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

Geneva, August 28, 2020

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.207)

- The United States provided a status report in this dispute on August 17, 2020, 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.182)

- The United States provided a status report in this dispute on August 17, 2020, in accordance with Article 21.6 of the DSU.

- The U.S. Administration will continue to confer with the European Union, and to work closely with the U.S. Congress, in order to reach a mutually satisfactory resolution of this matter.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

C. EUROPEAN COMMUNITIES - MEASURES AFFECTING THE APPROVAL AND MARKETING OF BIOTECH PRODUCTS: STATUS REPORT BY THE EUROPEAN UNION (WT/DS291/37/ADD.145)

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

- We appreciate the update during the last DSB meeting that the EU has scheduled its next Standing Committee on genetically modified food and feed for September 15, 2020. We request that the Standing Committee move forward with this meeting without delay, as the past four meetings have been canceled (which were originally scheduled for March 6, April 20, June 12, and July 10).

- We certainly understand the impact that COVID-19 restrictions have had on daily operations. However, the United States continues to see persistent delays that affect dozens of applications that have been awaiting approval for an extended period – delays that existed long before COVID-19 restrictions came into effect.

- The EU has previously suggested that, with respect to these delays, the fault lies with the applicants. We disagree; our concerns relate to delays at every stage of the approval process resulting from the actions or inactions of the EU and its member States.

- Currently, approximately twenty (20) applications are pending risk management decisions in the standing committee on biotech and two (2) await final approval by the European Commission. Three (3) of these applications have been going through the EU approval system for over 10 years.

- We urge the European Union to adopt final approvals for those products that have completed evaluation by the Standing Committee. We also urge the Standing Committee and Commission to issue final approvals for those products that have successfully received an EFSA positive opinion, yet remain under the Committee's "internal procedures".

- As we stated at the last DSB meeting, we do not acknowledge the EU's claims that there is no ban on genetically engineered (GE) products in the EU.

- Rather, the EU has failed to lift all of the WTO-inconsistent member-State bans covered by the DSB recommendation.

- The DSB adopted findings that, even where the EU had approved a particular product, in many instances EU member States banned those products for certain uses without a scientific basis.

- This includes not only the two member States subject to panel findings – Austria and Italy.

- There are seven additional member States that previously maintained bans on cultivation and have since opted out of cultivation under the EU's legislation: Bulgaria, France, Germany, Greece, Hungary, Luxembourg, and Poland.

- There are also eight member States that did not previously ban cultivation of MON-810 but have since opted out of cultivation under the EU's legislation: Croatia, Cyprus, Denmark, Latvia, Lithuania, Malta, the Netherlands, and Slovenia.

- Further, Austria and Italy appear to maintain bans on other products subject to specific panel findings.

- The EU's only response, which it continues to repeat, is that the member States do not restrict marketing or free movement of MON-810 in the EU. As we noted at the prior DSB meeting, this answer does nothing to address U.S. concerns.

- We also disagree with the EU's response during the last DSB meeting that opt-out procedures taken by member States are "proportional, non-discriminatory and based on compelling grounds." The restrictions adopted by EU member States restrict international trade in these products, and have no scientific justification.

- Furthermore, despite the assertions of the EU during the last DSB meeting, this situation exists regardless of whether or not the European Commission receives "complaints" from seed operators or stakeholders. Indeed, this is why the DSB adopted findings that such restrictions on MON-810 are in breach of the EU's WTO commitments.

- 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 based on scientific principles, and that decisions are taken without undue delay.

- We look forward to addressing the EU's other comments in the coming months and during the next US-EU biannual consultation, which we intend to schedule for Fall 2020.

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.29)

- The United States provided a status report in this dispute on August 17, 2020, in accordance with Article 21.6 of the DSU.

- On May 6, 2019, the U.S. Department of Commerce published a notice in the U.S. Federal Register announcing the revocation of the antidumping and countervailing duty orders on imports of large residential washers from Korea (84 Fed. Reg. 19,763 (May 6, 2019)). With this action, the United States has completed implementation of the DSB recommendations concerning those antidumping and countervailing duty orders.

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

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

E. UNITED STATES – CERTAIN METHODOLOGIES AND THEIR APPLICATION TO ANTI DUMPING PROCEEDINGS INVOLVING CHINA: STATUS REPORT BY THE UNITED STATES (WT/DS471/17/ADD.21)

- The United States provided a status report in this dispute on August 17, 2020, in accordance with Article 21.6 of the DSU.

