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THE MULTILATERAL TRADING SYSTEM IN CRISIS:

EU-Canada Leadership and Collaboration

Kristen Hopewell



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At a glance

- **The multilateral trading system** is in crisis. Beginning under President Donald Trump, the United States abdicated its traditional leadership role in the trade regime, abandoning multilateralism in favour of aggressive unilateralism and launching an unprecedented assault on the World Trade Organization (WTO). Despite President Biden's professed commitment to international cooperation, there has been little change in US trade policy under his administration. Meanwhile, China has also shown a flagrant disregard for the rule of law in trade, weaponizing trade as an instrument of economic coercion against weaker states, in blatant violation of the rules and principles of the WTO. In short, two of the world's dominant economic powers have been increasingly behaving as rogue states in the multilateral trading system.
- **The WTO's core negotiation function** has broken down, as evident in the collapse of the Doha Round and the repeated paralysis that has impeded subsequent negotiations. The WTO's dispute settlement mechanism is also in jeopardy. The US is blocking appointments to the Appellate Body, leaving it without any judges to adjudicate disputes. The WTO's dispute settlement system is a fundamental pillar of the rules-based multilateral trading system: it is essential to enforcing global trade rules and providing a peaceful means of resolving trade disputes among states. Without a functional enforcement mechanism, the entire system of multilateral trade rules is in danger of unraveling.
- **With the trade regime in crisis**, a key question has been whether other states would have the will and capacity to lead system-preserving initiatives. Initially, with the rise of Trump and his anti-trade agenda, most attention focused on whether China – widely seen as the chief hegemonic challenger to the United States – would

assume the mantle of leadership in the trading system. Instead, however, it is the European Union and Canada that have taken the lead in mobilizing states and advancing initiatives directed at defending and protecting the rules-based trading system.

- **The European Union and Canada** have been important partners in efforts to “save the WTO”. Both are open economies and major traders, with a keen interest in preserving the liberal international economic order, and a strong commitment to international cooperation and the rule of law in trade. Canada and the EU have a long history of engagement and collaboration in the trading system, which has provided the foundation for their current cooperation.
- **The European Union, working in close partnership** with Canada, has led efforts to address the Appellate Body crisis by spearheading the creation of an interim appeals arrangement – the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) – to replace the defunct Appellate Body and maintain a two-tier system of independent judicial review in WTO disputes. Canada has led the Ottawa Group, a coalition of states seeking to propose practical reform ideas to maintain and strengthen the WTO system. It has done so with strong support from the EU, whose economic and trading might has added considerable weight to the initiative.
- **Building on this strong partnership**, Canada and the EU should seek to expand their cooperative efforts to maintain the functioning of the liberal trading order. This must involve both activities targeted at the WTO as well as those that move beyond its confines. Core priorities include resuscitating the WTO’s negotiation function, strengthening trade enforcement, and advancing alternative forums for international cooperation and rule-making on trade.
- **A key avenue for continued Canada-EU** collaboration is in seeking to revive the WTO’s negotiation function. Current efforts to secure an agreement to curb harmful fisheries subsidies are in acute need of leadership and presents an important opportunity for Canada and the EU to expand their cooperation and leadership. Such an agreement has been identified as an urgent international environmental

and development priority. As one of the sole currently active areas of multilateral trade negotiations, it is also considered a critical test of the WTO's ability to deliver new global trade rules. A meaningful and ambitious WTO agreement to combat global fisheries subsidies would be a powerful demonstration of the continued relevance of the institution and its commitment to ensuring that global trade rules work for the benefit of all.

- **Canada and the EU should build** on their partnership in creating the MPIA to explore further opportunities to strengthen trade enforcement, both within and beyond the WTO system. A key challenge is grappling with an alarming increase in trade aggression and rule violation by major trading powers. Responding to the current crisis will require outside-the-box thinking to drive institutional and policy innovation. This could include, for example, developing a rapid response mechanism to address rule-violations and impose penalties more swiftly; enabling the use of temporary injunctions to halt damaging behavior while cases are being decided; or creating mechanisms for coordinated retaliation – i.e., states allying together in the economic equivalent of a mutual defense pact – in which states agree to jointly retaliate against any country that engages in economic coercion.
- **The European Union and Canada** should work together to support a bid by the EU to join the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), one of the world's largest free trade areas. With the WTO's negotiation function largely paralyzed, mega-regional trade agreements like the CPTPP provide an important forum for international cooperation on trade and the negotiation of new, stronger rules to help maintain an open and rules-based global trading order. The EU already has free trade agreements signed or under negotiation with most of members of the CPTPP. Existing participants are keen to expand its membership to other states willing to abide by the rule of law and the high standards of the agreement. The EU's participation would significantly broaden and strengthen the pact, and provide a considerable inducement for the US to consider rejoining.

Introduction

For over 70 years, American support for multilateral institutions was a cornerstone of the liberal international economic order (LIEO). Nowhere was this more apparent than in the trade regime. As the dominant state in the international system, the United States played a central role in leading the construction of an open and rules-based multilateral trading system.¹ The American hegemon “ran the system,” providing leadership and facilitating cooperation among states.² Multilateralism – the commitment to international cooperation in pursuit of free trade, based on the principle of reciprocity, or the idea that participants would enjoy roughly equivalent benefits – is a foundational principle of the global trading order, as is the notion that it is as a rules-based system, based on the rule of law rather than raw power. The rules of the multilateral trading system have played a key role in fostering increasing economic integration and creating stable conditions for the functioning of global markets.

In recent years, however, the multilateral trading system has been plunged into crisis. Under President Trump, the United States discarded its traditional commitment to multilateral cooperation and respect for the rule of law, and instead openly embraced the raw use of coercive power in trade, including arbitrarily imposing tariffs on all of its major trading partners, launching a trade war with China, and threatening to withdraw from trade agreements to strong-arm other states into making one-sided concessions to the United States. The American hegemon’s blatant violation of the rules and principles of the multilateral trading system, combined with its repeated threats to withdraw from the World Trade Organization (WTO), plunged the WTO – the primary institution intended to ensure stable and orderly trading relations in the global economy – into an existential crisis.

In what has constituted the most direct and acute threat to the trade regime, the United States has blocked appointments to the Appellate Body – which acts effectively as a supreme court for global trade – throwing the WTO’s dispute settlement mechanism (DSM) into jeopardy. The WTO’s dispute settlement system is a fundamental pillar of the rules-based multilateral trading system: it is essential to enforcing global trade rules and providing a peaceful means of resolving trade disputes among states. Yet the United States blockage has left the Appellate Body with no judges to adjudicate disputes, making it possible for states to block the adoption of WTO panel rulings. Even under the Biden administration, which has continued many of the trade policies of his predecessor, there are still no signs of an imminent resolution to the Appellate Body impasse on the horizon. Without a functional dispute settlement system to ensure the WTO’s rules are enforced, the entire system of multilateral trade rules is in danger of unraveling.

At the same time, rule-breaking has become increasingly rampant in the trade regime, not just by the US but also by China. In addition to concerns about the compatibility of China’s state capitalist model with the WTO system, China has also been violating the rules and spirit of the WTO with growing frequency by using the power derived from its large market to engage in economic coercion and weaponize trade. In short, two of the world’s dominant powers have been increasingly behaving as rogue states in the multilateral trading system.

With the trade regime in crisis, a key question has been whether other states would have the will and capacity to lead system-preserving initiatives. Initially, with the rise of Trump and his anti-trade agenda, most attention focused on whether China – widely seen as the chief hegemonic challenger to the United States – would assume the mantle of leadership in the trading system.³ Meanwhile, there was considerable skepticism about the European Union’s capacity to exercise leadership

Without a functional dispute settlement system to ensure the WTO’s rules are enforced, the entire system of multilateral trade rules is in danger of unraveling.

amid the crisis.⁴ Despite its economic might and role as a major power in the trading system, historically the European Union has generally been seen as punching below its weight in terms of leadership at the WTO.⁵

In fact, however, confronted with a significant threat to the liberal trading order, it is the European Union, rather than China, that has led efforts to rescue the system. Despite considerable hype about China's rise as a prospective global hegemon, it is not China but the European Union, and to a lesser extent Canada, that has taken responsibility for exercising leadership at the WTO. Successful leadership in the multilateral trading system requires advancing initiatives that are able to gain the backing of other states. While China may want to preserve the existing order, it lacks the capacity to lead system-preserving initiatives.

In recent years, the European Union and Canada have taken the lead in mobilizing states and advancing initiatives directed at defending and protecting the rules-based trading system. The European Union, working in close partnership with Canada, has led efforts to address the Appellate Body crisis by spearheading the creation of an interim appeals arrangement – the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) – to replace the now defunct Appellate Body. In effect, the European Union created an “Appellate Body minus the US,” encompassing most of the world's major trading powers and users of the WTO's dispute settlement mechanism.

While lacking the economic and political heft of the EU, Canada has also played an important role in recent efforts to maintain the liberal trading order. As the world's ninth largest economy (seventh when the EU member states are counted collectively), Canada has a long history of middle-power diplomacy at the WTO, where it has traditionally been seen as punching above its weight.⁶ Amid the current crisis in the trade regime, Canada has led the Ottawa Group, a coalition of states seeking to propose practical reform ideas to maintain and strengthen the WTO system. It has done so with strong support from the EU, which is a pivotal participant in the initiative.

