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

Geneva, March 27, 2018

ADOPTION OF THE AGENDA

- We thank the delegation of China for providing advance notice of its intention to make a statement under Other Business. This notice is called for under Rule 6 of the General Council Rules of Procedure, which the DSB also applies.

- Under those Rules, in particular, Rule 25, "[r]epresentatives should avoid unduly long debates". Rule 25 also provides that "[d]iscussions on substantive issues. . . shall be avoided, and the [DSB] shall limit itself to taking note of the announcement by the sponsoring delegation" and any reaction by another delegation "directly concerned".

- We trust that any statement made under Other Business will be consistent with this rule.

- As a delegation "directly concerned," the United States will provide a reaction to China's statement.

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.181)

- The United States provided a status report in this dispute on March 15, 2018, 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.155)

- The United States provided a status report in this dispute on March 15, 2018, 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.

Second Intervention

- As we have previously stated, these criticisms are completely unfounded. The intellectual property protection that the United States provides within its own territory equals or surpasses that of any other Member. Indeed, we find it interesting that a Member that continues to criticize the U.S. commitment to strong intellectual property rights has a domestic record of protecting intellectual property rights that appears less than robust, to say the least.

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.118)

- The United States thanks the European Union ("EU") for its status report and its statement today.

- The United States reiterates its ongoing concerns that the EU measures affecting the approval of biotech products continue to involve prolonged, unpredictable, and unexplained delays at every stage of the approval process. These delays have affected the products previously approved by the EU, and continue to affect the dozens of applications that still await approval.

- Further, even when the EU finally approves a biotech product, the EU has facilitated the ability of individual EU member States to impose bans on the supposedly approved product. In particular, the EU has adopted legislation that allows EU member States to "opt out" of certain approvals, even where the European Food Safety Authority has concluded that the product is safe.

- The United States urges the EU to ensure that all of its measures affecting the approval of biotech products, including measures adopted by individual EU member States, are supported by scientific evidence, and that decisions are taken without undue delay.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

D. UNITED STATES – ANTI-DUMPING AND COUNTERVAILING MEASURES ON LARGE RESIDENTIAL WASHERS FROM KOREA: STATUS REPORT BY THE UNITED STATES (WT/DS464/17/ADD.3)

- The United States provided a status report in this dispute on March 15, 2018, in accordance with Article 21.6 of the DSU.

- On December 15, 2017, the United States Trade Representative requested that the U.S. Department of Commerce make a determination under section 129 of the *Uruguay Round Agreements Act* to address the DSB's recommendations relating to the Department's countervailing duty investigation of washers from Korea. On December 18, the Department of Commerce initiated a proceeding to make such determination. Since that time, the Department issued initial and supplemental questionnaires seeking additional information necessary to conduct the section 129 proceeding.

- The United States continues to consult with interested parties on options to address the recommendations of the DSB relating to antidumping measures challenged in this dispute.

2. UNITED STATES – CONTINUED DUMPING AND SUBSIDY OFFSET ACT OF 2000: IMPLEMENTATION OF THE RECOMMENDATIONS ADOPTED BY THE DSB

A. STATEMENT BY THE EUROPEAN UNION

- 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 has acknowledged that the Deficit Reduction Act does not permit the distribution of duties collected on goods entered after October 1, 2007, more than 10 years ago.

- With respect to the EU's request for status reports in this matter, as we have already explained at previous DSB meetings, there is no obligation under the DSU to provide further status reports once a Member announces that it has implemented the DSB recommendations and rulings, regardless of whether the complaining party disagrees about compliance.

- And as we have noted many times previously, the EU has demonstrated repeatedly it shares this understanding, at least when it is the responding party in a dispute. Once again, this month the EU has provided no status report for disputes in which there is a disagreement between the parties on the EU's compliance.

6. UNITED STATES – COUNTERVAILING MEASURES ON SOFTWOOD LUMBER FROM CANADA

A. REQUEST FOR THE ESTABLISHMENT OF A PANEL BY CANADA (WT/DS533/2)

- We are disappointed that Canada has chosen to move forward with a request for panel establishment.

- We have explained to Canada that the measures in its request are fully consistent with U.S. obligations under the WTO Agreement.

- We also would like to point out that the panel request before the DSB today identifies a measure that did not exist at the time that Canada requested consultations with the United States, namely the countervailing duty order on softwood lumber from Canada. This measure was published more than one month after Canada requested consultations.

- Canada cannot request the establishment of a panel to review a measure that did not exist at the time of its consultations request, and which necessarily was not the subject of consultations.

- For these reasons, the United States urges Canada to reconsider its decision to pursue a panel in this dispute, and we are not in a position to agree to the establishment of a panel at this time.

