U.S. Mission to International Organizations in Geneva

Statements by Ambassador Dennis Shea at the March 3, 2020 General Council Meeting

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WTO General Council Meeting

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7. **PROCEDURES TO STRENGTHEN THE NEGOTIATING FUNCTION OF THE WTO – STATEMENT BY THE UNITED STATES (WT/GC/W/757/REV.1 AND WT/GC/W/764/REV.1)**

The United States is pleased to continue our discussion of this important reform initiative.

As the Membership is aware, in January 2019, the United States submitted a detailed paper on differentiation at the WTO. On that factual and analytic basis, the United States in February 2019 submitted to the General Council a proposal to resolve the differentiation problem through a pragmatic approach that recognizes the complexity of this issue.

The U.S. proposal establishes objective criteria for determining whether a WTO Member may continue to avail itself of blanket "special and differential treatment" (S&D) in current and future WTO negotiations. The four criteria are:

- A WTO Member that is a Member of the OECD, or a Member that has begun the accession process to the OECD;
- A WTO Member that is a member of the G20;
- A WTO Member that is designated as a "high income" country by the World Bank; or
- A WTO Member that accounts for no less than 0.5 percent of global merchandise trade.

For the "High Income" and the "Share of Global Merchandise Trade" criteria, a Member must meet the criteria for three years prior to the date of decision or three years thereafter.

Members who meet at least one of the four criteria would forego blanket S&D provisions in current and future WTO negotiations. However, they would retain the ability to negotiate the flexibilities they need to defend their interests.

Since the last meeting of the General Council in December, we have continued to deepen our conversations with several Members across the development spectrum. These include Members that would meet at least one of the four criteria, as well as Members that would benefit if the more advanced, wealthy, or influential economies among us finally accept responsibilities commensurate with their role in the global economy.

We are encouraged by these conversations. The United States' arguments in favor of reform enjoy support from a diverse and deep cross-section of the Membership here, even if some cannot openly express their support in Geneva.

They agree that certain Members are inappropriately seeking S&D in WTO negotiations despite overwhelming evidence of economic strength, wealth, or influence; that these Members' rigid insistence on receiving special treatment intended for much poorer, less-integrated Members is damaging the WTO and our collective ability to reach agreements; and that this issue must be addressed if the WTO is to be a viable forum for negotiations.

We are also encouraged by the Members that are giving serious thought to our reform proposal. We stand ready to continue our discussions with them.

G20 Membership

Today I would like to discuss one of the four criteria in the U.S. proposal – G20 membership.

A few Members have asked why G20 members should forego S&D in current and future WTO negotiations. They argue that the G20 was created to reflect the voices of developed and developing economies.

In our view, the founding documents of the G20 tell a different story, which in an important respect mirrors the need for change at the WTO.

In December 1999, in the communique of the inaugural meeting of the G20 Finance Ministers and Central Bank Governors, G20 members stated the following:

"The G-20 was established to provide a new mechanism for informal dialogue in the framework of the Bretton Woods institutional system, to broaden the discussions on key economic and financial policy issues among systemically significant economies and promote cooperation to achieve stable and sustain able world economic growth that benefits all."

In other words, at the founding of the G20, every member self-identified as a "systemically significant economy" that should be at the table to help solve global economic problems for the benefit of all, including the poorest among us.

Importantly, the creation of the G20 involved a conscious decision by its members to adapt the international architecture to a changed world – an example that the WTO desperately needs to follow.

Previously, the roster of systemically significant economies had been narrower, with economic power concentrated in fewer hands. By 1999, tectonic shifts in the global economy had begun to disperse that power and influence to a wider group of countries. Each member of the new G20 was an important economic power; domestic developments in each could affect conditions far beyond its borders.

These tectonic shifts continued and accelerated. Today, a diverse set of indicators confirm that the self-declared developing members of the G20 have differentiated themselves from the poorest, least integrated Members of the WTO.

