

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

**Geneva, June 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.205)
    - The United States provided a status report in this dispute on June 18, 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.180)
    - The United States provided a status report in this dispute on June 18, 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.143)

- 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.
- For example, the Standing Committee on Plants, Animals, Food and Feed (PAFF) section responsible for biotechnology has not held a meeting for biotech products this year. This is not a COVID-19 issue - the Commission continues to cancel scheduled biotech standing committee meetings, most recently the meeting scheduled for June, even though meetings of six (6) other standing committee sections have been held, such as the June meetings regarding pesticides and food safety.
- 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. Three (3) of these applications have been going through the EU approval system for over 10 years. This absence of meetings further delays new product approvals.
- 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.
- It is, and has consistently been, the position of the United States that 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. 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.27)

- The United States provided a status report in this dispute on June 18, 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.

Second Intervention

- The premise of Canada's intervention is flawed, and indicative of what has led this body to the place it is today. A panel does not depart from or follow the findings in prior reports. Were a panel to do so, that panel would have failed in its duty under the DSU.
- The role of a panel is to assist the DSB in making a recommendation to bring a WTO-inconsistent measure into conformity with the WTO agreements.<sup>1</sup>
- A panel makes an objective assessment of the conformity of a measure with the covered agreements<sup>2</sup> by interpreting the text of the covered agreements using customary rules of interpretation of public international law.<sup>3</sup> Nothing in the DSU or customary rules of interpretation assigns precedential value to prior adopted reports, including Appellate Body reports.
- The United States has explained this issue at length in the DSB,<sup>4</sup> and in the USTR *Report*

---

<sup>1</sup> DSU Art. 7.1 (setting out a panel's terms of reference: "To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s).").

<sup>2</sup> DSU Art. 11 ("Function of Panels") ("The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.").

<sup>3</sup> DSU Art. 3.2 ("The Members recognize that it [the WTO dispute settlement system] serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.").

<sup>4</sup> Dispute Settlement Body, Minutes of the Meeting Held on December 18, 2018, WT/DSB/M/423, paras. 4.2-4.25.

*on the Appellate Body*.<sup>5</sup> Many WTO Members seemingly had accepted that a prior Appellate Body report is not “precedent”, and that a panel does not follow or depart from such a report – but Canada now reveals that it did not share the conclusions of other Members and the then-DSB Chair’s “Walker Principles”. If there is a textual basis in the DSU for Canada’s position, we would like to hear it.

- Canada lost its dispute before the panel because Canada failed to persuade the panel of the correctness of its proposed interpretations of the Antidumping Agreement. And the United States won before the panel because the United States succeeded in persuading the panel that the interpretations proposed by the United States are correct.
- The panel of antidumping experts rejected Canada’s claim that zeroing is prohibited under the second sentence of Article 2.4.2. But that is *not* the first time that a panel of antidumping experts has rejected a claim that the Antidumping Agreement prohibits zeroing.
- In fact, it is the *fifth time* that a party has argued zeroing is prohibited, and a WTO panel has *rejected* that claim. The consistent view of the United States for nearly two decades has been repeatedly vindicated: nothing in the WTO agreements prohibits the use of zeroing.
- At what point do Canada and other parties accept that their arguments are simply not persuasive to antidumping experts?

---

<sup>5</sup> 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](https://geneva.usmission.gov/wp-content/uploads/sites/290/AB-Report_02.11.20.pdf).

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.19)
    - The United States provided a status report in this dispute on June 18, 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.14)
    - 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.



