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

Geneva, January 12, 2018

1. UNITED STATES - ANTI-DUMPING MEASURES ON OIL COUNTRY TUBULAR GOODS FROM KOREA

A. REPORT OF THE PANEL (WT/DS488/R AND WT/DS488/R/ADD.1)

- The United States would like to begin by thanking the members of the Panel and the Secretariat assisting them for their work on this dispute. While we are disappointed with certain aspects of the Panel's findings, we acknowledge the Panel's thorough review of the legal arguments put forward by the parties.

- Korea raised a number of claims under a variety of provisions of the Anti-Dumping Agreement and the GATT 1994. The Panel rightly rejected the majority of those claims.

- In particular, the United States welcomes the Panel's finding that Korea did not establish that Article 2.2 of the Anti-Dumping Agreement requires an authority, where home market sales are not viable, to evaluate third-country export sales before determining whether to construct normal value. No such requirement exists in the text of Article 2.2, and the Panel was correct to decline Korea's invitation to read such an obligation into the Anti-Dumping Agreement.

- The United States also appreciates the Panel's rejection of Korea's arguments under Article 2.3 of the Anti-Dumping Agreement. Korea's arguments essentially asked the Panel to review U.S. compliance with U.S. law, not with the text of the Anti-Dumping Agreement. That is not an appropriate task for a WTO panel, and the Panel was correct to reject Korea's claim.

- However, the United States is disappointed with the Panel's findings that the U.S. Department of Commerce's calculation of constructed value profit was not consistent with certain obligations set out in the Anti-Dumping Agreement. The panel found that the United States had acted inconsistently with the chapeau of Article 2.2.2 because it did not determine profit for constructed value based on actual data pertaining to sales of the like product in the home market.

- It makes little sense in light of the structure of the Anti-Dumping Agreement to suggest that, where an investigating authority determines under Article 2.2 that home market sales are inappropriate for "a proper comparison," the authority is nevertheless obligated to *collect* data regarding those sales under Article 2.2.2 when constructing normal value.

- The Panel's findings are potentially very burdensome for foreign respondents, who must gather and provide this additional, and potentially voluminous, data.

- The Panel also found that the United States had acted inconsistently with Articles 2.2.2(i) and (iii) in relation to profit because the U.S. Department of Commerce supposedly relied on a narrow definition of the "same general category of products". But the Panel appears not to have understood the Department's definition of the "same general category of products", which included *all* OCTG products subject to the anti-dumping investigation.

- The Panel's mistake was based in part on its reference to a separate anti-dumping determination submitted by Korea – evidence that did not form part of the record before the Department of Commerce and upon which the Panel therefore should not have relied.

- The Panel otherwise rejected, found to be outside of its terms of reference, or exercised judicial economy on other claims raised in this dispute. The United States appreciates the Panel's careful examination of the arguments presented by the parties and third parties to this dispute.

- The Panel appropriately limited its findings only to those issues necessary to assist the DSB in making the recommendation provided for in the DSU, consistent with its terms of reference under DSU Article 7.1 and its role under DSU Article 11.

- Although the United States is disappointed with certain of the Panel's findings, on balance, we have decided to permit the report to be adopted today. We take this step in light of all the circumstances, including the overall quality of the Panel report, and encourage other Members similarly to consider the nature and number of appeals they file.

- We again thank the Panel and the Secretariat assisting it for its work on this dispute, and we thank Members for their attention to this statement.

2. INDIA – CERTAIN MEASURES RELATING TO SOLAR CELLS AND SOLAR MODULES

A. RECOURSE TO ARTICLE 22.2 OF THE DSU BY THE UNITED STATES (WT/DS456/18)

- Mr. Chairman, on December 19, 2017, the United States requested authorization from the DSB to suspend concessions or other obligations with respect to India due to its failure to comply with the recommendations and rulings of the DSB in this dispute.[1]

- On January 3, 2018, India submitted a communication in which it objected to the U.S. request.[2]

- I have just used the term "objected", but it is necessary to be precise. Under DSU Article 22.6, "the DSB, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time" unless the United States joins a consensus to reject the request – which we do not – or unless India, and I quote, "objects to the level of suspension proposed" by the United States.

