
Centre for International
Governance Innovation

CIGI Expert Consultation on WTO Reform

Special Report: Spring 2019



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Our research initiatives focus on governance of the global economy, global security and politics, and international law in collaboration with a range of strategic partners and have received support from the Government of Canada, the Government of Ontario, as well as founder Jim Balsillie.

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About the Report

This report results from expert consultations on the topic of World Trade Organization reform organized by the Centre for International Governance Innovation (CIGI) in the spring of 2019. The consultations were led by Oonagh Fitzgerald, director of International Law; Bob Fay, director of Global Economics; and Hugo Perezcano-Díaz, then deputy director of International Economic Law, with contributions from numerous internal and external CIGI fellows. With input and guidance from the CIGI leadership team, then CIGI Senior Fellow Robert McDougall was tasked with synthesizing the notes and recordings of the various consultation sessions to produce a report summarizing the feedback received through the expert consultations. Inquiries about the report should be directed to Oonagh Fitzgerald at ofitzgerald@cigionline.org or 1-519-885-2444, ext. 7207.

About the Rapporteur

At the time this report was prepared, **Robert McDougall** was a senior fellow at CIGI, researching issues related to World Trade Organization (WTO) reform. Prior to this, Robert spent 15 years as an international trade lawyer at Global Affairs Canada (formerly Foreign Affairs and International Trade Canada), during which time he provided trade law advice and litigated disputes before the WTO. As permanent delegate to the WTO for five years, he was Canada's representative to the Dispute Settlement Body, to negotiations to improve the dispute settlement system and in many disputes involving Canada. Previously, as Canada's permanent delegate to the Organisation for Economic Co-operation and Development in Paris, he represented Canada in activities relating to trade, agriculture, science, technology and industry, including major initiatives on innovation, the digital economy and green growth. In August 2019, Robert returned to Global Affairs Canada as legal counsel in the Trade Law Bureau.

About International Law

CIGI strives to be a leader on international law research, with recognized impact on significant global issues. Using an integrated multidisciplinary research approach, CIGI provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law. The goal is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future.

Abbreviations and Acronyms

BRI	Belt and Road Initiative
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
FTAs	free trade agreements
IMF	International Monetary Fund
IP	intellectual property
ITC	International Trade Center
MSMEs	micro, small and medium-sized enterprises
OECD	Organisation for Economic Co-operation and Development
S&DT	special and differential treatment
SOEs	state-owned enterprises
TPRs	Trade Policy Reviews
TPRM	Trade Policy Review Mechanism
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UNCTAD	United Nations Conference on Trade and Development
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

Executive Summary

The Centre for International Governance Innovation (CIGI) conducted consultations in the spring of 2019 with trade experts and stakeholders about options for modernizing the trade rules and strengthening the World Trade Organization (WTO). The consultations focused on the three themes of improving the WTO through monitoring of existing rules, strengthening and safeguarding the dispute settlement function, and modernizing the trade rules for the twenty-first century. This report synthesizes the results of the consultations. It was prepared by then CIGI Senior Fellow Robert McDougall as rapporteur, with input and guidance from Hugo Perezcano-Díaz, Bob Fay and Oonagh Fitzgerald.

Improving WTO Monitoring of Existing Rules

The consultations confirmed the importance to effective trade cooperation of the monitoring function of the WTO, but also a number of weaknesses in current practices. Trade tensions and the inability to advance the negotiating agenda are exacerbated by a lack of trust, which is itself partly the result of an insufficient information and evidence base on which to pursue informed confidence-building deliberations. Concerns by WTO members about the uses to which information will be put exacerbate existing challenges of notification requirements that may be more burdensome than necessary. In response, notification requirements could be updated so that they are fit for purpose, and emphasis could be placed more on building the capacity of those who are behind in their notifications rather than on enforcement and penalties.

Formal notifications may, in any event, be an outdated way of gathering information, which could instead involve data-gathering technologies and information gathering conducted independently by the WTO Secretariat. Other sources of information might include other international organizations that already have their own data sources, such as the International Monetary Fund (IMF), the World Bank and the Organisation for Economic Co-operation and Development (OECD), as well as other stakeholders.

WTO members might also consider establishing a “boundary organization” consisting of appointed arms-length subject-matter experts tasked with developing consensus on technical matters. The Trade Policy Review Mechanism (TPRM) is also an important opportunity for improved information exchange and deliberation.

Safeguarding and Strengthening the Dispute Settlement Function

The challenges to the dispute settlement function were recognized as a symptom of broader tensions in trade cooperation. While it was acknowledged that the current impasse over the Appellate Body may be, in part, a reaction to too much judicialization of dispute settlement under the WTO, the current design of the system means that the incapacitation of the Appellate Body risks bringing the whole system to a halt. There was a caution that the rule of law cannot be an end in itself when the rules no longer reflect the balance of power and the negotiation function is paralyzed. In the meantime, the focus on the impasse over the Appellate Body risks distracting from other reforms that would make the dispute settlement system more accessible to a wider range of WTO members.

Since it was generally accepted that agreement to appoint new Appellate Body members is unlikely by December 2019, WTO members may need to consider pursuing both interim and permanent solutions simultaneously. While voting to appoint new members was considered not likely legally viable and too provocative, interim solutions include “no appeal” or “appeal-arbitration” agreements to preserve access to enforcement mechanisms. Other options considered for the Appellate Body include a cooling-off period, reforms to address US concerns or even disbanding it permanently. But there was also caution against solutions that either try to exclude the United States or that appease it unnecessarily. A number of other potential improvements to dispute settlement were considered. But there was also a broad consensus that the dispute settlement system will not properly function unless the negotiation function is also made more effective.

Modernizing the Trade Rules for the Twenty-first Century

The need to modernize the trade rules to reflect new social, technological, economic and geopolitical realities was recognized as the most important challenge facing rules-based trade cooperation. Trade rules need to be updated to contribute to combatting global challenges such as inequality and climate change, relying in part on experiences in regional trade agreements. There should also be better coordination with non-trade issues pursued in other organizations, although linkages will be more effective if made with rules that have already been developed in other venues.

Of particular importance are new rules to govern the “new” (data-driven) economy, which is in the process of changing the way value is created, captured and traded. Trade rules will need to better integrate issues such as competition and privacy policy, and to treat certain older trade issues, such as intellectual property (IP), subsidies and national security, differently. There are limits to what the WTO can do alone, and care should be taken not to expect too much from it, at least not until the non-trade issues are properly addressed in more appropriate fora. Negotiations of a “Digital Round” will be especially challenging for developing countries and small countries that do not have well-established digital economy firms. These economies may be better served by focusing on data governance issues to preserve the ability of their firms to access the raw material for value creation in the new economy.

Prospects for updating the substantive trade rules can be improved through greater variation and innovation in the architecture of the trading system, for example, by pursuing new rules at the multilateral, plurilateral, regional and sectoral levels. Bringing about more effective and legitimate outcomes will require cooperation and coordination among different international organizations and actors. Increasing variation in the models and levels of development will also require new approaches to balancing flexibility and reciprocity in the trade obligations of developing countries, while also providing support for capacity building. Despite the gloomy state of international trade cooperation, engaging in long-term scenario planning can help manage the risks and lead the trading system toward a more cooperative future.

Introduction

Profound changes in the global economy and political upheaval in some countries have eroded the legitimacy of and respect for the rules and institutions of the multilateral trading system. As a result, there is an urgent need to rebuild confidence in multilateralism, modernize the trade rules to better reflect new economic, political, social and environmental realities, and reinvigorate and reform the institutions of trade cooperation. In the spring of 2019, at the request of Global Affairs Canada, CIGI held consultations with trade experts and stakeholders about options for modernizing the trade rules and strengthening the WTO. CIGI convened a group of trade experts and stakeholders in Canada to discuss the challenges facing the trading system and identify concrete suggestions to modernize the rules and strengthen the WTO.

CIGI conducted consultations between March 27, 2019, and May 2, 2019, through a number of group and individual interviews and a one-day round table discussion in Ottawa. Views were received from more than 60 people, including 40 Canadians and 20 non-Canadians, with a range of expertise and backgrounds, including in international law, international economics, public administration and government relations. They came from universities, think tanks, private firms and business associations. Several former Canadian trade officials who had been involved in the negotiations of the WTO also participated, as did several former staff members of the WTO. The consultations were held under the CIGI Discussion Rule.¹

The CIGI consultations were based on the three themes identified in background material² prepared in support of meetings convened by the Government of Canada in October 2018 in Ottawa, of trade ministers from 12 other members of the

WTO.³ The “Ottawa Group” — as it has become known informally — discussed the state of rules-based trade cooperation and considered “pragmatic and realistic actions” to restore confidence in the trading system and discourage further protectionism. The Ottawa Group subsequently met on two other occasions, in Davos, Switzerland, in January 2019⁴ and in Paris, France, in May 2019.⁵

The three themes were:

- **Improving the Efficiency and Effectiveness of the WTO Monitoring Function:** Effective information sharing and monitoring of national measures affecting trade are the foundation of reciprocal and mutually advantageous trade arrangements. It allows for mutual learning, informed deliberation and early settlement of trade concerns. Improving these functions in a time of growing uncertainty can help manage trade tensions and enhance trade cooperation.
- **Safeguarding and Strengthening the Dispute Settlement System:** Dispute settlement in the WTO has enjoyed significant success over the last 25 years but faces increasing challenges, not least of which is the failure, since early 2017, to agree on appointments of members of the Appellate Body to replace those whose terms have expired. To overcome the impasse and respond to changing conditions, the dispute settlement system will need to be updated so that it operates more fully in the service of trade cooperation.
- **Modernizing the Trade Rules for the Twenty-first Century:** The negotiating function of the WTO has arguably been the least effective

1 When discussions are held under the CIGI Discussion Rule, participants are free to use the information received, and the identity and affiliation of participants may be revealed, but no views expressed, or other information received, may be attributed to any participant.

2 “Strengthening and Modernizing the WTO: Discussion Paper”, Communication from Canada (21 September 2018), online: <<http://bit.ly/wto-job-gc-2018>>; “Strengthening the Deliberative Function of the WTO: Discussion Paper”, Communication from Canada (14 December 2018), online: <<http://bit.ly/wto-job-gc-211>>.

3 The WTO members involved include Australia, Brazil, Canada, Chile, the European Union, Japan, Kenya, Mexico, New Zealand, Norway, Singapore, South Korea and Switzerland. See Global Affairs Canada, “Ottawa Group and WTO Reform”, online: <www.canada.ca/en/global-affairs/news/2019/05/ottawa-group-and-wto-reform.html>.

4 Government of Canada, “Joint Communiqué of the Ottawa Ministerial on WTO Reform group meeting in Davos” (24 January 2019), online: <www.international.gc.ca/world-monde/international_relations-reactions-internationales/wto-omc/2019-01-24-davos.aspx>.

5 Global Affairs Canada, “Summary of Ottawa Group Meeting in Paris, May 2019”, online: <www.canada.ca/en/global-affairs/news/2019/05/summary-of-ottawa-group-meeting-in-paris-may-2019.html>.

and, with only a few exceptions, has failed to update the multilateral trading rules to reflect the profound changes in the global economy since the inception of the WTO. With increasing diversity of interests and levels of development, WTO members will need to adopt novel approaches to rule development, applied in selective substantive policy areas to revitalize the rule-making function of the WTO.

Limitations of the Consultations

The consultations, and therefore their results, are subject to certain constraints and limitations. First, the quick organization of the consultations affected the availability of some potential participants. Nonetheless, the enthusiastic responses to the invitation to participate indicated a high degree of interest in these issues, suggesting opportunities for follow-up activities. Second, the exercise was able to gather significant informed opinions and ideas about the future of the trading system from legal, economic, business, administrative and academic experts. However, they provided less insight into the views and interests of average Canadians and Canadian businesses about WTO reform.

Third, the broad scope of the issues covered left insufficient time for the development of consensus views on many of the issues discussed. Many ideas were put forward, some were discussed quite thoroughly, others less so. As a result, the report contains a broad array of ideas but does not purport to reflect the consensus of participants. Fourth, while several important insights surfaced repeatedly and seemed to reflect a widely held view, these tended to be about strategic approaches to WTO reform rather than specific reform options. These are noted in the list of key strategic observations directly below. Where the ideas pertained in particular to one of the three themes, they are listed as key thematic observations following the summary of the relevant thematic discussion.

