

PERMANENT MISSION OF THE UNITED STATES TO THE WORLD TRADE ORGANIZATION
MISSION PERMANENTE DES ÉTATS-UNIS D'AMÉRIQUE
AUPRÈS DE L'ORGANISATION MONDIALE DU COMMERCE

11, ROUTE DE PREGNY
1292 CHAMBÉSY - GENEVA

June 5, 2020

Mr. Roberto Azevêdo
Director-General
World Trade Organization
Centre William Rappard
1211 Geneva

Dear Director-General Azevêdo:

China, the European Union, and some other Members recently submitted a statement and related documents to the WTO regarding their formation of an appeal arbitration arrangement that would be authorized to conduct appellate reviews of any disputes between or among those Members.¹ The United States does not object to WTO Members utilizing Article 25 or other informal procedures to help resolve disputes. Indeed, the United States has had discussions with a number of Members regarding alternatives to the traditional WTO dispute settlement system. The China-EU arrangement, however, incorporates and exacerbates some of the worst aspects of the Appellate Body's practices. It is an arrangement that seeks to clothe itself with faux Appellate Body authority while impinging on the rights of non-participating Members. The United States also objects to the use of WTO budget funds for a process that is clearly far more than a simple Article 25 arbitration.

In agreeing to the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), WTO Members have set out explicitly the purpose of WTO dispute settlement: "The aim of the dispute settlement mechanism is to secure a positive solution to a dispute."² If any Member considers that use of the arbitration provision in Article 25 may assist it in securing such a positive solution, the United States in principle supports such efforts.

The United States objects, however, to any arrangement that would perpetuate the failings of the Appellate Body, which the United States has catalogued in detail.³ The China-EU

¹ The documents consist of: (i) "Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes"; (ii) a "Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU"; (iii) an "Agreed Procedures for Arbitration under Article 25 of the DSU in Dispute DSX;" and (iv) "Composition of the Pool of Arbitrators Pursuant to Paragraph 4 of Communication JOB/DSB/1/ADD.12."

² DSU Art. 3.7.

³ United States Trade Representative, *Report on the Appellate Body of the World Trade Organization* (February 2020), available at https://geneva.usmission.gov/wp-content/uploads/sites/290/AB-Report_02.11.20.pdf; Statement by the United States Concerning Matters Related to the Functioning of the Appellate Body, Meeting of the General Council on December 9 2019, available at <https://geneva.usmission.gov/2019/12/09/ambassador-shea-statement-at->

arrangement does just that, exacerbating the erroneous appellate practice rather than reforming it. For example, the arrangement weakens the mandatory deadline for appellate reports; contemplates appellate review of panel findings of fact; and fails to reflect the limitation on appellate review to those findings that will assist the DSB in recommending to a Member to bring a WTO-inconsistent measure into conformity with WTO rules.

The proposal also promotes the use of precedent by identifying “consistency” (regardless of correctness) as a guiding principle for decisions. The phrase “consistency and coherence in decision-making” does not appear anywhere in the DSU, but the proposed arrangement makes such “consistency and coherence” an explicit objective for different arbitrators in different disputes and then proposes procedures to facilitate this objective. Arbitrators are thus encouraged to create a body of law through litigation, rather than to focus on assisting the parties in securing a positive solution to a dispute. The numerous departures from the DSU highlight a fundamental difference among WTO Members: some Members prefer an appellate “court” with expansive powers, instead of the more narrow appellate review as agreed to by Members in the DSU.

In addition, the arrangement put forth by China, the European Union and some other Members seeks to imbue itself with WTO authority, which it does not have.

First, the introduction of a comprehensive set of documents to deal with perhaps two or three disputes over the next few years indicates that the real goal of certain Members in preferring this arrangement is not to help themselves resolve disputes but to create an ersatz Appellate Body that would serve as a model for any future WTO Appellate Body.⁴

Second, the proposal would expend WTO resources to seek to recreate the Appellate Body, its erroneous practices, and the Appellate Body Secretariat through a plurilateral arrangement. Article 25 provides no basis for the use of WTO resources to support functions that are not part of the arbitration, such as for a “pool of arbitrators” to “stay abreast of WTO dispute settlement activities” or to enable the arbitrators to “discuss among themselves matters of interpretation, practice[,] and procedure.” Moreover, the nomination and selection of individuals to serve in a “pool of arbitrators” is necessarily a process undertaken only by the participating Members. A group of Members has no right to expend WTO resources and direct the chairs of various WTO bodies to vet and select individuals to serve on a roster of arbitrators for potential arbitrations.

Nor does Article 25 provide a basis for a Member to direct the WTO Director-General to provide WTO Secretariat support to an arbitrator, nor the terms of such support. That, however, is what the China-EU arrangement does. The arrangement “envisages that the support structure will be entirely separate from the WTO Secretariat staff” and the WTO divisions that support panels. If Members desire a separate support staff for their dispute resolutions, those Members (and not the WTO membership as a whole) should finance it. Members should not be allowed to

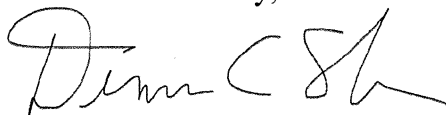
[the-wto-general-council-meeting/](#); Statement by the United States Concerning Appellate Body Appointments, Meeting of the Dispute Settlement Body on June 24, 2019, available at https://geneva.usmission.gov/wp-content/uploads/sites/290/Jun24.DSB_Stmt_as-deliv.fin_public.pdf.

⁴ Since 2015, there have only been four appeals in disputes between participating Members.

create their own support structure within the WTO that is separate from the WTO Secretariat and expect other Members to pay.⁵

Accordingly, the United States opposes both the establishment of what appears to be a new WTO Division for the benefit of participants in the China-EU arrangement and the allocation of staff for the exclusive use of those participants. A permanent support structure would be particularly inappropriate in light of the limited expected use of the procedures set forth in the arrangement.

Sincerely,

A handwritten signature in black ink, appearing to read "Dennis C. Shea". The signature is fluid and cursive, with the first name "Dennis" being the most prominent part.

Dennis C. Shea
Ambassador

cc: H.E. Mr. David Walker, Chair of the General Council
H.E. Mr. Dacio Castillo, Chair of the DSB

⁵ *Agreement Establishing the World Trade Organization* (“WTO Agreement”). See Standards of Conduct in the World Trade Organization, para. 25, in *Conditions of Service Applicable to the Staff of the WTO Secretariat* (WT/L/282) (“[T]he unity of the Secretariat and the primary responsibility of the Director-General as the head of that Secretariat must be understood and accepted.”).