

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

Geneva, May 22, 2017

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.172)
 - The United States provided a status report in this dispute on May 11, 2017, 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.147)
 - The United States provided a status report in this dispute on May 11, 2017, 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.110)
 - The United States thanks the European Union (“EU”) for its status report and its statement today.
 - As the United States has noted repeatedly, the EU measures affecting the approval and marketing of biotech products continue to result in lengthy, unpredictable, and unexplained delays in approvals. The delays and uncertainty in approvals cause adverse effects on trade.
 - The failure to approve biotech corn products is a source of particular concern to the United States. A number of corn products have received the approval of the EU’s scientific authority, yet remain stalled at the level of the EU Appeals Committee or the EU Commission.
 - The United States encourages the EU to make decisions on biotech approvals without unnecessary or further delays.

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

A. STATEMENT BY THE EUROPEAN UNION

- As the United States has noted at previous DSB meetings, the Deficit Reduction Act – which includes a provision repealing the Continued Dumping and Subsidy Offset Act of 2000 – was enacted into law in February 2006. Accordingly, the United States has taken all actions necessary to implement the DSB’s recommendations and rulings in these disputes.
- We recall, furthermore, that the EU has acknowledged that the Deficit Reduction Act does not permit the distribution of duties collected on goods entered after October 1, 2007, over nine years ago.
- With respect to the EU's request for status reports in this matter, as we have already explained at previous DSB meetings, there is no obligation under the DSU to provide further status reports once a Member announces that it has implemented the DSB recommendations and rulings, regardless of whether the complaining party disagrees about compliance.
- As we have noted previously, the EU has demonstrated repeatedly it shares this understanding, at least when it is the responding party in a dispute. Once again, this month the EU has provided no status report for one or more disputes in which there is a disagreement between the parties on the EU's compliance.
- Finally, we note the EU's recent announcement to maintain its suspension of concessions on U.S. goods.
- The United States continues to review the action by the EU and would not accept any characterization of such continued countermeasures as consistent with the DSB's authorization.
- As the EU is aware, the United States has announced that it has implemented the DSB’s recommendations and rulings. If the EU disagrees, there would appear to be a disagreement between the parties to the dispute about the situation of compliance.

4. UNITED STATES - COUNTERVAILING MEASURES ON CERTAIN PIPE AND TUBE PRODUCTS FROM TURKEY

A. REQUEST FOR THE ESTABLISHMENT OF A PANEL BY TURKEY
(WT/DS523/2)

- We are disappointed that Turkey has sought the establishment of a panel in this matter.
- As the United States has explained to Turkey, the determinations identified in Turkey's request for panel establishment are fully consistent with WTO rules.
- Furthermore, Turkey seeks to challenge certain alleged "practices". These matters, however, are not measures and would not fall within the scope of a dispute settlement proceeding.
- Further, we fail to understand why Turkey is pursuing a challenge to a determination that was vacated in the course of domestic litigation.
- We regret that Turkey would seek to use WTO resources in this manner, particularly when WTO dispute settlement resources are overburdened.
- For these reasons, the United States does not agree to the establishment of a panel today.

5. INDIA – MEASURES CONCERNING THE IMPORTATION OF CERTAIN AGRICULTURAL PRODUCTS (WT/DS430)

A. RECOURSE TO ARTICLE 21.5 OF THE DSU BY INDIA: REQUEST FOR THE ESTABLISHMENT OF A PANEL

- As the United States noted at last month's meeting of the DSB, India has no basis for asserting compliance with the DSB recommendations in this dispute.
- To recall, the DSB found that India's measures blocking the importation of U.S. poultry and other agricultural products were not based on science and breached several obligations of India under the SPS Agreement.
- The DSB adopted these rulings in June 2015, nearly two years ago. Despite that, India continues to maintain a complete ban on U.S. poultry and other agricultural products.
- The United States has made concrete proposals to India and has yet to receive a substantive reply from India to those proposals.
- It is regrettable that India remains focused on litigation instead of on actually achieving compliance in this dispute.
- Regarding India's comments about sequencing agreements, we find it puzzling that so much of India's Panel Request is dedicated to the issue of a sequencing agreement rather than explicating how India is ensuring its trading partners have access consistent with India's WTO obligations.
- In any event, the DSU does not require Members to enter into a sequencing agreement. The fact is that India had taken no steps to address the DSB's recommendations as of the time when the United States took procedural action to preserve its rights under Article 22.
- Regarding India's comments that Article 21.5 proceedings should come before Article 22.6 proceedings, Members have often agreed through sequencing agreements or otherwise to conduct proceedings in such an order, but as Members are well aware, this is not required under the DSU.
- Regarding India's comments about our request for authorization, under Article 22.6 of the DSU, the negative consensus rule applies within 30 days of the end of the period for compliance.
- By submitting the Article 22.2 request, the United States preserved its negative consensus rights.
- Taking this step was neither surprising nor unusual. Similar actions have been taken in other disputes.

