"The Future of Dispute Resolution in International (Agricultural) Trade"

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Abstract

In a forthcoming paper, Chow and Sheldon (2024) conclude that US challenge(s) to Canada's dairy tariff rate quotas (TRQs), under the US-Mexico-Canada (USMCA) preferential trade agreement's (PTA) dispute resolution mechanism, are really a "fuss about nothing", and no more than a response to lobbying by its dairy industry. However, this conclusion misses the possibility that the United States, in its enthusiasm for using the USMCA mechanism, is revealing a key component of its approach to settlement of trade disputes. In this context, the current paper focuses on answering two related questions: (i) are proponents of reviving the World Trade Organization's (WTO) Appellate Body acting in the vain hope of securing US support for its reform; and (ii), has the United States irrevocably moved on by creating and using parallel dispute resolution mechanisms in US-led PTAs, that can be used to revolve WTO-type disputes as well as specific PTA disputes?

Keywords: WTO, PTAs, USMCA, dispute resolution

Introduction

Prior to the World Trade Organization's (WTO) Appellate Body (AB) becoming defunct in December 2019, with associated consequences for its Dispute Settlement Understanding (DSU) (Hoekman and Mavroidis, 2020), a broader debate was already and still is underway among trade economists, as well as political scientists and trade lawyers, concerning the status of the organization, the future of the multilateral trading system, and the role of preferential trade agreements PTAs.[1,2] Focusing on the economic literature, Baldwin (2016) notes that, the goals of the General Agreement on Tariffs and Trade (GATT), and its successor the WTO, have mostly been achieved, i.e., establishment of a rules-based international trading system, and mutually beneficial trade liberalization. Over the lifetime of GATT/WTO, membership has expanded from 23 to 164 countries, and following eight rounds of successful multilateral trade negotiations, *ad valorem* tariffs on industrial goods now average less than four percent (Bagwell *et al*. 2016).

Despite this success, not much has happened in terms of multilateral trade liberalization since conclusion of the Uruguay Round of GATT in 1994. In the words of Baldwin (2016), "…the WTO is widely regarded as suffering from a deep malaise", the Doha Development Round having "…staggered between failures, flops, and false dawns since it was launched in 2001…" At the same time, there has been a significant proliferation in the number of PTAs since the mid-1990s, rising to a current cumulative total of 371 from 37 in 1994 (WTO, 2024), with significant tariff reductions continuing to occur despite the Doha deadlock.[3]

Baldwin (2016) argues that the growth in PTAs has partly been driven by an increased demand for "deep" as opposed to "shallow" policy reforms, the latter being what the GATT/WTO was set

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[1] For example, See Baldwin (2016), Bagwell *et al*. (2016), Baccini (2019), Brewster (2019), Thomas (2019), and Lester (2023).
[2] The term PTA is used throughout the paper, based on Limão's (2016) classification.
[3] The WTO data refers to regional trade agreements (RTAs), defined as reciprocal preferential trade agreements, i.e., two-way preferences on either part of or a substantial portion of trade.

up to negotiate. Deep integration, originally defined by Lawrence (1996) as "behind-the-border" integration, goes well beyond reducing tariffs, PTA provisions being denoted as "WTO-extra", with examples including labor and environmental standards, foreign direct investment (FDI) provisions, protection of intellectual property, and competition policy (Bagwell *et al*., 2016).

While trade economists seem to agree that changes in the global economy, including the rise in global value chains and offshoring, have affected the type of rules necessary for international economic cooperation, there is some divergence in terms of how the status of the WTO is viewed. On the one hand, Baldwin (2016) suggests trade governance has become a "two-pillar" system, the WTO taking care of traditional trade issues, PTAs focusing on "WTO-extra" provisions. By contrast, Bagwell *et al*. (2016), based on their extensive review of the literature, argue that the WTO is "not passé", and notwithstanding the changes in the global economy, "…the rules for international economic cooperation are still fundamentally the same…".[4]

Importantly though, parties to the WTO vs. PTA debate do appear to agree on one thing: the success of the former's dispute resolution[5] mechanism, often referred to as the "crown jewel" of the international trading system, and one which receives "…a high performance score…" (Baldwin, 2016).[6] In addition, in comparing dispute resolution under PTAs to that under the WTO, Bagwell *et al*. (2016) conclude that "…there is very little empirical record of sustained and effective dispute resolution taking place under major PTAs. With the exception of the European Union, dispute resolution provisions in most PTAs have rarely been used, and when actually triggered, their record of resolving disputes is mixed at best…"

[4] See Staiger (2022) for an extensive discussion of the future of the world trading system.
[5] Dispute resolution and dispute settlement are used interchangeably throughout the paper.
[6] Brewster (2019) argues that success of the WTO dispute settlement has been governed by the acceptance of three principles by member countries: multilateral adjudication, a prohibition on counter-retaliation, and the regulation of remedies.

Despite the avowed success of the WTO's dispute resolution mechanism, the DSU has effectively been paralyzed by the United States refusing to accept new appointments to the AB as the terms of sitting members expired (Hoekman and Mavroidis, 2020). It is important to note that while the number of AB members finally fell below the seven necessary to reach a quorum on December 10, 2019, this was the end result of long-running US dissatisfaction with decisions by the AB, and one that successive administrations (Obama/Trump/Biden) have expressed since 2016, when the Obama administration first opposed the appointment/reappointment of new/existing AB members (Chow, 2023).

With appointments to the WTO's AB being stymied by the United States, what does this mean for dispute resolution in a multilateral setting? A fundamental component of the DSU was the application of a two-instance adjudication regime, whereby panel decisions have no legal effect until adopted by the WTO's Dispute Settlement Body (DSB), and the DSB cannot adopt a panel decision until any appeal has been completed.[7] Key here is whether a panel decision is appealed or not: if it is not appealed, the DSB is able to adopt the decision and give it full legal effect, including enforcement, whereas if it is appealed, the decision is suspended indefinitely in a "legal limbo". Effectively, a panel decision cannot be adopted by the DSB until an appeal is completed, but an appeal cannot be completed because the AB is unable to convene, i.e., a member country can express dissatisfaction with a panel decision through appeal, thereby freezing the entire dispute resolution process at the mid-point of the adjudication regime (Chow, 2023).