- India's communication makes a bare reference to Article 22.6 of the DSU in a heading of the document. But India's communication nowhere states that it "objects to the level of suspension proposed" by the United States.

- Therefore, the DSB needs absolute clarity from India. If India clarifies today that it "objects to the level of suspension proposed" by the United States, then the matter is referred to arbitration pursuant to Article 22.6.

- If India fails to clarify that it is making the objection provided for in Article 22.6, then the matter will not have been referred to arbitration, and the DSB shall grant the authorization requested by the United States.

- In its communication, India asserts that the U.S. request is supposedly "invalid" for a number of reasons. None of those have merit, as we shall explain shortly. But two points bear emphasis at the outset. First, none of the reasons cited by India have any basis in Article 22.6 of the DSU and thus cannot prevent the DSB from granting the authorization requested by the United States.

[1] WT/DS456/18.

[2] WT/DS456/19.

- Second, nowhere in India's communication, nor in the "status report" submitted on December 14 claiming compliance,[3] does India identify even a single measure or action it has taken to come into compliance. Therefore, India has provided no basis for its assertion of compliance. In that circumstance, and without any other bilateral explanation from India, the United States had no choice but to make the request for authorization to preserve its rights under the DSU – the same choice that many other WTO Members have made in other disputes.

- India's communication asserts three grounds on which the U.S. request is supposedly "invalid", but India's complaints are unavailing. The United States hesitates to take up the DSB's time unnecessarily, but because India has circulated its views to Members, the United States considers it useful to explain just why these three assertions are irrelevant, and would contradict and undermine the DSU as agreed by Members.

- India is incorrect that the United States has not sufficiently indicated a level of nullification and impairment or why it considers India has not complied, that there is an obligation on a complaining party to seek to negotiate compensation, or that no request under Article 22.2 may be made before procedures are completed under Article 21.5.

- First, the text of the DSU contradicts India's contention that a Member must enter into negotiations on "mutually acceptable compensation" *before* requesting authorization to suspend concessions.

- Article 22.2 of the DSU provides that a *responding* Member is required to engage in negotiations for compensation only "*if so requested…by the party that invoked the dispute settlement procedures*" – in this case the United States.

- As the United States made no such request, no such negotiations were required under DSU Article 22.2. Rather, Article 22.2 provides in its second sentence that if no compensation has been agreed within 20 days of the expiry of the reasonable period of time, a complaining party may request DSB authorization. India simply misreads the plain text of the DSU and seeks to impose a new obligation on all WTO Members.

- Second, India complains that the U.S. request did not indicate why the United States considers that India has failed to comply with the DSB recommendations and rulings.

- In this respect, we note, first, that India provided the United States with no advance notice that India intended to claim compliance with the DSB recommendations and rulings on December 14, 2017; and that, second, India's claim of compliance was wholly unsubstantiated and limited to the mere assertion that "*India has ceased to impose any measures as found inconsistent in the DSB's findings and recommendations*."

[3] WT/DS456/17.

- Therefore, the United States has had no opportunity to evaluate any concrete compliance steps taken by India because India identified none.

- India is simply incorrect, moreover, in asserting that Article 22.2 requires a complaining Member to include in its request for suspension an explanation of why it considers the responding Member to have failed to comply with the recommendations of the DSB. The second sentence of Article 22.2 sets out that if no satisfactory compensation has been agreed, a complaining Member may request authorization from the DSB. Therefore, for a second time, India simply misreads the plain text of the DSU and seeks to impose a new obligation on all WTO Members.

- Third, India argues that the United States' request for authorization failed to specify a proposed level of suspension.

- This too is simply incorrect.

- The U.S. request states the following: "*the United States requests authorization from the DSB to suspend concessions or other obligations with respect to India at an annual level based on a formula commensurate with the trade effects caused to the interests of the United States by the failure of India to comply with the recommendations and rulings of the DSB*."

- Thus, the U.S. request sets out the "level of suspension proposed", in the terms of Article 22.6, in the form of a formula commensurate with the trade effects caused to the interests of the United States.

