Statements by the United States at the Meeting of the WTO Dispute Settlement Body
Geneva, June 18, 2014

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.138)

- The United States provided a status report in this dispute on June 5, 2014, in accordance with Article 21.6 of the DSU.

- At least six bills have been introduced in the current Congress in relation to the DSB recommendations and rulings in this dispute. Of these bills, at least four would repeal Section 211. This includes:

  (1) H.R. 214, which has been referred to the House Subcommittee on Trade;

  (2) H.R. 872, which has been referred to the House Subcommittee on Immigration and Border Security, and has 16 co-sponsors;

  (3) H.R. 873, which has been referred to the House Subcommittee on Immigration and Border Security, and has 17 co-sponsors; and

  (4) H.R. 1917, which was referred to the House Subcommittee on Courts, Intellectual Property and the Internet.

- At least two of these bills would modify Section 211. This includes:

  (1) H.R. 778, which has been referred to the House Subcommittee on Western Hemisphere, and has 19 co-sponsors; and

  (2) S. 647, which has been referred to the Senate Committee on the Judiciary and has 7 co-sponsors.

- The U.S. Administration will continue to work on solutions to implement the DSB's recommendations and rulings.

Second Intervention

- We regret that some Members have suggested that the U.S. Administration is not providing sufficient detail. Members, including Mexico, have asked us to provide more information and we've noted in our statement today six bills that were introduced in the current Congress. Some of these bills would modify Section 211 while others would repeal it outright.

- We would note that all of these bills are publicly available from the time of introduction. In fact, it is possible to track the progress of any particular bill through the legislative process using available online tools. Therefore, any delegation interested in reviewing the specifics of these bills may do so using the public material made available by the U.S. Congress online.

- In response to the comments about systemic concerns about the dispute settlement system, the facts simply do not support Members' assertions or justify such systemic concerns. As the United States has explained on several occasions at the DSB, and thus, will not repeat again today, we do not believe that those concerns are well-founded.

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.138)

- The United States provided a status report in this dispute on June 5, 2014, 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.113)

- The United States provided a status report in this dispute on June 5, 2014, 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.76)

- The United States would like to thank the EU for its status report and its statement today.

- As we have explained at past meetings of the DSB, the United States has substantial concerns regarding EU measures affecting the approval of biotech products.

- We are already half way through 2014, and the EU has not approved a single new biotech product yet this year. This is despite the fact that the EU's own food safety authority has issued positive safety assessments for approximately ten pending products.

- Furthermore, at least six of these biotech products have been considered by the relevant EU regulatory committee and then subsequently by an EU appeals committee. And, as the EU delegate described today, those actions are ongoing. However, as the EU delegate also noted, due to opposition from certain EU member States, these EU committees have failed to make decisions.

- Under the EU's own legislation, the European Commission is required to act without delay to approve biotech products in the event that votes in the regulatory committee and the appeals committee do not result in a decision.

- But so far the EU Commission has failed to act. We urge the EU to address these outstanding biotech product applications.

- And, more generally, we urge the EU to take steps to address the fact that EU delays, as well as EU member State bans on products approved at the EU-level, are causing substantial restrictions on trade.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

F. UNITED STATES - ANTI-DUMPING MEASURES ON CERTAIN SHRIMP FROM VIET NAM (WT/DS404/11/ADD.24)

- The United States provided a status report in this dispute on June 5, 2014, in accordance with Article 21.6 of the DSU.

- As we have noted at past DSB meetings, the U.S. Department of Commerce published a modification to its procedures in February 2012 in order to implement the DSB's recommendations and rulings regarding the use of "zeroing" in anti-dumping reviews. This modification addresses certain findings in this dispute.

- The United States will continue to consult with interested parties as it works to address the 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 President signed the Deficit Reduction Act into law on February 8, 2006, which includes a provision repealing the Continued Dumping and Subsidy Offset Act of 2000. Accordingly, the United States has taken all actions necessary to implement the DSB's recommendations and rulings in these disputes.

