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

Geneva, July 22, 2019

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.197)

- The United States provided a status report in this dispute on July 11, 2019, 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.172)

- The United States provided a status report in this dispute on July 11, 2019, 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 noted at prior meetings of the DSB, by intervening under this item, China attempts to give the appearance of concern for intellectual property rights.

- Yet, China has been engaging in industrial policy which has resulted in the transfer and theft of intellectual property and technology to the detriment of the United States and our workers and businesses.

- In contrast, the intellectual property protection that the United States provides within its own territory equals or surpasses that of any other Member.

- Indeed, none of the damaging technology transfer practices of China that we have discussed at recent DSB meetings are practices that Chinese companies or innovators face in the United States.

Third Intervention

- The United States is disappointed that China has chosen this forum to – once again – propagate inaccuracies and misrepresentations about USTR's Section 301 investigation of China's forced technology transfer practices and the report's findings.

- Contrary to China's assertions, the United States made its findings on China's unreasonable acts, policies, and practices after receiving and considering extensive hearing testimony and other evidence over an investigation that lasted seven months.

- The United States issued a 200-page report in March 2018 documenting how China had engaged in unfair practices, including forced technology transfer, failing to protect U.S. intellectual property rights, and conducting and supporting cyber theft from U.S.

companies, robbing them of sensitive commercial information and trade secrets.[1] The United States followed-up with an update to the report in November 2018, finding that China had failed to address fundamentally these concerns. These unfair trade practices and other actions by China have cost the United States and its businesses hundreds of billions of dollars every year.

- Indeed, no one, other than China, seriously defends as fair the forced technology transfer policies followed by China.

- For example, at the conclusion of the meeting of trade ministers of the United States, Japan, and the EU in September 2018, the Ministers, consistent with prior statements, "recalled their shared view that no country should require or pressure technology transfer from foreign companies to domestic companies, including, for example, through the use of JV requirements, foreign equity limitations, administrative review and licensing processes, or other means. The Ministers found such practices to be deplorable."

- The Ministers also "affirmed their commitment to effective means to stop harmful forced technology transfer policies and practices."

- China has labeled U.S. actions as "aggressive unilateralism." In our view, this is a deliberate misrepresentation of our actions and intentions. It is China that has chosen to engage in forced technology transfer, not the United States. The facts demonstrating China's acts, policies, and practices were clear.

- Therefore, the United States faced a stark choice: either take action to protect its citizens, innovators, and businesses against the serious, ongoing harm from China's policies and practices – or simply accept that this harm will continue because the WTO does not provide the necessary disciplines or remedies.

- The view of the U.S. Administration is clear: we will not passively accept unfair and harmful practices that cause real-world harm to U.S. workers and businesses just because the WTO does not provide an effective remedy for those practices.

[1] Findings of the Investigation into China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation under Section 301 of the Trade Act of 1974, Office of the United States Trade Representative, *available at* https://ustr.gov/sites/default/files/Section%20301%20FINAL.PDF.

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.135)

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

- The United States remains concerned with the EU's approval of biotech products. While we welcome the improvements in some areas, we continue to see ongoing and persistent delays that affect dozens of applications that have been awaiting approval for months or years, or that have already received approval. The United States has further concerns that these extensive delays will become even worse as the EU prepares for political changes at the Commission this year.

- Even when the EU finally approves a biotech product, EU member States continue to impose bans on the supposedly approved product. The amendment of EU Directive 2001/18, through EU Directive 2015/413, permits EU member States to, in effect, restrict or prohibit cultivation of genetically-modified organisms ("GMOs"), even where the European Food Safety Authority ("EFSA") has concluded that the product is safe.

- This legislation permits EU member States to restrict for non-scientific reasons certain uses of EU-authorized biotech products in their territories by demanding that EU cultivation authorizations be adjusted to exclude portions of an EU member State's territory from cultivation. At least seventeen EU member States, as well as certain regions within EU member States, have submitted such requests with respect to MON-810 maize.

- This fact cannot be squared with the EU's representation at previous DSB meetings that no member State has taken action to ban the cultivation of such a product.

- We again emphasize the public statement issued by the EU's Group of Chief Scientific Advisors on November 13, 2018, in response to the July 25, 2018, European Court of Justice (ECJ) ruling that addresses the forms of mutagenesis that qualify for the exemption contained in EU Directive 2001/18/EC. The Directive was a central issue in dispute in these WTO proceedings, and concerns the deliberate release into the environment of genetically modified organisms, or GMOs. Contrary to the EU's statement at prior DSB meetings, this ECJ ruling relates to previously authorized GMOs.

- The EU Group of Chief Scientific Advisors' statement speaks to the lack of scientific support for the regulatory framework under EU Directive 2001/18. The EU has repeatedly maintained at previous DSB meetings that these scientific advisors are just another group of stakeholders. The statement does not reflect a mere reaction from a

group of stakeholders. Rather, the statement reflects scientific advice provided to the EC Commission in response to its request for such information.

- The Chief Scientific Advisors' message provided in the statement is clear: "in view of the Court's ruling, it becomes evident that new scientific knowledge and recent technical developments have made the GMO Directive no longer fit for purpose." The statement further advises that current scientific knowledge calls into question the definition of "GMOs" under the Directive and notes that mutagenesis, as well as transgenesis, occurs naturally. The EU should take this guidance into account in its reconsideration of the GMO Directive, in light of the evident advancements in scientific knowledge and technology.

- The United States urges the EU to act in a manner that will bring into compliance the measures at issue in this dispute. The United States further 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 based on scientific principles, 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.19)

- The United States provided a status report in this dispute on July 11, 2019, in accordance with Article 21.6 of the DSU.

- On May 6, 2019, the U.S. Department of Commerce published a notice in the U.S. Federal Register announcing the revocation of the antidumping and countervailing duty orders on imports of large residential washers from Korea (84 Fed. Reg. 19,763 (May 6, 2019)). With this action, the United States has completed implementation of the DSB recommendations concerning those antidumping and countervailing duty orders.

- The United States continues to consult with interested parties on options to address the recommendations of the DSB relating to other measures challenged in this dispute.

Second Intervention

- The United States recalls that Canada has commenced a dispute settlement proceeding against the United States concerning the use of a differential pricing analysis and zeroing.

- Canada lost that dispute before the panel.

