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

Geneva, June 22, 2018

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.184)

- The United States provided a status report in this dispute on June 11, 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.159)

- The United States provided a status report in this dispute on June 11, 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

- By intervening under this item, China attempts to give the appearance of concern for intellectual property rights. At last month's DSB meeting, we discussed at some length some significant and trade distorting shortcomings in China's treatment of intellectual property. If China is interested in discussing the protection of intellectual property rights, the United States is certainly willing to cooperate by bringing that matter to the DSB's attention again.

- For now, we can say that, as the companies and innovators of China and other Members well know, the intellectual property protection that the United States provides within its own territory equals or surpasses that of any other Member.

- Indeed, as China also well knows, none of the damaging technology transfer practices of China that were discussed last month are practices that Chinese companies or innovators face in the United States.

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.122)

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

- As noted at the previous DSB meeting, the United States has ongoing concerns with the EU's approval of biotech products. We continue to see prolonged, unpredictable, and unexplained delays at every stage of the approval process. The delays have affected the products previously approved by the EU, and continue to affect the dozens of applications that have been awaiting approval for months or years.

- 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. As we have noted at previous DSB meetings, the EU has adopted legislation that permits EU member States to "opt out" of certain approvals, even where the European Food Safety Authority ("EFSA") has concluded that the product is safe.

- In its intervention at the May DSB meeting, the EU once again asserted that this "opt out" legislation[1] is not covered by the DSB recommendations and rulings, and that no EU country has imposed a ban. As we have explained, the EU cannot seriously maintain that measures serving to move a Member further out of compliance are not relevant to the DSB's surveillance of a Member's implementation.

- We further note that the EU's opt out legislation permits EU member States to restrict for non-scientific reasons certain uses of EU-authorized biotech products in their territories. And thus far, at least seventeen member States, as well as certain regions within EU member States, have submitted requests to opt out of EU approvals.

- The United States again 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] EU Directive 2015/412.

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.6)

- The United States provided a status report in this dispute on June 11, 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. Following initiation, Commerce issued initial and supplemental questionnaires seeking additional information.

- On April 4, 2018, Commerce issued a preliminary determination revising certain aspects of its original determination. Following issuance of the preliminary determination, Commerce provided interested parties with the opportunity to submit comments on the issues and analysis in the preliminary determination and rebuttal comments. Commerce reviewed those comments and rebuttal comments and took them into account for purposes of preparing the final determination.

- On June 4, 2018, Commerce issued a final determination, in which Commerce revised certain aspects of its original determination. Specifically, Commerce revised the analysis underlying the CVD determination, as it pertains to certain tax credit programs, in accordance with findings adopted by the DSB.

- 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.

<u>Second Intervention</u>

- The United States has explained to Korea the special challenges arising from the recommendations in this dispute.

- Nevertheless, Korea has requested authorization pursuant to Article 22.2 of the DSU to suspend concessions and other obligations. Korea's decision to proceed in that regard is disappointing, and not constructive.

- As the United States objected to the level of suspension proposed by Korea, the matter has been referred to arbitration pursuant to Article 22.6 of the DSU.

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

- 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.

- In fact, last month the DSB adopted two further reports finding that the EU and four of its member States – France, Germany, Spain, and the United Kingdom – have failed to comply in the *EU – Large Civil Aircraft* dispute (DS316). Despite those findings, and despite the U.S. view that the EU has not complied in that dispute, the EU has not submitted a status report this month.

- We fail to see how the EU's behavior is consistent with the alleged systemic view it has been espousing under this item for more than 10 years.

- We will comment further on the EU's double-standard – one for itself, the other for other WTO Members – in the U.S. statement under Other Business.

- As the EU is aware, the United States has announced in this dispute that it has implemented the DSB's recommendations and rulings. If the EU disagrees, there would simply appear to be a disagreement between the parties to the dispute about the situation of compliance.

3. UNITED STATES – MEASURES AFFECTING THE CROSS-BORDER SUPPLY OF GAMBLING AND BETTING SERVICES

A. STATEMENT BY ANTIGUA AND BARBUDA

- The United States does not understand why Antigua has chosen to place this matter on the agenda of today's DSB meeting.

- As the United States has explained at past meetings of the DSB, the United States has responded to the DSB findings in this dispute by invoking the multilateral procedure under Article XXI of the *General Agreement on Trade in Services* ("GATS") for modifying the U.S. schedule of concessions. Under GATS Article XXI, Members may make modifications in their schedules in a manner that maintains a balance of benefits among Members.

- In that process, the United States has offered to all interested Members a generous package of services concessions as compensation for removing internet gambling from the U.S. schedule. With one exception, each and every Member that expressed interest in this process has accepted the U.S. offer. The one exception is Antigua.

- Instead of engaging in the Article XXI process, Antigua has made extreme demands, including requests for monetary payments. Such payments are not part of the GATS Article XXI process. Nor are they provided for under the DSU.

