

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

**Geneva, May 28, 2018**

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.183)
    - The United States provided a status report in this dispute on May 17, 2018, 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.158)

- The United States provided a status report in this dispute on May 17, 2018, 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

- By intervening under this item, China attempts to give the appearance of concern for intellectual property rights. Later today, we will discuss the significant and trade distorting shortcomings in China's treatment of intellectual property under agenda item 4.
- For now, we can say that, as the companies and innovators of China and other Members well know, the intellectual property protection that the United States provides within its own territory equals or surpasses that of any other Member. Indeed, as China also well knows, none of the damaging technology transfer practices of China that are at issue under agenda item 4 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.121)

- The United States thanks the European Union (“EU”) for its status report and its statement today.
- The United States continues to have concerns with the EU’s approval of biotech products. We continue to see prolonged, unpredictable, and unexplained delays at every stage of the approval process. The delays have affected the products previously approved by the EU, and continue to affect the dozens of applications that have been awaiting approval for months or years.
- Even when the EU finally approves a biotech product, the EU has facilitated the ability of individual EU member States to impose bans on the supposedly approved product. As we have noted at previous DSB meetings, the EU has adopted legislation that permits EU member States to “opt out” of certain approvals, even where the European Food Safety Authority (EFSA) has concluded that the product is safe.
- In its intervention at the April DSB meeting, the EU’s response to U.S. concerns with the “opt out” legislation<sup>1</sup> was that the EU enacted this legislation after the adoption of the DSB recommendations in this dispute. The EU’s response is particularly unconvincing. Surely, the EU does not take the position that measures serving to move a Member further out of compliance are somehow irrelevant to the DSB’s surveillance of a Member’s implementation of a DSB recommendation to bring WTO-inconsistent measures into compliance with WTO rules.
- The EU’s opt out legislation permits EU member States to restrict for non-scientific reasons certain uses of EU-authorized biotech products in their territories. At least seventeen member States, as well as certain regions within EU member States, have submitted requests to opt out of EU approvals.
- The United States again 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 supported by scientific evidence, and that decisions are taken without undue delay.

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<sup>1</sup> EU Directive 2015/412.

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.5)

- The United States provided a status report in this dispute on May 17, 2018, in accordance with Article 21.6 of the DSU.
- On December 15, 2017, the United States Trade Representative requested that the U.S. Department of Commerce make a determination under section 129 of the *Uruguay Round Agreements Act* to address the DSB's recommendations relating to the Department's countervailing duty investigation of washers from Korea. On December 18, the Department of Commerce initiated a proceeding to make such determination. Following initiation, Commerce issued initial and supplemental questionnaires seeking additional information.
- On April 4, 2018, Commerce issued a preliminary determination revising certain aspects of its original determination. Specifically, Commerce revised the analysis underlying the CVD determination, as it pertains to certain tax credit programs, in accordance with findings adopted by the DSB. Following issuance of the preliminary determination, Commerce provided interested parties with the opportunity to submit comments on the issues and analysis in the preliminary determination. Interested parties then had an opportunity to provide rebuttal comments. Commerce is reviewing the comments and rebuttal comments for purposes of preparing a final determination.
- The United States continues to consult with interested parties on options to address the recommendations of the DSB relating to antidumping measures challenged in this dispute.

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 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 10 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.
- And as we have noted many times 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 disputes in which there is a disagreement between the parties on the EU’s compliance. In fact, while the EU has put on the agenda of this meeting an item relating to the *EU – Large Civil Aircraft* dispute (DS316), it has not submitted a status report despite the U.S. view that the EU has not complied in that dispute, a view that has been confirmed by two sets of conclusions that we will discuss shortly.
- Finally, 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.

Second Intervention

- The United States takes note of Canada’s support for the EU’s decision to place this item on the DSB agenda this month.

- In light of Canada's position, the United States would expect Canada to object to the failure by a responding Member to place on the DSB agenda any dispute where Canada considers that Member not to be in compliance. This situation could include *China – Cellulose Pulp*, DS483.
- Based on Canada's statement under this item, the United States observes that a decision by Canada not to place its dispute with China on the DSB agenda, or object to that failure, could be understood as agreement with a WTO Member's claim of compliance. Should we understand that to be the implication of Canada's statement today?