1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

G. CHINA – DOMESTIC SUPPORT FOR AGRICULTURAL PRODUCERS: STATUS REPORT BY CHINA (WT/DS511/15/ADD.2)

- The United States notes that the parties informed the DSB, on April 1, 2020, that the United States and China agreed that the reasonable period of time for China to implement the DSB recommendations and rulings expires on June 30, 2020.
- The findings of the panel in this dispute relate to China's provision of domestic support for its agricultural producers. China committed not to provide support in excess of its commitment level of "nil" set forth in China's Schedule. Therefore, while the United States notes certain changes in China's underlying legal instruments, the United States is interested in the manner in which those measures are applied in practice.
- China informed the DSB on June 19, 2020, that various agencies jointly promulgated four notices, respectively announcing the 2020 minimum procurement prices ("MPP") and the minimum procurement price policy for wheat and rice.
- The United States has requested additional information from China on how it will implement these measures – for example, how any limitation on procurement will function. The United States looks forward to receiving further information from China.
- The United States notes that China's status report asserts that China has fully implemented the recommendations and rulings of the DSB in this matter.
- The United States is not in a position to agree with China's claim of compliance at this time.
- As set out in this statement, the United States looks forward to continuing engagement with China on the information requested and on China's administration of domestic support measures.

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 Friday, June 26, the EU announced 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 suggests it has requested the DSB’s consideration of this item “as a matter of principle,” but the EU’s principles shift depending on whether it is the complaining or responding party.
  - 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.
  - Accordingly, 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.
- Of course, this would be a convenient limitation on Article 21.6 for purposes of this dispute, as the DSB authorized the United States to impose countermeasures of approximately \$7.5 billion annually due to the adverse effects on the United States from subsidies provided by the EU and 4 member States. But that limitation does not exist in the text of Article 21.6.
- 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.
- Perhaps the EU chooses not to report on the progress in its implementation because, rather than actually attempt to achieve compliance in this dispute, the EU has pursued a

strategy of endless and meritless litigation. The report of the second compliance panel shows how misguided the EU's strategy is.

- The second compliance panel, like the prior one, rejected the EU's claim of compliance. But despite yet another finding of non-compliance, the EU chose to appeal the panel report, seeking yet more litigation in this 15-year dispute.
- Would it not be more productive for the EU and its member States to focus on resolving this dispute? Despite the countermeasures on EU imports the United States has been compelled to impose, we still await a proposal from the EU on how it would withdraw *all the subsidies* the DSB found continued to cause adverse effects after the EU's implementation period ended.
- 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.
- The EU can report on the progress in its implementation in this dispute in light of the five separate WTO reports finding that the EU and four member States have failed to comply with WTO subsidy rules.

4. INDIA – TARIFF TREATMENT ON CERTAIN GOODS IN THE INFORMATION AND COMMUNICATIONS TECHNOLOGY SECTOR
  - A. REQUEST FOR THE ESTABLISHMENT OF A PANEL BY THE EUROPEAN UNION (WT/DS582/9)
    - As the United States explained at the last DSB meeting, the United States shares the European Union’s serious concerns regarding the customs duties applied by India on imports of certain information and communications technology (ICT) products.
    - The United States has raised these concerns bilaterally with India and in WTO committees over the past several years. Once again, we call on India to provide duty-free access for the products for which India has a WTO commitment to do so.
    - The United States will closely monitor the progress of this dispute, as well as the disputes initiated by Japan (DS584) and Chinese Taipei (DS588) also concerning India’s tariff treatment of certain ICT products.

6. INDIA – TARIFF TREATMENT ON CERTAIN GOODS

A. REQUEST FOR THE ESTABLISHMENT OF A PANEL BY JAPAN  
(WT/DS584/9)

- As stated under item 4 on today’s agenda, the United States has serious concerns regarding the customs duties applied by India on imports of certain ICT products.
- The United States will closely monitor the progress of this dispute, as well as the disputes initiated by the European Union (DS582) and Chinese Taipei (DS588) also concerning India’s tariff treatment of certain ICT products.

7. INDIA – TARIFF TREATMENT ON CERTAIN GOODS IN THE INFORMATION AND COMMUNICATIONS TECHNOLOGY SECTOR

A. REQUEST FOR THE ESTABLISHMENT OF A PANEL BY THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU (WT/DS588/7)

- As stated under items 4 and 6 on today’s agenda, the United States has serious concerns regarding the customs duties applied by India on imports of certain ICT products.
- The United States will closely monitor the progress of this dispute, as well as the disputes initiated by the European Union (DS582) and Japan (DS584) also concerning India’s tariff treatment of certain ICT products.