- The United States notes that Members' requests to suspend concessions under Article 22.2 of the DSU commonly express the proposed level of suspension in the form of a formula rather than a specific monetary amount.[4]

---

[4] *See, e.g., United States – Measures Affecting the Production and Sale of Clove Cigarettes: Recourse to Article 22.2 of the DSU by Indonesia* (WT/DS406/12) ("…the level of suspension proposed is equivalent on an annual basis to the nullification or impairment of benefits accruing to Indonesia…"); *European Communities – Measures Affecting the Approval and Marketing of Biotech Products: Recourse to Article 22.2 of the DSU by the United States* (WT/DS291/39) ("…the United States requests authorization from the Dispute Settlement Body ("DSB") to suspend concessions and other obligations with respect to the European Communities under the covered agreements at an annual level equivalent to the annual level of nullification or impairment of benefits accruing to the United States resulting from the European Communities' failure to bring measures of the European Communities and its member States concerning the approval and marketing of biotech products into compliance with the recommendations and rulings of the DSB…"); and, in *United States – Continued Dumping and Subsidy Offset Act of 2000* (DS217 and DS234), requests by the European Union (WT/DS217/22), Brazil (WT/DS217/20), Japan (WT/DS217/24), Korea (WT/DS217/25), Canada (WT/DS234/25), Mexico (WT/DS234/26), Chile (WT/DS217/21), and India (WT/DS217/23).

- And if India is dissatisfied with the level of suspension proposed by the United States, it may object to the proposed level pursuant to Article 22.6 for a determination of the level equivalent to the level of nullification or impairment.

- Finally, India argues that the United States' request for authorization is invalid because the United States has not previously established India's non-compliance through procedures under Article 21.5 of the DSU.

- As apparently all Members other than India recognize, nothing in the DSU supports the view that a Member must proceed with full Article 21.5 proceedings before the Member may even *request* authorization to suspend concessions under Article 22.2.

- It is for this very reason that, in some circumstances, Members have entered into *voluntary* agreements on the sequencing of proceedings. In some disputes, an agreement provides for the completion of a 21.5 compliance proceeding before a Member may request authorization to suspend concessions or other obligations. In others, the parties agree that, once a Member requests authorization pursuant to Article 22.2 and the responding Member objects, the arbitration can be suspended to permit Article 21.5 proceedings to occur.

- Where no sequencing agreement has been reached between the parties, as is the case here, a complaining Member must request authorization to suspend concessions within the time frame specified in Article 22.6 of the DSU or risk prejudicing its rights to do so at a later date.

- We could give numerous examples of Members acting to preserve their rights in this fashion. But Members other than India may recall that, in fact, just this month the EU acted in just this manner in relation to the *Russia – Pigs* (DS475) dispute.[5]

- The EU request pursuant to Article 22.2 of the DSU was considered by the DSB within 30 days of the expiry of Russia's compliance period, and despite Russia's claim of compliance, without an Article 21.5 proceeding having been completed, or even initiated. This action was perfectly within the EU's rights under the DSU, and we do not understand India to consider the request for authorization by the EU, or any other Member, to be "invalid".

---

[5] *Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union: Recourse to Article 22.2 of the DSU by the European Union* (WT/DS475/17) ("…the European Union requests authorization from the Dispute Settlement Body ("DSB") to suspend concessions and other obligations with respect to the Russian Federation as a result of the Russian Federation's failure to bring its measures into compliance with the recommendations and rulings of the DSB…").

- Therefore, India's objections to the U.S. request are without any legal basis, and cannot prevent the U.S. request from being approved today by the DSB.

- We again note that while India's communication makes reference to Article 22.6 of the DSU in a heading, India does not state that it "objects to the level of suspension proposed" by the United States, as specified in Article 22.6.

- It is on that basis that the matter would be referred to arbitration under Article 22.6.

- Having failed to make such an objection, the matter will not have been referred to arbitration, and the DSB shall grant the U.S. request for authorization today pursuant to DSU Article 22.6.

- To the extent that India today objects to the level of suspension proposed by the United States, the matter would be referred to arbitration, and there would remain no further action for the DSB to take with respect to this agenda item.

- In that case, while it would not be an efficient use of the resources of the WTO and of Members, we would not object if the DSB wished to take affirmative note of the fact that no action on its part was necessary with respect to the United States' request for authorization because the matter had been referred to arbitration by virtue of India's objection under Article 22.6 of the DSU.

