

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

Geneva, September 28, 2020

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.208)
 - The United States provided a status report in this dispute on September 17, 2020, 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.183)
 - The United States provided a status report in this dispute on September 17, 2020, 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.146)

- The United States thanks the European Union (“EU”) for its status report and its statement today.
- We understand that the EU held a meeting of the Standing Committee on genetically modified food and feed on September 15, 2020. The United States looks forward to receiving an update regarding the outcomes of that meeting.
- We also understand that the next Standing Committee is tentatively scheduled for the first week of October. We would welcome confirmation of the date and the agenda for that meeting.
- However, the United States continues to see persistent delays that affect a number of applications that have been awaiting approval for an extended period – delays that existed long before COVID-19 restrictions came into effect.
- The EU has previously suggested that, with respect to these delays, 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.
- Currently, approximately twenty (20) applications are pending risk management decisions in the standing committee on biotech and two (2) await final approval by the European Commission. Three (3) of these applications have been going through the EU approval system for over 10 years.
- We urge the European Union to adopt final approvals for those products that have completed evaluation by the Standing Committee. We also urge the Standing Committee and Commission to issue final approvals for those products that have successfully received an EFSA positive opinion, yet remain under the Committee’s “internal procedures”.
- As we stated at the last DSB meeting, we do not acknowledge the EU’s claims that there is no ban on genetically engineered (GE) products in the EU.
- Rather, the EU has failed to lift all of the WTO-inconsistent member-State bans covered by the DSB recommendation.
- The DSB adopted findings that, even where the EU had approved a particular product, in many instances EU member States banned those products for certain uses without a scientific basis.

- This includes not only the two member States subject to panel findings – Austria and Italy.
- There are seven additional member States that previously maintained bans on cultivation and have since opted out of cultivation under the EU’s legislation: Bulgaria, France, Germany, Greece, Hungary, Luxembourg, and Poland.
- There are also nine member States that did not previously ban cultivation of MON-810 but have since opted out of cultivation under the EU’s legislation: Croatia, Cyprus, Denmark, Latvia, Lithuania, Malta, the Netherlands, Slovakia, and Slovenia.
- Further, Austria and Italy appear to maintain bans on other products subject to specific panel findings.
- 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.
- We also disagree with the EU’s response that opt-out procedures taken by member States are “proportional, non-discriminatory and based on compelling grounds.” The restrictions adopted by EU member States restrict international trade in these products, and have no scientific justification.
- Furthermore, despite the assertions of the EU during the last DSB meeting, this situation exists regardless of whether or not the European Commission receives “complaints” from seed operators or stakeholders. 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.
- We look forward to addressing the EU’s other comments in the coming months and during the next US-EU biannual consultation, which we understand has been confirmed for October 22, 2020.

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.30)

- The United States provided a status report in this dispute on September 17, 2020, 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.22)
 - The United States provided a status report in this dispute on September 17, 2020, 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.17)
 - The United States thanks Indonesia for its status report but is concerned that Indonesia has not brought 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 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 more than 14 years ago in February 2006.
 - The Deficit Reduction Act does not permit the distribution of duties collected on goods entered after October 1, 2007, more than 12 years ago. Accordingly, the United States long ago implemented the DSB’s recommendations and rulings in these disputes.
 - Even aside from this, it is evidently not commonsense that is driving the EU’s approach to this agenda item. On June 26, the EU notified that it would apply an additional duty of 0.012 percent on certain imports of the United States. That is 12 thousandths of one percent. There is no trade rationale for inscribing this item month after month.
 - The EU has erroneously referred to a “clear obligation” under Article 21.6 for the United States to submit a status report in this dispute.
 - As we have explained repeatedly, Article 21.6 calls for a Member to provide a report “on the progress of its implementation.” There is no obligation under the DSU for a Member to provide further status reports once that Member announces that it *has implemented* the DSB recommendations.
 - The widespread practice of Members – including the European Union as a responding party – confirms this understanding of Article 21.6.
 - Indeed, at recent meetings, two Members (Brazil and China) have informed the DSB that they have come into compliance with the DSB recommendations in three disputes (DS472, DS497, and DS517), and the complaining parties did *not* accept the claims of compliance.
 - Those Members announcing compliance have not provided a status report for today’s meeting. This is consistent with the understanding that there is no obligation for a Member to provide further status reports once that Member announces that it has implemented the DSB recommendations.
 - The EU is the complaining party in one of those disputes (DS472). If the EU believes status reports are “required” under the DSU, it would have insisted that the responding Member provide a status report, or the EU would have inscribed that dispute as an item on today’s agenda. The EU took neither action.
 - Therefore, it is once again clear that the European Union does not truly believe that there is a “clear obligation” under Article 21.6 to submit a status report after a party has

