

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

Geneva, January 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.179)
 - The United States provided a status report in this dispute on January 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.154)

- The United States provided a status report in this dispute on January 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

- As we have previously stated, China's criticisms are completely unfounded. The intellectual property protection that the United States provides within its own territory equals or surpasses that of any other Member. Indeed, we find it interesting that many of the Members that continue to criticize the U.S. commitment to strong intellectual property rights have domestic records of protecting intellectual property rights that appear less than robust.

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.117)

- The United States thanks the European Union (“EU”) for its status report and its statement today.
- The United States understands that before the close of 2017, the EU did approve a small number of the pending applications for biotech products.
- While this development is welcome, the United States nonetheless notes its continuing concerns that the EU measures affecting the approval of biotech products involve prolonged, unpredictable, and unexplained delays at every stage of the approval process. These delays affected the recently approved products, as well as the great majority of applications still awaiting approval.
- Furthermore, 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 approved product.
- The United States urges the EU to ensure that its measures affecting the approval of biotech products, including measures adopted by individual EU member States, are based on scientific evidence, and that decisions are taken without undue delay.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

E. UNITED STATES – ANTI-DUMPING AND COUNTERVAILING MEASURES ON LARGE RESIDENTIAL WASHERS FROM KOREA: STATUS REPORT BY THE UNITED STATES (WT/DS464/17/ADD.1)

- The United States provided a status report in this dispute on January 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. On December 21, the Department issued to interested parties questionnaires soliciting additional information.
- 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.
- The United States notes Korea’s request pursuant to Article 22.2 of the DSU for authorization to suspend concessions and other obligations.
- The United States has explained to Korea the special challenges arising from the recommendations in this dispute. Particularly in this light, Korea’s decision is disappointing, and not constructive.
- In any event, the United States has objected to the level of suspension proposed by Korea, by a U.S. letter submitted on January 19, 2018, and the matter therefore was referred to arbitration pursuant to Article 22.6 of the DSU.

2. INDONESIA – IMPORTATION OF HORTICULTURAL PRODUCTS, ANIMALS AND ANIMAL PRODUCTS

A. IMPLEMENTATION OF THE RECOMMENDATIONS OF THE DSB

- The United States reviewed Indonesia’s communication¹ and listened carefully to its statement today.
- Article 21.3 of the DSU is clear that Members must “inform the DSB” at a DSB meeting “of its intentions in respect of implementation of the recommendations and rulings of the DSB.”
- Indonesia’s written communication of December 15, 2017, states that Indonesia needs a reasonable period of time for compliance, but the communication does not state Indonesia’s intentions in respect of compliance.
- In Indonesia’s statement today, the United States heard Indonesia say that it “understands fully its obligation to implement”, but we did not hear Indonesia say that it intends to comply with the DSB recommendations and rulings.
- The United States has discussed this deficiency bilaterally with Indonesia, so it is concerning that Indonesia has not been clear today.
- Will Indonesia, in its statement here today, announce its intention to comply with the DSB recommendations in this dispute?

Second Intervention

- This seems like a simple question: does Indonesia intend to comply with the DSB recommendations and rulings?
- It is troubling that Indonesia cannot confirm so today. Indonesia has said that it needs a reasonable period of time. But Indonesia has not said that Indonesia intends to comply.
- Moreover, Indonesia’s failure to state that it intends to comply has consequences. Under Article 21.3, the right to a reasonable period of time for compliance exists only following a statement that the Member indeed intends to comply.

¹ WT/DS478/16.

- Further, the Member that brought the dispute would have immediate rights under Article 22 of the DSU.
- So again, we would ask Indonesia to confirm whether it intends to comply.

Third Intervention

- The United States would like to express its understanding that Indonesia has not yet stated its intention to comply with the DSB recommendations.

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

A. STATEMENT BY THE EUROPEAN UNION

- As the United States has noted at previous DSB meetings, the Deficit Reduction Act – which includes a provision repealing the Continued Dumping and Subsidy Offset Act of 2000 – was enacted into law in February 2006. Accordingly, the United States has taken all actions necessary to implement the DSB’s recommendations and rulings in these disputes.
- We recall, furthermore, that the EU has acknowledged that the Deficit Reduction Act does not permit the distribution of duties collected on goods entered after October 1, 2007, more than 10 years ago.
- With respect to the EU’s request for status reports in this matter, as we have already explained at previous DSB meetings, there is no obligation under the DSU to provide further status reports once a Member announces that it has implemented the DSB recommendations and rulings, regardless of whether the complaining party disagrees about compliance.
- And as we have noted many times previously, the EU has demonstrated repeatedly it shares this understanding, at least when it is the responding party in a dispute. Once again, this month the EU has provided no status report for disputes in which there is a disagreement between the parties on the EU’s compliance.