In light of the current status of WTO dispute resolution, the analysis presented in this paper focuses on the extent, type, and use of dispute resolution mechanisms in PTAs, with a specific emphasis on whether they could become a robust substitute to the WTO system. The motivation

[7] See Articles 16.4 and 17.4 respectively of the DSU (WTO, 1994a).

for this comes from a forthcoming article concerning the recent challenge(s) by the United States to Canada's dairy tariff rate quotas (TRQs), under the US-Mexico-Canada (USMCA) free trade agreement's dispute resolution mechanism (Chow and Sheldon, 2024). The conclusion drawn by the authors is that, while the TRQ case(s) are a perhaps a "fuss about nothing" economically, they do appear to reveal, along with other USMCA cases, what may be a key part of the current US approach to resolution of trade disputes. In this context, two related questions are addressed in the current paper: (i) are proponents of reviving the WTO's AB doing so in the vain hope of securing US support for its reform; and (ii), have the United States and others such as the EU irrevocably moved on by creating and using parallel dispute resolution mechanisms in US-led and EU-led PTAs, that can be used to revolve WTO-type disputes as well as specific PTA disputes?

To answer these two questions, the paper is structured as follows. In order to provide economic context for the remainder of the paper, a selective review of the literature on PTAs is presented in section 1, focusing on what is known about their impact on trade liberalization, and why disputes can arise over unsettled issues. Then in section 2, the current paralysis in trade dispute resolution is described, with an emphasis on the key characteristics of the WTO's DSU, why it has broken down, and how the EU-led Multiparty Interim Appeal Arbitration Arrangement (MPIA) has been implemented as an alternative. In section 3, the characteristics of dispute resolution across PTAs are outlined, followed by a detailed description and analysis of the current approaches to dispute resolution taken by the United States and the EU. Then in section 4, the paper is summarized and key conclusions are drawn, in particular that the United States has moved away from a multilateral to a unilateral/bilateral/regional approach to dispute resolution, while the EU appears to be using a combination of multilateral and regional approaches. In addition, a proposal for an inter-PTA dispute resolution mechanism is then laid out as a possible way forward.

1. PTAs and Trade Liberalization

Impact of PTAS

Following Limão (2016), PTAs, which include free trade areas (USMCA), customs unions (MERCOSUR), and common markets (EU) can be defined as:

> "…an international treaty with restrictive membership and including any articles that (i) apply to only its members and (ii) aim to secure or increase their respective market access…"

The key to this definition is that, compared to the principle of non-discrimination (MFN) embedded in the GATT/WTO system, PTAs are by definition discriminatory.[8] Importantly though, GATT Article XXIV does provide an exception to MFN, allowing WTO members to form PTAs, the key stipulations being that the PTA must eliminate tariffs on "substantially all" trade among its member countries, and MFN tariffs applied to non-members of the PTA should not be increased.[9]

The economic literature on PTAs is extensive, with several reviews of multiple dimensions, including, *inter alia*, Baldwin and Venables (1995), Panagariya (2000), Krishna (2008), Freund and Ornelas (2010), and Limão (2016). Probably the key issue in the literature has been whether PTAs are "building blocks" or "stumbling blocks" to global free trade, a terminology originally due to Bhagwati (1991), and subsequently much debated and analyzed by, to name but a few, Baldwin (1996, 2006), Ethier (1998a, 1998b), and Aghion *et al*. (2007).

A common feature of this latter literature is the emphasis on the dynamics of trade liberalization: Baldwin (1996), in what he terms the "domino" theory of regionalism, argues deepening integration between a subset of countries increases incentives for other countries to seek membership of that PTA, thereby generating further trade liberalization, while Aghion *et al*. (2007)

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[8] See GATT Article I: 1 (WTO 1994b).

[9] See GATT Article XXIV: 8(a)(i), 5(a) and 5(b) (WTO 1994b).

analyze the conditions under which sequential bargaining (multiple rounds of PTA negotiations involving different subsets of countries) will lead to global free trade.

An alternative argument put forward by Ethier (1998b), and one developed later in the literature on offshoring and value chains (Baldwin, 2006), focuses on the incentives for policy reform in developing countries as a means to attracting FDI, thereby allowing them to participate more fully in the multilateral trading system. Importantly, Ethier (1998b) argues that joining PTAs has given small developing countries favorable access to larger developed markets, as well as contributing to internalization of an externality, Marshallian (non-pecuniary) scale economies at the international level, thereby reinforcing support for multilateralism.

Central to Bhagwati's (1991) terminology is application of Viner's (1950) argument that PTAs are not necessarily welfare-improving for members and non-members.[10] The key trade-off is one where distortion due to tariff(s) is reduced between members (trade creation), but there is also a substitution away from a non-member (trade diversion).[11] Viner (1950) showed that if the non-member is the lower cost supplier it is possible for trade diversion to outweigh trade creation. This argument has informed an extensive theoretical literature emphasizing the expected impact of PTAs, key results including those due to Kemp and Wan (1976), and Panagariya and Krishna (2002) showing under what conditions Pareto-improving PTAs can be achieved through either customs unions or regional trade agreements respectively – specifically what form the external tariff vector should take in order to eliminate trade diversion.[12]

[10] As noted by Bhagawti (1993), preferential trade liberalization is an example of the theory of second-best due to Lipsey and Lancaster (1956-57), discussed in the context of PTAs by, *inter alia*, Meade (1956) and Lipsey (1957).
[11] See Panagariya (2000) and Krishna (2008) for a detailed discussion of the Vinerian tradition.
[12] In motivating his argument, Ethier (1998b) dismisses the Vinerian paradigm of trade creation versus trade diversion on the grounds that it only applied to what he terms the "old regionalism", i.e., formation of the European Economic Community (EEC), and is not relevant to the "new regionalism" that began in the late-1980s, i.e., the US-Canada free trade agreement (CUSTA) and onwards.

Beyond the orthodox economic theory of PTAs, what does the empirical evidence have to say? In evaluating the increase in number of PTAs since completion of the Uruguay Round of GATT, Baldwin (2016) concludes that "…the specter that regional trading agreements would inefficiently divert trade never really appeared…", and given MFN tariffs are very low, PTAs provide little incentive to divert trade, the empirical evidence suggesting "…trade diversion due to bilateral and regional agreements is not a first-order concern in the world economy", Baldwin (2016) citing the findings of Estevadeordal *et al*. (2008) and Acharya *et al*. (2011) to support his argument.[13]

By contrast, Limão (2016) is considerably less optimistic in his conclusion about PTAs and the potential for trade diversion once evaluation includes dimensions beyond tariff reduction. A review of the studies of the impact of PTAs indicates large trade effects for PTA members relative to non-members, but these cannot be fully explained by tariffs - what Limão (2016) terms the trade elasticity puzzle. Essentially, a typical static trade model would require either an implausibly high trade elasticity or a very large reduction in tariffs to generate the observed trade effect of PTAs, neither condition being present in the data, the PTA effect remaining even after tariff reductions are accounted for. The implication to be drawn here is that while pre-PTA tariffs tend to be low, providing little reason for trade diversion, there is still potential for it to occur over time due to dynamic and deep integration effects, including, *inter alia*, reduction in non-tariff barriers (NTBs) (Chen and Mattoo, 2008), regulatory convergence and product standards (Grossman *et al*., 2021), trade in intermediate goods (Caliendo and Parro, 2015), and FDI (Chen, 2009). Limão (2016) also argues that trade policy uncertainty is a motive for establishing PTAs, i.e., they may reduce

[13] See Schiff and Winters (2003) who in summarizing the empirical literature on PTAs and trade diversion, conclude in general it tends to be small.

expected protection and also uncertainty about future policy, thereby increasing trade-related investment and trade volume (Limão and Maggi, 2015).

