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

Geneva, December 18, 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.210)

- The United States provided a status report in this dispute on December 7, 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 the appropriate statutory measures that would resolve this matter.

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B. UNITED STATES – SECTION 110(5) OF THE US COPYRIGHT ACT: STATUS REPORT BY THE UNITED STATES (WT/DS160/24/ADD.185)

- The United States provided a status report in this dispute on December 7, 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.148)

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

- Since the previous DSB meeting, the United States and the EU conducted the semiannual US-EU Biotechnology Dialog on October 22, 2020. The EU agreed to those consultations to normalize trade in light of the findings in DS291.

- During that meeting, the United States emphasized its concern with the persistent delays arising from the EU's biotechnology approval process. A large number of applications have been awaiting approval for an extended period.

- To be clear, these delays existed long before any COVID-19 restrictions came into effect.

- The EU has 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.

- Recent outcomes of both the Standing Committee and Appeals Committee on Genetically Modified Food and Feed and Environmental Risk Assessment demonstrate the political nature of the comitology process – which repeatedly delays safe products from receiving approval in the European market.

- During the most recent Standing Committee meetings (September 15, 2020 and October 7, 2020), EU Member States cited the "Precautionary Principle" and "scientific reasons" as justification for not issuing approvals. However, these claims contradict the fact that the European Food Safety Authority (EFSA) has successfully completed a science-based risk assessment for every product under consideration at these meetings.

- EU Member States at the Standing Committee also cited "no agreed national position", "negative public opinion", and "political reasons" as justifications for reaching "no opinion" and for not approving these products. As can be seen, none of these justifications are science-based.

- The Appeals Committee meeting held on November 12, 2020, which was meant to address those instances where member States reach "no opinion" regarding product approvals, cited the foregoing reasons as justification for not issuing biotech product approvals.

- We fail to see how this approval process addresses the undue delays contemplated in

DS291.

- In this light, and taking into account the EU's statement today, we would request a further update from the EU regarding the outcomes of the Appeals Committee meeting held on December 3, 2020 and the Standing Committee meeting held on December 16, 2020.

- We also urge and request that the European Union issue final approvals for those products that have completed science-based risk assessments at EFSA, including those products that are with the Standing Committee, Appeals Committee, and the European Commission under these "internal procedures".

- At this time, approximately twenty (20) applications are pending risk management decisions in the Standing Committee and Appeals Committee 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 a decade.

- As we stated at the last DSB meeting, the United States does 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 also 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.

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D. UNITED STATES – ANTI-DUMPING AND COUNTERVAILING MEASURES ON LARGE RESIDENTIAL WASHERS FROM KOREA: STATUS REPORT BY THE UNITED STATES (WT/DS464/17/ADD.32)

- The United States provided a status report in this dispute on December 7, 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.

Second Intervention

- The United States recalls that Canada has commenced a dispute settlement proceeding against the United States concerning the use of a differential pricing analysis and zeroing. Canada lost that dispute before the panel. The panel rejected Canada's arguments because they were unpersuasive and did not make sense of the text of the Antidumping Agreement.

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.24)

- The United States provided a status report in this dispute on December 7, 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.

Second Intervention

- The United States is aware that the reasonable period of time, as determined by an arbitrator under Article 21.3(c) of the DSU, expired on August 22, 2018.

- As explained in the U.S. status report, the United States continues to consult with interested parties on options to address the recommendations of the DSB.

- 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.19)

- The United States thanks Indonesia for its status report. We understand that Indonesia has recently amended the relevant laws that would address Measure 18.

- The United States looks forward to receiving further detail from Indonesia regarding these legislative changes and their implementation by the government.

- The United States hopes to work with Indonesia to ensure that Indonesia's import licensing regime is free from the measures at issue, including the 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.

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 common sense 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. There is no trade rationale for inscribing this item month after month.

- As it has done many times before, at the October DSB meeting, the EU once again called on the United States to abide by its "clear obligation" under Article 21.6 for the United States to submit a status report in this dispute. Notably, the EU did not call on any other Member in any other dispute to abide by this so-called "clear obligation," despite the fact that several Members are in the same situation as the United States.

- As we have explained repeatedly, 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, three Members – Australia, Brazil, and China – have informed the DSB that they have come into compliance with the DSB recommendations in four disputes (DS472, DS497, DS517, and DS529), 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 in that dispute, 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 a rule for this dispute, involving the United States, that it does not apply to other disputes involving other Members.