claimed compliance. The European Union has simply invented, in its own mind, a rule for this dispute that it does not apply to other disputes.

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 does *not* agree with the EU’s assertion that it has complied.
- The EU’s position is erroneous and not based on the text of the DSU.
- The EU argues that where “a matter is with the adjudicators, it is temporarily taken out of the DSB’s surveillance” and the DSB is somehow deprived of its authority to “maintain surveillance of implementation of rulings and recommendations.” Yet, there is nothing in the DSU text to support that argument, nothing in Article 2 of the DSU or elsewhere that limits the DSB’s authority in this manner, and the EU provides no explanation for how it reads DSU Article 21.6 to contain this limitation.
- The EU is not providing a status report because of its assertion that it has complied, demonstrating the EU’s principles vary depending on its status as complaining or responding party.
- The U.S. position on status reports has been consistent: under Article 21.6 of the DSU, once a responding Member announces to the DSB that it has complied, there is no further “progress” on which it can report, and therefore no further obligation to provide a status report.
- But as the EU allegedly disagrees with this position, it should for future meetings provide status reports in this DS316 dispute.
- The United States notes that it is committed to obtaining a long-term resolution of this dispute. The United States recently showed great restraint in its review of WTO-authorized countermeasures for the EU’s WTO-inconsistent launch subsidies. The United States will engage with the EU in a new process in order to seek an agreement that will remedy the conduct that harmed the U.S. aviation industry and workers and will ensure a level playing field for U.S. companies.

Second Intervention

- The United States is aware that the EU recently filed yet another notice of supposed compliance. The United States disagrees that the EU has achieved compliance.
- Instead, the United States agrees with the second compliance panel report, which rejected the EU's assertions and found that 8 EU launch aid subsidies continue to cause adverse effects.
- The EU now asserts that it has amended 2 of these 8 measures; therefore, it admittedly has made no changes to 6 WTO-inconsistent measures. Unfortunately, the amendments the EU made to French and Spanish A350 XWB launch aid are marginal and insufficient to withdraw those subsidies.
- The EU has also expressed doubt about U.S. compliance in DS353 (*US – Large Civil Aircraft*). But no one can deny that Washington State terminated the aerospace tax break – and the EU has not denied it. The text of the measure is public, and its terms were notified to the WTO and the EU. This is the sole measure found to cause adverse effects in the compliance proceeding.
- Nevertheless, as previously stated, the United States is committed to a new process with the EU in an effort to reach a long-term resolution of this dispute.

Third Intervention

- The EU again suggests that it is “still examining the impact of the legislative action concerning the Washington State B&O tax.” This formulation appears to be a way to avoid stating what is clear – that the United States unequivocally withdrew this measure. The elimination of the preferential tax rate is straightforward, and was enacted in March, some six months ago. It took effect on April 1st. From that date forward, the tax on Boeing's large civil aircraft is the same as the benchmark rate identified in the adopted reports. There is no grandfathering. It is not possible to still be examining this straightforward piece of legislation.
- The EU has also referred again to NASA and Department of Defense research and development measures as well as certain state and local measures. However, as the EU is aware, it attempted and failed to show that these measures were WTO-inconsistent after the end of the U.S. compliance period. To be clear, the EU was unsuccessful in the compliance proceeding in obtaining WTO findings of non-compliance on NASA research and development, on Department of Defense research and development, or on any state or local measures.
- Nevertheless, as previously stated, the United States is committed to a new process with the EU in an effort to reach a long-term resolution of this dispute.