- The United States is willing, of course, to discuss Canada's concerns bilaterally.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

E. UNITED STATES – CERTAIN METHODOLOGIES AND THEIR APPLICATION TO ANTI DUMPING PROCEEDINGS INVOLVING CHINA: STATUS REPORT BY THE UNITED STATES (WT/DS471/17/ADD.11)

- The United States provided a status report in this dispute on July 11, 2019, in accordance with Article 21.6 of the DSU.

- As explained in that report, the United States continues to consult with interested parties on options to address the recommendations of the DSB.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

G. UNITED STATES – ANTI-DUMPING MEASURES ON CERTAIN OIL COUNTRY TUBULAR GOODS FROM KOREA: STATUS REPORT BY THE UNITED STATES (WT/DS488/12/ADD.10)

- The United States provided a status report in this dispute on July 11, 2019, in accordance with Article 21.6 of the DSU. The report notes that the U.S. Department of Commerce published a final decision memorandum on July 5, 2019, in which it implemented the DSB recommendations in a manner that respects U.S. WTO obligations.

- The determination by the U.S. Department of Commerce fully responds to the findings of the WTO panel in relation to determining profit for purposes of constructed value.

- The United States has therefore come into compliance within the reasonable period of time agreed to by Korea and the United States, which expired on July 12, 2019.

Second Intervention

- We respectfully take exception to the point that the United States has not complied fully with the DSB recommendations.

- The U.S. Department of Commerce's determination addresses the DSB's recommendation first by clarifying the scope of the antidumping duty order on certain oil country tubular goods from Korea.

- The U.S. Department of Commerce further determined that it was unable to use respondents' actual data to determine profit for constructed value, resorted to a reasonable method to determine the appropriate data to calculate this profit, and calculated and applied a profit cap based on "facts available."

- If it does become necessary, the United States is fully prepared to defend this determination. The United States remains open to further discussions to address any concerns that Korea may have.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

H. INDONESIA – IMPORTATION OF HORTICULTURAL PRODUCTS, ANIMALS AND ANIMAL PRODUCTS: STATUS REPORT BY INDONESIA (WT/DS477/21 – WT/DS478/22/ADD.6)

- Indonesia continues to fail to bring its measures into compliance with WTO rules.
- The United States and New Zealand agree that significant concerns remain with the measures at issue, including the continued imposition of: harvest period restrictions, import realization requirements, warehouse capacity requirements, limited application windows, limited validity periods, and fixed licensed terms.
- The United States remains willing to work with Indonesia to fully and meaningfully resolve this dispute.
- We are still waiting to hear from Indonesia the concrete actions it will take to bring its measures into full compliance. Indonesia's statement that "further adjustment" to Measures 1-17 is "under intensive discussion" does not provide clarity in this regard, nor does Indonesia's claim that it will make "statutory changes" with regard to Measure 18.
- The United States looks forward to receiving further detail from Indonesia regarding the planned changes to its regulations and laws.

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

- 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 11 years ago.

- In May 2019, the EU notified the DSB that disbursements under CDSOA from EU exports to the United States totaled $4,660.86 in fiscal year 2018. As such, the current level of countermeasures under the Arbitrator's formula in relation to goods entered before 2007 is $3,355.82.

- The EU announced it would apply an additional duty of 0.001 percent on certain imports of the United States. These values are no doubt outweighed by the associated costs resulting from the application of these countermeasures.

- 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, regardless of whether the complaining party disagrees about compliance.

- The practice of Members – including the European Union as a responding party – confirms this widespread understanding of Article 21.6. Accordingly, since the United States has informed the DSB that it has taken all steps necessary for compliance, there is nothing more for the United States to provide in a status report.

3. EUROPEAN COMMUNITIES AND CERTAIN MEMBER STATES – MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT: IMPLEMENTATION OF THE RECOMMENDATIONS ADOPTED BY THE DSB

A. STATEMENT BY THE UNITED STATES

- The United States notes that once again the European Union has not provided Members with a status report concerning the dispute *EC – Large Civil Aircraft* (DS316).

- As we have noted at several recent DSB meetings, the EU has argued – under a different agenda item – that where the EU as a complaining party does not agree with another responding party Member's "assertion that it has implemented the DSB ruling," "the issue remains unresolved for the purposes of Article 21.6 DSU."

- Under this agenda item, however, the EU argues that by submitting a compliance communication, the EU no longer needs to file a status report, even though the United States as the complaining party disagrees that the EU has complied.

- At recent DSB meetings, the European Union has attempted to reconcile this view with the EU's longstanding, contrary position. The EU argues that the situation in CDSOA differs from *EC – Large Civil Aircraft* because, in CDSOA, the dispute has been adjudicated and there are no further proceedings pending. With this statement, the EU suggests that the issue of compliance in CDSOA has been adjudicated; in fact, it has not. The United States repealed the CDSOA measure after all of the proceedings in the dispute.

- By way of contrast, in DS316, the EU's claim of compliance has already been rejected by the DSB through its adoption of compliance panel and appellate reports.

- Under the EU's own view, the EU should be providing a status report. Yet it has failed to do so, demonstrating the inconsistency in the EU's position depending on its status as complaining or responding party.

- The U.S. position has been consistent and clear: Under Article 21.6 of the DSU, once a responding Member provides the DSB with a status report that announces compliance, there is no further "progress" on which it can report, and therefore no further obligation to provide a report.

- But as the EU allegedly disagrees with this position, it should for future meetings provide status reports in this DS316 dispute.

4. STATEMENT BY THE UNITED STATES ON TRANSPARENCY IN WTO DISPUTE SETTLEMENT

- The United States requested this agenda item to discuss an important systemic issue that is critical for the legitimacy of the WTO: transparency – or, perhaps more accurately, the lack of transparency – in WTO dispute settlement.

- For more than twenty years, the United States has called for Members to support the WTO by bringing openness and accountability to its operations, including dispute settlement.[2] At the 1998 Ministerial Conference, the United States proposed that all dispute settlement hearings at the WTO be opened to the public, and all submissions by the parties be made publicly available.

- In its statement at the 1998 Ministerial Conference, the United States urged that Members could act to improve transparency even without changes to the rules. To that end, the United States formally offered to open every panel proceeding that it is a party to, and we invited every other Member to agree to make this happen. The United States also made a proposal to mandate greater transparency through public meetings and access to submissions, but that proposal is without prejudice to the ability of Members to agree to greater transparency in each dispute.