- We recall, furthermore, that Members, including the EU and Japan, have acknowledged during previous DSB meetings that the 2006 Deficit Reduction Act does not permit the distribution of duties collected on goods entered after October 1, 2007, which is more than six 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 we have expressed at past DSB meetings, there is no obligation under the DSU to provide further status reports once a Member announces that it has implemented the DSB's recommendations and rulings. And we have in the past noted that Members speaking under this item have followed the same approach in disputes where they have been the responding party and have not continued to provide status reports where the complaining party has disagreed over compliance.

- Indeed, despite its intervention at past DSB meetings, as well as today's meeting, we are pleased to note that Canada has through its actions in the *FIT* disputes (DS412 / DS426) expressed the same systemic view as the United States. In the *FIT* disputes in which Canada is the responding party, it has taken the view that it was not required to provide a further status report or make an oral statement to the DSB concerning the issue of implementation once it announced compliance. We agree, and for the very same reason, the United States is not required to provide status reports in relation to this dispute in which the necessary action was taken many years ago.

3. CHINA - CERTAIN MEASURES AFFECTING ELECTRONIC PAYMENT SERVICES

A. STATEMENT BY THE UNITED STATES

- The United States continues to have serious concerns that China has failed to bring its measures into conformity with its WTO obligations.

- The situation has not changed since last month or since the United States first began raising this matter at the DSB.

- In particular, China continues to maintain a ban on foreign suppliers of electronic payment services ("EPS") by imposing a licensing requirement on them while providing no procedures for them to obtain that license.

- As a result, China's own domestic champion remains the only EPS supplier that can operate in China's domestic market.

- China's measures cannot be reconciled with the DSB's findings that China's WTO obligations include both market access and national treatment commitments concerning Mode 3 for EPS.[1]

- The United States takes note of China's statements in prior DSB meetings that it is working on the necessary regulations to allow for the licensing of foreign EPS suppliers, an implicit acknowledgement by China that it still has steps to take to fulfill the market access and national treatment commitment that are set out in its Schedule. We have been engaging with China at many levels to seek the timely issuance of these regulations, but they have still not yet been issued nearly eleven months after the expiry of the RPT in this dispute.

- As such, the United States continues to urge China to move forward with these regulations and to allow the licensing of foreign EPS suppliers in China, consistent with its WTO obligations.

1 *China – Certain Measures Affecting Electronic Payment Services*, WT/DS413/R (adopted Aug. 31, 2012), paras. 7.575, 7.678.

Second Intervention

- As we have stated before in the DSB, we strongly disagree with China's statement and assertion that it has complied in this dispute. The DSB's rulings and recommendations clearly state that "China has made a commitment on market access concerning mode 3"[2] and that "China has made a commitment on national treatment concerning mode 3."[3]

- Despite this clear language, China does not allow foreign EPS suppliers access to the market under mode 3 due to a licensing restriction that sets forth no criteria and no procedure under which to obtain the license. As a result, China Union Pay, the only domestic supplier, continues to operate while foreign EPS suppliers cannot.

- China knows, as we all do, that it has WTO commitments here. And, as I said before, it has recognized that it must take action to provide access to foreign EPS suppliers through regulations. The United States urges China to move forward with these regulations and allow the licensing of foreign EPS suppliers in China consistent with China's WTO obligations.

[2] *Id.*, at para. 7.575.

[3] *Id.*, at para. 7.678.

4. UNITED STATES - MEASURES AFFECTING THE CROSS BORDER SUPPLY OF GAMBLING AND BETTING SERVICES

A. STATEMENT BY ANTIGUA AND BARBUDA REGARDING THE IMPLEMENTATION OF THE RECOMMENDATIONS AND RULINGS ADOPTED BY THE DSB

- The United States remains committed to resolving this matter. We have met with Antigua at many different levels of the U.S. government, we have made multiple generous settlement offers to Antigua in the context of the GATS process that we initiated to withdraw the gambling concession at issue, and we remain committed to a constructive dialogue with Antigua to this day.