Political Economy and PTAs

In the context of the current paper, the issue of political uncertainty could include incorporation of a robust dispute resolution mechanism in a PTA, allowing for future application of agreed on disciplines to sectors that are not fully liberalized in initial negotiations. This idea is hinted at in Chow and Sheldon's (2024) discussion of challenge(s) by the United States to Canada's administration of its dairy TRQs. A feature of recent Canadian trade liberalization via PTAs has been the surrendering of modest amounts of market access for dairy product imports, yet its dairy supply management system remains in place.[14] To make sense of this, it is possible to draw on the political economic analysis of FTAs that takes explicit account of lobbying behavior (Grossman and Helpman, 1995). The key idea is that a government, in considering an PTA, has some ability to make the deal acceptable to competing interests through either partial or complete exclusion of some sectors from the agreement, but the countries negotiating an PTA will clash on the issue of exceptions, i.e., they want to protect politically powerful industries, while seeking to gain market access for their exporters. An equilibrium agreement is one that reflects the political pressures on the negotiating governments and the nature of the PTA bargaining process.

It can be assumed that successful negotiation of USMCA occurred because both the US and Canadian governments preferred it on political grounds as compared to maintaining the *status quo*, sector exclusions improving the possibility this was the case, because they could be "sold" to import-competing industries in exchange for their political support. Specifically, Canadian dairy production was granted partial exclusion in the USMCA negotiations because, the weighted sum

[14] See the Comprehensive Economic and Trade Agreement (CETA), and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), signed by Canada in 2016 and 2018 respectively.

of the political benefits of increased dairy product market access to the United States as the exporting country, and the political cost to Canada of more intense import competition from the United States, was expected to be negative. In addition, adapting an argument made by Maggi and Rodríguez (1998), it could be argued that, even if US access to the Canadian dairy sector continues to be less than fully liberalized under USMCA, the existence of a dispute resolution mechanism is a signal of commitment by the United States to pursue market access in the future, thereby satisfying future lobbying demands of the US dairy sector, as well as maximizing political contributions.

Therefore, despite less than full liberalization of its dairy sector, Canada is still subject to the provisions of the USMCA Agreement (USTR, 2020) covering TRQ administration (Chapter 3) and dispute resolution (Chapter 31), both of which the United States drew on when arguing that Canada's TRQ allocation mechanism limited its access to the latter's dairy market in violation of the provisions contained USMCA Chapter 3.A.2.11(b), a panel subsequently ruling in favor of the United States in 2021 (Arbitral Panel, 2021). The conclusion to be drawn here is straightforward: political-economic considerations militated against full liberalization of Canada's dairy sector, but inclusion of a dispute resolution mechanism in USMCA has aided in reduction of US uncertainty about Canada's current and future implementation of the rules on market access as they relate to administration of TRQs.

2. Dispute Resolution and the WTO

From GATT to the WTO

Settlement of trade disputes has always been a part of the GATT/WTO multilateral system, but with inception of the WTO in 1995, there was a clear switch from the "diplomacy-based" system that characterized GATT, to a much more "legalistic" system (Bagwell *et al.*, 2016). The central

dispute resolution mechanism of GATT was contained in Articles XXII and XXIII, the former calling for consultation between disputing parties, the latter calling for a procedure possibly culminating in a voting action by the ruling GATT body, i.e., the Contracting Parties (see WTO, 1994b). Formation of the WTO added the DSU consisting of a comprehensive, 37-page dispute resolution mechanism consisting of 27 Articles, as well as four appendices (see WTO, 1994a).

Much has been written about dispute resolution under GATT, notably extensive reviews of its weaknesses and development by Jackson (1978a, 1979, 1997). In Jackson's (1997) view, the extended text of the WTO's DSU solved many of the issues that "…plagued the previous GATT dispute-settlement system…". Hoekman and Mavroidis (2020) outline how design of the DSU consisted of two major components: first, formalization of a "negative-consensus"[15] or "automaticity" rule for WTO decision-making that would make it impossible for any parties to a trade dispute either to block establishment of a panel or adoption of panel and AB reports, i.e., requests to the DSB must be granted unless all WTO members at a DSB meeting choose to reject it; and second, adoption of a two-instance adjudication system consisting of a panel whose legal reasoning could be appealed.

The two-instance system is designed to function as follows: the DSB, consisting of all WTO members, must adopt a decision of a panel or AB before it has any legal effect. Panel decisions that are not appealed can be directly adopted by the DSB, and panel decisions that are appealed, are then open for adoption by the DSB, following a ruling by the AB. As noted above, panel and AB decisions are adopted by the DSB under the negative-consensus rule, i.e., decisions are adopted unless all members of the DSB decide against (Chow, 2023).

[15] Sometimes denoted as "reverse consensus".

Hoekman and Mavroidis (2020) argue that negative-consensus was the key innovation of the DSU in that removal of blocking behavior by individual countries would reduce uncertainty concerning the WTO's ability to enforce implementation of negotiated commitments. Two-instance adjudication was designed to be a means for WTO members to protect themselves against loss of sovereignty resulting from the formalization of negative consensus, which the GATT had effectively been moving towards incrementally (Hudec, 1993). Negotiation of the DSU represented a pushback against unilateral enforcement by large economies of their own trade laws, and the subsequent retaliatory behavior of targeted countries, the objective being to design a trade dispute resolution mechanism with defined deadlines, and one where decisions could be consistently enforced – what Hoekman and Mavroidis (2020) refer to as depoliticization. Given the number of disputes resulting in either a panel or an AB ruling since 1995, it would appear that WTO dispute settlement has been working, earning it the descriptor of "crown jewel" of the multilateral trading system (Bagwell *et al*., 2016).[16]

To understand the implications of the WTO's appeals system breaking down, it is necessary to outline why the AB was eventually included in the DSU. Hoekman and Mavroidis (2020) argue there were two key reasons for implementation of an AB: institutional and the need to guarantee coherence in jurisprudence. GATT was originally conceived of as a two-part adjudication process: a diplomatic phase, where countries would endeavor to solve their disputes via bilateral consultation, and if this failed, there would be a "court-like" phase where panels of independent experts adjudicated the dispute. Initially, panel decisions and choice of panel members can be described as pragmatic, but following the so-called 1976 "DISC" case (GATT, 1976) involving