- The story over 20 years later is disappointing, at best. Several WTO Members – including Australia, Canada, Chinese Taipei, the European Union, Japan, New Zealand, Norway, and others – have joined the United States in supporting greater transparency in WTO dispute settlement, for example, by agreeing to open hearings and public submissions. But most WTO Members continue to insist on closed hearings and confidential submissions. What is worse, some even seek to prevent the United States and other Members from making statements publicly available through direct viewing when they are made.

- By pushing to keep WTO dispute settlement closed and secret, these Members deny other Members, the public, and the WTO itself of significant benefits. Open and transparent WTO dispute settlement enhances WTO Members' understanding of the dispute settlement system, particularly for those who do not participate often in the system. Transparent dispute settlement promotes confidence in the professionalism and objectivity of WTO adjudicators, to the benefit of both parties and the dispute settlement system as a whole.

[2] *See, e.g.*, Statement by the President of the United States, WTO Ministerial 1998, *available at* https://www.wto.org/english/thewto_e/minist_e/min98_e/anniv_e/clinton_e.htm.

- Experience under the WTO dispute settlement system since 1995 has demonstrated that the findings contained in reports adopted by the Dispute Settlement Body can affect large sectors of society. At the same time, increased membership in the WTO has also meant that more governments and their citizens have an interest in DSB recommendations. Yet the citizens of the parties, and those Members not party to a dispute, have been unable to even observe the arguments or proceedings that result in these recommendations.

- The public has a legitimate interest in WTO dispute settlement proceedings. Indeed, acceptance of the results of WTO dispute settlement may be facilitated if those being asked to assist in the task of implementation, such as the constituencies of legislators, have confidence that the DSB recommendations are the result of a fair and adequate process.

- Despite the myriad benefits that greater transparency would bring to the WTO, a number of Members – including several major users of the dispute settlement system such as China, India, Indonesia, Korea, Mexico, Russia, Turkey, Vietnam, and others – have not only failed to agree to be more transparent in WTO dispute settlement. These Members have also actively obstructed efforts by others to provide greater transparency. Regrettably, some panels have acquiesced to the efforts of those Members by failing to permit another party to at least make its own statements open to public observation.

- And so what we observed in the early days of the WTO continues to remain the general rule, and not the exception: "Today, when one nation challenges the trade practices of another, the proceeding takes place behind closed doors."[3]

- This is unacceptable. The lack of transparency in WTO dispute settlement at the inception of the WTO was regrettable, but could perhaps be viewed as a remnant of the GATT system we inherited that could be expected to change as the WTO dispute settlement system matured. Today, over 20 years later and after the initiation of nearly 600 disputes, the continued lack of transparency is simply untenable and threatens to further erode public support for and, ultimately the viability of, this system that Members profess to support.

- In our statement today, we will first examine the rules we have and dispel common myths that certain Members seek to perpetuate about the dispute settlement system. There is no obligation in the DSU for WTO dispute settlement to be transparent. However, as we will explain, while the DSU does not mandate and ensure transparency, it does not prohibit decisions by Members to provide transparency, either.

[3] Statement by the President of the United States, WTO Ministerial 1998, *available at* https://www.wto.org/english/thewto_e/minist_e/min98_e/anniv_e/clinton_e.htm.

- Second, the United States will highlight that while some Members have promoted transparent dispute settlement over the years, for too long, too many Members that claim to support the multilateral trading system actively undermine it by promoting a lack of transparency in WTO dispute settlement. The positions of those Members opposed to greater transparency in WTO dispute settlement are misguided and only serve to erode support for the WTO and its dispute settlement system.

- Third, we will explain why opposition to greater transparency is contrary to the choices Members have made in other fora, including other international adjudicatory systems and regional free trade agreements. This highlights that WTO Members do not object to transparent dispute settlement in principle. Rather, Members recognize the value of transparency. Thus, there should be no impediment for all Members to take action now to remedy the lack of transparency in WTO dispute settlement.

- Fourth, before concluding, the United States will discuss briefly additional benefits associated with a transparent dispute settlement system.

I. The Lack of Transparency in WTO Dispute Settlement is Not Required by the DSU

- The text of the DSU does not mandate a lack of transparency in WTO dispute settlement.

- The relevant provisions of the DSU make clear that WTO adjudicators – panels, the Appellate Body, and arbitrators under Articles 21.3(c), 22.6, and 25 of the DSU – are not precluded from opening their meetings and hearings to all Members and the public.

- The DSU also makes clear that nothing in the DSU precludes a party from making its submissions publicly available.

- To the contrary, and as we will discuss, the scope of confidentiality provided for in the DSU is explicit and limited, and does not extend to the "arguments" or "positions" of a party.

A. The DSU Does Not Preclude Open Meetings

- Panels, the Appellate Body, and Arbitrators have opened their meetings to observation by WTO Members and the public upon request, and this is entirely consistent with the DSU. There is no DSU impediment to open meetings.

- DSU Article 14.1 and Appendix 3 do not mandate closed panel meetings or preclude open panel meetings.

- Article 14.1 of the DSU (entitled "Confidentiality") provides that a panel's "deliberations" shall be confidential.[4] A panel's "deliberations" refers to the internal discussions and debates among panel members concerning the dispute.[5]

- But panel deliberations is not synonymous with panel meetings. These are different terms used in the DSU with distinct meanings. In fact, whereas DSU Article 14.1 refers to a panel's "deliberations", other provisions of the DSU make reference to a panel meeting.[6] Panel working procedures often explicitly distinguish between the deliberations of the panel (which are confidential) and the meetings of the panel with the parties, which may be opened or closed, depending on the parties to the dispute.

- Thus, maintaining a panel's deliberations as confidential in no way suggests that a panel's meetings with the parties to a dispute must also be maintained as confidential.

- In our experience proposing open panel meetings, we have heard from certain Members opposed to greater transparency that Appendix 3 of the DSU precludes open panel meetings. Those Members often point to paragraph 2 of Appendix 3, which indicates that a panel shall meet in closed session. Reliance on this paragraph alone is an incomplete reading of the DSU. Article 12.1 of the DSU states that a panel may depart from the working procedures in Appendix 3 after consulting the parties to a dispute. In other words, it is clear from the DSU that a panel may decide *not* to meet in closed session after consulting with the parties.

- These provisions of the DSU must also be read and applied in conjunction with Article 18.2 of the DSU.[7] The second sentence of Article 18.2 is the critical provision on transparency in the DSU. It provides as follows: "Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public."