The European Union and Canada have been important partners in efforts to preserve and defend the rules-based multilateral trading system. Both

are open economies and major traders, with a keen interest in preserving the liberal international economic order, and a strong commitment to international cooperation and the rule of law in trade. Canada and the EU have a long history of engagement and collaboration in the trading system, which has provided the foundation for their current cooperation. Both played a central role in the creation and development of the established trading order, including as members of the “Quad,” an informal grouping consisting of the United States, the European Union, Japan and Canada, which historically formed the core of GATT/WTO negotiations.⁷ The EU and Canada further deepened their longstanding cooperation on trade through their recent bilateral free trade agreement, the Comprehensive Economic and Trade Agreement (CETA), which provisionally entered into force in 2017.

In existing international relations scholarship on the US-led LIEO, both Europe and Canada have typically been characterized as junior partners, supporting initiatives led by the American hegemon.⁸ But in the current moment of intense upheaval in the trading system, with the United States intentionally sabotaging the established order, the European Union and Canada – working in close conjunction – have taken on an important system-preserving, or order-preserving, function in the LIEO. Their actions have been akin to triage in battlefield medicine – trying to patch up and salvage the rules-based multilateral trading system that has come under active attack from both the US and China and prevent the actions of those states from destroying the system.

While the MPIA, for instance, is merely a stopgap measure, and a partial and imperfect one at that, it represents a crucial step in attempting to maintain a functional WTO dispute settlement system, without which global trade rules risk becoming unenforceable. Likewise, the Ottawa Group has served as an important forum for consensus-building and generating joint initiatives and concrete reform proposals to protect and preserve the WTO system. Amid a backlash against the liberal trading order from two of the most powerful states in the system, the European Union and Canada have together assumed the role of “system-preserving powers” – that is, powers that seek to maintain and defend the established global order.⁹

The crisis in the trade regime

American assault on the rules-based trading system

Beginning under President Donald Trump, the United States not only abandoned its traditional leadership role in the multilateral trading system but launched an unprecedented assault on the very system it had once created and led. Discarding any commitment to multilateral cooperation or respect for the rule of law, the United States openly embraced the raw use of coercive power in trade. While this included launching a trade war with China, it also went far beyond US-China trade relations.

Under Trump, the United States arbitrarily imposed tariffs not just on China but on *all* of the US's major trading partners. Invoking Section 232 of the US Trade Act,¹⁰ the United States imposed tariffs on \$30 billion of steel and aluminium imports, purportedly on the grounds of "national security", affecting a lengthy list of countries, including the European Union, Japan, South Korea, Canada, Mexico, Brazil, India, Australia, Turkey, Argentina, South Africa, and many others.¹¹ The US also threatened to impose tariffs on \$350 billion worth of imported cars, trucks and auto parts on similar grounds,¹² which would have hit a similarly diverse array of countries, and initiated five additional Section 232 investigations. Although Article XXI(b) of the GATT allows states to take actions that they consider necessary for the protection of their "essential security interests," this was intended to be limited to permitting restrictions on trade in weapons and nuclear materials and during war or other emergencies. However, the United States has wildly abused the national security exemption by using it to justify protectionist measures intended to bolster America's manufacturing industry.

Moreover, the Trump administration maintained that the WTO has no authority over measures taken in the name of national security and that such measures cannot be subject to the dispute settlement system; instead, the United States has insisted that countries have the right to “self-judge” their own national security interests – meaning it is up to a country implementing a trade measure to determine whether it is justified on the grounds of national security. This risks opening a Pandora’s Box – whereby any country could simply invoke the national security exemption to justify introducing protectionist trade measures – threatening to unravel the WTO’s carefully crafted set of rules to limit protectionism and create orderly conditions for global trade.

The US has also revived Section 301 tariffs as a cornerstone of its trade strategy.¹³ Section 301 of the US Trade Act enables the United States to unilaterally take retaliatory action against countries deemed to “unjustifiably” restrict or burden US commerce. Widely reviled by its trading partners, the sweeping, unilateral nature of Section 301 means it can be used as a blunt instrument of economic coercion. Prior to the establishment of the WTO, the United States frequently used Section 301 to pressure other countries to eliminate trade barriers and open their markets to US exports. For many states, a key motivation for creating the WTO’s binding dispute settlement mechanism was specifically to curtail the US’s use of Section 301 by providing a means of resolving trade disputes multilaterally and based on the rule of law rather than raw power.

Under Trump, the United States invoked Section 301 to launch its trade war with China, imposing tariffs on \$370 billion of goods imported from China and threatening to impose further tariffs on all Chinese imports.¹⁴ But the US’s renewed use of Section 301 has not been limited to China – over the past three years, the United States has launched Section 301 investigations against a dozen other countries, including Austria, Brazil, the Czech Republic, the European Union, France, India, Indonesia, Italy, Spain, Turkey, the UK, and Vietnam.¹⁵

The Trump administration also used the threat and imposition of unilateral tariffs, along with the threat of withdrawing from bilateral and regional free trade agreements, to compel other states to renegotiate

those agreements and make one-sided concessions to the United States. This included threatening to withdraw from the North American Free Trade Agreement (NAFTA) – the US’s largest trade agreement, on which Canada and Mexico rely for 77% and 81% of their exports, respectively¹⁶ – as a tactic to force the two countries to renegotiate the agreement (now the United States-Mexico-Canada Agreement, USMCA) and concede to new terms Trump deemed more favourable to the United States.

The Trump administration used similar tactics to force South Korea to renegotiate the US-Korea Free Trade Agreement (KORUS), and used the withdrawal of Generalized System of Preferences (GSP) access to force India to negotiate bilaterally on a series of US market access demands.¹⁷ The US also used the threat of tariffs to extract non-trade-related concessions from other states – as it did with Mexico, for example, deploying the threat of imposing 25% tariffs on imports from Mexico as a source of leverage to force the Mexican government to aggressively crackdown on Central American migrants transiting through the country to the United States.¹⁸

In addition, the Trump administration repeatedly threatened to withdraw from the WTO – a threat that gained force from the fact that the United States did indeed withdraw from a range of other international institutions and treaties, including the Trans-Pacific Partnership, the Paris climate agreement, UNESCO, and the UN Human Rights Council. And in its most direct and immediate threat to the rules-based trading order, the United States began blocking appointments to the Appellate Body, jeopardizing the WTO’s dispute settlement mechanism.

Many had hoped that the Biden administration would swiftly and definitively repudiate Trump’s trade policies. Instead, however, despite President Biden’s professed commitment to multilateralism and international cooperation, there has been remarkably little change in US trade policy under his administration. The US continues, for example, to block Appellate Body appointments. The Biden administration has also maintained many of Trump’s tariffs, as well as the practice of using those tariffs to force other states into bilateral negotiations with the

United States, and continues to wield the threat of Section 301 as a tool to strongarm other states.¹⁹

In sum, while China has certainly been the primary target of American trade actions, US trade aggression has gone far beyond just China. And such behavior cannot be attributed simply to the idiosyncrasies of the Trump administration. Not only did the United States turn away from the multilateral trading system begin prior to Trump,²⁰ but its brazen rule-breaking and its assault on the rules-based trading order have persisted under President Biden and show no signs of abating.

Chinese economic coercion

With the WTO under assault from the Trump Administration, China sought to position itself as a champion of free trade and the liberal trading order, seeking to uphold free trade and economic globalization in the face of the US threat. President Xi Jinping frequently contrasted Trump's "America First" agenda with China's purported commitment to multilateralism and a rules-based trading system, while signaling China's intention to assume a more significant leadership role on the international stage.

However, if we separate Beijing's rhetoric from the reality of its behavior, China too has shown a flagrant disregard for the rule of law in trade. It too has been weaponizing trade as an instrument of economic coercion against weaker states, in blatant violation of the rules and principles of the multilateral trading system. A growing list of countries around the world have been targets of China's trade aggression. Recently, for example, China blocked imports of Canadian pork, beef, soybeans, and canola – and arbitrarily imprisoned two Canadian citizens – in retaliation for the country's participation in the extradition of a Huawei executive to face fraud charges in the United States.²¹ Beijing's trade restrictions cost Canada \$4 billion in lost exports.²²

China has similarly blocked imports from Australia in retaliation for its calls for an independent inquiry into the origins of the Covid-19 pandemic as well as Canberra's complaints about Chinese Communist Party interference in Australia's domestic politics. As Australia's largest

trading partner, and the destination for nearly 40% of its exports, China's import curbs – which target an extraordinarily broad list of agricultural and mining products – are intended to inflict maximum economic pain on Australia's core export sectors.²³

Most recently, China blocked imports from Lithuania in retaliation for the country's deepening diplomatic relations with Taiwan. After Lithuania permitted Taiwan to establish a Taiwanese Representative Office in Vilnius, Beijing responded by imposing sweeping import curbs – including pharmaceuticals, lasers, electronics and agri-food products – that led Lithuanian exports to plummet by 91%.²⁴ The Chinese government has also used the threat of import restrictions to pressure companies in other EU countries, such as France, Germany and Sweden, to abandon the use of Lithuanian components in their production process.²⁵ The European Union launched a case against China at the WTO to challenge these measures, which Canada – along with other members of the G7 – has joined as a third party.²⁶

These are far from isolated incidents. Beijing has used the threat and imposition of trade restrictions to punish over a dozen other countries for various perceived affronts, including Japan, South Korea, New Zealand, Norway, Sweden, the Philippines, Taiwan, Mongolia, and the United Kingdom.²⁷ Although China's actions clearly violate the rules and principles of the multilateral trading system, WTO rules have proven entirely inadequate to prevent this behavior. Increasingly, both China and the United States simply ignore the rules.

