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

Geneva, February 28, 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.180)

- The United States provided a status report in this dispute on February 15, 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.155)

- The United States provided a status report in this dispute on February 15, 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

- As we have previously stated, China's criticisms are completely unfounded. The intellectual property protection that the United States provides within its own territory equals or surpasses that of any other Member. Indeed, we find it interesting that the Member that continues to criticize the U.S. commitment to strong intellectual property rights has domestic records of protecting intellectual property rights that appear less than robust.

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.118)

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

- The United States notes its continuing concerns that the EU measures affecting the approval of biotech products 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 still awaiting approval.

- Furthermore, 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 approved product.

- The United States urges the EU to ensure that its measures affecting the approval of biotech products, including measures adopted by individual EU member States, are based on 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.2)

- The United States provided a status report in this dispute on February 15, 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.

2. 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 disputes in which there is a disagreement between the parties on the EU's compliance.

3. CANADA – ANTI-DUMPING MEASURES ON IMPORTS OF CERTAIN CARBON STEEL WELDED PIPE FROM THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU

A. STATEMENT BY THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU

- Given Canada's position under item 2 in past DSB meetings that the item should remain on the DSB agenda where a complaining party disagrees with a responding party's claim of compliance, we would ask Canada whether it can confirm that it will provide a status report in this dispute next month.

4. INDIA – CERTAIN MEASURES RELATING TO SOLAR CELLS AND SOLAR MODULES

A. RECOURSE TO ARTICLE 21.5 OF THE DSU BY INDIA: REQUEST FOR THE ESTABLISHMENT OF A PANEL (WT/DS456/20)

- As the United States noted at two prior DSB meetings, India has no basis for asserting compliance with the DSB recommendations in this dispute.

- To recall, the DSB found that India's domestic content requirement, or DCR, measures for solar cells and modules breached India's national treatment obligations under the TRIMs Agreement and the GATT 1994.

- In its request, India claims that it has complied with the DSB recommendations in this dispute because it "no longer enters into any [Power Purchasing Agreements] involving the DCR measures".

- India's panel request, however, appears to indicate that India will, in fact, continue to apply the WTO-inconsistent DCR measures contained in Power Purchase Agreements that India entered into *before* December 2017.

- The United States does not understand how India can claim compliance while it continues applying these WTO-inconsistent DCR measures. We do not see the utility of establishing a compliance panel under these circumstances.

- The United States has reserved its rights to move forward under DSU Article 22.6 to obtain authorization to take countermeasures in relation to India's DCR measures.

- However, as we have communicated to India on several occasions, we remain willing to work with India to find a bilateral resolution to this dispute without the need for further dispute proceedings.

5. CHINA – ANTI-DUMPING AND COUNTERVAILING DUTY MEASURES ON BROILER PRODUCTS FROM THE UNITED STATES: RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE UNITED STATES

A. REPORT OF THE COMPLIANCE PANEL (WT/DS427/R AND WT/DS427/R/ADD.1)

- The United States is pleased to request the DSB to adopt the report of the compliance panel in this dispute. We thank the compliance panelists, and the WTO Secretariat assisting them, for their work on this matter.

- The United States is a world leader in broiler chicken production. Prior to China's imposition of anti-dumping (AD) duties and countervailing duties (CVDs) on U.S. broiler products, China was one of our largest markets. The duties have cost our industry billions of dollars in lost sales.

- The DSB will recall that the panel in the original dispute agreed with the United States that China's AD/CVD measures suffered from significant procedural and substantive deficiencies. Regrettably, China chose to continue the duties through a re-investigation process that also contained significant procedural and substantive deficiencies.

