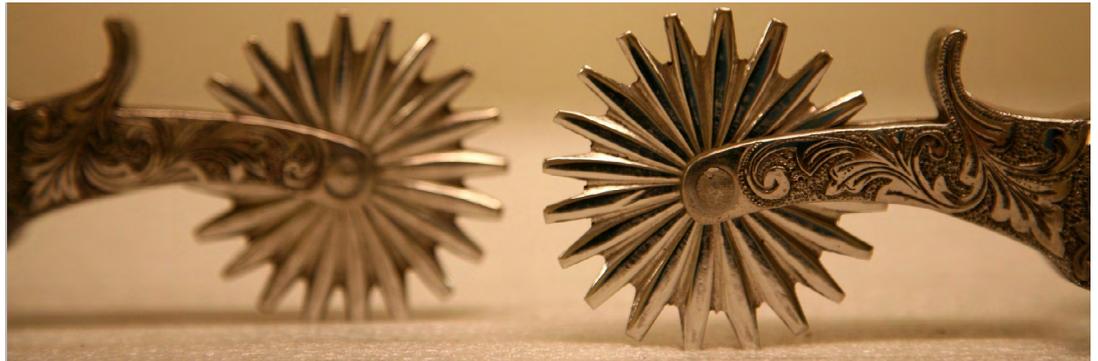


SAVING THE WTO APPELLATE BODY OR RETURNING TO THE WILD WEST OF TRADE?



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Summary

A year ago, the world was still wondering whether to expect a hard Trump or a soft Trump, and whether the new US president would be ready to adopt aggressive unilateral measures to balance the American trade deficit. Now, in the face of punitive measures targeting a specific product or country, and alternations between sanctions and concessions, the countries most exposed are adjusting their own retaliation measures.

Beyond this, European concerns are relate to Donald Trump's desire to either disentangle himself from multilateral trade rules, or his destabilisation strategy to strengthen the disciplines of the World Trade Organization (WTO).

Will the US continues to block the appointment of judges at the WTO's Appellate Body, the cornerstone of international trade regulation, to the point that they could blow up the dispute settlement system? In that case, one would have to brace for a trade war. Trade would no longer be rule-bound: we would be back in a Wild West replete with no-holds-barred showdowns. Or could the United States – along with the European Union, Japan and others – be serious about tackling the distortions that Chinese state capitalism is causing in the global economy, and that are having a more decisive impact on the US trade deficit?

The WTO needs its two legs: litigation and negotiation. It is by bringing China to the negotiating table that we can restore the confidence of the United States in the ability of the WTO to enforce fair rules. This would enable the litigation component to continue to playing its role in reducing trade tensions.

This policy paper examines Washington's criticisms of the Appellate Body, reviews the procedural reforms that could improve its operation, and advocates multilateral disciplines that should be more tightly enforced so that dispute settlement mechanisms facilitate fair trade. If the US President's vision turned out to be more short-termist, it would be up to Europe and the other major powers to preserve a plurilateral regulatory framework, which would be all the more needed to counter the new disruptive factor that the United States would become.

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INTRODUCTION

Donald Trump has made “fair trade” his mantra. However, does he seek to free himself from the rules of international trade or reform them? **Will he continue to favour an aggressively unilateral and transactional approach**, and focus exclusively on the reduction of the US trade deficit? Or will he change tack and use his destabilisation strategy to **tackle loopholes in the rulebook of international trade that allow China to maintain unfair economic practices?**

The European Union is not the only actor to file a complaint to the World Trade Organisation (WTO) against the breach of multilateral rules constituted by the imposition of higher tariffs on US imports of steel and aluminum. Japan, China, Russia, India, and others are following suit. With Washington announcing a similar measure on US car imports, just after the US withdrawal of the Iran nuclear deal (penalising any country willing to invest in Iran), it is difficult to determine the factors that may drive President Trump either to reform or to continue destabilising the international order in the name of US national security.

Donald Trump continues to pursue his protectionist offensive, applying a carousel retaliation method consisting of changing targets – products as well as countries – to enhance the overall effect. Economists, industry groups and economic actors are worried by the negative impact this strategy might have on US value chains and rising consumer prices in the US market. Trump employs this deterrent to destabilise countries with which he intends to fast-forward bilateral negotiations that would be of greater importance to the US economy than merely targeted tariffs.

Far more significant than any concessions he wants to get from Canada or Mexico on rules of origin, or the non-tariff barriers that protect the European agricultural market, are the ones he expects from China. This, however, cannot be limited to an adjustment of percentage points and quotas of imports for products made in the United States. Such a view would fail to engage with the major distortions that China’s economic development – with a state capitalism based on a system of state-owned enterprises, public subsidies, and government influence on the strategic choices of economic actors – is causing in the US and the global economy. This system is the backbone of the “Made in China 2025” strategy backed by the Silk Road initiative (or One Belt One Road, as it is officially called) and which seems in contradiction, if not with the letter, then at least with the spirit of WTO rules.

It remains to be seen whether Washington’s manoeuvre amounts to a strategic ploy: beyond punitive tariffs and bilateral renegotiations, **the final target might well be the Appellate Body (AB) or even the whole dispute settlement system**. After consultation and review of the dispute by expert panels at first instance, the Appellate Body offers the last possible resort to resolve a trade dispute between two countries to avoid an escalation of the conflict. It is the cornerstone of the regulation of international trade.

Does Donald Trump want to undermine the dispute settlement mechanism by continuing to block the appointment of new judges to the AB, or does he want to improve its functioning? If he pursues the first option, **one must indeed brace for a trade war, meaning that trade will no longer be rule-bound: international commerce would come to resemble a Wild West replete with no-holds-barred showdowns.**

How can one make sure that the US President remains committed to the settlement of disputes in accordance with the WTO framework? Can procedural reforms suffice when Washington blames the AB for overstepping its mandate and creating new rights and obligations for WTO members outside the framework of multilateral negotiations? The issue needs to be

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DOES DONALD TRUMP
WANT TO UNDERMINE
THE DISPUTE SETTLE-
MENT MECHANISM?

treated at the right political level, since Washington's criticisms are related to the AB's tendency to supplant the negotiation between WTO members by its own judicial decisions.



THE WTO NEEDS BOTH LEGS TO DO ITS WORK: LITIGATION AND NEGOTIATION.

The WTO needs both legs to do its work: litigation and negotiation. It is by bringing China to the negotiating table that we can restore the confidence of the United States in the ability of the WTO to enforce fair rules so that the litigation leg can continue to play its role in reducing trade tensions. Can Beijing's commitment to the multilateral system so far pave the way for a "constructive confrontation"? **By contenting themselves with a bilateral, short-term, barter-like deal, Washington and Beijing would only delay the risk of a trade war.**

After examining the US critique of the Appellate Body, this paper will assess the procedural reforms that can improve its functioning. The focus will be on tighter enforcement of the multilateral disciplines, which will be crucial if the dispute settlement mechanism is to ensure fair trade.

