



**BACKGROUND PAPER**

# THE WORLD TRADE ORGANIZATION: SELECTED CHALLENGES AND CANADA'S PRIORITIES

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*The World Trade Organization: Selected Challenges and Canada's Priorities*  
(Background Paper)

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## EXECUTIVE SUMMARY

The World Trade Organization (WTO) is currently facing challenges relating to its executive, legislative, monitoring and adjudicative functions. As a founding member of the WTO, Canada has a number of reform proposals that are designed to address these challenges and to help the organization retain its role in the rules-based multilateral trading system.

Challenges relating to the WTO's executive function appear to be the result of its decision-making process, the limited mandates of some of its bodies and the restricted role of its Secretariat. Through the Ottawa Ministerial on WTO Reform (the Ottawa Group), the WTO, Canada and some other WTO members are working to strengthen the organization's operation and functioning. In January 2019, they decided to begin consultations with other interested WTO members with the goal of developing proposals for reform. The initial focus will be the WTO's bodies that deal with trade in services, technical barriers to trade, sanitary and phytosanitary measures, and rules of origin.

Second, the WTO has had limited success in fulfilling its legislative (or negotiating) function, with the Doha Round of multilateral negotiations having made no significant progress since being launched in 2001. This outcome may be the result of the strict application of the "single undertaking" principle and trade-related differences among WTO members that may reflect their development status. Canada supports a negotiating approach that would recognize that, while the development needs of certain countries justify transitional periods to implement their WTO commitments, the long-term objective is full implementation of all obligations by all members. Furthermore, Canada wants to begin discussions regarding future WTO negotiations about e-commerce and certain issues relating to state-owned enterprises.

Third, the WTO members' national trade measures are probably not being monitored in an effective and timely manner, which could adversely affect the transparency of the multilateral trading system. In particular, it seems that the WTO's periodic trade policy reviews do not result in improvements to its members' national trade measures, and that these reviews are not sufficiently frequent to reflect current economic realities. Canada wants to enhance the review of – and clear communication about – WTO members' national trade measures, and to address concerns about compliance with the obligation to notify the appropriate WTO body about these measures.

Finally, despite the initial success of the WTO's Dispute Settlement Body, its Appellate Body is facing what some view as a crisis. Canada, which frequently accesses the WTO's dispute-settlement system, believes that resolving the issue of appointments to the Appellate Body will require addressing WTO members' concerns about how it functions.

If left unaddressed, challenges in these four areas could weaken the rules-based multilateral trading system. Canada and other like-minded WTO members are exploring aspects of – and approaches to – reform and future negotiations.

# THE WORLD TRADE ORGANIZATION: SELECTED CHALLENGES AND CANADA'S PRIORITIES

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## 1 INTRODUCTION

Amid a rise in protectionism and ongoing trade tensions around the world,<sup>1</sup> some observers believe that the role of the World Trade Organization (WTO) as the foundation of a rules-based multilateral trading system is particularly important at this time.<sup>2</sup> That said, almost 25 years after its establishment as the successor to the *General Agreement on Tariffs and Trade* (GATT), the WTO appears to be suffering from what has been characterized as a “deep malaise,”<sup>3</sup> and the organization is perhaps not functioning as efficiently and as effectively as possible.

For example, the WTO has not yet concluded the Doha Round of trade negotiations,<sup>4</sup> which began in 2001, and difficulties arising from the development status of some WTO members persist. Since its inception in 1995, the WTO has concluded only one new multilateral agreement: the *Agreement on Trade Facilitation*, which entered into force on 22 February 2017. Consequently, no new or updated multilateral agreement addresses, for instance, global supply chains or the technologies that are transforming trade and investment.

As well, the WTO seems to be unable to monitor effectively the extent to which its members are respecting the requirements of its multilateral agreements, and to address any inconsistencies between these agreements and members’ national trade measures in an effective and timely manner.<sup>5</sup> Moreover, the organization appears to be unable to ensure that its members’ national trade measures are communicated in a clear and timely manner.

The WTO is also facing challenges relating to dispute resolution. According to a number of observers, the difficulties that are being encountered in appointing new members to the organization’s Appellate Body are limiting the WTO’s ability to enforce multilateral agreements.<sup>6</sup> As a result, the rules-based multilateral trading system could be undermined as WTO members increasingly negotiate bilateral or plurilateral trade agreements.

Within this context, this paper discusses specific challenges that are putting stress on the WTO’s multilateral trading system and identifies Canada’s priorities in each of these areas. Before describing challenges relating to the WTO’s negotiation of new or updated multilateral agreements, its monitoring of members’ compliance with WTO agreements and its resolution of trade-related disputes between its members, the paper outlines some challenges concerning the WTO’s governance that may be affecting the degree to which the organization can effectively fulfill its responsibilities in the three aforementioned areas.

## 2 CHALLENGE: IMPROVING THE ORGANIZATION'S GOVERNANCE

Considered its “executive”<sup>7</sup> function, one of the WTO’s core responsibilities is to “facilitate the implementation, administration and operation, and further the objectives” of its multilateral agreements, which apply to all WTO members.<sup>8</sup> It also provides the “framework” for implementing, administering and operating its plurilateral trade agreements,<sup>9</sup> which apply to some WTO members. The WTO performs its executive function through various bodies, councils and committees,<sup>10</sup> as well as through its Secretariat.

Addressing challenges relating to the WTO’s executive function could improve the organization’s governance and, in turn, its ability to negotiate new – and update existing – multilateral agreements, monitor members’ compliance with these agreements, and resolve trade-related disputes that arise among its members.

### 2.1 THE DECISION-MAKING PROCESS

Sometimes called the WTO’s “decision-making triangle,”<sup>11</sup> the organization’s decision-making process relies on three principles:

- As a member-driven organization, the WTO’s decisions are taken by its members.
- The WTO’s decisions are reached by consensus.
- During negotiations, the WTO adopts a “single undertaking” approach according to which every issue on the agenda is considered to be part of a whole and indivisible package.

