

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

**Geneva, February 25, 2019**

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.192)
    - The United States provided a status report in this dispute on February 14, 2019, 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.167)

- The United States provided a status report in this dispute on February 14, 2019, 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 noted at prior meetings of the DSB, by intervening under this item, China attempts to give the appearance of concern for intellectual property rights.
- Yet, China has been engaging in industrial policy which has resulted in the transfer and theft of intellectual property and technology to the detriment of the United States and our workers and businesses.
- In contrast, the intellectual property protection that the United States provides within its own territory equals or surpasses that of any other Member.
- Indeed, none of the damaging technology transfer practices of China that we have discussed at recent DSB meetings 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.130)

- The United States thanks the European Union (“EU”) for its status report and its statement today.
- The United States continues to be concerned with the EU’s measures affecting the approval of biotech products. Delays persist and affect dozens of applications that have been awaiting approval for months or years, or that have already received approval.
- Further, even when the EU finally approves a biotech product, EU member States continue to impose bans on the supposedly approved product. As we have highlighted at prior meetings, the EU maintains legislation, in the form of the amendment of EU Directive 2001/18 through EU Directive 2015/413, that permits EU member States to, in effect, restrict or prohibit cultivation of genetically-modified organisms (“GMOs”), even where the European Food Safety Authority (“EFSA”) has concluded that the product is safe. This legislation permits EU member States to restrict for non-scientific reasons certain uses of EU-authorized biotech products in their territories by demanding that EU cultivation authorizations be adjusted to exclude portions of an EU member State’s territory from cultivation. At least seventeen EU member States, as well as certain regions within EU member States, have submitted such requests.
- We again highlight a public statement issued by the EU’s Group of Chief Scientific Advisors on November 13, 2018, in response to the July 25, 2018, European Court of Justice (ECJ) ruling that addresses the forms of mutagenesis that qualify for the exemption contained in EU Directive 2001/18/EC. The Directive was a central issue in dispute in these WTO proceedings, and concerns the deliberate release into the environment of GMOs. The United States takes issue with the EU’s statement at prior DSB meetings that this ECJ ruling does not relate to previously authorized GMOs. This statement is contradicted by the EU Group of Chief Scientific Advisor’s statement, which recognizes that, “in view of the Court’s ruling, it becomes evident that new scientific knowledge and recent technical developments have made the GMO Directive no longer fit for purpose.” The EU Group of Chief Scientific Advisors’ statement speaks to the lack of scientific support for the regulatory framework under EU Directive 2001/18. Further, the statement notes that current scientific knowledge calls into question the definition of “GMOs” under the Directive and notes that mutagenesis, as well as transgenesis, occurs naturally. The United States urges the EU to act in a manner that will bring into compliance the measures at issue in this dispute.

- The United States further 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.

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.14)

- The United States provided a status report in this dispute on February 14, 2019, in accordance with Article 21.6 of the DSU.
- On December 15, 2017, the U.S. 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 response to the 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.

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.6)
    - The United States provided a status report in this dispute on February 14, 2019, 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
  - G. UNITED STATES – ANTI-DUMPING MEASURES ON CERTAIN OIL COUNTRY TUBULAR GOODS FROM KOREA: STATUS REPORT BY THE UNITED STATES (WT/DS488/12/ADD.5)
    - On January 11, 2019, the United States and Korea informed the DSB that the parties had mutually agreed to modify the previously notified reasonable period of time for implementation of the DSB recommendations and rulings pursuant to Article 21.3(b) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*. The reasonable period of time now expires on July 12, 2019.
    - The United States provided a status report in this dispute on February 14, 2019, in accordance with Article 21.6 of the DSU.
    - On November 23, 2018, the U.S. Department of Commerce provided notice in the U.S. Federal Register that it has commenced a proceeding to gather information, analyze record evidence, and consider the determinations which would be necessary to bring the antidumping investigation at issue in this dispute into conformity with the recommendations and rulings of the DSB. The notice is available at 83 F.R. 59359.
    - The United States will continue to consult with interested parties on options to address the recommendations of the DSB.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

H. INDONESIA – IMPORTATION OF HORTICULTURAL PRODUCTS, ANIMALS AND ANIMAL PRODUCTS: STATUS REPORT BY INDONESIA (WT/DS477/21 – WT/DS478/22/ADD.1)

- Regrettably, Indonesia continues to fail to bring its measures into compliance.
- The United States and New Zealand agree that significant concerns remain with the measures at issue including: harvest period restrictions, import realization, warehouse capacity, application windows, validity period, and fixed licensed terms.
- The United States remains willing to work with Indonesia to fully and meaningfully resolve this dispute.
- Although Indonesia and the United States have engaged in bilateral discussions, we are still waiting to hear from Indonesia the concrete actions it will take to bring its measures into full compliance.
- The United States also looks forward to hearing the statutory changes Indonesia intends to make with respect to Measure 18.