7. UNITED STATES – ANTI-DUMPING MEASURES APPLYING DIFFERENTIAL PRICING METHODOLOGY TO SOFTWOOD LUMBER FROM CANADA

A. REQUEST FOR THE ESTABLISHMENT OF A PANEL BY CANADA (WT/DS534/2)

- As for the prior agenda item, we are disappointed that Canada has chosen to move forward with a request for panel establishment.
- We have explained to Canada that the measures in its request are fully consistent with U.S. obligations under the WTO Agreement.
- In addition, we observe that Canada has identified in its panel request a measure that did not exist at the time that Canada requested consultations with the United States, namely the antidumping order on softwood lumber from Canada. This measure was published more than one month after Canada requested consultations.
- It is not appropriate for a Member to request the establishment of a panel to review a measure that did not exist at the time of its consultations request, and which necessarily was not the subject of consultations.
- The United States takes note of Canada's references to Articles 4.9 and 10.4 of the DSU in its panel request. The United States does not see the basis on which Canada considers that Articles 4.9 and 10.4 of the DSU are relevant to this matter.
- First, Canada's panel request makes no attempt to explain why it considers this to be a case of urgency under Article 4.9. Softwood lumber from Canada is not a perishable good.
- Second, Canada has no basis for relying on Article 10.4 of the DSU. That article concerns measures already the subject of a panel proceeding. Canada's panel request refers to "[t]he U.S. anti-dumping measures applying the Differential Pricing Methodology ('DPM') to certain softwood lumber products from Canada." As the final determination in the antidumping investigation of softwood lumber from Canada was issued this past November, clearly it is not the case that those measures are already the subject of a panel proceeding.
- For these reasons, the United States is not in a position to agree to the establishment of a panel.

Second Intervention

- The assertion that Canadian producers will suffer irreparable harm lacks foundation. Such alleged harm is no different from the harm alleged by nearly all complainants in WTO dispute settlement. If mere assertion of an alleged harm were sufficient to invoke Article 4.9 of the DSU, as Canada appears to suggest, then every WTO dispute would be a case of urgency.

- The existence of Appellate Body findings or DSB recommendations in prior disputes concerning allegedly similar issues does not make this a case of urgency within the meaning of Article 4.9 of the DSU.

- With respect to Article 10.4 of the DSU, we continue to struggle to understand Canada's assertion that measures issued in November 2017 were somehow already subject to a panel proceeding that occurred several years prior.

9. APPELLATE BODY MATTERS

A. APPELLATE BODY APPOINTMENTS: PROPOSAL BY ARGENTINA; AUSTRALIA; PLURINATIONAL STATE OF BOLIVIA; BRAZIL; CANADA; CHILE; CHINA; COLOMBIA; COSTA RICA; DOMINICAN REPUBLIC; ECUADOR; EL SALVADOR; THE EUROPEAN UNION; GUATEMALA; HONDURAS; HONG KONG, CHINA; INDIA; ISRAEL; KAZAKHSTAN; KOREA; MEXICO; NEW ZEALAND; NICARAGUA; NORWAY; PAKISTAN; PANAMA; PARAGUAY; PERU; THE RUSSIAN FEDERATION; SINGAPORE; SWITZERLAND; THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU; TURKEY; UKRAINE; URUGUAY AND VIET NAM (WT/DSB/W/609/REV.2)

- The United States thanks the Chair for his continued work on these issues.
- We are not in a position to support the proposed decision.
- We have listened carefully to the interventions of other Members at recent meetings and appreciate the willingness expressed by some Members to engage on the important issues and concerns we have raised.
- However, the Dispute Settlement Body has not yet addressed the problem of persons continuing to serve on appeals well after their terms have expired.
- Under the Dispute Settlement Understanding, it is the DSB that has the authority to appoint Appellate Body members and to decide when their term in office expires,[1] and so it is up to the DSB to decide whether a person who is no longer an Appellate Body member can continue to serve on an appeal.
- At the February 28 meeting of the DSB, the United States drew Members' attention to questions raised by the Appellate Body's unsolicited "Background Note on Rule 15." We noted that, in several respects, the document failed to provide a correct or complete presentation of the issue, and therefore failed to contribute to Members' consideration of this issue.
- In light of the troubling omissions we identified, we would request additional information to understand the reasons for these omissions.

[1] *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Arts. 17.1, 17.2 ("DSU").

- For example, we called Members' attention to the statements in the background note that "[m]any international adjudicative bodies follow transitional rules or practices similar to Rule 15" and "the statutes of some international tribunals contemplate that the term of office of an adjudicator is automatically extended until a successor is appointed."[2]

- The background note only acknowledges that no rule providing for the extension of a member's term until a successor is appointed exists in the DSU.[3]

- However, in analogizing to the rules of "some international tribunals" that remain unnamed, the document fails to acknowledge a key fact apparent from even a cursory review of such rules – which one would assume was undertaken to support the analogy – that the rules for those other tribunals are based on their constitutive texts.