- As explained in that report, the United States continues to consult with interested parties on options to address the recommendations of the DSB.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

F. INDONESIA – IMPORTATION OF HORTICULTURAL PRODUCTS, ANIMALS AND ANIMAL PRODUCTS: STATUS REPORT BY INDONESIA (WT/DS477/21 – WT/DS478/22/ADD.16)

- The United States thanks Indonesia for its status report but is concerned that Indonesia has not brought its measures into compliance with WTO rules.

- The United States and New Zealand agree that significant concerns remain with the measures at issue, including the continued imposition of: harvest period restrictions, import realization requirements, warehouse capacity requirements, limited application windows, limited validity periods, and fixed licensed terms.

- The United States remains willing to work with Indonesia to fully and meaningfully resolve this dispute.

- We understand that Indonesia claims to have "completed its enactment process" of certain regulations, but we are still waiting to hear from Indonesia on whether and how such action would bring its measures into full compliance. It also remains unclear how Indonesia's proposed legislative amendments would address Measure 18 and when Indonesia will complete its process.

- The United States looks forward to receiving further detail from Indonesia regarding the changes to its regulations and laws, especially with respect to Ministry of Agriculture Regulation 46/2019 on Strategic Horticultural Commodities.

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 more than 14 years ago in February 2006.

- The Deficit Reduction Act does not permit the distribution of duties collected on goods entered after October 1, 2007, more than 12 years ago. Accordingly, the United States long ago implemented the DSB's recommendations and rulings in these disputes.

- Even aside from this, it is evidently not commonsense that is driving the EU's approach to this agenda item. On June 26, the EU notified that it would apply an additional duty of 0.012 percent on certain imports of the United States. That is 12 thousandths of one percent. There is no trade rationale for inscribing this item month after month.

- The EU has erroneously referred to a "clear obligation" under Article 21.6 for the United States to submit a status report in this dispute.

- As we have explained repeatedly, there is no obligation under the DSU for a Member to provide further status reports on the progress of its implementation once that Member announces that it *has implemented* the DSB recommendations.

- The widespread practice of Members – including the European Union as a responding party – confirms this understanding of Article 21.6.

- Indeed, at recent meetings, two Members (Brazil and China) have informed the DSB that they have come into compliance with the DSB recommendations in three disputes (DS472, DS497, and DS517), and the complaining parties did not accept the claims of compliance.

- Those Members announcing compliance have not provided a status report for today's meeting, consistent with the understanding that there is no obligation for a Member to provide further status reports once that Member announces that it has implemented the DSB recommendations.

- The EU is a complaining party in one of those disputes (DS472). If the EU believes status reports are "required" under the DSU, it would have insisted that the responding Member provide a status report, or the EU would have inscribed that dispute as an item on today's agenda. The EU did not.

- Therefore, it is once again clear that the European Union does not truly believe that there is a "clear obligation" under Article 21.6 to submit a status report after a party has claimed compliance.

3. EUROPEAN COMMUNITIES AND CERTAIN MEMBER STATES – MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT: IMPLEMENTATION OF THE RECOMMENDATIONS ADOPTED BY THE DSB

A. STATEMENT BY THE UNITED STATES

- The United States notes that once again the European Union has not provided Members with a status report concerning the dispute *EC – Large Civil Aircraft* (DS316).

- As we have noted at several recent DSB meetings, the EU has argued – under a different agenda item – that where the EU as a complaining party does not agree with another responding party Member's "*assertion* that it has implemented the DSB ruling," "the issue remains unresolved for the purposes of Article 21.6 DSU."

- Under this agenda item, however, the EU argues that by submitting a compliance communication, the EU no longer needs to file a status report, even though the United States as the complaining party does *not* agree with the EU's assertion that it has complied.

- The EU's position appears to be premised on two unfounded assertions, neither of which is based on the text of the DSU.

- First, the EU has erroneously argued that where "a matter is with the adjudicators, it is temporarily taken out of the DSB's surveillance."

- There is nothing in the DSU text to support that argument, and the EU provides no explanation for how it reads DSU Article 21.6 to contain this limitation.

- Second, the EU once again relies on its incorrect assertion that the EU's initiation of compliance panel proceedings means that the DSB is somehow deprived of its authority to "maintain surveillance of implementation of rulings and recommendations." Yet again, there is nothing in Article 2 of the DSU or elsewhere that limits the DSB's authority in this manner.

- The EU is not providing a status report because of its assertion that it has complied, demonstrating the EU's principles vary depending on its status as complaining or responding party.