What is more, although many of the countries targeted by China are key American allies, they have received little in the way of concrete or meaningful support from the United States. As Bonnie Glaser of the Center for Strategic and International Studies aptly puts it, “targeted countries have at most received rhetorical support ... and even that has

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been feeble.”²⁸ These countries have found themselves largely alone in seeking to stand up to the world’s second largest economic power, with their isolation only heightening their vulnerability. Ironically, while the United States wages its trade war with China, it has abandoned its closest allies to be victimized by China’s trade aggression and subject to overt threats and intimidation. Despite the US preoccupation with China’s industrial policy and its interventionist state, it has largely turned a blind eye to its economic coercion and the effects on US allies. And, indeed, rather than helping to defend its allies from Chinese trade aggression, the United States has done just the opposite: America’s closest allies – including the European Union, Canada, Japan, South Korea, and Australia – have been among the primary targets of its own trade aggression.

When dominant states refuse to abide by the rules

The core principle of the WTO is that trade should be governed by the rule of law, rather than the raw use of power. However, for both the United States and China, their approach to trade increasingly appears to be driven by Thucydides’ maxim that “the strong do what they will and the weak do what they must.”²⁹ The basic precondition for the WTO to function is that states are actually willing to be bound by the rule of law in trade. Yet that no longer appears to be the case for either the United States or China. Both have embraced aggressive unilateralism, using their economic might to bully other states.

The two dominant powers in the multilateral trading system – the United States and China – are now both effectively behaving as rogue states in the system. If powerful states refuse to abide by global trade rules, and openly violate the rules when it serves their interests to do so, the rules themselves risk becoming meaningless. The trade regime is thus at a critical juncture, facing the danger of a descent into lawlessness, where the rules cease to have any meaning and are no longer able to constrain state behavior. For most states, the key question is whether global trade rules and their enforcement can be strengthened to rein in the behavior of dominant states and prevent aggressive unilateralism and the arbitrary abuse of power.

In the United States, the debate about the contemporary crisis in the trading system has been overwhelmingly focused on China's trade policies, and specifically whether WTO rules can or should be tightened to better restrict China's use of industrial policy and its heavily interventionist state. But this is not the sole, or even necessarily the most important, challenge currently facing the system. Instead, for many states, it is China's use of economic coercion, not its industrial policy, that is the far more immediate and acute threat; and the threat of aggressive unilateralism and economic coercion comes from the United States as much as China.

The Appellate Body crisis

Both the US and China's aggressive unilateral trade actions have blatantly violated the rules and principles of the WTO and posed a severe threat to the stability of the trade regime and the global economy. Yet in what perhaps represents the most urgent threat to the WTO, the United States has disabled the institution's dispute settlement mechanism by blocking appointments to the Appellate Body.

The WTO's dispute settlement system is widely considered the crown jewel of the multilateral trading system. Its creation in 1995 represented the legalization of international trade, with states agreeing to be bound by international trade rules and delegating authority to a (de facto) international court to arbitrate disputes and enforce those rules.³⁰ The WTO has one of the strongest enforcement mechanisms of any international institution. While most international law is "soft law" – legal instruments with little or no legally binding force – the WTO has the authority to make "hard law" – legal obligations that are binding on states.³¹

Trade disputes are adjudicated by WTO dispute settlement panels, whose decisions are binding, subject to appeal before the Appellate Body, whose decisions are also binding. Appellate review is thus a crucial part of the WTO dispute settlement system. The WTO dispute mechanism is the most frequently used global dispute settlement system in the history of international law, having heard over 600 cases since

its creation.³² It has made the WTO one of the most powerful and important institutions in global economic governance.³³ The legalized DSM has also helped to level the playing field by ensuring that weaker states have recourse to legal remedies in their trading relations with more powerful states.³⁴

The Appellate Body hears appeals of decisions by WTO dispute settlement panels, and as such is a crucial part of the dispute settlement system. Since its creation, more than two-thirds of WTO disputes have been appealed and reached the Appellate Body.³⁵ However, in mid-2017 the United States began blocking all new appointments to the Appellate Body as the terms of its judges (referred to as Appellate Body “members”) expired. There are a total of seven seats on the Appellate Body, and it requires a minimum of three judges to form a panel to adjudicate a dispute. Since December 2019, with six of its seven seats vacant, the Appellate Body has not had enough judges to adjudicate disputes. Since December 2020, all seven of its seats have been vacant.

By blocking Appellate Body appointments, the United States has imperiled the WTO’s entire mechanism for settling disputes: if appealed, a dispute settlement panel decision is blocked – and will not become legally binding – until a decision of the Appellate Body. Consequently, without a functioning Appellate Body to hear the case, the country ruled against in a dispute can block adoption of the panel decision simply by filing an appeal. This has come to be known as appealing “into the void.” As of February 2022, a total of 24 panel reports have been appealed with no final resolution possible due to the Appellate Body blockage.³⁶

The seeds of this crisis in the dispute settlement system were planted before Trump. The US began complaining about the Appellate Body in the early 2000s, after the Appellate Body ruled against the United States on several cases involving its controversial methodology (“zeroing”)³⁷ for calculating antidumping duties used to block imports. Under President Obama, the United States started blocking Appellate Body reappointments. Appellate Body members are appointed by consensus for four-year terms, which can be renewed once. By unwritten tradition, reappointment is usually automatic. Yet in an unprecedented move in 2011, the United States blocked the reappointment of its own appointee,

Jennifer Hillman, for a second term, because it was displeased that she had not upheld US protectionist measures challenged in WTO disputes. Then in 2016, the United States blocked the reappointment of Korean judge Seung Wha Chang, because it disagreed with Appellate Body decisions he had participated in. By refusing to reappoint judges who made decisions that did not conform to US wishes, the United States drew universal condemnation from other WTO members, who viewed its actions as a serious threat to the independence and impartiality of the Appellate Body.³⁸

Under President Trump, however, the United States took this to a new extreme by blocking all appointments to the Appellate Body, incapacitating the WTO's enforcement mechanism. It has articulated a lengthy list of procedural complaints about the Appellate Body. The US claims that the Appellate Body has exceeded its authority and acted outside the mandate established by WTO member states by: i) exceeding the 90-day deadline set out for the completion of appeals; ii) allowing Appellate Body members whose terms expire to finish the appeals they were working on; iii) reviewing panel findings of fact, exceeding its authority to only review legal issues; iv) rendering advisory opinions on issues not necessary to assist the Dispute Settlement Body in resolving a dispute; v) claiming that its reports are entitled to be treated as binding precedent and must be followed by panels; vii) refusing to recommend that a country bring a WTO-inconsistent policy into compliance with WTO rules, if they have already removed the offending measure; and viii) opining on matters within the authority of other WTO bodies.³⁹

More fundamentally, however, beyond these procedural complaints, the United States accuses the Appellate Body of judicial overreach and objects that it has interpreted WTO rules in ways that run counter to American interests.⁴⁰ The US is dissatisfied with several Appellate Body

The US has signaled that it has little interest in reform of the Appellate Body until its systemic concerns regarding China's trade policies are addressed.

rulings that concern China's trade policies as well as the US's ability to use trade defense measures to restrict imports. The US criticizes the Appellate Body for prohibiting its use of zeroing in calculating antidumping duties and prohibiting double remedies (simultaneously imposing both antidumping and countervailing duties). The US also criticizes the Appellate Body for interpreting the definition of "public body" too narrowly, limiting the application of WTO subsidy rules to China's state-owned enterprises.⁴¹ The deeper issue is that the United States is dissatisfied not simply with the Appellate Body but with the WTO itself – for failing to adequately address China's state capitalism, discipline its allegedly unfair trading practices, and thus contain the threat to American hegemony posed by a rising China.⁴² The US has signaled that it has little interest in reform of the Appellate Body until its systemic concerns regarding China's trade policies are addressed.