As just one example, the share of global merchandise trade for the 10 self-declared developing members of the G20 has surged over the past three decades, from 9 percent to 24 percent. Yet, the share of global merchandise trade for the African continent over that period actually decreased from 2.8 to 2.7 percent, and the share for LDCs nudged up to just 1.2 percent.

However, G20 membership is a criterion in our S&D reform proposal not simply because of economic data. An important differentiating characteristic of G20 membership is influence; the opportunity and the capacity to shape the agenda for international engagement on a diverse set of issues, including globalization, aid, financial market development, regional economic integration, reserves, and demographics.

Amazingly, despite these gross advantages in economic weight and global influence, most self-declared developing Members of the G20 insist on receiving the same special treatment as the poorest and least integrated WTO Members.

We are pleased that two of the ten self-declared developing country G20 members have stated their intent to forego S&D in current and future WTO negotiations, and we hope to see more step forward during Saudi Arabia's G20 Presidency this year.

CVD Federal Register Notice

Chair, I'd like to spend a moment to explain another recent development.

As Members may be aware, The SCM Agreement requires WTO Members to extend S&D when applying their CVD laws to developing and least-developed countries.

There are two S&D provisions that are still in effect in the SCM Agreement: developing and least-developed countries are entitled to a higher de minimis threshold than developed countries, and they enjoy a higher threshold for import volume negligibility.

U.S. law, pursuant to the Uruguay Round Agreements Act, requires USTR to designate, and to update as necessary, which countries are developing and least-developed, for purposes of U.S. CVD investigations.

On February 10, USTR published a Notice in the Federal Register that updated the list of WTO Members that are designated as developing or least-developed countries for purposes of U.S. CVD investigations. The previous list was published in 1998.

As a result of the update, some Members are no longer eligible to receive the two forms of S&D when the United States conducts CVD investigations on imports into our country from those Members.

We wish to emphasize that the CVD Notice does not affect in any way the approach laid out in our S&D reform proposal, which is exclusively focused on S&D in future WTO agreements. As stated in the CVD Notice, it "has no effect on how that Member may be classified with respect to any other law."

The United States, through its S&D proposal, is not asking any Member to change its self-declared development status, nor is the United States asking any Member to forego S&D in existing WTO agreements. The CVD Notice does not affect our approach.

White House Memorandum

Finally, Chair, I would like to provide a brief update to Members on the President's instruction to USTR in July 2019 to publish on its website a list of all self-declared developing countries that the USTR believes can inappropriately seek S&D in WTO negotiations.

Members are asking when USTR will publish the list. I can tell you that USTR is actively consulting on this issue.

In closing, I note that the discussions that we are having with Members are constructive, sincere, and candid. We look forward to continuing to engage with Members on this reform proposal.

9. **THE IMPORTANCE OF MARKET-ORIENTED CONDITIONS TO THE WORLD TRADING SYSTEM – COMMUNICATION FROM THE UNITED STATES (WT/GC/W/796)**

The United States requested this agenda item to discuss the centrality of market orientation – one of the core principles of the WTO – in our collective efforts to achieve meaningful WTO reform. We have circulated a draft decision in which Members would reaffirm that market-oriented conditions are fundamental to a free, fair, and mutually advantageous trading system, to ensure a level playing field for our workers and businesses.

As we see it, any reform conversation must begin with some basic questions: What is the purpose of this organization? What values do we uphold?

You have heard the United States emphasize in previous statements that those who founded the WTO had the goal of moving all economies toward greater market openness and free market competition.