- The United States notes that as of the end of the reasonable period of time, and indeed as of the time of the U.S. request under Article 22.2 of the DSU, India was not even claiming that the measures that were the subject of the DSB's rulings and recommendations had been withdrawn or modified.

7. UNITED STATES – MEASURES CONCERNING THE IMPORTATION, MARKETING AND SALE OF TUNA AND TUNA PRODUCTS

A. RECOURSE TO ARTICLE 22.7 OF THE DSU BY MEXICO (WT/DS381/44)

- Mr. Chairman, the United States regrets the request for authorization put forward by Mexico today. But as discussed at previous DSB meetings, in March 2016, the U.S. National Oceanic and Atmospheric Administration (“NOAA”) issued a rule modifying the U.S. dolphin safe labeling measure. That rule directly addressed the DSB’s findings and brought the United States into compliance with its WTO obligations.
- As a result, if the compliance panel confirms that the current dolphin-safe labeling measure is no longer WTO-inconsistent, there would be no basis under WTO rules to apply any countermeasures.
- The United States does appreciate the hard work of the Arbitrator, and the Secretariat staff assisting it, in the Article 22.6 proceeding. Nonetheless, the United States has concerns with the Arbitrator’s award.
- First, the Arbitrator based its report on a measure that no longer exists. This choice was inconsistent with the purpose and proper operation of an Article 22.6 proceeding, as made clear by the text of the DSU. The level of suspension of concessions determined in any arbitration under Article 22.6 of the DSU must be equivalent to the current level of nullification and impairment. The text of DSU Article 22.4 is clear that the appropriate level of suspension of concessions may not exceed “the level of nullification or impairment” currently caused by the measure found to be WTO-inconsistent.
- Article 22.7 also makes it clear that the relevant inquiry is focused on the present level of nullification and impairment, and Article 22.8 of the DSU is explicit that there can be no suspension of concessions where there is compliance. Therefore, as the U.S. tuna measure has been brought into compliance, there is no basis for a suspension of concessions in this dispute.
- With respect to the trade effects analysis in the award, we would note that the Arbitrator’s analysis erroneously overestimates the trade impact of this measure. Most importantly, the Arbitrator used Mexico’s model as a basis for calculation, even though the model was based on three major assumptions that were unproven and, in fact, were contrary to the evidence on U.S. consumer preferences and the global supply of canned tuna.
- **First**, the Arbitrator accepted Mexico’s claim that the U.S. measure restricted the supply of canned yellowfin to the U.S. market, despite significant evidence to the contrary.
- The Arbitrator claimed that the adoption of the U.S. tuna measure in 1990 was “the main reason” for declining yellowfin imports and purchases by U.S. canneries. But the

Arbitrator ignored the fact that *all* tuna purchases by U.S. canneries declined in the 1990s.

- The Arbitrator also asserted that yellowfin prices “generally increase[ed]” after 1990. But the Arbitrator relied on evidence related to *fresh* yellowfin for sale in the direct consumption/sashimi markets, not cannery-grade frozen yellowfin. They are two different markets – as any lover of sushi would appreciate – and cannot be confused.
- **Second**, the Arbitrator found that, on average, U.S. consumers prefer canned yellowfin over other types of canned tuna. But *no* evidence suggested more than a tiny fraction of U.S. consumers have such a preference.
- To the contrary, the evidence established that U.S. consumers have a strong preference for canned albacore and skipjack-based lightmeat tuna, as skipjack is the least expensive type of tuna and is low in mercury.
- Multiple surveys confirmed that only a tiny percentage of consumers buying canned tuna (2-6%) look for yellowfin.
- Additionally, U.S. consumers, for decades, have been deeply concerned about the harmful effects of dolphin sets and have wanted to purchase tuna caught by other methods. In response to this concern, all major U.S. retailers have, for decades, decided not to purchase canned tuna produced by setting on dolphins.
- The United States presented statements by all of the largest U.S. retailers showing that their purchasing policies regarding canned tuna would not be affected by removal of the tuna measure. Some of the retailers declared explicitly that they would never purchase tuna caught by setting on dolphins, while others explained that their purchasing decisions were not affected by the official label and would not be changed by its removal.
- The Arbitrator ignored the evidence about U.S. consumer preferences and how they have shaped the decisions of all major U.S. retailers. Instead, the Arbitrator assumed that any retailer in the United States that had not explicitly vowed to *never* purchase tuna caught by setting nets on dolphins would start purchasing Mexican tuna if the measure were withdrawn. This included retailers that had confirmed that removal of the measure would have no effect on their purchasing decisions.
- **Third**, the Arbitrator agreed that Mexico would be the only supplier of canned yellowfin in the U.S. market. Let me repeat: no other WTO Member would successfully compete to sell canned yellowfin tuna in the U.S. market. This is unrealistic, and the assumption was made without *any* evidence as to the cost structure of the Mexican tuna industry compared to other industries or *any* evidence of the Mexican industry’s ability to compete successfully in *any* market outside Mexico.