- Antigua used rather inflammatory language today in characterizing the status of the discussions between the United States and Antigua, as well as in characterizing the positions that we each have taken and calling into question whether we have made any serious settlement offers. In this context, it is worth noting that the United States worked for months with Antigua on a settlement package in 2008 and thought that the parties had reached agreement, only to have Antigua subsequently repudiate it. We also offered Antigua in 2013 a broad range of useful suggestions to settle this dispute, only to have Antigua ignore the U.S. offer for a long period of time before just last month indicating that it was not acceptable.

- Although we understand that Antigua may not have found this most recent proposal acceptable, we continue to await a constructive answer or a realistic counter-proposal from Antigua in response.

- It is clear that the United States has tried repeatedly to resolve this dispute with Antigua, and we consider its suggestions to the contrary to be not based on any facts. Indeed, it is notable that the U.S. efforts to find a resolution through the GATS Article XXI process have succeeded with every Member *except* Antigua.

- Antigua has also suggested that the United States should submit status reports with respect to this dispute. We do not consider this is necessary or appropriate. The United States has invoked the GATS Article XXI procedure to withdraw this erroneous concession, and that process is the proper forum for further discussion of this matter.

- Despite the difficulties that we have had working things out with Antigua in the past, we continue to hope to find a solution to this dispute. In particular, we look forward to a constructive, positive engagement with Antigua's new government.

Second Intervention

- In response to the comments we have just heard, it bears repeating that the United States remains open to working with Antigua to find a solution to this dispute. We agree that we should focus on this task instead of pointing fingers at each other, and we encourage Antigua to provide a realistic counter-proposal to us in the near future.

6. CHINA - ANTI-DUMPING AND COUNTERVAILING DUTIES ON CERTAIN AUTOMOBILES FROM THE UNITED STATES

A. REPORT OF THE PANEL (WT/DS440/R)

- The United States is pleased to request the DSB to adopt the report of the panel in this dispute. The report is important and of a high quality, and we thank the panel, and the WTO Secretariat assisting them, for their work in producing the report.

- This dispute involves China's imposition of significant levels of antidumping (AD) and countervailing duties (CVD) on certain automobiles from the United States.

- After an extensive examination, the Panel correctly found that China's AD and CVD measures had serious substantive and procedural deficiencies under WTO rules.

- The report is important in at least three respects.

- First, the report is important both for U.S. exporters and Chinese consumers of U.S. automobiles, which were faced with AD duties ranging from 2.0 to 21.5 percent and CVD duties ranging from 6.2 to 12.9 percent. China is the second largest export market in the world for U.S.-made autos, and the significant duties that China imposed on U.S. autos unjustifiably restricted U.S. exports to this important market. And we would note that these duties did not only affect American producers, but also Japanese and German producers that manufacture vehicles in the United States for export to China.

- Second, this dispute is important because it is one of a series of disputes involving what appears to be a systemic misuse by China of AD and CVD measures. In November 2012 and again in September 2013, the DSB adopted very similar findings with regard to China's AD and CVD measures on a high-tech U.S. steel product and on chicken broiler products, respectively. This is the third panel to have considered U.S. claims that China's AD and CVD measures on U.S. products involve pervasive breaches of essentially the same WTO obligations.

- The United States also notes that other Members are pursuing similar claims involving other AD and CVD measures adopted by China. The United States continues to hope that China will respond to this series of disputes by making the systemic changes necessary to begin operating its AD and CVD regimes in accordance with WTO rules.

- Third, this report also has important systemic findings that will benefit all Members.

- For example, the report confirms that WTO rules require that determinations of dumping and subsidization must be based on an objective examination, and must be supported by facts and evidence.

- The report confirms the importance of transparency, and the obligation of investigating authorities to disclose essential facts used to determine dumping margins.

- The report also confirms that authorities must ensure that interested parties are provided non-confidential summaries of confidential information, which is crucial for the meaningful defense of their interests.