[16] For example, between 1995 and 2014, 500 formal disputes were initiated, nearly 200 resulting in panel rulings, of which more than half were subsequently appealed and subject to an AB ruling (Bagwell *et al*., 2016).

the United States' provisions for lower taxes on firms' export revenues,[17] there was a push for strengthening of the GATT Secretariat's legal expertise, a Legal Office being established in 1982. The objective of the Legal Office was to maintain the GATT's institutional memory, and to help with coherent jurisprudence across disputes, which further contributed to its depoliticization, with institution of the AB being a further step in achieving that goal (Hoekman and Mavroidis, 2020). The AB as designed, consists of seven members appointed for a fixed term based on their expertise, the DSU emphasizing the need for their independence (from the rest of the WTO), and impartiality (from parties to a dispute), i.e., adjudication of appeals was designed to be independent of political concerns (Hoekman and Mavroidis, 2020).

In terms of jurisprudence, the actions of the AB, and language contained in Article 3.2 of the DSU (WTO, 1994a), suggest that coherent case law should result in "…security and predictability to the multilateral trading system…", i.e., decisions in previous rulings should be observed in subsequent panels dealing with a similar issue(s). From the standpoint of strict legal doctrine, the DSU does not explicitly acknowledge the principle of *stare decisis*, but Article 17.6 of the DSU (WTO, 1994a) does point to value of following precedent, with WTO panels almost always having followed prior rulings of the AB (Hoekman and Mavroidis, 2020).

Non-Functioning of the Appellate Board (AB)

As noted previously, the AB ceased to function in December 2019, largely driven by US dissatisfaction with its decisions (Chow, 2023). The US critique of the AB essentially focuses on the way in which it has executed its mandate, and its dissatisfaction with some of its decisions. The latter fall into three groups: those decisions that (i) held certain US statutes to be in violation of WTO law, thereby requiring their appeal; (ii) rejected US enforcement of trade remedies such

[17] See Jackson (1978b) for a thorough discussion of this case.

anti-dumping laws; and (iii) ruled in favor of China in several cases, despite China not meeting its WTO commitments to dismantle its state-led economy, notably its continued use of industrial subsidies (Chow, 2023).[18]

Essentially, the United States believes the AB has exceeded its authority by engaging in "judicial activism" (USTR, 2018), claiming that it has rejected existing US rights, as well as inventing new rights and obligations in its rulings against the United States (Chow 2023). Payosava *et al*. (2018) provide further detail on this. First, the US charge of judicial activism is driven by the fact that while the AB was created to correct legal errors by panels, there has been no effective check on AB decisions, exacerbated by its *de facto* application of the principle *stare decisis*, the United States arguing the AB has been "creating its own rules" (WTO/DSB, 2002). Second, the AB has addressed issues not raised by parties as well as providing unnecessary opinions, i.e., commentary that in legal terms would be considered *obiter dicta* (Stewart, 2018), and in the US view this has the potential to wrongly influence future disputes if treated as precedent. Therefore, given the United States believes such decisions have been made outside of the defined authority of the WTO, they are considered unlawful, the United States having no obligation to abide by them – fundamentally, in the view of the United States, the AB has undermined its legitimate sovereignty (Hoekman and Mavroidis, 2020).

A survey by Fiorini *et al*. (2020) of WTO members' views concerning WTO dispute settlement and the AB indicates that the while United States is not alone in perceiving that the AB has gone beyond its mandate, its major focus seems to be on returning to what was decided in the GATT Uruguay Round negotiations in 1995 (Mavroidis and Hoekman, 2019), as opposed to

[18] The United States was particularly aggrieved by the AB ruling that financial contributions made to Chinese state-owned enterprises (SOEs) did not qualify as subsidies under the Agreement on Subsidies and Countervailing Measures (ASCM) – see Appellate Body Report (2011).

returning to the GATT-era when countries could block panels and adoption of panel reports (Hoekman and Mavroidis, 2020).

Which Way(s) Forward?

Assuming negative consensus is maintained, Hoekman and Mavroidis (2020) lay out what a single-stage adjudication mechanism might look like in the absence of a functioning AB, their key recommendation being establishment of a standing body of 12-15 panelists. They suggest this would not only satisfy the United States, but also improve the adjudication of disputes through reduction of legal errors, and improve panel performance in terms of minimizing poor analysis and inconsistent treatment of facts across cases, issues the AB was not permitted to address in the DSU.[19]

Beyond proposals for improving WTO dispute settlement, it is important to examine what could have and what has actually happened since demise of the AB. Pauwelyn (2019) has surveyed the various possibilities, drawing the following conclusions:

(i) The United States will not lift its veto on new appointments to the AB until: (a) the issue of AB judicial overreach is resolved; (b) the US-China trade relationship is resolved; and (c) how WTO dispute settlement subsequently unfolds. At present, there is absolutely no sign of the veto being removed, the United States preferring to utilize unilateral, bilateral and regional approaches to enforcing trade commitments.

(ii) It is very unlikely that the WTO as an institution, be it through its General Council, the DSB or AB, will overcome the US veto through actions such as starting the AB appointment process by majority vote (Kuijper, 2017), or changing the working procedures of the AB to one where, with fewer than three members, appeals are automatically considered as completed and

[19] See Mavroidis (2016) for a discussion of AB design and operational issues.

sent back to the DSB for adoption (Charnowitz, 2017). As Pauwelyn (2019) notes, the legality of both proposals has been questioned, and there is no support among WTO members to effectively sideline the United States in this manner.

(iii) Given the unlikelihood of possibilities (i) and (ii), Pauwelyn (2019) argues that for panel reports released after December 10, 2019,[20] there are four possible interim scenarios: (a) they will be appealed "into the void", thereby blocking the panel report, the United States having already followed such a strategy in 2020 after a panel ruled it had violated GATT Articles I and II in imposing tariffs on Chinese products under the Trump administration;[21] (b) no appeal of panel reports followed by their automatic adoption; (c) DSU Article 25 (WTO, 1994a) appeal arbitration with automatically binding results, the only option preserving both panel and appellate stages, as well as automaticity; and (d) "floating" panel reports that are neither adopted nor appealed/blocked, but are instead used in continued negotiations between parties to a dispute, an option aligning with the views of former USTR Robert Lighthizer.[22]

In evaluating scenarios (a)-(d), Pauwelyn (2019) comes to the following conclusions:

- first, appealing panel decisions "into the void' is highly likely, especially in cases where either a powerful respondent loses a case against a weaker complainant or in disputes between equally powerful parties, e.g., the United States-China case. Appealing to the language of Jackson (1979), the threat of appeals "into the void" pushes WTO dispute resolution away from the pole of "rule-oriented" and closer to the pole of "power-oriented", with the potential to escalate existing or new trade wars.