As a result, the United States has been unwilling to provide any proposals for reforming the Appellate Body. It has refused even to discuss potential solutions, or engage with the proposals put forward by other states. In February 2020, the United States released a lengthy 174-page report detailing its complaints about the Appellate Body – but offered no solutions.⁴³ Indeed, the Trump administration's US Trade Representative Robert Lighthizer stated that if the Appellate Body "never goes back into effect that would be fine."⁴⁴ Without a functional Appellate Body, the United States can simply block rulings against it by appealing into the void – as it did, for instance, in September 2020 after losing a longstanding dispute with Canada over softwood lumber, as well as in October 2020 when a WTO panel determined that its Section 301 tariffs on China violate WTO rules.⁴⁵

Other WTO members have expressed "grave concern" about the Appellate Body blockage, describing it as an "alarming crisis" with "damaging consequences."⁴⁶ In meetings of the WTO Dispute Settlement Body, the EU representative emphasized that "a properly functioning WTO dispute settlement system [is] of crucial importance for rules-based international trade" and an impartial appeals process is one of its essential features.⁴⁷ Nigeria, on behalf of the African Group, described the Appellate Body as "the fundamental pillar of the WTO and the

multilateral trading system.”⁴⁸ Canada stressed that the Appellate Body is crucial to preserving “the security and predictability of the multilateral trading system.”⁴⁹

The US’s actions in blocking appointments have been near universally condemned. As Mexico stated, there is “no legal justification” for the Appellate Body blockage, which has caused “concrete nullification and impairment” of the rights of WTO member states: “The fact that a Member might have concerns about certain aspects of the functioning of the Appellate Body should not serve as a pretext to undermine and disrupt its work as well as the work of the dispute settlement system.”⁵⁰ WTO members have identified restoring the Appellate Body as a “paramount priority” and repeatedly stressed “the urgency of the situation.”⁵¹ Yet despite over 120 WTO members petitioning the United States to unblock Appellate Body appointments, it has refused.⁵² There are widespread fears, as China summarized, that the Appellate Body crisis will lead to “the collapse of the WTO dispute settlement system,” which would “fundamentally destroy the multilateral trading system.”⁵³ Without a functioning dispute settlement mechanism, the trading system risks descending into the rule of the jungle.

Looking for leadership among the major powers

What happens when the hegemon sabotages the established order?

Since the start of the Trump presidency, a key theoretical and empirical question has been whether it would be possible to maintain the functioning of the liberal international economic order without the participation or leadership of the American hegemon. For most of its history, American hegemony played a vital role in the creation and maintenance of the liberal order, with the multilateral trading system one of its core pillars.⁵⁴ Within international relations scholarship, hegemonic stability theory has assumed that an open and rules-based multilateral trading system requires a hegemonic leader to underwrite the system.⁵⁵

Yet scholars and analysts have been debating the possibilities for “nonhegemonic cooperation” – that is, international cooperation in the absence of a single dominant power – to maintain international order since the 1970s and 80s, when signs of declining US hegemony first began to emerge.⁵⁶ The endurance of established governance regimes despite a decline in the relative power of the United States raised questions of whether institutional cooperation could withstand the decline of a hegemon. Scholars have sought to understand whether states could cooperate in the absence of a hegemon to maintain and enforce order.⁵⁷

There has been considerable interest in analyzing the conditions under which nonhegemonic cooperation is feasible and effective, and the factors that could make such cooperation possible in the absence of US

leadership. One of the key conditions scholars have identified is whether alternative leaders are available.⁵⁸ As Caroline Fehel and Johannes Thimm summarize in the journal *Global Governance*:

Are other key players in the policy area interested in preserving or advancing existing multilateral institutions, or do they prefer unilateral action or alternative institutions that could challenge or undermine existing fora? Are they willing to challenge US hegemonic leadership? And if so, are they able to form a coalition that is large and stable enough to fill the leadership vacuum left by the former hegemon?⁵⁹

The question of whether other major powers would have the will and capacity to lead system-preserving initiatives became acutely pressing amid the threat to the liberal international economic order posed by the Trump administration. In this case, the problem was not simply hegemonic decline – with a relative decline in US power amid the rise of China – but that the American hegemon was actively sabotaging the established system of global trade governance.

There has been much speculation about whether China – considered the principal hegemonic rival to the United States – would “take up the mantle of multilateralism” shed by the United States.⁶⁰ China is widely seen as a supporter of the status quo in the global trade regime: as the world’s largest trader, it has been a major beneficiary of, and has a keen interest in maintaining, the relatively open global trading order.⁶¹ President Xi Jinping’s speech defending economic globalization and free trade at the 2017 World Economic Forum in Davos, three days before Trump’s inauguration, garnered international headlines and was widely seen as signaling China’s intention to step forward to fill the gap left by the abdication of US leadership.

Writing in the *Financial Times*, Harvard University professor Christina Davis captured the prevailing wisdom at the time when she argued that “it is up to China to save the global trading system”:

China offers the last hope for reviving the WTO. With the Americans rejecting a leadership role and the Europeans mired

in a populist backlash, China has an opportunity to step forward. ... Exports remain central to Chinese economic growth. ... It would be the biggest loser from the death of the WTO.⁶²

China has indeed touted its “leadership” at the WTO and sought to position itself as a “defender” of the liberal trading order, with its officials asserting that China has taken a “stand for multilateralism and free trade, and called on the international community to maintain the multilateral trading system and oppose unilateralism and protectionism.”⁶³ However, it is not enough for a state to simply *assert* that it is a leader – such claims need to be backed by action. While China has been eager to claim leadership, its rhetorical claims have not been matched in deed. Despite its professed commitment to defending the multilateral trading system, as the following analysis will show, China lacks the will or capacity to play a system-preserving role in the liberal trading order.

In contrast, many have been skeptical about the European Union’s capacity for leadership amid the crisis. Beset by repeated internal threats – from the eurozone crisis to Brexit – the European Union has been seen as distracted and weakened by its own internal divisions and challenges, hampering its potential to lead.⁶⁴ Yet skepticism about the potential for European Union leadership has also been informed by the perception that, relative to its economic and political clout, it has previously underperformed as a leader on the international stage. Caroline FehI and Johannes Thimm encapsulated this view as follows:

There is no single country or region that can replace US leadership. The EU, with its experience with supranational governance and its professed commitment to advancing the multilateral order, would be one important piece to the puzzle, but it keeps punching below its weight.⁶⁵

Despite its economic might and considerable influence in the trade regime, the European Union has been widely seen as punching below its weight due to both internal divisions as well as difficulties securing followers.⁶⁶ There have thus been serious doubts about the European Union’s ability to exercise leadership amid the abdication of American leadership and the United States assault on the trading system.

Skepticism over the European Union's capacity for leadership

Given its size and economic importance, the European Union is undoubtedly a major actor in the international trading system. The scale of its internal market puts the European Union on a par with the United States. Historically, its economic weight has given the European Union considerable influence in shaping bargaining and outcomes at the GATT/WTO,⁶⁷ as well as in a multitude of bilateral trade agreements.⁶⁸ But economic might does not necessarily translate into leadership.⁶⁹

In international politics, leadership is not simply synonymous with influence, or the ability of a state to make, or break, decisions.⁷⁰ Instead, leadership in multilateral negotiations refers to the ability of an actor to “guide or direct the behavior of others towards a certain goal over a certain period of time.”⁷¹ A leader must have a vision, develop concrete initiatives, mobilize the support of other states, build coalitions to advance its initiatives, and propel negotiations towards its vision.⁷² Most importantly, leadership requires followers: “successful leadership depends not only on resources and ambition but also crucially on the support of followers.”⁷³

By this measure, the European Union has historically been seen as underperforming at the WTO. Ole Elgström's 2007 study of perceptions of the European Union among WTO members found that while the European Union was “seen as a key actor in the WTO ... it [was] not necessarily seen as a leader.”⁷⁴ Indeed, the European Union was “hardly perceived to provide visionary leadership or guidance.”⁷⁵ This does not mean that the European Union had not tried to assume such a role, but there had been a significant gap between its aspirations for leadership and ability to achieve it. The EU's leadership potential had been diminished by two key factors.

First, during the Doha Round of WTO negotiations, the European Union sought to exercise leadership by presenting itself as a leader of the development agenda in global trade. Its efforts were hampered, however, by a lack of credibility and the inability to gain followers.⁷⁶ The EU's claim to be a champion of development was contradicted by its protectionist

policies, particularly in agriculture, which hurt developing countries, as well as by what were seen as heavy-handed tactics in its bilateral and regional trade negotiations with developing countries.⁷⁷ Moreover, its agenda at the WTO was primarily seen as self-serving, driven by its own commercial interests rather than the needs of developing countries.

The European Union's efforts to establish leadership at the WTO by portraying itself as a moral voice for global development and an advocate for the interests of the developing world were further undermined by the fact that developing countries strongly opposed many of the concrete initiatives the European Union was actually advancing in the Doha Round.⁷⁸ As a result, developing country opposition ultimately thwarted much of the European Union's agenda for the Round, including on labor, environment, competition policy, investment and public procurement.