5. CHINA - DOMESTIC SUPPORT FOR AGRICULTURAL PRODUCERS

A. RECOURSE TO ARTICLE 21.5 OF THE DSU BY CHINA: REQUEST FOR THE ESTABLISHMENT OF A PANEL (WT/DS511/19)

- The DSB found that China provided domestic support to its agricultural producers in excess of its Aggregate Measure of Support (AMS) commitments under the *Agreement on Agriculture*.
- The DSB adopted its recommendation in April 2019 to China to bring its measures into conformity with its WTO commitments. Since then, China continues to provide significant levels of domestic support to its agricultural producers.
- The revised market price support measures notified by China in June do not themselves demonstrate that China now provides a level of domestic support within its commitment levels. Therefore, China has not demonstrated that its AMS (as calculated per the *Agreement on Agriculture*) will be within its commitment level in 2020.
- The United States reserved its right to suspend concessions under Article 22.6 of the DSU, and the level of nullification and impairment resulting from China's provision of domestic support in excess of its AMS commitments has been referred to arbitration. We have paused that arbitration. We understand that China does not seek further litigation but requested a panel to preserve its rights under Article 21.5 of the DSU.
- The United States and China continue to work together to reach a resolution to this dispute.

7. STATEMENT BY CANADA REGARDING THE PANEL REPORT IN "UNITED STATES – COUNTERVAILING MEASURES ON SOFTWOOD LUMBER FROM CANADA"
- The United States has notified the DSB of its decision to appeal the panel report, in accordance with the DSU.
 - The panel in this dispute erroneously interpreted and applied numerous provisions of the SCM Agreement, and many of the findings in the panel report build on erroneous Appellate Body interpretations and are deeply flawed.
 - The United States will, at the appropriate time, fully explain the errors in the panel report. As stated in our notification to the DSB of the U.S. decision to appeal, we are open to discussions with Canada on the way forward in this dispute.
 - The suggestion that the United States has appealed simply to delay this dispute settlement proceeding is utterly without foundation.
 - The DSU provides Members the right of appeal, and the United States has availed itself of that right.
 - The DSU also establishes rules governing the conduct of appeals, and for years the Appellate Body has failed to abide by those rules.
 - The Appellate Body’s failure to follow the agreed rules has undermined confidence in the World Trade Organization. It is difficult to maintain support for a rules-based trading system in which the adjudicator does not itself follow the rules.
 - The United States remains resolute in its view that Members need to resolve that issue as a priority. But 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.
 - The United States has always been a strong supporter of a rules-based international trading system and remains so now.

