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

Geneva, October 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.200)

- The United States provided a status report in this dispute on October 17, 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.175)

- The United States provided a status report in this dispute on October 17, 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.138)

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

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

- The EU suggests 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 is that the member States do not restrict marketing or free movement of MON-810 in the EU. 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.22)

- The United States provided a status report in this dispute on October 17, 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.14)

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

F. INDONESIA – IMPORTATION OF HORTICULTURAL PRODUCTS, ANIMALS AND ANIMAL PRODUCTS: STATUS REPORT BY INDONESIA (WT/DS477/21 – WT/DS478/22/ADD.9)

- 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 planned changes to its regulations and laws.

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 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.

- These values are no doubt outweighed by the associated costs resulting from the application of these countermeasures – or the DSB's taking up 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 WTO 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.

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 *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.

- At recent DSB meetings, the European Union has attempted to reconcile this view with the EU's longstanding, contrary position. The EU argues that the situation in CDSOA differs from *EC – Large Civil Aircraft* because, in CDSOA, the dispute has been adjudicated and there are no further proceedings pending.

- Now, at the September DSB meeting, the EU has said there is no significance to the fact that there are no current proceedings in CDSOA, and the EU now concedes what the United States has been explaining for months -- the issue of compliance in CDSOA has not been adjudicated. The United States repealed the CDSOA measure after all of the proceedings in the dispute, and the EU has not brought a challenge to the U.S. claim of compliance.

- This means that the EU's position has been reduced to 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 September 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.

- 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.

5. STATEMENT BY THE UNITED STATES CONCERNING ARTICLE 6.2 OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES

I. Introduction

- The United States requested this agenda item regarding an important issue, the incorrect legal interpretation by the Appellate Body of Article 6.2 of the DSU[1], which states in relevant part that a panel request shall "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly".

- In this statement, the United States will explain that the Appellate Body has added a requirement for the legal basis of a panel request that does not appear in the text. Specifically, the Appellate Body has imposed a requirement to explain "how or why the measure at issue is considered by the complaining Member to be violating the WTO obligation in question."[2]

- This incorrect interpretation has made disputes more complicated by encouraging procedural challenges. That procedural complexity, in turn, results in delays in proceedings and creates significant uncertainty for the parties to the dispute.

- This issue thus affects every WTO Member that is a party to a dispute, or considering whether to bring a dispute, and may affect third parties as well.

II. The Appellate Body's Erroneous Interpretation Has Practical Effects

- The Appellate Body's erroneous interpretation is not an abstract issue; rather, it has effects on every dispute and recently affected the outcome in one dispute. As Members may be aware, this issue came up in the September DSB meeting. Members considered an appellate report in the *Korea – Valves* dispute that vividly demonstrates the consequences of the Appellate Body's incorrect legal interpretation.

- In that dispute, the panel had found that certain claims in Japan's panel request were outside the panel's terms of reference. The panel explicitly reached this conclusion because it found that the panel request did not adequately explain "how or why" the challenged measure was inconsistent with the legal provisions Japan had identified, namely certain claims under Articles 3.1, 3.2, 3.4, 3.5, 4.1, 6.9, 12.2, and 12.2.2 of the Anti-Dumping Agreement as well as Article VI of the GATT 1994.[3]

[1] *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").
[2] *EC – Selected Customs Matters (AB)*, para. 130; *China – Raw Materials (AB)*, para. 226; *US – Countervailing Measures (China) (AB)*, para. 4.9.
[3] *See* Panel Report *Korea – Anti-Dumping Duties on Pneumatic Valves from Japan* (WT/DS504/R), para. 8.1.

- In making these findings that Japan's panel request had not brought these claims within the scope of the dispute, the panel stated that it was following its understanding of the Appellate Body's approach in prior disputes.

- This generated appeals. Despite the fact that the panel thought it was doing what the Appellate Body had said to do, the appellate report *reversed* the panel and found that claims rejected by the panel were in fact *within* the panel's terms of reference.

- The appellate report stated that "the reference to the phrase 'how or why' in certain past disputes does not indicate a standard different from the requirement that a panel request include a 'brief summary of the legal basis … sufficient to present the problem clearly' within the meaning of Article 6.2 of the DSU."[4] The appellate report then indicated that, in a number of instances, it was unable to complete the analysis of the claims. The result is that a number of claims Japan validly presented in the panel request were not resolved due to the incorrect interpretation of Article 6.2.

III. The Appellate Body's Interpretation Is Erroneous and Contrary to DSU Article 6.2

- When the DSB considered the appellate report for adoption, the complaining Member highlighted that a panel's erroneous decision not to rule on the key issues on a jurisdictional ground undermines a primary objective of the dispute settlement system.

- Another Member stated that it agreed "with the AB statement that '[s]pecifically, the reference to the phrase 'how or why' in certain past disputes does not indicate a standard different from the requirement that a panel request include a 'brief summary of the legal basis … sufficient to present the problem clearly'" even while acknowledging that this "was at the heart of the Panel's reasoning."[5]

- So while some Members have welcomed the Appellate Body's statement that the "how or why" approach was not *intended* to change the Article 6.2 legal standard, in effect this Appellate Body approach had done so. Recall that the panel thought it was faithfully *applying* the Appellate Body's "how" or "why" interpretation.