1 . WASHINGTON'S CRITIQUE OF THE WTO APPELLATE BODY

1.1 The functioning of the AB

1.1.1 Its mandate and functioning

The dispute settlement system established in 1947 by the General Agreement on Tariffs and Trade (GATT) remained highly fragmented. There were no established time limits for procedures. It was easy to block decisions – which had to be adopted by consensus – and numerous proceedings dragged on without reaching a conclusion. While this system allowed the law of retaliation to persist in trade matters, the 1994 Marrakesh Agreement establishing the WTO set out to formalise these procedures and created an Appellate Body.

This "global" mechanism applies to all disputes relating to the application of WTO agreements, whether multilateral agreements or reciprocal preferential trade agreements between two or more partners. It is the agreed way to settle a dispute between the relevant parties, who therefore undertake the commitment not to act unilaterally.

The mandate of the Appellate Body and its operation are set out in Article 17 of the Understanding on rules and procedures governing the settlement of disputes (DSU) of Annex 2 of the Marrakesh Agreement. This permanent body is comprised of seven members/judges who are appointed by consensus among the 164 WTO members for a four-year term, and they may be reappointed once. Although all WTO members can nominate candidates, it is informally established that these seats are reserved for individual representatives from the great commercial powers, including the United States and the European Union.

The AB confirms, modifies or invalidates the findings and legal conclusions of the panel of experts or a designated group established at the request of WTO members, when the consultation procedure has failed. When finally adopted by the Dispute Settlement Body (DSB), AB reports must be accepted by all parties to the dispute. Several principles are upheld:

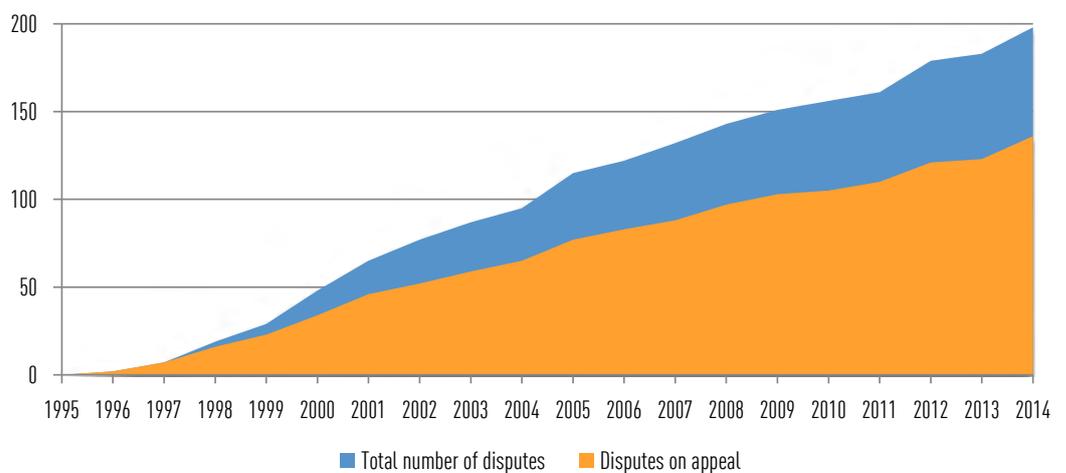
- **Neutrality.** Judges are experts who, although not full-time employees of the organisation, travel to Geneva as much as they deem necessary to handle a case. They must be three to process an appeal and cannot be of the same nationality as one of the parties to the dispute.

- **Near-automatic approval.** After submitting the interim report of the ad hoc group of experts, either party has 60 days to notify an appeal, otherwise the report is approved “quasi-automatically” **according to the principle of “negative” or “reverse” consensus.** This is to say it will be approved unless there is a consensus against its adoption. A member intending to block the decision to adopt the report must persuade all other WTO members (including the opposing party in the case in question) to join its cause or at least to remain passive, meaning that only one member could prevent this reverse consensus. De facto a mostly theoretical device, this negative consensus never occurred. Under former GATT system, it was the positive consensus that prevailed. This quasi-automaticity has been put in place to **enhance the security and predictability of the international trading system**, and probably explains the large percentage of reports that are appealed.
- **Confidentiality.** As is the case with special groups, the AB deliberations are confidential. The reports are written without the parties to the dispute being present, in light of the information provided and the statements made. The opinions expressed in the panel report by members of the special group are anonymous.
- **Compensation in the event of non-implementation.** Compensation and the suspension of concessions or other obligations are temporary measures that may be resorted to if the recommendations and rulings are not implemented within a reasonable time period by one of the parties to the dispute. All working procedures of the DSB and the AB promote dialogue and consultation between the parties at every stage, including before the adoption of the compensation measures mentioned above. Consensus and mutually acceptable agreement gradually structured WTO jurisprudence.

1.1.2 The appeal: a sought-after recourse

While the AB was designed as a safety valve to guard against possible questionable panel decisions, it turned out to be in much higher demand than initially expected. On average, 66.85% of the disputes were appealed between 1995 and 2014, a trend which contributed to the development of consistent case law. While in recent years two-thirds of the disputes were under appeal, in 2016 nearly 90% of the reports were appealed.

FIGURE 1 ■ Number of disputes referred on appeal to the WTO



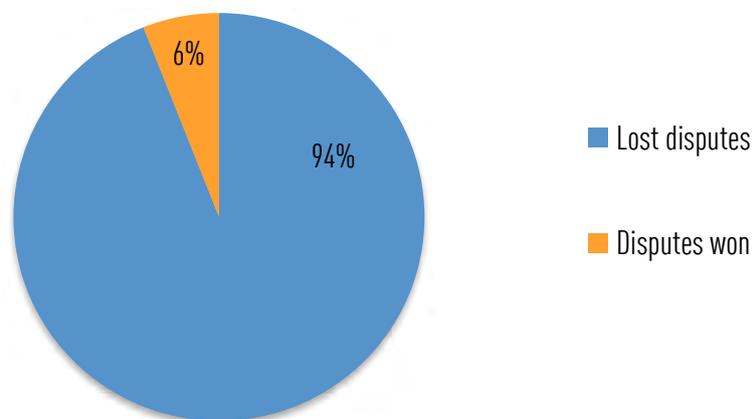
Source: Jacques Delors Institute (according to WTO data)

1.1.3. The United States as complainant and respondent

Not counting the disputes that were settled amicably, the United States won 90% of the complaints they filed. Of the 176 complaints that were appealed between 1996 and 2017, 85 involved the United States and in 55 cases they were complainants.¹ The United States is both the country that issues the most complaints in the world and the one targeted by the most complaints. It is also the country that loses the most cases in which it is the respondent. This win-loss ratio is, however, roughly equivalent to that of other member countries.

Yet concerning the anti-dumping measures applied by the United States and the European Union, 94% of the disputes in which the United States or the EU have been respondents have been lost on appeal.² The United States won only 2 disputes (DS221 and DS491) out of 29, and the EU not a single one of the eight cases in which it was involved. These figures better explain Washington's impatience with what they identify as a dysfunction of the WTO as far as trade defence instruments are concerned.