- Despite Antigua's failure to engage in the Article XXI process, the United States has expended substantial efforts to resolve this matter with Antigua on a bilateral basis.

- For example, in 2008, the United States worked for months with Antigua on a settlement package. We understood that the parties had reached agreement. But Antigua subsequently repudiated it.

- The United States also offered Antigua a broad range of useful suggestions to settle this dispute in November 2013. Antigua ignored the U.S. offer for a long period of time, and then sent very mixed signals for months as to whether the offer was acceptable. Ultimately, Antigua again chose to walk away from a settlement offer that would have provided real benefits to the people of Antigua.

- Most recently, the current U.S. Administration formally communicated with Antigua that the United States was prepared for further discussions. We have received no response.

- For these reasons, Antigua's decision to place this matter on the agenda today appears to be a political statement, rather than an effort to engage on a resolution of this dispute.

- With respect to the suggestion that this matter be referred to mediation or good offices, the United States considers that a serious effort to re-engage in negotiations would be more productive than referring the matter to a third party.

Second Intervention

- The statement by the representative of Antigua that a communication from the current U.S. Administration does not exist is a serious accusation. We would respectfully suggest there appears to be some misunderstanding or miscommunication.

- Our records show that the United States wrote to Antigua and noted that we look forward to further discussions. Antigua has not responded.

- Furthermore, we have a number of channels for less formal communication. Antigua also has not made use of those channels.

- In any event, the United States remains prepared to discuss this matter bilaterally.

5. STATEMENT BY THE UNITED STATES CONCERNING ARTICLE 17.5 OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES

- The United States requested this agenda item to draw Members' attention to the repeated issuance of Appellate Body reports beyond the 90-day deadline mandated in the DSU.

- For too long, the Appellate Body has ignored the clear text of the DSU. We want Members to read that rule together and to decide: do the words in the WTO Agreement matter? Or is the Appellate Body free to disregard and effectively re-write those words whenever it thinks that is necessary or appropriate?

- Similarly, for too long, WTO Members have failed to fulfill their responsibility, acting through the DSB, to apply and administer the relevant rules. Although some Members have spoken out, by failing to acknowledge and address this problem collectively, we have worsened the problem, as the facts will show.

- Through this statement, the United States intends to re-start a discussion among Members on whether we understand and respect the rules we have written. To facilitate that discussion, in this statement we will highlight five aspects of this issue for Members.

- First, we will highlight the text of Article 17.5 and the mandatory requirement to complete appeals in no more than 90 days, with no exceptions.

- Second, we explain that the Appellate Body's pre-2011 practice respected this rule and, when there were deviations, it was only with the agreement of the parties.

- Third, we will draw Members' attention to the inexplicable change in the Appellate Body's practice in 2011.

- Fourth, we will discuss the result of this change; namely, appeals are taking longer and longer.

- Finally, we will conclude by explaining the serious consequences for the WTO dispute settlement system of the Appellate Body's repeated, flagrant breach of Article 17.5.

First: The DSU is designed to promote prompt settlement of disputes and mandates that appeals be completed in no more than 90 days, with no exceptions

- The prompt settlement of disputes is a cornerstone of WTO dispute settlement. In Article 3 of the DSU, Members agreed that "[t]he prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is *essential to the effective functioning of the WTO and the maintenance of a proper balance between rights and obligations*."

- The principle of prompt settlement is enshrined in numerous provisions of the DSU, including Article 17.5 in particular.

- Article 17.5, which concerns appellate proceedings, provides that: "As a general rule, the proceedings shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report." It's worth pausing here. Appeals are not supposed to take 90 days. They are supposed to be completed in 60 days "as a general rule".

- But WTO Members recognized that would not always be possible, and so they provided for the possibility to extend the appeals period. The third sentence of Article 17.5 provides: "When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report."

- And then the final sentence of Article 17.5 provides: "In no case shall the proceedings exceed 90 days." This statement is categorical – it uses the terms "in no case" and "shall" – and therefore sets the outside limit of an extension of the appeals period at 90 days.

- Article 17.5 therefore does not accord discretion to the Appellate Body to issue reports beyond the 90-day deadline. In the early days, the Appellate Body itself recognized this. For example, when the Appellate Body first issued its working procedures, it explained to the DSB that the timeframes for WTO Members' submissions had to be short as a "consequence of Article 17(5) of the DSU, which states that … in no case shall [the proceedings] go beyond 90 days".[2]

- The Appellate Body's working procedures, at Rule 23*bis*, paragraph 3, also refer to "the requirement to circulate the appellate report within the time-period set out in Article 17.5". Thus, if any Member considers today that Article 17.5 does not mean exactly what it says, we would simply point out that, some 20 years ago, the Appellate Body understood Article 17.5 to mean exactly what it says.

