

Saving Toothless Tigers: How Canada Can Defend the WTO

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ABSTRACT

The World Trade Organization (WTO) is facing a legitimacy crisis due to changing power configurations in global politics and rapid economic integration. Dissatisfied with slow progress and outmoded trading rules, the United States (US) has systematically blocked appointments to the Appellate Body of the WTO dispute settlement system, thereby rendering it inoperable. As a middle power, Canada benefits from the rules-based multilateral order, but, as a country dependent on larger players, Canada yields limited influence when it comes to international institutional change. Canada should make an effort to re-engage the US by seeking to appease recent anxieties and show a willingness to take on the task of reimagining a more modern and functional WTO. This paper considers some factors causing the current crisis (including the criticisms of the WTO Dispute Settlement System) and suggests a role Canada can and should take in defence of our ailing system of multilateral trade.

1. INTRODUCTION

The World Trade Organization (WTO) is the international institution that deals with global rules of trade among 164 nations; it seeks to ensure predictable and stable free trade.¹ Additionally, the WTO serves as a dispute resolution forum when trade disputes arise between member states that cannot be resolved by consultation between parties.²

¹ *The Multilateral Trading System – Past, Present and Future* (Geneva: World Trade Organization, 2014) at 7 [Multilateral Trading System]. See also, WTO at https://www.wto.org/english/thewto_e/whatis_e/tif_e/org_6_e.htm.

² See generally, article 4 of the *Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization*, Annex 2, 1869 UNTS 401, 33 ILM 1226 (1994) [DSU], which

Disputes before the WTO are heard first by a panel established by the Dispute Settlement Body (DSB). DSB decisions are appealable to the WTO Appellate Body (AB), which is the highest body of the dispute settlement system (DSS).³ The DSS ultimately promotes cooperation among states and deters the violation of inter-state commitments.⁴ Today, the DSS is the most accepted and frequently-used global, multilevel forum for independent third-party adjudication of

deals with consultations related to WTO member disputes.

³ DSU, *supra* note 3, article 6(1) establishes the DSB, while appellate review is dealt with per articles 16.4 and 17.

⁴ Thomas Sattler, Gabrielle Spilker & Thomas Bernauer, “Does WTO Dispute Settlement Enforce or Inform?” (2013) 44 B J Pol S 877 at 877 – 878 [Sattler et al].

international trade disputes.⁵ Yet, despite its unique value, the United States (US) has consistently blocked the appointment of new AB panel members, and as of November 2020, no members remain.⁶ Meaning the AB is incapable of deciding on appealed panel reports.⁷ The US position is largely based on fears about judicial overreach, lacking judicial transparency, and drawn-out timelines for AB appeals.⁸

Arguably, US concerns with the AB are illustrative of a larger problem facing the entire institution. A lot has changed since the WTO and the trade rules it enforces were established in 1995.⁹ Rapid technological advancement and globalization have spurred unprecedented economic integration and redefined inter-state power dynamics. Yet, multilateral institutions have largely stayed the same, which has stretched their ability to foster inter-state consensus and cooperation.¹⁰

For middle powers such as Canada, which rely on the protection of a rules-based system of trade,¹¹ it

⁵ Ernst-Ulrich Petersmann, “How Should WTO Members React to Their WTO Crises,” (2019) 18 *World Trade Review* 3, at 505 [Petersmann].

⁶ Keith Johnson, “How Trump May Finally Kill the WTO” (9 December 2019) online: *Foreign Policy* <<https://foreignpolicy.com/2019/12/09/trump-may-kill-wto-finally-appellate-body-world-trade-organization/#>>.

⁷ Petersmann, *supra* note 6 at 503.

⁸ Aditya Rathore & Ashu Bajpai, “The WTO Appellate Body Crisis: How We Got Here and What Lies Ahead?” (14 April 2020) *Jurist*, online: <<https://www.jurist.org/commentary/2020/04/rathore-bajpai-wto-appellate-body-crisis/>>.

⁹ *Multilateral Trading System*, *supra* note 2 at 7.

¹⁰ Peter J Loewen & Andrew Potter, “Has Canada Reached Policy Gridlock?” in Tuohy et al (Eds) *Policy Transformation in Canada: Is the Past Prologue?* (Toronto: Toronto University Press, 2019) at 178 [Loewen & Potter].

¹¹ Andrew F Cooper, “The Evolution of Multilateralism in an Intermediate State: The Re-Oriented of Canadian Strategy in the Economic and Security Areas” in Andrew

is important that multilateral trade laws be updated rather than scrapped. In keeping with its historical position as a proponent of rules-based multilateralism, Canada recently created the Ottawa Group to pursue WTO reform and protect the DSS of the WTO through the establishment of a temporary appeals body until reforms occur.¹²

This paper will argue that the WTO should have a role in the current international order, and Canada should take part in reimagining a new system of trade that reflects contemporary state interests. In making this argument, Part 2 highlights the importance of the WTO dispute settlement system. Part 3 discusses the US’ relationship to the WTO, from its creation to its recent response to WTO growing pains. Part 4 similarly considers Canada’s past and present relationship to the WTO, underscoring its connection to the US, which has many congruent interests. Part 5 gives an overview of major changes in the current global order (particularly fluctuating power dynamics and the extensive economic integration) and their implications for the WTO and Canada. Finally, Part 6 considers current reform efforts and offers recommendations to make these more effective.

2. THE SIGNIFICANCE OF THE WTO DISPUTE SETTLEMENT SYSTEM

The WTO dispute settlement system is considered the sole defender of WTO trade rules.¹³ Without it,

Hurrell et al, *Paths to Power: Foreign Policy Strategies of Intermediate States* (Washington: Woodrow Wilson International Center for Scholars, 2000) at 3 [Hurrell et al].

¹² Government of Canada, “Canada and the World Trade Organization (WTO)” (19 January 2021) *Canada*, online: <<https://www.international.gc.ca/world-monde/international-relations-relations-internationales/wto-omc/index.aspx?lang=eng#a2>>.

¹³ Arie Reich, *The Effectiveness of the WTO Dispute Settlement System: A Statistical Analysis* (2017). EUI Department of Law Research Paper No. 2017/11, Bar Ilan University Faculty of Law Research Paper No. 18-01. Available at

WTO members are limited in their ability to enforce the rights and obligations contained in WTO agreements such as the *General Agreement on Tariffs and Trade*¹⁴ (GATT).¹⁵ Thus, the impasse at the AB could render rules aimed at preventing trade protectionism unenforceable.

This section provides an overview of the current WTO dispute settlement system (2.1.) and highlights its successes (2.2.) and criticisms (2.3.).

2.1. Understanding the operations and impact of the WTO's DSS

Between 1947 and 1995, the GATT dispute settlement process evolved from being primarily diplomatic negotiation into an adjudicative system.¹⁶ Today, disputes follow the settlement process set out in the *Understanding on Rules and Procedures Governing the Settlement of Disputes*¹⁷ (DSU). As the highest body in this process, the AB is comparable to the supreme court of Canada.¹⁸

SSRN: <https://ssrn.com/abstract=2997094> or <http://dx.doi.org/10.2139/ssrn.2997094>.

¹⁴ *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1, 33 ILM 1226 (1994) [WTO Agreement].