This decision-making process could explain the limited extent to which the WTO’s bodies,<sup>12</sup> particularly its Ministerial Council (MC), are able to achieve results.<sup>13</sup>

The WTO’s most recent MC, which was held in December 2017, did not result in a ministerial declaration,<sup>14</sup> nor did it reach consensus on several substantive issues.<sup>15</sup> These limited outcomes led some WTO members to explore plurilateral approaches to certain multilateral issues. For example, various groups of WTO members, some of which include Canada, have issued joint statements indicating that they will begin discussions about the development of a multilateral framework regarding “investment facilitation for development”;<sup>16</sup> initiate exploratory work concerning future WTO negotiations on e-commerce;<sup>17</sup> and create an informal working group on micro, small and medium-sized enterprises (MSMEs) to study relevant issues with the goal of establishing a formal work program for MSMEs at the next MC.<sup>18</sup>

To improve the WTO’s decision-making process, some reform proposals have called for the creation of an executive committee. Comprising representatives of four groups of WTO members, this committee would address the lack of leadership at the WTO and would provide guidance regarding both future negotiations by – and the operation of – the organization.<sup>19</sup>

## 2.2 THE MANDATES OF THE COUNCILS AND COMMITTEES

Between MCs, the WTO's General Council undertakes the day-to-day administration of the WTO's agreements through meeting as the General Council,<sup>20</sup> the Dispute Settlement Body (DSB)<sup>21</sup> and the Trade Policy Review Body (TPRB).<sup>22</sup> To oversee implementation of specific WTO agreements, the organization also has specialized councils, such as the Council for Trade in Goods and the Council for Trade in Services, and committees, such as the Committee on Sanitary and Phytosanitary Measures and the Committee on Technical Barriers to Trade.

The limited mandates of the WTO's specialized councils and committees have led to proposals for the "disposal of the nowadays less relevant committees" and for the creation of new committees, such as for e-commerce.<sup>23</sup>

## 2.3 THE ROLE OF THE SECRETARIAT

The WTO's Secretariat provides technical assistance to some WTO members to facilitate their implementation of the organization's multilateral agreements, gives professional and technical support to the WTO's various bodies, and produces global trade monitoring reports.

At present, the Secretariat's role in implementing the WTO's multilateral agreements is limited, partly because the WTO is a member-driven organization. Moreover, the Secretariat has no decision-making powers. According to some observers, strengthening the Secretariat's role as an agenda setter in the WTO and enhancing its capacity to undertake research and collect data<sup>24</sup> could enhance its ability to implement the WTO's multilateral agreements.

## 2.4 CANADA'S PRIORITIES

Canada wants to strengthen the operation and functioning of the WTO.<sup>25</sup> In September 2018, Canada's delegation to the WTO circulated a discussion paper that noted the need for "[l]onger term deliberation ... to develop more ambitious improvements to the regular [WTO] bodies."<sup>26</sup> Another discussion paper, which was distributed in December 2018, suggested that WTO members

could request the Secretariat to conduct factual information gathering and sharing from public sources to complement the information gathering from existing sources and country notifications for each respective council or committee.<sup>27</sup>

In October 2018, Canada and a group of like-minded WTO members created the Ottawa Ministerial on WTO Reform (the Ottawa Group). The Ottawa Group's first joint communiqué indicated that the "current situation at the WTO is no longer sustainable" and highlighted the goal of a "fully operational WTO that benefits all."<sup>28</sup>



In January 2019, the second joint communiqué stated that the Ottawa Group's officials will "begin open-ended consultations with all interested [WTO] Members to develop collective proposals on a cross-cutting and committee-by-committee basis."<sup>29</sup> The initial focus of these consultations will be work on four WTO bodies. According to Global Affairs Canada, they are

- the Council for Trade in Services, with discussions led by Australia;
- the Committee on Technical Barriers to Trade, with discussions led by Singapore;
- the Committee on Sanitary and Phytosanitary Measures, with discussions led by Brazil; and
- the Committee on Rules of Origin, with discussions led by Switzerland.<sup>30</sup>

### 3 CHALLENGE: NEGOTIATING NEW, AND UPDATING EXISTING, MULTILATERAL AGREEMENTS

The WTO's "legislative"<sup>31</sup> – or negotiating – function has long been considered the organization's "most important activity,"<sup>32</sup> notwithstanding its limited success to date in fulfilling this function. The *Marrakesh Agreement Establishing the World Trade Organization* (Agreement Establishing the WTO) distinguishes between two categories of multilateral negotiations and outlines the WTO's role in these negotiations:

- negotiations among the WTO members relating to their multilateral trade relations that fall under the four annexes of the Agreement Establishing the WTO, in respect of which the WTO "shall provide the forum" for their negotiations; and
- negotiations among the WTO members relating to their multilateral trade relations on new issues that are decided by the MC, in respect of which the WTO "may ... provide a forum for further negotiations ... and a framework" for implementing their results.<sup>33</sup>

#### 3.1 THE DOHA ROUND

The failure to make progress in the WTO's Doha Round of multilateral negotiations, which is sometimes referred to as the Doha Development Agenda (DDA), illustrates the organization's current difficulties in concluding new multilateral agreements. The Doha Round, which was originally scheduled to end in 2005, made no progress until the *Agreement on Trade Facilitation* was concluded in 2013.

