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Panel D1 – Is there a future for the rules-based trading system?

Chair: **Robert Brookfield –** Trade Law Bureau, Government of Canada

Speakers **Rambod Behboodi –** King & Spalding, Geneva
Jennifer Hillman – Georgetown Law Center
Matthew Yeo – Steptoe & Johnson LLP, Washington DC

Rapporteur: **Blake Van Santen**

Following the Morning Plenary on the second day of the Conference, the venue's main speaking platform in Victoria Hall was given over to discussion of the challenges currently facing the international trading system. The panel was chaired by Robert Brookfield, Director General of Canada's Trade Law Bureau. Mr. Brookfield is intimately connected with many of the issues on the panel's agenda. In addition to having led Canada's legal team that helped conclude the United States-Mexico-Canada Agreement (USMCA), Mr. Brookfield has also headed Canadian delegations to a number of free trade agreement negotiations and represented Canada in multiple WTO disputes.

Mr. Brookfield sparked the discussion by commenting on the negative trend we are currently witnessing of countries assuming increasingly interventionist and restrictive policies on trade. Jennifer Hillman, professor of law at Georgetown University and a former member of the WTO Appellate Body, was the first panelist to take up the topic. The most significant, and troubling, aspect of the current state of affairs, she observed, is the precipitous rise in the proportion of restrictive trade measures that are unequivocally illegal. WTO rules provide for a range of trade remedies that may be invoked by Member States in response to unfair trade practices. In the past, continued Ms. Hillman, the United States has often made use of these remedies, and to great effect. However, the United States has lately departed from this practice and is instead now resorting to unilateral measures that are in flagrant contravention

of established WTO rules and procedures. The most conspicuous examples of this are the tariffs recently imposed on imported steel and aluminum and the tariffs targeting Chinese trade goods. These actions violate fundamental commitments made by the United States to charge only the tariffs set out in its tariff schedule and observe the Most-Favored-Nation (MFN) principle by refraining from discrimination between trading partners. Ms. Hillman noted the importance of the wider narrative in which these actions have taken place: the United States agreed to join the WTO and thereby sacrifice its right to take unilateral measures in exchange for a binding dispute resolution mechanism as envisioned in the Dispute Settlement Understanding and its supplementing documents. For reasons that would be elaborated on by her fellow panelists, the United States considers the Appellate Body to have broken that bargain, permitting United States to reassert its right to impose unilateral restrictive trade measures. The seriousness of the threat we are now seeing to the rules-based trading system only becomes clear when considered in light of this broader narrative.

Next to opine on Mr. Brookfield's opening comment was Mr. Matthew Yeo, a partner at Steptoe & Johnson LLP, based out of Washington D.C., where he specializes in WTO disputes, trade policy and negotiations, and trade remedies. Mr. Yeo has extensive litigation experience relating to the interpretation and application of the WTO agreements and has appeared on behalf of Member States at all stages of the WTO dispute settlement process. In his response to Mr. Brookfield's comment, Mr. Yeo emphasized the importance of distinguishing between the types unilateral measures recently taken by the United States: those taken pursuant to s. 232 of the *Trade Expansion Act* of 1962, and those taken pursuant to s. 301 of the *Trade Act* of 1974. The former provision provides authority for the imposition of tariffs if the quantity or circumstances surrounding a particular class of imports are deemed to pose a threat to national security—the steel and aluminum tariffs are of this sort. The latter provision provides authority to impose trade sanctions on states that engage in unfair trade practices—the tariffs on China fall under this category. The recent s. 232 measures have at least a semblance of legality, explained Mr. Yeo, since it is possible for the United States to point to the national security provision in the General Agreement on Tariffs and Trade (GATT) as a legitimate basis for its tariffs on steel and aluminum. The s. 301 measures are, however, blatantly unlawful in light of Articles I and II of the GATT, which respectively establish the MFN principle and the obligation on Member States to adhere to their tariff schedules. These commitments are at the foundation of the WTO rules-based system and the cavalier attitude that the United States has taken toward them is of far greater concern than the s. 232 measures.

The last speaker to join the discussion was Mr. Rambod Behboodi, a partner at King & Spalding LLP, based out of Geneva, and an experienced litigator on NAFTA and WTO cases. Previously, Mr. Behboodi served as a Counsellor at the Rules Division of the WTO. Addressing Ms. Hillman's comments on the US-WTO "narrative" and the United States' belief in the legitimacy of its current behavior, Mr. Behboodi agreed that the United States feels hard done by under the existing global trade regime, especially following a spate of losses in cases at the WTO. However, Mr. Behboodi urged his audience, when considering this broader narrative, to keep in mind that the benefit states gain from the international trade system is not a product of the number of disputes they have won at the WTO. He pointed out that, in the early years of the WTO, the US lost some major cases but simultaneously made significant gains in

terms of policy. The *US — Shrimp* case illustrates this point. Perceptions of the "narrative" should therefore be less preoccupied with wins and losses than with the *nature* of those wins and losses.