- In sum, the U.S. position on status reports has been consistent and clear: under Article 21.6 of the DSU, once a responding Member announces to the DSB that it has complied, there is no further "progress" on which it can report, and therefore no further obligation to provide a status report.

- But as the EU allegedly disagrees with this position, it should for future meetings provide status reports in this DS316 dispute.

Second Intervention

- The United States is aware that the EU recently filed yet another notice of supposed compliance. The United States disagrees that the EU has achieved compliance.

- Instead, the United States agrees with the second compliance panel report, which found that 8 EU launch aid subsidies continue to cause adverse effects.

- The EU only asserts that it has amended 2 of these 8 measures; it admittedly has made no changes to 6 WTO-inconsistent measures. And, unfortunately, the amendments the EU made to French and Spanish A350 XWB launch aid are marginal and insufficient to withdraw those subsidies.

- The EU has also expressed doubt about U.S. compliance in DS353 (*US – Large Civil Aircraft*). But no one can deny that Washington State terminated the aerospace tax break – and the EU has not denied it. The text of the measure is public, and its terms were notified to the WTO and the EU. This is the sole measure found to cause adverse effects in the compliance proceeding.

- The United States is committed to obtaining a long-term resolution to this dispute. The United States recently showed great restraint in its review of WTO-authorized countermeasures for the EU's WTO-inconsistent launch aid subsidies. And the United States intends to begin a new process with the EU in an effort to reach an agreement that will remedy the conduct that harmed the U.S. aviation industry and workers and will ensure a level playing field for U.S. companies.

5. CHINA - DOMESTIC SUPPORT FOR AGRICULTURAL PRODUCERS

A. RECOURSE TO ARTICLE 21.5 OF THE DSU BY CHINA: REQUEST FOR THE ESTABLISHMENT OF A PANEL (WT/DS511/19)

- As we have stated previously, the United States is not in a position to agree with China that it has come into compliance with the DSB recommendations in this dispute.

- To recall, the DSB found that China provided domestic support to its agricultural producers in excess of its Aggregate Measure of Support (AMS) commitments under the *Agreement on Agriculture*.

- The DSB adopted these rulings in April 2019. Since then, China continues to provide significant levels of domestic support to its agricultural producers.

- The revised market price support measures notified by China in June do not themselves demonstrate that China now provides a level of domestic support within its commitment levels. Therefore, China has not demonstrated that its AMS (as calculated per the *Agreement on Agriculture*) will be within its commitment level in 2020. As such, the United States cannot at this time confirm China's assertion of compliance.

- The United States has reserved its right to suspend concessions under Article 22.6 of the DSU, and the level of nullification and impairment resulting from China's provision of domestic support in excess of its AMS commitments has been referred to arbitration. We have paused that proceeding. We understand that China does not seek further litigation but is requesting a panel to preserve its rights as well.

- Contrary to the position taken by China, nothing in the DSU supports the view that an Article 22.6 arbitration proceeding must be suspended while the corresponding Article 21.5 proceedings are ongoing.

- Members have at times agreed through *voluntary* agreements on the sequencing of proceedings or otherwise to conduct proceedings in such an order, but as Members are well aware, this is not required under the DSU. 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 or other obligations within the time frame specified in Article 22.6 of the DSU or risk prejudicing its rights to do so at a later date. Accordingly, in this proceeding, the United States has done so in a timely manner.

- The United States stands ready to work constructively with China to reach a resolution to

this dispute.

- For these reasons, the United States is not in a position to agree to the establishment of a compliance panel.

9. APPELLATE BODY APPOINTMENTS: PROPOSAL BY SOME WTO MEMBERS (WT/DSB/W/609/REV.18)

- As we have explained in prior meetings, we are not in a position to support the proposed decision. The systemic concerns that the United States has identified remain unaddressed. Instead, Members should consider how to achieve meaningful reform of the dispute settlement system.

- The U.S. view across multiple U.S. Administrations has been clear and consistent: When the Appellate Body overreaches and itself breaks WTO rules, it undermines the rules-based trading system.

- The Appellate Body's abuse of the limited authority we Members gave it damages the interests of all WTO Members who care about a WTO in which the agreements are respected as they were negotiated and agreed.

- Earlier this year, the Office of the U.S. Trade Representative published a Report on the Appellate Body of the World Trade Organization, detailing how the Appellate Body has failed to apply WTO rules as agreed by WTO Members, imposing new obligations and violating Members' rights.[1] The United States encourages Members to review the Report.

