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

Geneva, January 16, 2015

1. US – COUNTERVAILING DUTY MEASURES ON CERTAIN PRODUCTS FROM CHINA

   A. REPORT OF THE APPELLATE BODY (WT/DS437/AB/R) AND REPORT OF THE PANEL (WT/DS437/R and WT/DS437/R/Add.1)

- The United States would like to thank the Panel, the Appellate Body, and the Secretariat staff assisting them for their hard work in this dispute. We appreciate their efforts in dealing with a massive dispute covering a myriad of determinations and claims.

- Unfortunately, and despite those efforts, the Appellate Body report that will be adopted today contains two categories of findings that should be of wide concern to Members: first, the proper role of panels and the Appellate Body under the WTO dispute settlement system; and second, the Appellate Body's findings about how an administering authority needs to treat entities associated with the government for the purpose of determining market benchmarks.

- With respect to the first issue, the Appellate Body report suggests a view of dispute settlement that departs markedly from that set out in the DSU and reflected in numerous prior reports.

- As the United States understands it, the fundamental role of a panel is to consider the evidence and arguments put forward by the complaining party and the responses by the responding party, to make an objective assessment of the matter before it, and to issue a report explaining the basis of its findings. The Appellate Body report suggests that panels and the Appellate Body have a different role: namely, to conduct independent investigations and apply new legal standards, regardless of what either party actually argues to the panel.

- This approach would represent a fundamental departure from prior adopted reports. For example, in the *US – Gambling* dispute, the Appellate Body found that the complaining party must make a *prima facie* case by providing evidence and arguments sufficient to "*explain the basis for* the claimed inconsistency of the measure."[1] And, if the complaining party has not done so, then it would be legal error for the panel to assume the role of developing the *prima facie* case for the complaining party.

- In this dispute, however, the Appellate Body report has assumed the role of the complaining party by making China's *prima facie* case – for the first time – on appeal

1 Appellate Body Report, *US – Gambling*, para. 141.

with respect to a number of different claims. The Appellate Body then went on to find in China's favor by upholding arguments that the Appellate Body had developed itself.

- Equally remarkable, the Appellate Body has found that the panel breached its responsibilities under Article 11 of the DSU by failing to examine arguments never presented by China.

- Due to China's litigation strategy, this is one of the largest disputes ever brought to a WTO panel. In its panel request, China raised "as applied" claims concerning 17 separate countervailing duty proceedings, vaguely alleging dozens of breaches of various provisions of the SCM Agreement,[2] in addition to making broad "as such" claims.

- In presenting its claims to the Panel, China could have approached this as any other dispute, namely, by meeting its *prima* facie burden of evidence and arguments with respect to each claim as applied to each of the subject proceedings. But China chose not to do so. Instead, China relied on sweeping factual and legal generalizations.

- The United States responded to China's arguments in the manner that China presented them. The United States rebutted all of China's incorrect legal positions and all of China's sweeping factual characterizations. The Panel agreed that the United States had rebutted China's arguments, and found – with respect to the vast majority of the China's claims – that China had failed to establish any breach of the SCM Agreement.

- In short, the Panel did exactly what it was supposed to do under the WTO dispute settlement system – it examined the evidence and arguments before it, made an objective assessment, and then issued its report.

- Regrettably, the Appellate Body took a very different approach. Namely, it developed legal interpretations of the SCM Agreement, and then sought to apply those interpretations to the U.S. measures – without regard to the case made by China through the evidence and arguments it actually submitted to the panel. In doing so, the Appellate Body assumed a role more like an investigative authority. This is not a role provided for in the DSU.

- The Appellate Body's troubling approach was particularly striking with respect to China's numerous facts available claims. In the panel proceeding, both the United States and the Panel addressed China's claims in the way that China presented them, as involving broad characterizations of numerous, unrelated determinations. Yet, the Appellate Body found that the panel breached its responsibility under DSU Article 11 by not conducting independent examinations of arguments and issues that were never raised by China. We do not see how a panel can be said to have failed to make an objective assessment of the matter before it by failing to consider arguments that were *not* before it.

2 *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").

- Second, Members should have concerns with certain substantive findings in the Appellate Body report, especially with respect to the treatment of entities associated with the government for the purpose of determining market benchmarks. On the positive side, the report appropriately rejects China's central position that an investigating authority must determine that a state-owned enterprise (SOE) is a "public body" before it decides not to use the prices of SOEs as potential benchmarks. However, the Appellate Body then went on to repeat and rely on the problematic findings it made just ten days earlier with respect to this issue in another report in DS436[3] without any explanation as to why it was doing so and in a manner not even suggested by China's arguments in the dispute at issue.