3. EUROPEAN COMMUNITIES AND CERTAIN MEMBER STATES – MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT – COMMUNICATION BY THE EUROPEAN UNION (WT/DS316/34)
- The United States was surprised to receive this communication only when circulated to all WTO Members. Given that the United States brought this dispute, and will be entitled to take further steps under WTO rules once the compliance reports are adopted later in this meeting, we would have thought that the European Union would contact us directly if it had information relevant to resolving the dispute. The EU’s failure to communicate directly with us might therefore communicate a lack of seriousness about resolving this dispute. It will be for the EU and its member States to confirm or disprove that impression.
  - Based on the U.S. review since WTO Members received this communication, the EU document does not reflect new developments that might somehow resolve this longstanding dispute.
  - To the contrary, over six years ago, back in December 2011, the EU submitted a similar document.<sup>2</sup> That 2011 document itemized 36 so-called “steps” that the EU characterized as actions taken to come into compliance with the original WTO findings. The compliance panel, however, found that 34 of these supposed steps were not even actions at all.<sup>3</sup> In short, the 36 “steps” listed in the 2011 document certainly did not bring the EU into compliance with the recommendations of the DSB.
  - Today’s document identifies 18 so-called “steps.” Most of them are essentially the same as the items listed in the 2011 document. The reports proposed for adoption today found the EU’s supposed “steps” did nothing to end the inconsistency with Articles 5 and 6.3 of the SCM Agreement.
  - For instance, in today’s document, the EU characterizes as a “measure taken to comply” the “attenuation, through the passage of time and events that occurred during that time” of a causal link. We fail to see how anyone could characterize this as a “step,” let alone a “measure taken to comply.” Indeed, the EU itself seems to have difficulty deciding how to characterize it – the EU document alternates between “step,” “measure taken to comply,” and “measure that constitutes appropriate step.”

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<sup>2</sup> WT/DS316/17.

<sup>3</sup> *EC – Large Civil Aircraft (21.5) (Panel)*, para. 6.42.

- There are a handful of new assertions, namely that the EU member States renegotiated certain financing packages to reflect “a contemporaneous market benchmark.” But these assertions are so vague they indicate nothing about what, if anything, may have been done.
- The EU has been arguing for a decade that its financing of Airbus reflected market benchmarks. Four sets of dispute reports have disagreed with that assertion. In this light, it is difficult to give any credence to the EU’s latest assertions. Indeed, in the past, the EU has used these sorts of vague assertions to cloak noncompliance with its WTO obligations.
- The United States remains ready to hold serious discussions with the EU with the goal of reaching a mutually agreed solution. But this would require the EU to communicate directly and candidly with the United States, rather than indirectly and vaguely through a communication to all WTO Members.
- It would be regrettable if this document signaled not a desire to fix EU contraventions of WTO rules, but rather an intention to prolong this already lengthy dispute.

#### 4. CHINA'S TECHNOLOGY TRANSFER POLICIES

##### A. STATEMENT BY THE UNITED STATES

- As Members are aware, at the past two monthly DSB meetings, China has raised the U.S. investigation of China's technology transfer policies. As Members are also aware, the United States has initiated a WTO dispute in relation to one aspect of those technology transfer policies.<sup>4</sup> The problems, however, are much broader than the matters covered by the dispute, and run contrary to basic notions of fairness that underlie the multilateral trading system.
- The United States issued a factual report that details China's distortive policies on technology transfer this March. Two months have passed, and China has yet to provide any evidence to refute the report's facts or conclusions.
- At the last DSB meeting, China asserted that the findings in the U.S. report were "baseless." For China to say this is unfortunate. In fact, the U.S. findings are explained in great detail in that 200-page report. The report is publicly available on the USTR website, and Members are encouraged to review it.<sup>5</sup> The report analyzes four particular aspects of China's distortive policies on technology transfer. At this meeting, the United States will respond to China's assertions by summarizing one aspect of China's policies covered in the investigation.
- China's state-centered, non-market policies on trade and technology transfer affect all Members. The policies create the legal conditions for Chinese economic actors to effectively coerce foreign companies to transfer technology to Chinese firms on non-market terms.
- If left unchecked, the commercial effect of these policies will erode all of our economies and our long-term competitiveness.
- Central pillars of China's technology transfer regime are China's foreign ownership restrictions – such as joint venture requirements and foreign equity limitations – and various administrative review and licensing processes. In combination, these policies require or pressure technology transfer from foreign companies.

