

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

Geneva, April 27, 2018

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB
 - A. UNITED STATES – ANTI-DUMPING MEASURES ON CERTAIN HOT-ROLLED STEEL PRODUCTS FROM JAPAN: STATUS REPORT BY THE UNITED STATES (WT/DS184/15/ADD.182)
 - The United States provided a status report in this dispute on April 16, 2018, in accordance with Article 21.6 of the DSU.
 - The United States has addressed the DSB’s recommendations and rulings with respect to the calculation of anti-dumping margins in the hot-rolled steel anti-dumping duty investigation at issue.
 - With respect to the recommendations and rulings of the DSB that have yet to be addressed, the U.S. Administration will work with the U.S. Congress with respect to appropriate statutory measures that would resolve this matter.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

B. UNITED STATES – SECTION 110(5) OF THE US COPYRIGHT ACT:
STATUS REPORT BY THE UNITED STATES (WT/DS160/24/ADD.157)

- The United States provided a status report in this dispute on April 16, 2018, in accordance with Article 21.6 of the DSU.
- The U.S. Administration will continue to confer with the European Union, and to work closely with the U.S. Congress, in order to reach a mutually satisfactory resolution of this matter.

Second Intervention

- By intervening under this item, China attempts to give the appearance of concern for intellectual property rights. Later today, we will discuss the significant and trade distorting shortcomings in China's treatment of intellectual property under agenda item 5.
- For now, we can say that, as the companies and innovators of China and other Members well know, the intellectual property protection that the United States provides within its own territory equals or surpasses that of any other Member. Indeed, as China also well knows, none of the damaging technology transfer practices of China that are at issue under agenda item 5 are practices that Chinese companies or innovators face in the United States.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

C. EUROPEAN COMMUNITIES - MEASURES AFFECTING THE APPROVAL AND MARKETING OF BIOTECH PRODUCTS: STATUS REPORT BY THE EUROPEAN UNION (WT/DS291/37/ADD.120)

- The United States thanks the European Union (“EU”) for its status report and its statement today.
- The United States once again notes its ongoing concerns that the EU measures affecting the approval of biotech products continue to involve prolonged, unpredictable, and unexplained delays at every stage of the approval process. These delays have affected the products previously approved by the EU, and continue to affect the dozens of applications that have been awaiting approval for months.
- Even when the EU finally approves a biotech product, the EU has facilitated the ability of individual EU member States to impose bans on the supposedly approved product. As we have noted at previous DSB meetings, the EU has adopted legislation that permits EU member states to “opt out” of certain approvals, even where the European Food Safety Authority has concluded that the product is safe.
- The United States again urges the EU to ensure that all of its measures affecting the approval of biotech products, including measures adopted by individual EU member States, are supported by scientific evidence, and that decisions are taken without undue delay.

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.4)

- The United States provided a status report in this dispute on April 16, 2018, in accordance with Article 21.6 of the DSU.
- On December 15, 2017, the United States Trade Representative requested that the U.S. Department of Commerce make a determination under section 129 of the *Uruguay Round Agreements Act* to address the DSB's recommendations relating to the Department's countervailing duty investigation of washers from Korea. On December 18, the Department of Commerce initiated a proceeding to make such determination. Since that time, the Department issued initial and supplemental questionnaires seeking additional information necessary to conduct the section 129 proceeding.
- The United States continues to consult with interested parties on options to address the recommendations of the DSB relating to antidumping measures challenged in this dispute.

3. UNITED STATES – CONTINUED DUMPING AND SUBSIDY OFFSET ACT OF 2000: IMPLEMENTATION OF THE RECOMMENDATIONS ADOPTED BY THE DSB

A. STATEMENT BY THE EUROPEAN UNION

- As the United States has noted at previous DSB meetings, the Deficit Reduction Act – which includes a provision repealing the Continued Dumping and Subsidy Offset Act of 2000 – was enacted into law in February 2006. Accordingly, the United States has taken all actions necessary to implement the DSB’s recommendations and rulings in these disputes.
- We recall, furthermore, that the EU has acknowledged that the Deficit Reduction Act does not permit the distribution of duties collected on goods entered after October 1, 2007, more than 10 years ago.
- With respect to the EU’s request for status reports in this matter, as we have already explained at previous DSB meetings, there is no obligation under the DSU to provide further status reports once a Member announces that it has implemented the DSB recommendations and rulings, regardless of whether the complaining party disagrees about compliance.
- And as we have noted many times previously, the EU has demonstrated repeatedly it shares this understanding, at least when it is the responding party in a dispute. Once again, this month the EU has provided no status report for long-standing disputes in which there is a disagreement between the parties on the EU’s compliance.