The Marrakesh Declaration set out WTO Members' collective intention to establish the World Trade Organization to promote participation in a world trading system "based on open, market-oriented policies and the commitments set out in the Uruguay Round Agreements and Decisions." [1]

We also collectively noted our "desire to operate in a fairer and more open multilateral trading system for the benefit and welfare of [our] peoples."[2]

Many accession protocols concluded over the past 25 years reflect these core principles by reaffirming a commitment to the Marrakesh Declaration or more explicitly stating that the goal of WTO accession was to achieve economic reform "based fully on market principles"[3] or to "transition from a centrally-planned to a market based economy."[4] The importance of an acceding party's adoption of market-oriented reforms is evident in reviewing the historical record of WTO accessions, to ensure that it and existing Members fully benefit from reciprocal and mutually advantageous commitments.[5]

In May 2018, the Trade Ministers of the European Union, Japan, and the United States agreed that non-market-oriented policies and practices create unfair competitive conditions for our workers and businesses and undermine the proper functioning of international trade.[6]

These statements further reaffirm that market-oriented conditions remain fundamental to a free, fair, and mutually advantageous global trading system.

Why is this? It is because market-oriented conditions are crucial to ensure a level playing field for all Members' workers and businesses. Put differently, if your workers and businesses are subject to market constraints and disciplines, it is fundamentally unfair to force them to compete with another Member's enterprises that are not subject to these same constraints and disciplines.

For the United States, the WTO is and should be a place where countries come together to work towards developing and enforcing rules that promote the common goal of free and fair trade on the basis of openness and market principles.

To put it another way: It's as if we all agreed to join the same swimming club, using the same pool together, with all of us agreeing to swim in the same direction. As in any swimming club, there will be those who swim faster or slower, some who prefer different strokes, and some who need to take a short break on the side of the pool. On occasion, we will bump into each other and maybe even swim outside our respective lanes. But, in this club, there is a fundamental, shared understanding that we all should be swimming in the same direction toward a common destination.

A shared commitment to open, market-oriented policies across the WTO membership is critical to restoring and building confidence in this organization as a defender and promoter of free and fair trade. The draft decision, we believe, would help us accomplish this important goal.

The importance of market-oriented conditions to the world trading system may seem obvious to many of us. But sometimes restating the obvious and asserting our shared values is a necessary step on the path to progress. With the WTO in crisis, it seems that now is an appropriate time to do so.

So, what are some of the key elements that indicate that market-oriented conditions exist for market participants?

As we see it:

1. Decisions of enterprises on prices, costs, inputs, purchases, and sales are freely determined and made in response to market signals;
2. Enterprise decisions on investments are freely determined and made in response to market signals;
3. The prices of capital, labor, technology, and other factors are market-determined;
4. Capital allocation decisions of or affecting enterprises are freely determined and made in response to market signals;

5. Enterprises are subject to internationally-recognized accounting standards, including independent accounting;
6. Enterprises are subject to market-oriented and effective corporation law, bankruptcy law, competition law, and private property law, and may enforce their rights through impartial legal processes, such as an independent judicial system;
7. Enterprises are able to access freely relevant information on which to base their business decisions.
8. Moreover, in all of these areas, there should be no significant government interference in enterprise business decisions.

The absence of market-oriented conditions in one or more WTO Members can have devastating consequences for others.

The distortions are not mere ripples that cross into other Members' lanes; in a global economy, they can build into cresting waves that swamp other Members' economies, threatening to undermine the social compact between a government and its citizens. The adoption of non-market policies and practices can lead to severe overcapacity in certain industrial sectors, create unfair competitive conditions for workers and businesses that lead to massive job displacement and lost business opportunities, and hinder the development and use of innovative technologies.

Existing WTO rules go some way to ensuring fair competition that benefits all of our citizens, as producers and consumers. Commitments such as most-favored nation treatment, national treatment, subsidy disciplines, intellectual property rules, and others are designed to ensure fair play for us all. But the existence of non-market oriented conditions tilts the playing field in the direction of those Members that seek to unfairly determine economic outcomes.

As WTO Members consider new initiatives and rules – such as on fisheries subsidies, industrial subsidies, State Enterprises, or other issues – which could be key elements of achieving meaningful WTO reform, the importance of market-oriented conditions only increases.[7]

In our view, a shared understanding of and commitment to the market-oriented norms upon which the WTO is established will significantly increase the prospect that these rules, once implemented, will be both effective and durable.

