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

Geneva, September 29, 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.176)

- The United States provided a status report in this dispute on September 18, 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.151)

- The United States provided a status report in this dispute on September 18, 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.

Second Intervention

- We consider that China's criticism is 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 would find it interesting if a Member criticizing the U.S. commitment to strong intellectual property rights has a domestic record of protecting intellectual property rights that appears 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.114)

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

- As the United States has noted at prior meetings of the Dispute Settlement Body, EU measures affecting the approval of biotech products continue to involve prolonged, unpredictable, and unexplained delays at every stage of the approvals process.

- At this meeting, the United States also would recall the DSB findings with respect to EU member State bans on biotech products approved at the EU level. The DSB found that the member State bans covered in the dispute lacked a scientific basis and were thus inconsistent with the EU's obligations under the SPS Agreement.[1]

- Despite those findings, the EU has failed to lift all of the member State bans covered by the DSB findings. Moreover, EU member States have proceeded to adopt additional bans on the same products as those covered by the DSB findings.

- Even the EU's own courts recognize that any member State bans must have a scientific basis. Most recently, on September 13, 2017, the Court of Justice of the European Union ruled in favor of Italian farmers in their challenge to a ban that Italy imposed on one of the biotech corn products covered in the dispute.[2]

- The EU Court of Justice found that an EU member State may not ban a biotech product without evidence of serious risk to health or the environment. And in this case, the EU's scientific authority had found that the biotech corn product did not pose such risks.

- 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] *European Communities – Measures Affecting The Approval And Marketing of Biotech Products* (WT/DS291/R), paras. 8.21 to 8.30.
[2] Judgment of 13 September 2017, *Fidenato and Others*, Case C-111/16, EU:C:2017:676.

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, 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.

3. UNITED STATES – MEASURES AFFECTING THE CROSS-BORDER SUPPLY OF GAMBLING AND BETTING SERVICES

A. STATEMENT BY ANTIGUA AND BARBUDA

- As a preliminary matter, on behalf of the United States, I would like to express deep sympathy regarding the devastation that Hurricane Irma caused in Antigua and Barbuda. I understand that our governments are working together on the provision of humanitarian and other assistance, and we hope that rebuilding will be swift and successful.

- As the United States has noted at past meetings where Antigua and Barbuda placed this item on the agenda, the United States remains committed to resolving this matter.

- The United States has had numerous discussions with Antigua's new government in the past, and we look forward to future engagement. We have been reviewing Antigua's most recent communications with the new U.S. administration, and trying to work toward identifying a productive way forward. In this regard, Antigua's statement today will be taken into account.

4. CANADA – MEASURES CONCERNING TRADE IN COMMERCIAL AIRCRAFT

A. REQUEST FOR THE ESTABLISHMENT OF A PANEL BY BRAZIL (WT/DS522/6)

- The United States is pleased to see that Brazil and Canada are in agreement on Brazil's request for the DSB to initiate the procedures provided for in Annex V of the SCM Agreement.

- The Annex envisages a collaborative process related to, but separate from, the proceedings before a panel. It creates no framework of procedures to move forward absent consensus of at least the parties to the dispute. 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 is consistent with this collaborative process.

- We note that Brazil's panel request indicated that it intended to address questions under the Annex V procedure to Canada and several third-country Members, including the United States.

- In this regard, the United States recalls that Annex V provides that "the parties to the dispute and any third-country Member concerned shall notify to the DSB, as soon as the provisions of paragraph 4 of Article 7 have been invoked, the organization responsible for the administration of this provision within its territory". We take this opportunity to confirm that any requests under the Annex V procedure should be directed to the U.S. Mission to the WTO.

7. EUROPEAN UNION – ANTI-DUMPING MEASURES ON IMPORTS OF CERTAIN FATTY ALCOHOLS FROM INDONESIA

A. REPORT OF THE APPELLATE BODY (WT/DS442/AB/R AND WT/DS442/AB/R/ADD.1) AND REPORT OF THE PANEL (WT/DS442/R AND WT/DS442/R/ADD.1)

- The United States would like to comment on certain substantive and procedural aspects of this dispute. We focus in particular on the report issued in the appeal in this matter.