Second: The Appellate Body's past practice respected the 90-day deadline in Article 17.5

- An examination of the Appellate Body's pre-2011 practice demonstrates that it made every effort to comply with the requirements of the DSU. From the first appeal in 1996, in *US – Gasoline*, up to the appeal in *US – Tyres (China)* in 2011 – a span of 15 years, covering 101 appeals – the Appellate Body either met the 90-day requirement or, in a limited number of appeals, consulted and obtained the agreement of the parties to exceed the 90-day deadline.

- In fact, for 87 of those appeals, the Appellate Body issued its report within the 90 day deadline, including in complex appeals, such as *EC – Bananas*, *US – Steel Safeguards*, *EC – Tariff Preferences*, *US – Offset Act*, *Japan – DRAMs*, and others.

- In the other 14 of those appeals, the Appellate Body was concerned it would not be able to meet the 90-day requirement, and it therefore consulted with the parties and obtained their consent to go beyond that period. This was done in a transparent manner, and was reflected in the Appellate Body's report or a communication from the Appellate Body to the DSB.

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[2] *See, e.g.*, Communication from the Appellate Body, *Working Procedures for Appellate Review*, WT/AB/WP/W/1 (Feb. 7, 1996), pp. 2-3 ("You will notice that the time limits set out in the Working Procedures for Appellate Review are short. *This is the inevitable consequence of Article 17(5) of the DSU, which states that as a general rule, the proceedings shall not exceed 60 days, and in no case shall go beyond 90 days, from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report*. It is our view that the timeframes we have established for the filing of submissions and an oral hearing with the parties are reasonable *within the constraints imposed by the DSU* and afford due process to all parties concerned while at the same time providing the Appellate Body with the time it requires for careful study, deliberation, decision-making, report-writing by the division and subsequent translation of the Appellate Report.") (emphasis added).

- For example, in *European Communities – Export Subsidies on Sugar*, the Appellate Body Report reflects the following agreement of the parties to the dispute (the European Communities, Australia, Brazil, and Thailand):

> After consultation with the Appellate Body Secretariat, the European Communities and Australia, Brazil, and Thailand agreed, in letters filed on 19 January 2005, that it would not be possible for the Appellate Body to circulate its Report in this appeal within the 90-day time limit referred to in Article 17.5 of the DSU. *The European Communities and Australia, Brazil, and Thailand accordingly confirmed that they would deem the Appellate Body Report in this proceeding, issued no later than 28 April 2005, to be an Appellate Body Report circulated pursuant to Article 17.5 of the DSU*.[3]

- The practice of Members' submitting so-called "deeming letters", which was an explicit recognition that issuing a report outside of the 90-day period was not consistent with Article 17.5 of the DSU, was followed in at least ten appeals.[4]

- During this time, Members also cooperated in other ways to facilitate the ability of the Appellate Body to meet the 90-day deadline. At the request of the parties to the dispute, the DSB several times agreed to take DSB decisions to extend the time period for adoption or appeal of panel reports so that the appeal could be considered at a time when the Appellate Body would be better placed to issue its report within 90 days.[5]

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[3] *EC – Export Subsidies on Sugar (AB)*, para. 7.

[4] *See, e.g.*, *US – Upland Cotton (AB)*, WT/DS267/AB/R, para. 8; *EC – Export Subsidies on Sugar*, WT/DS265/AB/R, para. 7; *Mexico – Anti-Dumping Measures on Rice*, WT/DS295/AB/R, para. 7; *US – Upland Cotton (Article 21.5 – Brazil) (AB)*, WT/DS267/AB/RW, para. 14; *US – Antidumping and Countervailing Duties (China)*, WT/DS379/7; *EC – Fasteners (China)*, WT/DSB/M/301, para. 11; *United States – Continued Suspension of Obligations in the EC – Hormones Dispute (AB)*, WT/DS320/AB/R, & *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute (AB)*, WT/DS321/AB/R, para. 29 (adopted 14 November 2008) (letters by the European Communities, the United States, and Canada); Joint Communication from the United States and Mexico, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/13 (19 April 2012); and Joint Communication from the United States and China, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/14 (13 January 2012).

[5] *See, e.g.*, *EC – Export Subsidies on Sugar*, WT/DS265/24, WT/DS266/24, WT/DS283/5 (procedural agreements between the EC, Australia, Brazil, and Thailand to extend the 60-day time-period in Article 16.4 of the DSU); *US – Zeroing (EC)*, WT/DS294/11; *Brazil – Retreated Tires*, WT/DS332/8 (joint request by the European Communities and Brazil for a Decision by the DSB); *EC – Bananas III*,

- For example, in the context of the *EC – Fasteners* dispute, the European Union and China sought a DSB decision extending the 60-day time period for negative consensus adoption of the panel report in Article 16.4 of the DSU.[6] At a meeting held on January 25, 2011, the DSB agreed to the jointly-proposed decision.[7]

Third: In 2011, the Appellate Body began ignoring the 90-day requirement, and some WTO Members expressed significant concerns

- The Appellate Body's commitment to respecting the 90-day rule was commendable, and surely entailed significant efforts on the part of those AB Members and the Secretariat staff then assisting them. However, later that year (2011), starting with the appeal in *US – Tyres (China)*, the Appellate Body, without explanation, departed from the long-established practice of consulting and obtaining the parties' consent where it considered it could not meet the 90-day requirement.