8. 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)

- To the extent that Japan indicates that its measures are justified on the basis of Article XXI, we note that 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 to the protection of its essential security interests, as is reflected in the text of GATT 1994 Article XXI.<sup>6</sup>
- Therefore, if Japan invokes the essential security exception in defense of the challenged measures, the United States considers that the panel would lack the authority to review that invocation and to make findings on the claims raised in the dispute.
- The United States recalls that under DSU Article 7.1, a panel is to examine the matter referred to the DSB by the complaining party and “to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s).”
- If Article XXI is invoked, there are no findings by the panel that may assist the DSB in making the recommendations provided for in DSU Article 19.1.<sup>7</sup> This is because the DSB may make no finding of WTO-inconsistency or recommendation to a Member to bring its measure into conformity with WTO obligations.
- Therefore, if a panel is established and if Japan invokes Article XXI, any findings should be limited to a recognition that Article XXI has been invoked.
- Under these circumstances, the United States considers the parties should resolve the issues raised in this dispute outside the context of WTO dispute settlement.
- If the parties are unable to resolve the issue bilaterally, we encourage the parties to request assistance from the Director-General through his good offices or from another person or WTO Member in which the parties have confidence. Further, if a panel is established, it should consult with the parties “to develop a mutually satisfactory solution.”<sup>8</sup>

---

<sup>6</sup> 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).

<sup>7</sup> 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.”

<sup>8</sup> DSU Article 11: “Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.”



10. AUSTRALIA – CERTAIN MEASURES CONCERNING TRADEMARKS, GEOGRAPHICAL INDICATIONS AND OTHER PLAIN PACKAGING REQUIREMENTS APPLICABLE TO TOBACCO PRODUCTS AND PACKAGING
- A. REPORT OF THE APPELLATE BODY (WT/DS435/AB/R AND WT/DS435/AB/R/ADD.1) AND REPORT OF THE PANEL (WT/DS435/R AND WT/DS435/R/ADD.1 AND WT/DS435/R/SUPPL.1)
- B. REPORT OF THE APPELLATE BODY (WT/DS441/AB/R AND WT/DS441/R/ADD.1) AND REPORT OF THE PANEL (WT/DS441/R AND WT/DS441/R/ADD.1 AND WT/DS441/R/SUPPL.1)
- The United States wishes to raise an important systemic concern under this agenda item.
  - The documents circulated as WT/DS435/AB/R and WT/DS435/AB/R/ADD.1, and WT/DS441/AB/R and WT/DS441/R/ADD.1, contain discussion regarding so-called “due process” violations by the panel under Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”).
  - As the United States has explained, and Members know well, Article 17.6 of the DSU limits an appeal “to issues of law covered in the panel report and legal interpretations developed by the panel.” Attempts by appellants to re-litigate unfavorable *factual* determinations by panels are not encompassed by the right of appeal set out in Article 17.6.<sup>9</sup>
  - Neither is appeal of unfavorable factual determinations supported by the text of Article 11 of the DSU. This provision does not impose an *obligation* on a panel. Rather, it recognizes that the “function of panels” is that a panel “*should* make an objective assessment” of the matter before it. By describing this function using “should”, rather than creating an obligation using “shall”, WTO Members further established in the DSU that an alleged failure to make an objective assessment would not be subject of an appeal.
  - Furthermore, Article 11 of the DSU does not include the term “due process”. Nevertheless, the complainants in this dispute brought numerous claims of error, including for “due process” violations, under Article 11.
  - Such erroneous and unfounded claims of error under Article 11 resulted in significant expenditures of time and resources. The parties and third parties met with the Division for two oral hearings in June and November 2019, spanning a total of eight days of hearings.

---

<sup>9</sup> 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](https://geneva.usmission.gov/wp-content/uploads/sites/290/AB-Report_02.11.20.pdf); Dispute Settlement Body, Minutes of the Meeting Held on August 27, 2018, WT/DSB/M/417, paras. 4.2-4.17.

