OF THE DSB

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

- On September 26, 2016, the DSB adopted the panel and Appellate Body reports in the dispute *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*.
- Today, as provided in the first sentence of Article 21.3 of the DSU, the United States wishes to state that it intends to implement the recommendations 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 for implementation.
- In accordance with Article 21.3(b) of the DSU, the United States will discuss this matter with Korea with a view to reaching agreement on the period of time.

3. 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, which is over nine years ago.
- We therefore do not understand the purpose for which the EU and Japan have inscribed this item.
- 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.

4. CHINA – CERTAIN MEASURES AFFECTING ELECTRONIC PAYMENT SERVICES

A. STATEMENT BY THE UNITED STATES

- The DSB adopted its recommendations in this dispute more than four years ago, and the reasonable period of time expired more than three years ago.
- To this day, however, China’s domestic supplier and national champion – 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 (EPS) in China.
- China issued a regulation a few months ago that appears to set out a licensing application process for EPS suppliers to enter the domestic market.
- However, whether China will, in fact, allow foreign EPS suppliers to operate in the domestic Chinese market remains unclear.
- The United States urges China to ensure that the approval of foreign EPS suppliers occurs without delay, in accordance with China’s WTO obligations.

5. 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 in this dispute.
- We remain willing to discuss with India any questions it may have.
- India, however, has not contacted us to do so.
- Accordingly, we fail to understand what purpose is served by India’s decision to place this item on the agenda of today’s meeting.
- As the United States has consistently explained to the DSB, and again today under item 3, there is no obligation under the DSU to provide further status reports once a Member announces that it has implemented those DSB recommendations, regardless of whether the complaining party disagrees about compliance.
- 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.
- The provision of U.S. law at issue was not applied in the underlying investigation, and therefore had no bearing on compliance with respect to the countervailing duty at issue in this dispute.
- Indeed, to our knowledge, this provision of U.S. law has *never* been used in *any* investigation.
- With respect to any future investigations, the statutory provision relates to a decision by the administering authority to *self*-initiate a CVD investigation on the same day as an AD petition is filed by an industry, or vice versa.
- 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.

- The discretion provided for under U.S. law was not the subject of any findings by the Appellate Body in its report – not surprisingly, as this provision was not even addressed by either of the Parties in the course of this dispute.
- Nonetheless, we have previously confirmed that, having never been exercised in a WTO-inconsistent manner before, it is not now the intention of the United States to exercise this discretion differently.
- That is, the Department of Commerce has confirmed its commitment to exercise its discretion with respect to section 702(a) of the Tariff Act of 1930 pertaining to countervailing duty investigations and section 732(a) of that Act pertaining to antidumping duty investigations in a manner that is consistent with the WTO 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.

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

A. STATEMENT OF THE UNITED STATES

- Members will recall that India continues to modify its measures related to avian influenza, even though the reasonable period of time for compliance expired in June 2016.
- Most recently, India announced a revised measure on September 22, 2016.
- The United States recalls that the Panel found, and the Appellate Body confirmed, that international standards issued by the OIE would meet India's level of protection.
- Under the September 2016 version of India's measure, however, the United States continues to have concerns that India's measure may be substantially more trade restrictive than a measure based on OIE recommendations.
- For example, the content of the veterinary certificates that India would require upon the importation of agricultural products is an essential element in understanding India's revised measure. India's Department of Animal Husbandry, however, has removed from its website the veterinary certificates that would be required for the products covered by this dispute.<sup>1</sup>
- The United States stands ready to work constructively with India to reach a resolution to this dispute. Regrettably, however, the United States had no notice that the most recent revision to India's measure was forthcoming. As a practical matter, the parties cannot work together if India fails to communicate with the United States on the revisions to the measures at issue in this dispute.
- Until our concerns are resolved, the United States will continue to preserve and enforce U.S. rights under the DSU.

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<sup>1</sup> See <http://www.dahd.nic.in/Trade/Sanitary-requirement-veterinary-health-certificate-import-various-livestock-products>

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 to 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 this dispute.

