

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

Geneva, May 28, 2019

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.195)
 - The United States provided a status report in this dispute on May 16, 2019, 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.170)

- The United States provided a status report in this dispute on May 16, 2019, 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.

Second Intervention

- As we have noted at prior meetings of the DSB, by intervening under this item, China attempts to give the appearance of concern for intellectual property rights.
- Yet, China has been engaging in industrial policy which has resulted in the transfer and theft of intellectual property and technology to the detriment of the United States and our workers and businesses.
- In contrast, the intellectual property protection that the United States provides within its own territory equals or surpasses that of any other Member.
- Indeed, none of the damaging technology transfer practices of China that we have discussed at recent DSB meetings are practices that Chinese companies or innovators face in the United States.

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.133)

- The United States thanks the European Union (“EU”) for its status report and its statement today, and looks forward to the upcoming discussions with the EU in June.
- The United States continues to be concerned with the EU’s measures affecting the approval of biotech products. Ongoing and persistent delays affect dozens of applications that have been awaiting approval for months or years, or that have already received approval.
- As we have highlighted at prior meetings, even when the EU finally approves a biotech product, EU member States continue to impose bans on the supposedly approved product. The amendment of EU Directive 2001/18, through EU Directive 2015/413, permits EU member States to, in effect, restrict or prohibit cultivation of genetically-modified organisms (“GMOs”), even where the European Food Safety Authority (“EFSA”) has concluded that the product is safe.
- This legislation permits EU member States to restrict for non-scientific reasons certain uses of EU-authorized biotech products in their territories by demanding that EU cultivation authorizations be adjusted to exclude portions of an EU member State’s territory from cultivation. At least seventeen EU member States, as well as certain regions within EU member States, have submitted such requests with respect to MON-810 maize.
- This fact cannot be squared with the EU’s representation at previous DSB meetings that no member State has taken action to ban the cultivation of such a product. The EU has not shown how the withholding of products for cultivation does not amount to a ban on those products. Moreover, the EU has provided nothing to support its suggestion at the most recent DSB meeting that cultivation bans do not affect the free movement of seeds within the EU.
- We once again emphasize the public statement issued by the EU’s Group of Chief Scientific Advisors on November 13, 2018, in response to the July 25, 2018, European Court of Justice (ECJ) ruling that addresses the forms of mutagenesis that qualify for the exemption contained in EU Directive 2001/18/EC. The Directive was a central issue in dispute in these WTO proceedings, and concerns the deliberate release into the environment of genetically modified organisms, or GMOs. Contrary to the EU’s statement at prior DSB meetings, this ECJ ruling relates to previously authorized GMOs.

- The EU Group of Chief Scientific Advisors’ statement speaks to the lack of scientific support for the regulatory framework under EU Directive 2001/18. The EU has repeatedly maintained at previous DSB meetings that these scientific advisors are just another group of stakeholders. The statement clearly does not reflect a mere reaction from a group of stakeholders. Rather, the statement reflects scientific advice provided to the EC Commission in response to its request for such information.
- The Chief Scientific Advisors’ message provided in the statement is clear: “in view of the Court’s ruling, it becomes evident that new scientific knowledge and recent technical developments *have made the GMO Directive no longer fit for purpose.*” The statement further advises that current scientific knowledge calls into question the definition of “GMOs” under the Directive and notes that mutagenesis, as well as transgenesis, occurs naturally.
- The United States urges the EU to act in a manner that will bring into compliance the measures at issue in this dispute. The United States further 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.17)

- The United States provided a status report in this dispute on May 16, 2019, in accordance with Article 21.6 of the DSU.
- On May 6, 2019, the U.S. Department of Commerce published a notice in the U.S. Federal Register announcing the revocation of the antidumping and countervailing duty orders on imports of large residential washers from Korea (84 Fed. Reg. 19,763 (May 6, 2019)). With this action, the United States has completed implementation of the DSB recommendations concerning those antidumping and countervailing duty orders.
- The United States continues to consult with interested parties on options to address the recommendations of the DSB relating to other measures challenged in this dispute.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB
 - E. UNITED STATES – CERTAIN METHODOLOGIES AND THEIR APPLICATION TO ANTI DUMPING PROCEEDINGS INVOLVING CHINA: STATUS REPORT BY THE UNITED STATES (WT/DS471/17/ADD.9)
 - The United States provided a status report in this dispute on May 16, 2019, 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