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.
- The practice of Members confirms this widespread understanding of Article 21.6. Responding party Members do not continue submitting status reports where the responding Member has claimed compliance and the complaining Member disagrees, as we shall see under the next item concerning the *EU – Large Civil Aircraft* dispute.
- 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. 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 *EU – Large Civil Aircraft* (DS316).
- The United States has raised this same issue at recent past DSB meetings, where the EU similarly chose not to provide a status report.
- As we have noted at several recent DSB meetings, the EU has argued that Article 21.6 of the DSU requires that “the issue of implementation shall remain on the DSB’s agenda until the issue is resolved.” And the EU has argued 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.”
- Yet for this DS316 dispute, the EU just last month conceded that “compliance proceedings in this dispute are still ongoing and whether or not the matter is resolved is the very subject matter of th[e] ongoing litigation.”
- This stated EU position simply contradicts the EU’s actions in this dispute. Given the EU’s failure to provide a status report in this dispute again this month, we fail to see how the EU’s behavior is consistent with the alleged systemic view it has been espousing for more than 10 years.
- Under the EU’s own view, the EU should be providing a status report. Yet it has failed to do so.
- The only difference that we can see is that, now that the EU is a *responding* party, the EU is choosing to contradict the reading of DSU Article 21.6 it has long erroneously promoted.
- The EU’s purported rationale is that it need not provide a status report because it is pursuing a second compliance panel under Article 21.5 of the DSU. But as the United States has explained at past DSB meetings, there is nothing in Article 21.6 of the DSU to support this position.
- By way of contrast, under Article 21.6, a responding party Member provides the DSB with a status report “of its progress in the implementation” of the DSB’s recommendations. But once the Member has announced compliance, there is no further “progress” on which it can report, and therefore no further obligation to provide a report.

- And the conduct of every Member when acting as a responding party, including the EU, shows that WTO Members understand that a Member concerned has no obligation under DSU Article 21.6 to continue supplying status reports once that Member announces that it has implemented the DSB's recommendations.
- As the EU allegedly disagrees with this position, it should for future meetings provide status reports in this DS316 dispute.

5. APPELLATE BODY APPOINTMENTS: PROPOSAL BY VARIOUS MEMBERS  
(WT/DSB/W/609/REV.8)

- 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.
- As the United States has explained at recent DSB meetings, for more than 15 years and across multiple U.S. Administrations, the United States has been raising serious concerns with the Appellate Body's disregard for the rules set by WTO Members.
- Through persistent overreaching, the WTO Appellate Body has been adding obligations that were never agreed by the United States and other WTO Members.
- The 2018 U.S. Trade Policy Agenda outlined several longstanding U.S. concerns.<sup>1</sup>
  - The United States has raised repeated concerns that appellate reports have gone far beyond the text setting out WTO rules in varied areas, such as subsidies, antidumping duties, anti-subsidy duties, standards and technical barriers to trade, and safeguards, all restricting the ability of the United States to regulate in the public interest or protect U.S. workers and businesses against unfair trading practices.
  - And as we explained in recent meetings of the DSB, the Appellate Body has issued advisory opinions on issues not necessary to resolve a dispute and reviewed panel fact-finding despite appeals being limited to legal issues. Furthermore, the Appellate Body has asserted that panels must follow its reports although Members have not agreed to a system of precedent in the WTO, and continuously disregarded the 90-day mandatory deadline for appeals – all contrary to the WTO's agreed dispute settlement rules.
- And for more than a year, the United States has been calling for WTO Members to correct the situation where the Appellate Body acts as if it has the power to permit ex-Appellate Body members to continue to decide appeals even after their term of office – as set by the WTO Members – has expired. This so-called “Rule 15” is, on its face, another example of the Appellate Body's disregard for the WTO's rules.
- Our concerns have not been addressed. When the Appellate Body abuses the authority it was given within the dispute settlement system, it undermines the legitimacy of the

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<sup>1</sup> Office of the U.S. Trade Representative, 2018 President's Trade Policy Agenda, at 22-28.

system and damages the interests of all WTO Members who care about having the agreements respected as they were negotiated and agreed.