- We disagree with the majority’s decision in the appellate report to entertain these claims and, remarkably, even accept a claim of error. Even aside from there not being a basis to appeal under DSU Article 11, the United States agrees with the separate opinion’s conclusion that it was not “necessary to examine in detail the appellants’ claims that the Panel erred” and that, in any event, the panel did not act inconsistently with the original, high standard an Appellate Body report set out for Article 11 of the DSU.<sup>10</sup>
- This appeal presented a missed opportunity to reconsider the scope of appellate review permitted under the DSU. As we have explained in the *USTR Report on the Appellate Body*,<sup>11</sup> the DSU lacks any textual basis for appellate review of factual findings, irrespective of the standard of review to be applied.
- The Appellate Body’s decision to review the “objective assessment” of a panel has been seized by appellants to cover practically all factual determinations by a panel, as illustrated by this monstrous appeal.
- Our extensive experience as a litigant shows that panels take seriously their task to make an objective assessment. In fact, many current or former WTO delegates serve as panelists, and no doubt take their responsibilities very seriously.
- To the extent that mistakes can happen in the assessment of evidence, Article 15 of the DSU provides for an interim review stage to correct these errors. Remarkably, the complainants in this appeal chose *not* to avail themselves of that opportunity and work with the Panel to correct any factual errors. Instead, they sought further costly and time-consuming litigation by raising on appeal questions of fact that are beyond the scope of appellate review.
- The WTO dispute settlement system is not operating as it was intended, nor should it operate in this manner. This dispute underscores the need for real reform in order to restore the proper functioning of the dispute settlement system.
- In addition to these substantive concerns, the United States considers that very serious issues are raised by the failure of the Appellate Body to follow the mandatory 90-day deadline in Article 17.5 of the DSU and the continued service on this appeal of all three members of the Division who ceased to be a member of the Appellate Body during the appeal, including with respect to the status of such a report.
- As the document has not been issued by three Appellate Body members and was not

---

<sup>10</sup> *Australia – Plain Packaging* (AB), para. 6.524.

<sup>11</sup> United States Trade Representative, *Report on the Appellate Body of the World Trade Organization* (February 2020), Sec. II.C, at 37-47 (available at [https://geneva.usmission.gov/wp-content/uploads/sites/290/AB-Report\\_02.11.20.pdf](https://geneva.usmission.gov/wp-content/uploads/sites/290/AB-Report_02.11.20.pdf)).

issued within 90 days, consistent with the requirements of Article 17 of the DSU, it is not an “Appellate Body report” under Article 17, and therefore it is not subject to the adoption procedures reflected in Article 17.14. The circumstances of this dispute are particularly remarkable: the document has not been issued by any Appellate Body member and it was issued 691 days after a notice of appeal was submitted in DS435.

- For this item, we do not understand any party to oppose adoption of the reports, nor has any other WTO Member raised an objection.
- The aim of the dispute settlement system is to find a positive solution to the dispute. As no party to the dispute has objected, we understand that the parties consider that adoption of the reports would assist them in finding a positive solution. We would seek to support the parties’ interests on this issue.
- Therefore, there is a consensus to adopt the reports before the DSB today.