Mr. Behboodi proceeded to respectfully disagree with Ms. Hillman on the nature of the bargain made by the United States in joining the WTO. It was not, he declared, a straightforward procedural bargain whereby the United States gave up freedom of unilateral action in exchange for a binding dispute resolution mechanism. Rather, the United States considered its compensation to be the retention of broad discretion in key areas of the dispute settlement process, namely, in the application of trade remedies. Acceptance of the Appellate Body was, in fact, a procedural *concession* by the United States in exchange for a perceived substantive gain. The United States now has cause to feel shortchanged on both aspects of this bargain. Given developments in the Appellate Body's jurisprudence and its approach to its own procedure, the United States deservedly feels that its concession has proved far dearer, for a benefit far more circumscribed, than what it had agreed to in joining the WTO. Only if we step back and consider the true nature of the bargain the United States thought it was striking by joining the rules-based trading system can we begin to appreciate the validity of some of its complaints, which are not at all new, but which have only lately become more visible. And only then can we proceed to addressing some of the key issues.

Mr. Yeo was also familiar with the narrative discussed by his fellow panelists. Recognizing that American disillusionment was not without a sound basis, he recalled personally litigating cases where he was of the opinion that the Appellate Body misinterpreted provisions of the WTO agreements, effectively altering the nature of the rights and obligations agreed to by Member States. Crucially, however, alone among WTO Member States, the United States was never truly prepared to accept the Appellate Body and the wider dispute resolution mechanism as a form of binding adjudication, wherein court-like procedures would be followed and non-challengeable verdicts on trade issues rendered. Member States often bemoan losses in important cases, but none, save the United States, has gone so far as to block the election of Appellate Body members or threaten to leave the WTO. Fundamentally, such behavior stems from the fact that the United States was never completely on-board with a binding dispute settlement process.

The floor was again ceded to Ms. Hillman, who drew attention to the fact that, while the United States has brought and won more cases before the WTO than any other Member State, it has also found itself defending more cases than any other Member State. When Congress first approved the United States' entry into the WTO, it had been on the assumption that, by and large, the United States would be a party that brought and won disputes. The nation with the world's most open market and most transparent trade rules could not possibly be the *subject* of complaints, so the thinking went. But the conception has turned out to be a far cry from the reality. It had also been thought that appeals would be rare occurrences, whereas somewhere between sixty and ninety percent of cases are now heard by the Appellate Body. Further still, adjudication of appeals was supposed to be narrowly circumscribed to only those questions necessary to resolve the issues in dispute. However, time and again the Appellate Body has evinced a willingness to address a far broader array of issues. These incongruencies between the bargain the United States thought it was making in joining the WTO, and the bargain it got, explain, if they do not excuse, the unilateral measures taken by the Trump administration.

Mr. Yeo pointed out, with respect the United States' substantive complaints concerning the Appellate Body, that many of these relate to trade remedies, specifically anti-dumping measures and safeguards. However, the actual proportion of affected imports represents but a small percentage of the country's overall imports. The significance of trade remedies is, at bottom, more political than anything else. Yet the United States appears prepared to sacrifice the entire rules-based trading system, along with a reliable adjudication mechanism, both of which it has benefited from significantly, for the sake of the relatively insignificant set of measures it has recently imposed. The severely lopsided nature of this trade-off, asserted Mr. Yeo, has apparently been lost on key decision-makers inside the Trump administration.

Mr. Behboodi responded to Mr. Yeo's comments by pointing out that politicians must be able to sell free trade agreements to citizens, who typically require assurances that, if threatened economically, their country will be able to defend itself. To deride the United States' recent slew of trade sanctions as "merely political" is to miss the point entirely. Anti-dumping measures may have minimal impact on the bottom line, but, politically, such defensive mechanisms are critical to the survival of a free trade regime. As the terms of negotiated agreements are whittled away by the Appellate Body, states are understandably finding it difficult to stay the course, irrespective of the economic benefits they may be deriving from those agreements, such as they are.

Rejoining the debate, Ms. Hillman stated her opinion that, if President Trump today put the question to Congress whether the United States should block the functioning of the Appellate Body and in so doing imperil the wider rules-based system of international trade, few, if any, voices would be raised in defense of the WTO regime. The negative commentary surrounding the WTO has become so widespread and persistent, that, politically speaking, it would be unthinkable to defend the organization and the system of international trade to which it has given rise.

Rounding off the discussion, Mr. Behboodi noted that American concerns over the Appellate Body began under President Bush and continued under President Obama; the desire to reform the body is a longstanding one, and not merely an example of "Trump" pugnacity.

Question period ensued, and panelists were first asked their opinions on what it will take to move past the precarious situation in which the international trading system finds itself. Mr. Yeo asserted that an important first step is to recognize, as Mr. Behboodi pointed out, that American concerns with the Appellate Body have not been peculiar to the Trump administration and are, in many respects, well-grounded. In terms of next steps, after recognizing the validity of American concerns, those concerns must be addressed through good faith proposals for reform. However, in approaching such negotiations, the United States must be made to understand that a fully constituted Appellate Body is the non-negotiable end result.

