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The Canada-EU Interim Appeal Arbitration Agreement: A Hail Mary Pass, or the Panacea?

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Introduction

The World Trade Organization (the "WTO") is at an inflection point. As global dynamics shift, members must consider whether the institution, as it is currently configured, has passed its prime. The success of the WTO to date epitomizes the pinnacle of an apparent ideological consensus. However, the current recession of that consensus is forcing global institutions that blossomed under it, such as the WTO, to confront new challenges. In particular, the recession of that consensus is threatening the viability of the WTO's crown jewel, its dispute settlement system ("DSS").

In an attempt to divert, or at least alleviate this threat, certain members of the WTO have been trying to find a compromise. As of yet, members have failed to agree on a multilateral path forward. Canada and the European Union (the "EU") have been at the forefront of these efforts. On July 25, 2019, they decided to take bilateral action and announced that they had entered into an Interim Appeal Arbitration Arrangement (the "Agreement"). In so doing, both countries reaffirmed their commitment to a rules-based international system supported by a "functioning" WTO DSS.

This post explores the Agreement by reviewing the history of binding dispute mechanisms in economic affairs between sovereign entities, focusing on the advent of the WTO, and the potential roadblock that the institution is imminently facing. It also explores the commitment of the Agreement's signatories to a rules-based economic order in that context, touching on the role that arbitration can play in the future of that paradigm.

Are we Experiencing a Paradigm Shift?

We are currently living in a world where the rules-based liberalized global trading system, established after World War II, is teetering. The WTO's June 24, 2019 Monitoring Report on G20 Trade Measures confirms that the implementation of import restrictive trade measures by G20 countries has continued at an alarming pace and, when combined with the increases from the previous period, some fear that we are at an inflection point.

While it is easy to point to the Trump Administration's rhetoric regarding the need to negotiate new trading relationships that favour US interests, combined with their aggressive use of tariffs to

achieve a myriad of policy objectives as the catalyst, US misgivings of the WTO's dispute resolution mechanism predates the Trump Administration. Consistent with the US concern of offending the constitutional separation of powers, the US has always been wary of the Appellate Body ("AB") overstepping its mandate. This concern has been exacerbated by the vacuum created by the failure of WTO Members to negotiate and update ambiguous provisions of the WTO Agreements. This failure has effectively left the AB to fill the void through their interpretations; replacing the sovereign members' ability to dictate the terms of their participation. International institutions, and the notion of "binding" dispute resolution mechanisms, inherently require the buy-in of the constituting members for, by definition, each member is a sovereign unto themselves. An international institution, unlike a nation state, has no inherent power to make, or enforce, rules. The institution derives its legitimacy from participating members thus, its authority is dependent on members' willingness to adhere to their decisions.

Since World War II, and certainly since the end of the Cold War, the global economy, buttressed by advances in transportation and technology, entered into a period of astronomical growth. In the aftermath of World War II, the Bretton Woods system, of which the WTO's predecessor, the General Agreement on Trade and Tariffs (the "GATT") was a component, was designed to prevent the "beggar thy neighbor" policies that nations undertook after World War I. It was believed that the turn towards tariffs, quotas and protectionism following WWI led to the Great Depression and subsequently WWII. Within this context, International institutions were specifically set up to create a world of order and interdependence, such that the tragedies of war, which had plagued the 20th Century, would be unthinkable.

It is within this historical context that the sovereign nations of Europe formed the EU, on the premise that if nations could work together for security and mutual advantage, confidence in one another would grow. Further, nations with intertwined economies would think twice before going to war against one another, supporting the notion of an intertwined world where war should not be a primary tactic. During the Cold War, consensus around these ideas was limited to like-minded countries however in the Post-Cold War world, a global economy sustained by binding rules and effective dispute settlement seemed inevitable.

Canada is also a country deeply committed to the idea of sovereign nations participating in a rules-based global economy with binding dispute resolution. While these notions are ideologically consistent with Canadian sensibilities, this commitment is also informed by practical necessity. Canada is a trading nation, its trade balance and economy generally hinges on its ability to trade with the United States. If the global trading regime continues down its current path, Canada's ability to defend its economy against protectionist and discriminatory practices is diminished. In a world order where power dynamics supplant rules, Canada will always be at a disadvantage in resolving disputes with its largest trading partner.

