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

Geneva, January 28, 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.191)

- The United States provided a status report in this dispute on January 17, 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.166)

- The United States provided a status report in this dispute on January 17, 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. China's stated intention is to achieve global dominance in advanced technology. This causes harmful trade-distortive policies and practices.

- 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 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.129)

- 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 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. 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. At least seventeen EU member States, as well as certain regions within EU member States, have submitted requests to opt out of EU approvals.

- 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 Genetically Modified Organisms, or GMOs. The EU Group of Chief Scientific Advisor's statement 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." In light of these statements, 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.13)

- The United States provided a status report in this dispute on January 17, 2019, 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 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.5)

- The United States provided a status report in this dispute on January 17, 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.

Second Intervention

- The United States takes note of China's statement and will convey it to capital.

- The United States is willing to discuss this matter with China on a bilateral basis.

- To be clear, however, it is incorrect to suggest that the United States has taken no action. As we have reported to the DSB, the United States continues to consult with interested parties on options to address the recommendations of the DSB. That internal process is ongoing.

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.4)

- 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 January 17, 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)

- In November 2017, the DSB adopted reports finding that Indonesia's measures on horticultural products, animal, and animal products breached Article XI:1 of the GATT 1994. Accordingly, the DSB recommended that Indonesia bring its measures into conformity with its obligations under the GATT 1994.
- The reasonable period of time for Indonesia to implement the DSB's recommendations and rulings expired on July 22, 2018. The United States considers that Indonesia has failed to bring its measures restricting the importation of horticultural products, animals, and animal products into compliance with WTO rules.
- In August 2018, the United States requested authorization from the DSB to suspend concessions or other obligations at an annual level based on a formula commensurate with the trade effects caused to the interests of the United States.
- Indonesia objected to the U.S. request, referring the matter to arbitration.
- The United States has paused the arbitration to give the parties more time to work towards a resolution to the dispute.
- Regrettably, contrary to the assertions in its status report, Indonesia has failed to bring its measures into compliance.
- For example, Indonesia continues to impose quantitative restrictions on imported products, and still maintains application window, validity period, and fixed term requirements for import licenses that effectively ban the importation of U.S. horticultural products for weeks at a time. The DSB has already found these Indonesian restrictions to be inconsistent with Article XI:1 of the GATT 1994.
- The United States remains willing to work with Indonesia to fully and meaningfully resolve this dispute, permitting U.S. farmers and ranchers to satisfy the demand from Indonesian importers for their high-quality products.
- We look forward to hearing promptly from Indonesia what additional actions it will take to bring its measures into full compliance.

3. 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.

4. 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 itself does not agree with another 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 the conduct of every Member when acting as a responding party, including the EU, shows that WTO Members understand that a responding party 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.

- Last month, the EU also argued that since "the DSB exercised its function through the establishment of a compliance panel… [t]he matter is currently with the adjudicators and therefore temporarily taken out of the DSB's surveillance." Once again, however, the EU is inventing legal standards without grounds in the agreed text of the DSU.

- There is no reference in Article 21.6 to pausing or terminating surveillance in light of a compliance panel proceeding. However, Article 21.6 *does* refer to a Member submitting a report on its "progress in the implementation" of the DSB's recommendations. As explained, it follows that if a Member considers it has completed its "progress in the implementation" *by implementing*, then there would be no further obligation to provide a report.

5. UNITED STATES – TARIFF MEASURES ON CERTAIN GOODS FROM CHINA

A. REQUEST FOR THE ESTABLISHMENT OF A PANEL BY CHINA (WT/DS543/7)

- At the December meeting of the DSB, the United States noted that China intends to do, and is doing, great damage to the international trading system. China damages this system, which has brought China tremendous economic gains, both through its grossly unfair and trade-distorting forced technology transfer policies and practices and through this unfounded dispute.

- First, in bringing this dispute, China seeks to use the WTO dispute settlement system as a shield for a broad range of trade-distorting policies and practices not covered by WTO rules. In doing so, it is China, and certainly not the United States, that is threatening the overall viability of the WTO system.