8. CHINA - EXPORT DUTIES ON CERTAIN RAW MATERIALS

A. REQUEST FOR THE ESTABLISHMENT OF A PANEL BY THE UNITED STATES (WT/DS508/6)

- The United States recalls that in two prior disputes, the DSB found that China's export restrictions on various raw materials were inconsistent with WTO rules. Unfortunately, those raw materials are not the only ones on which China has imposed export restraints. China continues to maintain export restrictions on other raw materials.
- The U.S. panel request reflects U.S. concerns with China's restraints on the exportation of antimony, chromium, cobalt, copper, graphite, indium, lead, magnesia, talc, tantalum, and tin.
- These materials are critical inputs to a wide range of industrial sectors in the United States and in other Members. China's export restraints provide an advantage to its domestic industries purchasing these raw materials, at the expense of industries elsewhere.
- As described in more detail in the U.S. panel request, the export restraints at issue include export quotas, export duties, and restrictions on the rights of enterprises seeking to export. These restraints appear to be inconsistent with provisions of the GATT 1994 and China's Protocol of Accession.
- China's persistence in maintaining such export restrictions, notwithstanding our efforts to engage with China on this issue and WTO findings in the two previous disputes, is troubling.
- The United States attempted to resolve these issues through dialogue with China on a bilateral or multilateral basis. China did not take any action to resolve our concerns.
- We then requested and held formal WTO consultations with China on September 8 and 9. These efforts also unfortunately failed to resolve the dispute.
- Accordingly, the United States is requesting that the DSB establish a panel to examine the matter set out in our panel request with standard terms of reference.

9. EUROPEAN UNION – ANTI-DUMPING MEASURES ON BIODIESEL FROM ARGENTINA

A. REPORT OF THE APPELLATE BODY (WT/DS473/AB/R AND WT/DS473/AB/R/ADD.1) AND REPORT OF THE PANEL (WT/DS473/R AND WT/DS473/R/ADD.1)

- Before addressing a systemic issue raised in the Appellate Body report, we would first comment on the statement made by Mexico. It is quite disappointing to hear Mexico express concerns with greater transparency in the WTO dispute settlement system. Its position is surprising, given that Mexico has agreed to open dispute meetings in other international fora and even in some of its own WTO disputes.
- We would be interested in understanding better why Mexico is opposed to greater transparency.
- In our view, public hearings and greater transparency of the dispute settlement system promote greater confidence in the system. It allows other WTO Members and the public to observe the high quality work of panels and the Appellate Body.
- And we would recall that in *US – Continued Suspension*, the Appellate Body reasoned that pursuant to DSU Article 18.2, each party has a right to disclose statements of its own position to the public and that such statements extended to oral statements and answers to questions at a hearing. Thus, a party has the ability to maintain the confidentiality of its own statements, but also the ability to request the confidentiality of the proceeding be lifted for its statements.<sup>2</sup>
- The reports of the Panel and Appellate Body in this dispute make findings on a number of matters regarding the interpretation and application of the *Agreement on the Implementation of Article VI of the GATT 1994*. The United States understands from those reports that those findings turn on the facts and circumstances of the specific antidumping investigation at issue in this dispute. The United States will not comment on those facts and circumstances, and related findings, at today's meeting.
- The United States, however, would like to draw the DSB's attention to an important

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<sup>2</sup> *US – Continued Suspension (AB)*, Annex IV, para. 4.

systemic issue with implications for the operation of the dispute settlement system.

- The issue is how the Appellate Body should approach appeals from panel findings on the meaning of municipal law, as well as how the Appellate Body approached Argentina's particular appeal in this dispute on the meaning of the EU law being challenged.
- In the WTO system, or in any international law dispute settlement system, the meaning of municipal law is an issue of fact. In contrast, the interpretation of the WTO Agreement, or other relevant international law, is the issue of law for that system.
- This proposition is not controversial. For example, one of the standard treatises on international law (Brownlie) states that "*municipal laws are merely facts* which express the will and constitute the activities of States."<sup>3</sup>
- The Appellate Body, however, has treated panel findings on the meaning of municipal law as a matter of WTO law, to be decided by the Appellate Body *de novo* in an appeal under Article 17.6 of the DSU. The Appellate Body has given no rationale – based in the text of the DSU or in *any other source* -- for this fundamental departure from the principle that the meaning of municipal law is an issue of fact in international dispute settlement.
- In its report in this dispute, the Appellate Body's explanation for the proposition that the meaning of municipal law is an issue of law under DSU 17.6 is a single sentence: "Just as it is necessary for the panel to seek a detailed understanding of the municipal law at issue, so too is it necessary for the Appellate Body to review the panel's examination of that municipal law."<sup>4</sup>
- The only basis given for this assertion is a citation to the Appellate Body's own report in *India – Patents (US)*. That report, however, provides no meaningful explanation for this proposition. Ironically, *India – Patents* cites the very same international law treatise quoted above, which states that municipal law is an *issue of fact* for the purpose of international dispute settlement.<sup>5</sup> That is, the *India – Patents* report cites a treatise that stands for *the opposite* of what the Appellate Body cites it for.

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<sup>3</sup> Brownlie, *Principles of Public International Law*, at 39 (5th ed. 1998) (italics added).

<sup>4</sup> Appellate Body Report, *EU – Biodiesel*, para. 6.155 (citing *India – Patents (US)*).