The United States is currently engaging with interested WTO Members in on initiatives to support market-oriented policies and outcomes and to reinforce the values we endorsed when we helped create this institution. In the coming months, the U.S. delegation will be speaking with many more of you on this critical issue so that we can jointly endorse the draft General Council decision and increase our citizens' confidence that the WTO fully supports providing a level playing field for all.

11. **UNITED STATES TRADE REPRESENTATIVE REPORT ON THE APPELLATE BODY OF THE WORLD TRADE ORGANIZATION – STATEMENT BY THE UNITED STATES**

On February 11, 2020, the United States Trade Representative issued a Report on the failure of the Appellate Body of the World Trade Organization to respect WTO rules.

The Report details how the Appellate Body has repeatedly failed to interpret the rules of the WTO agreements consistent with the text of those agreements, as negotiated and agreed by WTO Members. In so doing, the Appellate Body has undermined a rules-based trading system by persistently breaking those rules.

The Report discusses the following examples of the Appellate Body's failure to follow WTO rules:

- The Appellate Body consistently ignores the mandatory 90-day deadline for deciding appeals set out in the Dispute Settlement Understanding (DSU);
- The Appellate Body allows individuals who have ceased to serve on the Appellate Body to continue deciding appeals despite the fact that only WTO Members in the Dispute Settlement Body have the authority under the DSU to set the term of appointment for a person to the Appellate Body;
- The Appellate Body has made findings on issues of fact, including issues of fact relating to WTO Members' domestic law, although the DSU explicitly limits appeals to issues of law and legal interpretation;
- The Appellate Body has issued advisory opinions and otherwise opined on unnecessary issues even though the DSU limits panel and AB findings to those necessary to assist the Dispute Settlement Body in making recommendations to resolve the dispute;
- The Appellate Body has insisted that dispute settlement panels treat prior Appellate Body interpretations as binding precedent absent "cogent reasons" despite express text giving the exclusive authority to issue "authoritative interpretations" to the Ministerial Conference and General Council;
- The Appellate Body has asserted that it may choose not to issue a recommendation despite explicit DSU text that mandates such a recommendation to a WTO Member to bring a WTO-inconsistent measure into compliance with WTO rules; and
- The Appellate Body has overstepped its authority to address the matter at issue in a dispute and instead opined on matters within the authority of WTO Members acting through the Ministerial Conference, General Council, and Dispute Settlement Body.

The Report also discusses how the Appellate Body has altered Members' substantive rights and obligations through erroneous interpretations of WTO agreements.

The Appellate Body has attempted to fill in "gaps" in those agreements, reading into them rights or obligations to which the United States and other WTO Members never agreed.

Examples of the Appellate Body's erroneous interpretations highlighted in the Report include the following:

- The Appellate Body's erroneous interpretation of the term "public body" threatens the ability of Members to counteract trade-distorting subsidies provided through SOEs, undermining the interests of all market-oriented actors;
- The Appellate Body has intruded on Members' legitimate policy space by essentially converting a non-discrimination obligation for regulations into a "detrimental impact" test;
- The Appellate Body has prevented WTO Members from fully addressing injurious dumping by prohibiting a common-sense and historically widespread method of calculating the extent of dumping that is injuring a domestic industry ("zeroing");
- The Appellate Body has invented a stringent and unrealistic test for using out-of-country benchmarks to measure subsidies that weakens the effectiveness of trade remedy laws in addressing distortions caused by state-owned enterprises in non-market economies;
- The Appellate Body's creation of an "unforeseen developments" test and severe causation analysis prevents the effective use of safeguards by WTO Members to protect their industries from import surges; and
- The Appellate Body has limited WTO Members' ability to impose countervailing duties and antidumping duties calculated using a non-market economy methodology to address simultaneous dumping and trade-distorting subsidization by non-market economies.