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<sup>4</sup> *China — Certain Measures Concerning the Protection of Intellectual Property Rights* (WT/DS542/1).

<sup>5</sup> The report is available at: <https://ustr.gov/sites/default/files/Section%20301%20FINAL.PDF>.

- The foreign ownership restrictions prohibit foreign investors from operating in certain industries unless they partner with a Chinese company, and in some cases, unless the Chinese partner is the controlling shareholder.<sup>6</sup>
- These requirements preclude foreign companies from entering the market on their own terms, and lay the foundation for China to coerce the transfer of technology.
- The United States documents in the factual report how this co-opting of foreign technology is accomplished.
- When companies negotiate the terms of the joint venture, the foreign side may be asked — or required — to transfer its technology in order to finalize the partnership. Especially in instances where the Chinese partner is a state-owned or state-directed company, foreign companies have limited leverage in the negotiation if they wish to access the market. This type of technology transfer is often an unwritten rule for market access.<sup>7</sup>
- China argues that foreign companies willingly enter into these agreements. China's tilting of the commercial playing field, however, creates a lose-lose choice for foreign companies: they must either transfer their technology to the new China-based joint venture, or they must cede access to one of the world's fastest-growing markets, thus harming both their short term growth and their long-term competitiveness.
- China also uses its administrative licensing and approvals processes to coerce technology transfer in exchange for the numerous approvals needed to establish and operate a business in China.
- Foreign investment in China requires obtaining numerous government approvals depending on the terms of the investment and the industry and location in which the investment occurs. At each stage of the approval process, vaguely worded provisions provide government officials with significant discretion to impose technology transfer requirements or otherwise pursue China's industrial policy objectives.<sup>8</sup>

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<sup>6</sup> Office of the United States Trade Representative, Findings of the Investigation into China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation Under Section 301 of the Trade Act of 1947, at 23-35.

<sup>7</sup> Office of the United States Trade Representative, Findings of the Investigation into China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation Under Section 301 of the Trade Act of 1947, at 22-23.

<sup>8</sup> Office of the United States Trade Representative, Findings of the Investigation into China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation Under Section 301 of the Trade Act of 1947, at 35-43.

- One of our leading industry associations described how the Chinese government uses its discretion in the review process to apply vague and unwritten rules in a selective and non-transparent manner as follows:

The relatively opaque nature of the inbound FDI approval processes enables China's investment approval authorities to favor domestic competitors over foreign investors, should they so desire, without leaving a paper trail of discriminatory written regulations . . . Foreign investors have reported this favoritism occurring in two ways: (i) through the application of vaguely worded or unpublished rules or requirements in ways that discriminate against foreign investors; and (ii) through the imposition of deal-specific conditions that go beyond any written legal requirements.<sup>9</sup>

- This is not the rule of law. In fact, it is China's laws themselves that enable this coercion.
- Fundamentally, China has made the decision to engage in a systematic, state-directed, and non-market pursuit of other Members' cutting-edge technology in service of China's industrial policy.
- This is not fair. This is not how Chinese companies or individuals are treated when they go out to engage in activity in other markets. And we have only touched on one aspect of China's technology transfer policies of concern.
- China needs to reevaluate and undertake a serious change in its policies of seeking development at the expense of its trading partners.

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<sup>9</sup> Office of the United States Trade Representative, Findings of the Investigation into China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation Under Section 301 of the Trade Act of 1947, at 37.