- The panel's regrettable, but understandable, error only confirms that the Appellate Body's "how" or "why" interpretation was incorrect, that it added an element beyond what is required under Article 6.2, and that it created uncertainty and confusion for the dispute.

- The erroneous "how" or "why" interpretation by the Appellate Body was not inadvertent. In at least three prior appeals, the Appellate Body departed from the text of Article 6.2 and imposed this additional requirement for panel requests – that is, the element of "how or why" a measure is inconsistent with a provision cited by the complaining party.[6]

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[4] *Korea Valves* (DS504), para. 5.12.

[5] https://eeas.europa.eu/delegations/world-trade-organization-wto/68177/eu-statement-regular-dsb-meeting-%E2%80%93-30-september-2019_en

[6] *EC – Selected Customs Matters (AB)*, para. 130; *China – Raw Materials (AB)*, para. 226; *US – Countervailing Measures (China) (AB)*, para. 4.9.

- The relevant text of Article 6.2 is that a panel request "shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." Neither "how" nor "why" appears in Article 6.2. Instead, in order to provide the brief summary required by Article 6.2, it is sufficient for a complaining Member to specify in its panel request the legal claims under the WTO provisions with respect to the identified measures.

- Not surprisingly, by imposing a "how or why" requirement beyond DSU Article 6.2, the Appellate Body's interpretation has provoked more litigation.

- Responding parties have used the "how or why" approach to raise challenges against a panel's terms of reference in at least 16 proceedings. Over the past two years, over 30% of panel reports addressed Article 6.2 and the Appellate Body's incorrect element of "how or why." These challenges are not because the panel request failed to identify the measure at issue or the legal basis for bringing the dispute.

- Rather, responding parties have argued that the Appellate Body's "how or why" approach requires complaining parties to do something more. They argue the complaining party must include in a panel request the arguments that the complaining party will present to the panel regarding each claim of an inconsistency with a provision of a covered agreement. And some panels, following the Appellate Body's error, have agreed with responding parties.

- But the DSU is clear that a panel request does not need to include arguments. Instead, the complaining party's arguments are to be made in the submissions, oral statements, and other filings with a panel.[7] Some panels have thus understood the "how or why" approach to require that panel requests go above and beyond what is required under the DSU.

- Before the Appellate Body read into DSU Article 6.2 the requirement to explain "how" or "why" a measure is inconsistent, this provision had never been understood this way. It is notable that the text for Article 6.2 was drawn from, and does not differ materially from, the 1989 GATT Decision on Improvements to the GATT Dispute Settlement Rules and Procedures. These Montreal Rules provided: "The [panel request] shall indicate whether consultations were held, and provide a brief summary of the factual and legal basis of the complaint sufficient to present the problem clearly."[8]

- The fact that the Article 6.2 language comes from the Montreal Rules suggests that its incorporation in the DSU was not meant to change the standard that would be applied to panel requests. Panel requests subsequent to the Montreal Rules did not include an explanation of "how or why" the measure at issue was inconsistent with the GATT 1947 provision at issue. Rather, GATT panel requests identified the relevant GATT legal

[7] *See, e.g.*, DSU Appendix 3, para. 4: "Before the first substantive meeting of the panel with the parties, the parties to the dispute shall transmit to the panel written submissions in which they present the facts of the case and their arguments."

[8] GATT, *Improvements to the GATT Dispute Settlement Rules and Procedures, Decision of 12 April 1989*, L/6489, 13 April 1989, Section F(a) ("Montreal Rules").

provision, or one of its obligations. The practice of Contracting Parties under the GATT 1947 with respect to panel requests therefore also demonstrates that the "how or why" approach is in error.

IV. The Appellate Body's Erroneous Interpretation Introduces Complexity, Delay, and Expense and Undermines the Dispute Settlement System

- By creating this "how or why" approach, the Appellate Body has encouraged responding parties to engage in procedural arguments as well as preliminary ruling requests, and at least 4 appeals. In turn, these have added to the complexity, length, and expense of dispute settlement, including additional burdens on complaining parties and third parties.

- The difficulties arising from the "how or why" approach have been further aggravated by the Appellate Body's approach to "cogent reasons," which we have discussed at prior DSB meetings. The "cogent reasons" approach means that panels have not looked to the text of Article 6.2 of the DSU in reviewing terms of reference challenges. Instead, as in the case of the *Korea – Valves* panel, some have relied upon and followed appellate reports advancing the erroneous "how" or "why" interpretation.

- In the most recent appellate report, the Appellate Body appears to have sought to back away from the "how" or "why" approach by reversing the panel report. However, while we welcome the recognition that the panel erred by applying the "how or why" approach, the appellate report did not explicitly disavow that approach.