- In combination, these findings resulted in a large overestimation of the trade effects from the previous version of the dolphin-safe labeling measure. But as noted at the outset, the Arbitrator's analysis was of a measure that no longer exists today. If the compliance panel confirms that the current, 2016 dolphin-safe labeling measure is no longer WTO-inconsistent, there would be no basis under WTO rules to apply any countermeasures in relation to the award we are discussing today.

9. UNITED STATES – CERTAIN METHODOLOGIES AND THEIR APPLICATION TO ANTI-DUMPING PROCEEDINGS INVOLVING CHINA
- A. REPORT OF THE APPELLATE BODY (WT/DS471/AB/R AND WT/DS471/AB/R/ADD.1) AND REPORT OF THE PANEL (WT/DS471/R AND WT/DS471/R/ADD.1)
- The United States thanks the Panel, the Appellate Body, and the Secretariat staff assisting them for their hard work in this dispute.
 - The United States welcomes the Appellate Body’s rejection of virtually all of China’s claims on appeal.
 - Indeed, the United States questions whether China’s decision to appeal comports with a judicious use of the WTO dispute settlement system. The Panel had found that the specific determinations at issue, as well as an alleged unwritten measure, were not consistent with obligations under the AD Agreement.
 - Despite this, China sought more findings from the Appellate Body, essentially on derivative issues. Findings on those derivative issues would not have contributed to “secur[ing] a positive solution to a dispute.”¹
 - Furthermore, China’s appeal lacked any legal merit. This is reflected in the Appellate Body’s complete rejection of China’s request for additional findings against the U.S. measures at issue.
 - In these circumstances, China’s decision to bring this appeal raises systemic concerns. Given the stress on the dispute settlement system resulting from the large number of ongoing disputes, it is incumbent upon Members to act prudently when making decisions concerning the commencement of new disputes and the taking of appeals.
 - At today’s meeting, the DSB also is adopting the report of the Panel. A number of the Panel’s findings are similar to or follow recent Appellate Body findings. In particular, these findings involve two important systemic issues – targeted dumping, and the use of a single antidumping rate for those exporters controlled by the government of China.
 - The United States has serious concerns with the panel and underlying Appellate Body findings on both issues.²

¹ See DSU, Art. 3.7.

² See Dispute Settlement Body, Minutes of Meeting, September 26, 2017, WT/DSB/M/385, paras. 8.8-8.22 (Appellate Body findings on targeted dumping); Dispute Settlement Body, Minutes of Meeting, July 28, 2011, WT/DSB/M/301, para. 8 (Appellate Body findings on rates for government-controlled exporters).

- First, with respect to targeted dumping, the Appellate Body in *US – Washing Machines* (DS464) prescribed a particular methodological approach to the application of the AD Agreement that is not based on the text of the covered agreements, but rather is focused on the application of language from prior Appellate Body reports addressing different legal issues. The Appellate Body essentially rewrote Article 2.4.2 of the AD Agreement by prescribing a wholly new methodology for addressing “targeted dumping.” That methodology was never contemplated at the time the AD Agreement was negotiated and adopted. Nor, to our knowledge, has the Appellate Body’s methodology been used by any Member at any time in the more than 20 years since the WTO Agreement entered into force. Indeed, no party in the dispute advocated the methodology ultimately articulated by the Appellate Body. The Panel here adopted the same approach.
- In rewriting the second sentence of Article 2.4.2, the Appellate Body incorrectly found that the use of “zeroing” in connection with the application of the average-to-transaction comparison methodology to so-called “pattern transactions” is inconsistent with the AD Agreement. As one Appellate Body member explained in dissent in *US – Washing Machines* (DS464), this finding cannot be supported under the rules of interpretation provided for under the DSU. Regrettably, the Panel here came to the same unsupportable conclusion.
- The Panel also found that the use of a rebuttable presumption that Chinese firms are under state control, and the consequent application of a single AD rate, was inconsistent with obligations under the AD Agreement. This finding to a large extent was based on prior Appellate Body findings in *EC – Fasteners* (DS397). As the United States has explained, the finding is not grounded in the AD Agreement, and fails to take account of the real-world difficulties that investigating authorities encounter when determining anti-dumping margins for large numbers of government-controlled exporters.
- The United States thanks the DSB for its attention to the important issues covered in our statement today.

10. APPOINTMENT OF APPELLATE BODY MEMBERS: PROPOSAL BY THE EUROPEAN UNION (WT/DSB/W/597)

- Mr. Chairman, given the ongoing transition in our political leadership and the very recent confirmation of a new U.S. Trade Representative, we are not in a position to support the proposed decision to launch a process to fill a position on the Appellate Body that will only become vacant in December.
- Nevertheless, the United States is willing to join a consensus for the DSB to take the decision proposed by Argentina, Brazil, Colombia, Chile, Guatemala, Mexico, and Peru. That decision is focused on a process to fill a position that will become vacant in just over one month's time. As we have conveyed to several Members, despite the ongoing transition, we received guidance that it would be acceptable to launch a process given the expiry of Mr. Ramirez's second term on June 30.