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

Geneva, November 22, 2017

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.178)

- The United States provided a status report in this dispute on November 9, 2017, 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.153)

- The United States provided a status report in this dispute on November 9, 2017, 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.116)

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

- The United States notes with concern that the EU measures affecting the approval of biotech products involve prolonged, unpredictable, and unexplained delays at every stage of the approvals process.

- 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)

- The United States provided a status report in this dispute on November 9, 2017, in accordance with Article 21.6 of the DSU.

- The United States continues to consult with interested parties on options to address the recommendations of the DSB.

- We will also be conferring with Korea in the near future on this and related issues.

Second Intervention

- The United States takes note of Korea's statement and will convey it to capital.

- As mentioned, the United States and Korea will be conferring on this matter in very near future. We would welcome discussing this matter with Korea on a bilateral basis.

- To be clear, however, it is incorrect to suggest that the United States has taken no action. As explained in the status report submitted to the DSB and circulated to Members ahead of this meeting, the United States continues to consult with interested parties on options to address the recommendations of the DSB. That process is ongoing.

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. UNITED ARAB EMIRATES – MEASURES RELATING TO TRADE IN GOODS AND SERVICES, AND TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS

A. REQUEST FOR THE ESTABLISHMENT OF A PANEL BY QATAR (WT/DS526/2)

- The United Arab Emirates, as it did at the October DSB meeting, has again indicated that its measures are justified on the basis of national security.

- As the United States noted at the previous DSB meeting, issues of national security are political in nature and are not matters appropriate for adjudication in the WTO dispute settlement system.

- Every Member of the WTO retains the authority to determine for itself those matters that it considers necessary to the protection of its essential security interests, as is reflected in the text of GATT 1994 Article XXI.[1]

- Therefore, if the UAE formally invokes Article XXI in defense of the challenged measures, the United States considers that the panel would lack the authority to review that invocation and to make findings on the claims raised in the dispute.

- The United States recalls that under DSU Article 7.1, a panel is to examine the matter referred to the DSB by the complaining party and "to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."

- If Article XXI is invoked, there are no findings by the panel that may assist the DSB in making the recommendations provided for in DSU Article 19.1.[2] This is because the DSB may make no finding of WTO-inconsistency or recommendation to a Member to bring its measure into conformity with WTO obligations.

- Therefore, if a panel is established and if the UAE invokes Article XXI, any findings should be limited to a recognition that Article XXI has been invoked.

- Under these circumstances, the United States considers the parties should resolve the issues raised in this dispute outside the context of WTO dispute settlement.

[1] GATT 1994 Article XXI(b) ("Nothing in this Agreement shall be construed … (b) to prevent any contracting party from taking any action *which it considers necessary* for the protection of *its essential security interests* … (italics added).

[2] DSU Article 19.1: "Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement."

- If the parties are unable to resolve the issue bilaterally, we encourage the parties to request assistance from the Director-General through his good offices or from another person or WTO Member in which the parties have confidence. Further, if a panel is established, it should consult with the parties "to develop a mutually satisfactory solution."[3]

[3] DSU Article 11: "Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution."

4. INDONESIA – MEASURES CONCERNING THE IMPORTATION OF CHICKEN MEAT AND CHICKEN PRODUCTS

A. REPORT OF THE PANEL (WT/DS484/R AND WT/DS484/R/ADD.1)

- The dispute is of particular interest to the United States because the United States, along with New Zealand, has raised similar claims with respect to Indonesia's import licensing regime. Indeed, our claims were upheld in the reports considered under the next agenda item of today's meeting.

- In general, the United States is pleased that the Panel has found that many of Indonesia's measures with respect to the importation of animals and animal products are inconsistent with Article XI:1 of the GATT 1994 and are not justified under Article XX of the GATT 1994.

- At today's meeting, however, the United States would like to highlight a systemic concern with the Panel's approach regarding measures adopted after the DSB established the Panel's terms of reference.

- As part of its defense, Indonesia relied on the contention that it had amended or replaced certain legal instruments after the time of panel establishment. In fact, Indonesia contends that it adopted two different sets of changes, and that one of those changes occurred after the first panel meeting.

- As the United States noted in its third-party submission to the Panel, such post-establishment activity should not have altered the scope of the measures considered by the Panel. Rather, pursuant to the Panel's terms of reference from the DSB under DSU Article 7.1, and its task to make an objective assessment of "the matter" referred to the DSB under DSU Article 11, the measures were only those that were set out in Brazil's panel request, as they existed at the time of the Panel's establishment.

- The Panel, however, appeared to consider all of the alleged amendments and replacements throughout the proceeding. The result was that instead of conducting a full and thorough examination of "the matter" within the Panel's terms of reference, including the specific measures at issue pursuant to DSU Article 6.2, the proceeding became an exercise in trying to analyze a moving target.

- By covering instruments adopted after panel establishment, the parties, the third parties, and the Panel were impeded from conducting a thorough review. Indeed, it appears that some of the instruments were changed after the time that third parties filed their written submissions. In these circumstances, third parties were denied an opportunity to present their views on at least some of the measures covered by the Panel's findings.