Second Intervention

- We will address the comments made by a few delegations before reacting to India's statement.

- First, with reference to the EU assertion that DSB action is necessary to refer the matter to arbitration, our position on this subject is well-known. No decision by the DSB is necessary to refer the matter to arbitration. Article 22.6 does not refer to any action of the DSB, and the text is clear that once a Member objects to another Member's request, that matter is automatically referred to arbitration.

- The situation here is not unique. Members may recall that no DSB decision was needed in this dispute to refer the matter to the Appellate Body upon India's appeal, nor has any DSB decision been needed in past disputes to refer the matter of the reasonable period of time to an Article 21.3(c) arbitrator.

- As just one illustration of why the DSB is not deciding today to refer these matters to arbitration, the United States would note that the DSB does not have before it any proposed decision to refer the matter to arbitration. DSB rules would require such a decision to be submitted 10 days before the DSB meeting. Clearly, the DSB is not taking a decision today, nor has it on any of the previous occasions when requests were referred to arbitration.

- Indeed, arbitration has commenced in the past without the need for a DSB meeting.[6]

- The DSU text makes clear that this is the correct reading of Article 22.6. Following a request by a Member under Article 22.2 of the DSU for authorization to suspend concessions or other obligations, the text of the second sentence of Article 22.6 states plainly: "If the Member concerned objects to the level of suspension proposed… the matter shall be referred to arbitration."

- Second, with regard to the comments made today by Canada, China, and Brazil, we note as an initial matter that the suggestion that the U.S. request does not specify a proposed level of suspension is incorrect.

- As explained earlier, the U.S. request clearly states that "the United States requests authorization from the DSB to suspend concessions or other obligations with respect to India at an annual level based on a formula commensurate with the trade effects caused to the interests of the United States by the failure of India to comply with the recommendations and rulings of the DSB."

- It is unclear whether these Members intend to suggest a request under Article 22.2 of the DSU should specify a monetary amount or include a detailed formula, but neither is required by the text of the DSU.

[6] *See, e.g.*, *Minutes of 4 June 2007 DSB Meeting*, WT/DSB/M/233 (relating to DS268), paras. 3, 4, 5 (noting agreement of parties matter had already been referred to arbitration by filing of objection*); Minutes of 21 January 2008 DSB Meeting*, WT/DSB/M/245 (relating to DS322), p. 2 (first through fourth paragraphs) (noting agreement of parties matter had already been referred to arbitration by filing of objection; request for authorization withdrawn from DSB agenda); *Minutes of 13 May 2016 DSB Meeting*, WT/DSB/M/376, (relating to DS381), paras. 7.9-7.11 (noting agreement of parties matter had already been referred to arbitration by filing of objection therefore need not remain on the DSB agenda).

- We would refer these delegations to prior requests made under Article 22.2 of the DSU. While some requests have assigned a monetary value to the proposed level of suspension, others have not.[7] Several requests have been made for a level of suspension commensurate with the annual level of nullification and impairment.[8] While some such requests may have included an indicative monetary value for the first year, the request was nevertheless for an amount to be determined formula as commensurate with the annual level of nullification and impairment.[9]

- We would also note India's request for authorization in the dispute *United States – Continued Dumping and Subsidy Offset Act of 2000* (WT/DS217). We find it interesting that India complains that the U.S. request does not specify a monetary value for the proposed level of suspension, when India itself has not included such a value in the past.[10]

- In any event, the DSB need not debate today what some Members consider "should" be included in an Article 22.2 request, as opposed to what the text of the DSU requires. The U.S. request did in fact specify the proposed level of suspension consistent with Article 22.2 of the DSU.

- Finally, with regard to India's statement today, we still have not heard from India an objection to the proposed level of suspension. As the United States has explained, the objections India has stated do not constitute legal bases for rejection of the U.S. request.

---

[7] *See, e.g., United States – Anti-Dumping Act of 1916: Recourse by Japan to Article 22.2 of the DSU* (WT/DS162/18) ("Since the recommendations and rulings of the DSB were that the Anti-Dumping Act of 1916 as such violated the U.S. obligations under GATT 1994, the AD Agreement and the WTO Agreement, it is not practical to indicate the level of nullification or impairment in terms of monetary value.").