FIGURE 2 ■ Disputes over anti-dumping measures in which the United States and the European Union were defenders



Source: Jacques Delors Institute (according to WTO data, 2018)

1.1.4 The appointment of new judges and the risk of blocking the AB

It did not take Donald Trump for the United States to block the appointment of new WTO judges. In 2011 Barack Obama had already blocked the reappointment of Jennifer Hillman, an American, and in 2014 that of James Gathii, who also a US citizen. He did so again in May 2016 for the South Korean Seung Wha Chang, whom he criticised for adopting decisions that go beyond the rights and obligations of WTO members. In a sign of increased politicisation of the judicial appointment process, it was the first time Washington opposed the appointment of a non-US judge.

Since 2017 the US have been blocking the appointment process to find successors of three judges (since June 30, 2017, August 1, 2017 and December 11, 2017 respectively), causing growing concern. Of the seven judges who compose the AB, at present there are only four, whose terms expire on the following dates:

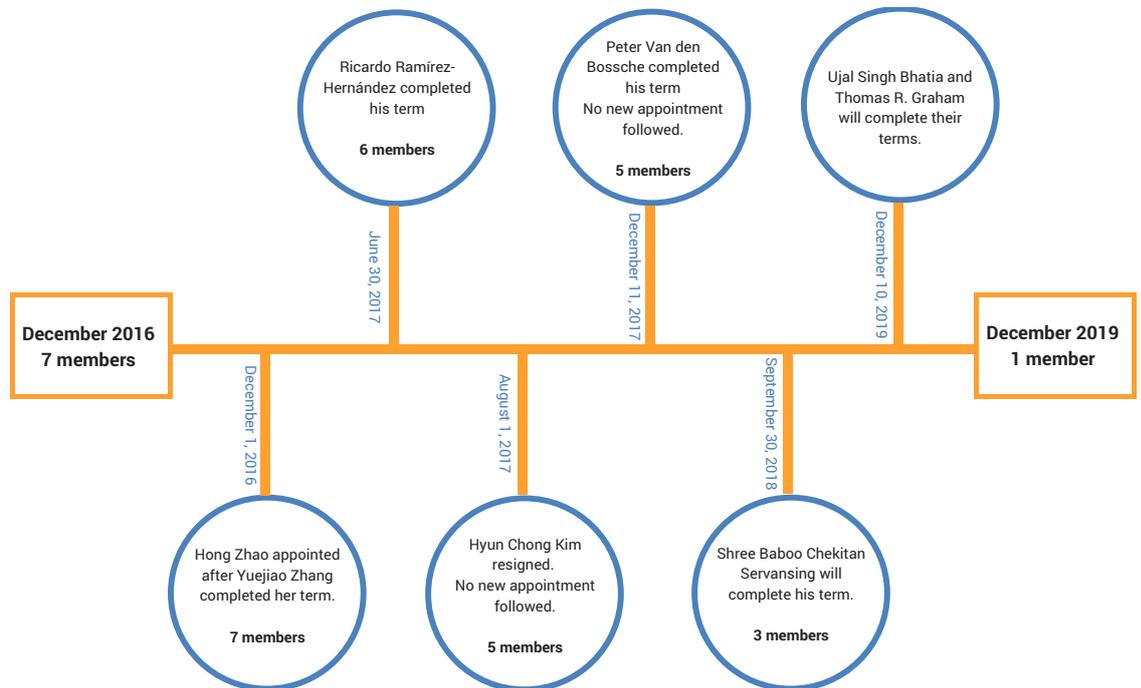
- September 30, 2018 (the Madagascan Shree Baboo Chekitan Servansing),
- December 10, 2019 (the American Tom Graham and the Indian, Ujal Singh Bhatia),

1. "The Dispute Settlement Crisis in the World Trade Organisation: Causes and Cures", Tetyana Payosova, Gary Clyde Hufbauer, and Jeffrey J. Schott, PIIE, March 2018, p. 3.

2. In this calculation from the WTO Dispute Index, only judgments handed down have been taken into account. It does not take into consideration cases involving safeguard measures or countervailing measures. In cases where the respondent only "partially" lost, the disputes were considered lost.

- and finally November 30, 2020 (the Chinese Hong Zhao)

FIGURE 2 ■ Terms of office of the judges of the WTO Appellate Body



Since there must be three persons to decide on a dispute, **the AB could be blocked as early as December 2019 if the United States continues to oppose the appointment of new judges, a procedure that takes several months.** Moreover, it is yet to be determined whether it will already come to a partial standstill by October 2018, in view of a questionable impartiality: since there would be only three judges in office, there would be no more possibility of random selection for the triad of judges dealing with each case.

Each judge is required to represent the totality of WTO Members and to refrain from defending the specific interest of its country of origin. However, the praxis dictating that a certain number of judge appointments is to be reserved for big trade powers (notably EU, US and China) emphasises the strategic impact of this appointment and reinforces the stakes for the judge's impartiality.

The scenario in which only three judges remain in office has not been considered in the AB working procedures. Even less the scenario in which the ones remaining are American and Chinese, in addition to an Indian one, as it would be the case by October 2018. In a context of a trade war between the US and China, the stakes for the two judges' neutrality leads to question whether it will be still possible to address cases on appeal in which the US and/or China are complainants or respondents.

It will also be noted that according to Article 16.4 of the DSU, once "a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal". It will therefore be sufficient for a member to decide to appeal to block the adoption of the DSB panel report which is not favourable to it, since the appeal procedure cannot be completed. Blocking the AB would also paralyse the DSB.

At the beginning of his presidency in January 2017, Donald Trump did not espouse a firm position on the appointment of judges to the AB. While the change of administration did not yet allow for an agreement to be reached on the launch of the procedure necessary to replace Peter

Van den Bossche, Washington said it was ready to support the consensus position advanced by Argentina, Brazil, Chile, Guatemala, Mexico and Peru. However, by the summer of 2017, the obstruction of the reappointment of judges has become evident.

Washington's frustration with the functioning of the AB was on display before Trump became President, and cut across party divisions. But there has undeniably been a change in position. The fact that judges whose terms have expired (Kim and Ramirez-Hernandez) are still examining cases that they were previously appointed to has been seen as a step too far.³

1.2 Washington's grievances against the AB: an old quarrel

The US Trade Representative (USTR) insists that successive US administrations have tried since 2005 to alert their partners to the dysfunctions of the AB, but to no avail. Neither the members of the WTO nor the AB, they argue, have taken note of these concerns.

The criticisms relate primarily to failures to respect the procedures of the AB. Yet there is also a political dimension to the issue. The increasing recourse to the AB is said to reflect the dysfunctionality of the WTO's negotiating leg and, sometimes circumvents the sovereign rights of WTO members – indeed, it is easier for a state to achieve progress on specific issues by filing a complaint against another state than by seeking to open multilateral negotiations. The jurisprudence of the AB even limits the ability of the United States to use trade defence instruments. In other words, if the AB is not responsible for the structural imbalance that has developed between the judicial law-making and the legislative rule-making in the WTO, it has nonetheless exacerbated it.

