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BEFORE
THE U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON WAYS & MEANS
SUBCOMMITTEE ON TRADE
"ADVANCING AMERICA'S INTERESTS AT THE WORLD TRADE ORGANIZATION'S 13TH MINISTERIAL MEETING"
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Chairman Smith, Ranking Member Blumenauer, and members of the Subcommittee, thank you for the opportunity to appear before you today. At the outset, let me emphasize that I am speaking solely in my personal capacity and not on behalf of any organization.

The process of reforming the World Trade Organization (WTO) began in earnest in December 2017 when U.S. Trade Representative Robert Lighthizer addressed the WTO's 11th Ministerial Conference in Buenos Aries. In his remarks, he highlighted the poor performance of many WTO members in fulfilling their notification obligations, the absurd situation where some of the world's richest nations were self-declaring as "developing" and claiming as-of-right exemptions from WTO disciplines, and the fact that the WTO had become much too litigation-focused. The result, he pointed out, was an organization that had long failed to live up to its expected role as a dynamic forum for negotiating new global trade rules that open markets. It was a privilege for me, as U.S. Ambassador to the WTO during the Trump Administration, to work with Ambassador Lighthizer and the other members of the USTR team to try to reinvigorate the WTO through a comprehensive reform agenda. This agenda included the following elements:

- A major effort to improve transparency, including a proposal to impose monetary penalties on WTO members that willfully and repeatedly failed to fulfill their notification obligations, as well as the use of "counter-notifications" to expose the unreported subsidies and trade practices of other WTO members;

- A proposed General Council decision reaffirming that "market-orientation" is a fundamental WTO norm and that the international trading system depends on the operation of market-oriented conditions in the economies of WTO members;

- A proposed General Council decision establishing objective criteria for determining whether a WTO member may continue to avail itself of blanket, open-ended "special and differential treatment" in current and future WTO negotiations; and

- The most comprehensive critique ever undertaken of the unchecked institutional creep of the WTO's Appellate Body, which had done much to damage the interests of the U.S. and other WTO members and encouraged a litigation rather a negotiation mindset at the organization.

During my tenure at the WTO, the U.S. was also an active participant in the Joint Statement Initiative on Electronic Commerce, one of the new plurilateral negotiations that emerged from the WTO's 11th Ministerial Conference. In the e-commerce negotiation, we insisted on strong and reciprocally assumed disciplines that protect cross-border data flows, prohibit data localization mandates, and safeguard U.S.-owned source code from forced disclosure to foreign governments. Like many others, I was baffled by the Biden Administration's decision this past October to abandon these longstanding U.S. objectives in the context of this negotiation.

Finally, a major focus of my work at the WTO was educating other WTO members about the incompatibility of the state-led, nonmarket economy of the People's Republic of China (PRC) with WTO norms of openness, non-discrimination, and market orientation. A discussion of the PRC's nonmarket economic system was the "headline event" for several contentious General Council meetings, the result of the U.S. putting this subject on the meeting agenda. My understanding is that no previous U.S. representative to the WTO had spoken so directly about the trade-disruptive impact of Chinese policies and practices in this forum.

Despite these efforts and the current Administration's approach of "WTO-reform-by-doing," it seems that very little has changed in Geneva that would signal a sustained upward trajectory for the organization. Recent dispute settlement panel decisions challenging the self-judging nature of the essential security exception in GATT Article XXI(b) have set the WTO back further.

Before exploring how best to advance America's interests at MC13, I would like to highlight an important point made by the *Select Committee on the Strategic Competition between the United States and the Chinese Communist Party* in its December 12, 2023 report, *Reset, Prevent, Build*. In a section on the WTO and the PRC, the report states: *"*It is time for likeminded countries to come together and seriously examine how to collectively counter the PRC's approach to economics and the harm it is doing to the global trading system. *If this cannot be achieved within the confines of the WTO*, then a new multilateral effort by likeminded market economies that goes back to first principles is needed, excluding mercantilist non-market economies that reject the basic principles upon which the WTO was established (italics added)."

Based on my experience, I can assure you that effectively countering the harm that the PRC is doing to the global trading system is simply not possible "within the confines of the WTO," at least within any reasonable timeframe. It would therefore be irresponsible for any American leader to outsource U.S. economic security to the organization. In numerous reports over the years, the Office of the U.S. Trade Representative has consistently rated the PRC's compliance with its WTO obligations as "poor." According to USTR, the U.S. has brought 27 cases against the PRC at the WTO and has "secured victories in every one of its cases that was decided." Yet, these victories have barely moved the needle, as the underlying policies behind challenged practices have remained largely unchanged. In addition, the WTO's consensus principle, which requires unanimous acceptance by all 164 WTO members before adopting a decision, makes the prospect of disciplining the PRC's unfair trade practices through the development and enforcement of meaningful new rules a virtual impossibility.

So, what can we expect at MC13? And how best can we advance U.S. interests?