[4]DSU Article 14.1 ("Panel deliberations shall be confidential.").

[5] *See, e.g.*, Cambridge English Dictionary Online, "deliberation", available at https://dictionary.cambridge.org/us/, ("considering or discussing something.").

[6] *See, e.g.*, DSU Article 15.2 ("At the request of a party, the panel shall hold a further meeting with the parties on the issues identified in the written comments.").

[7] DSU Art. 18.2 ("Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential. A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public.").

- What Article 18.2 provides is that no other provision of the DSU could interfere with a party's right to disclose its own positions to the public, including statements made in the course of a panel meeting. Thus, Article 18.2 makes clear that a party to a dispute may make public its statements and answers during a panel meeting. And if those statements can be made public, there is no reason why a party cannot seek to have such statements and answers made public at the time they are spoken.

- Appellate oral hearings have also been opened to observation by WTO Members and the public, and this is fully consistent with the DSU.

- Article 17.10 of the DSU does not preclude open hearings by the Appellate Body. Article 17.10, first sentence, states as follows: "The proceedings of the Appellate Body shall be confidential."[8] This provision does *not* state that an oral hearing must be closed to the public and non-participating WTO Members. And the text of the DSU confirms that the statements of WTO Members at an appellate oral hearing need not be kept confidential against that party's wishes.

- First, the DSU does not even mention an oral hearing of the Appellate Body. The omission of any mention of an Appellate Body oral hearing in Article 17 means that Article 17.10 cannot be directed at the question of whether such a hearing should be open or closed.

- Second, Article 17.10 must also be read and applied in conjunction with Article 18.2 of the DSU. As noted, Article 18.2 states that nothing in the DSU shall prevent a Member from making public statements of its own position. This text makes clear that a Member that is party to an appeal may agree to make public its statements and answers to questions during an appellate hearing. And if those statements can be made public, again, there is no reason why that party cannot have such statements and answers made public at the time they are spoken.

- Third, the practice of the Appellate Body to permit third-party observation of appellate oral hearings confirms an understanding that Article 17.10 does not mandate closed hearings. There is nothing in the DSU that authorizes a third party to observe any Appellate Body hearing, as opposed to the panel stage, at which a third party is given the opportunity to participate in a separate third party session under DSU Article 10.2. If Article 17.10 required that the appellate hearing be confidential, then third parties would have no right to attend and would not be permitted to observe the confidential oral hearing.

[8] DSU Art. 17.1 ("The proceedings of the Appellate Body shall be confidential. The reports of the Appellate Body shall be drafted without the presence of the parties to the dispute and in the light of the information provided and the statements made.").

- Fourth, an interpretation of Article 17.10 as requiring the confidentiality of appellate hearings is not consistent with Article 17, which requires that the Appellate Body decide an appeal through issuance of an appellate report. Like panel reports, Appellate Body reports routinely describe the arguments of the parties and third parties at the hearing. If Article 17.10 was construed as requiring the hearing be confidential, then such description or quotations would be a breach of confidentiality.

- An Appellate Body report also discloses the arguments of the parties and third parties in their written submissions, and notices of appeal are circulated as public WT/DS documents in every appeal. They are not kept confidential despite forming part of the "proceedings". Of course, no meaningful report could be issued without engaging with the notice of appeal or the parties' arguments.

- In addition to panel and appellate proceedings, the DSU provides for arbitral proceedings in Articles 21.3(c), 22.6, and 25. There is no provision of the DSU applicable to arbitrators that corresponds to Article 14 or Article 17.10, nor is there any other provision of the DSU that suggests meetings with arbitrators could not be opened to the public.

- Thus, there is no DSU impediment to Members taking action today to improve the transparency in WTO dispute settlement by agreeing to permit observation of the meetings and hearings in their disputes by all Members and the public.

B. The DSU Does Not Preclude Members from Making Their Submissions Public

- The DSU does not preclude Members from making their submissions and oral statements public. The confidentiality a Member may invoke under Article 18.2 is limited, and it is important to distinguish between what it provides and what it does not.

- There are only two references in Article 18.2 to maintaining something as confidential.

- The first sentence of Article 18.2 provides that "[w]ritten submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute." However, the second sentence of Article 18.2, as discussed, provides that "[n]othing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public." Read together, this means that a Member can make public its own written submissions, oral statements, and responses to questions (i.e., statements of its own position), but it *cannot* make public the "written submission[]" of another Member.

- The only other reference to maintaining something as confidential in Article 18.2 is in the third sentence, which provides that "Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential."

- Information means "facts about a situation, person, event, etc."[9], and in the context of Article 18, is contained in and a subset of a submission. This is demonstrated, for example, in the last sentence of Article 18.2, which refers to "information contained in" a written submission.

- "Information" does not refer to "arguments" or "positions" of a Member. Not only does this follow from the ordinary meaning of "information", but it follows from the context of Articles 14.2 and 17.10, which require panel and appellate reports to be drafted "in the light of the information provided and the statements made" (that is, the written and oral submissions that are the statements of a Member's position).

- And Article 18.2 does not refer to all "information", but rather only that information which another Member has designated as confidential. Even where a Member has designated specific "information" as confidential, that Member is obligated by Article 18.2 to provide, upon request, a non-confidential summary of that "information" that could be made public.

- In sum, each Member has the right to make public its own submissions and statements. Thus, there is no DSU impediment to Members taking action today to improve the transparency in WTO dispute settlement by agreeing to make their submissions available to all Members and the public.

C. The DSU Does Not Provide for Confidentiality of "Arguments" or "Positions" of a Party

- Some Members, in opposing open meetings or public submissions, have argued that the DSU provides for the confidentiality of "arguments" or "positions" of a party. It does not, and there are several reasons why such an argument fails.

- No provision of the DSU provides for the confidentiality of "arguments" or "positions". We have already discussed the limited references to confidentiality and what they provide.

- Moreover, a requirement to maintain arguments or positions as confidential would conflict with several provisions of the DSU.

- First, such a requirement would render inutile the right of a Member under DSU Article 18.2 to disclose to the public its own statements given that in a dispute settlement proceeding a Member's statements are by their nature going to engage with, and thus reveal, the arguments and positions of another Member. A Member's statement of its own positions will necessarily relate to the arguments of the other Members.

[9] Cambridge English Dictionary Online, "information", *available at* https://dictionary.cambridge.org/us/.