G. UNITED STATES – ANTI-DUMPING MEASURES ON CERTAIN OIL COUNTRY TUBULAR GOODS FROM KOREA: STATUS REPORT BY THE UNITED STATES (WT/DS488/12/ADD.8)

- The United States provided a status report in this dispute on May 16, 2019, in accordance with Article 21.6 of the DSU.
- On November 23, 2018, the U.S. Department of Commerce provided notice in the U.S. Federal Register that it has commenced a proceeding to gather information, analyze record evidence, and consider the determinations which would be necessary to bring the antidumping investigation at issue in this dispute into conformity with the recommendations and rulings of the DSB. The notice is available at 83 F.R. 59359.
- The United States will continue to consult with interested parties on options to address the recommendations of the DSB.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

H. INDONESIA – IMPORTATION OF HORTICULTURAL PRODUCTS, ANIMALS AND ANIMAL PRODUCTS: STATUS REPORT BY INDONESIA (WT/DS477/21 – WT/DS478/22/ADD.4)

- 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.
- We are still waiting to hear from Indonesia the concrete actions it will take to bring its measures into full compliance, including regarding the statutory changes Indonesia intends to make with respect to Measure 18.
- The United States remains willing to work with Indonesia to fully and meaningfully resolve this dispute, but we are very concerned with Indonesia's continued failure to come into full compliance with the recommendations of the DSB.

2. IMPLEMENTATION OF THE RECOMMENDATIONS OF THE DSB

A. KOREA – IMPORT BANS, AND TESTING AND CERTIFICATION REQUIREMENTS FOR RADIONUCLIDES

- The United States has listened closely to the interventions by the parties, including at the preceding DSB meeting. These interventions have raised systemic issues on which we would like to offer a few remarks.
- First, the DSU establishes that a responding party shall state its intentions in relation to the DSB’s recommendations. There is one recommendation set out in the DSU, that in Article 19.1. Under this provision, the recommendation adopted by the DSB is to bring a measure found WTO-inconsistent into conformity with the relevant covered agreement.
- Where the Appellate Body reverses a panel’s legal conclusion that a measure is WTO-inconsistent, the consequence will be no DSB recommendation. That is a serious consequence. Reversal of a finding of inconsistency should occur when the legal conclusion, or interpretation on which the conclusion is based, is clearly erroneous.
- Second, Japan has raised concerns in relation to the reversal of the panel’s findings under SPS Agreement Article 5.6, and we share those concerns.
- The appellate report states that the panel’s findings in relation to quantitative evaluation of the safety of Japanese imports would not “*necessarily*” achieve the qualitative levels of protection asserted, that the panel did not “*explicitly* integrate” its evaluation of the verbal formulations of the level of protection, and the panel ultimately “failed to account *clearly* for all elements” of the level of protection.
- What appear missing in this assessment is any conclusion that Japan had *not* made out the elements of its claim, or a conclusion that the quantitative evaluation of the safety of Japanese imports could *not* satisfy the qualitative levels asserted. There is no statement that the panel’s legal conclusion was, in simple terms, wrong.
- Third, the reversal here is also concerning because the panel made factual findings relating to the safety of those products after consulting with scientific experts. Under the DSU, it is panels that are charged with making factual findings, including in relation to the content and effect of domestic measures. Under Article 17.6, an appeal may *not* review facts, but is limited to issues of law and legal interpretation.
- The appellate report here has not expressly overturned the panel’s findings on the safety of Japanese imports. Nevertheless, it has overturned the panel’s findings that the safety of those imports achieves another Member’s level of protection, but *without* demonstrating how the panel’s findings cannot satisfy that level of protection.

- The appellate review performed in this dispute appears concerned less with substance and legal error, and more with form and wording.
- We therefore share Japan's view that this appellate report raises concerns of Appellate Body overreaching, and invite Members' reflection on this important systemic issue.

