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

Geneva, July 29, 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.206)

- The United States provided a status report in this dispute on July 16, 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.181)

- The United States provided a status report in this dispute on July 16, 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.144)

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

- The United States continues to see persistent delays that affect dozens of applications that have been awaiting approval for an extended period.

- The EU has previously suggested that 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, thirteen (13) applications are pending risk management decisions in the standing committee on biotech and two (2) await final approval by the European Commission. Two (2) of these applications have been going through the EU approval system for over 10 years.

- The EU also has suggested that the United States "appears" to acknowledge that there is no ban on genetically engineered products in the EU. The EU is incorrect.

- 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. 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.

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.28)

- The United States provided a status report in this dispute on July 16, 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.20)

- The United States provided a status report in this dispute on July 16, 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.15)

- Indonesia continues to fail to bring 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 14 years ago in February 2006. Accordingly, the United States has implemented 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 12 years ago.

- Even aside from this, we question the trade rationale for inscribing this 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, which, remarkably, reflects an *increase* in the additional duty of 0.001 percent.

- These minuscule tariffs vividly demonstrate what has been evident for years – it is not commonsense that is driving the EU's approach to this agenda item.

- The EU refers to the "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 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. We question whether the European Union believes that the "clear obligation" that exists under the European Union's understanding of Article 21.6 to submit a status report applies to other Members, including itself.

- Since the United States has informed the DSB that it has come into compliance in this dispute, there is nothing more for the United States to report in a status report.

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. It is another invention of the EU.

- 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 EU validates many criticisms of the WTO dispute settlement system with its assertion that the EU is serious about bringing its launch aid subsidies into WTO compliance, while the United States is not. The dispute settlement system has been turned into a tool to delay finding a solution between the parties.

- The EU's massive launch aid subsidies have been found to breach the EU's obligations in an uninterrupted string of reports going back a decade. At every turn, not only has the EU not made a serious attempt to withdraw these subsidies or remove their pernicious effects, it has made them worse – both by altering the terms of existing subsidies to make them larger and longer lasting, and by providing still more and larger subsidies. No Member making a genuine effort to comply could get it so wrong, so frequently, and for so long.

- The EU recently announced that France and Spain agreed with Airbus to amend the terms of two launch aid financing packages found to be WTO-inconsistent. The EU publicly suggested that this action now brought the EU into compliance.

- But the EU has not provided any details of these supposed amendments to the WTO or directly to the United States. Normally, a party claiming compliance can and does explain why. Nor does the EU even address the remaining six WTO-inconsistent launch aid measures.

- With this new compliance announcement, the EU effectively concedes that the United States was correct that the EU was out of compliance previously.

- And given the limited measures covered by the announcement, and the lack of any details on the supposed changes made, no one can take seriously that these changes actually address the full scope of massive, WTO-inconsistent subsidies and bring a resolution to this longstanding dispute.

- The contrast with U.S. actions could not be any sharper. The United States withdrew the sole measure found to cause adverse effects in the adopted compliance reports – the Washington State B&O tax rate reduction. The text of the measure is public, and its terms were notified to the WTO and the EU. No one can deny that the Washington State tax break has ended.

- And yet, with no basis in reality, the EU suggests that it is serious about compliance, while the United States is not.

- It is regrettable that the EU continues to refuse to seriously address its massive, WTO-inconsistent subsidies and therefore appears to want this dispute to go on.

6. JAPAN – MEASURES RELATED TO THE EXPORTATION OF PRODUCTS AND TECHNOLOGY TO KOREA

A. REQUEST FOR ESTABLISHMENT OF A PANEL BY THE REPUBLIC OF KOREA (WT/DS590/4)

- As the United States has explained at last month's meeting, and consistently maintained for more than 70 years, national security matters are not to be judged under the WTO dispute settlement system.

- Every Member of the WTO retains the authority to determine for itself those matters that it considers necessary to the protection of its essential security interests. This is reflected in the text of GATT 1994 Article XXI,[1] as well as in the GATS and TRIPs Agreement. It is a key component of the agreement of Members to enter into the WTO.

- Therefore, if Japan formally invokes an essential security exception in defense of the challenged measures, only Japan, and not the WTO, can judge for the Japanese people what is necessary to protect Japan's national security interests.

- Accordingly, a WTO panel would lack the authority to review that invocation and to make findings on the claims raised in the dispute.