Key Strategic Observations

→ While current tensions place significant strain on rules-based trade cooperation, they have also become a catalyst for renewed engagement and dialogue among governments on how to modernize the trade rules and strengthen the WTO. This new energy and focus provide an opportunity for countries

that support and depend on rules-based trade cooperation to contribute enlightened ideas and advance novel reform initiatives.

→ Multilateralism and rules-based trade cooperation are key for Canada's prosperity and relations with the rest of the world. As a middle power with a trade-dependent economy, Canada has both the incentive and the capacity to contribute to reform efforts. The Ottawa Group initiative was viewed as a positive baseline platform for the reform effort, but one that should be expanded to other WTO members.

→ While the need for reform of the rules and institutions of trade is apparent, succeeding in negotiating reform will be challenging due to the diverse and deep political tensions within and among WTO member states. This challenging negotiation context includes ongoing structural changes in the global economy, the growing importance of trade in data and services, growing complexity of transnational regulation, plurality of state interests, developed versus developing state perspectives, heightened geopolitical rivalry and populist backlash against globalization.

→ There was also an acknowledgement that while global issues are increasingly interconnected (for example, climate change, human and labour rights, the data-driven economy, competition, privacy and so forth), they need not — and cannot — all be addressed within the WTO. There should be greater cooperation and coordination between international organizations to address these and other important linkages.

→ Canadian initiatives to assist in modernizing the rules and institutions of multilateral trade cooperation are welcome, but a more ambitious, inclusive and systematic approach will be needed.

→ The June 2020 WTO Ministerial Conference provides an important milestone at which to identify realistic outcomes and then work backwards to build the necessary consensus.

→ Canada could leverage its traditional reputation as a “bridge” country to advance a positive and pragmatic vision for strengthening the rules and institutions for the future, rather than only reacting to tensions and immediate crises.

- Canada should work with other WTO members (beyond the Ottawa Group) to develop a comprehensive list of negotiating demands and methodically and patiently engage the capitals (beyond Geneva) of a progressively wider range of WTO members to build support for an inclusive reform agenda.
- Given the importance of the United States and China to the global economy and the risks posed by the current tensions between them, it will be important to keep them engaged in the WTO and committed to multilateral rules-based trade cooperation.
- On dispute settlement, while all participants acknowledged that the impasse over appointments to the Appellate Body is unlikely to be resolved in the short term, WTO members should avoid resorting to solutions that would either exclude the United States or address its concerns in ways that fundamentally undermine the dispute settlement system.
- Canada is well-placed to provide expertise and resources to developing countries to help build their capacity to engage on the reform agenda. This could assist in building a more inclusive reform agenda and a broader consensus.
- To ensure that the modernization of the rules is evidence-based, there needs to be improved information sharing, coordination and cooperation between the WTO and other international organizations and other relevant entities.
- To ensure that reform is legitimate and inclusive, there should be additional consultation and outreach with a more diverse range of stakeholders and efforts to strengthen public awareness of the benefits of trade, as well as the need for reform.
- The Canadian government should engage with civil society, business associations, think tanks and academics to assist with research and development of novel strategies and initiatives.

Beyond these general areas of convergence, the next sections summarize the discussions on the three themes, highlighting recommendations.

THEME 1

Improving the Monitoring of Existing Rules

Participants acknowledged the important, yet often underappreciated, contribution of the monitoring activities of the WTO to building trust and providing security and predictability in the trading system. A lack of understanding of measures taken by other members and evidence of how they might affect trade contributes to the “deep political divide” currently paralyzing the WTO. In the context of growing trade tensions and creeping protectionism, governments can build support for a more ambitious reform agenda by using the existing opportunities afforded by the WTO for information sharing and deliberation. While the many aspects of the WTO’s monitoring function were acknowledged, the discussion focused on improving the transparency and notification mechanisms, opportunities for diversifying the sources of information, and the constraints and risks of doing so.

Transparency and Information Sharing Are Important, but Still Subject to Constraints

Participants supported the basic premise — common in Western liberal democracies at least — that transparency in national decision making is critical to effective governance and that, from the perspective of transparency in international trade relations, information sharing is equally important for effective trade governance. Transparency has long been central to the work of the WTO, but because its expanding membership includes increasingly diverse political traditions, the sharing of information continues to encounter certain challenges. While members take their WTO governance functions seriously, not all have domestic traditions of transparency and therefore they may not be enthusiastic about empowering others to engage in extensive information gathering outside their control about their own national measures. Since the WTO operates by consensus, the conservative approach of many members to transparency will mean that progress in authorizing collection of a wider range of information will be slow and incremental.

The purpose for which information is gathered: There were different views on whether information is ever neutral or whether its value depends on the context in which it is gathered and the uses to which it is put. As a source of power, information can be used for multiple purposes, some more legitimate than others. Uncertainty around its end use in the WTO is therefore a constraint to improving information sharing. For example, WTO members who are uncertain about whether they comply with all their obligations may not be willing to share information about their national measures that might affect trade. Other members may be reluctant to have their domestic policies scrutinized too closely against interpretations of their obligations with which they may not agree. Improving information sharing in the WTO, especially if it involves expanding the sources of information, may therefore require first establishing clearer parameters around the use of the information. The WTO needs to establish clearly its legitimacy as a collector and user of information.

Concern about use in dispute settlement of information gathered: A particular concern of some members is that information gathered by and for the WTO might be used in dispute settlement proceedings against them. This diminishes further the willingness of members that already do not have strong transparency traditions or that face capacity challenges in collecting information. Even those members that do have the resources to make mandatory notifications might think twice about the kinds and level of detail of the information they provide. The effectiveness and reach of the dispute settlement system may therefore dissuade members from revealing too much information about their national measures. These concerns may also extend to information provided by other sources, such as other international organizations. If there is a risk that information from these other sources will find its way into WTO dispute settlement proceedings, governments may be less willing to share information even with those other organizations, leading to a net reduction of available information.

There were different views on the extent of these concerns. Some considered that the main consumers of the information are other governments, not adjudicators. Others were not worried about the information going to other governments, but that it also goes to private parties and their lawyers. In any event, regardless of who the intended and initial recipients are, there are many ways for members to be “hung by their own confessions,” for example, by having information they submit used to demonstrate the existence of a subsidy in countervailing duty cases. Possible solutions included reconsidering whether all obligations should be subject to dispute settlement, making certain information inadmissible in dispute settlement, or providing amnesty for self-disclosure of bad behaviour. All these solutions would require amendments to the Dispute Settlement Understanding (DSU) and risk undermining the right of recourse to dispute settlement. It is also possible that the current challenges to the dispute settlement system may provide an impetus for better notifications since the risk of it being used against a member may be diminished.

Government Notifications Are Important, but Must Be Fit for Purpose

Formal notifications by governments remain central to information sharing in the WTO, but some participants questioned whether this method is still the most effective and whether the extent of the current obligations are fit for purpose. A system based entirely on official notifications may reflect an outdated way of collecting information that overlooks options made available by modern technology and open information sources. Such a system also depends on the capacity and willingness of governments and therefore may be quite limited in what it can collect. Optimal information sharing therefore depends upon better calibration of the information needs and update of the notification obligations. A review of the notification requirements might identify ways to make them less complex and burdensome, and therefore more achievable. Ultimately, the objective should be to promote sharing of information that informs deliberation, while ensuring the use of that information neither prejudices the interests of the information holder nor their willingness to continue to share it.

Government capacity is an important constraint: Some participants noted that the transparency and notification obligations of the WTO can be significant burdens for many governments. Developing and least developed countries face particular challenges, but these challenges are also increasingly a concern for some developed countries. Many countries lack the resources to comply with their notification obligations, and as the WTO falls lower in the priorities of many governments, they may be less willing to allocate sufficient resources for notifications. The burdens of notification and information are also an issue in negotiations, such as those on fisheries subsidies, where a divide exists between developed and developing countries. Even on the issue of information gathering by international organizations or civil society, developing countries express concern about their capacity to verify it. Domestic capacity is therefore an issue, even when it concerns the involvement of well-meaning and well-resourced third parties.

Focus on building capacity instead of enforcement and penalties: One suggestion for reconciling poor notification rates with capacity challenges was to focus less on enforcement and penalties and more on building the requisite capacity. If a member has difficulty complying with reasonable notification obligations, there could be an evaluation of the capacity constraints and provision of capacity building to facilitate compliance. In this regard, the recent proposal in the WTO to update the notification regime contains a number of positive elements. While the provision for administrative sanctions will unlikely be agreeable or even effective, proposals to allow governments to seek technical assistance as part of their efforts to comply are promising. Similar to the special and differential treatment (S&DT) provisions of the Trade Facilitation Agreement — which tie implementation to the acquisition of capacity to comply and involve an expert group evaluation of capacity needs — the notification proposals take the organization in the direction of a “compliance” regime rather than an “enforcement” regime. It was suggested that Canada should build on work it has already done to offer expertise to help other members develop this notification capacity.

Expanding the Sources of Information and Cooperation

There was some support among participants for use in the monitoring activities of the WTO of information gathered independently by the Secretariat or received from other international organizations and external stakeholders. Given the limitations of formal notifications, there was broad support for using other sources of publicly available information. There is an abundance of information already available, either in the public domain or in the hands of other organizations that, for a variety of reasons, does not enter the WTO record. Some considered that, in an age of open data and sophisticated data technology, the notification and monitoring function of the WTO could be approached primarily as a data challenge. This challenge could be met, at least in part, with the assistance of information technology consultants and data scientists who could “scrape” public websites for information on trade measures. The non-governmental monitoring service Global Trade Alert already uses data-scraping techniques to compile an extensive array of information on trade measures.

Role of the Secretariat: There were mixed views among participants on whether the WTO Secretariat should be authorized or instructed to gather information and initiate discussions in the regular bodies. Some considered that the Secretariat should take an active role in helping members comply with their notification obligations. For example, it could be tasked with gathering information about trade measures from public sources and publishing this information on the WTO website, along with an indication of whether the measures have been confirmed by the government adopting them. However, others considered that the need for the Secretariat to be impartial, and to be seen as impartial, would limit what it could do on its own. Many governments are very cautious about what they will allow the Secretariat to do and seem to have become even more cautious in recent years. A more legitimate alternative might be for the committee chairpersons to request the Secretariat to collect additional information. Chairpersons could be authorized to initiate such requests only in response to issues raised by members that require additional information, thereby preserving the impartiality of the Secretariat.

Information sharing and cooperation with other international organizations: Participants had a range of views on cooperation with other international organizations. For example, information sharing could be improved with organizations that have overlapping mandates and their own data sources, such as the IMF, World Bank, the OECD and the International Labour Organization. In particular, non-confidential information from the country experts and in-country offices of the IMF and World Bank could be tapped for WTO purposes, as long as this does not undermine the ability of these organizations to collect information for their own purposes. Many participants encouraged cooperation between the WTO and the IMF in preparation of WTO Trade Policy Reviews (TPRs), which are similar to IMF article 4 Surveillance Consultations. Such collaboration could be worked out between the heads of the various organizations without the need to amend any WTO agreements. There was, however, strong dissent about cooperation with the IMF. Additionally, cooperation with organizations such as the World Health Organization and the United Nations Environment Programme could be approached the same way as it is with the World Intellectual Property Organization, the only Geneva-based organization with which the WTO has an existing collaboration agreement. Information sharing with these organizations would help develop clearer understandings of the meaning of certain international obligations.

Input from other stakeholders: The view was expressed that the WTO may reflect an “outdated” and “inflexible” intergovernmental model, and should instead be more open to receive information and perspectives from non-governmental actors such as representatives of civil society, business and academia. While the annual WTO Public Forum has been improved in recent years, there could be additional opportunities for input from different stakeholders beyond the forum. One suggestion was to create a boundary organization, i.e., an arms-length body of subject-matter experts unaffiliated with governments, that is tasked with developing consensus on technical matters. The objective of such a body could be similar to that of the Intergovernmental Panel on Climate Change in providing scientifically rigorous analysis of issues pertinent to climate change negotiations.

Concerns about the legitimacy of information from other sources: Receiving information from non-

governmental sources did raise some concerns among participants, however, in particular over how to ensure the integrity, quality and impartiality of the information. If information that is not endorsed by governments is to make it into the official WTO record, there may need to be screening and verification methods to ensure that misinformation, regardless of its source, does not contaminate deliberations or unduly prejudice a member's interests. Already in the context of dispute settlement, there is some controversy over information obtained from external sources, its status and its relevance. WTO adjudicators have not completely rejected information from external sources, but instead use it as context to better understand the facts and inform their perspectives. Nonetheless, the uncertainty of its status and the controversy around its use illustrate the challenges of ensuring the legitimacy of information received from non-governmental sources.