5. UNITED STATES ACTIONS UNDER SECTION 301 OF THE TRADE ACT OF 1974

A. STATEMENT BY CHINA

- The United States thanks China for placing this item on the agenda as it gives WTO Members the opportunity to discuss the seriously trade distorting policies adopted by China that are the subject of the ongoing Section 301 investigation mentioned in China's statement.
- Let us be clear: it is these policies, and not responses by the United States or other Members to address these trade distorting policies, that are a threat to the international trading system.
- As Members are aware, the United States has issued a detailed factual report regarding the results of the U.S. investigation under Section 301, which is available on the USTR website.
- The report contains extensive evidence that China engages in the following four types of practices involving technology transfer:
- First, China uses foreign ownership restrictions, such as joint venture requirements and foreign equity limitations, and various administrative review and licensing processes, to require or pressure technology transfer from foreign companies.
- These foreign ownership restrictions prohibit foreign investors from operating in certain industries unless they partner with a Chinese company, and in some cases, unless the Chinese partner is the controlling shareholder.
- These requirements preclude foreign companies from entering the market on their own terms, and lay the foundation for China to require or pressure the transfer of technology.
- China also uses its administrative licensing and approvals processes to force technology transfer in exchange for the numerous approvals needed to establish and operate a business in China.
- Vague provisions and uncertainty about the applicable rules provide Chinese authorities with wide discretion to use administrative processes to pressure technology transfer or otherwise act in furtherance of China's trade-distorting industrial policy objectives.

- Second, China's regime of technology regulations forces U.S. companies seeking to license technologies to Chinese entities to do so on non-market-based terms that favor Chinese recipients.
- China imposes a different set of rules for imported technology transfers originating from outside China, such as from foreign entities attempting to do business in China. These rules do not apply to technology transfers occurring between two domestic Chinese companies.
- China's mandatory requirements for importation of foreign technology are discriminatory and clearly more burdensome than the requirements applicable to domestic Chinese companies.
- Specifically, China mandates that all indemnity risks be borne by the foreign technology transferor. Parties cannot negotiate the allocation of this risk, even if the transferee would be willing to bear the risk under the contract.
- China also mandates that all improvements belong to the party making the improvement and that a foreign licensor cannot stop the Chinese licensee from making improvements to the technology. China further requires that joint ventures, mandated under Chinese law, may continue to use transferred technology after the conclusion of any licensing contract.
- These restrictions tip the technology transfer regime in favor of Chinese entities before a foreign company even attempts to enter the market in China.
- Third, China directs and unfairly facilitates the systematic investment in, and acquisition of, foreign companies and assets by Chinese companies to obtain cutting-edge technologies and intellectual property and generate the transfer of technology to Chinese companies.
- The role of the state in directing and supporting this outbound investment strategy is pervasive, and evident at multiple levels of government – central, regional, and local.
- China has devoted massive amounts of financing to encourage and facilitate outbound investment in areas it deems strategic.
- To implement these policies, China employs tools such as investment approval mechanisms and a system of "encouraged" sectors to channel and support outbound investment.

- These investments and acquisitions align with state objectives and policies, and are often undertaken by state-owned enterprises that are, by definition, owned and controlled by the government.
- Even when undertaken by companies in which the government does not own an observable controlling stake, these transactions are frequently guided and directed by the state.
- In addition, many of these transactions are funded by state-owned entities or banks, often in situations where comparable commercial financing would have been unavailable.
- Fourth, China conducts and supports unauthorized intrusions into, and theft from, the computer networks of foreign companies to access their sensitive commercial information and trade secrets.
- For over a decade, China has conducted and supported cyber intrusions into U.S. commercial networks, targeting confidential business information held by U.S. firms.
- Through these cyber intrusions, China has gained unauthorized access to a wide range of commercially-valuable business information, including trade secrets, technical data, negotiating positions, and sensitive and proprietary internal communications.
- China has used cyber-enabled theft and cyber intrusions to serve its strategic economic objectives. Documented incidents of China's cyber intrusions against U.S. commercial entities align closely with China's industrial policy objectives.
- These four technology transfer policies harm every Member, and every industry in every Member, that relies on technology for maintaining competitiveness in world markets and increasing its people's standard of living.
- Instead of addressing its damaging and discriminatory policies, China accuses the United States of "unilateralism."
- This criticism has absolutely no validity.
- From the outset of the investigation, the United States was clear that where an act, policy, or practice appeared to involve WTO rules, the United States would pursue the matter through WTO dispute settlement.
- In fact, one of the areas of investigation – involving technology licensing – appears to be amenable to WTO dispute settlement. In particular, certain technology licensing

measures adopted by China appear to deny patent rights to foreign IP holders and discriminate against foreign IP holders. Thus, China's measures appear to be inconsistent with China's obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).