1.2.1 Non-compliance with procedures

- **The notice of resignation of a judge**

The resignation of Hyun Chong Kim, who became South Korea's trade minister, has not been subject to 90 days' notice, as stipulated in the AB's working procedures.

- **The increase in the duration of the proceedings under appeal**

While the time limits for conducting an appeal process are 60 days, or 90 days for complex appeals, they have been respected only once since 2013, and the current average duration is almost one year (for US-Aircraft it took 346 days, and the last three AB files took 265, 207 and 262 days). The AB may indeed request the DSB (and therefore the member countries) to grant it additional time if considered necessary. For Washington, compliance with the allowed time limit would encourage the AB to restrict its examination to questions of law rather than to re-examine the whole procedure.

- **What about ongoing proceedings when a judge's term expires?**

A rule of the AB's working procedures – Rule 15 – allows a judge whose term has expired to complete a case, subject to agreement of the AB and prior notice to the DSB. This possibility is primarily a matter of efficiency: if the procedure is already well underway it is counterproductive to solicit a new judge who would initiate it all over again, adding additional delays and costs. However, extending the average duration of an appeal procedure would only increase the opportunities for invoking Rule 15.

The United States is objecting to the application of this rule. Washington points out that if the

³ On August 31, 2017, the United States [declared](#): "We consider that the first priority is for the DSB to discuss and decide how to deal with reports being issued by persons who are no longer members of the Appellate Body. Members should consider how resolution of those issues might affect a selection process." This attitude was [confirmed](#) on October 23, 2017: "In the U.S. view, we cannot consider a decision launching a selection process when a person to be replaced continues to serve and decide appeals after the expiry of their term."

nationality of the newly appointed judge is the same as the nationality of the judge whose term of office has expired, this situation would allow a member country to have two sitting judges during this period of overlap, in contradiction with the rule according to which there should be only one judge per member country.⁴

On February 28, 2018, the United States again challenged the notion that this authorisation lies with the AB and that the DSB is only subject to notification, arguing that Rule 15 has not been approved by the DSB.

Exploiting this legal loophole to obstruct the appointment of new judges, Washington could also challenge the final decision made by the judges whose term has expired, and thereby call into question the authority of the AB. Since the United States does not currently have an appeal case that concerns them, it would not be affected. It should be noted that by early 2018, a member of the AB whose mandate expired last June is engaged in three appeal procedures and another, whose mandate expired in December, is tasked with the completion of five cases.⁵

However, the burden of an ever-increasing number of appeals that weighs on the remaining four judges will likely increase the duration of appeal proceedings even further. There is a growing risk of a case being handled by a judge whose mandate has expired. Conversely, the more proceedings are pursued by judges who have completed their terms, the more the United States will be inclined to block the appointment of new judges.

1.2.2 The progressive self-empowerment of the AB

The criticism of the non-compliance with the AB's procedures is accompanied by Washington's growing mistrust of what it refers to as the AB's "judicial activism": the body transgresses its remit. **The AB's adherence to the spirit and the letter of the Marrakech agreements is openly questioned.**

From the perspective of the United States, the Uruguay Round negotiations were aimed at creating an organisation revolving around the member countries, the only ones who are able to negotiate on a given subject. Whether it is the DSB or the AB, these bodies remain under the control of the currently 164 members and any problem of interpretation of the WTO rules must be addressed at the level of member countries. From this point of view, the WTO remains above all a deal that, on the part of its members, involves rights and duties, without the AB being able to develop independent WTO case law. Every judicial system is called upon to interpret the established legal norms, but it should do so solely by rectifying legal mistakes made by the DSB panel, not by creating new rights and obligations for WTO members.

The United States denounces the independence gradually acquired by the AB and considers that it is not the responsibility of this body to fill the gaps in the WTO agreements: the omissions in the texts have a particular *raison d'être*, since they draw attention to issues on which states have failed to agree. For Washington, it is essential to bear in mind the circumstances and the history of the negotiations for they provide the backdrop against which it is possible to interpret the agreements and to clarify the meaning of certain provisions.⁶

Washington accuses the AB of going beyond the limits of its mandate in several ways:

- **Overreaching:** the AB creates new obligations for the member states through its interpretation of the WTO agreements. The decisions of the AB judges are said to supplant

⁴ For example, the report on the dispute on EU – Antidumping Measures on Imports of Certain Fatty Alcohols from Indonesia (DS442), for which Judge Hyun Chong Kim was responsible, was circulated to WTO members after his resignation, and after the term of another judge on appeal, Ramirez-Hernandez, expired in June 2017. According to Washington, this amounted to a violation of the AB's working procedures, which should have led to the replacement of Kim by another judge or to a decision not to adopt the report.

⁵ "Transition on the WTO Appellate Body: A Pair of reforms?", IIEL Issue Brief 2/2018, p. 2.

⁶ PIIE, 2018, p. 8.

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THE UNITED STATES DENOUNCES THE INDEPENDENCE GRADUALLY ACQUIRED BY THE AB AND CONSIDERS THAT IT IS NOT THE RESPONSIBILITY OF THIS BODY TO FILL THE GAPS IN THE WTO AGREEMENTS.

the legal framework of the country concerned by the dispute.⁷

- **Obiter dicta:** rather than settle the dispute, the AB is accused of producing binding opinions on matters that are not raised by the parties and/or are not essential to the resolution of the dispute.⁸ Not only does this delay proceedings, it also creates case law for future litigation that is not appropriate.
- **De novo reviews:** most or all of the DSB panel's rulings are said to be reviewed by the AB, from the establishment of the facts (which fall within the competence of the countries) to their legal qualification (which falls within the competence of the panels). This, in fact, has led the AB to modify or reverse 85% of the DSB's rulings. For Washington this is tantamount to depriving WTO members of a two-step procedure.
- **Establishment of precedents:** the AB considers that only the interpretation of agreements it retains is valid, whereas according to the texts, if a provision admits several interpretations, the measure taken by a national administration is in conformity with the WTO to the extent that it respects one of the possible interpretations. Thus, Article 17.6 of the Anti-Dumping Agreement gives some weight to factual decisions and interpretations of the law of national authorities and is intended to prevent dispute settlement panels from making decisions based solely on their own views.
- **Significant dependence on the AB Secretariat:** The lack of legal expertise of some judges, it is argued, leads them to rely excessively on the work of the AB Secretariat, in terms of summaries of the positions of the parties, legal issues raised by the case, the evaluation of facts, preliminary draft decisions. In practice, the Secretariat has acquired a leading role in the development of commercial law jurisprudence. For Washington, abdicating sovereignty in this way would require the formal procedure of a vote in the US Congress.