[8] *See, e.g., United States – Measures Affecting the Production and Sale of Clove Cigarettes: Recourse to Article 22.2 of the DSU by Indonesia* (WT/DS406/12) and *European Communities – Measures Affecting the Approval and Marketing of Biotech Products: Recourse to Article 22.2 of the DSU by the United States* (WT/DS291/39).

[9] *See, e.g., United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint): Recourse to Article 22.2 of the DSU, and Articles 4.10 and 7.9 of the SCM Agreement, by the European Union* (WT/DS353/17) ("Accordingly, pursuant to Article 22.2 of the DSU and Articles 4.10 and 7.9 of the SCM Agreement, the European Union requests the DSB to grant authorization to the European Union to take countermeasures that are appropriate, and commensurate with the degree and nature of the adverse effects determined to exist, respectively. Based on currently available data, countermeasures consistent with these standards total approximately USD 12 billion annually. The European Union may update this amount annually using the most recently available data.").

[10] *See United States – Continued Dumping and Subsidy Offset Act of 2000: Recourse by India to Article 22.2 of the DSU* (WT/DS217/23) ("Pursuant to Article 22.2 of the DSU, India requests the authorization of the DSB to suspend the application to the United States of tariff concessions and related obligations under GATT 1994 in an amount that will be determined every year by the amount of offset payments made to affected domestic producers in the latest annual distribution of anti-dumping and countervailing duties under the CDSOA, as explained below.").

- Article 22.6 provides that the matter shall be referred to arbitration if the Member concerned objects to the level of nullification and impairment indicated in the request.

- This is the only basis upon which the request for suspension would not be granted by the DSB under Article 22.6.

- Absent an objection "to the level of suspension proposed", the U.S. request for authorization is the item before the DSB, and "the DSB, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request".

- The DSU does not provide for any other outcome under these circumstances.

- We therefore will continue to insist that the DSB must grant the authorization as requested by the United States.

Third Intervention

- Regarding the EU's statement, we continue to be surprised by a suggestion by any delegate that the U.S. request is somehow deficient and does not specify the proposed level of suspension requested. It does: "the United States requests authorization from the DSB to suspend concessions or other obligations with respect to India at an annual level based on a formula commensurate with the trade effects caused to the interests of the United States by the failure of India to comply with the recommendations and rulings of the DSB."

- Consider the EU's request under Article 22.2 of the DSU in *United States – Measures Affecting Trade in Large Civil Aircraft* (Second Complaint) (WT/DS353). There, the EU "request[ed] the DSB to grant authorization to the European Union to take countermeasures that are appropriate, and commensurate with the degree and nature of the adverse effects determined to exist, respectively."[11] This statement is not unlike the framing of the U.S. request. We would also refer delegations to other requests, such as Indonesia's request in *United States – Measures Affecting the Production and Sale of Clove Cigarettes* (WT/DS406), where Indonesia did not include a monetary value or a detailed formula.[12] That request is almost identical to the request that the United States submitted in this dispute.

[11] WT/DS353/17.

[12] WT/DS406/12.

- Nonetheless, the issue of what "should" be included in a request under Article 22.2 is not before the DSB today.

- The issue is whether India has objected consistently with Article 22.6 of the DSU.

- We note that the EU has stated that it understands India to have objected that "the principles and procedures of paragraph 3 have not been followed." If that is India's position, they should confirm this.

- Alternatively, Japan indicated it understands India to be objecting to the level of suspension proposed. If India were to confirm that it is, in fact, objecting to the level of suspension proposed, that would assist Members in this discussion.

- But we have not heard India articulate such objections – not in their "objection" submitted before this meeting or in their statement today. And the fact that they have not clarified the basis of their objection today leads us to understand they are in fact not objecting to the level of suspension proposed by the United States, but rather to the sufficiency of the request, which is not a basis for referral to arbitration.

- Therefore, without clarification from India, the United States insists that the DSB must today authorize the suspension of concessions as requested.

Fourth Intervention

- The United States does not consider India's "objection" notification of January 3, 2018, to have clearly objected to the level of suspension proposed by the United States. However, as India has now clarified that it is objecting to the U.S. request on that basis, we understand that, upon India's objection, the matter was referred to arbitration.