¹⁵ DSU, *supra* note 3, article 1 states that the WTO dispute settlement system has jurisdiction over disputes arising under all agreements listed in appendix 1, which includes GATT. See also: Tania Voon, "Eliminating Trade Remedies from the WTO: Lessons from Regional Trade Agreements" (2010) 59 *The International and Comparative Law Quarterly*, at 635.

¹⁶ Peter Van den Bossche, *The Law and Policy of the World Trade Organization*, (Cambridge: Cambridge University Press, 2012) at 693 [Van den Bossche].

¹⁷ *WTO Agreement*, *supra* note 15.

¹⁸ Tom Miles, "Long-Outlawed US Trade Policy Wins WTO Approval in Canada Lumber Dispute" (9 April 2019) *Reuters*, online: <https://fr.reuters.com/article/ousivMolt/idUSKCN1RL1V6>.

The WTO has a two-tiered dispute settlement system consisting of a panel and an appeal process.¹⁹ The DSB administers the rules and procedures set out in the DSU, such as creating panels, monitoring panel report adoption and suspending or waving obligations found in WTO agreements.²⁰

WTO disputes begin with a formal request for consultation. If this is unsuccessful, parties may request a panel be established within 60 days of lodging the consultation request.²¹ Parties to a dispute have 20-days following the establishment of a panel to agree on panellists. If no agreement is forthcoming, a panel will be selected by the Director-General.²²

Once the panel is composed, litigation begins. After oral arguments and rebuttals are made, the DSB panel issues an interim report to the parties for comment. After considering comments from the interim report, a final report is issued to parties of the dispute. Final reports are subsequently distributed among all WTO members in their relevant languages. The entire process involves two rounds of a written submission, two-panel meetings and written questions from the panel to the parties. As a general rule, the whole process must be completed within a maximum period of six months from the establishment of the panel.²³

¹⁹ Gregory Shaffer, Manfred Elsig, & Sergio Puig, "Authority of the WTO Appellate Body" (2016) 79 *Law and Contemporary Problems* 237, at 237 [Shaffer et al].

²⁰ DSU, *supra* note 3 article 2.1.

²¹ *Ibid*, article 4.7, "[i]f the consultations fail to settle within 60 days after the date of receipt of the request for consultations, the complaining party may request the establishment of a panel."

²² DSU, *supra* note 5 article 8.7, which requires the WTO director general to consult with the Chairman of the DSB and the Chairman of the relevant council or committee.

²³ *Ibid*, articles 15.1, 15.2, 12 and 12.8. Beyond the six-month general rule, article 12.9 states that "[i]n no case should the period from the establishment of the panel to

Parties to a dispute must appeal a panel report within 60-days of circulation, or it is adopted.²⁴ If appealed, contended panel reports go before the AB for review by set panellists.²⁵ AB panel membership “shall be broadly representative of membership in the WTO,” and members cannot participate in disputes that could “create a direct or indirect conflict of interest.”²⁶ The AB can uphold, modify or reverse the legal findings of a DSB panel. Generally, AB reports are binding and required to be “unconditionally accepted by parties to the dispute” as well as the DSB.²⁷

2.2. *The DSS is a key part of the rules-based multilateral system*

The WTO serves an important role in international trade and should be maintained.

The WTO system promotes stable and predictable free trade among member states by implementing and enforcing trade rules to govern state action.²⁸ For example, it is generally accepted among WTO members that competition law principles, including non-discrimination, procedural fairness, prohibitions of price-fixed cartels, etc.,²⁹ promote innovation, consumer welfare, increased quality of goods and services, and lower product prices.³⁰ While there are benefits of cooperation, there are still incentives to avoid rules and engage in anti-

the circulation of the report to the Members exceed nine months.”

²⁴ *Ibid*, articles 17.4 and 16.4.

²⁵ *Ibid*, article 17.1.

²⁶ *Ibid*, article 17.3.

²⁷ *Ibid*, articles 17.13 and 17.14.

²⁸ *WTO Agreement*, *supra* note 15.

²⁹ Petersmann, *supra* note 6 at 519 – 520.

³⁰ Rita Yi Man Li, et al., “Rationales for the Implementation of Competition law in the EU, the US and Asia: Content Analysis and Data Visualization Approach” (2016) *Asian Journal of Law and Economics* at 2.

competitive behaviours, especially where cooperation is costly. Dispute settlement provides countries with a forum in which sovereign states can call out and rectify broken promises without resorting to the use of force. This promotes interstate cooperation by deterring, discovering, and punishing offenders. Additionally, it helps states to implement their commitments by clarifying complex issues and providing information.³¹

2.3. *Main criticisms of the WTO's DSS, including the AB*

The DSS and AB of the WTO have been criticized for overreach, high costs and long delays. Such criticisms only add to existing WTO member dissatisfaction with the WTO and associated rules due to perceived inequality in the distribution of trade benefits.³²

Overreach by the AB refers to the interpretation of WTO rules beyond what a particular dispute requires. This is problematic given that various rules seem to give WTO members some control over their dispute settlement process. Article 3.2 of the DSU limits AB members from interpreting WTO rules, stating the DSB “cannot add or diminish the rights and obligations provided in the covered agreements.”³³ Article IX.2 of the *Marrakesh Agreement*³⁴ gives WTO Members the “exclusive authority to adopt interpretations” of obligations contained in WTO agreements. These rules were relied on by the Obama administration when it argued that the AB went beyond its

³¹ Sattler et al, *supra* note 5 at 881 and 878.

³² Criticisms of the WTO system fall into three main categories: the ability of WTO members to self-identify as “developing”; the failure of WTO members to notify the WTO of subsidies, i.e., lack of adequate monitoring; and overreach by the Appellate Body: James Smith, “Inequality in International Trade? Developing Countries and Institutional Change in WTO Dispute Settlement” (2004) 11 *Rev of Int'l Political Econ* 3 at 543.

³³ DSU, *supra* note 3.

³⁴ *WTO Agreement*, *supra* note 15.

mandate in several cases involving the US when the AB embellished on the interstate agreements before it. For example, in *Australia-Automotive Leather*, where a DSB panel considered Australian subsidies on car-leather producers and recommended that Australia remove the subsidies and have recipients remit subsidies to the Australian government. Notably, the panel went beyond the remedies requested by the US.³⁵

Additionally, the litigation process must be efficient if the rule of law is to be effective.³⁶ When the WTO was originally negotiated, the appellate mechanism was intended for use in rare circumstances.³⁷ However, the AB has been much more active than originally anticipated.³⁸ Accordingly, there have been substantial delays, with AB reports often being issued well after the 90-day maximum deadline.³⁹

³⁵ Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather* (21 January 2000) WTO Doc, WT/DS126/RW, where it states, “[t]he United States did not agree with every word of the Panel Report. The Panel’s remedy went beyond that sought by the United States.”

³⁶ James Bacchus & Simon Lester, “Trade Justice Delayed is Trade Justice Denied: How to Make WTO Dispute Settlement Faster and More Effective” Free Trade Bulletin No. 75, (20 November 2019) CATO Institute, online: <https://www.cato.org/publications/free-trade-bulletin/trade-justice-delayed-trade-justice-denied>.

³⁷ *Negotiating Group on Dispute Settlement, Communication of Canada* (28 June 1990) MTN GNG/NG13/W/41 at 4. Available online: <https://docs.wto.org/gattdocs/q/UR/GNGNG13/W41.PDF>.