- As the United States has explained repeatedly, the fundamental problem is that the Appellate Body has not respected the current, clear language of the DSU.

- Members cannot find meaningful solutions to this problem without understanding how we arrived at this point. Without an accurate diagnosis, we cannot assess the likely effectiveness of any potential solution.

- The United States has actively sought engagement from Members on these issues. Yet, some Members have remained unwilling to admit there is even a problem, much less engage in a deeper discussion of the Appellate Body's failures.

- And rather than seeking to understand why the Appellate Body has departed from what Members agreed, these Members and others have now redirected the focus and energies of the Membership to pursue an arrangement that would, at best, perpetuate the failings of the Appellate Body.[2]

- Nevertheless, the United States is determined to bring about real WTO reform. We Members must ensure that the WTO dispute settlement system reinforces the WTO's critical negotiating and monitoring functions, and does not undermine those functions by overreaching and gap-filling.

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[1] United States Trade Representative, *Report on the Appellate Body of the World Trade Organization* (February 2020), available at https://geneva.usmission.gov/wp-content/uploads/sites/290/AB-Report_02.11.20.pdf.
[2] *See* U.S. Statement at the June 29, 2020, Meeting of the Dispute Settlement Body (Item 13), *available at*: https://geneva.usmission.gov/wp-content/uploads/sites/290/Jun29.DSB_.Stmt_.as-deliv.fin_.public13218.pdf.

- As discussions among Members continue, the dispute settlement system continues to function.

- The central objective of that system remains unchanged: to assist the parties to find a solution to their dispute. As before, Members have many methods to resolve a dispute, including through bilateral engagement, alternative dispute procedures, and third-party adjudication.

- As noted at prior meetings of the DSB, Members are experimenting and deciding what makes the most sense for their own disputes.

- For instance, in *Indonesia – Safeguard on Certain Iron or Steel Products* (DS490/DS496), Chinese Taipei, Indonesia, and Vietnam reached procedural understandings that included an agreement not to appeal any compliance panel report.[3]

- Similarly, in the dispute *United States – Anti-Dumping Measures on Certain Oil Country Tubular Goods from Korea* (DS488), Korea and the United States agreed not to appeal the report of any compliance panel.[4]

- Australia and Indonesia have agreed not to appeal the panel report in the dispute *Australia – Anti-Dumping Measures on A4 Copy Paper* (DS529).[5]

- Parties should make efforts to find a positive solution to their dispute, consistent with the aim of the WTO dispute settlement system.

- The United States will continue to insist that WTO rules be followed by the WTO dispute settlement system. We will continue our efforts and our discussions with Members and with the Chair to seek a solution on these important issues.

[3] "Understanding between Indonesia and Chinese Taipei regarding Procedures under Articles 21 and 22 of the DSU", (WT/DS490/3) (April 11, 2019), para. 7 ("The parties agree that if, on the date of the circulation of the panel report under Article 21.5 of the DSU, the Appellate Body is composed of fewer than three Members available to serve on a division in an appeal in these proceedings, they will not appeal that report under Articles 16.4 and 17 of the DSU.") and "Understanding between Indonesia and Viet Nam regarding Procedures under Articles 21 and 22 of the DSU", WT/DS496/14 (March 22, 2019), para. 7 ("The parties agree that if, on the date of the circulation of the panel report under Article 21.5 of the DSU, the Appellate Body is composed of fewer than three Members available to serve on a division in an appeal in these proceedings, they will not appeal that report under Articles 16.4 and 17 of the DSU.").

[4] "Understanding between the Republic of Korea and the United States regarding Procedures under Articles 21 and 22 of the DSU", (WT/DS488/16) (February 6, 2020), para. 4 (" Following circulation of the report of the Article 21.5 panel, either party may request adoption of the Article 21.5 panel report at a meeting of the DSB within 60 days of circulation of the report. Each party to the dispute agrees not to appeal the report of the Article 21.5 panel pursuant to Article 16.4 of the DSU.").

[5] Minutes of the Meeting of the Dispute Settlement Body on January 27, 2020 (WT/DSB/M/440), paras. 4.2 ("Indonesia also wished to thank Australia for working together with Indonesia in a spirit of cooperation in order to reach an agreement not to appeal the Panel Report" and 4.3 ("Australia and Indonesia had agreed not to appeal the Panel Report and to engage in good faith negotiations of a reasonable period of time for Australia to bring its measures into conformity with the DSB's recommendations and rulings, in accordance with Article 21.3(b) of the DSU.").