

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

Geneva, October 23, 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.177)
 - The United States provided a status report in this dispute on October 12, 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.152)
 - The United States provided a status report in this dispute on October 12, 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.115)

- The United States thanks the European Union (“EU”) for its status report and its statement today.
- The United States would like to again note that the EU persists in maintaining measures affecting the approval of biotech products that result in prolonged, unpredictable, and unexplained delays at every stage of the approvals process.
- 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.
- Further, the United States notes that the EU has failed to lift all of the member State bans covered by the DSB findings, and that EU member States have proceeded to adopt additional bans on the same products as those covered by the DSB findings. These bans are unsupported by science and should be removed.

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, some 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.
- As we have noted 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.

4. 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)

- We note that the United Arab Emirates has indicated that its measures are justified on the basis of national security.
- Issues of national security are political and are not matters appropriate for adjudication in the WTO dispute settlement system.
- The United States therefore considers the parties should resolve this issue outside the context of WTO dispute settlement.
- 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.

5. CANADA – MEASURES CONCERNING TRADE IN COMMERCIAL AIRCRAFT

A. DESIGNATION BY THE DSB OF THE REPRESENTATIVE REFERRED TO IN PARAGRAPH 4 OF ANNEX V OF THE SCM AGREEMENT

- We welcome the agreement of Brazil and Canada to the appointment of this qualified individual to serve as the facilitator in the Annex V process initiated by the decision of the DSB at its last meeting.
- This agreement allows the DSB today to take a decision to appoint a facilitator that has the parties' confidence and support.
- We are confident he will assist the parties and compile an appropriate record for the panel's work in this dispute.

Second Intervention

- We do not share Brazil's view that the appointment of a facilitator is automatic, or that the DSB Chair should serve as the facilitator in the absence of the parties' agreement.
- Annex V calls for the DSB to take two steps to commence information-gathering: under paragraph 2, "the DSB shall, upon request, initiate the procedure. . . ." and then, under paragraph 4, "{t}he DSB shall designate a representative to serve the function of facilitating the information-gathering process." There cannot be a procedure or a representative unless the DSB does something to "initiate" or "designate" that procedure or representative.
- The DSB does not play the passive role of merely witnessing or commenting on dispute settlement. The DSU envisages an active role for the DSB in administering those rules and procedures. That role means that a procedural step charged to the authority of the DSB can take place only if that body has actually taken ("executed") the relevant step. Interpreting an authority of the DSB as occurring without DSB action would be fundamentally inconsistent with the active role envisaged by the DSU.
- DSU Article 2.4 states unambiguously that "{w}here the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus." Article IX:1 of the Marrakesh Agreement provides that "[d]ecisions by the General Council when convened as the Dispute Settlement Body shall be taken only in accordance with the provisions of paragraph 4 of Article 2 of the Dispute Settlement Understanding."
- In contrast, where a dispute settlement provision does not require positive consensus for action by the DSB – such as when the DSB establishes a panel under Article 6.1 – this is

explicit in the text of the relevant provision. The absence of such language in Annex V confirms that the positive consensus rules apply to the initiation of the Annex V procedures.

- The Annex envisages a collaborative process related to, but separate from, the proceedings before the Panel. Thus, application of the positive consensus rule to initiation of the Annex V procedures and designation of a DSB representative reflects the collaborative approach embodied in Annex V itself.
- Brazil and Canada's agreement to initiate the Annex V process at the last meeting of the DSB, as well as their subsequent agreement on the facilitator, is consistent with this collaborative process.

Third Intervention

- We note that Brazil has referred to the Appellate Body's report in *US – Large Civil Aircraft (DS353)*.
- The DSB, like any other political body of the WTO – such as the General Council or Ministerial Conference – should resolve disagreements on procedural matters through their own, internal rules and processes. It is not for the dispute settlement system to tell the DSB or the Ministerial Conference or any other WTO body how to operate under its own rules of procedure and whether and how a decision is to be taken.
- Therefore, any statements relating to the DSB's procedures in the *US – Large Civil Aircraft* dispute were unwarranted, and a regrettable choice by the Appellate Body.
- To compound the concern, any such statement was not necessary to resolve that appeal and would therefore be in the nature of *obiter dicta*.
- The Appellate Body's discussion of whether the initiation of Annex V was by positive consensus was clearly unnecessary to resolve the dispute. The Appellate Body itself declined to find that all of the conditions for the initiation of the Annex V procedure had been fulfilled.¹ And the panel considering the same issue had found that, in fact, the DSB had initiated no procedure and that no procedure had been undertaken. On that basis, the panel had declined to make findings on the legal issue, a judicious approach the Appellate Body failed to emulate.

¹ *US – Large Civil Aircraft (DS353) (AB)*, para. 549.

8. APPELLATE BODY MATTERS

A. STATEMENT BY THE CHAIR

B. APPOINTMENT OF APPELLATE BODY MEMBERS: PROPOSAL BY THE EUROPEAN UNION (WT/DSB/W/597/REV.5)

C. PROPOSAL REGARDING THE APPELLATE BODY SELECTION PROCESS (WT/DSB/W/596/REV.5)

- The United States thanks the Chair for his continued work on these issues.
- With respect to the proposals at issue, as mentioned at the last meeting of the DSB, we are not in a position to support either of the proposed decisions.
- 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 appeals to which he was assigned prior to June 30. In fact, we do not understand any Member to object to his service on these appeals. In that circumstance, the DSB should take up its responsibility to adopt an appropriate decision.
- Mr. Chairman, the United States has been discussing this issue informally with multiple delegations recently. Those meetings have 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 also have heard a willingness of several delegations to work together 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 these important issues.

OTHER BUSINESS: US – WASHERS AD/CVD (KOREA) (DS464): STATEMENT BY KOREA

- We thank the delegation of Korea for providing advance notice of its intention to make a statement under Other Business. This notice is called for under Rule 6 of the General Council Rules of Procedure, which the DSB also applies.
- Under those Rules, in particular, Rule 25, “Discussions on substantive issues . . . shall be avoided, and the [DSB] shall limit itself to taking note of the announcement by the sponsoring delegation” and any reaction by another delegation “directly concerned”.
- The United States notes that the agenda for this meeting closed prior to the date six months after establishment of the reasonable period of time in this dispute.
- Further, the reasonable period of time, as determined by an arbitrator under Article 21.3(c) of the DSU, expires on December 26, 2017.
- The United States takes note of Korea’s statement and will convey it to capital.