To answer these questions, I think it is helpful to look first at the outcomes achieved at MC12. In my judgment, the following outcomes served (or at least did not harm) U.S. interests and gave a diminished WTO some space to argue for its continuing relevance:

- A two-year extension of the moratorium on customs duties for electronic transmissions;
- A new multilateral agreement, concluded after more than 20 years of negotiation, prohibiting certain harmful fisheries subsidies;
- A Ministerial Decision exempting World Food Program humanitarian purchases from export prohibitions or restrictions; and

- Non-binding Ministerial Declarations on subjects such as the Emergency Response to Food Insecurity, the WTO Response to the COVID-19 Pandemic and Preparedness for Future Pandemics, and Responding to Modern Sanitary and Phytosanitary Challenges.

One MC12 outcome, however, was decidedly against U.S. interests: a Ministerial Decision waiving IP protections provided by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) for COVID-19 vaccines.

This decision cuts against the core U.S. goal of maintaining a robust intellectual property rights system both domestically and in our international arrangements as a way of nurturing our nation's innovators and inventors. Regrettably, it was supported by the United States despite any compelling evidence that IP protections have hindered global access to COVID-19 vaccines. On the contrary, factors such as trade barriers and customs bottlenecks, lack of storage capacity, last-mile distribution challenges (particularly in rural areas), a shortage of well-trained front-line workers, and high levels of vaccine hesitancy in both the developed and developing world have been the primary impediments to vaccine access and vaccinations. It is my understanding that not a single country has attempted to exercise a waiver under the Ministerial Decision or expressed an intention to do so.

Looking ahead to MC13, the outcomes we can expect may be even less ambitious than those achieved at MC12. From the U.S. perspective, that should be perfectly acceptable. The focus of U.S. negotiators should be on achieving one or two small "wins," while pushing back on any Ministerial decisions, declarations, or other actions that may harm our interests.

The Must Do

In my judgment, the one "must do" at MC13 is extending the current moratorium on the imposition of customs duties on electronic transmissions until at least the next Ministerial Conference (presumably occurring in 2026). The moratorium has been in place since 1998 and has been extended numerous times, most recently at MC12, where the members agreed to "intensify discussions on [its] scope, definition and impact" as a condition of extending the moratorium through March 31, 2024. While the prospects of establishing a permanent moratorium at MC13 are remote, another two-year extension combined with a robust work program would be a good outcome.

Since the moratorium was first established, trade in digital products has grown dramatically. Supporters of the moratorium highlight the need for the unencumbered "cross-border exchange of knowledge, technical know-how, and scientific and commercial information across transnational IT networks," the moratorium's importance to "supply chain resilience for manufacturing and services industries," and the benefits it provides to small businesses seeking access to global markets.

The biggest skeptics of the moratorium are India, South Africa, and Indonesia as well as Pakistan and Bangladesh. At times, they cite the need for greater "policy space" to develop their own digitally-based industries. They also argue that lifting the moratorium and allowing the imposition of customs duties would provide a source of new revenue, though the Organization for Economic Cooperation and Development has estimated that "[t]he overall revenue implications of the Moratorium are small…." Some WTO members (India, in particular) may use our desire and that of other developed nations for an extension of the moratorium as leverage, a bargaining chip, to achieve other objectives they deem important such as permanent protection for public stockholding programs for food security.

Nice to Haves

At MC12, WTO members adopted the Agreement on Fisheries Subsidies designed to support the sustainability of marine life and the world's oceans. The agreement specifically curbs subsidies to 1) illegal, unreported, and unrelated (IUU) fishing, 2) fishing on overfished stocks, and 3) fishing on the unregulated high seas. The agreement imposes notification requirements on WTO members beyond what is required by the Agreement on Subsidies and Countervailing Measures.

While the agreement is significantly less ambitious than the initial negotiating texts that were debated prior to MC12, it is nonetheless only the second multilateral agreement ever reached at the WTO and the first to focus on the environment. A "nice to have" outcome at MC13 would be a follow-up agreement that disciplines harmful fisheries subsidies that contribute to overcapacity and overfishing (like fuel and ship construction subsidies and subsidies that artificially inflate market prices). Developing strong disciplines for these types of subsidies has always been a key U.S. negotiating objective, including during the Trump Administration. I understand that U.S. negotiators in Geneva are hard at work pressing for such an outcome, but I would not hold my breath considering how difficult it was to achieve the more limited outcome at MC12 after a 20-year negotiation. As U.S. Ambassador to the WTO María Pagán recently pointed out about current negotiations, WTO members have devoted too much time discussing carve-outs from obligations rather than the obligations themselves, and there is a need for greater transparency and data about the subsidizing activities of various members.

During the lead-up to MC12, the Biden Administration sought to inject the issue of forced labor into the fisheries negotiations, seeking (1) the inclusion of effective disciplines on harmful subsidies to fishing activities that may be associated with the use of forced labor; (2) the explicit recognition of the problem and the need to eliminate it; and (3) greater transparency with respect to vessels or operators engaged in the use of forced labor. While this effort was unsuccessful (China, for example, claims that the WTO has no mandate to examine the issue of forced labor), advocating for forced labor provisions in the fisheries context should continue to be a priority for the U.S. at MC13 and beyond.

