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

Geneva, November 22, 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.201)

- The United States provided a status report in this dispute on November 11, 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.176)

- The United States provided a status report in this dispute on November 11, 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.

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.139)

- The United States thanks the European Union ("EU") for its status report and its statement today.

- The United States continues to see persistent delays that affect dozens of applications that have been awaiting approval for an extended period.

- The EU has previously suggested that the fault lies with the applicants. We disagree; our concerns relate to delays at every stage of the approval process resulting from the actions or inactions of the EU and its member States.

- Even when the EU finally approves a biotech product, EU member States continue to impose unwarranted restrictions on the supposedly approved product. As we have noted at prior DSB meetings, the amendment of EU Directive 2001/18, through EU Directive 2015/413, permits EU member States to restrict or prohibit certain uses of genetically-modified organisms ("GMOs"), even where the European Food Safety Authority ("EFSA") has concluded that the product is safe. At least seventeen EU member States, as well as certain regions within EU member States, have submitted requests to adopt such measures with respect to MON-810 maize.

- The EU's only response, which it continues to repeat, is that the member States do not restrict marketing or free movement of MON-810 in the EU. As we noted at the prior DSB meeting, this answer does nothing to address U.S. concerns. The restrictions adopted by EU member States restrict international trade in these products, and have no scientific justification. Indeed, this is why the DSB adopted findings that such restrictions on MON-810 are in breach of the EU's WTO commitments.

- The United States urges the EU to ensure that all of its measures affecting the approval of biotech products, including measures adopted by individual EU member States, are based on scientific principles, and that decisions are taken without undue delay.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

D. UNITED STATES – ANTI-DUMPING AND COUNTERVAILING MEASURES ON LARGE RESIDENTIAL WASHERS FROM KOREA: STATUS REPORT BY THE UNITED STATES (WT/DS464/17/ADD.23)

- The United States provided a status report in this dispute on November 11, 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.15)

- The United States provided a status report in this dispute on November 11, 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.

Second Intervention

- The United States is aware of the decision of the Arbitrator concerning the level of nullification or impairment. China's decision to pursue that arbitration is disappointing, and not constructive.

- The United States is troubled that the Arbitrator applied an approach to determining the amount of impact on China that has no foundation in economic analysis. Specifically, the first step of the Arbitrator's two-step approach necessarily inflates and overstates the impact. The United States explained this to the Arbitrator. Even China argued against the use of a two-step approach. It is unfortunate that the Arbitrator nevertheless applied its two-step approach over the objections of the United States and China.

- The United States is willing to discuss this matter with China on a bilateral basis.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

F. INDONESIA – IMPORTATION OF HORTICULTURAL PRODUCTS, ANIMALS AND ANIMAL PRODUCTS: STATUS REPORT BY INDONESIA (WT/DS477/21 – WT/DS478/22/ADD.10)

- Indonesia continues to fail to bring its measures into compliance with WTO rules.
- The United States and New Zealand agree that significant concerns remain with the measures at issue, including the continued imposition of: harvest period restrictions, import realization requirements, warehouse capacity requirements, limited application windows, limited validity periods, and fixed licensed terms.
- The United States remains willing to work with Indonesia to fully and meaningfully resolve this dispute.
- We understand that Indonesia claims to have "completed its enactment process" of certain regulations, but we are still waiting to hear from Indonesia on whether and how such action would bring its measures into full compliance. It also remains unclear how Indonesia's proposed legislative amendments would address Measure 18 and when Indonesia will complete its process.
- The United States looks forward to receiving further detail from Indonesia regarding the changes to its regulations and laws, especially with respect to Ministry of Agriculture Regulation 39/2019 on RIPH requirements and Regulation 46/2019 on Strategic Horticultural Commodities.

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 implemented the DSB's recommendations and rulings in these disputes.

- We recall, furthermore, that the EU has acknowledged that the Deficit Reduction Act does not permit the distribution of duties collected on goods entered after October 1, 2007, more than 12 years ago.

- Even aside from this, we question the trade rationale for inscribing this item. In May 2019, the EU notified the DSB that disbursements related to EU exports to the United States totaled $4,660.86 in fiscal year 2018. As such, the EU announced it would apply an additional duty of 0.001 percent – that is, one-one thousandth of a percent – on certain imports of the United States, including imports of sweet corn.

- One would think the EU member State customs authorities will incur far greater costs from applying these minuscule tariffs than the duties they collect. But it has been evident for years that it is not commonsense that is driving the EU's approach to 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 – including the European Union as a responding party – confirms this widespread understanding of Article 21.6. Accordingly, since the United States has informed the DSB that it has come into compliance in this dispute, there is nothing more for the United States to provide in a status report.

3. EUROPEAN COMMUNITIES AND CERTAIN MEMBER STATES – MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT: IMPLEMENTATION OF THE RECOMMENDATIONS ADOPTED BY THE DSB

A. STATEMENT BY THE UNITED STATES

- The United States notes that once again the European Union has not provided Members with a status report concerning the dispute *EC – Large Civil Aircraft* (DS316).