- Last month, the United States pointed to the example of the Statute of the International Court of Justice, which is annexed to and an integral part of the United Nations Charter.[4]

- For the benefit of other Members, we would like to share what we have learned reviewing the rules applying to other international tribunals. This review confirms that the issue of *who* may continue to serve and decide a dispute is not a mere "working procedure" to be decided by the tribunal.

- For example, like in the case of the International Court of Justice, the Statute of the International Tribunal for the Law of the Sea sets out for that Tribunal in Article 5(3) a transition rule for departing members.[5]

- Similarly, for the European Court of Human Rights, Article 23(3) of the European Convention on Human Rights sets out a rule for judges who have been replaced.[6]

---

[2] Background Note, para. 3.
[3] Background Note, para. 3.
[4] Statute of the International Court of Justice, Art. 13(3) ("The members of the Court shall continue to discharge their duties until their places have been filled. Though replaced, they shall finish any cases which they may have begun."); UN Charter, Art. 92 ("The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter.").
[5] Statute of the International Tribunal for the Law of the Sea, Art. 5(3) ("The members of the Tribunal shall continue to discharge their duties until their places have been filled. Though replaced, they shall finish any proceedings which they may have begun before the date of their replacement.").
[6] European Convention on Human Rights, Art. 23(3) ("The judges shall hold office until replaced. They shall, however, continue to deal with such cases as they already have under consideration.").

- Unlike those other tribunals, Rule 15 is not set out in the constitutive text of the WTO dispute settlement system – the DSU. It has therefore not been agreed to by WTO Members. We would appreciate understanding from the Appellate Body why this basic difference between the DSU and "some international tribunals" was not reflected in what was purported to be a background document.

- We also previously called Members' attention to the Appellate Body's assertion in the Background Note that "[u]ntil recently, the application of Rule 15 has *never been called into question* by any participant or third participant in any appeal, *nor has it been criticized by any Member in the DSB* when an Appellate Body report signed by an AB Member completing an appeal pursuant to Rule 15 was adopted by the DSB."[7]

- This statement is misleading at best. The language appears to have been very carefully crafted to avoid mentioning that Rule 15 was, in fact, "criticized by [a WTO] Member in the DSB" and was "called into question" at the time of its adoption.

- In particular, India had stated explicitly that Rule 15 – and, specifically, the continuation of an Appellate Body member after the expiry of his or her term without the approval of the DSB – raised a "systemic concern" and "was contrary to Article 17.1 of the DSU."[8]

- The criticism of Rule 15 in the DSB by a WTO Member at the time of its adoption is the type of basic information one would expect to be included in a document with the intention to make an objective presentation of the issue. Its omission raises serious concerns.

- We would appreciate receiving information from the Appellate Body explaining why India's intervention was not drawn to the attention of WTO Members in this document. We would further appreciate understanding why the Appellate Body's statement was drafted in the manner it was.

- Finally, as we also noted at the last meeting, only one Member has attempted to offer a substantive explanation of the legality of Rule 15. China asserted that the "rotation"

---

[7] Background Note, para. 2 (italics added).

[8] DSB Meeting Minutes for February 21, 1996 at 12 (WT/DSB/M/11) (March 19, 1996): India raised "a systemic concern with regard to Rule 15 which implied that the Appellate Body could authorize a member to continue to be a member after it ceased to be a member. This was contrary to Article 17.1 of the DSU which, inter alia, provided that a standing Appellate Body shall be established by the DSB and that it shall be composed of seven persons. Rule 15 would lead to a situation where the Appellate Body could consist of more than seven members or an Appellate Body member continued after the expiry of his term without the approval of the DSB. While the practical need for the provision contained in Rule 15 was understandable, he would be seriously concerned if a member of the Appellate Body could continue without concurrence or approval by the DSB. This Rule provided for notification to the DSB instead of approval and therefore was in violation of Article 17.1 of the DSU."

required by the DSU provides the legal basis for Rule 15. As we explained, that argument exhibits a fundamental misunderstanding of the DSU.

- Article 17.1 provides, in relevant part, that the Appellate Body "shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body." Rotation, as used in this provision, is concerned with ensuring variation among the individuals serving in different appeals.

- But the very provision speaks of "*[p]ersons serving* on the Appellate Body" – not "person[s] who [have] *cease[d]* to be a Member of the Appellate Body."[9] The DSU provision on "rotation" has no relevance to the question raised by Rule 15 – continued service on an appeal by an individual who has ceased to be a member of the Appellate Body.