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[20] Appeals pending before the AB prior to December 10, 2019 should have been carried-over and completed by former Appellate Board Members – see Pauwelyn (2019).
[21] See International Economic Law (2021), and WTO (2020).
[22] See Center for Strategic and International Studies (CSIS) interview with Robert Lighthizer (CSIS, 2017)

- second, some panel reports will not be appealed, automatically being adopted by the DSB, e.g., parties choose not to appeal because of the associated costs (reputational and risk of retaliation).

- third, in 2019, the EU circulated a draft text providing for interim appeal arbitration pursuant to Article 25 of the DSU, but at the time of writing, the EU proposal had not been tested, and it was not clear how many other WTO members would sign up to it (Pauwelyn, 2019). However, in April 2020 an interim replacement of the AB was created by an EU-led coalition of 19 WTO members, denoted as the MPIA.[23] The MPIA commits signatories that act as either complainants or respondents in panels to either accept their reports or use the MPIA to appeal their findings through an AB-like process. Detailed discussion of the first ruling by MPIA is reserved for the next section of the current paper, but when MPIA was introduced, some skepticism was expressed about its potential as a plurilateral agreement, including that it represents a small percentage of total WTO membership, and perhaps most importantly it does not include the United States (Hoekman and Mavroidis, 2020).

- fourth, the potential for "floating" panel reports depends very much on the balance of power between complainants and respondents, as well as the credibility of either party threatening to appeal a panel decision. For example, a complainant could win, but the respondent may want to avoid the costs of appealing "into the void", such an outcome also being sub-optimal for the complainant. In which case, the winning complainant could choose not to get the panel report adopted by the DSB, as long as the losing respondent commits to not appealing the panel report, i.e., the panel report would not be adopted, appealed or blocked.

[23] Currently, there are 26 members of MPIA, including Australia, Canada, China, and Japan. https://wtoplurilaterals.info/plural_initiative/the-mpia/

Pauwelyn's (2019) overall conclusion is that WTO dispute settlement will "…likely get worse before it gets better…". However, in the context of the question posed in the current paper, he does speculate that dispute resolution under PTAs might in some circumstances fill the gap. Many WTO consultation requests, if filed now would be between members of PTAs that provide for judicial resolution of trade issues, although major trading partners such as the United States and the EU currently lack a PTA. The remainder of the current paper evaluates the potential for resolving trade disputes through PTAs.

3. PTAs and Dispute Resolution

Key Features

In order to provide a general background to the current approaches to dispute resolution of the United States and the EU, a brief description of what is known in aggregate about PTAs and dispute resolution is laid out here, drawing on the encyclopedic survey and analysis by Chase *et al.* (2016). Prior to the latter survey, despite most PTAs containing procedures for resolving disputes, systematic classification of such procedures has been limited, with the exception of Smith (2000), and Jo and Namgung (2012). Key to classification is defining models of dispute resolution, Chase *et al*. (2016) drawing on Porges (2011), describe three options with an increasing degree of legalism: political/diplomatic dispute resolution, referral to an *ad hoc* arbitral panel (quasi-judicial), and systems administered by a standing tribunal (judicial).

Chase *et al*. (2016) applied their classification to 226 PTAs notified to the WTO through the end of 2012, and in force at the time of their study. In terms of the evolution of RTAs and dispute resolution, the key finding is that until 2004, the political/diplomatic option was dominant, but was replaced after by the quasi-judicial option, whose growth in use appears to be correlated with the

rapid increase in the number of PTAs post-1995. By the end of 2012, of the sample of PTAs, 147, 69, and 10 employed the quasi-judicial, political/diplomatic, and judicial options respectively.

Given its dominance in PTAs, the key features of the quasi-judicial option reported by Chase *et al*. (2016) are typically: allowance for claims against measures deemed inconsistent with the PTA(s); complainants can choose between either the PTA or WTO forum, but once a choice is made, the non-selected forum is foreclosed; consultations between disputing parties is allowed at a pre-adjudication stage; *ad hoc* panels are typically composed of three members, with automaticity of composition; and appellate review is not typical.

In the context of the current paper, perhaps the most striking finding of Chase *et al*. (2016) is that while the number of PTAs containing some type of dispute resolution mechanism has grown in line with the number of PTAs, the number actively using that mechanism up to 2012 was rather small, notable exceptions being the EU, EFTA, and MERCOSUR. PTA members who were parties to a dispute have typically filed a complaint at the WTO as opposed to through their PTA, even though some of the disputes could have been brought to a quasi-judicial dispute resolution mechanism (Chase *et al*., 2026). A later study by Vidigal (2017) finds that over the period 2007-16, virtually no trade disputes were resolved through PTA forums, the sole case being under the Dominican Republic-Central America Free Trade Agreement (CAFTA) agreement, involving Costa Rica and El Salvador (Grupo Arbitral, 2014).

A number of arguments have been put forward to explain the primacy of the WTO in dispute resolution. Porges (2011) suggests the WTO has been more attractive because: its institutions are familiar; the principle of negative-consensus prevents the blocking of dispute resolution; and the extent and nature of retaliatory power afforded to members. Lewis and Van den Bossche (2014) focus on the WTO's: experience in dispute resolution; predictability of jurisprudence; and

appellate review in its two-instance system. Davey (2006) suggests WTO decisions have been seen as more legitimate because: panels are drawn from neutral member countries; there is appellate review; and dispute settlement is more adjudicative. Busch (2007) and Leal-Arcas (2011) both focus on what is termed "forum-shopping", their common conclusion being that complainants select that forum maximizing their chances of winning and compelling the respondent to remove it injurious measures. Finally, Vidigal (2017) argues that even though the PTA option can in principle produce quicker authorization for a complainant to retaliate with less judicial oversight, that option has rarely been resorted to, countries typically choosing the WTO option of the weaker remedy of adjudication. The explanation for this is the collective pressure of WTO members on respondents, not just that of complainants, which leads to adjudication rather than retaliation.

However, notwithstanding these arguments, they do of course pre-date the breakdown in WTO dispute settlement in 2019, which brings the discussion back to the key question posed in this paper: to what extent are the United States and others such as the EU moving away from dispute resolution by multilateral means in the WTO towards that offered through PTAs?