Strengthening the TPRM

Participants discussed how the scheduled TPRs of each WTO member provide an important mechanism for both information sharing and deliberation between WTO members. There have been more than 400 reviews, based on initial reports prepared by the Secretariat, to which the member reviewed submits a reply, and other members can then pose questions and interact with officials from that country. The TPRM could, however, be improved in several ways. First, there could be more flexibility regarding the timing of the reviews of members, calibrating them to take place when circumstances warrant. The director-general could have the authority to recommend a change to the schedule of a given TPR, after consultations with the member to be reviewed. Second, reviews of certain countries currently subject to a faster schedule — such as China, the European Union, Japan and the United States — might be further streamlined to focus on a smaller number of outstanding issues. Third, since TPRs are an opportunity to learn about the spillovers from member trade policies, the review itself could be made less diplomatic. Inviting discussants who are trade policy experts without government affiliation might allow for a more objective and probing discussion, similar to the approach taken by the IMF under its article 4 consultations. Fourth, the Secretariat could be asked to include more information and evaluation in their initial reports,

even information that normally should be provided by the member itself as part of its notifications.

Special Concerns about China's Notification Record

Participants discussed China's uneven record of notifications, which is one — but certainly not the only — catalyst of the growing controversy over WTO notifications. China's transparency record is inconsistent and ad hoc between central and local governments, coastal and interior governments, various agencies of the central government and for laws versus regulations. China has a particular problem making its subsidies notifications. One reason for variable compliance is decentralized law making — in which national, provincial and municipal governments, as well as special economic zones, all play a role — and the lack of an institutionalized domestic transparency mechanism. The notifications that do get made are also either insufficient or vague, and the English translations of poor quality. Several suggestions were made to improve China's record, including recommending that China centralize transparency compliance in "leading small groups"; requesting China to provide Chinese language versions for translation by the WTO Secretariat; and using more "counter notifications" (i.e., notifications made by WTO members about the measures of other members), as proposed by the United States, and other available information sources to give China an incentive to improve its own record.

Key Observations on Improving the WTO Monitoring of Existing Rules

The discussion around improving the WTO monitoring of existing rules was not comprehensive. Many participants did not have in-depth practical experience with the current challenges facing the monitoring function. Further analysis of this topic would benefit from canvassing the views of staff in the national missions to the WTO and staff working in the WTO Secretariat.

Within the limits of the discussion, there were nonetheless several key takeaways regarding reform of the monitoring function:

- Regardless of what happens in negotiations and dispute settlement, effective trade cooperation depends on ongoing

transparency and deliberation of national measures that might affect trade.

- The current paralysis and lack of trust in the WTO is caused, in part, by an insufficient information or evidence base on which to pursue informed negotiations.
- Despite the importance of information sharing, concerns about the uses to which it will be put, especially in dispute settlement, make governments less forthcoming than is necessary for the system to function well.
- Government notifications remain the most important source of information, but many governments face capacity challenges in complying with notification requirements that, in some cases, may be unnecessarily burdensome.
- Notifications can be improved by ensuring that information needs are fit for purpose and by providing more support for building the capacity of governments to gather and share information.
- Notifications may have become an outdated approach to transparency and could be partially replaced by having the Secretariat compile information from public data and other sources, as long as the information is verified and legitimate.
- Other sources of information include other international organizations, other stakeholders and specifically composed expert groups tasked with developing consensus on technical issues.
- TPRs are an important opportunity for information exchange and deliberation, but could be improved by making their timing more flexible, their content more targeted, their discussions more probing and the Secretariat reports more detailed in some areas.
- China presents a special challenge of inadequate transparency due to decentralized government structures, but it could be encouraged to centralize notifications and make them in the original language, and other members could “counter notify” China’s measures from their own or other sources of information.

THEME 2

Safeguarding and Strengthening the Dispute Settlement System

Participants noted that the dispute settlement system of the WTO has been characterized as the “jewel in the crown” of the trading system. Originally anchored in articles XXII and XXIII of the General Agreement on Tariffs and Trade (GATT), it has evolved over many decades into the complex rules and process-based system that exists today. As an evolutionary system, change has been gradual and incremental, not revolutionary, with the exception perhaps of the introduction of appellate review in 1995. While the increasing codification of dispute settlement procedures has provided stability to the system, it has remained largely static since the establishment of the WTO. As a result, the stresses and strains accumulated over the last 25 years are now starting to show.

Participants discussed how the demand for dispute settlement has grown, yet it is still not well correlated to volumes and patterns of trade. Disputes have become more complex — or have been made more complex — leading to ever-longer and more cumbersome adjudicative procedures that may be increasingly inaccessible to small economies and for small-value disputes. Members have not only failed to keep the trade rules up to date through negotiations, but have also been unable to exercise their collective authority over the interpretation of their existing commitments. These failures have placed an additional burden on the dispute settlement system to resolve normative disagreements that have become more intractable as the interests of WTO members have diversified.

This is the backdrop for growing dissatisfaction, especially of the United States, with the operation and outcomes of the dispute settlement system that has led to the impasse over new appointments to the Appellate Body. During the consultations, participants discussed these issues, including the institutional and commercial origins of the impasse, what might have gone wrong, and what options are now available to other WTO members to put the dispute settlement system back on track and bring the United States back into the fold.

The Impasse over the Appellate Body Is a Symptom of a Deeper Crisis

There was broad consensus among those consulted that the threat to the functioning of the Appellate Body is only a symptom of a deeper crisis affecting rules-based trade cooperation. Rather than causing the crisis in the WTO, the current impasse in dispute settlement is a consequence of the long-standing failure of the negotiation — or rule-making — function. Consensus decision-making rules, which are nonetheless an important feature of treaty organizations composed of sovereign states, have paralyzed negotiations over new rules. However, more important than the decision-making rules is that WTO members cannot agree on significant new rules on difficult substantive issues in a complex and evolving policy environment.

The inability of members to update the existing trade rules and adopt new ones to reflect the shifting balance of economic power, or to legitimize or overturn controversial outcomes of adjudication, has led to an institutional imbalance between the negotiation and dispute settlement functions of the WTO. As the pressure on the currency and legitimacy of the trade rules has grown, so too has the pressure on the Appellate Body.

The Appellate Body as a Compromise with Unintended Consequences

For some participants, the impasse over the Appellate Body is not the most significant factor in the WTO crisis. In their view, while binding dispute settlement is one of the major achievements of the Uruguay Round, the Appellate Body itself was not seen as an essential ingredient of that success. Instead, the real innovations over the GATT were the quasi-automatic establishment of panels (through negative consensus), strict timelines and quasi-automatic adoption of panel reports.

Participants noted that it was the United States that insisted in the Uruguay Round of negotiations on consensus rule making and higher voting thresholds for amendments, while also insisting on automatic report adoption and timelines that were shorter than the deadlines in its section 301 legislation.⁶ By contrast, the European Union advocated majority voting and lower voting thresholds for amendments that would apply to all members, while favouring member control and flexibility over dispute settlement, including a right for panels to defer issues to the Dispute Settlement Body (DSB) that they considered they could not resolve. While the system that emerged was closer to the vision of the United States, the result is that the difficulties created by consensus rule making have focused disproportionate attention on compulsory win-lose adjudication.

The Appellate Body itself was only established as a necessary trade-off to allay concerns about reports of rogue panels being adopted through negative consensus. As a result of the last-minute nature of its inclusion, there were no detailed negotiations on the provisions of the DSU that established the Appellate Body, which was instead given broad discretion to determine its own operations and working procedures. Indeed, the introduction of strict timelines was perhaps more important than appellate review, since strict timelines were a concession to the United States in exchange for other features of the system designed to control US unilateralism.

Too much judicialization? Some participants acknowledged that the judicialization of dispute settlement in the WTO, which was at least partially unintended, might have gone too far. As with the results of most international negotiations, the WTO agreements contain many instances of constructive ambiguity, silences, gaps and omissions. However, superimposed on these ambiguous legal rules was the (indirect) instruction to interpret them using the Vienna Convention on the Law of Treaties (VCLT), for which “words matter.” It was argued that the effect of this was to replace the more policy-oriented analysis of the GATT. WTO adjudicators, as mandated, have used the techniques set out in the VCLT to fill the gaps, even though the ambiguous text and highly brokered context may not be conducive to that kind of analysis.

A system that promises to provide a “correct” interpretation of every ambiguity has diminished the incentives to pursue “dispute avoidance” and early resolution techniques. In other words, the trading system may have become too “legalized” and too dependent on “litigation” to solve what are often deep-seated political differences.

It was suggested that many of the challenges facing the dispute settlement system today may trace their origins, at least in part, to these institutional imbalances, the mismatch between ambiguous texts and the application of the VCLT, and the disproportionate focus on adjudication. Given these imbalances, it is likely that even if the negotiation function were more successful, some WTO members would still try to accomplish through win-lose adjudication what they cannot obtain, or would have to pay for, through negotiations.

An Incapacitated Appellate Body Changes the Nature of the System

Contrary to the above views, however, other participants considered that the fate of the entire dispute settlement system is deeply tied to the existence and functioning of the Appellate Body. The Appellate Body’s incapacitation is therefore significant, not because the WTO needs appellate review per se, but because it is an essential feature of the design and architecture of the existing system, perhaps even a necessary part of the bargain of the Uruguay Round. According to this view, rendering the Appellate Body dysfunctional changes the entire nature of the WTO and may be the beginning of a slippery slope of losing the dispute settlement system entirely.

They point out that if a panel report is appealed to an incapacitated Appellate Body — arguably, the Appellate Body is already incapacitated — the appeal cannot proceed, placing the dispute in limbo. This ability to effectively block report adoption reverts dispute settlement to what it was under the GATT, which would be disastrous for most countries. Some questioned whether, as a legal matter, the DSB can even adopt a panel report for which the right of appeal has been denied. Since the right of appeal is an integral part of the bargain by which members agree to be bound by their WTO commitments, a member that loses its right of appeal may not consider itself bound to implement the results of an unappealable panel report. The problem therefore cannot simply be

⁶ *Trade Act of 1974*, Pub L No 93–618, § 301 (codified as amended at 19 USC § 2411).

swept under the rug to focus on other priorities but must be addressed for the system even to function.

Others challenged this theoretical notion of interconnectivity between the various bodies, whereby the whole cannot function without all its parts. They questioned the dramatic conclusion that once a formal right of appeal is lost, panel reports cannot acquire legal status and the dispute settlement system is therefore brought to a halt. Instead, they considered that, when the Appellate Body becomes dysfunctional at the end of 2019, WTO members will find a way to allow the system to function even under the current design. The nature of the rules-based system means that panel reports can still have value, with or without appeal. The Appellate Body may be in crisis, but this does not mean the whole dispute settlement system is also in crisis.

Attack on the Rule of Law or New Geopolitical Reality?

There was no real insight into what the US administration ultimately hopes to achieve by blocking appointments. It was noted that some in the administration seem to prefer, and may even actively seek, the default outcome of an incapacitated Appellate Body: reversion to the power-based character of the GATT system. However, the fact that many of the concerns raised by the United States pre-date the current administration suggests a more fundamental, even bipartisan, objective to restore the dispute settlement system to what the United States thought it had agreed to in 1995. The absence of any clear and conclusive indication from the administration about its objectives has made developing a response more challenging.

Attack on the rule of law: Some considered the actions of the United States to be an assault on the rule of law, noting that the dispute settlement system was strengthened in the WTO precisely to constrain unilateral action by powerful states. This was, and remains, particularly important to countries such as Canada that do not have the clout to resist unilateral pressure. While the United States agreed in 1995 to have itself constrained, it now seems to prefer the flexibility to exercise its economic power to achieve its trade objectives. Some suggested the United States needs to be reminded of its “fundamental

moral and ethical obligation” to uphold the rule of law, both domestically and internationally.

While others acknowledged the importance of the rule of law, they suggested that an insistence on respect for the rule of law cannot be the ultimate goal. The rule of law cannot be an end in itself in a system with a static legislative capacity and rules that no longer reflect the balance of power between states, or even represent the wishes of all states. Instead, there needs to be a recognition of the power dynamics of the geopolitical issues being played out. Historically, US trade actions under section 301 have been described as a form of civil disobedience, turned to when it could not make progress through the regular mechanisms for negotiation. The resurgence of action under section 301 should perhaps be seen in the same light.