³⁸ WTO, “‘Unprecedented Challenges’ Confront Appellate Body, Chair Warns” (22 June 2018) *World Trade Organization*, online: https://www.wto.org/english/news_e/news18_e/ab_22j_un18_e.htm.

³⁹ DSU, *supra* note 3 article 17.5.

3. US FOREIGN POLICY & CHANGING APPROACH TO MULTILATERAL TRADE

Understanding the current state and future of the multilateral system of trade requires an understanding of its origins within the global multilateral economic system. The WTO is the result of the coordinated effort of its member states to create and maintain a rules-based trade regime.⁴⁰

This part describes the US’ role in establishing the WTO (3.1.) and explains the US’s recent opposition to the system it helped create, including the stance of US President Joe Biden (3.2.).

3.1. Understanding the US’ role in creating a system of multilateral trade

The WTO was established on January 1, 1995, after decades of coordination among sovereign states that would not have been possible without hard-won US support.⁴¹

After World War II, the US accounted for nearly a third of total world production and more than half of global production of manufactured goods.⁴² Though the US was in a position to “sell everything to everyone,” nobody was buying.⁴³ The war had stifled demand for US products (particularly in Europe). Trade liberalization under the provisional GATT offered one solution to the problem of insufficient demand by opening foreign markets.⁴⁴ Accordingly, President Truman dedicated resources under the Marshall Plan to assist Europe’s

⁴⁰ Craig VanGrasstek, *The History and Future of the World Trade Organization* (Geneva: World Trade Organization, 2013) at 3-5 [VanGrasstek].

⁴¹ *Ibid* at 4.

⁴² Rorden Wilkinson, “Measuring the WTO’s Performance: An Alternative Account” (2011) 2 *Global Policy* 1 at 46 [Wilkinson].

⁴³ Clair Wilcox, *A Charter for World Trade* (New York: The MacMillan Company, 1949) at 10-11.

⁴⁴ Wilkinson, *supra* note 43 at 46.

economic recovery by providing financial aid and fostering technological-catch-up.⁴⁵

Although a trade liberalization under a central trade organization meant the dispersion of wealth to prospective export markets, the US congress remained skeptical. Price inflation in the 1920s and the 1930s Great Depression had hurt the agriculture industry in the US and, because of this, the US Congress viewed GATT negotiations as a threat to protectionist US policy aimed at sheltering the agriculture industry.⁴⁶ The result was a selective approach to liberalization, whereby the US-supported trade in sectors it was likely to prosper from trade but not agriculture.⁴⁷

In December of 1945, at the same time GATT was being negotiated, the US State Department released the *Suggested Charter for an International Trade Organization of the United Nations*⁴⁸, which served as the basis for the unsuccessful *Havana Charter*.⁴⁹ Along with importing rules to govern a broad range of commercial trade issues, the *Havana Charter* envisioned a central international trade organization that would, among other things, facilitate, monitor, and uphold trade rules. President Truman asked the US Congress to approve the Charter in 1948 but withdrew his request in 1950 after two years of legislative inaction. By 1955, after nearly a decade of failed attempts to secure Congress' support on GATT reforms, it became clear that the US Congress was unlikely to cooperate with international trade initiatives.⁵⁰

⁴⁵ Sylvia Ostry, "World Trade 50 Years After the Marshall Plan" (1997) 203 *World Economic Affairs* 2 at 46 [Ostry].

⁴⁶ Jane Porter & Douglas Bowers, *A Short History of US Agricultural Trade Negotiations* (New York: 1989) at 5.

⁴⁷ Wilkinson, *supra* note 43 at 47.

⁴⁸ (Washington: Department of State, 1946).

⁴⁹ *United Nations Conference on Trade and Employment* held at Havana, Cuba (New York: Interim Commission for the International Trade Organization, 1948).

⁵⁰ VanGrasstek, *supra* note 41 at 43 - 45.

Fresh efforts to implement a multilateral trade organization in the 1990s gained traction when the US Congress proved amenable to proposals that advanced US interests in areas like intellectual property (IP) and services. From 1986 to 1993, countries negotiated the emerging multilateral trading system in the Uruguay Round, which culminated in GATT transitioning into the WTO. Importantly, rather than giving up, proponents of the new institution determined that coaxing US support might be a matter of striking the right bargain with respect to services and IP, which were (and still are) critically important to the US economy.⁵¹

During the Uruguay Round, US negotiators leveraged the threat of a contrary Congress to pursue universal rules in line with western policy and lessen the risk of trade disputes owing to differences in national policy. As part of its strategy, the US also reserved the right to withhold its consensus until the last moment, which intensified the need to satisfy its objectives in the preparation of the final package.⁵²

It could be said that the Uruguay Round exemplifies the enduring US foreign policy strategy of qualified cooperation, which is the use of its economic and political might to secure US objectives in the development of international law.

3.2. *Blocking Appointments to the AB under Past and Present US Presidents*

On December 10, 2019, reduced to only a single member, the AB lost its ability to function after the US successively blocked the appointment of new AB panel members over several years. Prior to ceasing its function, more than a hundred states relied on the DSS, including all five permanent members of the United Nations Security Council.⁵³

⁵¹ VanGrasstek, *supra* note 41 45 – 46.

⁵² *Ibid* at 63 – 64, and 235.

⁵³ Petersmann, *supra* note 6 at 505.

The US, under the Obama administration, first objected to AB member reappointment with panel member Seung Wha Chang (South Korea).⁵⁴ By objecting, the US made reappointment impossible because WTO member consensus is required for reappointment.⁵⁵ The Obama administration alleged that member Chang violated the DSU⁵⁶ when he modified rights and obligations set out in covered agreements.⁵⁷ The US specifically took issue with ‘moot’ panel findings made in several appellate reports that did not directly relate to the issues being adjudicated, as well as instances where the AB applied a novel approach without a basis for doing so. The US argued that “advisory opinions on legal issues” were inappropriate because the AB “is not an academic body that may pursue issues [that] are of interest to them.”⁵⁸ It was further argued that by making such advisory statements in recommendations, the AB went beyond its mandate⁵⁹ and was “making law” rather than

⁵⁴ *US Statement, supra* note * at 1.

⁵⁵ DSU, *supra* note 3, article 17.2 (providing for reappointment of WTO members) and article 2.4 (requiring a consensus of WTO members for DSB action).

⁵⁶ *Ibid*, article 3.2 states “[r]ecommendations and rulings of the DSB cannot add or diminish the rights and obligations provided in the covered agreements”) and article 19.2 states “[i]n accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.”).

⁵⁷ United States (2019) *Statements by the United States at the Meeting of the WTO Dispute Settlement Body*. Geneva: World Trade Organization at 2 [*US Statements, 2019*].

⁵⁸ *US Statements, 2019, supra* note 58 at 3 – 5.