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 the 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 that 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 to 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 continues to engage with the EU 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 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 asserts that it has amended 2 of these 8 measures; and 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 and the sole basis for countermeasures authorized by the WTO. As it clearly has been withdrawn, the EU has no basis for countermeasures of any kind.

- However, the United States continues to engage with the EU 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.

7. STATEMENT BY CANADA ON PRACTICES CONCERNING THE USE OF FLEXIBLE ARRANGEMENTS IN DISPUTE SETTLEMENT PROCEEDINGS DURING THE COVID-19 PANDEMIC (JOB/DSB/1/ADD.13)

- The United States thanks Canada for its statement today, which raises issues of systemic importance.

- The United States again 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.

- Where the rights of the parties and third parties under the DSU cannot be fully protected, a virtual session in lieu of a physical meeting in the presence of the parties and third parties cannot be considered an adequate substitute.

- For example, we note that several parties and third parties in ongoing disputes have raised pertinent concerns in relation to the conduct of virtual sessions. These include not only DSU considerations, but also 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. We must keep in mind and be respectful of the different circumstances that each Member faces at home.

- 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.

9. APPELLATE BODY APPOINTMENTS: PROPOSAL BY SOME WTO MEMBERS (WT/DSB/W/609/REV.19)

- As the United States has explained in prior meetings, we are not in a position to support the proposed decision. The systemic concerns that we have identified for more than 16 years and across multiple U.S. Administrations, remain unaddressed.

- Over the past three years, we have engaged in many discussions with Members – on a bilateral basis, in small groups, and in large settings. After three years of effort, what have we learned?

- First, we have learned that *the Appellate Body thinks it did no wrong*. We know this because, despite U.S. action on appointments under both the Obama Administration and the Trump Administration, the Appellate Body did not change its approach. In fact, it expanded and deepened its WTO-inconsistent practices and interpretations. This reflects an institution that came to view itself as more important than the rules – and the Members – that created it.

- We have learned that the *Appellate Body turned out to be less expert than panelists* in adjudicating disputes under the DSU. We know this because the United States catalogued numerous substantive interpretive errors by the Appellate Body.[1] In most cases, a panel reached a correct interpretation, and the Appellate Body got it wrong. And so, while some Members may think the Appellate Body did a better job than panels – we think the record shows the opposite: panels generally respected WTO rules, and the Appellate Body far too often did not.

- We have learned that *some Members think the Appellate Body did no wrong*. This is regrettable because we have not heard any convincing defense of the Appellate Body's errors in interpreting the DSU or substantive WTO rules. The ongoing denial by some of any AB errors reflects, in part, a fundamental divide among Members on the proper role

[1] *See* United States Trade Representative Report on the Appellate Body of the World Trade Organization, February 2020, pp. 81-119, *available at* https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf; *see also, e.g.*, Dispute Settlement Body, Minutes of the Meetings WT/DSB/M/294, paras. 103-127 (statement of the United States concerning the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China) (AB)*); WT/DSB/M/346, para. 7.7 (statement of the United States concerning the Appellate Body report in *EC – Seal Products (AB)*); WT/DSB/M/211, paras. 37-40 (expressing concerns with the Appellate Body's interpretation of Article 2.4.2 of the Antidumping Agreement); WT/DSB/M/225, paras. 73-76 (expressing concerns with the Appellate Body's interpretation of the Antidumping Agreement with regard to zeroing); WT/DSB/M/250, paras. 47-55 (expressing concerns that the Appellate Body wrongly claims that its reports are entitled to be treated as precedent and must be followed by panels absent "cogent reasons"); WT/DSB/265, paras. 75-81 (expressing concern that the Appellate Body's findings incorrectly expanded the scope of the proceedings, concern with the Appellate Body's interpretation of the Antidumping Agreement with regard to zeroing, and concern that the Appellate Body had failed to apply the special standard of review under the Anti-Dumping Agreement); WT/DSB/M/385, paras. 8.8-8.19; WT/DSB/M/73 (expressing concerns with the Appellate Body's interpretation of the Safeguards Agreement).

of the Appellate Body in the WTO and the global trading system more generally.

- We have learned that *some other Members <u>may</u> think the Appellate Body did wrong, but are content to maintain the status quo*. We do not understand how a Membership that proclaims its support for a rules-based trading system can nonetheless accept persistent rule-breaking by its dispute settlement system. This unwillingness on the part of some Members may unfortunately reflect a Membership incapable of holding WTO institutions, including the Appellate Body, accountable. Experience shows, however, that without accountability, there can be no reform.