12. UNITED STATES – COUNTERVAILING MEASURES ON SUPERCALENDERED PAPER FROM CANADA

A. RECOURSE TO ARTICLE 22.2 OF THE DSU BY CANADA (WT/DS505/13)

- On June 18, 2020, Canada filed a request that the DSB authorize Canada to suspend concessions because it considers that the United States failed to comply with the recommendations of the DSB.
- The United States objects to the premise of Canada’s request, which is that the DSB adopted recommendations in this dispute on March 5, 2020. As we will explain again, the position of the United States is that no DSB recommendation was or could be adopted because there was no valid Appellate Body report, and there was no consensus for the DSB to adopt the reports.
- The United States has also repeatedly expressed concern that Canada continues to pursue a dispute that has no real world effect on Canadian exporters – a fact conceded by Canada’s recent request.
- Canada’s request asks for authorization based on speculation – that is, related to an alleged nullification or impairment that occurs “*if the ‘ongoing conduct’ continues to exist and [if it] applies to exports from Canada in the future*”.
- Canada is unable to even assert that it suffers from any nullification or impairment *today* because the alleged conduct is *not* applied to any Canadian good.
- Only one determination in this dispute involved Canada – *Supercalendered Paper* – and that countervailing duty order was revoked two years ago.
- Therefore, Canada suffers no nullification or impairment from the alleged measure, nor can it say that the alleged measure continues to exist, nor that Canada *will* suffer nullification or impairment in the future.
- Nevertheless – and without prejudice to the U.S. position that no recommendations were adopted by the DSB – by letter dated June 26, 2020, the United States also objected to the level of suspension of concessions or other obligations proposed by Canada.
- Under Article 22.6 of the DSU, the filing of the objection by the United States 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. Although unnecessary, the DSB may take note of that fact and confirm that it may not therefore consider Canada’s request for authorization.

- The United States recalls that at the March 5, 2020, DSB meeting, we did not join a consensus to adopt the reports put forward. There were multiple reasons why the appellate document was not a valid Appellate Body report under Article 17 of the DSU. First, the DSB had taken no action to permit two ex-AB members to continue to serve after their terms expired; second, the report was not issued within 90 days, as required by Article 17.5; and third, one person serving was affiliated with the Government of China, and therefore was not a valid member of the Appellate Body under Article 17.3.<sup>12</sup>
- Indeed, separate from this dispute, on January 31, 2020, the United States informed the WTO Director-General and the DSB Chair by letter of discovered information that disqualified a Chinese national, Ms. Zhao, from the Appellate Body.
- At the March 5 meeting, the United States detailed for Members the evidence demonstrating that Ms. Zhao is not “unaffiliated with any government.” No information has been presented, before, during, or after the March 5 DSB meeting that contradicts that evidence.
- Because of Ms. Zhao’s affiliation with the Government of China, the appellate document is not a valid Appellate Body report because it had not been provided and circulated on behalf of three Appellate Body members, as required under DSU Article 17.1.
- At the March 5 DSB meeting, Canada agreed that the allegations of Ms. Zhao’s lack of independence are serious and stated that they deserve full and impartial consideration. Canada asserted that the Rules of Conduct addressed such situations.
- The United States agrees with Canada’s apparent concern that Ms. Zhao’s participation in the appeal may also be inconsistent with the Rules of Conduct.
- The procedures under the Rules of Conduct for the Appellate Body itself to conduct an inquiry are not available in current circumstances. However, this does not mean that no inquiry may be conducted. To the contrary, in general the Rules provide for the DSB Chair or the Director-General to conduct the relevant inquiry.
- The DSB Chair and Director-General would be natural leaders of such an inquiry given their roles in the WTO dispute settlement system and the trust Members repose in them.
- The United States notes that the conduct at issue also would have constituted a breach of the obligation in DSU Article 17.3 to avoid a direct or indirect conflict of interest.<sup>13</sup> Ms. Zhao was demonstrably connected with the Chinese Government, which had a direct

---

<sup>12</sup> See U.S. Statement at the March 5, 2020, Meeting of the Dispute Settlement Body (Item 8).

<sup>13</sup> See DSU Art. 17.3 (“They [persons serving on the Appellate Body] shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest.”).

interest in this appeal as the “ongoing conduct” complained of related almost exclusively to China.<sup>14</sup> This reinforces the importance of an alternative form of ethical inquiry.

- Therefore, given Canada’s acknowledgement of serious issues of independence and impartiality, the United States would support an alternative inquiry under the Rules of Conduct.
- Even aside from the fact that Ms. Zhao was not a valid Appellate Body member under DSU Article 17.3, such an inquiry would confirm her disqualification from serving on the appeal.