2. IMPLEMENTATION OF THE RECOMMENDATIONS OF THE DSB

B. CHINA – DOMESTIC SUPPORT FOR AGRICULTURAL PRODUCERS

- The United States thanks China for its communication of May 16, 2019, and its statement today, indicating that it intends to implement the DSB’s recommendations and rulings in this dispute, and that it will need a reasonable period of time for implementation.
- China’s WTO-inconsistent domestic support measures are a source of significant concern to the United States and other WTO Members. We therefore look forward to China moving promptly to bring its measures into compliance with its obligations.
- We stand ready to agree with China, under Article 21.3(b) of the DSU, on the reasonable period of time to implement the DSB’s recommendations.

3. 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 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, more than 11 years ago.
- This month, the EU notified the DSB that the current level of countermeasures under the Arbitrator’s formula in relation to goods entered before 2007 is \$3,355.82. Accordingly, effective May 1, the EU announced it would be applying an additional duty of 0.001 percent on certain imports of the United States. We think these numbers speak volumes about the utility and wisdom behind this agenda item.
- 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, regardless of whether the complaining party disagrees about compliance.
- The practice of Members confirms this widespread understanding of Article 21.6. Responding party Members do *not* continue submitting status reports where the responding Member has claimed compliance and the complaining Member disagrees, as we shall see under the next item concerning the *EU – Large Civil Aircraft* dispute.
- Accordingly, since the United States has informed the DSB that it has taken all steps necessary for compliance, there is nothing more for the United States to provide in a status report.

Second Intervention

- We note the EU’s recent announcement that it will maintain its suspension of concessions on U.S. goods at a very low level. This is regrettable, especially given our close collaboration generally. The United States continues to review the action by the EU and would not accept any characterization of such continued countermeasures – no matter how small – as consistent with the DSB’s authorization.

4. 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 *EU – Large Civil Aircraft* (DS316).
- The United States has raised this same issue at recent past DSB meetings, where the EU similarly chose not to provide a status report.
- As we have noted at several recent DSB meetings, the EU has argued that Article 21.6 of the DSU requires that “the issue of implementation shall remain on the DSB’s agenda until the issue is resolved.” And the EU has argued 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.”
- The EU does not contest that the issue remains unresolved for purposes of Article 21.6 of the DSU. The EU’s only attempt to reconcile its stated position with its lack of a status report in this dispute is to argue that there is some exception to providing a status report if there are ongoing proceedings.
- The only problem with this EU effort is that there is no such exception anywhere in the DSU. It is simply an invention by the EU to try to justify its acting in this dispute in a manner that is inconsistent with the legal position it has taken for other disputes.
- Under the EU’s own view, the EU should be providing a status report. Yet it has failed to do so.
- The only difference that we can see is that, now that the EU is a *responding* party, the EU is choosing to contradict the reading of DSU Article 21.6 it has long erroneously promoted.
- Under Article 21.6 of the DSU, once a responding Member provides the DSB with a status report that announces compliance, there is no further “progress” on which it can report, and therefore no further obligation to provide a report.
- But as the EU allegedly disagrees with this position, it should for future meetings provide status reports in this DS316 dispute.

6. UNITED STATES – ANTI-DUMPING AND COUNTERVAILING DUTIES ON RIPE OLIVES FROM SPAIN
 - A. REQUEST FOR THE ESTABLISHMENT OF A PANEL BY THE EUROPEAN UNION (WT/DS577/3)
 - We regret that the European Union has sought the establishment of a panel in this matter.
 - As the United States has explained to the European Union, duties were imposed on ripe olives from Spain following thorough antidumping and countervailing duty investigations by the U.S. Department of Commerce, and equally thorough injury investigations by the U.S. International Trade Commission, fully consistent with WTO rules.
 - Furthermore, the European Union’s request to establish a panel includes claims that were not included in the request for consultations, meaning that the parties have yet to consult on these claims.
 - For these reasons, the United States does not agree to the establishment of a panel today.