<sup>5</sup> Appellate Body Report, *India – Patents (US)*, para. 65 and n. 52.

- Further, the Appellate Body’s stated rationale – that a “detailed understanding” is important – says nothing about the proper role of the Appellate Body in reviewing a Panel’s findings. Indeed, many *factual* issues in WTO dispute settlement require “detailed understanding.” But that provides no basis for treating those factual issues as issues of law to be decided *de novo* by the Appellate Body on appeal.
- The relevant provisions of the DSU reflect this straightforward division between issues of fact and law. As Members know, DSU Article 6.2 requires a complaining party to set out “the matter” in its panel request comprised of “the specific measures at issue” – that is, the core issue of fact – and to “provide a brief summary of the legal basis of the complaint” – that is, the issue of law. DSU Article 11 similarly distinguishes between the panel’s “objective assessment of the facts of the case” and its assessment of “the applicability of and conformity with the covered agreements” – that is, the issue of law. And DSU Article 12.7 makes the same distinction in relation to the findings of fact and law in the panel’s report. Thus, the DSU makes clear that the measure at issue is the core fact to be established by a complaining party, and the WTO consistency of that measure is the issue of law.
- The lack of coherence in the Appellate Body’s approach has been noted by other commentators. For example, an entry in *The Oxford Handbook of International Trade Law* states:

“[T]he logic of the Appellate Body’s finding [that panel findings on municipal law are issues of law under DSU Article 17.6] is *difficult to understand*. Just because a panel assesses whether a domestic legal act – which represents a fact from the perspective of WTO law – is consistent or inconsistent with WTO law *does not suddenly turn the meaning of the domestic legal act into a question of WTO law*. . . . [T]here must . . . be a discernable line between issues of fact and issues of law. After all, *the Appellate Body’s jurisdiction is circumscribed precisely by this distinction*.”<sup>6</sup>
- The problems with the Appellate Body’s approach is highlighted by this very appeal. One of Argentina’s claims was that a provision of EU law, the Basic Regulation, was inconsistent “as such” with the AD Agreement. On appeal, Argentina claimed that the

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<sup>6</sup>Jan Bohanes and Nick Lockhart, “Standard of Review in WTO Law”, *The Oxford Handbook of International Trade Law* (2009), at 42 (emphasis added).

panel erroneously construed that EU law. Argentina's argument was based on the text of the EU provision, legislative history, a supposed EU practice in several other investigations, and certain EU court decisions.

- On appeal, Argentina claimed *both* that the Panel's interpretation of EU law was wrong as a matter of law (although under what provision of the AD Agreement or the DSU remains unclear) *and* that the Panel failed to make an "objective assessment of the matter" under Article 11 of the DSU.
- Especially given the panel's alleged error in examining all of the different types of evidence introduced by Argentina, the Appellate Body could have, and should have, handled this matter as an appeal under Article 11 of the DSU. In an Article 11 appeal, of course, the Appellate Body would not have conducted a *de novo* review of EU law, but rather would have examined whether the panel had exceeded its "margin of appreciation" as the trier of fact.
- The Appellate Body, however, examined the meaning of the EU law *both* as a *de novo* legal issue, and then proceeded to conduct a separate examination of whether the Panel made an objective assessment.
- Frankly, this approach does not make sense. It departs from the Appellate Body's frequent admonition that a party should present an issue as an error of law or an error under Article 11, but not both types of claims with respect to the same issue.<sup>7</sup> Furthermore, it raises the prospect that the Appellate Body might find that the Panel *made* an objective assessment of a complex factual record, and at the same time might find that precisely the same panel finding was *incorrect* simply because the Appellate Body made a different factual determination based on its own *de novo* review.
- This type of outcome – which follows from the Appellate Body's finding that it can conduct its own *de novo* review of the meaning of domestic law – is inconsistent with the appropriate functioning of the dispute settlement system. It departs from the basic division of responsibilities where panels determine issues of fact and law, and the Appellate Body may be asked to review specific legal interpretations and legal conclusions.

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<sup>7</sup> See, e.g., *EC – Fasteners (China) (AB)*, para. 442; *Chile – Price Band System (Article 21.5 – Argentina) (AB)*, para. 238.

- It also represents a serious waste of the limited resources of the WTO dispute settlement system, adding complexity and delay to the process. No purpose is served by having a panel engage in a detailed review of a factual record related to the meaning of a domestic measure, and then to have the Appellate Body engage in its own *de novo* review of the exact same factual issues, so that the parties have to argue all the same factual issues a second time.
- We look forward to discussing these important issues with other Members to enhance the effectiveness and efficiency of the dispute settlement system.