Despite that limited progress, the WTO's 2015 Ministerial Declaration identified outstanding divisions among members concerning the larger Doha Round negotiations. In the declaration, many members reaffirmed "their full commitment to conclude the DDA," but others stated a preference for "new approaches" to multilateral negotiations.<sup>34</sup>

The WTO's difficulty in negotiating new, or updating existing, multilateral agreements has led countries to conclude bilateral and plurilateral agreements, which the WTO calls regional trade agreements (RTAs).<sup>35</sup> According to the WTO, RTAs are "reciprocal preferential trade agreements between two or more partners."<sup>36</sup> As of 17 January 2020, there were 303 RTAs in force among the WTO's members, an increase from 47 in 1995.<sup>37</sup> Some observers believe that the increase in RTAs "slows down" global trade.<sup>38</sup>

The *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (CPTPP) is a recent example of a plurilateral agreement that, once ratified by all partner countries, will account for an estimated 13.5% of global gross domestic product.<sup>39</sup> It entered into force for Canada and five other partner countries on 30 December 2018; it will enter into force for the remaining CPTPP countries once it is ratified by them.

### 3.2 THE "SINGLE UNDERTAKING" PRINCIPLE

A number of observers believe that a key cause of the WTO's lack of progress regarding new or updated multilateral agreements is its "decision-making triangle," which some feel is "incompatible with the new challenges" and is "unsustainable."<sup>40</sup>

For example, in their view, a less strict application of the "single undertaking" principle could help the WTO to conclude new, or update existing, multilateral agreements. In 2011, some WTO members committed to advancing "negotiations, where progress can be achieved, including focusing on the elements of the Doha Declaration that allow Members to reach provisional or definitive agreements" before the "full conclusion of the single undertaking."<sup>41</sup> This approach led to the *Agreement on Trade Facilitation*.

Moreover, due to the WTO's consensus principle, a November 2018 European Parliament resolution called for allowing WTO members to conclude plurilateral agreements or "critical mass" agreements<sup>42</sup> within the framework of the WTO regarding trade issues where full consensus does not yet exist.<sup>43</sup>

### 3.3 DIFFERENCES RELATING TO MEMBERS' DEVELOPMENT STATUS

The WTO's membership comprises developed countries, developing countries and least-developed countries (LDCs); together, the latter two groups form the majority of the members. In terms of LDCs, the WTO recognizes those countries that the United Nations has designated as such. Of the 47 countries that are currently designated as an LDC, 36 are WTO members.<sup>44</sup> The other WTO members self-identify as either "developed" or "developing."

Persistent trade-related differences among WTO members that may reflect their development status could be hindering the organization's ability to conclude new, or update existing, multilateral agreements. For example, a number of the developing countries and LDCs that are WTO members have resisted negotiating certain issues, such as investment and e-commerce, before securing improved market access for their agricultural exports to developed countries.<sup>45</sup>

Furthermore, a country's development status may affect the pace at which it implements its WTO obligations. Some developed countries are critical of the ability of certain WTO members to self-designate as developing countries and thereby to benefit from the special and differential treatment provisions that are in the WTO's multilateral agreements.<sup>46</sup>

### 3.4 EMERGING ISSUES

According to some observers, the WTO has not kept pace with 21<sup>st</sup>-century trade, which requires new or updated provisions in multilateral agreements.<sup>47</sup> A number of trade-related issues have emerged since 1995, such as the linkages between trade and climate change,<sup>48</sup> the Sustainable Development Goals,<sup>49</sup> gender issues<sup>50</sup> and human rights.<sup>51</sup> Other issues include e-commerce and state-owned enterprises (SOEs), both of which are discussed below.

The WTO's efforts to regulate e-commerce began in 1998 with the *Declaration on Global Electronic Commerce* and the creation of a work program on e-commerce. The declaration established a two-year moratorium on imposing customs duties on electronic transmissions,<sup>52</sup> which – by consensus – has been regularly renewed thereafter. However, this moratorium is “increasingly disputed.”<sup>53</sup> In December 2017, a group of WTO members issued a joint statement on e-commerce indicating that they will “initiate exploratory work together toward future WTO negotiations” on e-commerce.<sup>54</sup> In January 2019, 76 WTO members that account for 90% of global trade confirmed their intention to begin negotiations on e-commerce.<sup>55</sup>

Globally, the number of SOEs has grown over time after many were privatized in the 1990s and 2000s;<sup>56</sup> this growth may partly reflect a “major gap” in the WTO's regulation of state trading enterprises (STEs).<sup>57</sup> In 2010–2011, 204 of the world's 2,000 largest firms were SOEs in which governments held the majority share.<sup>58</sup> SOEs' competitive advantages could distort global trade and investment. For example, financial support from governments to SOEs and a regulatory environment that is perhaps more favourable to them could affect the extent to which other firms can both import and export goods at relatively lower prices, and own and operate production and processing facilities.<sup>59</sup>

According to a number of observers, the WTO needs new rules to regulate SOEs.<sup>60</sup> Article XVII of GATT 1947, which was incorporated into GATT 1994,<sup>61</sup> defined STEs in a way that – according to some – was “quite general and toothless.”<sup>62</sup> In 1994, WTO members adopted the Understanding on the Interpretation of Article XVII of GATT 1994, which includes a “working definition”<sup>63</sup> of the term “state trading enterprises” that does not address all concerns relating to the identification of such enterprises. The 25 September 2018 Joint Statement of the Trilateral Meeting of the Trade Ministers of the United States, Japan and the European Union noted the need to “develop effective rules” to address the “market-distorting behavior” of SOEs, particularly “harmful subsidy practices.”<sup>64</sup> The joint statement further commented on ongoing work designed to “maintain the effectiveness of existing WTO disciplines.”<sup>65</sup>

### 3.5 CANADA'S PRIORITIES

Canada wants to “reinvigorate” the WTO’s legislative function and to conclude negotiations about fisheries subsidies. Furthermore, the country believes that addressing modern economic and trade issues requires “flexible and open negotiating approaches toward multilateral outcomes.”<sup>66</sup> Canada is also seeking to prioritize three categories of issues in discussions aimed at modernizing multilateral agreements:

