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

Geneva, June 19, 2015

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

   A. UNITED STATES – SECTION 211 OMNIBUS APPROPRIATIONS ACT OF 1998: STATUS REPORT BY THE UNITED STATES (WT/DS176/11/ADD.150)

- The United States provided a status report in this dispute on June 8, 2015, in accordance with Article 21.6 of the DSU.

- Several bills introduced in the current U.S. Congress would repeal Section 211. Other previously introduced legislation would modify Section 211.

- The U.S. Administration will continue to work on solutions to implement the DSB's recommendations and rulings and resolve this matter with the European Union.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

B. UNITED STATES – ANTI-DUMPING MEASURES ON CERTAIN HOT-ROLLED STEEL PRODUCTS FROM JAPAN: STATUS REPORT BY THE UNITED STATES (WT/DS184/15/ADD.150)

- The United States provided a status report in this dispute on June 8, 2015, 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

C. UNITED STATES – SECTION 110(5) OF THE US COPYRIGHT ACT: STATUS REPORT BY THE UNITED STATES (WT/DS160/24/ADD.125)

- The United States provided a status report in this dispute on June 8, 2015, 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

D. EUROPEAN COMMUNITIES - MEASURES AFFECTING THE APPROVAL AND MARKETING OF BIOTECH PRODUCTS: STATUS REPORT BY THE EUROPEAN UNION (WT/DS291/37/ADD.88)

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

- The United States notes that dozens of biotech applications remain pending in the EU approval system. One of these applications has been pending for well over a decade. The ongoing backlog and delays remain a serious impediment to trade in biotech products.

- The United States is further concerned about an EU proposal for major change in the EU approval measures. If adopted, that measure would result in even greater disruptions in trade in agricultural products.

- As the United States has previously stated, the EU Commission has proposed to adopt an amendment to EU biotech approval measures that would allow individual EU member States to ban the use of biotech products within their territory, even where the EU has approved the product based on a scientific risk assessment.

- One or more EU member State bans would serve as a major impediment to the movement and use of biotech products throughout the entirety of the EU, and the United States is concerned about the relationship of such a proposal to the EU's obligations under the SPS Agreement.

- The United States urges the EU to ensure that its biotech approval measures operate in accordance with the EU's own laws and regulations and its obligations under the SPS Agreement. To the extent that the EU considers revisions to its biotech approval measures, the EU should ensure that these revisions are consistent with the EU's WTO obligations and should notify these revisions to the SPS Committee pursuant to Article 7 of the SPS Agreement.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

E. UNITED STATES – ANTI-DUMPING MEASURES ON CERTAIN SHRIMP FROM VIET NAM (WT/DS404/11/ADD.36)

- The United States provided a status report in this dispute on June 8, 2015, in accordance with Article 21.6 of the DSU.

- As we have noted at past DSB meetings, in February 2012 the U.S. Department of Commerce modified its procedures in a manner that addresses certain findings in this dispute.

- The United States will continue to consult with interested parties as it works to address the other recommendations and rulings of the DSB.

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

A. STATEMENTS BY THE EUROPEAN UNION AND JAPAN

- 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, Japan, and other Members have acknowledged that the Deficit Reduction Act does not permit the distribution of duties collected on goods entered after October 1, 2007, over seven and a half years ago.

- We therefore do not understand the purpose for which the EU and Japan have inscribed this item today.

- With respect to comments regarding further status reports in this matter, as we have already explained at previous DSB meetings, the United States fails to see what purpose would be served by further submission of status reports which would repeat, again, that the United States has taken all actions necessary to implement the DSB's recommendations and rulings in these disputes.

- Indeed, as these very WTO Members have demonstrated repeatedly when they have been a responding party in a dispute, there is no obligation under the DSU to provide further status reports once a Member announces that it has implemented those DSB recommendations and rulings, regardless of whether the complaining party disagrees about compliance.

- With respect to the EU's recent announcement that it will continue to apply duties, we regret that the EU has decided to continue to apply its suspension of concessions and are disappointed with this decision.

- Indeed, previously the EU made clear that its purpose in suspending concessions was to "induce compliance." As the United States has taken all steps necessary to comply with the DSB's recommendations and rulings, we fail to see how the continued suspension of concessions could further that purpose.

- As we have observed previously, the DSB only authorized the suspension of concessions or other obligations as provided in the Award of the Arbitrator.

- The United States continues to review the action by the EU and would not accept any characterization of such continued retaliation as consistent with the DSB's authorization.