- The United States explained its concerns to the DSB last month upon the adoption of the report in DS436, and we will not repeat them again today. In short, however, the Appellate Body appears to have departed from its well-reasoned finding in *US – Softwood Lumber IV* that the *private* prices from arms-length transactions in the country of provision are the "primary" benchmark.[4] And, the Appellate Body has provided no meaningful explanation about how a price by a government entity could be used to establish a market-based benchmark.

- Despite these concerns, it is important to note that we do appreciate other elements of the Appellate Body report, such as where Appellate Body – even when it was ultimately reversing the Panel's findings – rejected China's most extreme legal theories.

- For example, on the subsidy program issue, the Appellate Body agreed with the U.S. position that evidence of "systematic series of actions" may provide a sufficient basis to establish the existence of an unwritten subsidy program.[5]

- And the Appellate Body also rejected China's legal theory regarding an order of analysis with respect to Article 2 of the SCM Agreement, related to the issue of specificity. This theory lacked any textual basis and, if adopted, would have placed unnecessary burdens on investigating authorities.[6]

- Finally, we note that in the panel report being adopted today, the Panel appropriately rejected China's arguments regarding the legal standard to initiate investigations.[7] This theory was not founded in the text of the *SCM Agreement*, and if accepted, would have significantly impaired the ability of Members to properly and thoroughly investigate subsidies.

- In closing, the United States would like to address an important issue regarding the 90-day time limit under Article 17.5 of the DSU. In this dispute, the Appellate Body took

3 Appellate Body Report, *US – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R (adopted 19 Dec 2014).
4 *See* Appellate Body Report, *US – Softwood Lumber IV*, para. 90.
5 *See* Appellate Body Report, para. 4.141.
6 *See* Appellate Body Report, para. 4.126.
7 *See* Panel Report, paras. 7.143-7.155.

118 days to circulate its report. This marks the fourth time in the last five appeals that the Appellate Body has missed the 90-day deadline.

- Given the size and complexity of this dispute, as well as many other ongoing appeals, the United States of course would have been willing to positively consider a request from the Appellate Body to exceed the time limit. However, the Appellate Body failed to consult with the parties and simply sent out what appears to be a form letter notifying the DSB that it would yet again breach this clear provision of the DSU. Such action regrettably does not contribute to the strengthening of the WTO as a rules-based organization. The United States urges the Appellate Body to return to its pre-2011 practice of consulting with the parties, and seeking their agreement before exceeding the 90-day time limit.

- The United States is also disappointed that China would not agree to a letter, as Members have done in at least seven other disputes,[8] confirming that a report issued after the expiration of the 90-day deadline would be considered to be consistent with Article 17.5 of the DSU. China had previously agreed to do such a letter in three other disputes where this issue arose, such as *US – Anti-Dumping and Countervailing Duties (China)*, *EC – Fasteners (China)*, and *China – Raw Materials*.

- In more recent appeals, parties such as Argentina,[9] India,[10] and Japan[11] have also agreed to similar letters. Rather than continuing to address this matter on an *ad hoc* basis, which may further contribute to a lack of transparency and predictability surrounding the issue, the United States encourages Members and the Appellate Body to work together to find a solution to this issue, such as a return to past practice, that will help restore credibility to the system.

- The United States would like to thank the DSB for its attention to the important issues covered in our statement today.

8 *E.g.*, *US – Tuna II (Mexico)*; *US – COOL*; *US – Carbon Steel (India)*; *Argentina – Import Measures*.
9 WT/DS444/16; WT/DS445/17.
10 WT/DS436/9.
11 WT/DS445/17.

OTHER BUSINESS

UNITED STATES – COUNTERVAILING MEASURES ON CERTAIN HOT-ROLLED CARBON STEEL FLAT PRODUCTS FROM INDIA

A. IMPLEMENTATION OF THE RECOMMENDATIONS OF THE DSB

- Mr. Chairman, on December 19, 2014, the DSB adopted the reports of the Panel and the Appellate Body in the dispute *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India* (DS436).

- As provided in the first sentence of Article 21.3 of the DSU, the United States would like to inform the DSB that it intends to implement the DSB's recommendations and rulings in a manner that respects U.S. WTO obligations.

- The United States will need a reasonable period of time in which to do so.