Second, in the past, its leadership ambitions have also been hindered by the unique nature of the European Union as an actor in the international system. On trade, unlike other areas of global governance such as environment, the European Union has exclusive competence to act for its member states, meaning that it has the authority to negotiate international agreements and speak as a single voice at the WTO. Trade is therefore the area of global governance where we might expect the European Union to have the greatest capacity for leadership. Yet the European Union has frequently been described as a "conflicted trade power" due to the difficulties of arriving at a common negotiating position among its member states, who often disagree on trade policy.⁷⁹

Such internal divisions have previously undermined the European Union's capacity for leadership at the WTO.⁸⁰ Given the challenges of coordinating trade policy among its diverse member states, as Katie Verlin Laatikainen and Karen Smith put it, "the EU spends most of its time negotiating with itself."⁸¹ The European Union's "unwieldy,

Given the challenges of coordinating trade policy among its diverse member states, as Katie Verlin Laatikainen and Karen Smith put it, "the EU spends most of its time negotiating with itself."⁸¹

slow, and time-consuming” internal coordination process has frequently left little attention for working with, or seeking to lead, other states.⁸²

Despite previous challenges, however, and in contrast to prevailing expectations, the European Union emerged as a crucial leader in recent efforts to salvage the multilateral trade regime. Amid the unifying threat of Trump’s policies, the European Union was able to overcome internal disagreements in order to advance a pro-active agenda in response to the Appellate Body crisis, in particular. Articulating a clear vision – centered on the importance of maintaining a rules-based multilateral trading system – that strongly resonated with other states, the European Union put forward a concrete initiative to address the crisis. It was able to secure the support of other states – Canada central among them – and build a successful coalition to advance its initiative.

The current crisis has been one in which the European Union is particularly well-suited to lead. As Elgström found in his study of perceptions of the European Union among WTO members over a decade ago:

the one area where the EU receives most credit is as a protagonist of multilateralism. The Union is widely praised for its strong support of multilateral trade arrangements and is described as a key actor in this respect. A contrast is often made between the multilateralist EU and the unilateralist US, ... not only referring to trade but also to other policy areas. The perceived legitimacy of EU multilateralism is a potential asset, which could form the basis for leadership.⁸³

It is precisely this reputation as a committed multilateralist that has formed the foundation for the EU’s leadership today.

Amid the current crisis in the multilateral trading system, the European Union has had credibility as a leader of efforts to preserve the system, in a way that its efforts to present itself as a leader of the Doha development agenda did not. The EU’s primary foreign policy objective has been the pursuit of a negotiated global order, based on a commitment to multilateralism, integrative negotiations, and the creation of rules and

liberal regimes – which are the cornerstone of the European Union project itself.⁸⁴

As Michael Smith states in *International Affairs*, the European Union has displayed a marked and consistent “preference for multilateralism, for negotiation and above all for stability.”⁸⁵ With the liberal trading order under threat from the United States, the EU’s leadership in pursuing these goals at the WTO has held immense attraction for other states. The magnitude of the threat to the stability of the system, and thus to EU interests, galvanized the European Union and enabled it to overcome internal divisions in order to take action and assume leadership. Amid the current crisis, the EU has advanced objectives that have strong support from other states and put forward concrete initiatives directed at maintaining the rules-based multilateral trading system.

Of the three major powers in the trading system – the US, the European Union and China – it is the EU that has now emerged as most important actor seeking to uphold the establish order. In the current historical moment, the European Union has defied expectations by stepping into the leadership gap left by the US at the WTO. Importantly, however, it has not done so by acting alone. Canada has been one of its most important partners. While lacking the economic and political heft of the European Union, Canada is nonetheless a middle power with a long history of constructive diplomacy at the WTO. Like the European Union, it also shares a reputation for being a committed multilateralist and defender of the rule of law in trade.

Canada has played a central role in supporting the European Union in creating the MPIA to replace the defunct Appellate Body, which represents the most significant effort to respond to the crisis in the trading system to date. At the same time, the European Union has also been a key player in the Ottawa Group initiative led by Canada to pursue reforms to preserve the WTO system. The EU’s considerable economic weight has greatly enhanced the legitimacy and influence of the coalition and its agenda. Through such initiatives, Canada and the European Union have worked in close partnership seeking to preserve and defend the liberal trading order.

EU-Canada leadership and cooperation in response to the crisis

With the multilateral trading system under threat, both Canada and the European Union launched efforts to try to “save the WTO”, as the EU trade commissioner put it, and maintain the continued functioning of the liberal trading order.⁸⁶ Working in close collaboration, they have each stepped up, seeking to mobilize states and put forward concrete initiatives to defend the system. The two most prominent of these initiatives have been the EU-led Multi-Party Interim Appeal Arbitration Arrangement and the Canada-led Ottawa Group pursuing WTO reform.

The EU-led Multi-Party Interim Appeal Arbitration Arrangement (MPIA)

In response to the threat posed by Trump’s policies, the European Commission indicated that it was determined to do “whatever is necessary” to protect and defend the rules-based multilateral trading system, as one official stated.⁸⁷ The EU made addressing the Appellate Body crisis the cornerstone of its strategy and its top priority.

Beginning in late 2018, in an effort to stave off the impending Appellate Body collapse, various WTO members pushed for a negotiated solution to the impasse, tabling a dozen proposals for practical reforms to address US concerns. However, all of these proposals were rejected by the United States.⁸⁸ A prolonged period of intensive consultations (known as the Walker Process) led to a Draft General Council Decision on Appellate Body reform in November 2019, intended to address the procedural concerns raised by the United States, while safeguarding the essential

elements of an effective, independent, two-tier dispute settlement system. Yet this too was rejected by the United States, which blocked consensus on the draft decision.

With the United States barring attempts to resolve the Appellate Body crisis, the European Union launched efforts to find a means to enable the dispute system to continue to function without the US. The EU began by approaching Canada. In July 2019, the European Union and Canada announced an agreement to establish a bilateral interim appeal arbitration arrangement for WTO disputes. The interim arrangement would apply to disputes between the two parties and “replicate as closely as possible” the practices and procedures of the Appellate Body.⁸⁹ Appeals would be heard by three former Appellate Body members, selected by the WTO Director-General, under the same process as the Appellate Body.⁹⁰ The European Union then signed a second, similar agreement with Norway, which has close ties with the EU through its membership in the European Economic Area, in October 2019.⁹¹

Building on, and seeking to broaden, these agreements, at the January 2020 World Economic Forum in Davos, the EU, Canada and 15 other countries announced plans to negotiate a multi-party interim arrangement for appealing trade disputes.⁹² The EU spearheaded the initiative, seeking the participation of a critical mass of countries and specifically targeting the largest traders and most frequent users of the WTO dispute settlement system. In March 2020, under the leadership of the EU, states agreed on a Multi-Party Interim Appeal Arbitration Arrangement (MPIA), intended to broadly replicate the practices and procedures of the Appellate Body. It will remain in place until a permanent solution to the Appellate Body crisis is found and the Appellate Body is fully operational once again. The interim appeals arrangement will apply only to participating states but is open to all WTO members to join. Over 50 countries have agreed to participate.

The MPIA encompasses most major non-US users of the WTO dispute settlement system. It includes the EU and its member states, Canada, Australia, Benin, Brazil, China, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Hong Kong, Iceland, Macao, Mexico, Montenegro, New

Zealand, Nicaragua, Norway, Pakistan, Peru, Singapore, Switzerland, Ukraine and Uruguay. However, most WTO Members, including Japan, South Korea, India, Indonesia, Malaysia, Argentina, Egypt, South Africa, Saudi Arabia, the Russian Federation, are not parties to the MPIA.

Among the most notable absentees, given the size of their economies and their active engagement in WTO dispute settlement, are Japan, South Korea and India. Despite expressing support for the MPIA, Japan and South Korea have been reluctant to join for fear of antagonizing the United States, their primary security guarantor.⁹³ India recently lost a major \$7 billion export subsidy dispute (brought by the United States), as well as three cases challenging its sugar subsidy schemes (brought by Australia, Brazil and Guatemala), but was able to block these panel rulings by appealing into the void.⁹⁴ With additional panel rulings expected against it in the near future, India appears to have determined that the absence of a functional Appellate Body serves its immediate interests. Despite the absence of these states, the MPIA has nonetheless achieved a critical mass that comprises most of the major traders and most active users of the WTO DSM.

The EU, Canada and other MPIA participants indicate that their “clear priority” is to find a lasting solution to the Appellate Body crisis, but in the absence of such a solution, the MPIA represents the best available alternative.⁹⁵ The MPIA provides a means for appeals to be heard while the WTO’s formal appeals process is unable to function, allowing the essential features of WTO appellate review to be preserved. The arrangement is intended to mirror the substantive and procedural aspects of the Appellate Body. It establishes a pool of 10 arbitrators to hear appeals of WTO dispute settlement panel reports. As with the Appellate Body, each appeal will be heard by three arbitrators, whose decision will be binding on states. The MPIA also introduces novel features that reflect the EU’s proposals for Appellate Body reforms and address US criticisms of the Appellate Body, including providing a 90-day deadline for arbitrators to decide appeals and limiting arbitrators only to addressing issues that are pertinent to the resolution of the dispute and have been raised by the parties involved.

The MPIA became operational in August 2020, after the participants notified the WTO Dispute Settlement Body that they had agreed on the appointment of 10 arbitrators. The MPIA arbitrators have extensive experience with WTO disputes; virtually all have served as panelists or arbitrators or in the WTO Secretariat divisions that assist panels and the Appellate Body.⁹⁶ Parties to seven WTO disputes have already indicated they will proceed under the MPIA, showing states are willing to use the mechanism: Canada-Australia wine (DS537); Canada-Brazil aircraft (DS522); Costa Rica-Mexico avocados (DS524); Colombia-EU (DS591); China-Australia barley (DS598); China-Canada canola (DS589); and China-Australia wine (DS602).⁹⁷ With three of these initial seven cases involving Canada, it is currently set to be among the biggest users of the MPIA.