Adapting to a new geopolitical rivalry: The emergence of geopolitical rivalry raises new concerns for small and medium-sized countries that depend on the rules-based system, but seem increasingly unwilling to use the dispute settlement system to resolve their disputes (one example cited was Canada’s apparent reluctance to use the WTO to address China’s restrictions on canola imports). If adherence to the rule of law is going to be abandoned by the major powers, there will need to be alternative solutions for countries such as Canada. For example, there could be opportunities for collective evaluation of the trade concerns of smaller players, so they are not denied access to the system to resolve issues they are reluctant to escalate on their own into formal dispute settlement proceedings.

Whether the WTO has the right structure to survive the shift in the geopolitical balance of power was an open question for participants. In this context, to make concrete progress, it was urged that Canada focus on what may be politically feasible instead of pursuing “idealistic talk” of “legal orders” and the rule of law. Given the nature of US leverage and the obvious controversy around the crisis over appointments to the Appellate Body, instead of trying to pressure the United States on that issue, it might be more effective to engage constructively on the other important substantive rule-making issues.

Factors that May Have Contributed to the Dissatisfaction

To the extent that the Appellate Body may have strayed beyond its mandate, participants considered that the responsibility for this development was shared between WTO members and the institution itself. For their part, WTO members bear responsibility for appointing Appellate Body members that may not have had the correct qualifications and experience to perform the function properly. The result was a deferral of too much authority to the Secretariat. For its part, the Appellate Body has perhaps been naive and even arrogant about its authority, for example, regarding its decision to cease seeking permission from parties to extend the 90-day deadline to issue its reports. The Appellate Body may have considered, incorrectly as it turns out, that parties and WTO members could not hold them responsible, so they feared no consequences of actions that did not respect the letter of the DSU.

Participants suggested that disagreement about the purposes of the dispute settlement system may also have contributed to the contentious environment. Some argued that the purpose of the system is not only to resolve disputes between members, but also to clarify the obligations of the treaty and contribute to security and predictability. The challenge for adjudicators has been to fulfill both of these obligations adequately, and proposals that diminish the role of any institutionalized tribunals will make that even more difficult. The dual purpose was acknowledged by others, but it was pointed out that “clarification of obligations” is not the explicit or exclusive function of adjudicators. The function of panels is to assist the DSB (DSU article 11) and the function of the Appellate Body is to address issues of legal interpretation (DSU article 17). Clarifying obligations is the aim of the dispute settlement system as a whole, so it does not necessarily depend on the existence of appellate review.

For Many WTO Members, the Concerns May Be Elsewhere

Some participants observed that for many WTO members, possibly even the vast majority, the WTO is not in crisis and the rule of law is still the organizing principle for trade relations, even for certain small states disappointed by dispute settlement results that were not implemented.

The current impasse therefore should not be allowed to overshadow efforts to address other issues that require reform, such as the ineffectiveness of retaliation as an option for most countries. Since these other reforms are no longer seriously discussed, smaller states are not engaging, as they do not feel their voices will be heard and their concerns addressed. Therefore, strengthening the WTO also requires a focus on creating an inclusive framework for dispute settlement. Participants considered that Canada could play a role in de-escalating the rhetoric and engaging more widely with the majority of the membership who still believe in the system and want to see it work better for all members.

Resolving the Impasse: Interim and Permanent Options for Appellate Review

There was a general expectation that the impasse will not be resolved by December 2019, at which point the Appellate Body will be unable to hear new appeals, and there will be uncertainty about how the dispute settlement system should continue to function. Participants discussed the range of options available to WTO members, from interim solutions designed to “keep the lights on” in the dispute settlement system to more permanent solutions to the future of appellate review.

Vote to appoint new Appellate Body members: Some participants advocated recourse to voting on the appointment of new Appellate Body members to get around the objection of the United States. They argued that it would eliminate the need to negotiate amendments to the DSU, resolve the problem with minimal costs and resistance, and send a signal to other members that might contemplate the same blocking mechanism. However, there was no consensus on whether voting was even legally available in these circumstances. Article IX of the Marrakesh Agreement provides for voting where consensus cannot be achieved, “except as otherwise provided” in another agreement. In this case, article 2.4 of the DSU requires consensus for decisions of the DSB. While some considered that this restriction could be avoided by having the General Council conduct the vote, many considered that any decisions related to the administration of the DSU would need to be made by consensus, regardless of which body actually takes the decision.

Amend the DSU or create a plurilateral “DSU 2.0”: Other options would be to vote to amend the DSU to eliminate the opportunities for WTO members to interfere with the Appellate Body, or to create a parallel plurilateral DSU that would be added to the WTO Agreement also by a vote. This DSU 2.0 would replicate the existing system, with only minor changes to address some of the concerns raised by the United States, while also eliminating the opportunities to hold the system hostage. Unlike an effort to impose changes on the United States by amending the DSU through a vote, a plurilateral DSU 2.0 would only apply to those that agree to it. Supporters of “parallel” or “plural” systems argued that it would change the negotiating dynamics by circumventing member vetoes that prevent progress. It would also allow for the co-existence of fundamentally different conceptions of dispute settlement: one more power-based and the other more “judicial” in nature. Although this idea was considered to be a pragmatic effort to overcome “political deadlock with imperfect policy,” it would need to contain an explicit invitation for the United States to join in the future.

Cooling-off period for the Appellate Body: Some suggested that the best response in the current charged circumstances may be a cooling-off period, during which the Appellate Body would be placed in a state of “hibernation” while WTO members reflect on what they want for the future of the dispute settlement system. During this period of hibernation, the adoption of panel reports and the enforcement of outcomes could still be accomplished by signing *ex ante* no-appeal agreements, as some members have already done, or through recourse to appeal-arbitration under article 25 of the DSU, which is currently being contemplated by some members.⁷ Others, however, considered that the possibility of reaching agreement not to appeal would be unlikely for very important disputes. Unless another solution is found, this cooling-off period was considered to now be the default outcome.

⁷ Subsequent to the CIGI expert consultations, Canada and the European Union agreed to use the WTO’s arbitration rules to replicate the Appellate Body as closely as possible, with former WTO judges hearing cases: “EU, Canada agree first workaround to avoid US block on WTO judges”, online: <www.euractiv.com/section/ceta/news/eu-canada-agree-first-workaround-to-avoid-us-block-on-wto-judges/>. See also Government of Canada, “Interim appeal arbitration pursuant to Article 25 of the DSU”, online: <www.international.gc.ca/trade-commerce/trade_topics-domaines_commerce/wto_trade_dispute-omc_differends_commerciaux.aspx?lang=eng>.

A “restatement” process or Appellate Body “in exile”: Another interim proposal was to assemble, during a period of hibernation, a group of experts and jurists to review the interpretations of the Appellate Body for the purposes of consultations and dialogue with WTO members. This could be based on the model of the International Law Commission. A variation of this proposal was the creation of an Appellate Body in exile, consisting of experienced jurists who would review panel reports, receive submissions and issue interpretations as though it were an actual appellate review body. In neither case would the resulting analysis have any binding effect, but it could play a stopgap rule-of-law function. Neither of these proposals received much discussion or endorsement.

Dispense with the Appellate Body: Some considered that it would be viable to disband the Appellate Body permanently while keeping all the other improvements of the Uruguay Round, such as adoption of reports by negative consensus. Proponents of this approach recalled that the Appellate Body was not the critical innovation in the WTO, that it was added at the last minute and that it may have had unintended consequences in practice. Others countered, however, that if appellate review were eliminated, dispute settlement in trade relations may quickly encounter the same problems seen in the area of investment protection. Investor-state dispute settlement is often criticized as being ad hoc, chaotic and incoherent, leading to calls for a mechanism for appellate review. It was therefore suggested that the benefits of eliminating appellate review in the WTO might be short lived.

Reform the Appellate Body: Some participants encouraged WTO members to be pragmatic, to see the problem from the perspective of the United States, and to find solutions that address its concerns about the functioning of the dispute settlement system. They called for greater efforts to identify incentives that would bring the United States to the negotiating table. Some suggested, based on experience, that it may not require imaginative solutions or even new ideas, but rather just to draw inspiration from US domestic law for solutions that would be an improvement for the United States and be acceptable to other members. The proposals already made by Canada and others, in particular to provide the Appellate Body more guidance on the scope of its

mandate, were cited favourably, but more would be needed to get to the heart of the concerns.

Solutions to the Current Impasse Should Keep the United States Engaged

While there was a clear preference to work with the United States, it was acknowledged that members may face a “stark choice” between moving forward without the United States or moving backward with it. The alternative may be no dispute settlement at all. Participants were divided on how much to concede to the United States in the current impasse. Some cautioned against accepting the narrative of a legitimacy crisis and encouraged members to hold firm to the position that the system works well. They worried that even if the United States were offered concessions, it would find some other excuse to undermine the trading system. It was suggested that current US tactics were based on an overestimation of US leverage in the international economy, which would eventually become clear. While acknowledging that some issues resulted from ambiguous treaty text, especially in the area of trade remedies, some considered that it would be an “enormous mistake” to react to the challenge to the whole system on the basis of disagreement over certain substantive rules. Others were concerned that some of the proposals currently being discussed would weaken the rule of law and reintroduce significant power-based features.

On the other hand, many felt that solutions that attempt to exclude the United States — either through voting or construction of parallel systems — would be unappealing to most WTO members, including Canada. First, whether voting on Appellate Body appointments is legally authorized, it would be a direct provocation to the United States, under an administration that would likely welcome such a provocation and use it to justify an even more dramatic response. Voting would significantly change the dynamics of the WTO, so would need to be evaluated very carefully before being pursued. There are no “shortcuts” in the system, as consensus rules and conventions are there to protect all WTO members. Second, the United States is involved in a third of the disputes in the WTO, and most countries, including Canada, have most of their disputes with the United States. A dispute settlement

system that does not apply to the United States would not be in the interests of most members, so would be “pointless.” Moreover, attempting to isolate or exclude the United States might be “fatal” to its relationship with the WTO and even prompt it to withdraw from the organization.

Other Improvements to the Dispute Settlement System

While the concerns about the Appellate Body impasse, and the responses to it, dominated this part of the discussion, participants also raised a number of other issues about the functioning of the dispute settlement system. It was suggested that separately, and perhaps even prior to solving the urgent and substantive problems, WTO members should commit to negotiations involving the United States on other institutional reforms, some of which may also contribute to resolving the current impasse.

Improve other options for dispute settlement: Many participants expressed concern that adjudication had emerged as the most important approach to resolving trade disputes. They argued that more effort should be concentrated on “dispute avoidance” and on other approaches such as resolving disputes in the regular committees (“special trade concerns”), mediation and conciliation, or even collective political intervention in some disputes. In some cases, this might also mean focusing more on building compliance capacity rather than assigning blame and imposing penalties. Reducing reliance on adjudication would require changes in the way both members and adjudicators approach dispute resolution.

Permanent adjudicative bodies at both levels: A proposal that goes in the other direction was to establish a permanent first instance tribunal — modelled on the existing Appellate Body and including its own standalone secretariat — and to strengthen further appellate review. This would include drafting full statutes for both (modelled on the statute of the International Court of Justice), establishing full-time appointment and compensation, and updating the code of conduct with better rules for conflicts of interest. It was argued that fully fledged and supported tribunals for both levels would result in higher quality and more conservative reports, with less reliance on legal staff. In this regard, priority should be placed on strengthening the role of adjudicators, not on expanding the staff and budgets of their secretariats.

Terms of Appellate Body appointments: It was suggested that the existing system could be improved by having Appellate Body members appointed for one term of six to eight years, without the need for reappointment. This would fix the “design flaw” of reappointments, which provides an opportunity for WTO members to interfere with the independence of the adjudicators. Appellate Body members could also be made full time and required to reside in Geneva.

Appellate Body appointment criteria: Another suggestion to improve the legitimacy of the dispute settlement system was to stop making appointments to the Appellate Body according to geographical distribution, which effectively excludes candidates from Canada and other countries in the same regions as major powers. Instead, the appointment process should be based on merit, which would lead to only the best people being appointed from different WTO members.