- No respondent could ever disclose its own statements consistent with a requirement not to reveal the other party's arguments or positions. For example, a responding party in a dispute seeks to explain that the complaining party has not demonstrated that a challenged measure is inconsistent with the WTO obligations identified by the complaining party. Even if the responding party merely stated its position that a particular measure was *consistent* with a particular provision of a covered agreement, that statement would reveal *the measure* challenged by the complainant and, by implication, the *position* of the complainant with respect to that measure and legal claim.

- Second, if a party or third party could maintain its positions and arguments as confidential, it would not be possible for panels to issue reports satisfying the requirements of the DSU. This explains why no panel has ever treated the arguments or positions of a party as confidential.

- For example, a panel, in its report, is required to "set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes."[10] A panel report is also required to include "descriptive (factual and argument) sections."[11]

- Consequently, a panel report will set out each party's and third party's arguments and positions, including any defenses invoked. Nothing in the DSU provides that the material required to be included (and thus disclosed) in a panel report is nonetheless to be treated as confidential.

- There is nothing inherently confidential about a party or third party's arguments and positions in a dispute, and these are routinely made public throughout the dispute settlement process.

- In fact, panels and the Appellate Body routinely call on parties and third parties to provide executive summaries of their arguments to be attached to their reports. Those executive summaries reflect the statements of the parties and third parties. It is difficult to reconcile attaching those statements to panel and appellate reports in the form of an executive summary, which will be made public, while finding that a Member is not permitted to disclose them.[12]

[10] DSU Article 12.7.

[11] DSU Articles 15.1 and 15.2.

[12] In this regard, it is useful to note that the Appellate Body has itself recognized that "Appellate Body reports contain summaries of the participants' and third participants' written and oral submissions and frequently quote directly from them. Public disclosure of Appellate Body reports is an inherent and necessary feature of our rules-based system of adjudication." *US – Continued Suspension (AB),* Annex IV, para. 5.

- The findings by several panels and the Appellate Body permitting a Member to make its statements publicly while permitting other Members in that dispute to maintain confidentiality of their statements is instructive. For example, in the appeal in *US – Continued Suspension*, some Members objected to opening the hearing for their statements, but that did not prevent the Appellate Body from opening the hearing to those Members who wished to deliver their statements publicly.

- The Appellate Body decided that third participants could choose to deliver their statements in an open hearing while "[o]ral statements and responses to questions by third participants wishing to maintain the confidentiality of their submissions will not be subject to public observation." No party or third party was required to make any redaction from its oral statements even if the statement might disclose the arguments or positions of a third party that wished to maintain confidentiality for its submissions.

- Thus, one Member does not have a right to prevent another Member from disclosing their statements to the public even if they might disclose the "arguments" or "positions" of a party.

II. Despite the Efforts the United States and Other Supporters of Transparency, WTO Dispute Settlement Remains Overwhelming Non-Transparent

- Although the United States and other Members have undertaken serious efforts to provide for greater transparency in WTO dispute settlement, the successes have been limited. Due to the unwillingness of certain Members, including several major users of the system, to agree to open panel meetings and public submissions, WTO dispute settlement remains largely a secret process unfolding behind closed doors. And further damaging the system, these same Members consistently object to a request by a Member, such as the United States, that wishes to make its own statements publicly available.

A. The United States and Other Members Have Agreed to Open Meetings in a Number of Disputes

- At least 22 panels,[13] 16 appeals,[14] and six arbitrators[15] in proceedings under Article 22.6 of the DSU have opened their meetings – but this is a minority of proceedings in the nearly 600 disputes initiated to date. Those experiences have been beneficial for Members and for the public, and thus ultimately for the WTO.

- The United States has been a leading Member in requesting transparent proceedings for disputes in which it is a party. The United States has been joined in these efforts by other Members that similarly value transparency and recognize its importance for the continued viability of WTO dispute settlement, including Australia, Canada, Chinese Taipei, the European Union, Japan, New Zealand, and Norway, among others.

- With regard to open meetings, the United States and European Union have agreed to open meetings in at least 15 dispute settlement proceedings.[16] It is notable that this list includes open meetings by panels, the Appellate Body, and Article 22.6 Arbitrators in the large civil aircraft disputes, despite the commercial sensitivity of those disputes and the business confidential information and highly sensitive business confidential information involved.

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[13] *See, e.g., US/Canada – Continued Suspension, EC and certain member States – Large Civil Aircraft, US – Large Civil Aircraft (2nd complaint), EC – Bananas III (Article 21.5 – US), US – Continued Zeroing, US – Zeroing (EC) (Article 21.5 – EC), Australia – Apples, US – Zeroing (Japan) (Article 21.5 – Japan), EC – IT Products, US – COOL, EC and certain member States – Large Civil Aircraft (Article 21.5 – US), US – Measures Affecting Trade in Large Civil Aircraft (Article 21.5 – EU), EC – Seal Products (Canada, Norway), US – Supercalendered Paper (Canada), United States – Conditional Tax Incentives for Large Civil Aircraft, Canada – Wine (Australia), US – Steel and Aluminum Products (EU), US – Steel and Aluminum Products (Canada), US – Steel and Aluminum Products (Norway),* and *US – Steel and Aluminum Products (Switzerland).*

[14] *See, e.g., US/Canada – Continued Suspension, EC – Bananas III (Article 21.5 – Ecuador II) /EC – Bananas III (Article 21.5 – US), EC – Seal Products (Canada, Norway), Australia – Apples (NZ), US – Zeroing (Japan) (Article 21.5 – Japan), US – Zeroing (EC) (Article 21.5 – EC), US – Continued Zeroing, EC and certain member States – Large Civil Aircraft, US – Large Civil Aircraft (2nd complaint), EC and certain member States – Large Civil Aircraft (Article 21.5 – US), US – Measures Affecting Trade in Large Civil Aircraft (Article 21.5 – EU), US – Supercalendered Paper (Canada),* and *United States – Conditional Tax Incentives for Large Civil Aircraft.*

[15] *EC – Large Civil Aircraft (22.6 – EU), US – Large Civil Aircraft (22.6 – US), US – Zeroing (EC) (22.6 – US), US – COOL (Mexico) (22.6 – US), US – COOL (Canada) (22.6 – US), and US – Tuna II (22.6 – US).*