Strikingly, the MPIA was achieved, as one participant stated, in “a very short period of time.”⁹⁸ The Appellate Body was rendered inoperable in December 2019. By January 2020, the EU had mobilized a group of states committed to creating an alternative interim arrangement, the terms of which were agreed by March 2020. By August 2020 – just 9 months after the Appellate Body had ceased functioning – the MPIA was operational. Given the often glacial pace of WTO negotiations – the Uruguay Round, for instance, which created the WTO DSM, took 8 years, while the Doha Round, which began in 2001, has still yet to be concluded twenty years later – the speed at which the MPIA was created is itself remarkable. This reflected the acute sense of urgency among its participants, and the importance they placed on seeking to preserve the WTO’s dispute settlement mechanism.

The EU succeeded in building a major coalition of like-minded states to support the launch of the MPIA. The EU gained followers because it took the initiative in advancing a concrete response to the Appellate Body crisis that other states were eager to support. Participants joined the initiative, as one stated, because “they shared the same objective”

The EU succeeded in building a major coalition of like-minded states to support the launch of the MPIA.

of preserving the WTO's dispute settlement system.⁹⁹ Switzerland, for instance, welcomed the MPIA as “an important instrument in strengthening the security and predictability of the multilateral trading system in the current context.”¹⁰⁰ According to Guatemala, the MPIA was the result of “cooperation and pragmatism” and aimed at “preserving the fundamental characteristics on which the multilateral rules-based system rested.”¹⁰¹ The MPIA was seen as essential to promoting confidence in the WTO's dispute settlement mechanism and providing security and predictability in the multilateral trading system. States thus welcomed the EU's leadership in creating the MPIA because it was seen as a critical effort to ensure the continued effectiveness of the WTO dispute system and maintain the rule of law.

The MPIA also held symbolic importance as a show of collective resistance amid the United States attack on the multilateral trading system. With the core principles of the liberal order under threat, the MPIA provided a means for states to signal their dissatisfaction with US actions while simultaneously demonstrating their political commitment to international cooperation and the rule of law. The MPIA was about “showing responsibility,” as Norway put it: the MPIA “provided grounds for renewed trust in international cooperation,” while serving “to underline that the United States could not deliberately bring down the Appellate Body and then expect the Membership to gradually and implicitly accept the status quo.”¹⁰² The MPIA was seen, to quote Guatemala, as “an excellent example” of states’ “ability to conclude mutually beneficial agreements” at the WTO.¹⁰³

Moreover, since the MPIA mirrors the workings of the Appellate Body but also incorporates some solutions to US criticisms, it served to signal that such criticism could be dealt with through procedural reforms, rather than abandoning the system altogether as the United States had done. With the future of the multilateral trading system in jeopardy, the MPIA represented an important symbol of support for the system. Nor was this just “cheap talk” or empty statements in support of multilateralism, but states taking concrete actions to create a new institutional mechanism – the MPIA – and committing to be bound by its rulings.

The MPIA represents a club of committed multilateralists, consisting of a diverse group of states, varying in economic size, importance in world trade, and levels of development. It includes developed, developing and least-developed countries, which is significant given the deep North-South divisions that have often plagued WTO negotiations.¹⁰⁴ Of both practical and symbolic importance to the MPIA is the fact that it includes the world's two other largest trading powers besides the United States – the EU and China.

The EU's leadership has been critical to the success of the MPIA. The widespread fear is that the Appellate Body crisis portends the collapse of the rules-based multilateral trading system, to be replaced instead by far more chaotic global trade relations governed by the raw use of power. Given its considerable economic might, the EU would be in a far better position to cope with a power-based system than the vast majority of states. But in leading the MPIA, the EU signaled that it was striking a different path from the United States, and throwing its weight behind international cooperation and the rule of law.

China's involvement in the MPIA: following the EU's lead

China's economic weight has made it an important participant in the MPIA. With China's participation, the MPIA encompasses two of the world's three largest economies, helping to underscore the US's isolation in the Appellate Body crisis. But China is a follower rather than a leader in the EU-led initiative to create the MPIA. The interim arrangement originated with the EU, and it is the EU that mobilized other states and convinced them to participate. With its participation in the MPIA, China is following the EU's lead.

In fact, China took pains to indicate that it was *not* leading the MPIA, in order to ensure that its participation did not undermine support for the initiative. In its official statement to the WTO Dispute Settlement Body, China specifically sought “to clarify that the MPIA had been initiated by the EU.”¹⁰⁵ Other participants, China indicated, including itself, “had shared the EU's views, had joined the initiative, had participated in the negotiations and had endorsed the arrangement.” These participants

“accepted, appreciated and supported the EU’s leadership.” The US – which, not surprisingly, strongly opposed the MPIA – sought to cast aspersions on the initiative by repeatedly referring to it as “the China-EU arrangement.” But the parties to the MPIA refute this characterization, indicating that China was merely a participant in the initiative instigated and led by the EU.¹⁰⁶

Unlike the EU, China has not put forward or led states in any concrete initiative directed at defending and preserving the rules-based trading system. This is consistent with its previous behavior at the WTO. Throughout its 20-plus years of WTO membership, China has consistently shied away from a leadership role. While other states have used the leadership of coalitions to enhance their power at the WTO, China has participated in coalitions but never as a leader; many countries view China’s export capacity as a competitive threat and would be reluctant to support its leadership, and China has feared that a bid for leadership would engender backlash.¹⁰⁷

Despite its keen interest in maintaining the established trading order, China is presently unwilling or unable to lead system-preserving initiatives at the WTO. China’s capacity for leadership is undermined by its extensive use of protectionist trade policies – including heavy subsidies, import and export restrictions, discrimination against foreign firms, forced technology transfer, and violations of intellectual property rules – which are widely seen as a violation of the free trade principles of the WTO, as well as by its growing use of economic coercion against other states.

As a result, China has lacked credibility as a defender of multilateralism, free trade and the rule of law, and therefore not been considered a convincing leader of efforts to preserve the liberal trading order. China’s commitment to the rules-based multilateral trading system is widely seen as only partial and self-serving, frequently violating the rules of the WTO when in its interests to do so. Its actions are viewed with considerable distrust and suspicion, impeding its ability to gain followers. Furthermore, with China embroiled in a growing rivalry with the United States many fear could become a “new Cold War,” other states do not want to be seen as taking sides with China against the US. Not only do many countries share Washington’s concerns about China’s

trade practices, but they are also wary of damaging their relations with the United States, which remains the world's largest economic and military power.

Balancing competing concerns

The EU successfully managed to overcome significant internal divisions in order to create the MPIA. Member states were deeply divided over how the EU should respond to Trump, and there was considerable internal debate about whether the EU should move forward with the interim arrangement. Although the majority of EU states supported the initiative, some states – such as Germany, Denmark, the Netherlands, Luxembourg and Latvia – expressed concerns that it would anger the Americans and undermine the EU's relationship with the US. These states feared that moving forward with an interim appeals arrangement could provoke retaliation from the United States, or even cause the US to abandon the WTO altogether. As a representative from one EU state put it, the MPIA risked “pushing the Americans over the final edge. They are blocking the WTO but they haven't left the building yet.”¹⁰⁸ Critics were particularly concerned about the danger that the EU would be perceived as partnering with China against the United States and argued that the EU should instead try to work more closely with the US to pursue WTO reform.

The European Union negotiated these tensions by simultaneously pursuing both strategies. Alongside its efforts to create the MPIA, the EU also worked with the United States and Japan to launch a trilateral initiative directed at reforming WTO rules to create stronger disciplines on industrial subsidies, state-owned enterprises, and forced technology transfer – all of which are targeted at tackling China's model of state-sponsored capitalism and its trade practices. Working in partnership, the EU, US and Japan have proposed changes to WTO rules to expand the list of prohibited industrial subsidies and establish rules to address subsidies that cause overcapacity. The trilateral group has also proposed shifting the burden of proof by requiring states to demonstrate that their subsidy programs are not distorting trade or contributing to overcapacity, as well as advocating more stringent notification standards

for industrial subsidies. They have also called for an expanded definition of “public body,” maintaining that the Appellate Body’s excessively narrow interpretation of the term has undermined the effectiveness of WTO subsidy rules vis-à-vis China.

The European Union has thus walked a delicate line in managing its approach to both the United States and China at the WTO and navigating growing US-China conflict within the trade regime. The EU has refused to simply ally itself with one side or the other. Instead, it has sought to advance its interests through targeted, issue-specific partnerships with those who share its interests and objectives – strategically partnering with a broad group of states, including China, to address the Appellate Body blockage created by the United States, while simultaneously partnering with the United States and Japan to challenge China’s trading practices.

The Canada-led Ottawa group reform efforts

Like the European Union, Canada has similarly stressed that its first foreign policy priority is to “robustly support the rules-based international order, and all its institutions.”¹⁰⁹ In addition to working together in the EU-led MPIA, Canada and the EU have also closely collaborated in the Ottawa Group of like-minded countries pursuing WTO reform. Led by Canada, the group includes the EU, Australia, Brazil, Chile, Japan, Kenya, Mexico, New Zealand, Norway, Singapore, South Korea, Switzerland, and the United Kingdom. Part of the significance of the Ottawa Group lies in the fact that it is a diverse group of states, representing different geographic regions and different levels of economic development, all committed to trying to maintain the rules-based multilateral trading system. By throwing its weight behind the coalition, the EU greatly enhanced both its legitimacy and influence.