1.2.3 A bias against trade defence

The United States has been increasingly wary of the influence of the AB Secretariat, which they blame for having developed a jurisprudence that is openly hostile to trade defence instruments (TDI).⁹ According to the United States, the AB is based on academic legal constructions¹⁰ rather than on the reality of distortions of competition caused by non-WTO compliant state subsidies. The AB's case law is even said to have disrupted the very balance between liberalisation and trade defence on which the WTO agreements rest.

The AB's interpretation of the WTO subsidy agreement in resolving the US-China dispute over state-owned enterprises (DS379) from 2011 is best able to illustrate the US criticism of a malfunctioning AB.

Recalling that Article 1.1 of the Agreement on Subsidies and Countervailing Measures (SCM), which was adopted during the Uruguay Round, defines a subsidy as "a financial contribution by a government or any public body". There is indeed a significant number of organisations which, while not enjoying the prerogatives of public authorities, are controlled by the government and can thus serve as a channel for a financial contribution (notably state-owned en-

⁷. DS449.

⁸. See the US Opinion on the DS453 Panama-Argentina Financial Services Reports, the DS430 between the United States and India on agricultural products, and the DS447/478 between the United States and Indonesia on the importation of horticultural products and animals.

⁹. *A Comparison of WTO and CIT/CAFC Jurisprudence in Review of U.S. Commerce Department Decisions in Antidumping and Countervailing Duty Proceedings*, John D. Greenwald, *Tulane Journal of International and Comparative Law* 21 (2), 2013, pp. 261-272.

¹⁰. This criticism is squarely aimed at P. Van den Bossche, a Belgian academic and former Acting Director of the AB Secretariat, then a member of the AB for two terms from 2009 to 2017, who is said to foster such interpretations.

terprises and public banks). To prevent states from circumventing the provisions of the SCM Agreement through the use of such bodies, the US argument goes, the drafters chose to refer to them under the generic term “public body”. Historically, any entity controlled by the government can therefore be said to be a public body in accordance with Article 1 of this Agreement.

The 2011 dispute centred on US anti-dumping and countervailing measures against Chinese state-owned enterprises that Washington considered public bodies, since they were mostly “controlled” by the Chinese government. Against this view, Beijing advanced a narrower definition of a public body, claiming that it was necessary to prove that these companies resemble an “entity that exercises authority vested in it by the government for the purpose of performing functions of a governmental character”. The decision of the AB panel sided with the Chinese definition.

BOX 1 ■

In the settlement of the 2011 US-China state enterprise dispute (DS379), Washington blames the AB for :

- having acted, without legitimate competence, to create a preamble to the SCM Agreement, which would henceforth be considered as a key to interpretation of the Agreement, based on the Punta del Este Ministerial Declaration that is not part of the WTO agreements. In addition, the AB is guilty of using a vocabulary which is not the same as that of the SCM Agreement, even though the very absence of a preamble was intentional, since it resulted from the impossibility of reaching a consensus on its aims and objectives.
- having considered as applicable rules the draft articles of the International Law Commission (ILC) on State Responsibility for an Internationally Wrongful Act of 2001, which have never been adopted by the parties. These draft articles, which fall under public international law, are said not to be appropriate for the framework of a multilateral law negotiated specifically to regulate international trade. They correspond to the specific intentions of states at a given moment to limit public subsidies.
- having been based on draft Articles 4 and 5, which define an organ of a state as any entity exercising and/or empowered to exercise elements of governmental authority, to consider that in the anti-subsidy agreement the term public body does not necessarily cover state-owned enterprises.

According to **the 2011 case law**, countries wishing to use the anti-subsidy agreement against a state-owned enterprise will have to demonstrate that the enterprise in question is invested with “governmental authority”. This makes the implementation of the agreement particularly difficult and **constrains any new initiative by the United States or other members of the WTO against Chinese state-owned enterprises**. The Chinese government has now grounds to present state-owned enterprises, long held to be temporary expression of a transition towards market capitalism, as a sustainable model for the organisation of its economy.

In 2014, the AB panel’s conclusions on a new dispute between the United States and China over state-owned enterprises draw on the 2011 case law to recall that not everybody in which the state has a majority stake can be considered a state enterprise. The United States retorted that if the drafters of the anti-subsidy agreement had wished for such a restrictive definition, they would have been clearer, and that any enterprise which is controlled by the state or of whose resources the state can dispose freely should be viewed as a “public body”.

For its part, **the European Union considered** that the AB’s 2011 report does not provide a definitive interpretation of the term “public body” and **that there is a lack of information – and transparency – on these issues, which makes it harder to determine whether such bodies perform functions of a governmental character**.

By reducing the scope of the SCM Agreement - if anti-subsidy measures can only be imposed on entities invested with governmental authority, many state-owned enterprises are de facto excluded – the case law of the AB is said to be out of step with current distortions in competition. In addition, it imposes on the complainant the burden of proof that the state enterprise in question performs governmental functions, without even specifying the type of evidence that must be provided.

The AB's decision is said to introduce uncertainty because it does not state that the Chinese state-owned enterprises do not constitute public bodies. Rather, it argues that the US Department of Commerce based its decision on a misinterpretation of the term "public body". In doing so, the AB, according to the US view, does not fulfill its primary function, which is to provide clear and practical guidance for the application of WTO agreements.

Finally, **the United States maintains that, not only does the AB's decision discourage further litigation of the type brought to the WTO by the US, it will also have the counterproductive effect of encouraging countries, notably China,** to act opaquely by concealing the control they exercise over companies, since the burden of proof lies with the complaining administration.

This issue has all the more aggravated bipartisan US criticism and a loss of confidence in the WTO since the scale of Chinese subsidies creates a systemic problem of overcapacity in many sectors (steel, aluminum, cement). As the US trade representative announced, "We [the United States] will aggressively continue pursuing these [enormous Chinese distortions and the special rights and privileges enjoyed by China under the anti-dumping rules and not enjoyed by other members of the WTO] and other issues to ensure that the WTO promotes true market competition that rewards hard work and innovation – not market-distorting practices in countries like China."¹¹

If the WTO cannot enforce the existing agreements and prevents its members from making full use of the trade defence instruments, does the United States have no other remedy than unilateralism to restore fair trade relations?

2. HOW TO RESTORE THE TWO LEGS OF THE MULTILATERAL SYSTEM?

Does Donald Trump seek to undermine the AB to rid the United States of the shackles of the multilateral system? By blocking the AB, he is exerting leverage over US partners to publicly acknowledge that some of its decisions have called into question the spirit of the Marrakesh Agreement, and could prompt them to resolve this problem. But if US criticisms of the functioning of the AB are clear, the same cannot be said of the US proposals for reform. **What role, then, could Europeans play in encouraging the United States to remain committed to this body intended for the regulation of trade disputes?** Will adjusting the working procedures of the AB be sufficient? Or do the dysfunctions denounced by Washington adumbrate deeper systemic shortcomings of WTO rules when it comes to fighting against increasingly problematic distortions of trade competition? To save the WTO's "litigation leg", it will also be necessary to reinforce its "negotiation leg".