3. CHINA – CERTAIN MEASURES AFFECTING ELECTRONIC PAYMENT SERVICES

A. STATEMENT BY THE UNITED STATES

- The United States reiterates its serious concerns regarding China's failure to bring its measures into conformity with its WTO obligations, despite numerous interactions between the United States and China in the DSB and elsewhere.

- China continues to impose its ban on foreign suppliers of electronic payment services ("EPS") by requiring a license, while at the same time failing to provide specific procedures for obtaining that license.

- The United States has taken note of the recent decision by China's State Council to open the EPS market to qualified suppliers. However, specific regulations to implement the State Council's decision still have not been issued.

- As a result, one Chinese enterprise continues to be the only EPS supplier able to operate in the domestic market.

- As required under its WTO obligations, China must adopt immediately the implementing regulations necessary for allowing the operation of foreign EPS suppliers in China. We continue to look forward to the prompt issuance of those regulations.

8. INDIA – MEASURES CONCERNING THE IMPORTATION OF CERTAIN AGRICULTURAL PRODUCTS

A. REPORT OF THE APPELLATE BODY (WT/DS430/AB/R) AND REPORT OF THE PANEL (WT/DS430/R)

- The United States is pleased to propose the adoption of the panel and Appellate Body reports in this dispute involving India's non-science-based import restrictions on various agricultural products.

- As an initial matter, the United States would like to thank the Panel, the Appellate Body, and the Secretariat assisting them for their hard work in this dispute, which we trust will assist the parties in resolving this dispute through the lifting of those WTO-inconsistent and trade-restrictive measures.

- The measures at issue impose a country-wide ban on the imports of various agricultural commodities as soon as the exporting country reports an outbreak of avian influenza to the World Animal Health Organization (OIE).

- India's measures have precluded the United States and other Members from exporting various agricultural products to India. These trade restrictions cover products such as poultry meat, a product which the United States has a record of exporting over 7 billion pounds a year safely and without incident.

- The reports being adopted today uphold the claims of the United States that India's broad, trade restrictive measures breach several key obligations under the SPS Agreement.[1]

- The United States would like to emphasize that in bringing this dispute, the United States is not suggesting that appropriate AI controls are unnecessary. To the contrary, AI is an animal disease with serious economic consequences. Because the disease is endemic in wild bird populations, every Member – including India and the United States – is susceptible to occasional AI outbreaks in its commercial poultry stocks. The United States fully supports the work of the international community, as reflected in OIE standards, to adopt appropriate, science-based measures to control AI while allowing safe trade in agricultural products.

[1] Agreement on the Application of Sanitary and Phytosanitary Measures.

- The fundamental problems with India's measures is that they were not based on a scientific risk assessment or international standards, were far more trade restrictive than necessary to achieve the goal of not transmitting AI through traded products, precluded regionalization, and unjustifiably discriminated against foreign products and favored domestic products. The United States would like to draw attention to several key findings included in these reports.

- First, the Panel found – and the Appellate Body affirmed – that India's measures are not based on a risk assessment in breach of Articles 5.1 and 5.2 of the SPS Agreement.

    - The Appellate Body in sustaining the findings under Articles 5.1 and 5.2 rejected India's argument that an Article 5.1 breach cannot be sustained without a separate finding under Article 2.2 of the SPS Agreement. This finding is important in affirming the centrality of conducting a risk assessment to develop SPS measures based on scientific principles and evidence.

    - The United States does have some concerns, however, with the approach taken by the Appellate Body in its analysis under Article 2.2 of the SPS Agreement. In particular, the United States explained that India's failure to conduct a risk assessment supported the U.S. argument that India's measures were not "based on scientific principles," as required by Article 2.2. The Appellate Body report, however, does not contain any discussion of whether or not India based its measures on "scientific principles" pursuant to Article 2.2. In the U.S. view, India did not and could not.

- Second, the Panel found, and the Appellate Body upheld, that India breached Article 3.1 of the SPS Agreement because India's measures banning imports are not based on the relevant international standards, which in this dispute were those of the OIE.

    - The Panel found that the OIE's standards do not recommend import prohibitions, but rather provide for safe trade through the application of conditions that mitigate any risk from those products.

    - The Panel found that the OIE's standards allow for importation from zones and compartments free of avian influenza, not just countries. This finding is particularly important given that Members may experience occasional AI outbreaks that affect only specific regions, and not their entire territory.