Must Not Dos

I have identified at least two "must not dos" for MC13.

The first "must not do" is getting pushed into an unacceptable agreement on dispute settlement reform, particularly if it leads to the restoration of the Appellate Body or a second-tier appeals mechanism akin to it. I am pleased that the Biden Administration – through its "interest-based" informal discussions in Geneva – has continued the effort that we began in the Trump Administration to engage the WTO membership about the overreaching of the Appellate Body and its disregard of the clear text of the Dispute Settlement Understanding (DSU). As I often told my foreign colleagues at the WTO, concerns about the Appellate Body were widely shared across the political spectrum in the United States.

I won't provide a laundry list of examples of Appellate Body overreach that harmed U.S. interests and the institutional credibility of the WTO. They are amply documented in *USTR's Report on the Appellate Body of the World Trade Organization* (February 2020).

As the U.S. has argued across multiple Administrations, the WTO membership never charged the Appellate Body with creating a corpus of international trade jurisprudence. The Appellate Body's intended mandate was always a limited one – to correct legal errors by panels and to do so

expeditiously. During my tenure at the WTO, it was clear that some important WTO members viewed the Appellate Body quite differently: as an independent international court charged with establishing binding precedent, enforcing "coherence," filling gaps in the WTO agreements, and creating a global common law of trade. This view was reinforced by what former Appellate Body member Thomas Graham described as a "prevailing ethos" within the Appellate Body to act like a court that was unaccountable to WTO members along with an unjustified sense of infallibility and an excessive degree of control exercised by its staff.

Reconciling this clash of visions is very difficult, and it can't be papered over with a few word tweaks to the DSU. Negotiators should be focusing on the big picture of what type of dispute settlement system best serves the interests of WTO members rather than fixating on how to reconstitute the Appellate Body, which would be a grave mistake. Properly addressing erroneous Appellate Body interpretations on a range of critical issues is also essential.

Finally, let me mention that the MC12 outcome document committed WTO members "to conduct discussions with the view to having a fully and well-functioning dispute settlement system accessible to all Members by 2024." Since MC13 is taking place later this month with plenty of running room left in the year, it should not be viewed as a deadline for acting on dispute settlement reform.

A second "must not do" is expanding the misguided TRIPs waiver to COVID-19 therapeutics and diagnostics, as some WTO members (particularly China, India, and South Africa) have urged.

The Ministerial Decision establishing a TRIPS waiver for COVID-19 vaccines also contemplated that WTO members would decide by December 2022 on whether to expand the waiver to cover COVID-19 diagnostics and therapeutics. This deadline passed but has been indefinitely extended. To help inform the U.S. position on a TRIPs waiver expansion, U.S. Trade Representative Katherine Tai requested that the U.S. International Trade Commission (ITC) investigate the issue and report its findings, which the ITC did on October 17, 2023. While the ITC report does not take a position on whether the TRIPS waiver should be expanded to cover COVID-19 therapeutics and diagnostics, it does not make the case that an expansion is warranted or necessary. In fact, the report demonstrates that demand for these products has significantly declined. Opponents of the TRIPS waiver expansion at the WTO – notably, the European Union, Switzerland, the United Kingdom, and Mexico – have also pointed out there this no shortage of COVID-19 treatments, with supply far outstripping demand, and that IP protection is not a barrier to the availability of these products.

At MC13, the Biden Administration should strongly resist any effort to expand the TRIPS waiver to COVID-19 therapeutics and diagnostics. Doing so would disincentivize the significant investments necessary to research and develop life-saving medicines, including medicines needed to respond to future pandemics. I will also note that the PRC has not indicated it will refuse to seek the waiver if extended to cover COVID-19 treatments, a step it would be entitled to take as a self-declared "developing country" at the WTO.

Agriculture

Finally, let me say a few words on agriculture.

During the Trump Administration, the U.S. advocated for a "reset" of agriculture negotiations based on current market realities. To encourage this reset, we submitted numerous analytical papers focused on

market access and tariff issues with the intent of updating the WTO membership's understanding of the state of agricultural trade. In various fora, we asked how the WTO could credibly negotiate disciplines on agricultural domestic support when we do not have a clear picture of what the largest subsidizers in the world are doing. That's why we placed such a great emphasis on the importance of WTO members fulfilling their existing notification obligations and that's why we submitted three counter-notifications on India's market price support programs for wheat, rice, cotton and pulses. We also submitted a proposal aimed at improving transparency in the implementation of domestic support measures. While endorsing domestic support and market access reform, the Biden Administration has also emphasized the need for a "holistic approach" to negotiations on agriculture that would simultaneously encompass all relevant issues.

With WTO members apparently taking the same entrenched and divergent positions in Geneva, it appears that the agricultural outcome at MC13 will be limited to a work program leading up to the next ministerial meeting, MC14. At MC13, there will likely be calls for "more ambition," including specific reduction commitments in domestic support and a permanent solution to public stockholding. In these discussions, the United States should continue to insist on greater transparency and the need to liberalize agricultural trade through lower tariffs and greater market access.

Thank you for this opportunity to share my thoughts with you.