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

### Second Intervention

- We note that several Members, including Mexico, the EU, Canada, and China, have referenced the “shall” in the third sentence of Article 17.2 of the DSU.
- We would ask these Members to share their views on the “shall” in the first sentence of that article. That sentence reads, in part, that “[t]he DSB shall appoint persons to serve on the Appellate Body...”.
- Do these Members agree that this provision makes clear that it is the DSB that has the authority to appoint and reappoint members of the Appellate Body? And that the DSB – not the Appellate Body – has the responsibility to decide whether a person whose term of appointment has expired should continue serving, as if a member of the Appellate Body, on any pending appeals?
- Can these Members share their views on the “shall” in Article 17.5 of the DSU? As the text of Article 17.5 provides that “[i]n no case shall the proceedings exceed 90 days”, do these Members agree that the Appellate Body breaches this provision when it issues a report beyond the 90-day deadline?
- What are these Members’ views on the “shall” in Article 17.6? This article provides that “[a]n appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.” Do these Members agree that the Appellate Body does not respect this text when it engages in review of panel findings of fact?
- We look forward to hearing these Members’ views on these questions.
- We also note that at least one Member has said that the United States should table its own proposal. The United States has made its views on these issues very clear: if WTO Members say that we support a rules-based trading system, then the WTO Appellate Body must follow the rules we agreed to in 1995.
- And so, for instance, the Appellate Body must circulate its reports within 90 days of an

appeal.<sup>2</sup>

- A person who has ceased to be an Appellate Body member may not continue deciding appeals as if his term had been extended by the Dispute Settlement Body.<sup>3</sup>
- The Appellate Body may not make findings on issues of fact, including but not limited to those relating to domestic law.<sup>4</sup>
- The Appellate Body may not give advisory opinions on issues that will not assist the DSB in making a recommendation to bring a WTO-inconsistent measure into compliance with WTO rules.<sup>5</sup>
- The Appellate Body may not assert that its reports serve as precedent or provide authoritative interpretations.<sup>6</sup>
- And the Appellate Body may not change Members' substantive rights or obligations as set out in the text of the WTO agreements.<sup>7</sup>
- Rather than seeking to make revisions to the text of the Dispute Settlement Understanding to permit what is now prohibited, the United States believes it is necessary for Members to engage in a deeper discussion of the concerns raised, to consider *why* the Appellate Body has felt free to depart from what WTO Members agreed to, and to discuss *how best* to ensure that the system adheres to WTO rules as written.

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<sup>2</sup> DSU Article 17.5. Statement by the United States Concerning Article 17.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Meeting of the DSB on June 22, 2018, *available at*: [https://geneva.usmission.gov/wp-content/uploads/sites/290/Jun22.DSB\\_.Stmt\\_.as-delivered.fin\\_.public.rev\\_.pdf](https://geneva.usmission.gov/wp-content/uploads/sites/290/Jun22.DSB_.Stmt_.as-delivered.fin_.public.rev_.pdf).

<sup>3</sup> DSU Articles 17.1, 17.2. U.S. Statement at the August 31, 2017, Meeting of the DSB, *available at*: [https://geneva.usmission.gov/wp-content/uploads/sites/290/Aug31.DSB\\_.Stmt\\_.as-delivered.fin\\_.public.pdf](https://geneva.usmission.gov/wp-content/uploads/sites/290/Aug31.DSB_.Stmt_.as-delivered.fin_.public.pdf) and U.S. Statement at the February 28, 2018, Meeting of the DSB, *available at*: [https://geneva.usmission.gov/wp-content/uploads/sites/290/Feb28.DSB\\_.Stmt\\_.as-delivered.fin\\_.public-1.pdf](https://geneva.usmission.gov/wp-content/uploads/sites/290/Feb28.DSB_.Stmt_.as-delivered.fin_.public-1.pdf).

<sup>4</sup> DSU Article 17.6. Statement by the United States Concerning Article 17.6 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* and Appellate Review of Panel Findings of Fact, Including Domestic Law, Meeting of the DSB on August 27, 2018, *available at*: [https://geneva.usmission.gov/wp-content/uploads/sites/290/Aug27.DSB\\_.Stmt\\_.as-delivered.fin\\_.rev\\_.public.pdf](https://geneva.usmission.gov/wp-content/uploads/sites/290/Aug27.DSB_.Stmt_.as-delivered.fin_.rev_.public.pdf).

<sup>5</sup> DSU Articles 7.1, 11, 17.6. Statement by the United States Concerning the Issuance of Advisory Opinions on Issues Not Necessary to Resolve a Dispute, Meeting of the DSB on October 29, 2018, *available at*: [https://geneva.usmission.gov/wp-content/uploads/sites/290/Oct29.DSB\\_.Stmt\\_.as-delivered.fin\\_.rev\\_.public.pdf](https://geneva.usmission.gov/wp-content/uploads/sites/290/Oct29.DSB_.Stmt_.as-delivered.fin_.rev_.public.pdf).

<sup>6</sup> DSU Article 3.9, WTO Agreement Article IX:2.

<sup>7</sup> DSU Articles 3.2, 19.2.