The Problem and the Proposed Interim Solution

It is not surprising that Canada and the EU, each of which has flourished under the current paradigm, would be deeply committed to a rules-based system, with a mechanism for enforceability, such as the WTO's DSS. However, the WTO's DSS, anchored by the appeal process, may soon cease to function as such. The AB, which hears appeals from Panel decisions, is to be made up of 7 members, 3 of which convene to hear any one appeal (see Section 17.1 of the

Dispute Settlement Understanding (DSU)). Come December 10, 2019, the system may no longer have the capacity to hear appeals. On this date, the terms of two of the three remaining AB Members expire. While any member can nominate a member to the AB, the United States has effectively blocked any new members from being appointed. As a result, soon there will only be one member left, an insufficient number to hear an appeal.

Canada and the EU felt a need to react to the pending situation. The Agreement engages Article 25 as a basis for an arbitration agreement, meant to serve as a stop-gap measure to resolve their disputes. The Agreement replicates, as closely as possible, Article 17 of the Appellate Review Process, including requiring former members of the AB serving as arbitrators. Under the Agreement, the arbitrators for a particular dispute are selected by the Director General based on the same criteria that would be considered under Article 17.1 of the DSU and Rule 6(2) of the Working Procedures for Appellate Review. From a procedural perspective, and to ensure continuity, the Agreement calls on the parties to notify the WTO Secretariat of their intention to arbitrate within 60 days of the establishment of an arbitral panel, in order to meet the notification requirements of Article 25.2 of the DSU. The Annex to the Agreement explains the procedures in more detail, designed to be consistent with, and seamlessly integrate into, the WTO framework.

By grounding the Agreement within the DSU, Canada and the EU have not strayed from their commitment to the current system, but have provided an alternative dispute settlement scheme in an effort to ensure continuity. Although in announcing this Agreement, dedication to reforming the current system is emphasized, it may be that the Agreement will serve as a template to mediate the shifting balance. Given the growth of the WTO, and the corresponding ideological diversity of its members, including their varying commitments to the liberal philosophy upon which it is based, the system has become less tenable. The enforceability of the WTO system is only as effective as members' permit is to be. Incorporation of a system that provides members more control over the process may be more practical to ensure longevity.

Is Arbitration More Suitable to Resolve Disputes Between Sovereign Entities?

Recourse to arbitration as a means to resolve disputes between nations is far from a novel concept. It has long had a place in commercial relations between states. In fact, arbitration is arguably more suited to disputes between sovereign entities as it allows the parties to the dispute more freedom to set the terms for resolution. The notion that there could be enforceable law developed between nations perhaps belonged to a moment in time when there appeared to be ideological purity. Providing WTO Members with the contractual freedom to agree to the terms for dispute settlement may help the dispute settlement system maintain the legitimacy that it appears to be shedding for some of its larger, more powerful members. Of course, in order for arbitration to take a legitimate place within the context of the WTO DSS, there needs to be a well-designed system in place to guide the arbitration process long before a dispute arises. The agreement between Canada and the EU is a first step in this direction. Its efficacy for other members depends on their willingness to join in or to execute their own agreements. There is already a lot of discussion about whether the Agreement will serve as a catalyst to a plurilateral agreement.

Back in January, the Center for Strategic & International Studies looked at the issue and concluded that reliance on Article 25 of the DSU could serve as a mechanism to continue to resolve disputes within the framework of the WTO, although they were skeptical of the ability of such a parallel

dispute settlement system to function at the level of predictability that the current system does. Significantly, earlier this month, the European Commission issued a decision allowing the EU Commissioner for Trade to enter into similar interim agreements with other "willing partners."

Concluding Remarks

It is possible that an international economic order based on consensus, legal precedent and seemingly enforceable rules is not feasible in today's paradigm. Creating a framework for predictable international economic relations based on "enforceable" rules requires ideological consensus, and it is conceivable that this moment in time, when there appeared to be the requisite consensus, has passed. While the world's largest economy engages in a return to treating trade relationships as a policy tool, and trade negotiations as a zero sum game, those countries who remain committed, because of ideology, necessity, or both, to a predictable, rules-based global economic order, are astute to start looking at alternatives to the current paradigm. Developing an arbitration structure within the WTO system may, in fact, be a way to preserve the institution's legitimacy in a world where any void will be filled by a return to power dynamics governed by a dominant few.

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