- outstanding issues from previous negotiations, including from the Doha Round;
- issues concerning the creation of rules for the modern economy, such as e-commerce, and measures to address the social dimensions of globalization, such as inclusive trade; and
- issues relating to competitive conditions that may become distorted, such as through government subsidies and the operations of SOEs.<sup>67</sup>

To address the issue of WTO members’ development status, Canada is suggesting an approach that would recognize the “need for flexibility [in the WTO] for development purposes while also acknowledging that not all countries need or should benefit from the same level of flexibility.”<sup>68</sup>

Such an approach would recognize that, while the development needs of certain countries justify transitional periods to implement their WTO commitments, the long-term objective is full implementation of all obligations by all members. As well, this approach would entail establishing categories of members’ needs “differentiated by obligation, by country and by the length of the transition period required, to be applied based on evidence of need and subject to negotiation.”<sup>69</sup>

Furthermore, Canada feels that a “strong, rules-based framework” to regulate e-commerce is needed,<sup>70</sup> and it wants to begin discussions regarding future WTO negotiations on this issue.<sup>71</sup> For example, in 2019, Canada tabled proposed language concerning the regulation of e-commerce and circulated two concept papers that discuss a range of e-commerce-related issues.<sup>72</sup>

On the issue of SOEs, Canada believes that SOE-induced “distortion[s] of competitive conditions” should be prioritized in discussions that aim to modernize the WTO’s multilateral agreements.<sup>73</sup> Within the context of the Ottawa Group, Canada recently urged WTO members to work to address “market distortions caused by subsidies and other instruments.”<sup>74</sup>

## 4 CHALLENGE: MONITORING NATIONAL TRADE MEASURES

Through its “monitoring” function, the WTO seeks to enhance transparency within the multilateral trading system.<sup>75</sup> As a member-driven organization, it is primarily the WTO members themselves that monitor national trade measures. They do so through either the WTO’s committees or the Trade Policy Review Mechanism (TPRM).<sup>76</sup>

### 4.1 MONITORING PRACTICES

A number of observers have suggested that the WTO seems to be unable to identify and address violations of its multilateral agreements in an effective and timely manner.<sup>77</sup> These agreements require national trade measures to be disclosed in two ways: notification to the relevant WTO body and publication by the WTO members.

Most of the WTO’s multilateral agreements are administered by a committee created for that purpose.<sup>78</sup> At a meeting of these committees, WTO members discuss the extent to which their national trade measures comply with the relevant agreement. These discussions enable members to justify their trade measures and to consider any changes requested by other WTO members. However, the limited mandates of these committees preclude a “more forward-looking role”<sup>79</sup> in monitoring WTO members’ compliance with the agreements. For example, these committees cannot force WTO members to change their trade measures that are inconsistent with a WTO agreement.

All WTO members undergo periodic trade policy reviews, which are conducted by the TPRB based on reports by the member being reviewed and by the Secretariat.<sup>80</sup> For example, Canada underwent its 11<sup>th</sup> trade policy review on 12–14 June 2019.<sup>81</sup> These peer assessments cannot be used to “enforce specific obligations” or for the purposes of “dispute settlement procedures.” The TPRM does not seem to lead WTO members to make changes to their national trade measures, nor can the reviews be used to force members either to commit to new trade policy measures or to improve their existing measures.<sup>82</sup> Consequently, some observers believe that trade policy

reviews have “no material effect” on national trade policies,<sup>83</sup> although they could be helpful in identifying a particular member’s national trade measures that are problematic for other WTO members.

The frequency with which a WTO member undergoes a trade policy review depends on that member’s share of global trade. As of 1 January 2019, the WTO members with the four largest shares of global trade are reviewed every three years, and the next 16 members are reviewed every five years; the frequency for the remaining members is every seven years.<sup>84</sup> That said, WTO members that are LDCs may be subject to less frequent reviews than the other members.<sup>85</sup> In addition, according to a number of observers, members that have not yet attained a large share of global trade but that can influence that trade, such as Brazil and Indonesia, are reviewed less frequently than those that have a larger share.<sup>86</sup> Some observers feel that the frequency of review is generally insufficient in light of the magnitude and nature of current economic realities.<sup>87</sup>

#### 4.2 CANADA'S PRIORITIES

Canada wants to enhance the review of – and communication about – WTO members’ national trade measures, and is concerned about compliance with obligations that require members to notify the appropriate WTO body about these measures.<sup>88</sup> More specifically, Canada is interested in improving both the capacity of WTO bodies to hold trade-related discussions and the opportunity for WTO members to engage in these discussions. As well, Canada is seeking improved opportunities and mechanisms for WTO members to address their specific trade concerns.<sup>89</sup>

### 5 CHALLENGE: RESOLVING DISPUTES

The WTO’s “adjudicative” function provides the organization with a mechanism to enforce its agreements and settle disputes among its members. The *Understanding on Rules and Procedures Governing the Settlement of Disputes*, which is known as the Dispute Settlement Understanding (DSU), is the WTO’s main agreement concerning dispute settlement. It creates the DSB, which comprises all WTO members. The DSB has the authority to establish panels to adjudicate disputes, adopt panel reports, monitor the implementation of panel rulings and recommendations, and authorize the “suspension of concessions and other obligations” under the WTO’s multilateral agreements.<sup>90</sup>

## 5.1 THE DISPUTE-SETTLEMENT SYSTEM

The WTO has one of the world's most active international dispute-settlement mechanisms. Between the WTO's establishment on 1 January 1995 and 31 December 2018, members referred 573 disputes to the DSB and more than 350 rulings were issued.<sup>91</sup>

Typically, a DSB panel comprises three people, although panels may have five members in complex cases, and the panellists are from countries that are not a party to the particular dispute. Panels operate according to procedures set out in the DSU, and their findings and recommendations can be appealed to the WTO's Appellate Body. Each appealed case is heard by three of the Appellate Body's seven members, who are appointed for a term of four years and are eligible for reappointment once. According to the DSU, disputes should be resolved within one year of the panel being appointed; in practice, disputes are rarely resolved within this time frame.<sup>92</sup>

The Appellate Body cannot hear and adjudicate appeals with fewer than three members.<sup>93</sup> The term of two members ended on 10 December 2019, and – as of that date – the Appellate Body had one member.<sup>94</sup> Six seats are unfilled because the DSB has not, pursuant to its duty under paragraph 2 of Article 17 of the DSU, filled vacancies “as they arise.”