### Second Intervention

- Canada asserts that the appellate report must have been adopted by negative consensus. But it is evident that not any document issued with the title “Report of the Appellate Body” is such a document. For example, if such a document were signed by three members of the Appellate Body Secretariat, no one would seriously argue the report must be adopted by the DSB by negative consensus. That is because the alleged “Report” would not be consistent with DSU Article 17, which requires an appeal to be decided by three Appellate Body members.<sup>15</sup>
- In this dispute, the facts are not seriously contested. First, the DSB had taken no action to permit two ex-AB members to continue to serve after their terms expired; this is evident from the fact that no such decision was ever proposed to the DSB.
- Second, the report was not issued within 90 days, as required by Article 17.5; this too is not contested.
- Third, one Appellate Body member was affiliated with the Government of China; as the United States has pointed out, the evidence of affiliation brought forward by the United States has not been directly contested. Therefore, this affiliated person was not a valid member of the Appellate Body under Article 17.3.
- Given that there was no valid Appellate Body report before the DSB, the document could not be adopted by negative consensus under Article 17.14 as that rule did not attach to this document. Therefore, the DSB could only adopt the document by positive consensus. The United States made clear at the DSB meeting that it objected and did not join a consensus on adoption.

---

<sup>14</sup> See *United States – Countervailing Measures on Supercalendered Paper from Canada (Panel)*, WT/DS505/R, para. 7.295 and Tables 1-4 (seven of nine proceedings involving China).

<sup>15</sup> DSU Art. 17.1 (“The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case.”).

- As there was no consensus for adoption, the DSB did not adopt any reports in this dispute. Accordingly, there was no recommendation for the United States to bring a measure into conformity with a covered agreement.
- Regarding Canada’s comments concerning application of the Rules of Conduct, we note these rules were agreed by Members in order to help preserve the integrity and impartiality of the WTO dispute settlement system. That does not mean that the Rules are all that is necessary to do so. Rather, first and foremost, it is for WTO Members, and all participants in the system, to take responsibility for safeguarding that system.
- When Canada says only the Appellate Body may apply the obligations of impartiality and independence to a person serving on an appeal, and therefore the Rules cannot be applied now, Canada would actually use the Rules to undermine the integrity and impartiality of the WTO.
- If there are valid ethical concerns with the service by a person in an appeal, they should be investigated. It would be thoroughly inconsistent with our experience and close relationship with Canada to see it defend the behavior of the Chinese official in this dispute.
- And there is no question that Ms. Zhao’s professional connections with the Government of China raise serious ethical concerns. For instance, given Ms. Zhao’s professional connections with the Government of China, her participation in the appeal is not consistent with the obligations to be “independent and impartial” and “avoid direct or indirect conflicts of interest,” provided for in paragraph II:1 of the Rules of Conduct.<sup>16</sup>
- We therefore look forward to further conversations with Canada to find a shared approach through which we can maintain the integrity and impartiality of WTO dispute settlement.
- At the March 5 DSB meeting and again today, China has responded to the evidence explained by the United States. Importantly, and revealingly, China has not denied the following:
  - Ms. Zhao serves as Vice President of MOFCOM-AITEC.
  - Ms. Zhao receives or has received a salary for her position of Vice President.
  - MOFCOM-AITEC is an “affiliated” entity “subordinate” to MOFCOM.

---

<sup>16</sup> Rules of Conduct, Section II (“Governing Principle”), para. 1 (“Each person covered by these Rules . . . shall be independent and impartial [and] shall avoid direct or indirect conflicts of interest . . . so that through the observance of such standards of conduct the integrity and impartiality of that mechanism are preserved.”).

- MOFCOM-AITEC's budget is part of MOFCOM's budget, such that the salary for Ms. Zhao's Vice President position at MOFCOM-AITEC is funded by the Government of the People's Republic of China.
- The fact that China did not deny these statements or assert that they are incorrect only confirms that Ms. Zhao is affiliated with the Government of China and is therefore not a valid member of the Appellate Body.