2.1 The litigation leg: the reform of the procedures of the AB

The rules for amending the AB's working procedures offer more flexibility than the Dispute Settlement Understanding (DSU). In order to amend the DSU, which sets the rules of the appeal, a consensus must be reached within the Dispute Settlement Body and at a WTO Ministerial Conference. The US and Chilean attempts to amend the DSU to compel the panels and the AB to adhere strictly to their mandate have failed to obtain the required consensus.¹²

¹¹ 2017 Annual Report of the President of the United States on the Trade Agreements Program, USTR, p. 33.

¹² PIIE, 2018. See, for example, WTO DSB, "Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding on Improving Flexibility and Member Control in WTO Dispute Settlement", Contribution by Chile and the United States, TN/DS/W/28, December 23, 2002; WTO DSB, "Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding," Further Contribution of the United States on Improving Flexibility and Member Control in WTO Dispute Settlement, Communication from the United States, TN/DS/W/82, October 24, 2005, and Addendum, TN/DS/W/82/ Add.1, October 25, 2005.

By contrast, the AB's working procedures are developed in consultation with the WTO Director-General and the Chair of the Dispute Settlement Body (DSB). In order to amend them, the AB is not explicitly obliged to obtain a consensus from the DSB (Article 17.9 of the DSU) and must take into account only the comments of the WTO members. The working procedures of the AB have been modified six times since 1995.¹³

There is one additional obstacle: a time limit following which these amendments would no longer be possible. Indeed, all decisions that do not relate to an appeal (which shall be taken "solely by the division assigned to that appeal", i.e. three judges) "shall be taken by the Appellate Body as a whole".¹⁴ What is meant by "as a whole" has provoked debates among legal experts. Does it refer to the seven judges/members of the AB? What if there are only four out of seven, as is currently the case? Does it refer to a majority of four judges? Would it still be possible to amend the AB's Working Procedures after September 30, 2018 when Shree Baboo Chekitan Servansing's mandate expires, and the United States was continuing to block the appointment of new judges, there would be only three judges?

The minor criticism of the non-respect of the 90-day notice required before the resignation of a judge is an issue that must be better anticipated. There are several possible ways of amending the procedures to address Washington's concerns and encourage the United States to uphold the functioning of the AB and the WTO dispute settlement system as a whole.

2.1.1 Limit the scope of Rule 15

Several avenues of reform could be envisaged to limit the scope of Rule 15 - which allows a judge whose term has expired to complete an appeal procedure -, although US objections persist.

It would be conceivable:

- (i) to agree that the AB authorise continuation only when the key stage of the appeal hearing has taken place:¹⁵ this would limit the use of Rule 15 but does not erase the risk of having two judges of the same nationality with several months of overlap.
- (ii) to prohibit a judge from starting to hear a case three months before the end of his term of office (the maximum length of time for hearing a case): this does not yet guarantee that the investigation of a case will not exceed this time limit and the expiry of term of the judge.
- (iii) to extend the term of office of a judge until there is a consensus on the appointment of a new judge, as is the case for the International Court of Justice and most other courts and international tribunals.¹⁶ This would still leave the possibility that the home country of the judge whose term of office is extended uses its veto to block the appointment of a new judge and keep the sitting judge in place. Apart from the fact that this may require an amendment to the DSU (Article 17.2) and not just an amendment to the AB's Working Procedures (Rule 15), the United States has recently¹⁷ opposed this option, considering that the DSB does not resemble an international court or tribunal.

If the United States focuses much of its criticism on this issue, it is also due to the increase in the duration of the proceedings under appeal which reinforces the risk of *orbiter dicta* and leads to the increasing self-empowerment of the AB.

¹³ https://www.wto.org/french/tratop_f/dispu_f/ab_procedures_f.htm#fnt1

¹⁴ Rule 3.1 of the Working procedures for appellate review.

¹⁵ IIEL, 2/2018.

¹⁶ It should be noted that this is also the principle in use for the members of the US International Trade Commission. (IIEL, 2/2018, p. 4).

¹⁷ [United States Declaration on the DSB](#) of March 27, 2018, p. 11.

2.1.2 Clarify “constructive ambiguities”

As previously mentioned, American criticisms of overreaching, *orbiter dicta*, and the limitation of various interpretations of the WTO agreements to the verdicts of the AB (establishment of precedents) express the same concern. There is a fear that the AB encroaches on certain ambiguities within the WTO rules, described as “constructive ambiguities” since they were voluntarily acknowledged by the WTO members and hold out the prospect of future negotiations. The United States is not alone in raising this concern; Mexico, India, Chile, Argentina, Pakistan, Costa Rica, Malaysia and Turkey expressed similar reservations.¹⁸

Recalling that in the DSU it was clarified that “recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements” (article 3.2), the US President’s 2017 Trade Policy Agenda even went so far as to restate Washington’s commitment to the primacy of American sovereignty over any form of international jurisdiction.¹⁹

It should be noted, however, that the most important innovation introduced by the Uruguay Round to strengthen the dispute settlement mechanism is the introduction of the “negative consensus” principle referred to above, which requires consensus to oppose the adoption of a report.²⁰ As Pascal Lamy, former Director General of the WTO points out, “this is how the Rubicon of supranationality was crossed in 1994.”²¹

Rather than contesting the supranationality of the AB’s decisions, a first possibility to clarify the “constructive ambiguities” of WTO rules would be to refer to a WTO Committee the ambiguous issues that require debate and negotiations between members – this is the option preferred by Washington.

The second option is to apply (with an authoritative interpretation) the three-quarters rule in article IX.2 of the Marrakesh Agreement and to move beyond the historical practice of consensus.

While AB procedural amendments may seek to reopen a more constructive dialogue with Washington (without thereby abolishing all the grounds for US criticism), it is to be expected that a decisive challenge remains untouched: **how to transpose the discussion of the ambiguities of the WTO rules, which has barely begun, to the appropriate political level.** Processed on a case-by-case basis, depending on the complaints referred to an appeal procedure, these ambiguities could just as easily call for a negotiation that would be directly more focused on the problem at the heart of US criticisms: Chinese state capitalism and certain very specific distortions it causes. These are of concern to the US, Europe, Japan and other countries around the world. Saving the Appellate Body requires an investment of political capital to strengthen the WTO’s “second leg”: negotiation. The recent US complaint to the WTO against China-mandated technology transfers further demonstrates **Washington’s continued interest in the multilateral system, which Europeans must draw on to re-engage the debate on WTO rules.**

When the current AB chairman, Ujal Singh Bhatia, spoke in May 2018 of the need not to weaken the WTO dispute settlement system in an attempt to “revitalise” its bargaining power – for members will only be willing to agree on new rules if their implementation can be guaranteed – he has only emphasised the inseparable link between these two bodies of litigation and negotiation.²²

18. “The Broken Multilateral Trade Dispute System”, Terence P. Stewart, Asia Society Policy Institute, February 7, 2018, p. 5.

19. *The President’s 2017 Trade Policy Agenda*, p. 2.