- First, on substance. While the United States considers the Division to have arrived at the correct outcome in this particular case, the United States would like to draw the DSB's attention to an important systemic concern with the report's interpretation of the DSU.

- The EU had claimed that, due to the expiration of the contested measure during panel proceedings, the Panel erred in making a recommendation with respect to that measure.

- The United States recalls that Article 19.1 of the DSU sets out, in mandatory terms, the requirement that a panel or the Appellate Body "shall recommend" that any measure found to be WTO-inconsistent be brought into conformity with WTO rules. The DSU states that this "shall" be done – the requirement is not discretionary.

- The Division acknowledged this requirement, stating that it "*attach[ed] significance* to the fact that Article 19.1 is expressed in mandatory terms and linked directly to the findings made by a panel," and finding that the language "*suggests* that it is not within a panel's or the Appellate Body's *discretion* to make a recommendation in the event that a finding of inconsistency has been made."[3]

- But the Division then goes on to note its own statement in *US – Certain EC Products* that there was "an inconsistency between the finding of the panel that the relevant measure was no longer in existence and the subsequent recommendation of the panel that the DSB request the United States bring that measure into conformity with its WTO obligations."[4]

- The Division does not explain the basis in the DSU for that statement, however. And it failed to engage with the fact, explained at length by the United States, that the statement in *US – Certain EC Products* was *obiter dicta* as it was not made in response to any issue appealed in that dispute, and therefore was not necessary to resolve that appeal.[5]

[3] AB report, para. 5.199 (italics added).
[4] AB report, para. 5.200.
[5] *EU – Fatty Alcohols*, U.S. Third Participant Submission, para. 39, *available at* https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Ptcpt.Sub.fin.pdf.

- Three paragraphs later, the Division applies to the facts before it, not the mandatory requirement found in Article 19.1, but the rule it apparently has derived from certain of its own prior reports, including the *dicta* just described.

- Specifically, the report concludes that "[a]bsent any finding or acknowledgement by the Panel that the measure at issue is no longer in force, there was no basis for the Panel to have departed from the requirement in Article 19.1 of the DSU to make a recommendation after having found that measure to be inconsistent with the covered agreements."

- The United States has grave concerns with such a statement. In the face of clear, mandatory language in the DSU, the Appellate Body considers that its own prior reports can support an exception to the clear text of the DSU.

- The DSU provides no such authority to the Appellate Body or to its reports. The DSU and the other covered agreements set out the agreed rules and commitments of WTO Members, and those rules cannot be changed through dispute settlement reports. DSU Articles 3.2 and 19.2 make this clear: "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."

- As Indonesia and the United States also pointed out in the course of this appeal, it was unnecessary for the Division even to reach this legal issue. The alleged evidence of the expiry of the measure was not timely submitted to the Panel, and the Panel made no findings on this issue. Therefore, the Division could simply have noted the absence of any factual finding, and it could have avoided reaching a legal issue not necessary to resolve this dispute.

- Instead, the Division has made an erroneous statement, relying on previous erroneous statements and *obiter dicta*, and ignoring the clear text of DSU Article 19.1. This is not an approach that is consistent with the DSU or that contributes to Members' confidence in the WTO dispute settlement system.

- Turning now to a procedural issue. The United States raised with Members at the last meeting of the DSB important systemic questions regarding the Division hearing this appeal. As we will note under the next item, Members met informally on this issue but, frankly, engaged in very little substantive discussion of the systemic issues.

- The United States noted that Mr. Kim was no longer an Appellate Body member as of August 1, and the report in this dispute was not circulated until September 5 – more than one month later.

- Members have been informed that Mr. Kim "signed" the report on July 31, one day before resigning and becoming Korea's Trade Minister. But what is relevant under DSU Article 17.5 is when the report is circulated, not when it is signed. In these circumstances, we do not understand why Mr. Kim was not simply replaced on the Division, so as to permit a current Appellate Body member, fulfilling all the requirements of Article 17, to complete the appeal.