- Accordingly, on March 23, 2018, the United States initiated a WTO dispute on this issue.¹ The consultation request has been circulated, and WTO Members may review the request to see the TRIPS Agreement issues involved.
- And to be absolutely clear, the United States made no findings in the Section 301 investigation that the licensing measures at issue are inconsistent with China's TRIPS Agreement obligations. Rather, as for any WTO dispute, the matter will be resolved by the parties or findings may be sought through WTO dispute settlement.
- In contrast, the three other categories of measures covered in the U.S. investigation do not appear to implicate specific WTO obligations. In a previous meeting, we noted that, if China wished to tell the DSB that the three other sets of acts, policies, and practices covered in the Section 301 investigation do amount to breaches of WTO rules, it could do so. China now has another golden opportunity.
- Accordingly, China's argument that the United States has somehow acted inconsistently with Article 23 of the DSU is completely lacking in foundation. Indeed, by asserting that the United States has breached the DSU, it is China itself that is acting inconsistently with Article 23.
- More broadly, the WTO system is not threatened – as China claims – where a Member takes steps to address harmful, trade distorting policies not directly covered by WTO rules. To the contrary, what does threaten the WTO is that China is asserting that the mere existence of the WTO prevents any action by any Member to address its unfair, trade-distorting practices and policies – unless those policies are currently subject to WTO dispute settlement.
- If the WTO is seen as a shield protecting those Members that choose to adopt policies that can be shown to undermine the fairness and balance of the international trading system, then the WTO and the international trading system will lose all credibility and support among our citizens.

¹ China — *Certain Measures Concerning the Protection of Intellectual Property Rights* (DS542).

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

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

- We regret that Korea has sought the establishment of a panel in this matter.
- As the United States has explained to Korea, the determinations identified in Korea's request for panel establishment are fully consistent with WTO rules.
- Furthermore, Korea seeks to challenge certain items that are not measures and would not fall within the scope of a dispute settlement proceeding.
- For these reasons, the United States does not agree to the establishment of a panel today.

8. UNITED STATES – COUNTERVAILING MEASURES ON CERTAIN HOT-ROLLED CARBON STEEL FLAT PRODUCTS FROM INDIA

A. RECOURSE TO ARTICLE 21.5 OF THE DSU BY INDIA: REQUEST FOR THE ESTABLISHMENT OF A PANEL (WT/DS436/18)

- As the United States stated at the November 2016 meeting of the DSB, and at prior DSB meetings, the United States has completed implementation with respect to the DSB recommendations in this dispute. Contrary to India's view, there is no basis for suggesting that U.S. compliance was inadequate.
- We maintain that the measures identified in India's request for establishment of a panel are fully WTO-consistent.
- Nevertheless, the procedures set forth in the sequencing agreement between India and the United States provide that the United States shall accept the establishment of a panel at the first DSB meeting in which India's request appears on the agenda.
- The United States is prepared to engage in these proceedings and to explain to the panel why India has no legal basis for its claims.
- This statement is without prejudice to whether each of the items cited in India's panel request constitutes a measure taken to comply for purposes of Article 21.5 of the DSU, and therefore is subject to examination by the panel.

10. APPELLATE BODY MATTERS

A. APPELLATE BODY APPOINTMENTS: PROPOSAL BY ARGENTINA; AUSTRALIA; PLURINATIONAL STATE OF BOLIVIA; BRAZIL; CANADA; CHILE; CHINA; COLOMBIA; COSTA RICA; DOMINICAN REPUBLIC; ECUADOR; EL SALVADOR; THE EUROPEAN UNION; GUATEMALA; HONDURAS; HONG KONG, CHINA; INDIA; INDONESIA; ISRAEL; KAZAKHSTAN; KOREA; MEXICO; NEW ZEALAND; NICARAGUA; NORWAY; PAKISTAN; PANAMA; PARAGUAY; PERU; THE RUSSIAN FEDERATION; SINGAPORE; SWITZERLAND; THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU; TURKEY; UKRAINE; URUGUAY AND VIET NAM (WT/DSB/W/609/REV.3)

- The United States thanks the Chair for the continued work on these issues.
- As we have explained in prior meetings, we are not in a position to support the proposed decision.
- For at least the past 8 months, the United States has been raising and explaining the systemic concerns that arise from the Appellate Body's decisions that purport to "deem" as an Appellate Body member someone whose term of office has expired and thus is no longer an Appellate Body member, pursuant to its Working Procedures for Appellate Review (Rule 15).
- During that period of time, the DSB has adopted by positive consensus two reports signed by someone no longer an Appellate Body member, and there currently remain five ongoing appeals where the term of one or more of the persons appointed to the division has expired. In one instance, the person's term expired almost ten months ago.
- However, the Dispute Settlement Body has not yet addressed the problem of persons continuing to hear appeals well after their terms have expired.
- Under the Dispute Settlement Understanding, it is the DSB that has the authority to appoint Appellate Body members and to decide when their term in office expires,² and so it is up to the DSB to decide whether a person who is no longer an Appellate Body member can continue to serve on an appeal.

² *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Arts. 17.1, 17.2 ("DSU").

- We appreciate the recognition by Members at the last meeting of the fact that addressing this issue is a joint responsibility of all Members, and we appreciate the willingness they expressed to engage on this issue.
- The United States remains resolute in its view that Members need to resolve that issue as a priority. We therefore will continue our efforts and our discussions with Members and with the Chair to seek a solution on this important issue.