- At the time of the adoption of the report in that dispute, the United States informed the DSB of the approach taken by the Appellate Body in that appeal and expressed its concern:

> Pursuant to Article 17.5 of the DSU, the Appellate Body had notified the DSB through a letter circulated on 27 July that it would not be able to complete its Report within 60 days. While the notice had informed the DSB of the expected circulation date, it had not noted that this date was beyond the 90-day deadline. Moreover, contrary to past practice, the notification had made no mention of whether the parties had been consulted on this issue or whether each party had agreed. Neither did the Appellate Body Report mention these issues. And in fact, both parties had not agreed that the Report could be provided beyond the 90-day deadline specified in Article 17.5 of the DSU.[8]

WT/DS27/87 (procedural agreement between Ecuador and the European Communities regarding the Time-Period under Article 16.4 of the DSU); *Thailand Cigarettes*, WT/DS371/7 (Joint Request by Thailand and the Philippines for a Decision by the DSB); and *EC Fasteners*, WT/DS397/6.

[6] Joint Request by the European Union and China for a Decision by the DSB (WT/DS397/6).

[7] Minutes of the DSB Meeting on January 25, 2011 (WT/DSB/M/291), p. 15.

[8] Minutes of the DSB Meeting on October 5, 2011 (WT/DSB/B/304), para. 4.

- That was the first time the Appellate Body had operated in such a manner. In sharing its concerns, the United States expressed its view that the issuance of a report by the Appellate Body beyond the 90-day deadline in the DSU, without meaningful consultations with the parties, and even more importantly without the affirmative agreement of the parties, should not be repeated in the future.[9] At that same DSB meeting where the report was considered for adoption, several other Members similarly expressed concerns with the Appellate Body's approach, including Japan, Australia, Chile, Argentina, Costa Rica, and Guatemala.[10]

- Unfortunately, those statements did not change the Appellate Body's new approach. Other reports were issued beyond the 90-day deadline, without consultation with the parties, as we will review shortly. And the Appellate Body did so despite the fact that at least 10 WTO Members continued to express concerns in the DSB in relation to at least 10 reports issued beyond the time limit in Article 17.5.[11]

- Despite the Appellate Body's change in practice, at least for a period of time, Members continued to cooperate to address the legal uncertainty raised by the Appellate Body's breach of Article 17.5.

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[9] Minutes of the DSB Meeting on October 5, 2011 (WT/DSB/B/304), para. 6.

[10] *See, e.g.*, Minutes of the DSB Meeting on October 5, 2011 (WT/DSB/304), paras. 4-7, 11-20.

[11] *See, e.g.*, Minutes of the DSB Meeting on February 22, 2012 (WT/DSB/M/313) (adoption of report in *China – Raw Materials*; statements by the United States, Canada, Japan, Costa Rica, Norway, Australia, and Guatemala); Minutes of the DSB Meeting on March 23, 2012 (WT/DSB/M/313) (adoption of report in *US – Large Civil Aircraft*; statements by the United States and Japan); Minutes of the DSB Meeting on June 13, 2012 (WT/DSB/M/317) (adoption of report in *US – Tuna II*; statements by the United States, Japan and Mexico); Minutes of the DSB Meeting on July 10, 2012 (WT/DSB/M/319) (in relation to the appeal in *US – COOL*; statements by the United States, Canada, and Mexico); Minutes of the DSB Meeting on July 23, 2012 (WT/DSB/M/320) (adoption of report in *US – COOL*; statements by the United States, Costa Rica, Japan, Australia, Guatemala, and Turkey); Minutes of the DSB Meeting on June 18, 2014 (WT/DSB/M/346) (adoption of report in *EC – Seals*; statements by the United States, Guatemala, Norway, and Japan); Minutes of the DSB Meeting on December 19, 2014 (WT/DSB/M/354) (adoption of report in *US – Carbon Steel (India)*: statement by the United States); Minutes of the DSB Meeting on January 16, 2015 (WT/DSB/M/355) (adoption of report in *US – CVD (China)*; statements by the United States, Australia, and Canada); Minutes of the DSB Meeting on January 26, 2015 (WT/DSB/M/356) (adoption of reports in *Argentina – Import Measures*; statements by the United States, Japan, Chinese Taipei, Australia, Canada, and Norway); Minutes of the DSB Meeting on May 29, 2015 (WT/DSB/M/362) (adoption of reports in *US – COOL 21.5*, statements by Canada and the United States); and Minutes of the DSB Meeting on June 19, 2015 (WT/DSB/M/364) (adoption of the report in *India – Agricultural Products*; statements by the United States, Norway, and Japan).