- The key findings by the compliance panel include the following:

  - China failed to provide U.S. respondents notice of the information that MOFCOM required from China's domestic industry, in breach of Article 6.1 of the AD Agreement and Article 12.1 of the SCM Agreement;

  - China failed to provide U.S. respondents timely opportunities to see the requests for information made by MOFCOM and to prepare presentations, in breach of Article 6.4 of the AD Agreement and Article 12.3 of the SCM Agreement;

  - China improperly resorted to fact available for a U.S. respondent that had submitted appropriate and verifiable data, in breach of paragraph 3 of Annex II and Article 6.8 of the AD Agreement;

  - China failed to properly allocate costs in calculating U.S. producers' cost of production, in breach of Article 2.2.1.1 of the AD Agreement;

  - China failed to make a proper injury determination because its pricing analysis did not control for differences between imported and domestic products, in breach of Articles 3.1 & 3.2 of the AD Agreement and Articles 15.1 and 15.2 of the SCM Agreement;

- China failed to make a proper injury determination because its analysis of impacts relied on a flawed evaluation of capacity utilization and an irrelevant economic factor, in breach of Articles 3.1 and 3.4 of the AD Agreement and Articles 15.1 and 15.4 of the SCM Agreement; and

- China failed to make a proper injury determination because its causal link analysis relied on its faulty pricing and impact analyses, in breach of Articles 3.1 and 3.5 of the AD Agreement and 15.1 and 15.5 of the SCM Agreement.

- In short, the panel's comprehensive findings support the view of the United States – that is, China should never have imposed the duties, let alone continued them for years following the original WTO findings.

- As we have noted in the past, this is one of a series of disputes involving what appears to be retaliatory use by China of AD and CVD measures in response to unrelated trade measures adopted by its trading partners.

- The United States is therefore pleased that the DSB is adopting this important report. We hope China will address the systemic deficiencies highlighted in the report and ensure that all of its AD and CVD investigations comport with its WTO obligations.

- Yesterday, China informed the United States that China has decided to terminate the AD/CVD duties on U.S. broiler products. That news is welcome. We are in the process of reviewing this information. The United States looks forward to the prompt restoration of market access for high-quality U.S. chicken products.

Second Intervention

- With respect to China's purported "alarm" regarding what it considers to be certain "unfair" findings by the compliance panel, we note the original panel exercised judicial economy on certain U.S. claims, taking the view that China would have to reexamine its analysis on account of other findings of inconsistency. In the redetermination, China did nothing to address the problems and instead continued to rely on a flawed and WTO-inconsistent analysis. The fault for that decision rests with China, not the compliance panel.

- With respect to China's comments concerning the U.S. position on Appellate Body matters, the United States will address that issue under agenda item 7.

7. 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; 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.2)

- The United States thanks the Chair for his continued work on these issues.

- We are not in a position to support the proposed decision.

- We have listened carefully to the interventions of other Members at the last meeting and appreciate the willingness expressed by some Members to engage on the important issues and concerns we have raised.

- However, the Dispute Settlement Body has yet to take any action to address the problem of persons continuing to hear appeals well after their terms of appointment, as set by the DSB, have expired.

- One former Appellate Body member continues to serve on an appeal, despite ceasing to be a member of the Appellate Body 8 months ago. Another former member continues to serve on 5 appeals, more than any actual Appellate Body member, despite ceasing to be a member of the Appellate Body in December of last year.

- Some WTO Members may be comfortable with this situation, but it is not legal under our multilaterally agreed rules. 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.[1] It would also be for the DSB to decide whether a person who is no longer an Appellate Body member can continue to serve on an appeal.

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

- The Appellate Body simply does not have the authority to "deem" someone who is *not* an Appellate Body member *to be* a member. Appointing Appellate Body members, or determining that a private individual can nonetheless serve on an appeal, is not a power we WTO Members have assigned to the Appellate Body.

- We have heard a few Members say that Rule 15 does not raise any legal concerns for them because the DSU does provide to the Appellate Body the authority to establish its working procedures, or because it represents long-standing practice. But those assertions are in error. Neither the Appellate Body's authority to draw up its working procedures nor "practice" can amend the DSU.