20. In doing so, the right of any party, most often the one whose measure is challenged, to block the establishment of a panel or the adoption of a report would be abolished: “Historic development of the WTO dispute settlement system”, WTO. https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c2s2p1_e.htm

“WTO Bodies involved in the dispute settlement process”, WTO : https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s1p1_e.htm#decision_making

21. “L’Organisation mondiale du commerce et le droit”, Pascal Lamy, Communication à l’Académie des Sciences morales et politiques, Paris, January 18, 2016.

22. https://www.wto.org/english/news_e/news18_e/ab_07may18_e.htm



RATHER THAN CONTESTING THE SUPRANATIONALITY OF THE AB’S DECISIONS, A FIRST POSSIBILITY TO CLARIFY THE “CONSTRUCTIVE AMBIGUITIES” OF WTO RULES.

2.2 The negotiation leg: Strengthening WTO disciplines

The pressure brought to bear on China to lure the country to the negotiating table needs to be multilateralised, as bilateral talks between the United States and China are likely to penalise other countries, and particularly developing countries. It is at the WTO level that these issues need to be addressed. **China cannot be said to violate the WTO rules it acceded to in 2001, but the country's level of development no longer justifies the continuation of certain distortions. The cracks in the multilateral discipline have become too wide, and no longer allow for the tackling of these distortions.**

2.2.1 State capitalism in China

When it was created in 1995, the WTO was conceived as an international organisation to facilitate trade between market economies, in which the role of the state remains limited. China's entry into the WTO in 2001 was a challenge for the multilateral system that was all the more significant since the WTO had to absorb an economy based on a very broad public sector and a predominant role of state-owned enterprises. This transition raised questions about the WTO's ability to regulate such a state-dominated economy. As early as 1998, international trade experts such as Gary Clyde Hufbauer began to call on China "to privatise and liberalise its SOEs over the next decade, or the fabric of the WTO will be ripped."²³

China's accession protocol had already initiated a strengthening of the defence instruments of other WTO members. This, though, amounted to simple adjustments that were unable to seriously deal with the issue.²⁴ Since 2001, major Chinese government subsidies have bolstered the steel and glass industry, as well as the production of paper and auto parts.²⁵

While there was some effort to liberalise the Chinese economy, since the financial crisis the importance of state-owned enterprises has only increased. Today, they account for nearly 40% of China's main industrial assets, and 80-90% of the market share in "strategic industries".²⁶ In recent years there have also been significant mergers of state-owned enterprises to create national and international champions with considerable power in terms of competitiveness and market dominance.

This has become particularly significant in the steel and aluminum sectors where Chinese government subsidies have caused significant overcapacity problems. The EU's ambassador to the WTO referred to the subsidies of the Chinese state when in May 2018, at the WTO General Council, he declared that the current problems of global economic distortions and overcapacity are due to production methods that are not based on market principles (non-market based production).²⁷ **These distortions resulting from the Chinese economic model constitute a problem for the multilateral system.**

As China has filed a complaint with the WTO after the expiry of its accession protocol in December 2016 against countries that do not recognise its market economy status,²⁸ the issue is clearly fuelling tensions.

²³. "China as an Economic Actor on the World Stage: An Overview," G. C. Hufbauer in *China in the World Trading System: Defining the Principles of Engagement*, ed. F. Abbott, Kluwer Law International, 1998, p. 50.

²⁴. "The Treatment of Chinese SOEs in China's WTO Protocol of Accession", Philip Levy, Volume 16, Issue 4, World Trade Review, October 2017, pp. 635-653.

²⁵. Usha Haley and George Haley, *Subsidies to Chinese Industry: State Capitalism, Business Strategy, and Trade Policy*, Oxford University Press, 2013

²⁶. Trade Policy Review: China, WTO, 2016. https://www.wto.org/english/tratop_e/tpr_e/tp442_e.htm

²⁷. https://eeas.europa.eu/delegations/world-trade-organization-wto/44201/eu-statements-ambassador-marc-vanheukelen-general-council-8-may-2018_en

²⁸. The EU maintained its position while agreeing in December 2017 to strengthen its anti-dumping instruments.

2.2.2 Providing a political response through a trilateral initiative

Saving the AB and preserving the integrity of the WTO require a political response to this challenge. So far it has attracted the attention of the G20 members without jolting them into decisive actions. On the margins of the 11th Ministerial Conference of the WTO, which was held in Buenos Aires in December 2017, the United States, the European Union and Japan initiated a “trilateral initiative” to jointly address Chinese economic distortions (subsidies, state-owned enterprises, forced technology transfers, local content requirements and preferences).²⁹ In March 2018, they drew up a list of joint actions, planning to meet on the sidelines of the OECD Ministerial Meeting of May 30-31, 2018 in Paris to advance common initiatives.

If there is momentum for reform to better regulate the subsidies of Chinese state-owned enterprises, these efforts should aim at both reinforcing the implementation of the existing rules, especially regarding the notification of subsidies, and strengthening the disciplines on subsidies, including below-market financing by public financial institutions. The spectre of Chinese distortions is daunting, but the trilateral initiative could focus first and foremost on the issue of subsidies.

2.2.3 Ensure the implementation of existing rules

In the WTO, members can take protective measures against companies that have received subsidies and against certain subsidies, such as export subsidies, which are prohibited. **It must be ensured that these rules are respected, not least by notifying other WTO members of any government subsidy.** Article 25.1 of the Agreement on Subsidies and Countervailing Measures (SCM) obliges all WTO members to adhere to notification deadlines. However, the WTO estimates that since 1995 the percentage of members reporting subsidies has fallen from 50% to 38%.³⁰

SCM Committee Chairman Jin-dong Kim reiterated his concern over the chronically low compliance with transparency obligations, which undermines the functioning of the SCM agreement.³¹ In particular, the EU proposes to amend the rules on transparency and notification of subsidies along the following lines:³²

- having more streamlined monitoring of compliance with notification obligations and a greater involvement of the WTO Secretariat
- making it possible to lodge a complaint against a subsidy when the state which granted it did not notify it, despite the request addressed to it by the complainant
- creating a “general rebuttable assumption”, whereby all non-notified subsidies would be presumed to be actionable by other WTO members.

The commitment of other major trading powers affected by these notification failures, the United States and Japan in particular, would be crucial for restoring confidence in the functioning and legitimacy of the WTO. These measures would provide an opportunity to better fight against unfair competition due to subsidies granted to certain enterprises.

2.2.4 Amend the rules

As part of their trilateral initiative, the United States, the European Union and Japan should also aim to strengthen the discipline of SCM on subsidies. Following a meeting in Geneva in October 2017, their proposal, submitted to the WTO alongside Canada and Mexico, targets be-

²⁹ http://trade.ec.europa.eu/doclib/docs/2017/december/tradoc_156458.pdf

³⁰ “Améliorer les disciplines relatives aux notifications de subventions”, TN/RL/GEN/188, WTO, 2017.