- As WTO Members also well know, the term of Mr. Ramirez, another member of the Division hearing this appeal, expired on June 30. The DSB has taken no action to permit him to continue to serve as an Appellate Body member. Therefore, Mr. Ramirez too would appear not to have been an Appellate Body member on the date of circulation of this report.

- In these circumstances, the report has not been provided and circulated on behalf of three Appellate Body members, as required under DSU Articles 17.1 and 17.5. And because the report has not been issued consistent with the requirements of Article 17, it cannot be an "Appellate Body report" subject to the adoption procedures reflected in Article 17.14. Rather, the DSB would consider the report's adoption subject to the positive consensus rule applicable to DSB decisions, pursuant to DSU Article 2.4 and WTO Agreement Article IX:1, note 3.

- Given the serious concerns the United States has described with respect to the Division's statements regarding Article 19.1 of the DSU, we do not endorse the findings set out in the Division's report. Nor can we support an Appellate Body member's continuation of service without authorization by the DSB.

- However, we understand the parties to the dispute to support adoption of the reports of the panel and the Division in this dispute.

- As DSU Article 3.7 makes clear, "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute." And it would appear that the parties consider that adoption of these reports would help them achieve that aim. We further note that the situations with Mr. Kim and Mr. Ramirez only arose late into the appellate proceedings.

- In these particular and exceptional circumstances, therefore, the United States would be willing to join a consensus to adopt the reports proposed for adoption today, that is, the report contained in WT/DS442/AB/R & ADD.1 and the report contained in WT/DS442/R & ADD.1, as modified by the first report.

Second Intervention

- For the reasons we have explained, we do not consider the report circulated on September 5, 2017, to be an "Appellate Body report" subject to the adoption procedures reflected in Article 17.14 of the DSU. We therefore understand that the action the DSB is taking today is the adoption of the report contained in WT/DS442/AB/R & ADD.1 and the report contained in WT/DS442/R & ADD.1, as modified by the first report.

8. APPELLATE BODY MATTERS

A. STATEMENT BY THE CHAIR

- We appreciate the Chair's organization of an informal meeting of the DSB to consider the concerns raised by the United States at the August meeting of the DSB.

- A good number of WTO Members participated in that informal meeting. We appreciate that willingness to engage.

- We also note, however, that many of the interventions by delegations were focused on process issues. Of course, that is a Member's prerogative. But as a result we do not have a clear vision of the views of many delegations on the specific concerns we have raised.

- What was clear in our informal DSB meeting is that we did not hear any fundamental disagreements that the two concerns we raised are important and worthy of the DSB's consideration.

- As is clear from the previous item, the issuance of a report on appeal that does not adhere to the requirements set out in the DSU raises yet more concerns.

- For the United States, the issues are clear. Under the DSU, the DSB has a responsibility to decide whether a person who has ceased to be a member of the Appellate Body should continue serving.

- If the DSB agrees that such a person should continue to serve on an appeal, it would be the DSB's responsibility to provide an appropriate legal basis to permit this to occur.

- And as stated at last month's DSB meeting, the United States would welcome Mr. Ramirez's continued service on two pending appeals with appropriate action by the DSB.

- We therefore reiterate our willingness to meet with any interested delegation to discuss the concerns raised and to develop appropriate solutions.

9. PROPOSAL REGARDING THE APPELLATE BODY SELECTION PROCESS (WT/DSB/W/596/REV.4)

10. APPOINTMENT OF APPELLATE BODY MEMBERS: PROPOSAL BY THE EUROPEAN UNION (WT/DSB/W/597/REV.4)

- As mentioned under item 8, we are not in a position to support the proposed decision.

- In the U.S. view, we cannot be considering launching a selection process to fill a vacancy if the person to be replaced continues to serve and decide appeals. We first would need appropriate action on the part of the DSB.

- This point would also apply to the upcoming item 10 on the agenda.