- And we have learned that *some reform-minded Members think the Appellate Body did commit serious errors, and bravely see a need for real, fundamental reform* – reform so that the WTO dispute settlement system supports the WTO as a venue for discussion and negotiation between Members, rather than undermining the WTO and converting it into a mere litigation forum.

- So I think it is fair to say that we have learned a considerable amount. Members have deepened their understanding of the issues and, in some cases, sincerely wrestled with the challenge before us.

- But of course, many questions remain.

- There is the question that everyone here knows well – the "why" question. Some Members may be tired of hearing it, and we could similarly tire of having to ask it – but the question is too important to the future of the WTO to ignore it.

- Despite best efforts by the United States to push the conversation forward, we have heard very little from other Members on their views of how we arrived to this situation – where the Appellate Body had ignored the clear limits placed on it under the DSU and rewrote the substantive rules set out in the WTO agreements.

- In meeting after meeting, we posed this question to the Members. We explained why the "why question" was so important. But most Members did not want to undertake this critical, reflective exercise.

- In the absence of engagement from Members, we offered several potential explanations based on conversations and on our own reflections. For example, we noted:

    - One cause could be the ongoing challenges facing the WTO negotiating function and its oversight function, leading to unchecked "institutional creep" by the Appellate Body.

    - Another cause could be that some WTO Members believe that the Appellate Body is an independent "international court" and its members are like "judges" who have more authority to make rules than the focused review provided in the DSU.

    - Relatedly, some Appellate Body members viewed themselves as "appellate

judges"[2] serving on a "World Trade Court" that is the "centerpiece" of the WTO dispute settlement system.[3] Of course, such an expansive vision of the Appellate Body is not reflected in the DSU.

- Finally, we also noted that the compensation arrangements for AB members rewarded their delays and staying on beyond the end of their terms, and we learned that there was very little transparency and accountability for the compensation claimed.

- Besides these, we also heard from a former member of the Appellate Body, Mr. Graham, who was willing to speak out candidly on these issues.[4] He put forward a number of reasons "why" the Appellate Body erred and was unwilling to correct those errors – and these remarks deserve attention from all WTO Members. Among his observations on why the Appellate Body behaved as it did:

  - (1) A "prevailing ethos" to act like a court, and not be accountable to WTO Members,

  - (2) the degree of control by Appellate Body staff,

  - (3) an over-emphasis on "collegiality" that created "peer pressure to conform",

  - (4) an "excessive striving for consensus" that "led to excessively long and unclear compromise reports" and "encouraged over-reach, gap filling, and advisory opinions",

  - (5) "a sense of infallibility and of entitlement, to stretch the words of agreed texts, and to stretch decisions beyond merely resolving a particular dispute, so as to create a body of jurisprudence", and, finally,

  - an "undue adherence to precedent", "not only as to outcomes, but also as to reasoning, definitions, and obiter dicta", which "made it more important to know the past" than to "openly consider[] whether the past should be reconsidered."

- None of these potential reasons "why" are addressed in the decision before the DSB today. Starting a selection process would therefore simply revive the interpretations and practices that the United States has, for years, explained as contrary to the WTO agreement and unacceptable to us.

- Nor do these potential reasons "why" suggest a problem that can be resolved by simply

[2] Farewell Speech of Appellate Body member Peter Van den Bossche, *available at* https://www.wto.org/english/tratop_e/dispu_e/farwellspeech_peter_van_den_bossche_e.htm.
[3] Peter Van den Bossche, *From Afterthought to Centerpiece: The WTO Appellate Body and its Rise to Prominence in the World Trading System* (2005).
[4] Farewell speech of Appellate Body member Thomas R. Graham, *available at* https://www.wto.org/english/tratop_e/dispu_e/farwellspeechtgaham_e.htm.

agreeing on words that repeat, with feeling, existing WTO principles. Many Members have been unwilling to confront this difficult reality.

- Looking ahead, we must find ways to ensure that the limitations we Members imposed on all WTO adjudicators in the DSU are respected. We have to consider and grapple with the damage to the WTO, as a forum for discussion and negotiation, and as a rules-based system, for continued failure to adhere to those limitations.

- While there are many problems in international trade that require discussion of new norms and rules, the United States considers that the rules that we were able to agree in 1995 represent some important progress in bringing greater fairness and market-orientation to international trade.

- As we see it, the Appellate Body has effectively written a new, less-market-oriented, less reciprocal, and less mutually beneficial WTO agreement, which we never agreed to, and which I believe no U.S. Government would agree to. The United States will continue – as it always has – to engage with Members on these important issues.