5. UNITED STATES – ANTI-DUMPING AND COUNTERVAILING MEASURES ON LARGE RESIDENTIAL WASHERS FROM KOREA

A. RECOURSE TO ARTICLE 22.2 OF THE DSU BY KOREA (WT/DS464/18)

- On January 11, 2018, Korea requested that the DSB authorize Korea to suspend concessions and related obligations under the GATT 1994.
- By letter dated January 19, 2018, the United States objected to the level of suspension of concessions or other obligations proposed by Korea.
- Under the terms of Article 22.6 of the DSU, the filing of such an objection automatically results in the matter being referred to arbitration. Article 22.6 does not refer to any decision by the DSB, and no decision is therefore required or possible.
- Consequently, because of the U.S. objection under Article 22.6, the matter already has been referred to arbitration. Nevertheless, although unnecessary, the DSB may take note of that fact and confirm that it may not therefore consider Korea's request for authorization.

Second Intervention

- The United States does not agree with the EU's last statement – there is no DSB decision to take at this moment. The DSB could take note of the statements made and that the matter had been referred to arbitration, but there is nothing for the DSB to “agree” to.
- On Brazil's last comment, Brazil suggests that a referral to arbitration should occur at a DSB meeting for the sake of transparency. We do not agree. Transparency is provided by the fact that a request for authorization to suspend concessions, as well as any objection to that request, would be circulated to WTO Members. If a Member wished to comment on either of these documents, they would be free to request an agenda item and make a statement. But we do agree with Brazil's last statement that there are no third parties to an Article 22.6 arbitration.

Third Intervention

- We would point delegates to the DSB Meeting Minutes of January 3, 2018, concerning the EU's request to suspend concessions and the language that was used in that meeting regarding the matter referred to arbitration. No action by the DSB was required for the matter to be referred to arbitration.

Fourth Intervention

- We heard the Chair’s comments and statement, and disagree with the EU’s characterization. There was no statement that the DSB “agreed” to refer the matter to arbitration. The matter was automatically referred to arbitration under Article 22.6 by virtue of the objection filed by the United States on January 19, 2018.

Fifth Intervention

- For the United States, it is not a question of what might be the “best” practice according to the views of certain Members. It is a question of what is provided for in the text of the DSU. The text of Article 22.6 of the DSU does not provide for the DSB to take any action with respect to a Member’s objection, which refers the matter to arbitration.

6. UNITED STATES – ANTI-DUMPING AND COUNTERVAILING MEASURES ON CERTAIN COATED PAPER FROM INDONESIA

A. REPORT OF THE PANEL (WT/DS491/R AND WT/DS491/R/ADD.1)

- The United States thanks the Panel, and the Secretariat staff assisting it, for their work in this dispute.
- The United States particularly appreciates the Panel’s thorough review of the facts, legal claims, and arguments in this dispute, while at the same time applying the appropriate standard of review in a dispute involving administrative determinations in a trade remedy proceeding. As a result of that review, the Panel rejected all of Indonesia’s claims.
- The United States is gratified by this outcome. We also welcome Indonesia’s decision not to further expend the resources of the parties and the WTO dispute settlement system on this dispute.
- Indonesia brought numerous claims regarding the antidumping and countervailing duties on coated paper from Indonesia, as well as one “as such” challenge to a U.S. statute. Turning first to the challenges to the determinations in the coated paper investigation, the United States would draw Members’ attention to certain Panel findings.
- First, in calculating the level of benefit provided by Indonesia’s subsidies, the U.S. Department of Commerce (USDOC) conducted a thorough review of the record and concluded that an out-of-country benchmark was appropriate with respect to both the stumpage and log export ban programs. The Panel properly rejected Indonesia’s argument that USDOC’s choice of benchmark was inconsistent with Article 14(d) of the SCM Agreement.
- Second, USDOC found that the sale of the producer’s debt was not an arm’s length transaction but instead a debt buyback – that is, a subsidy in the form of debt forgiveness. Because neither Indonesia nor the responding paper producer provided necessary information during the investigation on the identity of the purchaser of the debt, USDOC resorted to the use of facts available. The Panel carefully examined the record, and properly rejected Indonesia’s claim that the use of facts available was inconsistent with Article 12.7 of the SCM Agreement.
- Third, USDOC found during the investigation that Indonesia provided subsidies to its paper industry through various subsidy programs, and that these subsidies were specific under Article 2.1(c) of the SCM Agreement. The Panel properly rejected Indonesia’s

claims that USDOC's specificity analysis did not adequately identify the relevant subsidy programs.