- As the Appellate Body itself noted many years ago: "Although panels enjoy some discretion in establishing their own working procedures, this discretion does not extend to modifying the substantive provisions of the DSU. To be sure, Article 12.1 of the DSU says: 'Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute'. Yet that is *all* that it says. Nothing in the DSU gives a panel the authority to disregard or to modify other explicit provisions of the DSU."[2]

- Just as a panel may not disregard or modify the DSU through adoption of its working procedures, so too *the Appellate Body* may not disregard or modify the DSU through *its* working procedures.

- Similarly, the fact that the Appellate Body has taken the same action repeatedly does not change the rules in the DSU.

- The DSU sets out our multilaterally agreed rules for WTO dispute settlement. If those rules are to be modified, this could only occur through agreement of all WTO Members.

- We also recall that the Appellate Body provided Members with a Background Note on Rule 15.[3] As the United States noted previously, that communication appears to raise more questions than it answers. In several respects, this document fails to provide a correct or complete presentation and therefore does not contribute to Members' consideration of this issue.

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[2] Appellate Body Report, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, para. 92.

[3] Background Note on Rule 15 of the Working Procedures for Appellate Body Review: Communication from the Appellate Body (JOB/AB/3) (Nov. 24, 2017) ("Background Note").

- First, the Appellate Body nowhere addresses the legal basis for including Rule 15 in working procedures that otherwise relate to the consideration of appeals by Appellate Body members – not persons who are *not* Appellate Body members. Nor does the document address how continued service by an ex-Appellate Body member relates to the DSB's appointment decision under Article 17 of the DSU. Instead, the Appellate Body appears to rely on policy considerations of efficient functioning.

- Second, the Appellate Body asserts that "[u]ntil recently, the application of Rule 15 has *never been called into question* by any participant or third participant in any appeal, *nor has it been criticized by any Member in the DSB* when an Appellate Body report signed by an AB Member completing an appeal pursuant to Rule 15 was adopted by the DSB."[4]

- Unfortunately, the Appellate Body appears to have very carefully crafted this language in a manner to avoid mentioning that in fact Rule 15 *was* "criticized by [a WTO] Member in the DSB" and was "called into question" at the time of its adoption. That WTO Member stated explicitly that Rule 15 raised a "systemic concern" and "was contrary to Article 17.1 of the DSU".[5] The omission of this statement from the AB Background Note is misleading at best. WTO Members deserve to be fully informed of the facts, including that Rule 15 has been a serious concern from the very beginning.

- Third, the Appellate Body states that Rule 15 "as initially conceived was intended to apply for relatively short periods of transition."[6] If this is the case, the Appellate Body has acted inconsistently with its own understanding of this provision in the past, not just the present. In some cases, an Appellate Body member was appointed to a division shortly before their term ended. In one case, the Appellate Body member was appointed to a division just three days before the term ended – meaning almost the entirety of the appeal was expected to occur after the individual had ceased to be a member.[7]

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[4] Background Note, para. 2 (italics added).

[5] DSB Meeting Minutes for February 21, 1996 at 12 (WT/DSB/M/11) (March 19, 1996): India raised "a systemic concern with regard to Rule 15 which implied that the Appellate Body could authorize a member to continue to be a member after it ceased to be a member. This was contrary to Article 17.1 of the DSU which, *inter alia*, provided that a standing Appellate Body shall be established by the DSB and that it shall be composed of seven persons. Rule 15 would lead to a situation where the Appellate Body could consist of more than seven members or an Appellate Body member continued after the expiry of his term without the approval of the DSB. While the practical need for the provision contained in Rule 15 was understandable, he would be seriously concerned if a member of the Appellate Body could continue without concurrence or approval by the DSB. This Rule provided for notification to the DSB instead of approval and therefore was in violation of Article 17.1 of the DSU."

[6] Background Note, para. 6.

[7] Communication from the AB Secretariat to the DSB Chair (May 29, 2008) (related to continued service by one person in *US – Continued Suspension* (WT/DS320) (AB-2008-5) and *Canada – Continued Suspension* (WT/DS321) (AB-2008-6)).