⁵⁹ It is not the role of panels of the AB to ‘make law’ outside the context of resolving the particular dispute before it: *US-Wool Shirts and Blouses (AB)*, WT/DS33/AB/R & Corr 1, at 19 (where article 3.2 of the DSU, *supra* note 5, is applied and it states “[a] panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute”).

applying WTO agreements. Under President Obama, the US called for a “proper adjudicative approach of the dispute settlement system.”⁶⁰

Since 2016, the US has vetoed the reappointment of AB members and rejected dozens of proposals to initiate selection processes that would fill the vacancies. In November 2017, President Trump blocked a joint proposal from WTO members that urged the DSB to select new AB members.⁶¹ The US indicated that it would not consider launching a selection process while a past member continued to serve.⁶² According to Rule 15 of the *Working Procedures for Appellate Review*, past AB members can continue to serve on appeals with the authorization of the AB.⁶³ The US contests Rule 15, arguing no person can be deemed an AB member for any purpose, absent WTO member consensus.⁶⁴ From January to May 2018, the US rejected four more proposals concerning the appointment of new members, citing the same concern about Rule 15.⁶⁵

In August 2018, the US announced its intention to veto the reappointment of a fourth retiring AB

⁶⁰ *US Statements, 2019, supra* note 58 at 3 and 9.

⁶¹ Appellate Body Appointments, *Proposal by Argentina, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, The European Union, Guatemala, Honduras, Hong Kong, et al.*, (2017) WTO Doc WT/DSB/W/609.

⁶² *Statement by the United States at the Meeting of the WTO Dispute Settlement Body* (Geneva: World Trade Organization, 2017). Available online: <[https://geneva.usmission.gov/wp-content/uploads/sites/290/Nov22.DSB .pdf](https://geneva.usmission.gov/wp-content/uploads/sites/290/Nov22.DSB.pdf)> [*US Statement, 2017*].

⁶³ *Working Procedures for Appellate Review* (16 August 2010) WTO Docs, WT/AB/WP/6, article 15 allows for a member to be deemed to continue as a member for the purpose of continuing to be a Member of the AB.

⁶⁴ *US Statement, 2017, supra* note 63 at 1, referencing DSU, *supra* note 5 article 17.2, which requires WTO member agreement for a single reappointment.

⁶⁵ *Statement by the United States at the Meeting of the WTO Dispute Settlement Body* (Geneva: World Trade Organization, 2018) [*US Statements, 2018*].

member. The concerns raised by President Trump were much broader than his predecessor; in addition to Rule 15 concerns, the US also raised the issues of AB overreach, limiting the power of the US to regulate in the public interest with respect to subsidies, anti-dumping, anti-subsidy duties, barriers to trade and other trade safeguards.⁶⁶

Several WTO member states, including Canada, submitted a second proposal at the December 2018 WTO general council meeting, suggesting the following five DSU amendments:⁶⁷

1. Allow outgoing AB members to continue to serve on hearings that began during their term;
2. Allow parties to agree to a 90-day extension for the issuance of AB panel reports;
3. Require clarification that panel reports cannot consider issues of law and interpretation of domestic, municipal law;
4. Provide that the AB only resolve those issues that are brought before it to the extent that is necessary to resolve the dispute; and
5. Host annual meetings of the AB and DSB where members may discuss the AB's jurisprudence.

The US rejected these proposals outright and without providing an explanation or recommendation.⁶⁸ The US rejected two further

requests for a selection process made in April⁶⁹ and June⁷⁰ of 2019, by which time six of the seven AB seats had been vacated.⁷¹

Arguably, the US' unwillingness to engage with proposals for reform and AB member selection offends article 17.2 of the DSU, which states that "[v]acancies shall be filled as they arise."⁷² The US has not responded to the issue of whether it is violating this section of the DSU, though it could be noted that the US Ambassador Dennis Shea acknowledged that the term 'shall' imposes a mandatory obligation when used in other contexts of the DSU.⁷³

The proper functioning of the AB is particularly important for the US, which has received a quarter of all WTO disputes. The passing of the presidency from Trump to Joe Biden sparked optimism about the end of AB impasse. While the new Biden administration confirmed the importance of ending WTO impasse on January 29th, 2021,⁷⁴ it has since taken a similar approach to the previous Trump administration. On March 19th, 2021, the US appealed another DSB recommendation, which

⁶⁶ *Ibid* at 37 - 38.

⁶⁷ *Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore and Mexico to the General Council* (11 December 2018) WTO Doc WT/GC/W/752/Rev.2. at 1 – 2.

⁶⁸ *US Statements, 2018, supra* note 66 at 44.

⁶⁹ *Appellate Body Appointments, Proposal by Argentina, Australia, Benin, et al* (16 April 2019) WTO Docs WT/DSB/W/Rev10.

⁷⁰ *Appellate Body Appointments, Proposal by Argentina, Australia, Benin, et al* (24 June 2019) WTO Docs WT/DSB/W/609/Rev11.

⁷¹ *US Statements, 2019, supra* note 58.

⁷² DSU, *supra* note 3.

⁷³ *US Mission to International Organizations in Geneva, Statements Delivered by Ambassador Dennis Shea – WTO General Council Meeting* (23 July 2019) online: <<https://geneva.usmission.gov/2019/07/23/statements-delivered-by-ambassador-dennis-shea-wto-general-council-meeting-july-23-2019/>> [Shea].

⁷⁴ Doug Palmer, "Biden Administration Joins for 'Swift Appointment' of New WTO Head" (29 January 2021) *Politico*, online: <<https://www.politico.com/news/2021/01/29/biden-world-trade-organization-463820>> [Palmer].

related to duties imposed on South Korea under Barack Obama, thereby pushing the matter into legal limbo with nearly 18 other DSB decisions.⁷⁵ As of June 2021, no consensus has been reached with respect to the WTO's AB, and the crisis shows no sign of abating soon.⁷⁶

4. CANADA'S ROLE IN INTERNATIONAL RELATIONS: THEN AND NOW

Canada is often referred to as a 'middle power' by academics,⁷⁷ which is a non-legal term that is often used to describe the position of small powers that have relatively more influence than their peers.⁷⁸ The concept has its roots in the notion that smaller powers could gain predominance depending on their relevance, contribution, and capacity, i.e. their importance to greater powers.⁷⁹ Canada has

⁷⁵ Reuters Staff, "US Appeals WTO Decision in South Korea Trade Dispute, Official Says" (19 March 2021) *Reuters*, online: <<https://www.reuters.com/article/us-trade-wto/u-s-appeals-wto-decision-in-south-korea-trade-dispute-idUSKBN2BB0XD>>.

⁷⁶ Eleanor Wragg, "Slim Chances for the WTO Appellate Body Despite US Return to Multilateralism" (3 March 2021) *Global Trade Review*, online: <<https://www.gtreview.com/news/americas/slim-chances-for-the-wto-appellate-body-despite-the-us-return-to-multilateralism/>>.

⁷⁷ For an early discussion of the theory of middle power status, see generally: David Vital, *The Inequality of States: A Survey of the Small Power in International Relations* (Oxford: Clarendon Press, 1967). See also, John W Holmes, "Canada as a Middle Power" (1966) 10 *The Centennial Review* 4 at 433, where he states that the phrase 'middle power' "originally implied a power of medium strength, but it began to develop also the connotation of a middle or mediatory position in conflicts. [...] The term has no meaning in international law; it is an expression of convenience."

⁷⁸ Adam Chapnik, "The Canadian Middle Power Myth" (2000) 55 *Intern'l J* 2 at 188 [Chapnik], arguing the concept of middlepowermanship was created to "justify the attainment of disproportionate influence in international affairs."