Since 2017, the United States has refused to consent to the appointment of new Appellate Body members. The country has long-standing objections to decisions involving the Appellate Body's interpretation of certain U.S. trade remedy measures; these measures have been the subject of most of the complaints brought by WTO members against the United States.<sup>95</sup> The United States Trade Representative contends that the Appellate Body is “adding to or diminishing U.S. rights by not applying the WTO agreements as written” in the areas of subsidies, anti-dumping and countervailing duties, and safeguards.<sup>96</sup>

On 28 May 2019, as his term ended, former Appellate Body member Peter Van den Bossche said the following to the DSB:

There are very difficult times ahead for the WTO dispute settlement system. This system was – and currently still is – a glorious experiment with the rule of law in international relations. In six months and two weeks from now, this unique experiment may start to unravel and gradually come to an end. History will not judge kindly those responsible for the collapse of the WTO dispute settlement system.<sup>97</sup>

## 5.2 CANADA'S PRIORITIES

Canada frequently accesses the WTO's dispute-settlement system. Since 1995, the country has been a complainant in 40 disputes, 20 of which have involved the United States. As well, Canada has been a defendant in 23 disputes.<sup>98</sup>

Canada supports an effective rules-based dispute-settlement system. At present, there are several pending WTO disputes that are significant for the country. One dispute involves a complaint about anti-dumping measures that the United States is applying on its imports of certain Canadian softwood lumber products.<sup>99</sup> As well, the Government of Canada has filed a complaint in relation to China's restrictions on its imports of Canadian canola seed.<sup>100</sup> Moreover, at the request of Brazil, a DSB panel is examining whether various Government of Canada support measures provided to Bombardier Inc. are compatible with the WTO's subsidy rules.<sup>101</sup>

According to the Government of Canada, resolving the "impasse" about the appointment of Appellate Body members will require addressing concerns about the Appellate Body's functioning.<sup>102</sup> One concern relates to the extent to which, through its decisions designed to clarify the WTO's agreements, the Appellate Body has increased the rights and obligations of WTO members. Canada supports the development of mechanisms that would provide members with opportunities to decide which disputes should proceed to the Appellate Body.<sup>103</sup> In particular, Canada's proposal includes "the use of alternative mechanisms such as mediation to settle disputes or at least narrow their scope," and "even formal exclusion of certain types of disputes or certain issues from adjudication."<sup>104</sup>

Regarding the Appellate Body's interpretation of WTO members' domestic laws, Canada supports the need to clarify that "the primary objective of the [WTO's] dispute settlement system is the settlement of specific disputes and that only findings that are necessary to achieve this objective are required."<sup>105</sup> Furthermore, Canada and the European Union have indicated

their intention to resort to arbitration under Article 25 of the DSU as an interim appeal arbitration procedure, if the Appellate Body is not able to hear appeals of panel reports in any future dispute between Canada and the European Union due to an insufficient number of its members.<sup>106</sup>

In particular, they envisage that appeals will be heard by three arbitrators selected by the WTO's Director-General from the pool of available former members of the Appellate Body.<sup>107</sup> In their view, this "interim arrangement will cease to apply as soon as the Appellate Body is again fully composed," although "any pending arbitration will be completed under the interim appeal arbitration procedure, unless the parties agree otherwise."<sup>108</sup>



On 24 January 2020, some WTO members committed to join the interim appeal arbitration procedure.<sup>109</sup> To date, Australia, Brazil, Canada, Chile, China, Colombia, Costa Rica, the European Union, Guatemala, Mexico, New Zealand, Norway, Panama, Singapore, South Korea, Switzerland and Uruguay have agreed to “work towards putting in place contingency measures that would allow for appeals of WTO panel reports in disputes among [the participating countries].”<sup>110</sup>

## 6 CONCLUSION

While the WTO is facing challenges relating to its governance and to its ability to negotiate agreements, monitor adherence to them and resolve disputes, a number of countries around the world continue to express support for the multilateral trading system. Canada is among the countries that are exploring reform options with the goal of ensuring the ongoing effectiveness of the WTO.