- Fourth, it is misleading for the Appellate Body Background Note to analogize to the rules of "some international tribunals" that remain unnamed.[8] The rules for those other tribunals are based on their constitutive texts. For example, the transition rule for the International Court of Justice is set out in its Statute, which is annexed to and an integral part of the United Nations Charter.[9] Unlike for those other tribunals, Rule 15 is *not* set out in the DSU and has *not* been agreed by WTO Members.

- Fifth, it is not clear from the communication whether the outgoing Appellate Body member participates in the Appellate Body's decision to "deem" them to be an Appellate Body member after their term expires. Rule 15 applies to a person "who ceases to be" a member. But some Appellate Body decisions authorizing a person to continue to work on an appeal have been taken *prior to* the expiry of that person's term of appointment. This raises the question whether the Appellate Body's decision under Rule 15 would be affected by that person's participation in that very decision.

- Sixth, the Appellate Body indicates that a new Appellate Body member is not permitted to participate in the exchange of views of an appeal involving a former Appellate Body member.[10] The Note does not explain what is the legal basis for denying a legitimate Appellate Body member appointed by the DSB the ability to participate in the exchange. Rule 4(3) of the Appellate Body Working Procedures states that "the division responsible for deciding each appeal shall exchange views with other [Appellate Body] Members before the division finalizes the appellate report for circulation to the WTO Members."[11] It appears that the Appellate Body may be treating a Rule 15 situation as an exception to Rule 4(3), without having amended the Appellate Body Working Procedures.

- These are but some of the questions raised by the communication addressed to WTO Members.

- As we have stated before, the Appellate Body simply does not have the authority to deem someone who is not an Appellate Body member to be a member. It is the DSB that has a responsibility under the DSU to decide whether a person whose term of appointment has

[8] Background Note, para. 3.
[9] Statute of the International Court of Justice, Art. 13(3) ("The members of the Court shall continue to discharge their duties until their places have been filled. Though replaced, they shall finish any cases which they may have begun."); UN Charter, Art. 92 ("The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter.").
[10] Background Note, para. 4.
[11] Working Procedures for Appellate Review, WT/AB/WP/6, Rule 4(3) (16 August 2010).

expired should continue serving.

- The United States is resolute in its view that Members need to resolve that issue first before moving on to the issue of replacing such a person. We therefore will continue our efforts and our discussions with Members and with the Chair to seek a solution on this important issue.

Second Intervention

- At this meeting, we have heard only two Members express the view that the Appellate Body has the authority to "deem" someone who is not an Appellate Body member to be a member of the Appellate Body for the purposes of a particular appeal. And of those two Members, only one put forward any argument for this position. We take this opportunity to comment on that argument.

- That Member asserts that the rotation required by the DSU provides the legal basis for Rule 15. This argument exhibits a fundamental misunderstanding of the DSU. Article 17.1 provides, in relevant part, that the Appellate Body "shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body." Rotation, as used in this provision, is concerned with ensuring variation among the individuals serving in different cases. We fail to see how this rotation has any relevance to the question raised by Rule 15 – continued service on an appeal by an individual that has ceased to be a member of the Appellate Body.

- Today we have also heard certain Members express a willingness to engage on the important issues and concerns we have raised. We look forward to that engagement.

OTHER BUSINESS: INDONESIA – IMPORTATION OF HORTICULTURAL PRODUCTS, ANIMALS AND ANIMAL PRODUCTS (DS477/DS478): STATEMENT BY INDONESIA

- We welcome Indonesia's clarification and confirmation today that it intends to comply with the DSB recommendations and rulings in this dispute.

- The United States recalls that the DSB has found that each of the 18 Indonesian measures at issue in this dispute are inconsistent with Indonesia's WTO obligations.

- Given the severely restrictive nature of Indonesia's measures on importation of horticultural products, animals, and animal products, and how long they have been in place, we expect that Indonesia will promptly remove all of these WTO-inconsistent barriers.