5. UNITED STATES – ANTI-DUMPING AND COUNTERVAILING DUTIES ON CERTAIN PRODUCTS AND THE USE OF FACTS AVAILABLE

A. REQUEST FOR THE ESTABLISHMENT OF A PANEL BY THE REPUBLIC OF KOREA (WT/DS539/6)

- We are disappointed that Korea has chosen to move forward with a request for panel establishment.
- As the United States has explained to Korea, the determinations identified in Korea's request for panel establishment are fully consistent with U.S. obligations under the WTO Agreement.
- Additionally, as the United States noted at the April DSB meeting, Korea seeks to challenge certain items that are not measures and do not fall within the scope of a dispute settlement proceeding.
- For these reasons, we are disappointed that Korea has submitted its panel request for a second time.

7. INDIA – EXPORT RELATED MEASURES

A. REQUEST FOR THE ESTABLISHMENT OF A PANEL BY THE UNITED STATES (WT/DS541/4)

- The United States recalls that all WTO Members, including India, are required to provide any subsidies consistently with the obligations in the *Agreement on Subsidies and Countervailing Measures* (“SCM Agreement”). In the case of India, this includes the obligation of Article 3.1(a) of the SCM Agreement that prohibits subsidies contingent upon export performance.
- Regrettably, it appears that India provides subsidies contingent upon export performance inconsistently with its WTO obligations.
- In particular, India appears to provide export subsidies through (1) the Export Oriented Units Scheme and sector specific schemes, including Electronics Hardware Technology Parks Scheme and Bio-Technology Parks Scheme, (2) the Merchandise Exports from India Scheme, (3) the Export Promotion Capital Goods Scheme, (4) Special Economic Zones, and (5) a duty-free imports for exporters program.
- Prior to initiating this dispute, the United States attempted to resolve its concerns with India’s subsidy programs, both bilaterally and in the SCM Committee. However, India has continued to grant these export-contingent subsidies. Further, India has expanded the scope and scale of its export subsidies.
- The United States and India have consulted on the matters set out in the U.S. request for consultations, but the consultations failed to resolve the dispute.
- For these reasons, the United States requests that the DSB establish a panel to examine the matter set out in the U.S. panel request with standard terms of reference. Consistent with Article 4.4 of the SCM Agreement, which provides for “the immediate establishment of a panel” upon a party’s request, the DSB will establish the panel at today’s meeting.

Second Intervention

- The United States takes note of India’s statement today. The text of the DSU and the SCM Agreement are clear that a panel must be established at this DSB meeting. Accordingly, we insist that a panel must be established by the DSB at this meeting.

8. EUROPEAN COMMUNITIES AND CERTAIN MEMBER STATES – MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT: RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE UNITED STATES

A. REPORT OF THE APPELLATE BODY (WT/DS316/AB/RW AND WT/32316/AB/RW/ADD.1) AND REPORT OF THE PANEL (WT/DS316/RW AND WT/DS316/RW/ADD.1)

- The United States thanks the Panel, the members of the Division, and the Secretariat staff assisting them for their work on this matter. This was a large and complicated proceeding, and the United States sincerely appreciates their efforts to produce high quality reports.
- These reports find that the European Union and the Airbus member States – France, Germany, Spain, and the United Kingdom – failed to bring WTO-inconsistent subsidies into compliance with WTO rules and continued to breach their WTO obligations by giving massive amounts of subsidized financing to Airbus. These subsidies have caused adverse effects on U.S. aircraft sales and exports worth tens of billions of dollars.
- This is as true now as it was when Airbus began 50 years ago. The reports at issue today conclude explicitly that EU member State financing of the A380 and A350 XWB were at below-market rates and resulted in massive lost sales and market share losses.
- We have seen an EU statement in which it asserts some small vindication in the findings that some of its oldest subsidies were found to have expired. We heard some of these assertions again today. However, this view ignores that the latest report did not disturb the compliance panel’s findings that all of the EU launch aid financing of Airbus was subsidized, and caused immense adverse effects to the interests of the United States. Thus, the launch aid was inconsistent with Articles 5 and 6.3 of the SCM Agreement. The findings in the more recent report mean only that those older subsidies created a wrong under the SCM Agreement that no longer has a remedy.
- With respect to adoption of the reports, the United States raises again an important systemic concern regarding the service on appeals of Appellate Body members whose terms have expired.