- There is no basis under the DSU for a panel to make findings on new measures that are not within its terms of reference as set by the DSB.

5. INDONESIA – IMPORTATION OF HORTICULTURAL PRODUCTS, ANIMALS AND ANIMAL PRODUCTS

A. REPORT OF THE APPELLATE BODY (WT/DS477/AB/R AND WT/DS477/AB/R/ADD.1) AND REPORT OF THE PANEL (WT/DS477/R, WT/DS477/R/ADD.1 AND WT/DS477/R/CORR.1)

B. REPORT OF THE APPELLATE BODY (WT/DS478/AB/R AND WT/DS478/AB/R/ADD.1) AND REPORT OF THE PANEL (WT/DS478/R, WT/DS478/R/ADD.1 AND WT/DS478/R/CORR.1)

- The United States thanks the Panel, the members of the Division, and the Secretariat staff assisting them for their work in this dispute. We also wish to thank our co-complainant, New Zealand, for the very close and fruitful collaboration throughout this dispute.

- The adoption today of the reports in this dispute will bring to a close this stage of proceedings that have been ongoing since early 2013. For over four years, the United States has been trying to resolve with Indonesia the issue of its highly trade-restrictive and blatantly WTO-inconsistent import licensing regimes. With the adoption of these reports, the United States will again seek to work together with Indonesia to resolve this matter and bring its import licensing regimes into compliance with its WTO obligations.

- This dispute concerns eighteen separate measures that Indonesia imposes – primarily through its import licensing regimes – on the importation of horticultural products and animals and animal products.

- These measures include: (1) a positive list, under which unlisted animal products are not permitted to be imported; (2) limited application windows and validity periods, and fixed license terms that restrict imports of covered products during a given period to the types and quantities pre-approved by the Indonesian government; (3) a domestic purchase requirement; (4) seasonal restrictions on imports during the Indonesian harvest; (5) restrictions on the use for which products can be imported; and, (6) a requirement that imports are allowed only if domestic production is deemed insufficient.

- The Panel found that each of the challenged measures is inconsistent with Article XI:1 of the GATT 1994 and is not justified under Article XX of the GATT 1994. Those findings of inconsistency have now been confirmed on appeal.

- On appeal, Indonesia claimed that Article 4.2 of the Agreement on Agriculture applies to agricultural products to the exclusion of Article XI:1 of the GATT 1994.

- In finding that each of the challenged measures is inconsistent with Article XI:1, the reports in this dispute soundly rejected Indonesia's argument. To the contrary, the reports confirm that Article 21.1 of the Agreement on Agriculture operates only to the

extent of a conflict between the provisions of the Agreement on Agriculture and the provisions of another covered agreement. The reports also reject Indonesia's argument that the principle of *lex specialis* is relevant in this context.

- Further, the reports confirm that, in considering claims under different provisions of the covered agreements, a panel may order its analysis as it sees fit unless the order would affect the substantive outcome under the provisions at issue.

- Overall, the United States is pleased with the outcome in this dispute, which we expect will contribute to achieving a solution to this matter.

- We are disappointed, however, that the Division's report addresses certain of Indonesia's claims even as it rejects those claims. We recognize that the report appears more succinct than some others, but even so, the report reaches issues that were not necessary to resolve the dispute because the claims had no capacity to alter the DSB recommendations.

- Under Article 3.3 of the DSU, the aim of the WTO dispute settlement system is "to secure a positive solution to the dispute." Article 3.3 establishes that "[t]he prompt settlement of situations [of impairment of benefits] is essential" and Article 3.7 provides that "[r]ecommendations or rulings of the DSB shall be aimed at achieving a satisfactory settlement of the matter".

- To contribute to these goals, Articles 7.1, 11, and 19 of the DSU establish the key function of panels and the Appellate Body. Their responsibility is to make such findings as will assist the DSB in making the recommendation to the responding Member to bring any WTO-inconsistent challenged measures into compliance with the relevant provisions of the covered agreements.

- On these bases, the Appellate Body has, in the past, refrained from interpreting provisions of the covered agreements where doing so was "unnecessary for the purposes of resolving [the] dispute."[4] This is the case where the responding Member's obligation regarding compliance would not change "irrespective of whether [the Appellate Body] were to uphold or reverse the panel's finding" on the issue.[5]

- In such situations, the Appellate Body has "addressed" the issues raised by a claim, within the meaning of Article 17.6 of the DSU, by explaining that the claim could have no effect on the DSB recommendations and rulings and, on that basis, declining to make substantive findings on it.

- As the United States explained in its submission and during the appellate hearing, and as several other Members agreed, once the Division found that Article XI:1 continued to

[4] *US – Upland Cotton (AB)*, paras. 510-511, 747; *see also India – Solar Cells (AB)*, paras. 5.156-5.163.
[5] *US – Upland Cotton (AB)*, para. 510.

apply to agricultural products and upheld the Panel's findings that each of the challenged measures was inconsistent with that provision, the Division could, and should, have refrained from substantively addressing the remainder of Indonesia's claims. None of Indonesia's other claims had any potential to alter the DSB recommendations and rulings.