- For example, in the context of the *China – Raw Materials* dispute, despite the failure of the Appellate Body to seek the consent of the parties, the United States and China submitted a joint communication indicating they agreed to extend the 90-day deadline for completion of the appeal, and would deem the report to be an Appellate Body report circulated pursuant to Article 17.5 of the DSU. The text of the joint US-China deeming letter read as follows:

> Prior to the initiation of the appeal in the above referenced dispute, the Appellate Body Secretariat requested to meet with the United States and China to discuss scheduling issues relating to a possible appeal. The Secretariat informed the parties that the Appellate Body considered that it would not be possible to circulate the Appellate Body Report in an appeal within the 90-day time limit referred to in Article 17.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"). In light of the complex appeal under consideration by the Appellate Body and the numerous issues likely to arise in an appeal in this dispute, the United States and China agreed to extend the 90-day deadline for completion of the Appellate Body Report.
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> On 28 October 2011, the Appellate Body informed the DSB of its reasons for the delay in providing its report and stated that the report "will be circulated to Members no later than Tuesday, 31 January 2012". Consistent with past practice, the United States and China hereby confirm that they will each deem an Appellate Body Report in this proceeding, issued no later than 31 January 2012, to be an Appellate Body Report circulated pursuant to Article 17.5 of the DSU.[12]

- Unfortunately, Members' cooperation did not continue as some Members became unwilling to take action to address this problem. For instance, in the original appeal in the *US – COOL* disputes, Canada, Mexico, and the United States jointly requested the DSB to adopt a decision to deem an appellate report in each dispute "circulated by the Appellate Body no later than 29 June 2012, to be an Appellate Body report circulated pursuant to Article 17.5 of the DSU."[13]

[12] Joint Communication from the United States and China (WT/DS394/14).

[13] WT/DS384/15 and WT/DS386/14.

- The parties explained that consideration by the DSB of the draft decision and adoption of that decision would serve several useful purposes:

> First, through circulation of the draft decision and consideration at a DSB meeting, the issue is given full transparency. Members of the DSB can give due consideration to the reasons cited by the Appellate Body in its communication for circulation outside the 90-day time limit as well as the reasons cited by the parties to the disputes for putting forward the draft decision. Through circulation of the draft decision, the parties to the disputes are informing other Members of their agreement to the circulation of the appellate reports outside the 90-day time limit. The parties consider that it would be desirable that the Appellate Body consult with the parties and have their agreement, and this draft decision informs other Members of the parties' agreement. Through the process of consideration of the draft decision, Members will therefore be fully apprised of the circumstances under which the reports may come before the DSB for adoption.
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> Second, the parties consider it desirable that the DSB provide greater certainty on the adoption procedure that will apply to the reports. The reports will be put before the DSB for adoption by all Members. Any Member may observe that the 90-day deadline in Article 17.5 of the DSU has not been met. The parties to the disputes consider that in these circumstances it would be appropriate also for the DSB to agree to deem the reports to be Appellate Body reports pursuant to Article 17.5 of the DSU. Without prejudice to any Member's systemic views on the proper adoption procedure, the draft decision, if adopted by the DSB, would increase certainty with respect to the adoption process.
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> Finally, the parties note that the language of the draft decision has been drawn from the letters filed by a number of Members in numerous past appeals, through which the parties to those disputes have expressed their willingness to deem the reports in those appeals to be Appellate Body reports pursuant to Article 17.5 of the DSU. [14]

[14] WT/DS384/15 and WT/DS386/14.

- Unfortunately, some WTO Members indicated informally they would not support the proposed DSB decision. That choice was, and is, regrettable. Those WTO Members chose to ignore a clear breach of the DSU. They refused to recognize the role of WTO Members to administer the rules of the DSU. They refused to support the parties to the dispute to address a serious procedural concern. And, as we shall see, their refusal apparently encouraged the Appellate Body to exceed the 90 days more frequently and by increasing amounts.

- It is also worth noting that the parties, in the communication for that proposed decision, already identified that there were concerns related to the adoption procedure for reports circulated after the 90-day deadline in the DSU. This was six years ago – this is not a new issue.

Fourth: Since 2011, the Appellate Body has frequently and increasingly breached its 90 days obligation

- Prior to the appeal in *US – Tyres (China)* in 2011, excluding the EU and US large civil aircraft disputes, the average length of an appeal was approximately 90 days. As noted, in those rare instances where the Appellate Body exceeded 90 days, it did so with the agreement of the parties to the dispute.

- However, since the Appellate Body's unexplained change of approach in 2011, the situation is very different. The average length of appeals since then, again excluding the EU and US large civil aircraft disputes, is approximately 149 days. That is, an appeal has taken, on average, 59 more days, which is an increase of 66 percent (two-thirds).

- In fact, if one considers only the appeals since 2014, the problem is even more striking. Since May 2014, not a single appeal has been completed within the 90-day deadline. The average over that 4.5 year period is 163 days.