⁷⁹ This is often referred to as the "functional principle": Denis Stairs, "Of Medium Powers and Middling Roles"

historically attracted additional influence because of its functional importance to the US,⁸⁰ which has diminished in recent years.⁸¹ This part describes Canada's role in establishing the WTO (4.1.) and explains the Canada-US trade relationship (4.2.) and how it impacts Canada's foreign policy (4.3.).

4.1. Canada's role in the creation of the WTO

As an important US ally, Canada played a crucial role in gaining US support for the WTO.

In 1990, Canada and Europe initially proposed a new international trade organization ("ITO"), which later translated into the WTO.⁸² This initial proposal reflected Canadian and European concerns that the provisional GATT regime was too weak and fragmented to adequately enforce disciplines on certain new issues. Ultimately, it fell to Canada to put forward the proposal because its special importance to the US and unassuming reputation meant it was the least likely state to be met with an automatic objection.⁸³

Canada also led attempts to work out an internationally agreed definition on subsidies, and improved disciplines on countervailing duties use.⁸⁴ The ITO proposal would later pave the way for the WTO, showing the importance of initiative and big ideas when it comes to achieving systemic change. It is important to remember that "the multilateral trading system could never have been built if it had

in Ken Booth (Ed) *Statecraft and Security: The Cold War and Beyond* (Cambridge: Cambridge University Press, 1998).

⁸⁰ Chapnik, *supra* note 79 at 188.

⁸¹ Ted Mellnik & Aaron Williams, "Is Canada 'Ripping Us Off'? Or is it The Best US Trade Partner?" (21 September 2018) *The Washington Post*, online: <<https://www.washingtonpost.com/graphics/2018/business/us-canada-trade-balance/>>.

⁸² Ostry, *supra* note 46 at 47.

⁸³ VanGrasstek, *supra* note 41 at 49 and 58.

⁸⁴ Hurrell et al, *supra* note 12 at 5.

not first been imagined.”⁸⁵ This narrative is illustrative of Canada’s historical multilateral diplomacy style as an ‘activist insider,’ which refers to its enhanced capacity to coordinate and facilitate international cooperation as a valuable ally and unassuming enemy.⁸⁶ Additionally, it ought to inform Canada’s response to the current WTO crisis and the need to re-imagine the AB.

4.2. Understanding the Canada-US trade relationship and its impact on trade policy

Throughout its history, Canada’s relationship with the US has been fraught with the conflicting desires to create closer economic ties and remain at a safe distance.⁸⁷ Regardless of Canada’s policy hopes, the reality is that Canada must carefully maintain its long-standing ties with the US, even as it canvasses new emerging trading partners.

Canada and the US share close ties economically, culturally, and even geographically. In 2020, an estimated CAD\$2 billion worth of trade was conducted between Canada and the US daily.⁸⁸ As of 2019, 75 percent of all Canadian exports went to the United States.⁸⁹ Accordingly, Canadian trade policy is, has been, and will be limited by the need to please our largest trading partner.⁹⁰ First and

foremost, Canadian foreign policy must protect this long-standing goodwill.

While deep economic integration between the two countries has clear benefits, it also leaves Canada, as the smaller party, more vulnerable to domination.⁹¹ To manage this risk Canada negotiated trade rules established in the 1994 *North American Free Trade Agreement* (NAFTA).⁹² Regional trade agreements, like NAFTA, are one way to set boundaries between asymmetrical state powers. In fact, international law is largely thought to level the playing field by replacing a power-based system with a rules-based system.⁹³ Axiomatically, Canada has a strong incentive to establish rules to check disproportionate US power. Unsurprisingly, Canada has been a staunch supporter of rules-based trade and the WTO. Similarly, it continues to negotiate new free trade agreements (FTAs) (recently with the EU and Ukraine) and renegotiate old ones (like NAFTA).⁹⁴

Negotiating rules and standards has always been Canada’s best policy tool when it comes to managing friendly and effective relations with the US. Softwood lumber provides a great example of

⁸⁵ VanGrasstek, *supra* note 41 at xiii and 3.

⁸⁶ Hurrell et al, *supra* note 12 at 4.

⁸⁷ Blayne Haggart, “Canada and the United States: Trade, Investment, Integration and the Future” (2 April 2001) Economics Division, online: <<http://www.publications.gc.ca/Collection-R/LoPBdP/BP/prb013-e.htm>>.

⁸⁸ Loprespub, “The Movement of Goods and People In and Out of Canada in a COVID-19 World” (3 April 2020) *Library of Parliament*, online: <<https://hillnotes.ca/2020/04/03/the-movement-of-goods-and-people-in-and-out-of-canada-in-a-covid-19-world/>>.

⁸⁹ Loewen & Potter, *supra* note 11 at 178.

⁹⁰ Laura Dawson & Sean Speer, *Commentary: Managing the Canada-US Relationship From the Honeymoon to*

the Long-Term (Ottawa: Macdonald-Laurier Institute, 2016) at 4 [Speer & Dawson].

⁹¹ Loewen & Potter, *supra* note 11 at 178.

⁹² *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can TS No 2 (entered into force 1 January 1994) [NAFTA].

⁹³ Daniel W Drezner, “The Power and Peril of International Regime Complexity” (2009) 7 *Perspectives on Pol* 65 at 65, where it states “[b]y creating focal points and reducing the transaction costs of rule creation, institutions can shift arenas of international relations from power-based outcomes to rule-based outcomes.”

⁹⁴ *Canada-European Union Comprehensive Economic and Trade Agreement Implementation Act*, SC 2017, c 6; *Canada-Ukraine Free Trade Agreement Implementation Act*, SC 2017, c 8; and, *Canada-United States-Mexico Agreement Implementation Act*, SC 2020, c 1.

how issues are more likely to arise absent rules. The softwood lumber sector, which is excluded from trade agreements, has been a source of bilateral trade issues between Canada and the US for decades.⁹⁵ Disagreement centres on set Canadian stumpage fees⁹⁶ on lumber exports that the US argues are an unfair subsidy because they are lower and more predictable than stumpage fees paid by US producers, which are determined at auction.⁹⁷ The negotiation of the 2006 *Softwood Lumber Agreement* stabilized the softwood lumber trade until 2015, when it expired, and it has yet to be replaced.⁹⁸

It should be noted that even where the AB rules are in Canada's favour, enforcement is not a guarantee, and in instances where countries depart from obligations established in AB rulings, trade relations take on a sharper political push and pull. An example of this can be seen in the 2012 Canada-US country of origin labelling (COOL) dispute, which involved the US blocking Canadian meat imports (mostly beef and pork) following a US COOL mandate. Canada challenged the mandate arguing it was particularly onerous for Canadian producers and unfairly impacted trade by reducing the value and number of cattle and hogs shipped to the US.⁹⁹ Though Canada's challenge was successful, it did little to curb congress.¹⁰⁰ Following a subsequent Canadian application, the

WTO sanctioned retaliatory tariffs on select US imports.¹⁰¹

The mandate was not rescinded until the Canadian government imposed a list of well-planned and sophisticated retaliatory tariffs targeting key industries important to districts represented by congressional leaders.¹⁰² This example illustrates the potential for states to engage in reciprocal trade maneuvers that can have far-reaching political and economic implications. In comparison, adherence to multilateral trade rules and rulings improves stability and cooperation.

4.3. *What Canada's foreign policy history says about future foreign policy decisions*

As described above, Canada benefits immensely from trade with the US and from established multi- or bi-lateral rules that set limits and safeguards on this relationship, among others. It is important that Canada not lose either its relationship with the US or the tools to manage it.