- Fourth, also in connection with USDOC's specificity findings, the Panel properly rejected Indonesia's argument that USDOC failed to specify either the identity or relevant jurisdiction of the granting authority under Article 2.1 of the SCM Agreement.
- Fifth, the U.S. International Trade Commission's (USITC) conducted an extensive, thorough, and well-reasoned investigation, and found that Indonesia's exports of coated paper threatened injury to the U.S. domestic industry. Indonesia's arguments with respect to injury essentially amounted to a request that the Panel conduct a *de novo* review. The Panel properly rejected Indonesia's approach and instead found no error under Article 3 of the AD Agreement and Article 15 of the SCM Agreement in the analysis and reasoning of the USITC.
- The Panel also rejected Indonesia's "as such" claim concerning the U.S. statute governing USITC voting procedures. There was no reason for Indonesia to bring this claim as the statutory provision was not even applied in the coated paper investigation. But in any event, the Panel properly rejected Indonesia's argument that the statute as used in threat of injury cases is inconsistent with the "special care" provisions of Article 3.8 of the AD Agreement and Article 15.8 of the SCM Agreement.
- In so doing, the Panel properly rejected the proposition that these special care provisions could serve as a means for intruding into the internal decision-making procedures of investigating authorities.
- In conclusion, the United States welcomes the Panel's report and is pleased to support its adoption today.

8. APPELLATE BODY MATTERS

A. STATEMENT BY THE CHAIRMAN

B. APPELLATE BODY APPOINTMENTS: JOINT PROPOSAL (WT/DSB/W/609)

- The United States thanks the Chair for his continued work on these issues.
- We are not in a position to support the proposed decision.
- As noted in the past, Mr. Ramirez continues to serve on an appeal, despite ceasing to be a member of the Appellate Body nearly 7 months ago. Now, a new situation has arisen: Mr. Van Den Bossche continues to serve on 5 appeals, despite ceasing to be a member of the Appellate Body in December of last year.
- Mr. Chairman, the latest decision by the Appellate Body to, in its words, “authorize” a person who is no longer a member of the Appellate Body to continue hearing appeals creates a number of very serious concerns.
- First, and foremost, as stated at past meetings, the Appellate Body simply does not have the authority to deem someone who is not an Appellate Body member to be a member. It is the DSB that has a responsibility under the DSU to decide whether a person whose term of appointment has expired should continue serving. The United States is resolute in its view that Members need to resolve that issue first before moving on to the issue of replacing such a person.
- Second, consider that in one current appeal, only one member of the Division hearing that appeal continues to be a member of the Appellate Body pursuant to DSB appointment decisions.
- Third, we note that, with the most recent Appellate Body “authorization”, one person who is no longer a member of the Appellate Body is serving on more appeals -- at least five -- than anyone who *is* a member of the Appellate Body.
- And so, in addition to our concern that all of this is contrary to the DSU and without any DSB authorization, we have to ask: is this reasonable or appropriate?
- The United States has continued to convene meetings to discuss this issue informally with a number of delegations. This outreach has been productive in that we believe we have heard a general recognition that it is the DSB that has the authority to set the term of

an AB member under DSU Article 17.2; it follows that the DSB has a responsibility to decide whether a person should continue serving beyond that term.

- We have also heard agreement from several delegations that Rule 15 raises difficult legal questions that the DSB should address.
- In the course of our engagement, we have not heard delegations reject the importance of the issue we have brought to the DSB's attention. To the contrary, we have heard a willingness of delegations to work together on this issue to find a way forward.
- We also recall that the Appellate Body provided Members with a Background Note on Rule 15. That communication appears to raise more questions than it answers. We look forward to discussing that communication with Members as well.
- We therefore will continue our efforts and our discussions with Members and with the Chair to seek a solution on this important issue.