Rate of appeal: Some considered the high rate of appeal of panel reports to be unsustainable, greater than any legal system could be expected to accommodate. One explanation for the high rate was the absence of financial disincentives, since there is no cost recovery by the WTO for the provision of dispute settlement services. A government that seeks to placate domestic constituencies by gaining time faces little risk or costs from appealing. One solution — used by other tiered adjudicative systems — would be to raise the standard of appellate review of panels, since little is gained from the Appellate Body engaging in a full review of panel reports, changing only the reasoning but upholding the result. It was noted that the Appellate Body could discourage less meritorious appeals by exercising judicial economy more frequently.

Treat trade remedies disputes differently: The centrality of controversial developments in the area of trade remedies (i.e., antidumping and countervailing duties, and safeguard measures) was widely acknowledged. The obligations in these areas are ambiguous — either intentionally or as a result of poor negotiation — and most of the complaints by the United States seem to concern interpretations in this area. While the amount of trade implicated is probably insignificant, it has great political salience in the United States. Some argued it was not worth sacrificing the whole system for the sake of issues of marginal importance. They urged members to be open to flexible solutions that address specific US concerns in the area of trade remedies, including

conceding to the United States on issues such as “zeroing,” diverting trade remedies disputes to a non-adjudicative process, or eliminating appeals from panel findings related to trade remedies.

Divert small (or large) claims to specialized procedures: It was suggested that the emergence of strategic rivalry between the United States, China, the European Union and perhaps Japan can be expected to create significant strain on dispute settlement in the future. One solution might be to divert disputes between these members — or certain kinds of disputes — to dedicated dispute settlement procedures, perhaps even alternative dispute settlement under article 5 (on mediation) of the DSU.

Use different rules of interpretation: Given the concern about the application of the VCLT to ambiguous and incomplete trade rules, it was suggested that different rules of interpretation might be used. Even if the Appellate Body has clarified obligations that reflect incomplete negotiations, it did so by faithfully adopting a textual approach, as the DSU instructs it to do. It therefore did not have the option not to rule on ambiguous trade remedies obligations. Possible suggestions for improvement included using a different (more deferential) standard of review or a “purposive” (teleological) approach to interpretation, the latter of which would probably only make matters worse.

Adopt only the findings and recommendations: One proposed solution to concerns about the status of past Appellate Body reports was to adopt parts of the reports separately, in a two-step process: first, adopt by negative consensus the findings and recommendations, including alternative but more specific recommendations for compliance; and second, adopt by positive consensus the reasoning, perhaps even in the General Council to make it more legitimate. It was argued that such a process — which, like civil law systems, puts the emphasis on outcomes — would give the parties more specific recommendations while avoiding accusations of judicial law making. Others doubted this would work either practically or theoretically. They countered that the purpose of the dispute settlement system is also to clarify the obligations, that adopting the results without the reasoning would complicate compliance, that what makes a judgment legitimate is not who wins or loses but the clarity of the reasoning, and that governments need to be able to explain the outcome and sell it to affected domestic stakeholders. Therefore, the

legitimacy of the system depends on a clear set of findings, with reasons and a logical analysis.

Strengthening the Rule-making Function and Updating the Substantive Rules

There was broad agreement that safeguarding the dispute settlement function depends first and foremost on strengthening the rule-making function, or at least modernizing the trade rules through existing mechanisms. The failure to agree on new rules has led to an unsustainable emphasis on the dispute settlement function. However, this imbalance should be fixed not by weakening dispute settlement but by strengthening the negotiating function. There are flexible mechanisms, such as authoritative interpretations, to update both the substantive rules and override interpretations adopted in dispute settlement, but these have not been used. More effort should be put into making their use more likely.

Many participants considered, however, that the real problems facing the WTO are not the operation of the dispute settlement or negotiation functions so much as the inability to agree on new substantive rules. Notwithstanding the usual criticism that the rule-making mechanisms and procedures are ineffective, renewed effort needs to be focused on substantive rule making. No amount of tinkering with procedures, either in dispute settlement or in negotiation, is going to overcome divergences in interests between an increasingly pluralistic membership of the WTO. Making the WTO work well again will mean taking account of the interests of all its members. With the current levels of geopolitical tension over trade, however, participants recognized how difficult it might be to get the major powers to return any time soon to the negotiating table.

Key Observations on Safeguarding and Strengthening the Dispute Settlement System

→ The impasse over the Appellate Body is a symptom of the deeper crisis in the trading system related to structural changes in the global economy and the failure of the rule-making function of the WTO to keep up with these changes.

- The Appellate Body may not be a necessary feature of the WTO dispute settlement system and judicialization may have gone too far, but in the current design and architecture, the incapacitation of the Appellate Body threatens the whole system.
- While the rules-based system for resolving disputes is fundamentally important to the trading system, its legitimacy erodes as the rules grow out of date and no longer reflect economic and geopolitical conditions.
- The impasse over the Appellate Body risks distracting from discussion of other improvement that would make the dispute settlement system more inclusive and effective for many members.
- Agreement to appoint new Appellate Body members likely will not be reached by December 2019, so interim alternatives and permanent solutions should be pursued simultaneously.
- Interim solutions such as no-appeal and appeal-arbitration agreements can preserve rights for some members, but solutions that attempt to exclude the United States are not in the interests of most members.
- The Appellate Body could be suspended in the interim period, permanently disbanded or reformed to address US concerns, but care should be taken not to make significant changes under pressure or without considering more targeted improvements to the functioning of the Appellate Body.
- A number of other reforms can improve the operation of the Appellate Body, strengthen the efficiency and legitimacy of the institution, and help insulate it from geopolitical rivalry.
- There could be greater focus on dispute avoidance techniques, alternative mechanisms for dispute resolution such as mediation and conciliation, and even collective political intervention in some disputes.
- The dispute settlement function cannot be safeguarded unless, at the same time, the WTO's rule-making function is also strengthened and the substantive trade rules are modernized.

THEME 3

Modernizing the Trade Rules for the Twenty-first Century

Participants considered that the most important challenge facing trade cooperation in the twenty-first century is to update the substantive rules to reflect changes in the structure of the global economy, shifts in national political economies and the increasingly pluralistic interests of WTO members. Trade rules will continue to reach further behind the border into standards and regulation, competition and investment, and will need to address a variety of behind-the-border and cross-border issues raised by the new economy. The rules will increasingly need to expand the boundaries of what has traditionally been included in trade, integrating issues related to sustainable development, climate change and policies aimed at making trade more inclusive. In addition, renewed technological rivalry may require updated rules on subsidies, IP and national security, including cyber security.

This complex geopolitical-economic environment means that the approaches to rule making that have worked in the past may not work as well in the future. The WTO will need to adapt. WTO negotiations, both their architecture and their substantive content, will need to be approached differently, especially on issues on the periphery of trade. Addressing complexity may also require better engagement with specialized groups and non-state actors. Governments need to develop a better understanding of what they want to accomplish through trade rules before they can engage effectively in new negotiations.

Updating the Rules to Make Trade More Inclusive

A backlash against globalization in developed countries has been fuelled, in part, by concerns about the uneven distribution of the benefits of free trade, growing economic inequality and the economic exclusion of disadvantaged populations: women, Indigenous peoples and disadvantaged minorities. Many countries acknowledge that more needs to be done to

ensure that trade is inclusive, that is, that the benefits of trade are more broadly shared.

There is still some uncertainty, however, about what specifically can be done in the trade rules, and in the WTO in particular, to achieve this objective. Some participants suggested that, given the complexity of multilateral negotiations, inclusive trade might be best addressed in regional and bilateral free trade agreements (FTAs) rather than the WTO. Indeed, most developments on these issues have occurred in FTAs, which may provide lessons about how to pursue an inclusive trade agenda in other venues and in the WTO.

Lessons from FTAs: The discussion suggested that the first lesson might be that there needs to be more clarity on what inclusive trade means in practice. While inclusive trade primarily aims at including women, Indigenous peoples and economically disadvantaged minorities in the benefits of international trade, it could also include labour more generally and other issues of sustainable development. Participants also were uncertain about how deeply the notion of inclusive trade can penetrate into the trade rules: how should it apply to substantive commitments, process and transparency issues, and behind-the-border measures? Some noted there is a risk of politicizing issues so they lose traction when governments change, and there is a risk of overpromising and then failing to deliver. Others suggested that governments may need to be specific and realistic about what the trade regime can deliver, for example, focusing on incremental measures that promote greater equality and produce measurable results. There was inconclusive discussion about whether to approach these issues individually or together as a package, or whether they should be approached incrementally (i.e., sector by sector) or systemically (for example, by making economic rights of certain groups part of the whole system of trade rules).

It was noted that the discussion of trade and gender has both a human rights and economic

equality dimension, challenging whether the existing rules are entirely gender neutral. The objective is to remove barriers to women's economic empowerment and their participation in international trade. International rules on non-discrimination against women and girls inform the measures being incorporated into FTAs. The gender and trade discussion is consistent with the United Nations Sustainable Development Goals, which recognize the importance of integration of economic, social, human rights, political and environmental factors.

Some participants expressed caution about codifying new rules on disadvantaged groups in trade agreements. Since it is well established that women are negatively affected by trade, the focus on trade and gender is appropriate. However, men also work on the lower scale of production value and are often adversely affected by trade liberalization. Governments will need to be sensitive to the fact that developing appropriate mechanisms and modalities for including women and Indigenous peoples in international trade may require different approaches.

Options for advancing trade and gender: It is clear, nonetheless, that governments want to do more to address issues such as trade and gender, and the discussion suggested that some options for action are emerging. First, at a minimum, trade agreements provide a high-profile opportunity to affirm politically meaningful commitments that have been taken elsewhere. Second, WTO members can mitigate harm by refraining from making new trade commitments that might interfere with commitments on gender elsewhere. Third, and more concretely, governments can commit to conducting gender impact assessments across various sectors as part of trade negotiations and commit to taking action if the evaluation finds that an agreement will be harmful to women's interests. Fourth, some trade commitments deliver tangible benefits to certain groups, for example, through procurement carve-outs for Indigenous peoples. Another example would be to pursue liberalization in sectors where most of the workers are women (for example, textiles), so the benefits would accrue mostly to women. This would also be a way for developing countries to gain in exchange for supporting the inclusive trade agenda.

While there are currently no negotiations in the WTO on new substantive rules on gender, the environment or labour, many of the issues

are under active discussion with the intention of developing best practices. WTO activity on trade and gender includes the Buenos Aires Joint Declaration on Trade and Women's Economic Empowerment, a dedicated work program, and a number of workshops held in conjunction with the United Nations Conference on Trade and Development (UNCTAD), the International Trade Center (ITC), member missions and other governmental and non-governmental organizations. And while there is not yet any dedicated technical assistance, UNCTAD, the ITC and others are engaged in preparatory work to deliver such programs.

Combatting Climate Change with New Disciplines on Fossil Fuel Subsidies

Participants noted that the trade rules can make an important contribution to combatting climate change by developing new disciplines on fossil fuel subsidies. The complete elimination of such subsidies would charge the consumer more fully for the social cost of carbon, ultimately leading to a decrease in global emissions. The WTO has, so far, missed the opportunity to be part of the discussion on reforming fossil fuel subsidies. However, developing new disciplines on these subsidies for environmental purposes provides an opportunity to move the trading system beyond its traditional trade-only focus and address head-on the fragmentation of climate change policy. Including these other objectives would also enhance bargaining possibilities.

The current WTO rules do not adequately address the damaging aspects of fossil fuel subsidies. First, due to the nature of the subsidies, it would be difficult to find a financial contribution under article 1 of the Agreement on Subsidies and Countervailing Measures. Second, since most subsidies are provided through the tax system, there are measurement issues for both consumption and production subsidies. Previous WTO disputes have shown how difficult and arbitrary it is to demonstrate foregone revenue. In this case, it would be appropriate to focus on the additional emissions that a particular subsidy causes, since not all subsidies have the same carbon dioxide output. Third, WTO rules do not sufficiently discipline the activities of state-owned enterprises (SOEs). And fourth, the current rules on "specificity" and "injury"

apply to the commercial injury of competitors, whereas for fossil fuel subsidies, the injurious impact is carbon emissions and global warming.