- Second, China's request is entirely hypocritical. China is currently damaging the United States not only through its forced technology transfer practices but additionally by imposing discriminatory duties on over $100 billion in U.S. exports. So while China with one hand points an accusing finger at U.S. tariff measures for being "unilateral" and WTO-inconsistent, with the other hand China points a finger squarely at itself by adopting its own "unilateral" tariff measures in connection with the very same issue.

- Third, in these circumstances, the outcome of any dispute settlement proceeding would be pointless. As we have noted, China has already taken the unilateral decision that the U.S. measures cannot be justified, and China has already imposed tariff measures on U.S. goods.

- Accordingly, the United States regrets that China has chosen for a second time to request the establishment of a panel with regard to this matter. This action suggests China is not serious about addressing the legitimate concerns of its trading partners over Chinese technology transfer practices that no one could describe or defend as fair.

6. TURKEY – ADDITIONAL DUTIES ON CERTAIN PRODUCTS FROM THE UNITED STATES

A. REQUEST FOR THE ESTABLISHMENT OF A PANEL BY THE UNITED STATES (WT/DS561/2)

- The United States has explained that the U.S. actions taken on imports of steel and aluminum pursuant to Section 232 are to address a threat to its national security.

- Every sovereign has the right to take action it considers necessary for the protection of its essential security. This inherent right was not forfeited in 1947 with the GATT or in 1994 with the creation of the WTO. Instead, this right was enshrined in Article XXI of the GATT 1994. The actions of the United States are completely justified under this article.

- What remains inconsistent with the WTO Agreement, however, is the unilateral retaliation against the United States by various WTO Members including Turkey. These Members pretend that the US actions under Section 232 are so-called "safeguards," and claim that their unilateral, retaliatory duties constitute suspension of substantially equivalent concessions under the WTO *Agreement on Safeguards*.

- Just as these Members appear to be ready to undermine the dispute settlement system by ignoring the plain meaning of Article XXI and 70 years of practice, so too are they ready to undermine the WTO by pretending to follow its rules while imposing measures that blatantly disregard them.

- The additional, retaliatory duties are nothing other than duties in excess of Turkey's WTO commitments and are applied only to the United States, contrary to Turkey's most-favored-nation obligation. The United States will not permit its businesses, farmers, and workers to be targeted in this WTO-inconsistent way.

- For these reasons, the United States requests that the DSB establish a panel to examine this matter with standard terms of reference.

<u>Second Intervention</u>

- Turkey's approach for the retaliatory action at issue makes clear that, like the United States, it does not consider the Safeguards Agreement to be applicable in this dispute. For example, Turkey has not addressed whether its action is in response to an alleged "safeguard" taken as a result of an absolute increase in imports. If there was an absolute increase, the right to suspend substantially equivalent concessions under the Safeguard Agreement may not be exercised for the first three years of the safeguard measure. The

United States does not understand how Turkey can claim to be following the Safeguards Agreement without actually following what the Safeguards Agreement says.

- There is no doubt that Article XIX of the GATT 1994 may be invoked by a Member to depart temporarily from its commitments in order to take emergency action with respect to increased imports. The United States, however, is not invoking Article XIX as a basis for its Section 232 actions and has not utilized its domestic law on safeguards. Thus, Article XIX and the Safeguards Agreement are not relevant to the U.S. actions under Section 232.

- Because the United States is not invoking Article XIX, there is no basis for another Member to pretend that Article XIX should have been invoked and to use safeguards rules that are simply inapplicable.

8. APPELLATE BODY APPOINTMENTS: PROPOSAL BY VARIOUS MEMBERS (WT/DSB/W/609/REV.7)

- 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.[1]
    - 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, 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 system and damages the interests of all WTO Members who care about having the agreements respected as they were negotiated and agreed.

[1] Office of the U.S. Trade Representative, 2018 President's Trade Policy Agenda, at 22-28.

- 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.