- In conclusion, as we noted previously, some WTO Members may be comfortable with the situation of former members continuing to act as though they are still members of the Appellate Body, but it is not legal under our multilaterally agreed rules.

- The United States remains resolute in its view that Members need to resolve that issue first before moving on to the issue of replacing such a person. We therefore will continue our efforts and our discussions with Members and with the Chair to seek a solution on this important issue.

[9] Working Procedures for Appellate Review, Rule 15: "A person who ceases to be a Member of the Appellate Body may, with the authorization of the Appellate Body and upon notification to the DSB, complete the disposition of any appeal to which that person was assigned while a Member, and that person shall, for that purpose only, be deemed to continue to be a Member of the Appellate Body.").

OTHER BUSINESS: U.S. SECTION 301 INVESTIGATION OF CHINA'S LAWS, POLICIES, PRACTICES, OR ACTIONS RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION: STATEMENT BY CHINA

- The United States would be pleased to discuss at length the seriously trade distorting policies adopted by China that are the subject of the ongoing Section 301 investigation mentioned in China's statement. It is these policies, and not responses by the United States or other Members, that are a threat to the international trading system.

- As Members are aware, however, pursuant to DSU rules, substantive discussions under Other Business are to be avoided.

- Accordingly, we will keep our comments brief. All interested Members, however, are invited to engage in a careful review of the detailed factual report issued in the course of the investigation. The report is approximately 200 pages in length, and is available on the USTR website.

- The report contains extensive evidence that China engages in the following four types of practices involving technology transfer:

- First, China uses foreign ownership restrictions, such as joint venture requirements and foreign equity limitations, and various administrative review and licensing processes, to require or pressure technology transfer from U.S. companies.

- Second, China's regime of technology regulations forces U.S. companies seeking to license technologies to Chinese entities to do so on non-market-based terms that favor Chinese recipients.

- Third, China directs and unfairly facilitates the systematic investment in, and acquisition of, U.S. companies and assets by Chinese companies to obtain cutting-edge technologies and intellectual property and generate the transfer of technology to Chinese companies.

- Fourth, China conducts and supports unauthorized intrusions into, and theft from, the computer networks of U.S. companies to access their sensitive commercial information and trade secrets.

- These policies harm every Member, and every industry in every Member, that relies on technology for maintaining competitiveness in world markets and increasing its people's standards of living.

- Instead of addressing its harmful policies, China accuses the United States of "unilateralism."

- This criticism has absolutely no validity. The United States made no findings in the Section 301 investigation that China breached its WTO obligations.

- From the outset of the investigation, the United States was clear that where an act, policy, or practice appeared to involve WTO rules, the United States would pursue the matter through WTO dispute settlement.

- In fact, one of the areas of investigation – involving technology licensing – appears to be amenable to WTO dispute settlement. In particular, certain technology licensing measures adopted by China appear to deny patent rights to foreign IP holders and discriminate against foreign IP holders. Thus, China's measures appear to be inconsistent with China's obligations under the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPs Agreement).

- Accordingly, last Friday, March 23, 2018, the United States initiated a WTO dispute on this issue.[10] The consultation request has been circulated, and WTO Members may review the request to see the TRIPS Agreement issues involved.

- And to be absolutely clear, the United States made no findings in the Section 301 investigation that the licensing measures at issue are inconsistent with China's TRIPs Agreement obligations. Rather, as for any WTO dispute, the matter will be resolved by the parties or findings may be sought through WTO dispute settlement.

- In contrast, the three other categories of measures covered in the U.S. investigation do not appear to implicate specific WTO obligations. Nonetheless, if China wishes to inform the DSB that the three other sets of acts, policies, and practices covered in the Section 301 investigation do amount to breaches of WTO rules, it may do so now.

- Accordingly, China's argument that the United States has somehow acted inconsistently with Article 23 of the DSU is completely lacking in foundation. Indeed, by asserting that the United States has breached the DSU, it is China itself that is acting inconsistently with Article 23.

- More broadly, the WTO system is not threatened – as China claims – where a Member takes steps to address harmful, trade distorting policies not directly covered by WTO rules. To the contrary, what does threaten the WTO is where a Member, such as China,

[10] *China — Certain Measures Concerning the Protection of Intellectual Property Rights* (DS542).

asserts that the mere existence of the WTO prevents any action by any Member to address unfair, trade-distorting policies – unless those policies are currently subject to WTO dispute settlement.

- If the WTO is seen instead as protecting those Members that choose to adopt policies that can *be shown* to undermine the fairness and balance of the international trading system, then the WTO and the international trading system will lose all credibility and support among our citizens.