- As the United States explained at the November meeting of the DSB in the context of the *Indonesia – Horticultural Products, Animals, and Animal Products* dispute, Mr. Ramirez’s term expired on June 30, 2017. The DSB has taken no action to permit him to continue to serve as an Appellate Body member, and, therefore, he was not an Appellate Body member on the date of circulation of this report. Similarly, Mr. Van den Bossche’s term expired on December 11, 2017, and the DSB also has taken no action to permit him to continue to serve as an Appellate Body member.
- Furthermore, no DSB authorization was sought or obtained by the Division to exceed the mandatory 90-day deadline for an appellate report under DSU Article 17.5.
- The United States therefore considers that the implications for this report are the same as in the *Indonesia – Horticultural Products, Animals, and Animal Products* dispute, specifically, that the report has not been issued consistent with the requirements of Article 17. Accordingly, it cannot be an “Appellate Body report” subject to the special adoption procedures set out in Article 17.14 of the DSU, which applies to an appellate report in conformity with that Article.
- The United States supports the adoption of the panel and appellate reports in this dispute. We understand that the EU and the Airbus member States, the other parties to the dispute, do also as the EU proposed this item so that the DSB could adopt these reports. As Article 3.7 of the DSU makes clear, “[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute.”
- Therefore, as the parties consider that adoption of these reports would help them achieve a “positive solution to the dispute”, the United States invites other Members to join the parties’ consensus to adopt the reports proposed for adoption today, that is, the report contained in WT/DS316/AB/RW and WT/DS316/AB/RW/ADD.1 and the panel report contained in WT/DS316/RW and WT/DS316/RW/ADD.1, as modified by the former report.
- Madame Chair, let me also address next steps in this dispute, which is very economically significant for the United States and has occupied so many WTO dispute settlement resources.
- To be clear, the U.S. preferred outcome is a mutually agreed solution with respect to aircraft financing. The United States remains ready to hold serious discussions to achieve this goal. But, again, this would require the EU to communicate directly and candidly with the United States, rather than indirectly and vaguely through a communication to all WTO Members.

- We are ready to discuss with the EU and its member States how we might resolve both sides' disagreements with respect to existing WTO-inconsistent subsidies and reach an agreement so that neither side adopts new WTO-inconsistent subsidies.
- If necessary, the United States is prepared to move forward with a process to impose countermeasures on EU products. But in our view, what is needed to resolve this dispute is not more WTO litigation, but a real desire to resolve this dispute.

9. EUROPEAN COMMUNITIES AND CERTAIN MEMBER STATES – MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT: RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE UNITED STATES
  - A. REPORT OF THE PANEL (WT/DS316/RW AND WT/32316/RW/ADD.1) AND THE REPORT CONTAINED IN WT/DS316/AB/RW AND WT/DS316/AB/RW/ADD.1
    - Madame Chair, the DSB has adopted the reports contained in WT/DS316/RW and WT/DS316/AB/RW already under agenda item 8 of this meeting. Therefore, there is no further action for the DSB to take under this item, and in this circumstance, the DSB may move on to item 10.
    - Rather than reiterate its views on this dispute, the United States refers Members to the views it has expressed under agenda item 8 in relation to this item.

10. EUROPEAN UNION – COUNTERVAILING MEASURES ON CERTAIN POLETHYLENE TEREPHTHALATE FROM PAKISTAN

A. REPORT OF THE APPELLATE BODY (WT/DS486/AB/R AND WT/DS486/AB/R/ADD.1) AND REPORT OF THE PANEL (WT/DS486/R, WT/DS486/R/ADD.1 AND WT/DS486/R/CORR.1)