[16] *See, e.g., EC – Bananas III (Article 21.5 – US)* (DS27), *US – Continued Zeroing* (DS350), *US – Zeroing (EC) (Article 21.5 – EC)* (DS294), *EC – IT Products* (DS375), *US – Continued Suspension* (DS320), *EC and certain member States – Large Civil Aircraft* (DS316), *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)* (DS316), *EC and certain member States – Large Civil Aircraft (Article 21.5 II – EU)* (DS316), *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)* (DS316), *US – Large Civil Aircraft (2nd complaint)* (DS353), *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)* (DS353), *US – Large Civil Aircraft (2nd complaint) (Article 22.6 – EU)* (DS353),

- The United States has also worked closely with Canada and agreed to open meetings in a number of WTO disputes, including in at least nine separate proceedings and including open panel meetings, appellate hearings, and the meeting of an Article 22.6 Arbitrator.[17]

- Open meetings have also been held in disputes in which the United States was not a party, including for example the panel meetings in *EC – Bananas III (21.5 – Ecuador)* (DS27), *EC – IT Products (Japan)* (DS376), *EC – IT Products (Chinese Taipei)* (DS377), *Canada – Renewable Energy / Feed-In Tariff Program (EU, Japan)* (DS412/DS426), and *Canada – Wine (Australia)*, and the panel meetings and appellate hearings in *Australia – Apples (New Zealand)* (DS367) and *EC – Seal Products (Canada, Norway)* (DS400/DS401).

- With respect to the open meetings and hearings that have taken place, the experience has been entirely successful. The United States is not aware of any incidents of improper behavior by observing members of the public, and the presence of public observers does not appear to have affected the professionalism with which parties, third parties, and adjudicators traditionally conducted themselves. While this observation normally occurs via transmission to a viewing room, this has been true even in instances in which the public has been allowed to observe from the same room in which the meeting was taking place. Nor has the passive observation of meetings by members of the public interfered with the intergovernmental nature of the WTO, the government-to-government nature of dispute settlement, or the ability of parties to settle a dispute through the negotiation of a mutually agreed solution.

- Attendance at open panel meetings has varied, but one would expect this given that not all disputes will be of equal interest or of interest to the same persons. Moreover, the important point is that the benefits from having open meetings arise regardless of actual attendance. This is because the mere possibility of attending a meeting helps to ensure confidence in the system and that the system has nothing to hide.

- In short, any concerns expressed with regard to open meetings have not come to pass. Instead, open meetings have served to promote transparency and confidence in the WTO dispute settlement system, increase familiarity with the objective, professional manner in which hearings are conducted, and consequently provide potential benefits for the implementation of any resulting recommendations by the Dispute Settlement Body.

United States — Conditional Tax Incentives for Large Civil Aircraft (DS487), *United States – Steel and Aluminum Products (EU)* (DS548), and *EU – Additional Duties (US)* (DS559).

[17] *See, e.g.*, *US – COOL* (DS384), *US – COOL (Article 21.5 – Canada)* (DS384), *US – COOL (Article 22.6 – US)* (DS384), *US/Canada – Continued Suspension* (DS320/DS321), *US – Supercalendered Paper* (DS505), *US – Lumber AD* (DS534), *US – Lumber CVD* (DS533), *US – Steel and Aluminum Products* (DS550), and *Canada – Additional Duties (US)* (DS557).

B. Due to Opposition by Some Members, Including Certain Major Users of the WTO Dispute Settlement System, Closed Meetings and Non-Public Submissions Unfortunately Remain the General Rule, Not the Exception

- Despite the benefits that greater transparency would bring to the WTO and its dispute settlement system, for too long, too many Members that claim to support the multilateral trading system actively undermine it by promoting a lack of transparency in WTO dispute settlement.

- If the only WTO disputes were between supporters of open meetings, the WTO would have a very transparent dispute settlement process. But such disputes represent the small minority of disputes.

- Ironically, it is some of the most frequent users of the system, that have actively opposed requests for public meetings and have not made their submissions public. For example:

    - The United States proposed open meetings in at least 17 disputes with China, but China has always declined.

    - The United States proposed open meetings in at least nine disputes with India, but India has always declined.

    - The United States has proposed open meetings in at least six disputes with Korea, but Korea has always declined.

    - The United States has proposed open meetings in at least three disputes with Indonesia, but Indonesia has always declined.

    - The United States has proposed open meetings in at least three disputes with Turkey, but Turkey has always declined.

    - The United States has proposed open meeting in at least nine disputes with Mexico, and Mexico has declined, except for in a joint dispute with Canada.

- The United States has also requested open meetings in disputes with Brazil and Russia, and each of those Members has declined.

- These Members represent some of the most frequent users of the system they all profess to support. Their opposition to open meetings and greater transparency in WTO dispute settlement is misguided and only serves to further erode support for the system.

- And what is worse, these Members consistently object to a request by a Member, such as the United States, that wishes to make its own statements publicly available at the time they are spoken. It would be understandable, if misguided, for them to seek to keep their own statements confidential. But there is no basis in the DSU or in logic for the assertion that *they* should have the ability to keep U.S. statements of its own position confidential, *against* U.S. wishes.

- Regrettably, certain panels have acquiesced in those efforts. The United States highly regrets those decisions, which are not required by the DSU and undermine the legitimacy of the dispute settlement mechanism.

- The positions of these non-transparent Members are not required by the "state-to-state" or intergovernmental nature of WTO dispute settlement. As we will discuss shortly, many WTO Members, including these Members, participate in other state-to-state adjudicatory systems and provide for open hearings and public submissions.

- The positions of these non-transparent Members are also not required by the subject matter. There is nothing in the subject matter of the WTO agreements that inherently requires confidentiality, unless specifically provided for. And the fact that the most frequent users of the dispute settlement system, the United States and the European Union, both seek to have all of their disputes publicly observed demonstrates there is nothing in the subject matter of the WTO agreements that must be kept confidential.

- The positions of these non-transparent Members are also not required by an alleged "sensitivity" of disputes. First, the argument makes no sense at all where such a Member is challenging a measure of the United States. Second, as we will discuss shortly, other intergovernmental fora have dealt with issues that are intergovernmental in nature and are at least as sensitive as those involved in WTO disputes. Third, if a dispute truly concerned a sensitive issue, that is all the more reason that the public should have a full opportunity to observe the dispute settlement process. And, as the United States and European Union have demonstrated in the context of the aircraft disputes, sensitive commercial information can be protected while also providing for open hearings and public submissions.