- As we have noted at several recent DSB meetings, the EU has argued – under a different agenda item – that where the EU as a complaining party does not agree with another responding party Member's "assertion that it has implemented the DSB ruling," "the issue remains unresolved for the purposes of Article 21.6 DSU."

- Under this agenda item, however, the EU argues that by submitting a compliance communication, the EU no longer needs to file a status report, even though the United States as the complaining party disagrees that the EU has complied.

- The EU's position appears to be premised on two unfounded assertions, neither of which is based on the text of the DSU.

- First, the EU has erroneously argued that where "a matter is with the adjudicators, it is temporarily taken out of the DSB's surveillance." At the October DSB meeting, the EU phrased this as "the crucial point for the defending party's obligation to provide status reports to the DSB is the stage of the dispute. In the Airbus case, the dispute is at a stage where the defending party does not have an obligation to submit status reports to the DSB."

- There is nothing in the DSU text to support that argument, and the EU provides no explanation for how it reads DSU Article 21.6 to contain this limitation. And as Members well know, based on the DSB's findings of EU non-compliance in this dispute, the DSB recently authorized the United States to impose countermeasures in excess of $7 billion annually due to the adverse effects on the United States from subsidies provided by 4 EU member States.

- Second, the EU once again relies on its incorrect assertion that the EU's initiation of compliance panel proceedings means that the DSB is somehow deprived of its authority to "maintain surveillance of implementation of rulings and recommendations." Yet again, there is nothing in Article 2 of the DSU or elsewhere that limits the DSB's authority in this manner. It is another invention of the EU.

- The EU should be providing a status report. Yet it has failed to do so, demonstrating the inconsistency in the EU's position depending on its status as complaining or responding party.

- The U.S. position has been consistent and clear: 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.

4. STATEMENT BY THE UNITED STATES ON SYSTEMIC CONCERNS REGARDING THE COMPENSATION OF APPELLATE BODY MEMBERS

- The United States placed this item on the agenda to discuss an issue of systemic importance: the compensation structure for Appellate Body members. We also wish to draw attention to the compensation that has been provided in the past to former Appellate Body members who continue to decide appeals past the end of their terms under the so-called Rule 15.

- As Members consider *why* the Appellate Body has felt free to depart from the clear rules agreed upon by Members, certain structural features, such as this one, may be relevant.

- At the outset, let us be clear: the issue raised today by the United States does not concern any particular Appellate Body member or former Appellate Body member. The illustrative figures in today's statement are historical and not intended to reflect the conduct of current Appellate Body members. Rather, the U.S. intention is to further Members' understanding of the compensation structure as a general matter, and to consider the possible consequences of that structure.

- The United States has sought from the WTO Secretariat a deeper understanding of the compensation arrangement and practices. An Appellate Body member's compensation consists of two primary elements.

- First, a person serving on the Appellate Body receives a monthly retainer fee. The purpose of the retainer fee is to ensure that persons can be available at all times, despite the part-time nature of the employment. In 1995, WTO Members considered a retainer fee of CHF 7,000 per month to be appropriate.

- In 2019, Appellate Body members receive a retainer fee plus a monthly administrative fee that totals approximately CHF 9,415 per month. These fees produce an annual income of nearly CHF 113,000.

- We have learned that, in practice, ex-Appellate Body members continuing to decide appeals past the end of their terms also received the retainer fee. Thus, so long as any appeal to which they are assigned remains active, an ex-member receives CHF 9,415 per month.

- The second element is a daily working fee. In addition to the monthly retainer, Appellate Body members receive a daily fee based on the number of days worked. Payment of this fee is not subject to regular reporting requirements to WTO Members, for example, through the Budget Committee.

- In 2019, Appellate Body and ex-Appellate Body members working on appeals receive a fee of CHF 783 per day worked. Looking at the yearly averages over the past four years, Appellate Body members have received, on average, a working fee that ranges from nearly

CHF 12,000 to more than CHF 15,000 *per month*. This would mean that Appellate Body members collected the daily fee for nearly every working day every month.

- Together with the monthly retainer fee, these two elements alone can result in annual compensation of approximately CHF 300,000 for an Appellate Body member. The same is true for ex-Appellate Body members, depending on their level of activity. The value of this compensation is even higher when tax benefits are considered.

- For purposes of comparison, we understand that this compensation is significantly more than the annual salary of a WTO Deputy Director-General. Of course, a Deputy Director-General is a full-time position, while serving as an Appellate Body member is, by design, a part-time role.

- In addition to a monthly retainer and daily fees, Appellate Body members receive a per diem of CHF 374 per day for meals and lodging while in Geneva. As part of the per diem arrangement, Appellate Body members have the option to receive CHF 3000 per month for rent payments. In such cases, the member still receives a per diem allowance for meals of CHF 150 per day.