- As a third party in this dispute, the United States provided views primarily focused on the interpretation of the DSU with respect to the matter that Pakistan put before the panel. In the course of the panel proceedings, the measure at issue terminated and Pakistan confirmed that it did not seek a *recommendation* from the panel. In other words, Pakistan confirmed that no dispute remained between the parties that the challenged measure had been brought into conformity with WTO rules. Nevertheless, Pakistan continued to request *findings* from the panel and later from the Appellate Body.
- The European Union appealed the panel’s issuance of findings in this dispute, and the United States supported the EU’s appeal. As we explained,<sup>10</sup> the DSU does not grant WTO adjudicators the authority to issue advisory opinions regarding the interpretation of the covered agreements in the abstract. A complaining party may not structure its case in a manner that in effect would create such an authority. Rather, the WTO *dispute settlement* system aims to secure a positive solution to a *dispute* between the parties.<sup>11</sup>
- Pakistan confirmed before the panel and on appeal that it did not seek a recommendation from the DSB when it stated “that panels cannot make *recommendations* on expired measures under Article 19.1 of the DSU.”<sup>12</sup>
- Pakistan’s statement that it did not seek a recommendation confirms that there was no dispute between the parties. Rather, as the panel found, Pakistan sought findings because “the parties dispute, on a fundamental level, *how* investigating authorities *should determine* the extent to which duty drawback schemes *like the [one at issue] may constitute* countervailable subsidies within the meaning of the SCM Agreement.”<sup>13</sup>

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<sup>10</sup> EU Appellant Submission, paras. 35-37.

<sup>11</sup> DSU Article 3.7 (“The aim of the dispute settlement mechanism is to secure a positive solution to a dispute.”).

<sup>12</sup> See Pakistan Response to EU Request for Preliminary Ruling, para. 4.19 (“Pakistan acknowledges, of course, that panels cannot make *recommendations* on expired measures under Article 19.1 of the DSU. This makes sense, because Article 19.1 foresees only one type of recommendation, that is, that a Member must ‘bring the measure into conformity’ with a covered agreement. Logically, measures cannot be brought into conformity if they no longer exist. As panels and the Appellate Body have repeatedly shown, however, panels may – and regularly do – make rulings on measures that expired after the panel was established.”) (citing *US – Certain EC Products (AB)*, para. 81; *US – Poultry (China) (Panel)*, para. 7.56; *US – Upland Cotton (AB)*, para. 272; and *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US) (AB)*, para. 271).

<sup>13</sup> Panel Report, para. 7.13 (emphasis added), citing to Pakistan’s response to the European Union’s preliminary ruling request, para. 4.72.

- That is, Pakistan sought an advisory opinion regarding the application of the SCM Agreement in the future – with respect to different duties on different products, and potentially based on different programs.
- The appellate report confirms that the finding is advisory in nature. The appellate report appears to agree with the panel that it was relevant to “resolve” the issue under the SCM Agreement because “similar” cases could arise and “similar” reasoning could be applied in those cases.<sup>14</sup>
- A disagreement between the parties “on *how investigating authorities should*” administer the countervailing duty law – in other circumstances not presented in this dispute – does not fall within the terms of reference for the panel – which also delimits appellate review – as set out by the DSB for this dispute.
- As the text of the DSU indicates, the terms of reference of a panel under DSU Article 7.1 provide for a panel to make an “objective *assessment* of the matter”, words we all know well, but to make the “*findings as will assist the DSB in making the recommendation*” under the DSU to bring a WTO-inconsistent measure into conformity with WTO rules.<sup>15</sup> DSU Article 11, on the function of panels, repeats these words and this structure.<sup>16</sup> But those latter words – to make “*findings as will assist the DSB in making the recommendation*” under the DSU – were essentially disregarded in the reports before the DSB today.
- Where a complaining party requests an adjudicator to make findings *not* consistent with the terms of reference established by the DSB, the panel must decline to do so. As Pakistan requested findings with respect to the interpretation and application of the SCM Agreement, but no recommendation on the challenged EU measure, the panel should have found Pakistan’s request to be outside its terms of reference and refrained from making the requested, purely advisory, findings on that basis.

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<sup>14</sup> Appellate Report, paras. 5.48-5.49.