The Ottawa Group has held a regular series of meetings since being created in 2018 and issued several joint statements and proposals. It has identified and focused on three priority areas in need of urgent action: (1) safeguarding and strengthening the dispute settlement system; (2) reinvigorating the WTO’s negotiating function, including how the

development dimension can be best pursued in rulemaking; and (3) strengthening the monitoring and transparency of WTO members' trade policies.¹¹⁰

Most recently, since the outbreak of the COVID-19 pandemic, the Ottawa Group has played a leading role in efforts to use the WTO to strengthen the international response to the pandemic. The Ottawa Group proposed a Trade and Health Initiative (TAHI) submitted to the WTO General Council in December 2020.¹¹¹

Along with Canada and the EU, the joint communication was co-sponsored by Australia, Brazil, Brunei Darussalam, Chile, China, Hong Kong (China), Iceland, Japan, Kenya, Republic of Korea, Mexico, Moldova, Montenegro, New Zealand, North Macedonia, Norway, Singapore, Switzerland, Taiwan, the United Kingdom, Uruguay and Vanuatu. It calls for cooperation among WTO members to ensure access to essential medical goods, including vaccines, reduce supply chain disruption and foster a stable and predictable trading environment.

The Trade and Health Initiative identifies a range of actions that countries are encouraged to adopt in response to the pandemic, including limiting export restrictions; implementing trade-facilitating measures in the areas of customs, services and technical regulations; temporarily removing or reducing tariffs on essential medical goods; and improving transparency.

The Ottawa Group has provided a critical forum for dialogue and cooperation among like-minded states committed to preserving the multilateral trading system. It has proved to be an important incubator of pro-active and constructive reform proposals. To be clear, the concrete outcomes of the Ottawa Group have not as yet matched that of the MPIA, in significance or impact. But the group's emphasis on bridge-building, collaboration and multilateralism, and seeking constructive solutions has provided a welcome antidote to the stasis and stagnation, and growing discord, that have recently plagued the WTO, even before the crisis reached its current height.

Opportunities for future leadership and collaboration

The historical record suggests that crises can operate as turning points, opening up possibilities for dramatic reforms and changes. We have seen this before in the multilateral trading system. The liberal trading order experienced a similar crisis in the 1980s, when a rising wave of protectionism threatened to pull the trade regime apart and cause the system to collapse. Instead, however, what occurred was just opposite – from the turmoil of the 1980s ultimately grew the Uruguay Round and the creation of the WTO, representing a dramatic expansion and deepening of the rules-based multilateral trading system.¹¹²

Amid the current crisis, it is clear that the trade regime is once again on a precipice. The question is whether the system will collapse, or whether we will see a deepening and expansion of the system, a strengthening of the rules and their enforcement, and a renewed commitment to a rules-based trading order.

Building on the strong foundation of their partnership, Canada and the EU have a critical role to play in efforts to maintain the functioning of the liberal trading system. Responding to the current crisis will require outside-the-box thinking to drive policy and institutional innovation. This must involve both activities targeted at the WTO as well as those that move beyond its confines. Core priorities include resuscitating the WTO's negotiation function and strengthening trade enforcement, while also exploring alternative forums for international cooperation and rule-making on trade.

1. Resuscitating the WTO's negotiating function

One important opportunity for potential future collaboration for the EU and Canada is in revitalizing the WTO's negotiation function, which has been identified by the Ottawa Group as a priority objective. The reality is that the multilateral trading system was already in considerable turmoil even prior to the Trump administration. The WTO's core negotiation function had broken down, as evident in the collapse of the Doha Round and the repeated failure of most subsequent negotiating efforts. Since the breakdown of the round, there has been an attempt to salvage the negotiating function of the WTO by hiving off smaller, more specific and seemingly less controversial issues where it may be easier for states to reach agreement.

At the 2013 Bali Ministerial, states reached agreement on trade facilitation, food stockholding, and select issues related to special and differential treatment for least developed countries. However, even that limited package proved highly contentious and its enactment was nearly derailed by persistent conflict between the US and India over food stockholding. The 2015 Nairobi Ministerial produced agreement on agricultural export subsidies, certain LDC issues, and expansion of the plurilateral Information Technology Agreement involving a subset of WTO members. This shift to narrowly-focused, piecemeal deals is a far cry from the comprehensive trade round originally envisioned for the Doha Round and the WTO's intended function of continuing to craft broad-based universal deals through a single-undertaking. And even with a piecemeal approach, there have been few areas where states have been able to reach agreement.

A persistent source of conflict has been the issue of whether the large emerging economies, such as China and India, should be entitled to "special and differential treatment" (SDT) – granting them various forms of exemptions and exceptions from liberalization – in light of their status as developing countries. Given the magnitude of China's economy, and its heavy use of subsidies and other trade-distorting policies, extending SDT to China is especially controversial.

One critical area of current negotiations in urgent need of leadership is the effort to secure a WTO agreement to curb harmful fisheries subsidies.

The 2015 UN Sustainable Development Goals (SDGs) identified such an agreement as an urgent international priority. Subsidies have fuelled a global fisheries crisis, by driving overcapacity and overfishing. The UN Food and Agriculture Organization estimates that 90% of global fish stocks are already fully exploited and almost a third are being fished at a biologically unsustainable level.¹¹³ A successful agreement to restrict capacity-enhancing subsidies would be a “triple win” for trade, development and the environment.

However, while the UN SDGs set a deadline to conclude the fisheries negotiations by the end of 2020, that deadline passed without agreement. WTO negotiators are now seeking to reach a global fisheries agreement by the next Ministerial Meeting scheduled for June 2022. As one of the sole active areas of multilateral negotiations at the WTO, achieving a successful agreement is seen as essential to demonstrating the institution’s continued relevance and its ability to deliver new global trade rules.

Approximately \$35 billion in fisheries subsidies are provided annually, with the vast majority going to large-scale, industrial fishing fleets.¹¹⁴ Subsidies for inputs like fuel and larger boats allow such fleets to travel vast distances across the world’s oceans to exploit fisheries resources in distant waters. The collapse of global fisheries is not just an environmental issue but also has significant implications for global development and food security. Nearly 40 million people globally depend on fishing for their livelihoods, and nearly half of the world’s population relies on fish as a significant source of protein.¹¹⁵

Vulnerable fishing communities in Africa, Central and South America, and the South Pacific are being forced to compete with heavily-subsidized foreign fleets, with declining fish stocks reducing local incomes and food supply. Although West Africa, for instance, has some of the world’s richest fishing grounds, its fish stocks are being rapidly depleted by foreign ships. Impoverished locals fishing in hand-made canoes are competing against industrial “mega-trawlers” using mile-long nets to scoop up everything from seabed to surface.¹¹⁶

WTO negotiations have often required the leadership of a powerful state or group of states to cajole other countries and steer negotiations

towards a successful conclusion. The US has traditionally been a key leader in the fisheries negotiations: it was the country that first put the issue on the agenda at the WTO and played a major role in advancing the early stages of the fisheries negotiations.¹¹⁷ But with the US largely missing in action at the WTO in recent years, progress towards a global fisheries agreement has been hampered by a lack of leadership.

This is an area where the European Union and Canada could play an important role. Beyond their efforts to bolster multilateralism and a rules-based global trading system,

both also share a commitment to ensuring that trade agreements promote environmental protection and sustainable development. For Canada and the EU, working together to play a leading role in efforts to secure an ambitious WTO agreement to combat global fisheries subsidies would be an important means to revitalize the WTO's negotiating function, while helping to ensure that its rules work for the benefit of all.

2. Strengthening trade enforcement

A second pressing area for continued Canada-EU cooperation and leadership is in strengthening the enforcement of global trade rules, which has also been identified as a priority by the Ottawa Group. The WTO's existing rules and enforcement mechanism have proven ineffective to stop the growing use of economic coercion by two of the world's largest economies, the United States and China. Among other factors, the WTO dispute settlement mechanism is far too slow and cumbersome, and its limited remedies are not sufficient to deter rule-breaking by powerful states. The system is thus badly in need of reform, particularly to strengthen mechanisms to prevent the weaponization of trade and the use of economic coercion.

This could include making enforcement faster and more effective – by streamlining and accelerating the WTO dispute process, providing a rapid response mechanism to address rule-violations and impose penalties more swiftly, or enabling the use of temporary injunctions to halt damaging behavior while cases are being decided. It could also involve instituting stronger penalties for rule violation, including allowing

retroactive remedies; redefining “proportionate retaliation” to account for asymmetries in economic might between countries; enabling more-than-proportionate retaliation in cases of blatant economic coercion as a stronger deterrent against rule-breaking; and potentially creating mechanisms for coordinated retaliation – i.e., states allying together in the economic equivalent of a mutual defense pact – in which states agree to jointly retaliate against any country that engages in economic coercion.