9. STATEMENT BY AUSTRALIA ON COVID-19 AND DISPUTE SETTLEMENT

- The United States thanks Australia for its statement today, which raises issues of systemic importance.
- The United States first wishes to extend its sympathies to all those who have directly borne the impact of the novel coronavirus pandemic.
- The global pandemic has caused significant disruptions to the work of the WTO, including panel proceedings. Travel restrictions imposed by WTO Members have made it difficult to schedule a substantive meeting of the panel with parties in Geneva. In some instances, this has resulted in a postponement of the meeting.
- Under these extraordinary circumstances, we encourage each panel to consult with the parties to the dispute on how to proceed, bearing in mind the views of the parties and the relevant provisions of the DSU.
- As part of the consultation process, it is incumbent on each panel to engage with the parties on the health, travel, and technological restrictions that affect the parties to a dispute. We encourage panels to undertake this consultation *before* taking a decision on how to move forward.
- Before the scheduling of a panel meeting, it would be appropriate for a panel to consult with the parties on the travel restrictions that may limit a party's ability to attend a meeting in Geneva.
- The same logic applies if a panel were to consider an alternative arrangement to an in-person meeting. In that situation, it would likewise be appropriate for a panel to consult with the parties on the constraints that may limit a party's ability to participate meaningfully in the arrangement under consideration.
- For example, we note that several parties and third parties in ongoing disputes have raised pertinent concerns with the possibility of holding a "virtual meeting". These include not only DSU considerations but the effect on a party's right of participation, including situations where health or technology considerations preclude or seriously undermine a party's ability to participate remotely.
- The circumstances of each dispute and each party will vary. It would be misguided for all panels to adopt a single solution to the challenge posed by the global pandemic to the work of panel proceedings.
- As WTO panels navigate these extraordinary circumstances, we encourage each panel to consult with the parties to the dispute and to consider carefully the feasibility and implications of a possible course of action *before* taking a decision.

11. APPELLATE BODY APPOINTMENTS: PROPOSAL BY SOME WTO MEMBERS (WT/DSB/W/609/REV.18)

- As we have explained in prior meetings, we are not in a position to support the proposed decision. The systemic concerns that the United States has identified remain unaddressed. Instead, Members should consider how to achieve meaningful reform of the dispute settlement system.
- The U.S. view across multiple U.S. Administrations has been clear and consistent: When the Appellate Body overreaches and itself breaks WTO rules, it undermines the rules-based trading system.
- The Appellate Body's abuse of the limited authority we Members gave it damages the interests of all WTO Members who care about a WTO in which the agreements are respected as they were negotiated and agreed.
- Earlier this year, the Office of the U.S. Trade Representative published a Report on the Appellate Body of the World Trade Organization, detailing how the Appellate Body has failed to apply WTO rules as agreed by WTO Members, imposing new obligations and violating Members' rights.¹ The United States encourages Members to review the Report.
- As the United States has explained repeatedly, the fundamental problem is that the Appellate Body has not respected 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, we cannot assess the likely effectiveness of any potential solution.
- The United States has actively sought engagement from Members on these issues. Yet, some Members have remained unwilling to admit there is even a problem, much less engage in a deeper discussion of the Appellate Body's failures.
- And rather than seeking to understand why the Appellate Body has departed from what Members agreed, these Members and others have now redirected the focus and energies of the Membership to pursue an arrangement that would, at best, perpetuate the failings of the Appellate Body.²
- Nevertheless, the United States is determined to bring about real WTO reform. We Members must ensure that the WTO dispute settlement system reinforces the WTO's critical negotiating and monitoring functions, and does not undermine those functions by overreaching and gap-filling.

¹ United States Trade Representative, *Report on the Appellate Body of the World Trade Organization* (February 2020), available at https://geneva.usmission.gov/wp-content/uploads/sites/290/AB-Report_02.11.20.pdf.

² See U.S. Statement at the June 29, 2020, Meeting of the Dispute Settlement Body (Item 13), available at: https://geneva.usmission.gov/wp-content/uploads/sites/290/Jun29.DSB_.Stmt_.as-deliv.fin_.public13218.pdf.

- As discussions among Members continue, the dispute settlement system continues to function.
- The central objective of that system remains unchanged: to assist the parties to find a solution to their dispute. As before, Members have many methods to resolve a dispute, including through bilateral engagement, alternative dispute procedures, and third-party adjudication.
- And, as discussed under agenda item 7, the United States is open to further discussions with Canada with respect to the panel report in the dispute, *United States – Countervailing Measures on Softwood Lumber from Canada* (DS533).
- Parties should make efforts to find a positive solution to their dispute, consistent with the aim of the WTO dispute settlement system.
- The United States will continue to insist that WTO rules be followed by the WTO dispute settlement system. We will continue our efforts and our discussions with Members and with the Chair to seek a solution on these important issues.