<sup>15</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.”) (footnotes omitted); *see* DSU Article 21.1 (“Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.”).

<sup>16</sup> DSU Article 11 (“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.”).

- We therefore agreed with the EU’s appeal that Pakistan’s alleged “dispute” was a purely advisory exercise. The United States further agrees with the EU that the DSU does not grant WTO adjudicators the authority to issue advisory opinions regarding the interpretation of provisions of the covered agreements in the abstract, and outside the context of resolving a dispute.<sup>17</sup>
- The United States has been warning Members for some time about the concern that WTO adjudicators have been giving “findings” that are advisory, or unnecessary to resolve the dispute.<sup>18</sup> We recall one egregious instance, in the appeal in *Argentina – Measures Relating to Trade in Goods and Services*, in which more than two-thirds of the Appellate Body’s analysis – 46 pages – was in the nature of obiter dicta. This is not only inconsistent with the DSU and terms of reference established by the DSB, but contributes to delays in dispute settlement and increased complexity for all Members.
- This dispute could and should have been resolved upon Pakistan’s statement that it sought no recommendation on the EU’s withdrawn measure. In that circumstance, there were no “findings as w[ould] assist the DSB in making the recommendations” in the DSU. The reports in this dispute were not necessary to resolve a dispute, but rather – as the EU rightly pointed out – an exercise in making unnecessary interpretations.
- With respect to the appellate report in this dispute, the United States raises again an important systemic concern regarding the service on appeals of an Appellate Body member whose term has expired.
- In this proceeding, the term of Mr. Van den Bossche expired on December 11, 2017, and the DSB has taken no action to permit him to continue to serve as an Appellate Body member. Therefore, the report in this appeal was not issued by three Appellate Body members. Furthermore, the report was issued well beyond the mandatory 90-day deadline in DSU Article 17.5. The DSB has taken no action to authorize that departure from WTO rules.
- The United States therefore considers that the implications for this report are the same as in the *EC – Large Civil Aircraft* dispute and others in which WTO rules have been broken by the adjudicator. Specifically, the report has not been issued consistent with the

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<sup>17</sup> See *US – Wool Shirts and Blouses (AB)*, WT/DS33/AB/R & Corr.1, at 19 (“Given the explicit aim of dispute settlement that permeates the DSU, we do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to “make law” by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute.”).

<sup>18</sup> See, e.g., The President’s 2018 Trade Policy Agenda, at 26-27 (available at <https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2018/2018-trade-policy-agenda-and-2017>).

requirements of Article 17 and so cannot be an “Appellate Body report” subject to the adoption procedures reflected in Article 17.14 of the DSU.

- The United States has serious concerns with these reports. We do not support adoption of alleged “findings” that are merely advisory and inconsistent with the DSU and the terms of reference established by the DSB.
- However, we understand that both parties would agree to adoption of these reports because they both agree that the absence of any recommendation by the DSB would help them reach a positive solution.
- If the statements in the panel and appellate reports that no recommendation is being made helps the parties reach a positive solution, the United States can support adoption to the extent of that statement.
- However, and especially given the breaches of DSU Article 17 we have outlined today, we do not support adoption of any of the alleged “findings” contained in the panel and appellate reports. We therefore do not consider those alleged “findings” to be adopted by the DSB today.

#### Second Intervention

- The U.S. view is that the report in this appeal has not been issued consistent with the requirements of Article 17 and so cannot be an “Appellate Body report” subject to the adoption procedures reflected in Article 17.14 of the DSU.
- The report can therefore be adopted by consensus of the DSB today.
- The United States has explained its serious concerns with the alleged “findings” in the reports that were purely advisory. Given Pakistan’s statement that it sought no recommendation on the EU’s withdrawn measure, there were no “findings as w[ould] assist the DSB in making the recommendations” in the DSU. Accordingly, those alleged “findings” were contrary to DSU Articles 7, 11, 17, and 19, and outside the terms of reference established by the DSB.
- We also have expressed that we understand that both parties would agree to adoption of these reports because they both agree that the absence of any recommendation by the DSB would help them reach a positive solution.