- What is clear from the data is that the length of appeals has continued to increase from the point at which the Appellate Body stopped respecting the 90-day deadline established by Members in Article 17.5 of the DSU. That is, once the Appellate Body asserted that it had the authority to take whatever time it considers appropriate for individual appeals, it also apparently decided that the appropriate time period would, almost always, be more than 90 days.

- It is also worth noting that the Appellate Body has also stopped observing the obligation in Article 17.5 of the DSU to provide the DSB with an estimate of the period within which it will submit its report. Recent communications from the Appellate Body simply inform Members that the Appellate Body will not meet the 90-day deadline, without providing any estimated date for when the Appellate Body will circulate a report.

- This problem may also relate to other systemic concerns Members have expressed. For example, an appeal will take longer where the Appellate Body spends valuable time addressing issues that are not necessary to resolve a dispute.

Fifth: The Appellate Body creates reasons for breaching the rule rather than changing its behavior to ensure compliance with the rule

- The Appellate Body has for many years apparently considered that it is not possible to issue reports within the 90-day deadline. The United States has two reactions to that notion: first, we do not see objective evidence to support it; second, and more importantly, that it is not within the Appellate Body's authority to disregard or amend the DSU.

- On the first point, the Appellate Body seems to assert that under Article 17.12, it must "address each of the issues raised" in the appeal – as if this means that the report must write an interpretation and reach the merits on each issue. But we know this is not true because the Appellate Body itself has, over and over, exercised judicial economy on issues on appeal – which means it does *not* address the merits of that claim.[15] And it is appropriate to exercise judicial economy because to "address" an issue does not mean to write an interpretation; it means to think about and dispose of the issue appropriately, which could also mean *not* writing an interpretation.[16]

- Appellate Body reports also provide compelling evidence that the Appellate Body is not making every effort to issue its reports within 90 days. How do we know this? Because in multiple appeals, the Appellate Body has reached issues not necessary to resolve the appeal.

[15] *See, e.g., US – Upland Cotton (AB)*, paras. 510-511, 747, where the Appellate Body refrained from interpreting provisions of the covered agreements where doing so was "unnecessary for the purposes of resolving [the] dispute." *See also India – Solar Cells (AB)*, paras. 5.156-5.163.

[16] Oxford Dictionary online: "Address" (third definition): "think about and begin to deal with (an issue or problem)".

- In this regard, we recall that the report in *Argentina – Measures Relating to Trade in Goods and Services* was issued 167 days after the notice of appeal, but more than two-thirds of the Appellate Body's analysis – 46 pages – was in the nature of obiter dicta. In that appeal, having resolved the first, threshold issue of "likeness", it would have been appropriate to stop the analysis at that point. Instead, the Appellate Body went on to consider issues on appeal that the Appellate Body itself considered not necessary to resolve the dispute.[17]

- Similarly, as we explained with regard to the appeal in *Indonesia Import Licensing* last year, once the Division in that appeal found that Article XI:1 continued to apply to agricultural products and upheld the Panel's findings that each of the challenged measures was inconsistent with that provision, the Division could and should have refrained from substantively addressing the remainder of Indonesia's claims, none of which had any potential to alter the DSB recommendations and rulings.[18] Unfortunately, it did not so refrain, and the report was issued 265 days after the date of appeal.

- Similarly, at the last DSB meeting, the United States explained that the appeal in *EU – Countervailing Measures on Certain PET from Pakistan* could and should have been resolved upon Pakistan's statement that it sought no recommendation on the EU's withdrawn measure. In this regard, we agreed with the EU's appeal that Pakistan's alleged "dispute" was a purely advisory exercise. And as we explained at the last DSB meeting, the United States further agreed with the EU that the DSU does not grant WTO adjudicators the authority to issue advisory opinions regarding the interpretation of provisions of the covered agreements in the abstract, and outside the context of resolving a dispute.[19] And yet the report in that dispute was issued 258 days after the notice of appeal.

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[17] *Argentina – Measures Relating to Trade in Goods and Services (AB)*, para. 6.83 ("Our reversal of these findings [on likeness] means that the Panel's findings on "treatment no less favourable" are moot because they were based on the Panel's findings that the relevant services and service suppliers are "like". Moreover, as a consequence of our reversal of the Panel's "likeness" findings, *there remains no finding of inconsistency with the GATS. This, in turn, renders moot the Panel's analysis* . . . pursuant to Article XIV(c) of the GATS and . . . paragraph 2(a) of the GATS Annex on Financial Services." (italics added)). But after clarifying that all of the Panel's findings other than "likeness" were rendered moot, the Appellate Body in paragraph 6.84 states that "[w]ith these considerations in mind, we turn to address the issues raised in Panama's appeals." That is, after clarifying that Panama's appeals concern "moot" panel findings, the Appellate Body goes on to address those moot appeals. That approach does not reflect the role of dispute settlement as set out in the DSU and, as the report was issued after 90 days, is in breach of Article 17.5 of the DSU.