The United States has been raising these concerns about the Appellate Body's disregard for WTO rules for many years. Unfortunately, the problem has only worsened as too many WTO Members have remained unwilling to do anything to rein in this conduct. Worse, some Members still refuse to admit there is a problem.

But these failings do not impact the United States alone – they have dire consequences for all WTO Members. And the Appellate Body's failure to follow the agreed rules has undermined not only WTO dispute settlement, but the effectiveness and functioning of the WTO more generally.

For example, the Appellate Body's failure to follow the agreed rules has undermined the World Trade Organization as a forum for negotiation of new rules and for discussion to reach a deeper understanding of the meaning of existing rules.

The United States published this Report – it's about 170 pages – to examine and explain the problem, not dictate solutions to the Membership.

WTO Members must first come to terms with the failings of the Appellate Body if we are to achieve lasting and effective reform of the WTO dispute settlement system.

This will require WTO Members to engage in a deeper discussion of why the Appellate Body has felt free to depart from the role Members assigned to it.

Without this understanding, there is no reason to believe that simply adopting new or additional text, in whatever form, will solve these endemic problems.

The United States has brought forward some ideas, and some Members and commentators have begun to contribute their ideas as well. For example, some have noted that Appellate Body members have not been more familiar than panelists with the subject matter of the WTO agreements, and may have been even less familiar. Some have pointed to the difficulties an institution may have in admitting that it has made an error. Others have pointed to the type of Secretariat support received by WTO adjudicators. We welcome further thoughts and deepening our conversations on these issues.

The United States looks forward to discussing this Report with the membership here.

As stated in the report, the United States will engage with any WTO Member committed to restoring the WTO dispute settlement system to the role given to it by WTO Members and ensuring that the dispute settlement system supports, rather than weakens, the WTO as a forum for discussion, monitoring, and negotiation.

[1] Marrakesh Declaration of 15 April 1994, fifth preambular paragraph.

[2] Marrakesh Declaration, para. 2.

[3] Report of the Working Party on the Accession of Croatia to the WTO of 29 June 2000, para. 4, WT/ACC/HRV/59.

[4] Report of the Working Party on the Accession of Georgia to the WTO of 31 August 1999, para 5, WT/ACC/GEO/31.

[5] See, e.g., GATT/WTO accession documents for: Poland (accession 1 Jan. 1995), Hungary (accession 1 Jan. 1995), Czech Republic and Slovak Republic (accession 1 Jan. 1995), Romania (accession 1 Jan. 1995), Slovenia (accession 30 July 1995), Bulgaria (accession 1 Dec. 1996), Mongolia (accession 29 Jan. 1997), Kyrgyz Republic (accession 20 Dec. 1998), Latvia (accession 10 Feb. 1999), Estonia (accession 13 Nov. 1999), Georgia (accession 14 June 2000), Albania (accession 8 Sept. 2000), Croatia (accession 30

Nov. 2000), Lithuania (accession 31 May 2001), Republic of Moldova (accession 26 July 2001), China (accession 11 Dec. 2001), Armenia (accession 5 Feb. 2003), North Macedonia (accession 4 April 2003), Cambodia (accession 13 Oct. 2004), Viet Nam (accession 11 Jan. 2007), Ukraine (accession 16 May 2008), Russian Federation (accession 22 Aug. 2012), Lao People's Democratic Republic (accession 2 Feb. 2013), Tajikistan (accession 2 March 2013), and Kazakhstan (accession 30 Nov. 2015).

[6] Joint Statement on Trilateral Meeting of the Trade Ministers of the United States, Japan, and the European Union (May 31, 2018), Annexed Statement 3: Joint Statement on Market Oriented Conditions (https://trade.ec.europa.eu/doclib/docs/2018/may/tradoc_156906.pdf).

[7] See, e.g., Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union (January 14, 2020) (outlining several areas for new rules, including additional types of prohibited subsidies under the Agreement on Subsidies and Countervailing Measures).