While Canada is not innocent of protectionism,¹⁰³ the dominant theme in Canadian trade policy history is the promotion of a binding rules-based multilateral system.¹⁰⁴ The degree of a country's support for international law can be measured by the level of its compliance.¹⁰⁵ However, the fact that Canada does not have a perfect record of compliance with multilateral laws should not

⁹⁵ Ronald J Wonnacott, "2006-1 The Softwood Lumber Dispute: A Proposal" (2006) Economics Policy Research Institute Working Paper at 1 [Wonnacott].

⁹⁶ These are fees producers must pay to the provincial government to cut logs on Crown Lands.

⁹⁷ Wonnacott, *supra* note 96 at 5 – 6.

⁹⁸ Speer & Dawson, *supra* note 91 at 5.

⁹⁹ *United States – Certain Country of Origin Labelling (COOL) Requirements (Complaint by Canada)*, WTO Doc WT/DS384/AB/R (2012) at paras 7.265 – 7.266.

¹⁰⁰ Speer & Dawson, *supra* note 91 at 9.

¹⁰¹ *United States-Certain Country of Origin Labelling (COOL) Requirements (Complaint by Canada)* (2013), WTO Doc WT/DS384/26.

¹⁰² Speer & Dawson, *supra* note 91 at 9.

¹⁰³ *Ibid* at 7.

¹⁰⁴ Hurrell et al, *supra* note 12 at 4.

¹⁰⁵ Jana von Stein, "The Engines of Compliance" in Dunoff & Pollack (Eds), *Interdisciplinary Perspectives on International Law and International Relations* (Cambridge: Cambridge University Press, 2013) at 478.

detract from its historical efforts to implement a multilateral rules-based system.¹⁰⁶

Furthermore, despite Canada's attempts to diversify its trading partners, for example, with China or India, the ongoing economic and political importance of the US cannot be understated. Additionally, given that the US has a greater ability to leverage its interests, which are often aligned with those of Canada, the loss of US support means the loss of a powerful ally and advocate.¹⁰⁷

5. EFFECTS OF A CHANGING GLOBAL ORDER ON THE WTO AND CANADA

Since the end of WWII, China and other developing nations have risen in economic and political importance alongside a slight inverse US decline.¹⁰⁸ Navigating fluctuating power balances and deepening economic integration are major challenges, not only for small and medium-sized countries but also for the multilateral trade regime.¹⁰⁹ This part describes the broader implications of a changing global order on Canada and the WTO, considering changing power dynamics (5.1) and integrating forces such as technology and global value chains (5.2).

5.1. Canada and the WTO in a changing global power landscape

The current deadlock of the AB is only one symptom of a general trend towards non-

cooperation in international trade and relations.¹¹⁰ Today, global power structures have evolved significantly from what they were during the Uruguay Round negotiations, which has resulted in a gap between largely static WTO trade rules and present realities.¹¹¹

The extent and impact of China's, and other BRICs countries', growth is still unclear. What is clear, however, is that power poles are shifting, rendering the future of multilateral trade uncertain. Importantly, power dispersion and redistribution exacerbate collective action problems, the complexity of negotiations and the challenges involved in concluding new agreements.¹¹²

Decision-making at the WTO requires consensus, so that any member has veto power over a negotiated outcome. As state-interests diverge, consensus becomes more difficult to achieve. Today, emerging powers are mainly concerned with sector-specific trade interests. Meanwhile, established economies have more trade concerns such as those relating to state-owned enterprises, domestic industrial subsidy regimes, intellectual property, and investment.¹¹³ Unfortunately, discord among members pursuing incongruent interests leaves outmoded trade rules frozen and adds to frustration with the system's ability to serve members' diverse interests.¹¹⁴

For Canada, changing power dynamics and trends toward regional and bilateral FTAs¹¹⁵ means

¹⁰⁶ Mark Pollack, "Who Supports International Law, and Why?: The United States, the European Union, and the International Legal Order" (2015) 13 I Con 13 at 880, where it states "states may undertake significant efforts to implement deep and demanding international agreements, [...], but fall short of full compliance."

¹⁰⁷ Speer & Dawson, *supra* note 91 at 5 and 11.

¹⁰⁸ Stephen G Brooks & William C Wohlforth, "The Rise and Fall of the Great Powers in the Twenty-First Century: China's Rise and the Fate of America's Position" (2016) 40 Int'l Security 3 at 7.

¹⁰⁹ *Ibid* at 12.

¹¹⁰ Robert McDougall, *Crisis in the WTO: Restoring the WTO Dispute Settlement Function* (2018) Center for International Governance Innovation Papers No 194 at 1.

¹¹¹ Matthew D Stephen & Michal Parížek, "New Powers and the Distribution of Preferences in Global trade Governance: From Deadlock and Drift to Fragmentation" (2019) 24 New Political Econ 6 at 736 [Stephen & Parížek].

¹¹² *Ibid* at 747 – 748.

¹¹³ *Ibid* at 748.

¹¹⁴ Stephen & Parížek, *supra* note 112 at 748 – 749.

¹¹⁵ *Ibid* at 750.

assessing trading patterns and attracting new trading partners. For example, improving the bilateral Canada-China relationship has been a priority of the Justin Trudeau government. Nevertheless, Canada cannot afford to pursue ties with China over those with the US since US ties run too deep and are too crucial to risk.¹¹⁶

5.2. The broader implications of advancing technology and GVCs

Trade liberalization benefits consumers and corporations by facilitating the movement of capital, which promotes growth and investment.¹¹⁷ A shift away from interconnected to localized economies means real losses in gross domestic product and market volatility, as lost access to diverse international sourcing and sales forces domestic markets to absorb economic shocks.¹¹⁸

Canada historically exported its abundant natural resources and imported finished products.¹¹⁹ This changed with the growth of intra-industry trade and the unbundling of the production process.¹²⁰ By

allowing countries to leverage their competitive advantages in different production stages, unbundling into global value chains (GVCs) drastically increased the economic gains from trade.¹²¹ Additionally, GVCs make MNEs increasingly vulnerable to international political, social and economic strife.¹²² Accordingly, globally integrated national economies are also more vulnerable to issues taking place beyond their borders.¹²³ Nearly 40 percent of Canadian exports flow through GVCs, meaning that many Canadian export industries are exposed to global shocks.¹²⁴

Technology has drastically improved the speed and cost of international travel and communication.¹²⁵ Today, new technologies have transformed old industries (e.g., communications, auto, and textiles) and given rise to new ones (e.g., biomed and

¹¹⁶ Jeremy Paltiel, “Facing China: Canada Between Fear and Hope” (2018) 73 Int’l J 3 at 352 and 357 [Paltiel].

¹¹⁷ Michel Poitevin & Luc Vallee, “Trade and COVID-19: The Evolution of the Import-Export Balance is Silent as to the Benefits of Free Trade” (9 June 2020) *The Globe and Mail*, online: <<https://www.theglobeandmail.com/business/commentary/article-trade-and-covid-19-the-evolution-of-the-import-export-balance-is/>>.

¹¹⁸ OECD, “Shocks, Risks and Global Value Chains: Insights from the OECD METRO Model” (June 2020) *OECD*, online: <<http://www.oecd.org/trade/documents/shocks-risks-gvc-insights-oecd-metro-model.pdf>> at 10 [OECD 2020].