Some suggested that there are, nonetheless, several reasons for the WTO to take on new disciplines on these subsidies. First, it is an effective forum for international cooperation, bargaining, commitment and, to some extent, reporting on these kinds of national measures. It is also evolving into a forum for exchange of diverse policy commitments, involving cross-sectoral trade-offs that address behind-the-border issues. Second, the WTO has experience regulating other kinds of similar subsidies, such as for agriculture (even the environmental aspects) and for fisheries (comparable to fossil fuel subsidies). New disciplines would also address the impact of fossil fuel subsidies on trade relations through distortions of production and downstream industries. Finally, since only a small number of states provide fossil fuel subsidies, new disciplines in this area provide an opportunity to pursue a sectoral plurilateral in the WTO. Regardless of whether new disciplines can be pursued, Canada was encouraged to commit to eliminating all fossil fuel subsidies.

Linkages between Trade and Non-trade Issues

Participants discussed the relationship between trade and non-trade issues, as well as opportunities for greater linkages and synergies. One reason to link trade and non-trade issues is to overcome policy fragmentation to address more effectively various global challenges. While the trading system tends to overshadow other types of international cooperation, just as national policy making accepts that issues are not easily separable, it would be easier to maintain open global markets if there were better coordination with other related policy areas.

Gradual inclusion of other areas in the trade rules: Some observed that the evolution of the WTO already recognizes the interrelated nature of policy making, as the trade rules slowly expanded beyond trade discrimination to include minimum standards for IP (in the Agreement on Trade-Related Aspects of Intellectual Property Rights [TRIPS Agreement]) and domestic regulations (on technical barriers and on sanitary and phytosanitary standards). While each of these policy areas is addressed in different specialized organizations, with different expertise, they have been progressively integrated into the

trading system. There have also been efforts to link other non-trade issues to the trading system over the last 25 years. Since the WTO had a functioning and binding dispute settlement system, and other treaty bodies either did not function as well or faced enforcement challenges, establishing a link to trade was one way to expand recognition of and, in some cases, encourage compliance with the commitments in those other areas.

With the WTO negotiating agenda stalled and the dispute settlement system under siege, linking trade negotiations with other non-trade issues might again provide opportunities for “diffuse reciprocity” — as opposed to “mirror image reciprocity.” This would allow for a wider range of potential trade-offs as part of a package deal. For example, the addition of the TRIPS Agreement expanded the zone of agreement in the Uruguay Round. An example in the regional setting would be Canada’s efforts to find broader trade-offs with Mercosur by making links with animal health and veterinary practice. Linkages seem to work best with other areas where international legal standards already exist, as illustrated by the example of the TRIPS Agreement. Therefore, before pursuing any additional linkages within the WTO, basic threshold commitments could be negotiated outside the WTO and later brought into the trading system. For example, it might be easier to integrate rules on border tax adjustments for carbon emissions into the WTO if they were first made part of an existing regime outside the WTO.

Using trade remedies to enforce other standards: Another kind of linkage between trade and other issues, one that could also contribute to the inclusive trade agenda, would be to make trade remedies available in response to instances of so-called “social dumping.”⁸ Such a mechanism would authorize countries to calculate both the commercial and non-commercial costs of non-compliance with standards contained in human rights and labour agreements to both protect domestic interests and compel other countries to comply with the standards. However, such remedies would be hard to implement and would

8 Defined by the European Parliament Think Tank as “a set of practices on an international, national or inter-corporate level, aimed at gaining an advantage over competitors, which could have important negative consequences on economic processes and workers’ social security.” See European Parliament Think Tank, “Understanding social dumping in the European Union” (21 March 2017), online: <[www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BR\(2017\)599353](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BR(2017)599353)>.

be susceptible to abuse. Developing countries, in particular, would see these as a new form of protectionism. Indeed, efforts to condition market access on compliance with non-trade standards and values in the name of inclusive trade could be resisted by many developing countries as a new form of Western hegemony designed to undercut their comparative advantage. Canada has already encountered this resistance to its inclusive trade agenda in its FTA discussions with China.

Applying the Trade Rules to China

There was also a question of whether the WTO rules need to be updated to deal specifically with China's state-party-dominated model of economic development. While some consider that the existing rules are not adequate, others argued that both the general rules and China-specific rules in its Accession Protocol are more powerful than is generally assumed. For example, article 15 of the Accession Protocol on alternative benchmarks for subsidies investigations does not expire and could be used to challenge subsidies granted through SOEs in China. Instead of trying to reach agreement on new rules dedicated to issues that arise in China — which would be difficult, time-consuming and unlikely to be agreeable to China — a more effective approach might be to conduct a full review of China's compliance with the commitments in its Accession Protocol. Others suggested that China is already making progress in removing restrictions on access to its market, as was seen with its ban on forced technology transfer implemented to improve its relationship with the United States.

Moving the WTO into the Digital Age: New Rules for the New Economy

Participants observed that the WTO was created for the industrial age. Its rules are therefore largely about tariff reductions and liberalization to drive competition, innovation and trade. However, rapid technological change requires corresponding updates to the rules and the institution of trade. Almost immediately after the founding of the WTO, members began discussions on new commitments on e-commerce, but have been unable to agree on anything other than a moratorium on duties on digital trade. Faced with the failure to reach a multilateral outcome, and with digital trade growing to US\$26 trillion

in the meantime, like-minded WTO members began negotiations in January 2019 on new plurilateral commitments on e-commerce. The challenges of crafting effective international rules for the digital age will be significant, and certainly beyond what the WTO can handle on its own.

It was argued that the new economy is the result of the transition from a knowledge-based economy to a data-driven economy, which fundamentally changes the nature of innovation and value creation. Economic dominance is no longer just a matter of having the best human capital, but also requires having the best computing power to underpin the exploitation of the value contained in data. Whereas the old trade rules were instruments of the analog Cold War, the new strategic competition involves a battle over data and artificial intelligence. Since classical trade liberalization is no longer the most effective policy lever in the new economy, the issues that will need to be addressed to bring the WTO into the digital age are quite different.

IP: It was noted that the IP obligations of the TRIPS Agreement are unlike others in the legal framework of the WTO. Most trade commitments are meant to create winners on both sides of a trading relationship through liberalization that lowers barriers for reciprocal benefit. By comparison, the commitments in the TRIPS Agreement often benefit one side more than the other, based on relative creative capacity. In the new economy, where value is increasingly based on intangible assets, IP protection becomes even more central to the distribution of the benefits of trade. Further, those with the technological advantage are able to extract value and market dominance from massive quantities of data they continuously accumulate from around the world. Extension of IP protection will entrench IP as an instrument for rent transfers from IP-creating countries to IP-consuming countries, and therefore may no longer be in the interests of many countries concerned about protecting their own infant industries, extracting value from domestic data and even asserting data sovereignty. Also, where previously IP protection was exchanged for disclosure, IP rights over algorithms in the new economy afford protection to creations that are not disclosed. The nature of the new economy therefore changes the nature of the bargain sought in trade negotiations, making negotiations even more difficult than they were in the win-win world of traditional trade.

Competition policy: Since network externalities and economies of scale are sources of market failure in the data-driven economy, it was suggested that competition policy may need to become an essential feature of the trade rules, not just an optional add-on. Traditional disciplines on subsidies and other tools used for trade in goods may no longer be enough to address the concentration of market power in the United States and China over digital trade. New rules may also be necessary to address oligopolies in trade in services. In the absence of effective multilateral rules in the WTO, countries will use their own rules and their own enforcement mechanisms, perhaps even in a manner that has extraterritorial implications. The obligations contained in the TRIPS Agreement may complicate efforts to address the competition-related challenges of data dominance in the new economy. For example, when Germany forced an insurance company to share its market data with competitors as part of competition intervention, it raised concerns about the protection of trade secrets.

Cyber security and national security: Participants considered how the nature of digital technology and the integration of global supply chains present new challenges in securing critical telecommunications infrastructure and the Internet of Things. In a world where physical infrastructure is run by digital infrastructure, the types of rules that will be required are different than what was negotiated in the Canada-United States-Mexico Agreement (CUSMA). Recent bans in several countries on sales to or from several Chinese companies (for example, Huawei) illustrate the challenges in establishing trust that the servers and data will not be accessible by strategic competitors. Furthermore, always-connected consumer devices may be hackable in ways that present additional security and safety risks. The issue is whether traditional trade rules provide enough flexibility for governments to address these concerns by restricting access to data. The security exception of article XXI of the GATT may be available in some circumstances, but interpretation of its scope will come under increasing strain. A balance will need to be struck between limiting the application of the security exception while not making the world a riskier place.

Standards for data and privacy: It was highlighted that one of the main battlegrounds in the new economy will be over standards for data flows

and privacy protection. It might be increasingly difficult to find a common basis for negotiations on digital trade when the gaps seem to be widening between the major economies and the consequences of conceding ground will be stifled economic opportunity. Some considered, however, that the United States and China, at least, may not be that far apart, given that US positions on cross-border data flows are not as absolute as is often thought. For example, obligations in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership and CUSMA do not provide an absolute right for free flow of data, but only for information related to the conduct of activities covered by the agreement. There may therefore be room for the United States and China to make practical and flexible commitments that would see China open up to cloud computing, while some requirements for data localization are allowed. On the other hand, what is still missing from any current trade rules is an accounting for the value of data as an intangible asset.

Subsidies: While there is increasing concern that China's pervasive subsidies give Chinese firms an unfair advantage in global trade, the nature of its economy requires a certain amount of public sector investment. Some considered that rather than pursuing more disciplines on subsidies to restrict China's activities, it might instead be preferable for Western governments to have more flexibility to become involved in promoting national technology development. This would overcome concerns that private corporations in the West are underinvesting in research and development at a time when China's state-party-directed model appears to be delivering more targeted results.

The Role of the WTO in Regulating the New Economy

Participants acknowledged that the WTO has an important role to play in regulating cooperation in the new economy, but considered that future rules may need to have a different orientation than that which governed the industrial age. For example, private enterprises are usually seen as the main beneficiaries of trade rules designed to enable them to operate globally. In the new economy, the public interest may require that trade negotiations aim instead to limit certain private sector activities, in particular to ensure that superstar firms can be taxed fairly and the value of their data fully captured.

Second, while rules on e-commerce fit easily into the traditional focus of the WTO, it will be more challenging to develop rules on the data generated by e-commerce, which raises concerns about asymmetric control. Traditionally, the purpose of the trade rules is to lower barriers to exchange in order to foster competition. In the data-driven economy, however, reducing barriers actually risks eliminating competition. And third, the nature of the TRIPS Agreement reflects the fact that most countries welcomed foreign investment, as it brought capital and technology. However, it was also suggested that strategic, technology-related investments have the increasingly extractive purpose of acquiring technology companies in order to expatriate their technology. The new environment of suspicion of technology investment may lead to a different approach to rules on investment.

There are also other areas where trade rules will be helpful, such as anti-discrimination rules on access to source codes, disciplines on geo-blocking (i.e., when countries prevent companies from sending digital goods abroad or impose roaming fees on communications made abroad) and the trade-related aspects of data protection standards. Nonetheless, participants considered that the WTO will find it difficult to fit many issues of the new economy into its traditional mandate and advised caution in expecting too much of the organization. Some standards — for example, on cyber security and data governance — will likely need to be developed elsewhere, for example, in the OECD and International Telecommunication Union. There is a need to engage developing countries as well as developed countries in order to achieve consensus on global rules for the new data-driven economy. As the global economy, and the related development of dominant standards, increasingly splits into hegemonic spheres of influence, China's Belt and Road Initiative (BRI) has emerged as a notable example.

The Digital Round and the Interests of Developing and Small Countries

Concern was expressed that the winner-takes-most dynamic of the new economy presents particular challenges for developing countries and small economies that are not in the position to contribute to standard setting. The future of the WTO may therefore rest on the engagement and cooperation among countries that depend on the multilateral trading system to level the playing field. Among developing countries, there is not yet a shared understanding of the barriers they face, although there is better understanding of e-commerce than the implications of digital trade more generally. There is some degree of “data nationalism” in most countries, with many developing countries calling for infant industry protection for data companies and supporting data localization as a way to control data.

It was suggested that levelling the playing field in the new economy may require a new “digital round” of trade negotiations. However, since only the United States and China are in a strong position, the negotiations are likely to be lopsided and difficult. Others may need to think differently about how to proceed with such negotiations. For example, developing and small economies can focus on data governance. The notion of data trusts, which aggregate sufficiently large data and give competitive access to that data to others, could be the basis for a new grand bargain in the WTO. On this, Canada could continue to play an important role in building trust through a bottom-up process that progressively brings more countries into the fold.