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## NOTES

1. François Dupuis and Francis Généreux, “[Economic Viewpoint: The Rise in Protectionism and the Prospect of a Global Trade War](#),” *Economic Studies*, Desjardins Group, 10 July 2018.
2. William H. Lash III, “[The Limited but Important Role of the WTO](#),” *Cato Journal*, Vol. 19, No. 3, Winter 2000, pp. 371–377. See also Manfred Elsig, Jappe Eckhardt and Maura Iliuteanu, “[Functioning of the WTO: Mapping the Challenges and asking the Hard Questions](#),” Background Paper, ICTSD [International Centre for Trade and Sustainable Development]–WTI Expert Group Meeting, E-15 Initiative, Geneva, 28 February 2013–1 March 2013.
3. Richard Baldwin, “[The World Trade Organization and the Future of Multilateralism](#),” *Journal of Economic Perspectives*, Vol. 30, No. 1, Winter 2016, p. 95.
4. The Doha Round had an ambitious agenda that covered several areas of trade in goods, services, agriculture and intellectual property protection. It also aimed to help developing countries and least-developed countries (LDCs) that are World Trade Organization [WTO] members increase their access to foreign markets and share of global trade. See WTO, “[Doha briefing notes](#),” *Doha WTO Ministerial 2001*.
5. Jens Kastner, “[Stretched to the Breaking Point: WTO is Becoming Dysfunctional](#),” CKGSB [Cheung Kong Graduate School of Business] *Knowledge*, 20 May 2019.
6. Jens Hillebrand Pohl, “[Seven months until Appellate Body apocalypse: time to prepare for the worst case](#),” Maastricht University Law Blog, 3 May 2019.
7. Armin Von Bogdandy, “[Law and Politics in the WTO – Strategies to Cope with a Deficient Relationship](#),” in J. A. Frowein and R. Wolfrum, eds., *Max Planck Yearbook of United Nations Law*, Vol. 5, Kluwer Law International, The Netherlands, 2001, p. 614.
8. See WTO, *Marrakesh Agreement Establishing the World Trade Organization* [Agreement Establishing the WTO], [Article III: Functions of the WTO](#), para. 1.
9. The 550 pages of legal texts that were signed in Marrakesh on 15 April 1994 are collectively called the *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations* [Final Act]. The Final Act includes the following components:
  - the Final Act, which is like a “cover note”;
  - the Agreement Establishing the WTO, which is an umbrella agreement; and

- four annexes to the Agreement Establishing the WTO:
    - Annex 1 (Multilateral Agreements on Trade in Goods, the *General Agreement on Trade in Services*, and the *Agreement on Trade-Related Aspects of Intellectual Property Rights*);
    - Annex 2 (*Understanding on Rules and Procedures Governing the Settlement of Disputes*);
    - Annex 3 (Trade Policy Review Mechanism); and
    - Annex 4 (the Plurilateral Trade Agreements, the Ministerial Decisions and Declarations that accompany the Agreements, and the Understanding on Commitments in Financial Services that accompanies the Agreements).
10. The Ministerial Conference (MC) is the WTO's highest decision-making body; it usually meets at least once every two years. Below the MC in the decision-making structure is the General Council, which meets as the General Council, the Dispute Settlement Body and the Trade Policy Review Body. The Goods Council, the Services Council and the Intellectual Property Council report to the General Council. The WTO's structure also includes specialized committees, working groups and working parties that deal with the individual agreements and other trade-related areas.
  11. Manfred Elsig and Thomas Cottier, "[Reforming the WTO: the decision-making triangle revisited](#)," Chapter 13 in Thomas Cottier and Manfred Elsig, eds., *Governing the World Trade Organization: Past, Present and Beyond Doha*, Cambridge University Press, Cambridge, U.K., 2011, p. 291.
  12. Claus-Dieter Ehlermann and Lothar Ehring, "[Decision-Making in the World Trade Organization: Is the Consensus Practice of the World Trade Organization Adequate for Making, Revising and Implementing Rules on International Trade?](#)," *Journal of International Economic Law*, Vol. 8, No. 1, 23 September 2005.
  13. The MC can take binding decisions on all matters under any of its multilateral trade agreements. See WTO, Agreement Establishing the WTO, [Article IV: Structure of the WTO](#), para. 1.
  14. WTO, "[Eleventh WTO Ministerial Conference](#)," *Ministerial Conferences*.
  15. For instance, the WTO's 11<sup>th</sup> MC failed to reach an agreement on public stockholding for food security purposes. Agreement was also lacking on fisheries subsidies, although some WTO members made a commitment to reach such an agreement by 2019.
  16. WTO, "[Joint Ministerial Statement on Investment Facilitation for Development](#)," Statement, WT/MIN(17)/59, Ministerial Conference, Eleventh Session, Buenos Aires, 13 December 2017, p. 1.
  17. WTO, "[Joint Statement on Electronic Commerce](#)," Statement, WT/MIN(17)/60, Ministerial Conference, Eleventh Session, Buenos Aires, 13 December 2017.
  18. WTO, "[Joint Ministerial Statement: Declaration on the Establishment of a WTO Informal Work Programme for MSMEs](#)" (micro, small and medium-sized enterprises), Statement, WT/MIN(17)/58/Rev.1, Ministerial Conference, Eleventh Session, Buenos Aires, 20 December 2017, p. 2.
  19. Robert Basedow, [Strengthening the World Trade Organization – Critical Demands for Imperative Success: Identifying politically viable options for an incremental reform](#), Global Economic Dynamics, Bertelsmann Stiftung, 27 April 2017, p. 16. The four groups of WTO members identified are "developed/OECD [Organisation for Economic Co-operation and Development] economies; emerging economies; developing economies; and least developed economies."
  20. WTO, Agreement Establishing the WTO, Article IV, para. 2.
  21. *Ibid.*, para. 3.
  22. *Ibid.*, para. 4.
  23. Basedow (2017), p. 17.
  24. *Ibid.*, pp. 30–31.
  25. WTO, "[Statement by H.E. Mr François-Philippe Champagne: Minister of International Trade – Canada](#)," Statement, WT/MIN(17)/ST/15, Ministerial Conference, Eleventh Session, Buenos Aires, 13 December 2017, p. 2.
  26. WTO, [Strengthening and Modernizing the WTO: Discussion Paper](#), Communication from Canada, JOB/GC/201, 24 September 2018, p. 7.
  27. WTO, [Strengthening the Deliberative Function of the WTO: Discussion Paper](#), Communication from Canada, JOB/GC/211, 14 December 2018, p. 2.