Current US Approach(es) to Dispute Resolution

As noted above, paralysis of the WTO's dispute resolution system became a reality in December 2019, with the United States continuing to block the appointment of new AB members, thereby preventing it from maintaining a quorum. While criticism of the WTO did not begin with the Trump administration, the United States having long-held concerns about AB overreach and their rulings on key issues such as subsidies (Bown and Hillman, 2019; Chow, 2023), actions such as successive implementation of tariffs against China over the period 2018-20 (Bown, 2021), indicate there has been a substantive change in the US approach to its international trading relationships. Importantly, this approach has not fundamentally changed under the Biden administration, the

Trump tariffs against China being maintained, along with the introduction of targeted tariffs of 50 and 100 percent on imports from China of semiconductors and electric vehicles (EVs) respectively (Wolff, 2024).

There is also a distinct probability that the trade war with China could be ratcheted up, a bipartisan US House Select Committee (US Congress, 2024) recently recommending that the United States discontinue Permanent Normal Trade Relations (PNTR) with China, i.e., China's MFN status would be revoked (Elms, 2024).[24,25] What this means for US tariffs on Chinese imports is currently unclear, one suggestion being that all existing Section 301 exclusions are withdrawn, implying 25 percent tariffs across the board on imports from China, another that tariff rates will be set at levels similar to those applied to other countries without PNTR such as Belarus, Cuba, North Korea, and Russia (Oxford Economics, 2023). If Donald Trump were to be re-elected, there is a chance an incoming administration would implement even higher tariffs of 60 percent against Chinese products, as well as 10 percent tariffs on imports from the rest of the world (Wolff, 2024; Clausing and Lovely, 2024).

(i) US-Unilateral/Bilateral Dispute Resolution

The observation to be drawn here is that there is clearly bipartisan support for the United States to continue shifting from multilateral to unilateral/bilateral means of setting its trade relations with China. This is an extension of how Mattoo and Staiger (2020) interpreted the US-China trade war, i.e., the former switching from a "rules-based" to a "power-based" approach to trade negotiations, targeting higher "bargaining" tariffs at a country with which it has consistently run a bilateral trade

[24] PNTR is the US designation for MFN trade with a country, granted to China in 2000, thereby allowing China to join the WTO that same year (Pregelj, 2001).
[25] The China Trade Relations Act was also introduced into the US Senate in 2023, sponsored by Senators Cotton, Scott, Budd, and Vance recommending the ending of China's PNTR status (Cotton, 2023).

deficit, a key component of the strategy being the disabling of the WTO's DSU through paralyzing the AB (Pauwelyn, 2019; Chow, 2020).

Formal analysis of "power-based" bargaining, as well as follow-up discussion can be found in Mattoo and Staiger (2020) and Sheldon (2021) respectively. In addition, several empirical studies have presented assessments of the impact of the trade war on the US economy, including Amiti *et al*. (2019, 2020), Fajgelbaum *et al*. (2020), Fajgelbaum and Khandelwal (2022), Autor *et al*. (2024), with other studies focusing specifically on the impact of China's retaliatory tariffs on the US agricultural sector, i.e., Carter and Steinbach (2020), and Grant *et al*. (2021). Estimates of the potential economy-wide impact of removing PNTR and Trump's proposed tariffs have also been reported in Oxford Economics (2023), and Clausing and Lovely (2024), with Carter and Steinbach (2024) evaluating the likely impact on California agriculture of revocation of PNTR.

As theory would suggest, unilateral and substantive increases in tariffs by the United States led to an aggressive retaliatory response by China, both countries appearing to apply trigger strategies, pushing their bilateral relationship to a non-cooperative equilibrium (Sheldon, 2021).[26] However, on some level the US switch to "power-based" bargaining did work with signing of the Economic and Trade Agreement between United States and China (USCTA) in early-2020 (USCTA, 2020), China committing to a voluntary import expansion of $200 billion worth of imports from the United States, although notably absent from the agreement was any attempt to address China's use of industrial subsidies (Sheldon, 2021). In the context of the current paper, as a bilateral trade agreement, and one that remains in force under the Biden administration, USCTA contains a dispute resolution mechanism in its Chapter 7 (USCTA, 2020), providing one signal of

[26] See Zissimos (2007) for a discussion of trigger strategies in the context of GATT/WTO.

how the United States is currently approaching trade relations, and one that creates a unilateral procedure completely within its control and outside of the WTO (Chow, 2020, 2023).

Under USCTA, a "Bilateral Evaluation and Dispute Resolution Arrangement" has been established, headed by the Deputy USTR and a designated Chinese Vice-Minister under the Vice-Premier. A dispute commences when either country files an appeal against the other through their Bilateral Evaluation and Dispute Resolution Office. Designated officials from both countries then seek to solve the dispute via negotiation, and if that fails it is referred to the Deputy USTR and Vice Minister, and then on to the USTR and Vice Premier. If matters are not resolved:

> "…the Parties shall engage in expedited consultations on the response to the damages or losses incurred by the Complaining Party. If the Parties reach consensus on a response, the response shall be implemented…" (USCTA Article 7.4.4(b)).

The key feature of USCTA dispute resolution is what happens if consensus is not possible, USCTA authorizing a unilateral response:

> "If the Parties do not reach consensus on a response, the Complaining Party may resort to taking action…, including by suspending an obligation under this Agreement or by adopting a remedial measure in a proportionate way that it considers appropriate with the purpose of preventing the escalation of the situation and maintaining the normal bilateral trade relationship." (USCTA Article 7.4.4(b))

Effectively, under this provision, the United States can unilaterally impose a trade sanction against China, the latter not being able to respond if it believes a complaint made by the United States has been made in good faith, and little alternative but to pull out of USCTA if it feels a complaint made by the United States has been made in bad faith (USCTA Article 7.7.4(b)). In the view of Chow (2020, 2023), the United States is the most likely party to make use of trade retaliation to solve any trade grievance with China.

Significantly, not only does USCTA require disputes to be solved internally, but it is also in violation of DSU Article 23 (WTO, 1994a). WTO members are expressly prohibited from taking

unilateral action if it believes its rights have been violated by another WTO member, such that determination can only be made through its dispute resolution mechanism. Integrity of the system is preserved through the requirement that all members wait for a decision by the WTO, and to base any national findings on that decision.

Chow (2020) argues that violation of DSU Article 23 (WTO, 1994a) can occur in three specific ways: (i) WTO decisions in favor of China against the United States can be reversed under USCTA, e.g., an AB decision against the United States concerning China's counterfeit product laws was reversed under USCTA Article 1.20;[27] (ii) WTO decisions and rules can be enforced through USCTA without referral to the WTO under USCTA Article 7.4:4(b), e.g., the United States can unilaterally decide China is not in compliance with a panel ruling on China's corn, wheat and rice TRQs;[28] and (iii) China's WTO obligations can be enforced through USCTA as opposed to seeking resolution through the WTO, e.g., the United States could claim a breach of the WTO rules is also a breach of USCTA, thereby allowing it to use the USCTA dispute resolution mechanism directly against China under USCTA Article 7.6.