- And the report underscores that an analysis of price effects must be based on positive evidence and involve an objective examination, while a determination that imports caused injury to the domestic industry must be supported by facts and evidence on the administrative record.

- The United States would also note – as is not surprising in a report covering such a broad range of issues – that the United States does not agree with certain limited findings that were made by the Panel.

- For example, the Panel did not uphold the U.S. claim that China skewed the injury analysis by excluding domestic producers that did not support the investigation. But the Appellate Body has previously confirmed that an injury analysis must not be based on a biased subset of the domestic industry. The United States understands that this Panel finding relates only to the unique facts of this dispute.

- The Panel also did not find an inconsistency in China's failure to disclose essential facts and provide public notice regarding the AD and CVD duty rates for unknown U.S. exporters. Reconciling this finding with prior panel and Appellate Body reports is difficult. Again, the United States understands this finding is tied to the unique facts of the dispute.

- But these claims were not at the core of the pervasive procedural and substantive flaws found by the Panel. For the reasons we have set out today, the United States is pleased to propose that the DSB adopt this important report. As noted, we hope China will begin to address its systemic problems so as to ensure that all of its AD and CVD investigations comport with its WTO obligations.

Second Intervention

- The United States takes note of China's statement that it has terminated the AD and CVD measures on automobiles from the United States.

- With the withdrawal of the AD and CVD duties on U.S. autos, it would appear that no more action is necessary for China in respect of the findings and recommendations in the Panel report.

- The United States is pleased with this development and will continue to monitor any duties applied to U.S. autos exports.

- However, the United States reiterates its view that China would benefit from taking broader action – beyond mere termination of the AD and CVD measures here – to address the systemic problems that were highlighted by the series of dispute settlement reports that have found that numerous AD and CVD measures imposed by China have breached its WTO obligations.

- In multiple disputes, including *China – GOES* and *China – Broiler Products*, the panel and Appellate Body found China's AD and CVD measures inconsistent with its WTO obligations for many of the same reasons as the panel report being adopted today. Instead of acknowledging this, China has attempted to change the subject by raising disputes related to U.S. AD measures. These are not the measures that were at issue in the panel report being adopted today, and instead of raising these unrelated issues, we would encourage China to address the systemic problems with its AD and CVD regime.

7. EUROPEAN COMMUNITIES – MEASURES PROHIBITING THE IMPORTATION AND MARKETING OF SEAL PRODUCTS

A. REPORT OF THE APPELLATE BODY (WT/DS400/AB/R) AND REPORT OF THE PANEL (WT/DS400/R AND WT/DS400/R/ADD.1)

B. REPORT OF THE APPELLATE BODY (WT/DS401/AB/R) AND REPORT OF THE PANEL (WT/DS401/R AND WT/DS401/R/ADD.1)

- Mr. Chairman, this dispute and the reports being adopted today raise a number of important systemic issues that should be of interest to Members.

- The United States was a third party in this dispute and appreciates some of the challenges faced by the Panel and the Appellate Body in producing their reports. Many of the issues involved and the claims and arguments of the parties were quite complex and nuanced, and we appreciate the hard work by both the panel and Appellate Body in grappling with those issues.

- One key issue addressed in the dispute was whether the measure at issue was a technical regulation. The Appellate Body's finding that the measure at issue is not a technical regulation is welcome and fully supported by the text of the TBT Agreement.

- The measure does not lay down product characteristics or a process or a production method that is related to product characteristics. Therefore, the measure does not come within the first sentence of the definition of a technical regulation as set out in Annex 1 of the TBT Agreement.

- Here, the measure concerned the characteristics of the type of hunt involved, not the characteristics of the product itself. Two identical final products with exactly the same characteristics would be treated differently based not on those characteristics, but on the fact that one product involved a certain type of hunt while the other involved a different type. Thus, we welcome the Appellate Body's analysis and its reversal of the Panel's finding.

- With respect to the non-discrimination claims under Articles I and III of the GATT 1994, the findings by the Panel and Appellate Body are more troubling.