- It is the U.S. understanding that Appellate Body members have made use of this rental-reimbursement option. By doing so, the annual payment to Appellate Body members increases by CHF 36,000, *plus* the additional meal allowance of CHF 150 per day. We understand that the average monthly per diem payment for each Appellate Body member has routinely exceeded CHF 4000 despite, on average in recent years, only eight days of hearings per year for each member. We do not think it reasonable for an individual to be provided a year-round apartment in Geneva, at WTO Member expense, when that individual's duties require him or her to be in Geneva perhaps a dozen days per year.

- In addition to compensation and per diems, airline tickets are paid for by the WTO. We understand the expenditure for airline tickets has typically exceeded about CHF 5000 per Appellate Body member per month.

- Taken together, the amount of compensation and other payments realized per member has remained steady and at a high level – well in excess of CHF 300,000 for part-time employment. The number of reports circulated over recent years has remained steady – about five to six reports per year.

- During this time, to assist in the preparation of these five or six reports, the Appellate Body has received significant legal and administrative support. Today, the Appellate Body secretariat consists of approximately 20 professional staff with a budget of over CHF 7 million, of which roughly CHF 4.3 million contributes to staffing resources. There can be no question that Appellate Body members are well resourced and supported.

- Although we think it unlikely that any WTO Member anticipated that persons on the Appellate Body would claim to be working on WTO disputes essentially every working

day of the year, Members agreed to this compensation structure. We did so, however, based on the understanding that the Appellate Body would respect the rules as set out in the DSU. Those rules include the requirement that appellate reports be issued in 60 days or, exceptionally, 90 days, and the requirement that WTO Members – and not the Appellate Body itself – appoint Appellate Body members.

- These rules are no longer being respected.

- We would question whether this approach to compensation creates the appropriate incentive.

- Under this system, the more time spent on an appeal means higher compensation. An appeal that extends beyond the 90-day deadline may benefit Appellate Body members in a way that strict adherence to that deadline would not.

- The benefit realized may be even more substantial for an ex-Appellate Body member who would not otherwise receive the monthly retainer for the duration of the appeal. The monthly retainer was intended to compensate persons for making themselves available to hear an appeal on short notice. But this does not apply to an ex-Appellate Body member, who even under the so-called Rule 15 cannot be assigned to any new appeals. Therefore, the not-previously disclosed practice of continuing to pay a monthly retainer fee to persons past the end of their DSB-approved terms has significant financial implications.

- Indeed, were an ex-Appellate Body member to continue to work on an appeal for a year past the end of his or her term, the financial implication would be to receive over CHF 100,000 in additional compensation.

- A system that provides a financial reward for violating DSU rules and prolonging the duration of an appeal would appear inconsistent with the objective behind the DSU rule of providing for the prompt resolution of disputes.

- So we would ask: Does the current structure create the correct incentive, or a negative one? Does this structure encourage prolonged appeals at the expense of clear WTO rules?

- Without debate or effective oversight, have WTO Members acquiesced in a compensation structure that undermines, rather than promotes, the prompt resolution of a dispute?

- As part of this discussion, the United States affirms its strong commitment to the independence of adjudicators, including the Appellate Body. As reflected in the Rules of Conduct, Appellate Body members fulfill their responsibility to act independently by serving in their individual capacity, and by avoiding any conflicts of interest.

- The United States also supports institutional accountability. We do not believe that "independence" and "accountability" are mutually exclusive. Members have a collective

responsibility to ensure accountability, while respecting the independence of WTO adjudicators.

- Understanding and overseeing the compensation of adjudicators is therefore an important responsibility for WTO Members in administering and ensuring the proper functioning of our dispute settlement system.

- It is our hope that Members will reflect further on the questions raised in today's statement. We look forward to continued discussion on this important issue.

6. APPELLATE BODY APPOINTMENTS: PROPOSAL BY SOME WTO MEMBERS (WT/DSB/W/609/REV.14)

- 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.
- The United States recognizes the work of the Facilitator, including the report provided to Members at the October meeting of the General Council.
- As the United States explained, the fundamental problem is that the Appellate Body is not respecting the current, clear language of the DSU.
- Members cannot find meaningful solutions to this problem without understanding how we arrived at this point. Without an accurate diagnosis, Members cannot assess the likely effectiveness of any potential solution.
- While the Facilitator's Report suggests agreement among some Members that the DSU imposes clear limitations on the Appellate Body, we fail to see convergence on how to ensure that those limitations are respected going forward, and what are the consequences for continued failure to adhere to those limitations.
- If WTO Members say that we support a rules-based trading system, then how can we permit the WTO Appellate Body to break the rules we agreed to in 1995?
- The U.S. view across multiple U.S. Administrations has been clear and consistent: When the Appellate Body overreaches and abuses the authority it was given within the dispute settlement system, it undermines the legitimacy of the system and damages the interests of all WTO Members who care about having the agreements respected as they were negotiated and agreed.
- 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.