[18] *See* U.S. Statement at November 22, 2017, DSB Meeting at https://geneva.usmission.gov/wp-content/uploads/2017/11/Nov22.DSB_.pdf (item 5).

[19] *See* U.S. Statement at May 28, 2018, DSB Meeting at https://geneva.usmission.gov/wp-content/uploads/2018/05/May28.DSB_.Stmt_.as-deliv.fin_.public.pdf (item 10).

- These reports and others therefore do not support the notion that it is not possible for the Appellate Body to comply with the 90-day rule in DSU Article 17.5.

- Second, and more importantly, it is simply not the Appellate Body's place to disregard or amend the DSU.

- In the absence of a DSU amendment, or other appropriate DSB action, Article 17.5 sets out a rule. The 90-day deadline was recently referred to as a "great rule"; whether it is, or is not, it is a "rule". Because WTO Members have not amended Article 17.5 to provide for an exception, it is the responsibility of the Appellate Body to follow that rule.

- When a rule is not followed, the Appellate Body diminishes the rights of WTO Members, contrary to DSU Article 3.2, and undermines confidence in the WTO as a whole.

Sixth: It is past time for WTO Members to meet their responsibility to administer the WTO rules-based system according to the rules

- We urgently need to find solutions to this rule-breaking. Of course, WTO Members themselves may assist by focusing their appeals on issues that are material to the outcome of the dispute. And the Appellate Body can approach appeals by focusing on addressing only those issues necessary to resolve a dispute promptly.

- But most importantly, a rules-based system needs the adjudicators to follow the rules of the system.

- It is simply not tenable for the Appellate Body, in seeking to help ensure Members observe their obligations under the WTO agreements, to itself ignore the requirements of the DSU.

- Members will recall that we have had discussions recently on the consequences of issuance of an appellate report that is not in conformity with Article 17 of the DSU. As this statement makes clear, Article 17.5 and the 90-day deadline is a fundamental rule and critical piece of Article 17. The consequence of the Appellate Body choosing to breach DSU rules and issue a report after the 90-day deadline would be that this report no longer qualifies as an Appellate Body report for purposes of the exceptional negative consensus adoption procedure of Article 17.14 of the DSU. No party should bear uncertainty as to the adoption of a report due to the adjudicator's unwillingness to follow the rules or obtain the DSB's agreement to deviate from those rules.

- If Members fail to take responsibility for administering and maintaining the system, and do nothing to address this growing problem, we can expect the length of appeals to continue to grow, as they have for the last seven years.

- We can expect the dispute settlement system to move further way from the principle of prompt settlement reflected in DSU Article 3.

- We can expect that the system would become even less effective for resolving disputes, diminishing WTO Members' desire and willingness to bring their disputes to the WTO.

- The consequence will be to further erode support for the dispute settlement system and for the WTO as a whole.

- If any Member disagrees with our understanding of the plain text of Article 17.5, we look forward to hearing how you read that obligation. For any other Member, we look forward to engaging you to finally address this longstanding, and still urgent, problem.

6. CANADA – MEASURES GOVERNING THE SALE OF WINE IN GROCERY STORES (SECOND COMPLAINT)

A. REQUEST FOR THE ESTABLISHMENT OF A PANEL BY THE UNITED STATES (WT/DS531/7)

- In 2017, the United States requested consultations with Canada regarding regulations governing the sale of wine in grocery stores in the Canadian province of British Columbia ("BC"). Consultations failed to resolve the dispute.

- As set out in the U.S. request for the establishment of a panel, the BC regulations governing the sale of wine in grocery stores appear to breach Canada's WTO obligations.

- Specifically, the measures at issue appear to be inconsistent with Article III:4 of the GATT 1994 because they accord less favorable treatment to imported products than to like products of national origin.

- The BC regulations exclude all imported wine from grocery store shelves, an important retail channel for wine sales in BC. It is obvious that such discriminatory measures limit sales opportunities for U.S. wine producers and provide a substantial competitive advantage for BC wine.

- These regulations adversely affect U.S. wine producers. Indeed, these measures disadvantage all wine producers not from British Columbia. The United States urges Canada and all Canadian provinces, including BC, to adhere to WTO obligations.

- For these reasons, the United States requests that the DSB establish a panel to examine the matter set out in the U.S. panel request.

7. UNITED STATES – ANTI-DUMPING MEASURES ON FISH FILLETS FROM VIET NAM

A. REQUEST FOR THE ESTABLISHMENT OF A PANEL BY VIET NAM (WT/DS536/2)

- We regret that Viet Nam has sought the establishment of a panel in this matter.
- As the United States has explained to Viet Nam, the determinations identified in Viet Nam's request for panel establishment are fully consistent with WTO rules.
- Furthermore, Viet Nam seeks to challenge certain items that are not measures and would not fall within the scope of a dispute settlement proceeding.
- For these reasons, the United States does not agree to the establishment of a panel today.