- Nothing in the report suggests that the Division did not agree that this was the case. Indeed, with respect to Indonesia's claims under GATT 1994 Article XI:2(c) and Article XX, the report acknowledged that substantively addressing the claims could have no effect on the recommendations and rulings in the dispute.[6] And with respect to the burden of proof under Article 4.2, while the report suggests that the issue was "intertwined" with Indonesia's argument concerning the application of Article 21.1 of the Agreement on Agriculture,[7] the report had already entirely rejected Indonesia's argument that Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture could conflict before reaching the issue of the burden of proof.[8]

- Nevertheless, the report substantively addresses all three claims. Indeed, even with respect to Indonesia's Article XX claim, where the report expressly *agrees* with the U.S. argument that addressing the claim is not necessary,[9] the Division nonetheless discusses the legal standard under Article XX at some length and then, without analysis or further explanation, declares the Panel's findings moot and of no legal effect.[10]

- The United States is concerned with the approach in this report. Substantive review of claims not necessary to resolve the dispute between the parties not only uses the Appellate Body's scarce resources unnecessarily, but it is not consistent with the role of the dispute settlement system set out in the DSU.

- With respect to adoption of the reports, the United States raises again an important systemic concern regarding the service on appeals of an Appellate Body member whose term has expired.

- As the United States explained at the September meeting of the DSB in the context of the *EU – Fatty Alcohol* dispute, Mr. Ricardo Ramirez Hernandez's term expired on June 30. The DSB has taken no action to permit him to continue to serve as an Appellate Body member, and, therefore, he was not an Appellate Body member on the date of circulation of this report.

- The United States therefore considers that the implications for this report are the same as in the *Fatty Alcohol* dispute, specifically, that the report has not been issued consistent

[6] Appellate Report, paras. 5.63, 5.102-103.
[7] Appellate Report, para. 5.37.
[8] Appellate Report, paras. 5.13-5.18.
[9] Appellate Report, paras. 5.102-103.
[10] Appellate Report, paras. 5.91-101, 5.103.

with the requirements of Article 17 and so cannot be an "Appellate Body report" subject to the adoption procedures reflected in Article 17.14.

- The United States supports the adoption of the reports of the panel and the Division in this dispute, and we understand that the other parties to the dispute do also. Article 3.7 of the DSU makes it clear that "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute."

- Therefore, as the parties consider that adoption of these reports would help them achieve that aim, the United States invites other Members to join a consensus to adopt the reports proposed for adoption today, that is, the reports contained in WT/DS477/AB/R and WT/DS478/AB/R and the panel reports contained in WT/DS477/R and WT/DS478/R, as modified by the former reports.

7. APPELLATE BODY MATTERS

A. STATEMENT BY THE CHAIRMAN

B. APPELLATE BODY APPOINTMENTS: PROPOSAL BY ARGENTINA, BRAZIL, CHILE, COLOMBIA, COSTA RICA, ECUADOR, EL SALVADOR, EUROPEAN UNION, GUATEMALA, HONDURAS, HONG KONG, CHINA; MEXICO, NICARAGUA, NORWAY, PAKISTAN, PERU, RUSSIAN FEDERATION, SINGAPORE, SWITZERLAND, SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU; TURKEY, URUGUAY AND VIET NAM (WT/DSB/W/609)

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

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

- Mr. Ramirez continues to serve on an appeal, despite ceasing to be a member of the Appellate Body nearly 5 months ago.

- In the U.S. view, we cannot consider a decision launching a selection process when a person to be replaced continues to serve and decide appeals after the expiry of their term.

- As noted in past meetings, the DSB has a responsibility under the DSU to decide whether a person whose term of appointment has expired should continue serving. The United States considers that Members need to discuss and resolve that issue first before moving on to the issue of replacing such a person.

- As also noted previously, the United States would welcome Mr. Ramirez's continued service on the remaining appeal to which he was assigned prior to June 30. In fact, we do not understand any Member to object to his service on this appeal. In that circumstance, it should not be difficult for the DSB to take up its responsibility to adopt an appropriate decision.

- Mr. Chairman, the United States has continued to convene meetings to discuss this issue informally with a number of delegations. This outreach has been productive in that we believe we have heard a general recognition that the DSB has the authority to set the term of an AB member under DSU Article 17.2; it follows that the DSB has a responsibility to decide whether a person should continue serving beyond that term.

- We have also heard agreement from several delegations that Rule 15 raises difficult legal questions that the DSB should address.

- In the course of our engagement, we have not heard delegations reject the importance of

the issue we have brought to the DSB's attention. To the contrary, we have heard a willingness of delegations to work together on this issue to find a way forward.

- We therefore will continue our efforts and our discussions with Members and with the Chair to seek a solution on this important issue.