Mr. Behboodi's thinking was that, given the volatility of the current political atmosphere, it would be idle to speculate on exactly what will satisfy the key players in the major disputes of the day. Mr. Behboodi recollected a line from a recent United States policy paper declaring that only if the United States agrees to let the Appellate Body resume functioning can Member States proceed, at some future

point, to consider how best to address the body's procedural issues. Mr. Behboodi implied that it is putting the cart before the horse to discuss what can be done to move forward, when the question of whether there is a will to move forward appears so much in doubt.

Ms. Hillman agreed with Mr. Yeo that it would go some way to assuaging American concerns if the Appellate Body were to revert to strict adherence to the provisions of its constitutive document and desist from picking and choosing the provisions it is to be bound by. However, Ms. Hillman expressed her concern that if the United States' position were ever to harden, if it has not already, to requiring, as the price of its cooperation, a return to the GATT-era consensus approach whereby panel reports could simply be blocked by dissatisfied parties to the dispute, then it is not clear that a way forward could ever be found from the present predicament.

The third question for the panelists was how China figures into the rules-based trading system, both now, and in the future. Mr. Behboodi considered a main issue with China's integration into the international trading system to be the lack of judicial independence in the country; the Chief Justice of China's highest court has stated that the judicial system only exists to advance communist party policies. Another issue is the lack of transparency in China. This makes it difficult for other Member States to grasp the nature of political-economic conditions in the country, increasing the difficulty not only in addressing, but even in identifying market access issues.

Ms. Hillman pointed out that integrating China into the international trading system would require rectifying the failure of the WTO's current rules to adequately address the issue of Chinese government subsidies provided through state owned enterprises. This would include redefining both the types of entities that may provide subsidies and what constitutes evidence of a subsidy, as well as clarifying which remedies can be used to address infractions. The issue of technology transfer is also intimately tied up in the question of China's role in international trade. While the United States is taking action against what it sees as China's unfair trade practices in this regard (i.e. Chinese laws conditioning foreign investment on agreements to transfer technology to China's domestic industry) through its s. 301 measures, a way must be sought for this problem to be addressed within the strictures of the rules-based system. Ms. Hillman voiced her personal support for a "big, bold case" against China at the WTO, brought by a coalition of countries—both for purposes of evidence-pooling and protection from retaliation—and comprehensive in scope. Such a move would not only help focus the discussion surrounding what needs to happen for China to be brought in line with its WTO commitments, it would also help keep the WTO at the centre of the international trade system.

Mr. Yeo conjectured that many unexplored options remain as to the forms of discipline that could be brought to bear on China in response to its illicit trade practices. Such options exist, moreover, within the framework of the rules-based system; destabilizing unilateral measures such as those taken by the United States need not be resorted to. As an example, Mr. Yeo cited the possibility of bringing a claim pursuant to the Agreement on Subsidies and Countervailing Measures over the serious prejudice to Member States caused by China's excess capacity of steel and aluminum. Taking action against China *within* the rules-based trading system is all the more advisable since China has demonstrated a

willingness to comply with decisions rendered through the WTO dispute resolution process. Illegal retaliatory measures, concluded Mr. Yeo, are not the way to approach the China issue.

As a final subject for discussion, the speakers were asked exactly how the situation of the international trade system has degenerated to its current state. Ms. Hillman replied that, firstly, there has been a failure of communication in the sense of ensuring that everyone understands the value of the rules-based trading system. The results of this failure are most obvious in, but are not confined to, the United States. International trade could benefit far more people than it does at present, if only more people knew how to take advantage of the opportunities it has to offer. Secondly, there has been a substantive failure in the rules-based system concerning issues like trade remedies, technology transfer, intellectual property theft, and currency manipulation, to name a few. There needs to be a greater willingness to address these issues and improve the fabric of the system. Lastly, Ms. Hillman pointed to significant gaps between states' trade and domestic policies, which serve to increase the ever-deepening gulf between the haves and the have-nots within states.

Rather than his thoughts on the road that led us here, Mr. Yeo chose to leave the audience with a hopeful vignette from his visit to Geneva the previous week. Mr. Yeo had been in Geneva participating in a WTO dispute resolution. Notwithstanding the embattled state of the dispute resolution mechanism and the pessimistic light in which it is now commonly cast, Mr. Yeo found that both parties behaved civilly and reasonably, while the panel was a highly engaged and professional one. We had likely not heard of this particular dispute because it had been kept confidential, which is the way it should be. Mr. Yeo's brief anecdote provided one small example of why the system we are fighting for is one worth saving.

The final word among the panelists fell to Mr. Behboodi, who traced our current situation back to the failure of the Appellate Body to truly listen to the concerns of its constituents, which is what, at bottom, WTO Member States really are. The Appellate Body does not have the long line of jurisprudence and entrenched legitimacy that domestic courts have, yet it customarily takes far greater license in its approach to its own institutional limits. Judicial restraint, intimated Mr. Behboodi, is a quality that the Appellate Body might do well to put greater stock in, and sooner rather than later.

Mr. Brookfield concluded the panel by echoing the optimism of Harold Koh's keynote speech from the Conference's opening day. There is still hope, Mr. Brookfield assured his listeners, not just for the survival of the rules-based trading system, but for that system to thrive.