- The United States observes that since the erroneous panel findings in *Russia — Measures Concerning Traffic in Transit* (DS512), several WTO Members have rushed to challenge national security measures. This surge in litigation poses serious risks to the WTO, threatening to enmesh this Organization in national security matters it has wisely avoided for over 70 years.

[1] GATT 1994 Article XXI(b) ("Nothing in this Agreement shall be construed … (b) to prevent any contracting party from taking any action *which it considers necessary* for the protection of *its essential security interests* … (italics added).

10. STATEMENT BY QATAR REGARDING THE PANEL REPORT IN "SAUDI ARABIA – MEASURES CONCERNING THE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS"

- As the United States has observed in previous DSB meetings, issues of national security are political in nature and are not matters appropriate for adjudication in the WTO dispute settlement system.

- Every Member of the WTO retains the authority to determine for itself those matters that it considers necessary for the protection of its essential security interests, as is reflected in the text of GATT 1994 Article XXI, for example, and in TRIPS Article 73.

- The Panel in *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights* erred in assessing Saudi Arabia's invocation of its essential security interests.

- Saudi Arabia invoked the essential security exception under TRIPS Article 73 in response to the claims raised by Qatar in this dispute, and as the terms of Article 73 make clear, only Saudi Arabia can judge for itself what action is necessary for the protection of its essential security interests.

- The United States observes that, in assessing Saudi Arabia's invocation of its essential security interests in this dispute, the Panel simply "transposed" the approach of the *Russia – Traffic in Transit* panel based on agreement of the parties (para. 7.243). Simply transposing the approach of a prior panel – even if based on the agreement of the parties – is not consistent with the function of panels as set out in the DSU and makes the approach of the Panel advisory.

- Furthermore, the analysis of the essential security exception in the *Russia – Traffic in Transit* panel's report is seriously flawed.

- As the United States has explained previously,[2] that panel's interpretation of the essential security exception at Article XXI is not consistent with the customary rules of interpretation set forth in the Vienna Convention.

- In addition to being inconsistent with the ordinary meaning of the terms of Article XXI, the panel failed to interpret that provision as a whole. Furthermore, in its examination of the negotiating history of the treaty, the *Russia – Traffic in Transit* panel misconstrued certain statements by negotiating parties and relied on materials not properly considered part of the negotiating history.

- WTO Members have understood, from the very beginning of the international trading

[2] *See* Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, April 26, 2019, *available at* https://geneva.usmission.gov/wp-content/uploads/sites/290/Apr26.DSB_.Stmt_.as-deliv.fin_.public.pdf.

system, that each Member may judge for itself what actions it considers necessary to protect its essential security interests.

- This has been the position of the United States for over 70 years, since the negotiation of the GATT. That position has been shared by every WTO Member whose national security action was previously the subject of complaint, including the European Union, Australia, Canada, Russia, and others. And this is the position reflected in the text of Article XXI of the GATT 1994 and Article 73 of the TRIPS Agreement.

- Consistent with a proper interpretation of these articles, therefore, any findings in the Panel's report should have been limited to a recognition that Article 73 had been invoked, as there were no other findings that could assist the DSB in making the recommendations provided for in DSU Article 19.1.[3]

[3] DSU Article 19.1: "Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement."

14. 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, what Members should be considering is how do we achieve a 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.[4] 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.[5]

- 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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[4] 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.
[5] *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

- 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 a procedural understanding that included an agreement not to appeal any compliance panel report.[6]

- 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.[7]

- Australia and Indonesia informed the DSB that they had agreed not to appeal the panel report in the dispute *Australia – Anti-Dumping Measures on A4 Copy Paper* (DS529).[8]

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

- In this regard, we note recent announcements that Canada and Australia will notify a solution in the dispute *Canada – Measures Governing the Sale of Wine* (DS537), without circulation of a panel report.[9] This example illustrates that Members can and should

[6] "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.").

[7] "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.").

[8] 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.").

[9] *See, e.g.*, Summary of understanding between Australia and Canada regarding certain measures related to the sale of wine maintained by the Government of Canada, available at https://www.canada.ca/en/global-affairs/news/2020/07/summary-of-understanding-between-australia-and-canada-regarding-certain-measures-related-to-the-sale-of-wine-maintained-by-the-government-of-canada.html.

continue to seek positive solutions to their disputes, and WTO dispute settlement continues to function while discussions about WTO reform are ongoing.

- 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.