(ii) <u>US-PTAs and Dispute Resolution</u>

Fundamentally, USCTA is a rejection of independent dispute resolution as embodied in the WTO's DSU, as well as being a distinct break with all PTAs it has previously signed, covering 20 countries,[29] all of which require the use of independent and neutral arbitration panels which can render decisions either for or against the United States (Chow, 2020), and where disputes can be resolved through the relevant PTA or the WTO.[30] Excluding USMCA, these free trade agreements

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[27] See Panel Report (2009).
[28] See Panel Report (2019).
[29] See USTR (2024).
[30] See Chow (2020) for a detailed discussion of dispute resolution under the US-Korea Free Trade Agreement (KORUS).

(FTAs), along with the relevant article covering choice of dispute settlement, are: the United States-Australia FTA (Article 21.4); United States-Bahrain FTA (Article 19.4); United States-Chile FTA (Article 22.3); United States-Morrocco FTA (Article 20.4); United States-Columbia Trade Promotion Agreement (Article 21.3); CAFTA (Article 20.3); United States-Korea FTA (KORUS) (Article 22.6); United States-Oman FTA (Article 20.4); and the United States-Panama Trade Promotion Agreement (Article 20.3).[31] In the case of USMCA, state-to-state dispute resolution under the provisions of USMCA Chapter 31, is a modification of the procedure that operated under the provisions of the North American Free Trade Agreement (NAFTA) Chapter 2 (Government of Canada, 2018).

The structure of dispute resolution in USMCA is very similar to the quasi-judicial option of most PTAs, the key features being: (i) parties have a choice of forum such that, if a panel is established under USMCA, that rules out the complaining party requesting establishment of a WTO panel, and vice-versa (USMCA Article 31.3); (ii) a party can request consultations with another Party with the expectation of their seeking to resolve the matter through such consultations (USMCA Article 31.4); (iii) if consultations fail, establishment of a panel can be requested (USMCA Article 31.6), panels consisting of three-five members depending on the number of parties to the dispute (USMCA Article 31.9); (iv) panels make assessments of the matter before it (USMCA Article 31.13), presenting an initial report to the disputing parties, who have the right of response, after which a final report is presented (USMCA Article 31.17), i.e., there is no appeals process; (v) following a panel report, the disputing parties should seek to agree on resolution, which could consist of, elimination of the respondent party's non-conforming action, provision of

[31] Note that the CPTPP (Article 28.4) offers a choice of either the WTO or its own dispute resolution mechanism, the United States being a party to the CPTPP's predecessor the Trans-Pacific Partnership (TPP), drafting the original treaty text. The United States withdrew from TPP after President Trump came into office.

compensation, or another remedy agreed by the disputing parties (USMCA Article 31.18); (vi) finally, if the disputing parties are unable to resolve the dispute, the complainant may suspend respondent benefits equivalent to their own loss of benefits (USMCA Article 31.19).

In commentary on Chapter 31, Hillman (2019) argues it does not contain an effective enforcement mechanism, but as Howse (2024) notes, it does address the ability of parties to block panel members, an issue characterizing NAFTA post-2000 (Lester *et al.*, 2019).[32] The proof of the pudding is perhaps in the eating though, the rate at which USMCA dispute resolution is being utilized by its three member countries being more extensive than under NAFTA Chapter 20, where only three panel reports were ever circulated (WorldTradeLaw.net, 2020). Since 2022, there have already been four Chapter 31 panel reports, including two involving dairy TRQs (WorldTradeLaw.net, 2024). In addition, a panel is currently investigating a ban by Mexico on imports of genetically modified corn used in food products (Good, 2023).

The conclusion one can draw here is that the United States' use of the USMCA dispute resolution mechanism suggests that the many ongoing efforts of those who seek to rescue the WTO from its crisis may be in vain. The United States may have already shown its hand that it does not intend to agree to any reforms that would revive the WTO's AB. Rather, the United States intends to abandon the WTO and to substitute its own dispute resolution mechanism in PTAs that can be used to resolve both WTO and particular PTA disputes (Chow and Sheldon, 2024).

Current EU Approach(es) to Dispute Resolution

In contrast to the United States, the EU appears to be following both multilateral and PTA-based approaches to the resolution of trade disputes. As noted in a previous section, an EU coalition of

[32] After failed consultation over US restrictions on it sugar exports, Mexico requested a panel in 2000. The issue of panel selection was never resolved, the United States effectively blocking choice of a chair, Mexico eventually imposing unilateral countermeasures in 2001 (see Lester *et al.*, 2019) for a full discussion.

19 countries (now 26), created the MPIA as a response to the non-functioning AB with the objective of preserving WTO dispute settlement, thereby preventing appeals "into the void". Participants in MPIA have committed not to appeal panel reports, but instead use the alternative of arbitration as laid out in DSU Article 25 (WTO, 1994a). Effectively, this is a two-instance adjudication system already allowed for within the WTO's rules, described by Pauwelyn (2023) as an open plurilateral solution concluded *ex ante* between a sub-set of WTO members, but open to other members to join.[33]

Importantly, the MPIA produced its first appellate award at the end of 2023 (Panel Report, 2023). Specifically, the EU filed a dispute against anti-dumping duties imposed by Colombia on frozen fries from Belgium, Germany, and the Netherlands. At the first stage, the panel found that Colombia had violated a number of provisions of the WTO Anti-Dumping Agreement, and at the second stage the MPIA appeal arbitrators reversed one and confirmed three of the panel's findings. The findings were then discussed at the DSB, but per DSU Article 25 (WTO, 1994a), they were not formally adopted. Notably, Colombia signaled its intention of complying with the findings, noting at the DSB that the MPIA had been shown to be a viable and well-functioning interim mechanism that preserved the right of appeal of WTO members (Pauwelyn, 2023).

It would seem that the EU, through its leadership in setting up MPIA, and also its involvement in the first case that went to MPIA arbitration, remains committed to a multilateral approach, backed up by its support for making WTO dispute resolution system operational again (European Commission, 2021a). At the same time though, the EU has continued to sign PTAs and is also

[33] Chow and Sheldon (2023) have argued that if the United States were to join a dispute against China in coalition with the EU and Japan, and a panel were to rule against China, under MPIA China would be precluded under the DSU from trying to "sever" the case as it applies to the United States. Specifically, a single panel report would be subject to the MPIA arbitration process, as both China and the EU are both MPIA members (see MPIA, Article 9).

beginning to test the viability of dispute resolution outside of the WTO (Weinberger and Van Kerckhoven, 2022).