C. The United States and Several Other Members Make Their Submissions Public, but Many Members Do Not

- Ensuring that all Members and the public have access to the parties' submissions in dispute settlement proceedings is a key component of maintaining support for the dispute settlement system. As discussed, there is no DSU impediment to making one's own submissions public (or publicly available).

- The United States makes public its submissions for all disputes in which it is a party or third party. We understand that, like the United States, other Members such as the European Union and Australia post their submissions online.

- Unfortunately, too many Members, including significant users and beneficiaries of the system – such as, China, India, Indonesia, Korea, Mexico, Russia, and Vietnam, for example – insist on maintaining their submissions as confidential. The United States does not disagree that these Members have the right to do so. This is explicitly provided for in Article 18.2. However, we question why they have taken that decision and how they think this could contribute to the legitimacy of (and, ultimately, the viability of) the system that they profess to support.

- For example, we understand that these Members access U.S. submissions that have been made public in past disputes. Certain of these Members have cited to those U.S. submissions in their own arguments. We consider that to be positive because each Member should be accountable for its views and be able to explain how a position it currently is espousing relates to a position it has taken in another dispute. And we also consider that it helps WTO adjudicators to come to better reasoned decisions to consider how the view of a Member may or may not have changed, and whether its position as a litigant may have affected its interpretive views.

- But if it is a good quality of WTO dispute settlement to be able to hold the United States accountable for its views, it must equally be the case that it is good for WTO dispute settlement to be able to hold every other WTO Member accountable for its views. Put differently, we cannot see a basis for China, or India, or Korea, or Russia, or Mexico, or Vietnam, or Indonesia, or any other Member to consider that it should not also be held accountable for its views as expressed in ongoing and past disputes. A Member that keeps its submissions confidential deprives the WTO dispute settlement system of important benefits.

- That a Member chooses to keep its submissions confidential naturally can raise concerns about the extent to which it is willing to explain its views, both domestically and internationally. That is, the question is raised whether that Member is taking views that do not correspond to other views it has taken, or that have not been fully considered internally. Such concerns about the nature of positions being taken by non-transparent Members also do not contribute to the legitimacy of the dispute settlement system.

III. Members' Positions in Other Fora Illustrate Members Do Not Object to Transparency in Principle

- Opposition to greater transparency is contrary to the choices Members have made in other fora, including other international adjudicatory systems and regional free trade agreements. This highlights that most Members do not object to transparency in principle.

- A number of international dispute settlement fora and tribunals are (or were) open to the public, such as the International Court of Justice[18], the International Tribunal for the Law of the Sea[19], the International Criminal Tribunal for the former Yugoslavia[20], the

[18] Statute of the International Court of Justice, Article 46 ("The hearing in Court shall be public, unless the Court shall decide otherwise, or unless the parties demand that the public be not admitted."); Article 59, Rules of Court.

[19] Statute of the International Tribunal for the Law of the Sea, Article 26.2 ("The hearing shall be public, unless the Tribunal decides otherwise or unless the parties demand that the public be not admitted."); Article 74, Rules of the Tribunal.

[20] Rule 78, Rules of Procedure and Evidence.

International Criminal Tribunal for Rwanda[21], the European Court of Human Rights[22], the African Court on Human and Peoples' Rights[23], and the Inter-American Court of Human Rights[24].

- These fora deal with issues that are intergovernmental in nature and are at least as sensitive as those involved in WTO disputes. For example, these fora have addressed boundary disputes, use of force, nuclear weapons, human rights violations, and genocide.

- There are at least two key conclusions to be drawn from these comparisons. First, a comparison of WTO dispute settlement to other international dispute settlement fora reveals that the WTO, with perhaps the most active dispute settlement system, is one of the least transparent dispute settlement systems.

- Second, Members' participation in these other more transparent fora demonstrates that Members do not object in principle to greater transparency. Rather, they recognize the benefits it brings to these institutions.

- These same conclusions can be drawn from an examination of Members' participation in regional free trade agreements. At least 40 regional free trade agreements, involving more than 75 WTO Members, require transparency – be it through public submissions, open hearings, or both. Members involved in such agreements include: Argentina, Armenia, Australia, Bahrain, Botswana, Brazil, Brunei, Canada, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Eswatini, the European Union, Georgia, Guatemala, Honduras, Hong Kong-China, Iceland, Israel, Japan, Jordan, Korea, Lesotho, Liechtenstein, Malaysia, Mexico, Moldova, Montenegro, Morocco, Mozambique, Namibia, New Zealand, Nicaragua, Norway, Oman, Panama, Paraguay, Peru, Singapore, South Africa, Switzerland, Ukraine, Uruguay, the United States, and Vietnam.

- Again, Members' participation in regional free trade agreements requiring transparency underscores that the WTO lags behind other fora, and a significant number of WTO Members do not in principle oppose transparency.

[21] Rule 78, Rules of Procedure and Evidence.

[22] Rule 33, Chapter 1, Title II, Rules of Court.

[23] Article 10, on the Establishment of an African Court of Human and Peoples' Rights, Protocol to the African Charter on Human and Peoples' Rights. Rules of Court, Rule 43 ("Public Hearings") ("1. Cases shall be heard in open court. 2. However, the Court may, of its own accord or at the request of a party, hold its hearings in camera if, in its opinion, it is in the interest of public morality, safety or public order to do so. 3. Whenever the Court orders that any proceedings shall not be conducted in public, the Court shall give one or more of the reasons specified in sub-rule 2 of this Rule as the basis of its decision. The parties or their legal representatives shall be permitted to be present and heard *in camera*.").

[24] Statute of the Inter-American Court of Human Rights, Article 24(1) ("The hearings shall be public, unless the Court, in exceptional circumstances, decides otherwise.").

- We note that this list also includes some Members, like Brazil, Korea, Mexico, and Vietnam that have objected to open meetings in disputes with the United States.

- It is difficult to reconcile those Members' support for transparency in other fora, including regional free trade agreements, while opposing transparency in WTO dispute settlement.

- Why should WTO dispute settlement be any less transparent than these other fora in which Members participate? Why would Members encourage the perception that WTO dispute settlement has something to hide?

IV. Increased Transparency Enhances Members' Understanding of the WTO Dispute Settlement

- The benefits of increased transparency in WTO dispute settlement are numerous.

- Increased transparency, through open meetings and public submissions, is essential if the results of WTO dispute settlement are to enjoy legitimacy.