28. Global Affairs Canada [GAC], "[Joint Communiqué of the Ottawa Ministerial on WTO Reform](#)," Statement, 25 October 2018.
29. Government of Canada, "[Joint Communiqué of the Ottawa Ministerial on WTO Reform group meeting in Davos](#)," Statement, 24 January 2019.
30. GAC, "[Improving the deliberative function of WTO bodies](#)," Backgrounder.
31. Bogdandy (2001), p. 623.
32. Manfred Elsig, [The Functioning of the WTO: Options for Reform and Enhanced Performance](#), Policy Options Paper, E15 Expert Group on the Functioning of the WTO, ICTSD and World Economic Forum, Geneva, 2016, p. 10.
33. WTO, Agreement Establishing the WTO, Article III, para. 2.
34. WTO, "[Nairobi Ministerial Declaration](#)," *Tenth WTO Ministerial Conference, Nairobi, 2015*, WT/MIN(15)/DEC, Part III, para. 30, 19 December 2015.
35. The WTO's multilateral agreements have provisions that allow members to conclude bilateral and plurilateral agreements among themselves under certain conditions. See WTO, *General Agreement on Tariffs and Trade* [GATT], [Article XXIV: Territorial Application – Frontier Traffic – Customs Unions and Free-trade Areas](#); WTO, *General Agreement on Trade in Services*, [Article V: Economic Integration](#); and the Enabling Clause of GATT (see WTO, [Differential and more favourable treatment reciprocity and fuller participation of developing countries](#), Decision of 28 November 1979 [L/4903], para. 2(c)).
36. WTO, [Regional trade agreements](#).
37. Ibid.
38. Osama Sajid, [Youth Voices: Effects of The Spaghetti Bowl on South Asia–East Asia Trade Relations](#), World Bank Blogs, 11 February 2015.
39. Government of Canada, [What is the CPTPP?](#)
40. Elsig (2016), p. 10.
41. WTO, [Eighth Ministerial Conference: Chairman's Concluding Statement](#), WT/MIN(11)/11, Ministerial Conference, Eighth Session, Geneva, 17 December 2011, p. 3.
42. "Critical mass" agreements are negotiated by a subset of WTO members. The benefits of these agreements are extended to members of the WTO on a most-favoured-nation basis. An example of a critical mass agreement is the 1996 *Information Technology Agreement*, which was expanded in 2015. See WTO, [Information Technology Agreement](#).
43. European Parliament, [European Parliament resolution of 29 November 2018 on WTO: the way forward \(2018/2084\(INJ\)\)](#), Brussels, 29 November 2018.
44. WTO, "[Least-developed countries](#)," *Understanding the WTO: The Organization*.
45. Hung Tran, [The WTO may be beyond saving](#), Atlantic Council Blog (*New Atlanticist*), 27 March 2019.
46. The WTO's multilateral agreements include provisions that give developing countries special rights and that allow WTO members to treat them more favourably. These provisions include: longer time periods for implementing the provisions of the multilateral agreements; measures to increase trading opportunities for these countries; measures requiring all WTO members to safeguard the trade interests of WTO members that are developing countries; support for building the capacity to engage in the WTO's work, deal with trade disputes and implement requirements relating to technical standards; and measures relating to WTO members that are LDCs.
47. Richard Baldwin, [21<sup>st</sup> century trade and global trade governance: The WTO's future](#), Graduate Institute, Geneva, posted on the WTO Public Forum 2012.
48. Ludvine Tamiotti et al., [Trade and Climate Change](#), Report by the United Nations Environment Programme and the WTO, 2009.
49. WTO, "[Mainstreaming trade to attain the Sustainable Development Goals](#)," *Sustainable Development Goals*, 2018.
50. WTO, [Joint Declaration on Trade and Women's Economic Empowerment on the Occasion of the WTO Ministerial Conference in Buenos Aires in December 2017](#).

51. Gudrun Monika Zagel, [WTO & Human Rights: Examining Linkages and Suggesting Convergence](#), Voices of Development Jurists Paper Series, IDLO [International Development Law Organization], Vol. 2, No. 2, 2005.
52. WTO, [Declaration on Global Electronic Commerce: Adopted on 20 May 1998](#), WT/MIN(98)/DEC/2, Ministerial Conference, Second Session, Geneva, 25 May 1998.
53. Wallace Cheng and Clara Brandi, [Governing Digital Trade – A New Role for the WTO](#), Deutsches Institut für Entwicklungspolitik/German Development Institute, Briefing Paper 6/2019.
54. WTO, “Joint Statement on Electronic Commerce,” Statement, WT/MIN(17)/60, Ministerial Conference, Eleventh Session, Buenos Aires, 13 December 2017, p. 1.
55. WTO, [Joint Statement on Electronic Commerce](#),” Statement, WT/L/1056, 25 January 2019.
56. Kirk Haywood, [The Treatment of State Enterprises in the WTO & Plurilateral Trade Agreements](#), Emerging Issues Briefing Note (3), The Commonwealth Secretariat, March 2016, p. 1.
57. Thomas J. Duesterberg, [The Importance of WTO Reform from a Transatlantic Perspective](#), Hudson Institute, February 2019, p. 3.
58. Ines Willemyns, [“Disciplines on State-Owned Enterprises in International Economic Law: Are We Moving in the Right Direction?”](#), *Journal of International Economic Law*, Vol. 19, No. 3, September 2016. The 2,000 firms referenced are those in the Forbes Global 2000, which is an annual ranking of the top 2,000 public companies. It uses a mix of four metrics: sales; profits; assets; and market value.
59. Ibid.
60. Ibid.
61. The original version of the *General Agreement on Tariffs and Trade* is known as “GATT 1947.” “GATT 1994” refers to GATT 1947 as it was amended by agreements reached during the Uruguay Round of multilateral negotiations.
62. Willemyns (2016).
63. The WTO’s working definition of “state trading enterprises” is:
 

[g]overnmental and non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports.