Updating the Architecture of Rules-based Trade Cooperation

Participants considered that, in an era of global challenges, regulatory complexity and political upheaval, effective mechanisms for international cooperation are as essential as ever. Since cooperation can still be successfully negotiated where there are common interests, the perspective of whether there is a crisis in the trading system may depend upon the choice of forum and negotiating partners. The challenge is therefore to choose the right forum for each area of new standard setting. Participants discussed a number of considerations.

The limits of developing new standards in the WTO: The private sector needs uniform standards that reduce the burdens of conducting their business across borders. If countries do not have the same standards, lack of trust may lead to denial of market access. Increasing competition to set global standards may require new ways to cooperate in the development of such standards. The WTO is an important piece of this regulatory puzzle, but cannot be the exclusive or even the primary forum to address most of these modern challenges. There are limits to what the WTO can do, and it cannot be expected to solve all the issues of cooperation. It might instead be preferable for many new rules and standards to be developed first outside the WTO. While the WTO should be involved in the trade-related aspects of these developments, it should be cautious about bringing non-trade-related issues into the WTO. For example, the changing nature of the economy and the transition to the new economy may require governments to think differently about how to regulate competition. It was suggested that this may require that digital trading giants such as Amazon and Google be regulated more like companies in the financial and insurance sectors than traditional trading companies of the past.

Advantages and disadvantages of FTAs: Although participants considered multilateral negotiations to be important, they were realistic about the constraints. Such negotiations may take years to complete and require the construction and maintenance of like-minded coalitions. If objectives are perceived by some countries as being “politicized” — a potential risk with the inclusive trade agenda — they may face greater resistance in a multilateral setting consisting of diverse state interests. Faced with these challenges, FTAs have become a major vehicle for new standard setting among states with similar or compatible objectives. It may be easier to depoliticize certain issues in an FTA among like-minded trading partners, as illustrated by the experience with labour and environment provisions of many FTAs and the micro, small and medium-sized enterprises (MSMEs) chapters of the Trans-Pacific Partnership. On the other hand, some questioned whether any FTA has yet fully optimized the potential of the inclusive trade agenda to provide women, Indigenous peoples, other economically disadvantaged minorities and MSMEs with better access to the benefits of trade. Others questioned the rules of origin (that is, whether businesses

will benefit in the future) and the enforceability of FTAs, noting that until recently, states have opted to take their disputes to the WTO rather than to the dispute settlement mechanisms of their FTAs.

Grand bargains versus sector-specific initiatives: The choice of which issues to include in negotiations over new rules was also seen as important by participants. On the one hand, including a wider range of issues in the negotiations, perhaps even some non-trade issues, may create synergies by enlarging the zone of agreement (through diffuse reciprocity). For example, the addition of the TRIPS Agreement to the Uruguay Round made wider coalitions possible. On the other hand, sector-specific negotiations may be more successful by including only a few items and participants. Such initiatives can proceed with only states interested in, for example, steel or fossil fuels. They also avoid “hostage taking” by states that are less affected or vetoes by states that stand to benefit from states not reaching agreement, for example, those that benefit from the fossil fuel subsidies of other producing states. An inclusive trade agenda may also benefit from a sectoral approach by allowing standalone agreements in sectors with strong representation of women, such as textiles.

New cooperation “clubs” (plurilaterals): Despite their own limitations, plurilateral negotiations seem to offer the best chance to make progress in many policy areas. Due to their relative efficiency, the interest in plurilaterals has been growing to include areas such as environmental goods, services, e-commerce, investment facilitation and border carbon adjustments, among others. Participants thought it likely that more clubs would be created where, as in the case of public procurement, participation depends upon states adhering to the standards of the club. There was, however, some concern that the failure to find a way to pursue plurilaterals within the WTO structure risks rendering the organization dysfunctional. It could lead to a world divided into spheres of influence between the United States, China, the European Union and perhaps Russia. It will therefore be important to strike a balance between multilateral and plurilateral approaches to new rule making.

The examples of the BRI and Digital Silk Road were provided to illustrate how clubs can lead to divergence, on at least two levels. First, clubs can lead to a divergence in hardware standards: the firms building the BRI infrastructure are all Chinese firms, whose standards are being adopted. Firms

such as Huawei externalize China's standards and practices to BRI partner countries, including on items such as censorship software. Second, clubs can lead to a divergence in legal institutions: China is working with BRI countries to develop alternative legal formats, such as a uniform bill of lading as part of China's BRI railway network and standalone dispute settlement procedures. These developments will only exacerbate the divisions between the West and China. These risks reinforce the need to make the WTO work, as there is no sustainable alternative to effective multilateralism. Participants considered that a balance needs to be struck between issues being addressed inside the WTO and those addressed outside the WTO, with proper coordination to avoid forum shopping and a fragmented system.

Modernizing Enforcement Mechanisms and Remedies

As the focus of trade cooperation in the new economy moves to standards, regulations and competition, the current tariff-based approach to remedies and enforcement may need to be reconsidered. The ability to enforce commitments through authorized tariffs was one of the main advances of the WTO, providing legitimacy to sanctions designed to bring about compliance. However, in a world dominated by standards and digital trade, tariffs applied on cross-border trade may no longer provide an adequate remedy. Instead, in the digital world at least, the focus will shift to competition policy to enforce commitments, which will be just as controversial as tariffs have been as remedies in the industrial age. Other approaches might be to deny access if data protection does not meet a certain standard or to use public procurement rules to enforce reciprocity. However, while it may be necessary to update the methodologies of enforcement before each country tries to impose its own standards on others, participants wondered whether there was yet a sufficient sense of urgency to make any progress on this.

Responding to New Challenges to the Legal Framework

It was noted that the resurgence of geopolitical tension and increasing technological rivalry is accompanied by diminishing respect and adherence to the existing WTO rules. Competition

for technological dominance raises a number of national security issues that do not fit neatly in the current legal framework. Threats to critical infrastructure, cyber security and a winner-takes-most mentality pursued by firms and their home countries create great uncertainty for the global economy. While the intervention of the WTO in issues that raise national security concerns might provide a short-term sense of certainty, concerns about the legitimacy of such intervention may, in the long run, undermine the entire system. Likewise, while the principles of non-discrimination and Most Favoured Nation would seem to apply still to emerging competition in technology, other legal principles may ultimately prove more appropriate. For example, it was suggested that the WTO could consider introducing a rule of equity, not *ex aequo et bono*, but rather a particular methodology that is fact-intensive to address some issues on a case-by-case basis.

The Development Dimension and S&DT

Participants recognized the importance of development issues to the reform of the trade rules. They encouraged constructive engagement with developing countries to ensure they are not left out or overwhelmed by too many issues on the table. They also called for a solutions-oriented approach to the controversial issues of developing country status and eligibility for S&DT, one that responds to the capacity-building needs of developing countries and is based on flexibility, not reciprocity, for developing countries. It was considered that efforts to "graduate" developing countries out of developing country status will not work with countries such as China, which considers that, as an accession member already subject to a WTO-plus Accession Protocol, it should not be asked to make more uncompensated concessions. Indeed, it is unlikely that most developing countries will relinquish their status as developing countries or their entitlements to S&DT.

It was suggested that WTO members need to move beyond labels, as China has already signalled a willingness to do so. Instead of a blanket denial of S&DT through graduation, there need to be carefully designed rules that provide objective benchmarks for when differential treatment is not available, for example, if exports exceed a certain level of world trade. The regime for S&DT of the Trade Facilitation Agreement provides a good starting

point. It does not function based on labels but through individualized commitments, a technique also used in the Paris Agreement on climate change. A focus on individualized implementation schedules and practicable commitments allows members to define their own relationship with the trade rules according to their development needs.

Optimism in the Face of Change and Increased Competition

There was broad agreement that the multilateral trading system that developed in the post-World War II period contributed to the greatest improvement in living standards in human history. The multilateral trading system was founded on a hypothesis of “trade for peace” and supported by a view that trade was win-win. By contrast, the current environment does not seem to be as positive: new technologies and innovation are dramatically changing the very foundation of the economy, and the resulting technological rivalry is causing the trade rules to be used as a tool to pursue hegemony. Moreover, as trade tensions between the United States and the European Union show, the challenges to the system are not just from new actors trying to change the rules of the game.

Some participants observed that the most important function of the WTO is negotiation and it has fallen into disarray. Other functions of the WTO, such as enforcement, cannot operate well unless the rule-making function continues to work. The GATT was fundamentally about negotiation, and the various rounds (for example, Tokyo, Uruguay) generally dealt with issues between the two opposing powers of the United States and the European Union. In the current context, it is not clear that progress can be made until there is a meeting of the minds between the United States and China. Without a breakthrough in that relationship, the trading system will continue to evolve into separate blocs. Other countries that want to preserve the rules-based multilateral system will have to muddle through until there are breakthroughs by the others. Some participants thus viewed the direction of the trading system as a source of significant pessimism.

Others considered a pessimistic assessment of the current state of affairs to be ahistorical. The trading system has always been used by major economies to dominate others, especially developing economies. The rise of China and other emerging

powers has indeed changed the landscape of trade compared to the 1980s. While these powers are using the rules of the game to their advantage, it is not clear that Western governments are prepared for this world of “multiple geographies.” The Western world needs to do more to prepare for the changes that are taking place. The Uruguay Round went on for nine years of stop-start negotiations, during which different countries always had different interests. With the expansion of the WTO from 125 members to 164, the negotiations will be even more complex. Ultimately, while there have always been difficulties in trade negotiations, the system has muddled along relatively successfully.

The world has changed, and will continue to change, and governments must learn from the past in order to move forward. It will take hard work to reproduce the successes of the past in the changed context of the twenty-first century. While it is tempting to be pessimistic about the current state of rules-based trade cooperation, this should not lead governments to act reflexively in an effort to preserve the status quo. Rather than focus on single scenarios, long-range and ambitious thinking is required to plan for many possible scenarios. Participants concluded that it was important to pursue WTO reform with energy, ambition and realism, seeking a broad range of alliances where possible, and working to create greater flexibility to accommodate the evolving interests and needs of WTO members in an uncertain and dynamic global economy.

Key Observations on Modernizing the Trade Rules for the Twenty-first Century

- Concerns about growing inequality and a backlash against globalization mean that efforts need to be made to ensure that the benefits of trade are more broadly shared.
- Experience with pursuing inclusive trade suggests that it may need better definition, and objectives need to be realistic and measurable, but the options for improving women’s engagement in international trade are becoming more concrete.
- The trading system should contribute to and not impede global efforts to combat climate change. Reducing fossil fuel subsidies could

make an important contribution, although current WTO rules are not sufficient to do so.

- To avoid fragmentation in addressing global challenges, the trade rules can be better integrated with rules for other non-trade issues, although such linkages may work better when standards have already been developed outside the WTO, as happened in the case of the TRIPS Agreement.
 - The current trade rules were created for the industrial age, but the new (data-driven) economy has changed the rules of the game because control over the accumulation and exploitation of data allows winner-take-most giants to limit the spread of the benefits of trade.
 - The trade rules may need to consider a number of issues differently, such as the scope of IP, competition policy, standards for data and privacy protection, national security and cyber security, subsidies, geo-blocking, access to source codes and so forth.
 - The WTO can contribute to regulating the new economy, but to do so, the traditional approaches to trade negotiations and trade regulation may need to evolve, focusing in some cases on restrictions on private activity rather than only openness; in other cases, new rules may be best developed first in other fora.
 - A new Digital Round may be necessary to level the playing field in the new economy. Although the United States and China have all the leverage for now, other members will need to cooperate and focus on developing data governance frameworks in pursuit of a new grand bargain in the WTO.
 - In updating the architecture of rules-based trade cooperation, choices can be made between the multilateral system, plurilateral and sectoral agreements, and regional and bilateral agreements, each of which has its advantages and disadvantages.
 - There are, nonetheless, limits to what the WTO can do to develop standards in certain areas, and cooperation with other international organizations will bring about more effective and legitimate outcomes, for which it might be necessary to update WTO enforcement mechanisms.
- Addressing the development dimension will be important to strengthening the WTO, including finding ways to provide flexibility in the rules for developing countries that are commensurate with their level of development and building their capacity to take on new commitments.
 - With geopolitical rivalry currently undermining rules-based trade cooperation, it is crucial to persevere in broadening engagement and long-term planning for WTO reform, with a framework agenda that is adaptable to evolving circumstances.