- Another benefit is that open and transparent WTO dispute settlement proceedings enhance WTO Members' understanding of the dispute settlement system. This is particularly true for those who do not participate often in the system.

- The United States also notes that third parties in some disputes have requested additional rights, often requesting to attend the entirety of panel meetings and to receive all submissions.

- To be clear, the United States considers that a Panel cannot grant additional "rights" without the agreement of the parties to a dispute. However, where the parties to a dispute agree to open their meetings to all WTO Members and the public, and they make their submissions publicly available, third parties (as well as all WTO Members and the public) would have the ability to observe all panel meetings and receive all submissions.

- We therefore find it ironic that some Members have opposed opening panel meetings to the public, while simultaneously requesting panels to provide them with additional third-party rights. In making such requests, those Members recognize that there is value in transparency and in seeing the parties' arguments at the time they are made. But in opposing the opening of meetings to other Members and the public, those Members have sought to obtain the benefit of greater transparency solely for themselves, while denying it to other Members and the public. The apparent position of these Members that the benefits of improved transparency should be limited to only a few Members is simply untenable.

- On a related and final note before concluding, the United States recalls that some Members in the past have suggested that opening meetings and making submissions available to all WTO Members, but not the public, would be a positive incremental step towards greater transparency. The United States seriously disagrees.

- Not only is there no basis in the DSU to restrict the ability of any WTO Member to make public statements of its own position – the operative word being "public", not "restricted" – but such an approach would only serve to reinforce perceptions about the lack of transparency in WTO dispute settlement, thereby further undermining its support.

V. Conclusion: If Members Claim to Support the WTO Dispute Settlement System, They Should Take All Steps Now to Provide for a Transparent Dispute Settlement System

- Many Members claim to want to reform and keep relevant the WTO, and we have seen some proposals brought forward to enhance transparency and notifications. But the actions of too many Members have stymied transparency in WTO dispute settlement for far too long.

- As reviewed in this statement, the lack of transparency in WTO dispute settlement is not required by the DSU and Members cannot defend the lack of transparency on this basis.

- To the contrary, whether the WTO has an open and transparent dispute settlement system depends, to a great extent, on the willingness of Members to support such a system.

- We have also highlighted that Members' participation in other fora illustrates Members do not object to transparency in international adjudicatory systems and trade agreements in principle. Thus, there is no impediment to Members taking action today to address this lack of transparency in WTO dispute settlement.

- It is long overdue for Members to agree to open all substantive dispute settlement meetings to observation by all Members and the public while protecting confidential information. Each Member should immediately take steps in each dispute in which it is participating to request to make its statements publicly observable and to make its written submissions publicly available.

5. UNITED STATES – SAFEGUARD MEASURE ON IMPORTS OF CRYSTALLINE SILICON PHOTOVOLTAIC PRODUCTS

A. REQUEST FOR THE ESTABLISHMENT OF A PANEL BY CHINA (WT/DS562/8)

- The WTO Agreement recognizes the right of Members to temporarily suspend concessions and other obligations in order to take a safeguard action when a product is being imported into its territory in such increased quantities and under such conditions as to cause serious injury or threat of serious injury to the Member's domestic industry.

- The United States has exercised this right with respect to imports of crystalline silicon photovoltaic ("CSPV") products and imposed such a safeguard action. An independent investigative authority, the U.S. International Trade Commission, determined that the domestic industry producing like or similar products was seriously injured and that the cause of that injury was increased imports of the products at issue.

- The U.S. process was open and transparent, and fully in accord with both U.S. domestic safeguard law and WTO obligations.

- The United States also notes that China's request to establish a panel improperly includes a claim not referenced in China's request for consultations.

- For these reasons, the United States is not in a position to agree to the establishment of a panel today.

7. APPELLATE BODY APPOINTMENTS: PROPOSAL BY SOME WTO MEMBERS (WT/DSB/W/609/REV.12)

- 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.

- The systemic concerns that we have identified remain unaddressed.

- As the United States has explained at recent DSB meetings, for more than 16 years and across multiple U.S. Administrations, the United States has been raising serious concerns with the Appellate Body's overreaching and disregard for the rules set by WTO Members.

- The United States will continue to insist that WTO rules be followed by the WTO dispute settlement system, and will continue our efforts and our discussions with Members and with the Chair to seek a solution on these important issues.

Second Intervention

- We have listened closely as several Members have criticized the United States. These Members argue that the United States has failed to participate in ongoing discussions on Appellate Body reform.

- These statements are wrong – and appear to represent public posturing by these Members. The facts establish that no Member has been more constructively and consistently engaged on these substantive issues than the United States. Let us set the record straight.

- Over the past year, in the DSB, the United States has outlined its concerns in exhaustive detail. We have not avoided discussion; rather, we have laid out in the clearest possible terms the U.S. position on the issues raised.

- While the DSU text is straightforward and clear, we recognize that the Appellate Body has ignored that text, and many WTO Members had not focused on just how far the Appellate Body's practice had strayed from that text.

- And so, beyond our detailed DSB statements, we have made clear our willingness to discuss these concerns further with any Member in order to deepen each other's understanding of these substantive issues. Several Members have participated in these dialogues and in many instances we have found the discussions to be frank and productive.

- In the Informal Process, the United States has been represented at every stage of the process, seeking to gain a better understanding of each Member's views on the issues

raised. As the United States has made clear, it is critical to understand if Members have a common understanding of the concerns raised.

- Unfortunately, one, or perhaps a few, WTO Members have indicated they do not share the concerns of the United States that the Appellate Body has deviated from the DSU text. These Members have not, however, adequately or persuasively explained how they could read the plain DSU text differently. Therefore, where a different understanding has become apparent, we have registered the lack of any DSU textual basis for that different understanding during meetings of the General Council.

- So the United States continues, as it has always done, to be engaged on these important substantive issues, including by meeting regularly with the Facilitator and Members to exchange views on the issues under discussion.

- Indeed, for several months, both within the Informal Process and outside, the United States has actively sought engagement from Members on what we believe to be a fundamental issue. That is, how have we come to this point where the Appellate Body, a body established by Members to serve the Members, is disregarding the clear rules that were set by those same Members. In other words, Members need to engage in a deeper discussion of *why* the Appellate Body has felt free to depart from what Members agreed to.

- Engagement is a two-way street. Without further engagement from WTO Members on the cause of the problem, there is no reason to believe that simply adopting new or additional language, in whatever form, will be effective in addressing the concerns that the United States and other Members have raised.