    - The Appellate Body correctly rejected India's claim that the panel somehow committed legal error by consulting with the OIE regarding the proper understanding of the OIE's standards.

- Third, the Panel found, and the Appellate Body upheld, that India's measures are in breach of Article 5.6 of the SPS Agreement because they are more trade restrictive than necessary to achieve India's appropriate level of protection.

    - The Panel and Appellate Body found that the OIE's standards achieve a high level of protection and are less trade restrictive than blanket import prohibitions. This finding highlights that Members, in devising SPS measures, should consider scientifically-based international standards so as to avoid unnecessary barriers to trade.

- Fourth, the Panel found that India's measures are in breach of both sentences of Article 2.3 of the SPS Agreement.

    - The Panel properly recognized, and India did not appeal, that India's measures constitute a disguised restriction on international trade in breach of Article 2.3.

    - The Panel also recognized that India's measures discriminate against imported products, and in two different ways.

    - The Panel recognized, and India did not appeal, that India's imposition of import prohibitions on products from anywhere in an exporting country following an AI incident is discriminatory given that India's domestic restrictions apply only to a small area following an AI incident.

    - The Panel also found, and the Appellate Body upheld, that India's imposition of import prohibitions based on low pathogenicity avian influenza, or LPNAI, is discriminatory given its lack of a surveillance system capable of reliably detecting LPNAI incidents and thus of triggering LPNAI-based restrictions on domestic products.

- Fifth, the Panel found, and the Appellate Body upheld, that India breached its obligations with respect to regionalization under Articles 6.1 and 6.2 of the SPS Agreement.

    - This was the first dispute in which a report addressed these important provisions. These findings make clear that India's rejection of the concept of regionalization with respect to AI is not consistent with its WTO obligations.

    - The Panel and Appellate Body's reports serve to highlight the importance of regionalization, both in general and with respect to AI in particular. Countries should not maintain measures that apply to the whole territory of a Member when an AI incident is limited to a particular region.

- While we welcome these findings overall, the United States does have certain concerns with a portion of the Appellate Body report addressed to Article 6. The Article 6 analysis begins with a lengthy abstract discussion, before it reaches the issues on appeal and without tying that discussion to the issues on appeal.[2] And the Appellate Body even expresses "concerns" in relation to certain findings by the Panel not raised in the appeal.[3]

- In the view of the United States, issues not raised in the appeal are not on appeal, and a thorough, considered, and persuasive interpretation of the WTO Agreements is more likely to result where parties and third parties have engaged on the issues of legal interpretation actually at issue on appeal.

- Moreover, particularly at a time when workload issues are increasingly affecting the timetable for the resolution of disputes, a focus on those issues that *have* been appealed, and on questions that need to be addressed in resolving arguments raised on appeal, would facilitate the efficient functioning of dispute settlement process.

- In that regard, regrettably, the United States must also recall a familiar procedural matter. The Appellate Body here has continued a trend of not circulating its report within 90 days as mandated in Article 17.5 of the DSU, without consultation.

- The United States notes that India and the United States, at the Appellate Body's request, agreed to delay this appeal beyond the busy end of year period.

- Having made such an effort to assist the Appellate Body in managing its workload, we are particularly disappointed by the fact that this report was not issued within 90 days. We are further concerned with two other developments.

  - First, the appeal in DS429 (*US – Shrimp II*), which involved a panel report issued *after* the India report, was allowed to jump ahead of the India appeal.

  - Second, the Appellate Body continued its recent deviation from its pre-2011 practice and failed to consult with the parties or seek their agreement when it became clear that it would be unable to meet the DSU deadline.

[2] *India – Agricultural Products (AB)*, paras. 5.129 – 5.144.
[3] *Id.*, paras. 5.142 – 5.143.

- If Members' efforts to facilitate the Appellate Body's workload by delaying appeals are met with other appeals jumping ahead or a lack of consultation, Members may in the future have some hesitancy before agreeing to delays in filing appeals.

- Accordingly, the United States continues to encourages Members and the Appellate Body to work together to find a solution to this matter, such as a return to past practice.

- Mr. Chairman, in conclusion, we would like to return to the Panel and Appellate Body's reports themselves, and to highlight that their findings and conclusions comprehensively demonstrate that categorical import prohibitions are not appropriate in addressing the risks from avian influenza. The reports being adopted today have important implications for Members' measures addressed to AI, as well as for SPS measures in general. We thank again both the Panel and the Appellate Body for these high-quality reports.