- Therefore, to assist the parties to the dispute, the United States is willing to join a consensus to adopt that conclusion, that is, that no recommendation is being made in this dispute.
- We do not support adoption of those alleged “findings” in the reports that are inconsistent with the DSU and outside the terms of reference established by the DSB. We do not understand why any WTO Member would wish to adopt statements by WTO adjudicators that are inconsistent with WTO rules.

11. APPELLATE BODY MATTERS

A. APPELLATE BODY APPOINTMENTS: PROPOSAL BY CERTAIN MEMBERS (WT/DSB/W/609/REV.3)

- 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.
- For at least the past 8 months, the United States has been raising and explaining the systemic concerns that arise from the Appellate Body’s decisions that purport to “deem” as an Appellate Body member someone whose term of office has expired and thus is no longer an Appellate Body member, pursuant to its Working Procedures for Appellate Review (Rule 15).
- During that period of time, the DSB has adopted by positive consensus four reports signed by someone no longer an Appellate Body member, and there currently remain two ongoing appeals where the term of one of the persons appointed to the division has expired.
- However, the Dispute Settlement Body has not yet addressed the problem of persons continuing to hear appeals well after their terms have expired.
- Under the Dispute Settlement Understanding, it is the DSB that has the authority to appoint Appellate Body members and to decide when their term in office expires,<sup>19</sup> and so it is up to the DSB to decide whether a person who is no longer an Appellate Body member can continue to serve on an appeal.
- Last month, the United States repeated concerns with the Background Note circulated by the Appellate Body on Rule 15 and asked for Members to be provided additional information.
- To recall, we pointed out that, unlike other international tribunals cited in the Background Note, Rule 15 is not set out in the constitutive text of the WTO dispute settlement system – that is, the DSU. It has therefore not been agreed to by WTO Members. This is contrary to what the delegate from Brazil may have suggested earlier in this meeting.

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<sup>19</sup> *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Arts. 17.1, 17.2 (“DSU”).

- We therefore asked to be informed by the Appellate Body why this basic difference between the DSU and “some international tribunals” was not reflected in what was purported to be a background document.
- We also called Members’ attention again to a misleading, at best, statement that appeared to have been very carefully crafted to avoid mentioning that Rule 15 was, in fact, “criticized by [a WTO] Member in the DSB” and was “called into question” at the time of its adoption,<sup>20</sup> contrary to assertions in the Background Note.
- The criticism of Rule 15 in the DSB by a WTO Member at the time of its adoption is the type of basic information one would expect to be included in a document with the intention to make an objective presentation of the issue.
- We therefore asked to be informed by the Appellate Body why India’s intervention was not drawn to the attention of WTO Members in the Background Note and further asked why the Appellate Body’s statement was drafted in the manner it was.
- We have yet to receive information in response to either of these inquiries.
- We appreciate the recognition by Members at the last meeting of the fact that addressing this issue is a joint responsibility of all Members, and we appreciate the willingness they expressed to engage on this issue.
- The United States remains resolute in its view that Members need to resolve that issue as a priority. A number of ideas have been mentioned in the context of informal discussions in which we have participated, representing a diversity of views on possible solutions. We therefore will continue our efforts and our discussions with Members and with the Chair to seek a solution on this important issue.

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<sup>20</sup> DSB Meeting Minutes for February 21, 1996 at 12 (WT/DSB/M/11) (March 19, 1996): India raised “a systemic concern with regard to Rule 15 which implied that the Appellate Body could authorize a member to continue to be a member after it ceased to be a member. This was contrary to Article 17.1 of the DSU which, inter alia, provided that a standing Appellate Body shall be established by the DSB and that it shall be composed of seven persons. Rule 15 would lead to a situation where the Appellate Body could consist of more than seven members or an Appellate Body member continued after the expiry of his term without the approval of the DSB. While the practical need for the provision contained in Rule 15 was understandable, he would be seriously concerned if a member of the Appellate Body could continue without concurrence or approval by the DSB. This Rule provided for notification to the DSB instead of approval and therefore was in violation of Article 17.1 of the DSU.”