- In particular, we are not fully persuaded by the Appellate Body's finding that the national treatment provisions of the TBT Agreement are to be interpreted differently from the national treatment provisions of the GATT 1994 in light of the fact that these two provisions contain identical wording.

- These findings appear to ensure that a measure could be found consistent with Article 2.1 of the TBT Agreement, yet inconsistent with the identically worded in GATT Article III:4.

- Indeed, these findings raise the very real possibility, as demonstrated in this dispute, that Article 2.1 of the TBT Agreement will become superfluous, and the legal approach developed in the recent TBT disputes will become just an historical footnote.

- The Appellate Body report seeks to respond to this concern in part by stating that "the European Union has not pointed to any concrete examples of a legitimate objective that could factor into an analysis under Article 2.1 of the TBT Agreement, but would not fall within the scope of Article XX of the GATT 1994."

- However, there were such examples that were provided during the appeal. One such example is provided by the TBT Agreement text itself and that is – the preamble refers to "measures necessary to ensure the quality of" a Member's exports. There is no parallel provision in Article XX of the GATT 1994.

- It is also difficult to understand how a "detrimental impact" on imports from one Member compared to another Member can by itself be sufficient to find that those imports are being treated less favorably. One would expect that any measure will affect some products differently from others. Yet that different treatment would not amount to discrimination unless one also looks at the reason why there was such a difference in treatment.

- On the other hand, with respect to the analysis under Article XX(a) of the GATT 1994, the Panel and Appellate Body carefully considered and addressed a number of difficult issues involving what is a public moral for purposes of that provision and what does it mean to protect a public moral.

- In that analysis, the Panel and the Appellate Body considered and declined to accept a number of arguments that would have significantly departed from the text of Article XX(a). Members need to have the ability to delineate their approach to public morals in accordance with the particular context of their own domestic system. The findings that are being adopted today affirm that ability and should be generally welcomed by Members.

- Finally, the United States would like to comment on an important systemic issue raised in the context of this appeal something that Canada has also raised. This was raised not by the report itself, but by the Appellate Body's March 24, 2014, letter to the DSB Chair, in which it indicates that it "will not be able to circulate its reports within the 90-day timeframe provided for in the last sentence of Article 17.5 of the DSU."

- While the 90-day deadline in the DSU text is categorical, Members have an understanding of the workload challenges faced by the Appellate Body, and have been willing to agree to receive a report after this deadline and provide in writing their commitment to treat the report as if it were circulated within the 90-day deadline when they have been meaningfully consulted with by the Division handling a particular appeal. Equally important, such consultation and agreement, when noted in the Appellate Body's communication and by the parties, provides transparency to the DSB in relation to the observance of the rules in the DSU.

- For these reasons, the Appellate Body regularly consulted with and obtained the agreement of Members to issue reports after 90 days between 1997 and 2011. We have been taking a close look at the facts earlier this week and have found that during those years, the Appellate Body obtained the parties agreement in 14 consecutive disputes – the first 14 disputes where the circulation of the report exceeded 90 days from the date of appeal.

- Unfortunately, it is our understanding that the Division hearing this appeal deviated from this well-established practice. It is regrettable that the agreement of the parties to circulate its reports after the 90-day deadline was not obtained and that transparency to the DSB was not provided. As Canada has mentioned, part of the rationale for delaying the report might been because the parties had suggested changing the date of the hearing, but this highlights the parties would have readily agreed to issuance of the report after the deadline.

- This deviation from past practice is extremely troubling, and we are concerned that it may repeat itself in the near future, in particular in light of the fact that the Appellate Body may face a higher than normal workload in the year to come. We hope that the Appellate Body and Members can engage in a dialogue on this issue in the weeks ahead to come to a solution that respects the mandatory deadline set out in the text of the DSU and provides the DSB with transparency with respect to the agreement of the parties and timing of the issuance of Appellate Body reports while at the same time ensuring that the Appellate Body has the time to produce high-quality reports. In this regard, we believe that the well-established practice until 2011 served WTO Members and the Appellate Body well.