WTO, [Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994](#), p. 27.
64. Office of the United States [U.S.] Trade Representative, [Joint Statement on Trilateral Meeting of the Trade Ministers of the United States, Japan, and the European Union](#),” Statement, 25 September 2018.
65. Ibid.
66. GAC, “Joint Communiqué of the Ottawa Ministerial on WTO Reform,” Statement, 25 October 2018.
67. WTO, *Strengthening and Modernizing the WTO: Discussion Paper*, Communication from Canada, JOB/GC/201, 24 September 2018, p. 5.
68. Ibid.
69. Ibid.
70. Government of Canada, [Canada and the World Trade Organization \(WTO\)](#).
71. See WTO, “Joint Statement on Electronic Commerce,” Statement, WT/MIN(17)/60, Ministerial Conference, Eleventh Session, Buenos Aires, 13 December 2017, p. 1; and WTO, *Joint Statement on Electronic Commerce*, WT/L/1056, 25 January 2019.
72. Government of Canada, [Canada and the World Trade Organization \(WTO\)](#).
73. WTO, *Strengthening and Modernizing the WTO: Discussion Paper*, Communication from Canada, JOB/GC/201, 24 September 2018, p. 5.
74. Government of Canada, “Joint Communiqué of the Ottawa Ministerial on WTO Reform group meeting in Davos,” Statement, 24 January 2019.

75. Centre for International Governance Innovation [CIGI], [CIGI Expert Consultation on WTO Reform](#), Special Report, Spring 2019, pp. 6–10.
76. See WTO, Agreement Establishing the WTO, [Annex 3: Trade Policy Review Mechanism](#).
77. Tran (2019).
78. Examples include the Committee on Technical Barriers to Trade (TBT), which is established by the *Agreement on Technical Barriers to Trade* and the Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS), which administers the *Agreement on Trade-Related Aspects of Intellectual Property Rights*. See WTO; “TBT Committee,” [Technical barriers to trade](#); and WTO, [Council for TRIPS](#).
79. Basedow (2017), p. 10.
80. See WTO, Agreement Establishing the WTO, Annex 3, para. C(v).
81. WTO, [Trade Policy Review: Canada](#), 12 and 14 June 2019.
82. See WTO, Agreement Establishing the WTO, Annex 3, para. A(i).
83. Valentin Zahrt, [The WTO's Trade Policy Review Mechanism: How to Create Political Will for Liberalization?](#), ECIPE [European Centre for International Political Economy] Working Paper No. 11/2009, p. 5.
84. WTO, [Amendment of the Trade Policy Review Mechanism: Decision of 26 July 2017](#), WT/L/1014, 27 July 2017.
85. WTO, Agreement Establishing the WTO, Annex 3, para. C(ii).
86. Japan, Ministry of Economy, Trade and Industry, “Monitoring Trade Policies/Measures,” Chapter 18 in [2014 Report on Compliance by Major Trading Partners with Trade Agreements – WTO, FTA/EPA and IIA](#), Part II – WTO Rules and Major Cases.
87. Ibid.
88. GAC, “Joint Communiqué of the Ottawa Ministerial on WTO Reform,” Statement, 25 October 2018.
89. WTO, *Strengthening and Modernizing the WTO: Discussion Paper*, Communication from Canada, JOB/GC/201, 24 September 2018, p. 2.
90. See WTO, *Understanding on Rules and Procedures Governing the Settlement of Disputes* (known as the Dispute Settlement Understanding [DSU]), [Article 2: Administration](#). These concessions include tariff reduction commitments that WTO members have made. The obligations include those relating to most-favoured-nation treatment and national treatment. Pursuant to the former obligation, each jurisdiction must provide all trading partners with which it has a trade agreement with equal conditions of access to its domestic market. Under the latter obligation, each jurisdiction is required to treat goods and services that have entered its domestic market in the same way that it treats such goods and services when they are produced, owned or controlled by its own citizens.
91. WTO, “[Dispute settlement activity – some figures](#),” *Dispute Settlement: The Disputes*.
92. WTO, [Appellate Body: Annual Report for 2018](#), March 2019, p. 143.
93. See DSU, [Article 17: Appellate Review](#), para. 1.
94. WTO, “[Appellate Body Members](#),” *Dispute Settlement: Members*.
95. Cathleen D. Cimino-Isaacs, Rachel F. Fefer and Ian F. Fergusson, [World Trade Organization: Overview and Future Direction](#), CRS Report for Congress, Congressional Research Service, U.S. Library of Congress, 6 December 2019, pp. 50–51.
96. Office of the U.S. Trade Representative, [2018 Trade Policy Agenda and 2017 Annual Report of the President of the United States on the Trade Agreements Program](#), March 2018, pp. 22–23.
97. Peter Van den Bossche, Member of the WTO Appellate Body, “[Farewell speech of Appellate Body member Peter Van den Bossche](#),” Address to the WTO Dispute Settlement Body, 28 May 2019.
98. WTO, “[Disputes by member](#),” *Dispute Settlement: The Disputes*.
99. WTO, “[DS534: United States – Anti-Dumping Measures Applying Differential Pricing Methodology to Softwood Lumber from Canada](#),” *Dispute Settlement*.
100. WTO, [China – Measures Concerning the Importation of Canola Seed from Canada](#), Request for Consultations by Canada, WT/DS589/1, G/L/1324, G/SPS/GEN/1727, G/TFA/D2/1, 12 September 2019.

101. WTO, "[DS522: Canada – Measures Concerning Trade in Commercial Aircraft](#)," *Dispute Settlement*.
102. WTO, *Strengthening and Modernizing the WTO: Discussion Paper*, Communication from Canada, JOB/GC/201, 24 September 2018, p. 3.
103. Ibid.
104. Ibid.
105. Ibid.
106. Government of Canada, [Interim appeal arbitration pursuant to Article 25 of the DSU](#).
107. Ibid.
108. Ibid.
109. GAC, "[Statement by Canada on interim arrangement for appealing trade disputes through WTO](#)," Statement, 24 January 2020.
110. Government of Canada, "[Statement by Ministers, Davos, Switzerland, 24 January 2020](#)," Statement, 24 January 2020.