Like the evolution of PTAs generally, the trade dispute resolution mechanisms incorporated into PTAs of which the EU is a member, have transitioned from the diplomatic to a quasi-judicial option (Weinberger and Van Kerckhoven, 2022). The shift to the quasi-judicial option began with signing of the EU-Mexico PTA (European Community, 1997) in 1997 which was designed to be compatible with the WTO's DSU. This was followed in 2002 by the EU-Chile PTA (European Community, 2002), which embodied a separate set of detailed rules on dispute resolution (European Community, 2002, art.183-188).

These rules are very similar to those in other PTAs: preliminary consultation between parties, unilateral initiation of arbitral proceedings by a complainant if consultations fail, panel formation from an agreed list of arbitrators, release of a final panel report and ruling, and ensuring compliance with a ruling. These fundamental procedures have also been built into subsequent PTAs involving the EU, such as the EU-Canada Comprehensive Economic Trade Agreement (CETA) and the EU-Japan Economic Partnership which entered into force in 2017 and 2019 respectively. The key difference between dispute resolution in PTAs of which the EU is a member and the WTO's, is the lack of two-instance adjudication, i.e., there is no equivalent of the AB.

Even though PTA dispute resolution has been available to the EU, prior to 2018, it chose to follow the WTO option (Vidigal, 2017). However, since then it has initiated disputes with Korea and Ukraine in 2018, South Africa in 2019, and Algeria in 2020 (European Commission, 2021b). While issues relating to the WTO's DSU regime are ongoing, and likely influencing the EU's choice of forum to resolve trade disputes, as already discussed, the EU has taken leadership in

seeking an alternative plurilateral mechanism under the WTO rules, which lies in very clear contrast to the unilateral/bilateral/PTA strategy currently adopted by the United States.

4. Summary and Conclusions

With the lack of progress in the Doha Round of WTO, and the parallel growth of PTAs, much has been written about the future of the multilateral trading system, with a particular focus on shallow versus deep integration and the impact of value chains on trading relationships. At the same time significant concerns have been expressed about the future of the WTO's system of dispute resolution, the latter being viewed by many as a major achievement of the Uruguay Round and a significant improvement over the system that operated under GATT. Compared to GATT, the WTO system, as implemented up to December 2019, has been more formal and based on a litigation model with a panel serving as a court of first instance and an AB serving as a "high court" of international trade, panel or AB decisions referred to the DSB being automatically adopted following the principle of negative-consensus.

Shortly after establishment of the WTO, the United States became frustrated with the work of the AB. According to the United States, the AB engaged in judicial activism in deciding cases against the United States. Historically as the most influential and powerful nation in the WTO, the United States did not expect to lose so many cases in the WTO, such losses coming as an unwelcome surprise. Some WTO losses required repeal of venerable US legislation in existence decades before the WTO became established. Other major losing decisions for the United States also involved China, its recent and current chief trade protagonist.

As a result of these concerns, successive US administrations have blocked the appointment/ reappointment of panelists to the AB, such that by the end of 2019, the number of panelists fell below that necessary for a quorum. The paralysis of the AB has meant that all WTO obligations

have become, in effect, unenforceable. Any WTO member that is found by a panel to have breached its WTO obligations can simply file an appeal of the panel decision. Once an appeal is filed, the DSB Body is required to wait until the conclusion of the appeal before it can adopt the AB decision. Given the AB's lack of a quorum, the appeal cannot be completed so the case is suspended indefinitely in a legal limbo, i.e., it is appealed "into the void". This result has created a crisis in the WTO because all obligations have now become unenforceable, potentially imperiling the continuing existence of the WTO itself. At the moment the only safety valve is the MPIA, a plurilateral agreement among 26 WTO members led by the EU, implemented to ensure interim two-instance adjudication of disputes among WTO members.

With President Biden's election in 2020, observers were hopeful a new administration would signal a change in policy towards the WTO. However, blockade of the AB by the United States has continued, and it is unclear when and if the AB will be restored. It is equally unclear whether the United States has any intention of ever lifting its blockade on the AB, and as yet it has given absolutely no indication it will sign up to the MPIA. This can be seen as part of a broader US shift away from a "rules-based" to a "power-based" approach to its trade relations. Most obviously, the 2018-20 trade war saw an across-the-board increase in US tariffs with retaliation from China, further escalation only being prevented following negotiation of USCTA, an agreement that allows for unilateral US trade actions against China in violation of WTO rules.

With targeted tariffs being implemented by the current administration, along with the potential for a significant future increase in tariffs by a future administration, and even an end to China's MFN status, it seems that the United States has abandoned multilateral dispute resolution. However, complimentary to the power-based approach towards China is the fact that PTAs of which the United States is a member contain dispute resolution provisions. The latter are typically

built on top of a substratum of existing WTO rules, with many rules/clauses in the WTO and these PTAs, such as USMCA, either overlapping or being identical in substance. Specifically, a dispute between USMCA members concerning these obligations can be brought either in the WTO or in the USMCA, however if through the former, it falls into the legal "morass" created by the paralysis of the AB, while a dispute in the USMCA can be resolved by a fully functional dispute resolution mechanism.

Returning to the two questions posed in the introduction. While the United States shows no desire to revive/reform WTO dispute resolution, and has not joined MPIA, the rate at which it has been engaged in dispute resolution under USMCA suggests it regards this and other PTAs as a robust alternative to the WTO's DSU. At the same time, the EU clearly supports multilateral solution to trade disputes, but since 2018 the EU has also made greater use of PTA dispute resolution. Given this commonality, a proposal is made here for a possible way forward for trade dispute resolution: PTAs could have an "opt in" clause for non-members. The clause would allow non-members of a specific PTA to use its dispute resolution mechanism in any trade dispute with a member of the treaty. To take the USMCA as an example, the opt in clause would allow a third country, such as Germany or Japan, to use the USMCA dispute resolution mechanism for trade disputes with the United States, Mexico, or Canada, and then be a non-member country for disputes that arise out of WTO obligations. USMCA Article 31.3 covers disputes under the USMCA or the WTO and provides the choice of the USMCA or the WTO dispute resolution mechanism. Currently, for non-members of the USMCA, the only option would be to choose the WTO. The same opt in clauses can be adopted by all of the other trade agreements set forth above, which would create a larger network of agreements that can be used to resolve WTO disputes.

In addition, it is proposed that the WTO be the clearinghouse and center at which the opt in

clauses are exercised. The WTO membership includes the vast bulk of nations all with offices at the WTO headquarters. The WTO can serve as a convenient and central location at which the opt in clauses are notified and implemented and at which the PTA dispute resolution bodies can hear cases. With the continuing proliferation of bilateral and regional PTAs, this approach could provide substantial opportunities for countries to resolve their WTO disputes in fully functioning dispute resolution systems without having to wait for the restoration of the WTO's AB.

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