7. CHINA – TARIFF RATE QUOTAS FOR CERTAIN AGRICULTURAL PRODUCTS

A. REPORT OF THE PANEL (WT/DS517/R AND WT/DS517/R/ADD.1)

- The United States thanks the Panel, and the Secretariat staff assisting the Panel, for their work on this dispute.
- The United States welcomes the findings of the Panel in this report, which confirm that China failed to administer its tariff-rate quotas for wheat, corn, and rice consistently with its WTO commitments.
- China has committed to administer its TRQs on a transparent, predictable, and fair basis, using clearly specified administrative procedures and requirements that do not inhibit the filling of each TRQ.
- The Panel found that several aspects of China's TRQ administration, including in particular its eligibility criteria, allocation principles, reallocation procedures, public comment process, allocation of state-trading and non-state trading portions of each TRQ, and processing restrictions, are not transparent, predictable, or fair, fail to use clearly specified procedures or requirements, and ultimately inhibit China's TRQs from filling.
- We also note the Panel's findings that the many disparities between what is set out in China's legal instruments and China's practice further demonstrate that China administers its TRQs inconsistently with its commitments.
- For example, the Panel found that whereas China's legal instruments provide that the state-trading and non-state trading portions of TRQs are available for allocation to all applicants, China *in practice* allocates the state trading portions of each TRQ exclusively to state trading enterprises (STE), and without applying its published rules.
- This means that, among other things, COFCO, China's state-owned enterprise for grains trading, is not required to return unused TRQ amounts for reallocation to private entities. Therefore, unless COFCO imports its full allocation amount, large portions of China's TRQ would go unused every year.
- The Panel Report also confirms what China's low TRQ fill rates suggest: that China's TRQ administration inhibits the filling of the TRQs inconsistent with its WTO obligations. As a result, WTO Members do not have the access to China's market that China agreed to when it joined the WTO.
- The United States therefore respectfully proposes that the DSB adopt the report contained in WT/DS517/R and WTDS517/R/Add.1 and looks forward to China's prompt implementation.

8. APPELLATE BODY APPOINTMENTS: PROPOSAL BY VARIOUS MEMBERS
(WT/DSB/W/609/REV.10)

- The United States thanks the Chair for the continued work on these issues.
- 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.
- As the United States has explained at recent DSB meetings, for more than 15 years and across multiple U.S. Administrations, the United States has been raising serious concerns with the Appellate Body's overreaching and disregard for the rules set by WTO Members.
- Through persistent overreaching, the WTO Appellate Body has been adding obligations that were never agreed by the United States and other WTO Members.
- The 2018 U.S. Trade Policy Agenda outlined several longstanding U.S. concerns.¹
 - The United States has raised repeated concerns that appellate reports have gone far beyond the text setting out WTO rules in varied areas, such as subsidies, antidumping duties, anti-subsidy duties, standards and technical barriers to trade, and safeguards, restricting the ability of the United States to regulate in the public interest or protect U.S. workers and businesses against unfair trading practices.
 - And as we explained in recent meetings of the DSB, the Appellate Body has issued advisory opinions on issues not necessary to resolve a dispute and reviewed panel fact-finding despite appeals being limited to legal issues. Furthermore, the Appellate Body has asserted that panels must follow its reports although Members have not agreed to a system of precedent in the WTO, and continuously disregarded the 90-day mandatory deadline for appeals – all contrary to the WTO's agreed dispute settlement rules.
 - And for more than a year, the United States has been calling for WTO Members to correct the situation where the Appellate Body acts as if it has the power to permit ex-Appellate Body members to continue to decide appeals even after their term of office – as set by the WTO Members – has expired. This so-called "Rule 15" is, on its face, another example of the Appellate Body's disregard for the WTO's rules.
 - Our concerns have not been addressed. When the Appellate Body overreaches and abuses the authority it was given within the dispute settlement system, it undermines the

¹ Office of the U.S. Trade Representative, 2018 President's Trade Policy Agenda, at 22-28.

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.

- The United States will continue to insist that WTO rules be followed by the WTO dispute settlement system, and will continue our efforts and our discussions with Members and with the Chair to seek a solution on these important issues.