This is a pivotal moment for the multilateral trading system, in which either the system must be reformed to strengthen its rules or risks collapsing altogether. Salvaging the rules-based trading order will require institutional innovation and creative reforms, in which the European Union and Canada are well positioned to play a leading role.

3. Mega-regionals: EU participation in the CPTPP

A final prospective avenue for further cooperation between Canada and the European Union to maintain an open, rules-based trading order lies in mega-regional trade agreements, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). Canada is a founding member of the agreement, which created one of the world’s largest free trade areas. Membership in the CPTPP is no longer limited by geography, as the United Kingdom has already begun negotiations to join. The European Union would be a welcome addition to the agreement.

The pact originated as the Trans-Pacific Partnership (TPP), a mega-regional free trade deal championed by the Obama administration as a cornerstone of US strategy to bolster American alliances and counter China’s growing influence in the Asia-Pacific region. Designed as a high-standard trade agreement encompassing 40% of global GDP, the TPP was intended to operate in parallel to the Transatlantic Trade and Investment Partnership (TTIP) then under negotiation between the United States and the European Union.

The turn to mega-regional free trade agreements by the US and the EU was motivated by frustration with the recurring stalemates that

has paralyzed WTO negotiations and repeatedly thwarted efforts to negotiate new global trade rules through multilateral channels. Mega-regionals were seen as a means to bypass the deadlock at the WTO and, given the combined power of the TPP and TTIP, enable the US and EU to write the rules of global trade for the 21st century. Many viewed the pacts as holding the potential to become the basis for a new multilateral trade regime – a “WTO redux or WTO 2.0” – particularly if they were ultimately united to create a single, integrated trade zone.¹¹⁸

The agreements were also conceived as a means to bolster the liberal international economic order, based on relatively open markets and free trade, and counter China’s state capitalism.¹¹⁹ Centered on liberal economic principles, the agreements sought to create high standard, market-oriented rules across a range of areas, including information technology, intellectual property, the environment, and the role of the state. Covering a large share of the global economy and trade, the attraction of these markets could create a powerful inducement for other states, such as China, to undertake significant economic reforms to gain entrance in future.

In a surprising reversal, however, the Trump administration withdrew the US from the TPP in 2017 and brought a halt to the TTIP negotiations with the European Union. The remaining members of the trans-pacific negotiations nonetheless went ahead with the proposed agreement, which became known as the CPTPP.

In yet another surprising turn, in September 2021, China announced that it had officially applied to join the CPTPP. The Global Times, a state-run newspaper and mouthpiece for the Chinese Communist Party, described this as a landmark move that aims to “cement the country’s leadership in global trade” and leave the US “increasingly isolated.”¹²⁰

The turn to mega-regional free trade agreements by the US and the EU was motivated by frustration with the recurring stalemates that has paralyzed WTO negotiations and repeatedly thwarted efforts to negotiate new global trade rules through multilateral channels.

The agreement's 11 existing members – Canada, Australia, Brunei, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam – must now decide whether to allow China to join.

For Beijing, joining the CPTPP would be a major symbolic and strategic victory, providing a means to bolster its economic clout and consolidate its growing dominance in the Asia-Pacific region and beyond. Membership would deepen China's trade and investment ties with CPTPP members, cementing its position at the center of regional and global supply chains. Notably, Beijing's application to join the pact came just one day after the announcement of the new AUKUS defense partnership between the US, UK and Australia, aimed at countering China's growing military power in the region.¹²¹

China's economic weight exceeds that of all the existing CPTPP members put together, giving it considerable leverage in its push to join the agreement. For most CPTPP members, China is already their largest export market, meaning they are likely to come under significant pressure to support Beijing's bid to join the agreement. Some participants may also support China's membership as a means to expand their access to its large market. Singapore and Malaysia, for instance, have already indicated that they welcome Beijing's interest in joining CPTPP.¹²²

Trade experts question whether China would be able to meet the high standards of the agreement, such as its strict rules on industrial subsidies and state-owned enterprises. However, since many CPTPP participants depend heavily on trade with China, they may be pressured to lower the standards of the agreement in order to accommodate Beijing.

This carries significant risks. Several members, particularly Canada, Japan, and Australia, are concerned by the prospect of extending membership to China, given its growing record of economic coercion. Beijing's seeming disregard for the rule of law in trade has left many questioning whether it can be trusted to abide by the terms of the CPTPP.

Given the gravitational pull of China's enormous market, countries around the world are finding themselves increasingly dependent on trade with China – and therefore vulnerable to an increasingly

authoritarian and aggressive Chinese state. For CPTPP countries, China's membership would ultimately intensify their dependence on its market and exacerbate their vulnerability.

CPTPP members left the door open for the US to rejoin the agreement, prompting considerable speculation about whether the US might seek to rejoin the deal – perhaps to pre-empt China's bid. Yet, for the time being, the Biden administration has indicated that it is prioritizing its domestic policy agenda and putting the negotiation of free trade agreements on the backburner.

A number of other countries, including South Korea, Indonesia and Thailand, have also expressed interest in joining CPTPP. The United Kingdom's accession process is already underway, and Taiwan has filed a formal bid to join. Expanding its membership is seen as an important way to broaden and strengthen the agreement.

The EU's economic weight would add considerable heft to the agreement. It would also provide significant incentive for the United States to consider rejoining. The European Union should join the CPTPP and – together with Canada – convince the United States to do the same, as former European Union trade commissioner Cecelia Malmstrom has recently proposed.¹²³ The European Union has already signed bilateral free trade agreements with many members of the pact, including Canada, Chile, Japan, Mexico, Peru, Singapore, and Vietnam.¹²⁴ It has also been making favourable progress in negotiations with Australia and New Zealand. Joining the CPTPP would be a powerful signal of the European Union's commitment to a liberal trading order and to strengthening global trading rules with its partners.

Conclusion

The EU and Canada have established a strong track record of leadership and cooperation amid the current crisis in the trade regime. Despite skepticism about the EU's capacity for leadership, and speculation that China – the state most frequently identified as a hegemonic rival to the United States – was seeking to position itself as an emerging leader of the global trading order, it is the European Union, with strong support from Canada, that has taken the most significant, concrete steps to address the crisis at the WTO and maintain the functioning of the rules-based multilateral trading system.

At a critical juncture in the future of the liberal trading order, the MPIA represents an important demonstration of leadership by the European Union, working in close partnership with Canada. With an American hegemon openly hostile to multilateralism and the rules-based trading system, and actively blocking the operation of the Appellate Body, the European Union stepped into the void, mobilizing states and successfully spearheading the MPIA as a means to maintain a two-tier system of independent judicial review in WTO disputes. The European Union had a clear vision and was able to overcome internal divisions, advance a concrete initiative, and marshal the support of other states.

Less than a year after the collapse of the Appellate Body, the European Union, Canada and their other partners had effectively established a new international court, with a slate of arbitrators in place and a docket of cases in line to be heard, and the backing of many of the largest traders and users of the WTO dispute settlement system. The EU-led interim appeals arrangement is a key component of the effort to make global trade governance less dependent on American leadership and

more resilient in the face of US attempts to undermine the rules-based multilateral trading system.

It is thus the European Union, and to a lesser extent Canada, rather than China, that is behaving as a system-preserving power at the WTO. This underscores the significant limitations to China's capacity to exercise leadership in the established liberal international economic order.

Unlike the EU's leadership of the MPIA and Canada's leadership of the Ottawa Group, China has not been advancing system-preserving initiatives. Despite its commercial interests in maintaining the existing global trade regime, China is unable to play the same role in efforts to maintain and preserve the system as the European Union or even Canada. It lacks trust and credibility as a champion of the liberal order, which impedes its ability to advance initiatives or attract the support of followers.

The MPIA and the Ottawa Group represent important instances of non-hegemonic cooperation in the multilateral trading system. Through their cooperative leadership of these initiatives, the European Union and Canada have played a crucial role in efforts to stabilize the trading system. Their collective action in responding to the Appellate Body crisis through the creation of the MPIA represents a form of defensive leadership – seeking to preserve the established order. It remains to be seen, however, whether they will be able to exercise more proactive leadership in efforts to reform the WTO, which require consensus among states on how the rules and functioning of the institution should be altered. In the case of the Ottawa Group, for example, it is proving highly challenging to translate proposals for WTO reform into concrete action that can secure the support of the wider membership of the organization.

Despite its commercial interests in maintaining the existing global trade regime, China is unable to play the same role in efforts to maintain and preserve the system as the European Union or even Canada.

Building on their strong partnership, Canada and the EU should seek to expand their collaborative efforts to try to maintain the functioning of the liberal trading order. Going forward, this must involve both activities targeted at the WTO as well as those that move beyond its confines. Opportunities to extend their cooperation and leadership include working together to: (1) resuscitate the WTO's negotiation function, focusing on efforts to secure a fisheries subsidies agreement, which is seen as a crucial test of the organization's continued relevance and its ability to deliver new global trade rules; (2) strengthen trade enforcement, both within and, where necessary, beyond the WTO system; and (3) establish and bolster alternative forums for international cooperation and rule-making on trade, such as through an EU bid to join the CPTPP.

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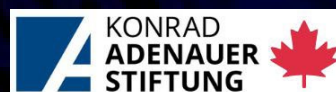
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