¹¹⁹ Remarks by Timothy Lane, “How Canada’s International Trade is Changing with the Times” (18 September 2017) *Bank of Canada*, online: <<https://www.bankofcanada.ca/wp-content/uploads/2017/09/remarks-180917.pdf>> at 2.

¹²⁰ Richard Baldwin, “Trade and Industrialization after Globalization’s Second Unbundling: How Building and

Joining a Supply Chain Are Different and Why it Matters” in *Globalization in an Age of Crisis: Multilateral Economic Cooperation in the Twenty-First Century* (Cambridge: National Bureau of Economic Research, 2013) at 168, where it states that before the 1980s “international competition [occurred] mainly at the level of sectors (say, Japanese versus Thai cars). In the second unbundling, (Post- 1985), international competition occurs at a finer degree of resolution – the level of production stages.”

¹²¹ Patrick Alexander, *Staff Working Paper: Vertical Specialization and Gains from Trade* (Ottawa: Bank of Canada, 2017) at 2.

¹²² Canada, *Canada’s State of Trade* (Ottawa: Global Affairs Canada, 2020) at 51 [*State of Trade*] (GVCs also benefit MNEs by improving access to knowledge, talent, and less expensive resources and labour).

¹²³ “GVCs” refer to unbundled production processes in which goods criss-cross national borders before being ready for final export: OECD 2020, *supra* note 119 at 2.

¹²⁴ Desjardins, “The Evolution of Global Value Chains and Their Economic Implications” (2019) *Desjardins, Economic Studies* at 2. Available online: <<https://www.desjardins.com/ressources/pdf/pv190514-e.pdf>>.

¹²⁵ Van den Bossche, *supra* note 24 at 3.

artificial intelligence).¹²⁶ The value of technology in trade cannot be understated as it allows both developed and developing countries to compete in the global market. Accordingly, technology has become a major sticking point of international discord.¹²⁷

With technology and GVCs marching forward at an alarming pace and quickly outpacing outdated trade rules, disputes are becoming more likely, harder to avoid and capable of causing steeper injury. Accordingly, maintaining multilateral dispute resolution should be a priority.

6. CANADA'S SUPPORT OF THE WTO, MORE IMPORTANT NOW THAN EVER

Today, the rules of multilateral trade and the willingness (and capacity) to enforce them are eroding.¹²⁸ Changes in technology and the structure of the global economy have disrupted national economies and societies, resulting in concerns about the unequal distribution of trade benefits, which current rules are ill-equipped to adequately address.¹²⁹ In recent years, there have been a number of proposals for WTO reform, some of which have even called for the institution's abandonment.¹³⁰ This paper focuses on Canada's role in the needed reform of the WTO's DSS.¹³¹

¹²⁶ Xie Fuzhan, "The New Industrial Revolution, Global Governance Reshaping and Multilateralism" (2019) 14 *China Economist* 6 at 2 – 3.

¹²⁷ Stephen & Parízek, *supra* note 115 at 748.

¹²⁸ Paltiel, *supra* note 117 at 351.

¹²⁹ *Strengthening and Modernizing the WTO: Discussion Paper (Canada)*, (2018) JOB/GC/201 at 1 [*Modernizing the WTO*].

¹³⁰ E.g., Jean-Pierre Cling, "The Future of Global Trade and the WTO" (2014) 16 *Institut National de la Statistique et des Études Économiques* 2 at 112.

¹³¹ *Modernizing the WTO*, *supra* note 130 at 1.

Canada is a supporter of progressive WTO reform.¹³² In fact, Canada has spearheaded the Ottawa Group, a group of WTO members that are collaborating to find ways of addressing some of the larger issues currently facing the WTO. This part will consider how Canada is responding to current reform needs (6.1.) and how efforts might be enhanced going forward (6.2.).

6.1. Appreciating Canada's contributions to WTO reform discussions

An inoperable AB threatens the entire DSS, but resolving this issue requires institutional reform addressing concerns relating to changing power dynamics and new global realities.¹³³ This paper focuses on the reform of the DSS and not the institution. However, without such reform, an operative AB may eventually become moot. Effective reform of the WTO's DSS must address issues relating to state sovereignty and AB function and efficiency.¹³⁴

Canada has made several recommendations aimed at resolving AB-impasse at the WTO.¹³⁵

Firstly, Canada suggested that mechanisms be introduced to provide both binding and non-binding guidance to adjudicative bodies on politically charged issues.

Secondly, Canada proposed the recommended systemic and procedural steps aimed at improving AB transparency and efficiency, which are:

- Narrow the primary objective of the DSS to the specific dispute before it.
- Narrow the standard of review to legal issues rather than findings of fact or domestic law.

¹³² WTO, *Trade Policy Review - Canada*, (17 April 2019) WT/TPR/S/389 at 10.

¹³³ *Ibid* at 3.

¹³⁴ *Modernizing the WTO*, *supra* note 130 at 3.

¹³⁵ *Ibid* at 3-4.

- Allow for the expression of minority views and restrict the issuance of overbroad rulings.
- Develop guidance for party consultation when the AB cannot meet its mandated deadlines.

Thirdly, aging or outmoded trading rules along with proliferating GVCs and rapidly advancing technology have increased the complexity of disputes now coming before the AB. In response to this issue, Canada has suggested diverting certain issues to alternative mechanisms, such as mediation, or excluding them from the jurisdiction of WTO adjudicators altogether. It also recommended streamlining adjudicative procedures to be flexible to certain types of disputes.

To date, the mission statement of the Ottawa Group is to consult with WTO members and achieve effective institutional reform, but the group has yet to table a proposal for long-term AB reform.¹³⁶ In the meantime, Canada along with other WTO Members have established a temporary *Multi-Party Interim Appeal Arbitration Arrangement*¹³⁷ (“MPIA”) to allow for binding two-stage dispute settlement among willing WTO members until the AB resumes operations.¹³⁸ Many features of the AB were carried into the functions of the MPIA, which

became operational in late April 2020,¹³⁹ with a few notable changes:¹⁴⁰

1. To address concerns about judicial overreach, the MPIA imports a narrower scope of review.¹⁴¹ Article 9 of the MPIA states “arbitrators may uphold, modify, or reverse the legal findings of the panel” and any “findings which have not been appealed shall be deemed to form an integral part of the arbitration award.”¹⁴²
2. the MPIA imports an adapted arbitrator selection process. Politicization of the selection process of new AB members threatens the independence, legitimacy, and authority of the overall dispute settlement system. Today, the personal and political biases of candidates AB, and now MPIA, members are carefully scrutinized.¹⁴³ To address concerns about bias, appeals to the MPIA will be heard by a panel of three arbitrators selected from a pool of ten standing arbitrators.¹⁴⁴ The pool of arbitrators will consist of qualified persons who are not affiliated with any government and who are barred from participating in disputes that may create a conflict of interest.¹⁴⁵
3. The process for vetting candidates for the standing pool of arbitrators begins with

¹³⁶ Government of Canada, “Joint Communiqué of the Ottawa Ministerial on WTO Reform Group Meeting in Davos” (24 January 2019) Canada, online: <https://www.international.gc.ca/world-monde/international_relations-relations_internationales/wto-omc/2019-01-24-davos.aspx?lang=eng>.