Appendix of Key Strategic and Thematic Observations

Key Strategic Observations

- While current tensions place significant strain on rules-based trade cooperation, they have also become a catalyst for renewed engagement and dialogue among governments on how to modernize the trade rules and strengthen the WTO. This new energy and focus provide an opportunity for countries that support and depend on rules-based trade cooperation to contribute enlightened ideas and advance novel reform initiatives.
- Multilateralism and rules-based trade cooperation are key for Canada's prosperity and relations with the rest of the world. As a middle power with a trade-dependent economy, Canada has both the incentive and the capacity to contribute to reform efforts. The Ottawa Group initiative was viewed as a positive baseline platform for the reform effort, but one that should be expanded to other WTO members.
- While the need for reform of the rules and institutions of trade is apparent, succeeding in negotiating reform will be challenging due to the diverse and deep political tensions within and among WTO member states. This challenging negotiation context includes ongoing structural changes in the global economy, the growing importance of trade in data and services, growing complexity of transnational regulation, plurality of state interests, developed versus developing state perspectives, heightened geopolitical rivalry and populist backlash against globalization.
- There was also an acknowledgement that while global issues are increasingly interconnected (for example, climate change, human and labour rights, the data-driven economy, competition, privacy and so forth), they need not — and cannot — all be addressed within the WTO. There should be greater cooperation and coordination between international organizations to address these and other important linkages.
- Canadian initiatives to assist in modernizing the rules and institutions of multilateral trade cooperation are welcome, but a more ambitious, inclusive and systematic approach will be needed.
- The June 2020 WTO Ministerial Conference provides an important milestone at which to identify realistic outcomes and then work backwards to build the necessary consensus.
- Canada could leverage its traditional reputation as a “bridge” country to advance a positive and pragmatic vision for strengthening the rules and institutions for the future, rather than only reacting to tensions and immediate crises.
- Canada should work with other WTO members (beyond the Ottawa Group) to develop a comprehensive list of negotiating demands and methodically and patiently engage the capitals (beyond Geneva) of a progressively wider range of WTO members to build support for an inclusive reform agenda.
- Given the importance of the United States and China to the global economy and the risks posed by the current tensions between them, it will be important to keep them engaged in the WTO and committed to multilateral rules-based trade cooperation.
- On dispute settlement, while all participants acknowledged that the impasse over appointments to the Appellate Body is unlikely to be resolved in the short term, WTO members should avoid resorting to solutions that would either exclude the United States or address its concerns in ways that fundamentally undermine the dispute settlement system.
- Canada is well-placed to provide expertise and resources to developing countries to help build their capacity to engage on the reform agenda. This could assist in building a more inclusive reform agenda and a broader consensus.

- To ensure that the modernization of the rules is evidence-based, there needs to be improved information sharing, coordination and cooperation between the WTO and other international organizations and other relevant entities.
- To ensure that reform is legitimate and inclusive, there should be additional consultation and outreach with a more diverse range of stakeholders and efforts to strengthen public awareness of the benefits of trade, as well as the need for reform.
- The Canadian government should engage with civil society, business associations, think tanks and academics to assist with research and development of novel strategies and initiatives.

Theme 1: Key Observations on Improving the WTO Monitoring of Existing Rules

The discussion around improving the WTO monitoring of existing rules was not comprehensive. Many participants did not have in-depth practical experience with the current challenges facing the monitoring function. Further analysis of this topic would benefit from canvassing the views of staff in the national missions to the WTO and staff working in the WTO Secretariat.

Within the limits of the discussion, there were nonetheless several key takeaways regarding reform of the monitoring function:

- Regardless of what happens in negotiations and dispute settlement, effective trade cooperation depends on ongoing transparency and deliberation of national measures that might affect trade.
- The current paralysis and lack of trust in the WTO is caused, in part, by an insufficient information or evidence base on which to pursue informed negotiations.
- Despite the importance of information sharing, concerns about the uses to which it will be put, especially in dispute settlement, make governments less forthcoming than is necessary for the system to function well.
- Government notifications remain the most important source of information,

but many governments face capacity challenges in complying with notification requirements that, in some cases, may be unnecessarily burdensome.

- Notifications can be improved by ensuring that information needs are fit for purpose and by providing more support for building the capacity of governments to gather and share information.
- Notifications may have become an outdated approach to transparency and could be partially replaced by having the Secretariat compile information from public data and other sources, as long as the information is verified and legitimate.
- Other sources of information include other international organizations, other stakeholders and specifically composed expert groups tasked with developing consensus on technical issues.
- TPRs are an important opportunity for information exchange and deliberation, but could be improved by making their timing more flexible, their content more targeted, their discussions more probing and the Secretariat reports more detailed in some areas.
- China presents a special challenge of inadequate transparency due to decentralized government structures, but it could be encouraged to centralize notifications and make them in the original language, and other members could “counter notify” China’s measures from their own or other sources of information.

Theme 2: Key Observations on Safeguarding and Strengthening the Dispute Settlement System

- The impasse over the Appellate Body is a symptom of the deeper crisis in the trading system related to structural changes in the global economy and the failure of the rule-making function of the WTO to keep up with these changes.
- The Appellate Body may not be a necessary feature of the WTO dispute settlement system and judicialization may have gone too far, but in the current design and architecture, the incapacitation of the Appellate Body threatens the whole system.

- While the rules-based system for resolving disputes is fundamentally important to the trading system, its legitimacy erodes as the rules grow out of date and no longer reflect economic and geopolitical conditions.
- The impasse over the Appellate Body risks distracting from discussion of other improvement that would make the dispute settlement system more inclusive and effective for many members.
- Agreement to appoint new Appellate Body members likely will not be reached by December 2019, so interim alternatives and permanent solutions should be pursued simultaneously.
- Interim solutions such as no-appeal and appeal-arbitration agreements can preserve rights for some members, but solutions that attempt to exclude the United States are not in the interests of most members.
- The Appellate Body could be suspended in the interim period, permanently disbanded or reformed to address US concerns, but care should be taken not to make significant changes under pressure or without considering more targeted improvements to the functioning of the Appellate Body.
- A number of other reforms can improve the operation of the Appellate Body, strengthen the efficiency and legitimacy of the institution, and help insulate it from geopolitical rivalry.
- There could be greater focus on dispute avoidance techniques, alternative mechanisms for dispute resolution such as mediation and conciliation, and even collective political intervention in some disputes.
- The dispute settlement function cannot be safeguarded unless, at the same time, the WTO's rule-making function is also strengthened and the substantive trade rules are modernized.
- Experience with pursuing inclusive trade suggests that it may need better definition, and objectives need to be realistic and measurable, but the options for improving women's engagement in international trade are becoming more concrete.
- The trading system should contribute to and not impede global efforts to combat climate change. Reducing fossil fuel subsidies could make an important contribution, although current WTO rules are not sufficient to do so.
- To avoid fragmentation in addressing global challenges, the trade rules can be better integrated with rules for other non-trade issues, although such linkages may work better when standards have already been developed outside the WTO, as happened in the case of the TRIPS Agreement.
- The current trade rules were created for the industrial age, but the new (data-driven) economy has changed the rules of the game because control over the accumulation and exploitation of data allows winner-take-most giants to limit the spread of the benefits of trade.
- The trade rules may need to consider a number of issues differently, such as the scope of IP, competition policy, standards for data and privacy protection, national security and cyber security, subsidies, geo-blocking, access to source codes and so forth.
- The WTO can contribute to regulating the new economy, but to do so, the traditional approaches to trade negotiations and trade regulation may need to evolve, focusing in some cases on restrictions on private activity rather than only openness; in other cases, new rules may be best developed first in other fora.
- A new Digital Round may be necessary to level the playing field in the new economy. Although the United States and China have all the leverage for now, other members will need to cooperate and focus on developing data governance frameworks in pursuit of a new grand bargain in the WTO.
- In updating the architecture of rules-based trade cooperation, choices can be made between the multilateral system, plurilateral and sectoral agreements, and regional

Theme 3: Key Observations on Modernizing the Trade Rules for the Twenty-first Century

- Concerns about growing inequality and a backlash against globalization mean that efforts need to be made to ensure that the benefits of trade are more broadly shared.

and bilateral agreements, each of which has its advantages and disadvantages.

- There are, nonetheless, limits to what the WTO can do to develop standards in certain areas, and cooperation with other international organizations will bring about more effective and legitimate outcomes, for which it might be necessary to update WTO enforcement mechanisms.
- Addressing the development dimension will be important to strengthening the WTO, including finding ways to provide flexibility in the rules for developing countries that are commensurate with their level of development and building their capacity to take on new commitments.
- With geopolitical rivalry currently undermining rules-based trade cooperation, it is crucial to persevere in broadening engagement and long-term planning for WTO reform, with a framework agenda that is adaptable to evolving circumstances.

Agenda

April 16, 2019

Reference Materials

“Strengthening and Modernizing the WTO”, online: <<http://bit.ly/wto-job-gc-201>>.

“Strengthening the WTO Deliberative Function”, online: <<http://bit.ly/wto-job-gc-211>>.

General Questions

- Based on your particular expertise, which issues do you see as most important? What do you see as the way forward in resolving those issues?
- Do you think there is a particular Canadian angle to any of these issues? How important is this and how should it be addressed in this WTO reform exercise?
- Do you think these documents provide a useful menu for commencing WTO reform? Are there any key issues missing?
- Would you propose other approaches to the task, for example, starting with a narrower focus, focusing only on process, focusing only on substance, or setting definite priorities?
- What are your recommendations for the way forward on WTO reform?

9:00-9:15 a.m.

Welcome and Overview of Objectives of the Consultation

Oonagh Fitzgerald and Bob Fay

Introductions (all)

9:15-10:15 a.m.

Session 1: Improving the Efficiency and Effectiveness of the WTO Monitoring Function

Oonagh Fitzgerald (moderator) and Hector Torres

Topics include:

- improving notification and transparency of domestic measures;
- improving capacity and opportunity for deliberation; and
- improving the opportunities and mechanisms to address specific trade concerns.

10:15-10:30 a.m.

Health Break

10:30-11:30 a.m.

Session 2: Safeguarding and Strengthening the Dispute Settlement System

Hugo Perezcano-Díaz (moderator) and Valerie Hughes

Is the WTO dispute settlement system fit for purpose in an era of renewed strategic rivalry?

Topics include:

- diverting some disputes or issues from adjudication;

- revitalizing alternative forms of dispute settlement; and
 - streamlining adjudicative proceedings.
- 11:30 a.m.-12:30 p.m. Session 3: Safeguarding and Strengthening the Dispute Settlement System**
Hugo Perezcano-Díaz (moderator) and Nicolas Lampe
- Topics include:
- causes, consequences and solutions to the current crisis;
 - updating and ensuring appellate review:
 - interim solutions (voting, article 25, no-appeal agreements); and long-term solutions (addressing scope of appellate review, institutional imbalance).
- 12:30-1:30 p.m. Lunch: Dreaming the Future WTO**
Debra Steger
- 1:30-2:30 p.m. Session 4: Laying the Foundation for Modernizing the Substantive Trade Rules When the Time Is Right**
Silvia Maciunas (moderator), Markus Gehring and Joel Trachtman
- Topics include:
- the development agenda and US-China dispute regarding industrial subsidies, SOEs and forced tech transfer;
 - sustainable development and the low-carbon transition; and
 - inclusive trade (gender, Indigenous peoples and MSMEs).
- 2:30-2:45 p.m. Health Break**
- 2:45-3:45 p.m. Session 5: Laying the Foundation for Modernizing the Substantive Trade Rules When the Time Is Right**
Bassem Awad (moderator), Dan Ciuriak and Susan Aaronson
- Topics include:
- digital trade, data localization and services; and
 - TRIPS 2.0.
- 3:45-4:45 p.m. Session 6: Laying the Foundation for Modernizing the Substantive Trade Rules When the Time Is Right**
Bob Fay (moderator) and Patrick Leblond
- Topics include:
- substance, process and governance architecture;
 - means to modernize the rules;
 - plurilateral instruments; and
 - multilateral instruments.
- 4:45-5:00 p.m. Next Steps and Closing Remarks**
Oonagh Fitzgerald and Bob Fay

List of Participants

All participants were consulted at the round table individually, in person, by telephone or by video conference. They are listed with the titles they held at the time of the consultation. In addition to this one-day consultation, there was a series of smaller consultation meetings in April and May 2019, each of which touched on some or all of the topics in the agenda.

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