13. MULTI-PARTY INTERIM APPEAL ARBITRATION PURSUANT TO ARTICLE 25 OF THE DSU (JOB/DSB/1/ADD.12)

A. STATEMENTS BY THE MPIA PARTICIPATING PARTIES

- The United States does not object to WTO Members utilizing Article 25 or other informal procedures to help resolve disputes. Indeed, the United States has had discussions with a number of Members regarding alternatives to the traditional WTO dispute settlement system.
- In agreeing to the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), WTO Members have set out explicitly the purpose of WTO dispute settlement: “The aim of the dispute settlement mechanism is to secure a positive solution to a dispute.”<sup>17</sup> If any Member considers that use of the arbitration provision in Article 25 may assist it in securing such a positive solution, the United States in principle supports such efforts.
- The United States objects, however, to any arrangement that would perpetuate the failings of the Appellate Body, which the United States has catalogued in detail.<sup>18</sup>
- The arrangement that we are discussing under this agenda item incorporates and exacerbates some of the worst aspects of the Appellate Body’s practices.
- For example, the arrangement weakens the mandatory deadline for appellate reports; contemplates appellate review of panel findings of fact; and fails to reflect the limitation on appellate review to those findings that will assist the DSB in recommending to a Member to bring a WTO-inconsistent measure into conformity with WTO rules.
- The arrangement also promotes the use of precedent by identifying “consistency” (regardless of correctness) as a guiding principle for decisions. The phrase “consistency and coherence in decision-making” does not appear anywhere in the DSU, but the arrangement makes such “consistency and coherence” in decision-making an explicit objective for different arbitrators in different disputes and then proposes procedures to facilitate this objective.
- Arbitrators are thus encouraged to create a body of law through litigation, rather than to focus on assisting the parties in securing a positive solution to a dispute.

---

<sup>17</sup> DSU Art. 3.7.

<sup>18</sup> 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](https://geneva.usmission.gov/wp-content/uploads/sites/290/AB-Report_02.11.20.pdf); Statement by the United States Concerning Matters Related to the Functioning of the Appellate Body, Meeting of the General Council on December 9 2019, available at <https://geneva.usmission.gov/2019/12/09/ambassador-shea-statement-at-the-wto-general-council-meeting/>; Statement by the United States Concerning Appellate Body Appointments, Meeting of the Dispute Settlement Body on June 24, 2019, available at [https://geneva.usmission.gov/wp-content/uploads/sites/290/Jun24.DSB\\_Stmt\\_as-deliv.fin\\_public.pdf](https://geneva.usmission.gov/wp-content/uploads/sites/290/Jun24.DSB_Stmt_as-deliv.fin_public.pdf).

- The numerous departures from the DSU highlight that at least some Members prefer an appellate “court” with expansive powers, instead of the more narrow appellate review envisioned by Members in the DSU.
- In addition, through the selection process, the arrangement seeks to imbue itself with WTO authority, which it does not have.
- The introduction of a comprehensive set of documents to deal with perhaps two or three disputes over the next few years suggests that the real goal of the arrangement for some participants is not to help the participants resolve disputes but to create an ersatz Appellate Body that would serve as a model for any future WTO Appellate Body.<sup>19</sup>
- In sum, rather than work towards meaningful reform, some Members have now re-directed the focus and energies of the Membership to pursue an arrangement that would, at best, perpetuate the failings of the Appellate Body. The United States does not support such an effort and does not view it as contributing to reform of the dispute settlement system so that it supports the WTO’s critical negotiating and monitoring functions and does not undermine those functions by overreaching and gap-filling.

---

<sup>19</sup> Since 2015, there have only been four appeals in disputes between participating Members.

15. 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 we have identified remain unaddressed.
- The U.S. view across multiple U.S. Administrations has been clear and consistent: When the Appellate Body overreaches and 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.
- 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.<sup>20</sup> 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 incorporated and exacerbated some of the worst aspects of the Appellate Body's practices, as discussed under Agenda Item 13.
- Nevertheless, the United States is determined to bring about real WTO reform, including to 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.
- 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

---

<sup>20</sup> 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](https://geneva.usmission.gov/wp-content/uploads/sites/290/AB-Report_02.11.20.pdf).

adjudication.

- Consistent with the aim of the WTO dispute settlement system, the parties should make efforts to find a positive solution to their dispute, and this remains the U.S. preference.
- And 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.