- This may be an instance where the Appellate Body has determined that an earlier Appellate Body interpretation was incorrect, but for whatever reason the Appellate Body is not willing to state that explicitly.

- The problem is that this leaves Members and panels confused as to what approach prevails and therefore which approach to follow. To the United States, the text of the DSU prevails. Neither "how" nor "why" appears in DSU Article 6.2; therefore, this "how" or "why" approach is not rooted in the text of the DSU.

- The United States strongly believes that adherence to the text of the DSU and all the WTO agreements is necessary to maintain Members' confidence that the agreements they have reached will be respected and to maintain the effectiveness of the dispute settlement system.

V. Conclusion

- In conclusion, the Appellate Body in its reports has added a requirement for the legal basis of a panel request that does not appear in the text of the DSU. Specifically, through its interpretation of Article 6.2, the Appellate Body has imposed a requirement to explain "how or why" a measure is inconsistent with a provision cited by the complaining party.

- This incorrect interpretation has real, practical effects. It has made disputes more complicated by encouraging procedural challenges, which in turn results in delays in proceedings and significant uncertainty for Members who are, or may be, parties to a dispute.
- While the Appellate Body recently appears to have attempted to back away from this approach, it has done so in a manner that creates confusion and more uncertainty, without any assurance that the difficulties that have been identified will be alleviated.
- This is yet another instance demonstrating that the panels and the Appellate Body need to follow the text that Members have agreed to, rather than departing from that text and undermining the WTO dispute settlement system.

6. INDIA – ADDITIONAL DUTIES ON CERTAIN PRODUCTS FROM THE UNITED STATES

A. REQUEST FOR THE ESTABLISHMENT OF A PANEL BY THE UNITED STATES (WT/DS585/2)

- The United States has explained that the U.S. actions taken on imports of steel and aluminum pursuant to Section 232 are to address a threat to its national security.

- Every sovereign has the right to take action it considers necessary for the protection of its essential security. This inherent right was not forfeited in 1947 with the GATT or in 1994 with the creation of the WTO. Instead, this right was enshrined in Article XXI of the GATT 1994. The actions of the United States are completely justified under this article.

- What remains inconsistent with the WTO Agreement, however, is the unilateral retaliation against the United States by various WTO Members including India. These Members pretend that the US actions under Section 232 are so-called "safeguards," and claim that their unilateral, retaliatory duties constitute suspension of substantially equivalent concessions under the WTO *Agreement on Safeguards*.

- Just as these Members appear to be ready to undermine the dispute settlement system by ignoring the plain meaning of Article XXI and 70 years of practice, so too are they ready to undermine the WTO by pretending to follow its rules while imposing measures that blatantly disregard them.

- The additional, retaliatory duties are nothing other than duties in excess of India's WTO commitments and are applied only to the United States, contrary to India's most-favored-nation obligation. The United States will not permit its businesses, farmers, and workers to be targeted in this WTO-inconsistent way.

- For these reasons, the United States requests that the DSB establish a panel to examine this matter with standard terms of reference.

<u>Second Intervention</u>

- India's approach for the retaliatory action at issue makes clear that, like the United States, it does not consider the Safeguards Agreement to be applicable in this dispute. For example, India has not addressed whether its action is in response to an alleged "safeguard" taken as a result of an absolute increase in imports. If there was an absolute increase, the right to suspend substantially equivalent concessions under the Safeguard Agreement may not be exercised for the first three years of the safeguard measure. The United States does not understand how India can claim to be following the Safeguards Agreement without actually following what the Safeguards Agreement says.

- There is no doubt that Article XIX of the GATT 1994 may be invoked by a Member to depart temporarily from its commitments in order to take emergency action with respect to

increased imports. The United States, however, is not invoking Article XIX as a basis for its Section 232 actions and has not utilized its domestic law on safeguards. Thus, Article XIX and the Safeguards Agreement are not relevant to the U.S. actions under Section 232.

- Because the United States is not invoking Article XIX, there is no basis for another Member to pretend that Article XIX should have been invoked and to use safeguards rules that are simply inapplicable.

8. UNITED STATES – COUNTERVAILING DUTY MEASURES ON CERTAIN PRODUCTS FROM CHINA

A. RECOURSE TO ARTICLE 22.2 OF THE DSU BY CHINA (WT/DS437/30)

- On October 17, 2019, China requested that the DSB authorize China to suspend concessions and related obligations under the covered agreements.

- By letter dated October 25, 2019, the United States objected to the level of suspension of concessions or other obligations proposed by China.

- Under the terms of Article 22.6 of the DSU, the filing of such an objection automatically results in the matter being referred to arbitration. Article 22.6 does not refer to any decision by the DSB, and no decision is therefore required or possible.

- Consequently, because of the U.S. objection under Article 22.6, the matter already has been referred to arbitration. Nevertheless, although unnecessary, the DSB may take note of that fact and confirm that it may not therefore consider China's request for authorization.

9. 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.
- As the United States has explained repeatedly, for more than 16 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.
- 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 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.