9. APPELLATE BODY APPOINTMENTS: PROPOSAL BY VARIOUS MEMBERS (WT/DSB/W/609/REV.4)

- The United States thanks the Chair for the continued work on these issues.

- As we have explained in prior meetings, we are not in a position to support the proposed decision.

- The systemic concerns that we have identified remain unaddressed. For example, concerns arise from the Appellate Body's decisions that purport to "deem" as an Appellate Body member someone whose term of office has expired and thus is no longer an Appellate Body member, pursuant to its Working Procedures for Appellate Review (Rule 15).

- We note the respect that some Members expressed at the last meeting the need for the DSB to observe its obligations under the DSU. In this regard, we recall that it is the DSB, not the Appellate Body, that has the authority to appoint Appellate Body members and to decide when their term in office expires,[20] and so it is up to the DSB, not the Appellate Body, to decide whether a person who is no longer an Appellate Body member can continue to serve on an appeal.

- This is an area of responsibility that the DSB needs to address, and we appreciate that Members have expressed a willingness to engage on this issue.

- In past months, we have drawn attention to at least two aspects of the Appellate Body's unsolicited background note on Rule 15 that raise concerns. We noted that the document failed to provide a correct or complete presentation of the issue, including on past Member statements and other international tribunals. We have asked for clarification to be provided by the Appellate Body on those misstatements and continue to await an answer.

- The United States remains resolute in its view that Members need to resolve that issue as a priority. A number of ideas have been mentioned in the context of informal discussions in which we have participated, representing a diversity of views on possible solutions. We therefore will continue our efforts and our discussions with Members and with the Chair to seek a solution on this important issue.

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

OTHER BUSINESS: STATEMENT BY INDONESIA CONCERNING INDONESIA – IMPORT LICENSING (DS477/DS478)

- The United States is glad that the parties to the dispute have agreed that the reasonable period of time for Indonesia to comply with the DSB recommendations and rulings shall be eight months.

- Accordingly, we look forward to hearing from Indonesia regarding its compliance when the reasonable period of time expires on July 22, 2018.

- The United States notes that the parties have also agreed in a separate letter that Indonesia will have more time to make the statutory changes concerning Measure 18.

OTHER BUSINESS: STATEMENT BY THE UNITED STATES CONCERNING EC – LARGE CIVIL AIRCRAFT (DS316)

- Under Rule 25 of the General Council Rules of Procedures, which the DSB also applies, "[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". The United States will therefore be brief in its statement under this item.

- The text of Article 21.6 of the DSU is clear: following adoption by the DSB of a recommendation to a Member to bring its WTO-inconsistent measure into compliance with the covered agreements, a Member is to provide status reports on "*its progress in the implementation* of the recommendations". Therefore, there is no obligation to provide a further status report in a given dispute, once a Member announces that it *has implemented* the DSB recommendations, regardless of whether the complaining party disagrees about compliance.

- The EU, however, has been equally clear that it considers Article 21.6 of the DSU to require status reports, so long as there is a disagreement between the parties about compliance.

- For this reason, we were disappointed to see that the EU did not apply its own "systemic" position on status reports and did not file a status report for the *EU – Large Civil Aircraft* dispute, or even request an agenda item for this meeting.

- As was made clear at the last DSB meeting, the United States considers the EU has failed to comply in this dispute, and this is a view that has been confirmed by two sets of conclusions.

- It is now nearly one month later, and yet the only information we have regarding the EU's supposed compliance with the recommendations and rulings of the DSB is a document circulated on May 17th.

- This document does not reflect new developments that might somehow resolve this longstanding dispute. The document makes various assertions that are so vague they indicate nothing about what, if anything, may have been done.

- The EU has been arguing for a decade that its financing of Airbus reflected market benchmarks. Four sets of dispute reports have disagreed with that assertion. In this light, and without any concrete information from the EU, one cannot give any credence to the EU's assertions regarding compliance.

- Given the WTO's most recent non-compliance findings, and given that the EU has provided no basis for the United States to agree with its newest compliance claim, on what basis did the EU not provide a status report this month?

- Perhaps the EU considers that, despite the clear view the EU has expressed in countless meetings of the DSB, there is a caveat that excuses the EU from submitting a status report in this dispute. In the past, the EU has suggested that the EU rule didn't apply because compliance proceedings were ongoing. Now that those proceedings have concluded (with a finding of EU non-compliance), perhaps the EU will say the rule still does not apply because they have requested new consultations based on the "mystery measures" that the EU has not been able to describe.

- Whatever the justification the EU provides, we would ask where Members can find the text for this EU rule in Article 21.6 or elsewhere in the DSU. That text is likely to be as elusive as the EU's compliance steps in this dispute.

- In fact, the rule the EU appears to be applying is the same rule it has followed in every other dispute as a responding party. There is no obligation under the DSU to continue supplying status reports once a responding Member announces that it has implemented the DSB's recommendations.