¹³⁷ Annex 1, *Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU* (dated 30 April 2020) JOB/DSB/1/Add.12 [MPIA].

¹³⁸ *Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes*, JOB/DSB/1 (dated 8 July 2016) at art 1 [*Communication on MPIA*].

¹³⁹ DSU, *supra* note 3 at article 25(1).

¹⁴⁰ Ali Amerjee, “The Multiparty Interim Appeal Arbitration Arrangement: Will the US Be Missed?” (8 July 2020) *Linklaters*, online: <<https://www.linklaters.com/en/insights/blogs/tradelinks/2020/july/the-multiparty-interim-appeal-arbitration-arrangement-will-the-us-be-missed>> [Amerjee].

¹⁴¹ Amerjee, *supra* note 141.

¹⁴² MPIA, *supra* note 138 at article 9.

¹⁴³ Manfred Elsig & Mark Pollack, *Agents, Trustees, and International Courts: Nomination and Appointment of Judicial Candidates in the WTO Appellate Body* (2014) 20 Eur J Int; Rel 391, at 404-407.

¹⁴⁴ MPIA, *supra* note 138 at article 7

¹⁴⁵ *Communication on MPIA*, *supra* note 139 at para 4.

participating members nominating candidates¹⁴⁶ for a pre-selection process¹⁴⁷ to ensure fitness for the role.¹⁴⁸ While the MPIA purports to conduct a pre-selection process, this paper suggests that more transparency as to the backgrounds of nominees should be reviewed during the pre-selection process to eliminate the risk of bias.

4. Decisions of the MPIA will preserve the 90-day timeline for appeals but include some additional measures aimed to improve procedural efficiency. This includes setting limits on the length and number of hearings required and instituting a page limit for decisions.¹⁴⁹ The MPIA also has the authority to exclude claims relating to assessments of facts (under article 11 of the DSU¹⁵⁰). Whether these efficiency measures will be effective remains to be seen.

6.2. Recommendations for enhancement of Canadian contributions to the reform

Canada has been a subtle but strong force in the creation of the multilateral system. Today, action by intermediate powers is more important than ever. While Canada has taken some steps to utilize its influence, including establishing the Ottawa Group, there is room for more action.¹⁵¹ In particular, Canada should provide a more detailed proposal that reflects the importance of re-engaging the US

and ensuring that any reform proposals are attractive to the US Congress.

While the provisional MPIA has implemented some mechanisms to address the major concerns associated with judicial overreach, transparency, and timing,¹⁵² as a temporary body, the MPIA serves as a band-aid solution to AB gridlock. Particularly given that not all WTO countries are participating in the MPIA, including the US, Japan, and South Africa. Japan has indicated mistrust as to whether the MPIA would serve the purpose proponents claim, while South Africa cited concerns that the success of the MPIA might thwart AB reform. On its part, the US expressed its view that the MPIA does not cure issues of which it has long complained. New practices instituted by the MPIA may prove their value in practice and assist with AB resurrection.¹⁵³ Yet, without participation by WTO members, especially the US, the effectiveness of the MPIA will be limited.¹⁵⁴

A main Canadian objective should be to re-engage the US in WTO reform discussions. It has been argued that the exit of the US and other large powers from the dispute settlement system puts the entire system at risk of unravelling.¹⁵⁵ While it is true that cooperation from the US would facilitate WTO improvements and the creation of a more workable dispute settlement system,¹⁵⁶ US involvement has even greater ramifications for Canada. First, because WTO safeguards offer some protection against the domination of the bilateral trade agenda by the US, which would be difficult to

¹⁴⁶ Annex 2, *Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU* (dated 30 April 2020) JOB/DSB/1/Add.12 at article 1 (which can include nomination of current or former AB members).

¹⁴⁷ *Ibid* at article 3.

¹⁴⁸ *Ibid*, to be eligible for the standing panel, arbitrators must have expertise in law, international trade and the subject matter of the relevant agreements.

¹⁴⁹ MPIA, *supra* note 138 at article 12.

¹⁵⁰ Article 11 of the DSU, *supra* note 5 makes it the responsibility of the Dispute Settlement Body, rather than the appellate body, to make findings of fact.

¹⁵¹ Ostry, *supra* note 46 at 47.

¹⁵² *Communication on MPIA*, *supra* note 139.

¹⁵³ Mariana de Andrade, "Procedural Innovations in the MPIA: A Way to Strengthen the WTO Dispute Settlement Mechanism" (2019) 63 *Questions of International Law* at 122.

¹⁵⁴ Amerjee, *supra* note 141.

¹⁵⁵ Shaffer et al, *supra* note 27 at 270.

¹⁵⁶ Larry Bridwell, "Can the World Trade Organization Reorganize Without the United States of America?" (2020) 28 *JCS* 1 at 48.

negotiate in bilateral agreements otherwise, second, as previously mentioned, Canada must maintain goodwill with the US as its most important trading partner.¹⁵⁷

Proponents of AB reform should re-propose reform suggestions to the Biden administration, which has indicated more willingness to engage once pressing domestic pandemic concerns subside.¹⁵⁸ The Ottawa Group has an opportunity to – and should – prepare an invigorated proposal that addresses US concerns and is attractive to US Congress. Such a Canadian proposal would be complemented by Canada’s role as an intermediary, as was the case in the 1990s.¹⁵⁹

To attract the US Congress, proponents of the WTO could consider including institutional reform options into their proposal. Particularly, with respect to reforms that cater to larger US trade concerns, such as intellectual property. For example, in rejecting reform proposals, US ambassador Dennis Shea called for a “broad-based solution” and specifically cited US opposition to countries self-identified as “developing” seeking involuntary technology transfers unfairly.¹⁶⁰

Unlike the US, which is powerful on its own, the WTO and other international institutions have traditionally been the source of influence for Canada and other intermediate states.¹⁶¹ Canada should seek to maintain trade rules that reflect current realities impacting trade policy strategies, including the role of technology, GVCs and the need to balance new ties with burgeoning economies with old (and vital) ties with the US.¹⁶² Reform options proposed should appeal to the US,

without compromising Canada’s ability to foster stronger ties with other emerging powers.

7. CONCLUSION

As the dynamics of trade continue to evolve with technology and other forces, the need for a rules-based system of trade governed by a central body is only more pressing. This is particularly true for Canada, which is an open economy dependent on stable and predictable international trade.¹⁶³ This paper provided a roadmap of the past and current direction of the global system of multilateral trade and the WTO within it. Lessons learned from the creation of the WTO, adapted to reflect current realities, should be used to inform Canada’s response to the current crises before the WTO, particularly the AB member appointment gridlock. Going forward, Canada should make a concentrated effort to re-engage the US by seeking to appease recent anxieties and show a willingness to take on the task of reimagining and proposing a more modern and functional WTO.

¹⁵⁷ Paltiel, *supra* note 117 at 357.

¹⁵⁸ Palmer, *supra* note 75.

¹⁵⁹ VanGrasstek, *supra* note 41 at 49.

¹⁶⁰ Shea, *supra* note 74.

¹⁶¹ Hurrell et al, *supra* note 12 at 3.

¹⁶² Paltiel, *supra* note 117 at 350.

¹⁶³ Ng, “Minister’s Message” in *Canada’s State of Trade 2020*, *supra* note 123.

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