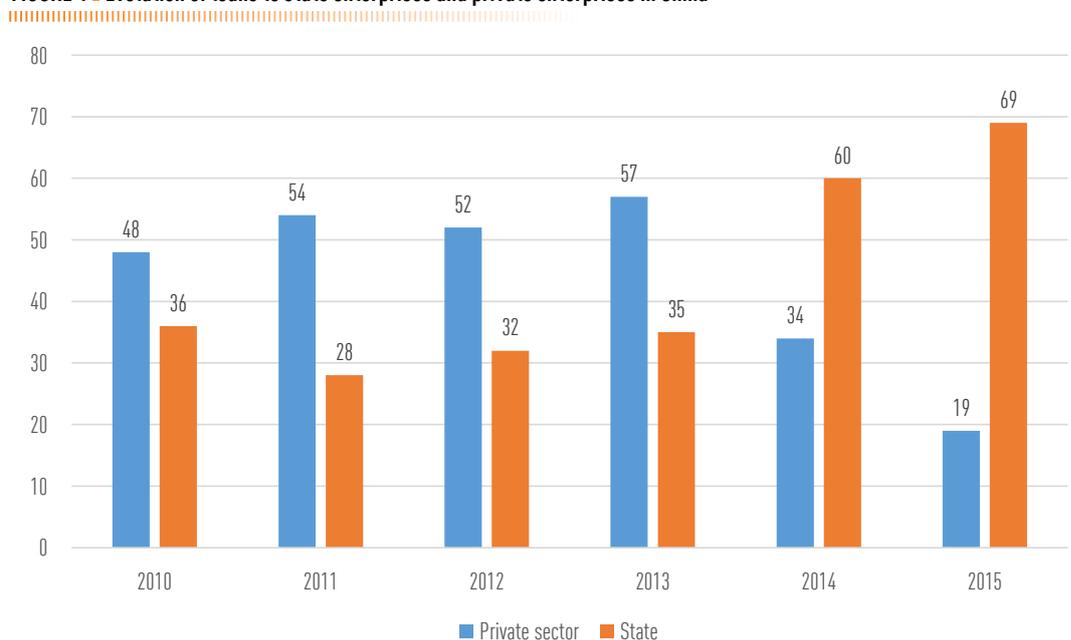
³¹ https://www.wto.org/english/news_e/news17_e/scm_25apr17_e.htm

³² http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155815.pdf

low-market financing for certain companies, which helps these companies stave off bankruptcy, encourages higher production and causes overcapacity in export markets. This is targeted at the Chinese financial system, which provides financing for the private sector. The proposal is organised around three categories of state-owned and state-controlled banks: commercial banks, joint-stock commercial banks, and state policy banks. Together, they account for nearly 70% of Chinese banking assets in 2015.

The predominance of the state in the Chinese financial sector allows the government to protect and develop strategic industries, regardless of commercial considerations. In recent years, increasingly large loans to dubious state-owned enterprises have exacerbated the problems of overcapacity in international markets. Nicholas Lardy of the Peterson Institute for International Economics has shown that the share of loans to Chinese state-owned enterprises has increased substantially relative to loans to private enterprises, although the profits of state-owned enterprises are much smaller.

FIGURE 4 ■ Evolution of loans to state enterprises and private enterprises in China



Source : Peterson Institute for International Economics, Nicholas R. Lardy and Zixuan Huang, 2018

Limiting the ability of the state to intervene in the financial sector is a sensitive issue, especially since the 2007-2008 financial crisis. Among the main challenges related to Chinese subsidies are the “less than adequate remunerations” (LTARs) through which the government supports companies with financing below market rates. It should be said, though, that other countries have done the same in the wake of the crisis.

Another avenue would be to curtail state funding to companies that do not have a credible restructuring plan. This may not be sufficient to tackle the problem of Chinese subsidies since firms can restructure without leaving the market, as they are meant to do. There also needs to be additional work on when debt forgiveness should be permissible, defining an uncreditworthy company, and how to consider whether debt-for-equity swaps are on commercial terms.

While it remains difficult to reach an agreement on financing below short-term market rates, active consultation of the major economic powers is necessary. To bring China to the negotiating table to amend the SCM Agreement, it is essential to rally around constructive proposals, keeping in mind the imperative of safeguarding the multilateral trading system.

Tightening the disciplines of the WTO would also lead to **a reconsideration of the multilateral regime governing the agriculture sector** – where the United States should in return be willing to make concessions. In addition, **regulations for e-commerce, as well as for non-tariff barriers** that are now becoming more important in trade, are required.

Privileging this constructive approach with the United States to enter into a negotiation on the strengthening of the disciplines of the WTO, which Europe and many other commercial partners call for, means to engage in a power struggle with China. However, if Donald Trump were to turn his back bargaining with Xi Jinping by restricting himself to mere transactions based on percentages and import quotas, the big defenders of the multilateral order would be forced to preserve this order by other means.

2.3 Reconsider the consensus principle to preserve the multilateral order

If the threat of a blockade of the AB and the entire dispute settlement system is a deterrent that the United States uses to persuade China to come to the negotiating table, it is just as much a threat to other members of the WTO. They must also be prepared to resort to emergency measures as a last resort to preserve a dispute settlement capacity, if necessary without the United States.

2.3.1 The “nuclear option” of a qualified majority

The American veto on the appointment of new judges to the AB could be circumvented by a qualified majority vote. The appointment procedure would be put on the agenda of the WTO General Council, which would exceptionally apply the principle of a qualified majority.

Described as the “nuclear option”, this approach would require the determination of a strong coalition of WTO members willing to oppose the United States. Nevertheless, this option would still favour recourse within the WTO framework. Other measures, designed to be transitory, also deserve a mention.

2.3.2 Transitional fixes

The first option would be for the AB to amend its own rules to allow the DSB panel reports in exceptional cases to be considered final on the day they are appealed.³³ This would not formally remove the appeal process, but would grant time to find a consensual solution with the United States and/or China.

In addition, recourse to an ad hoc arbitration system, already authorised by article 25 of the DSU,³⁴ could guarantee the best effort of WTO members to continue to avoid a system of unilateral retaliation during this period, which should only be a transition phase.³⁵

Arbitration would be initiated on the basis of mutual agreement of the parties concerned, who must agree on the procedures to be followed and undertake to respect the final decision adopted, without the DSB being involved. In doing so this arbitration would still allow for remaining within the framework of the WTO. However, if Article 3.10 of the DSU calls on all members to engage in procedures “in good faith in an effort to settle this dispute”, in reality the reluctance of some countries to allow for arbitration in a dispute they might lose can prevail over the desire to preserve the multilateral system.

³³. “How to Save WTO Dispute Settlement from the Trump Administration?”, Steve Charnovitz, International economic law and policy blog, 3 November 2017.

³⁴. This type of arbitration was already used in 2001 to resolve a dispute between the United States and the European Union.

³⁵. Jens Hillebrand Pohl, University of Maastricht <https://www.maastrichtuniversity.nl/blog/2017/12/maintaining-trust-wto-adjudication-arbitration-safety-valve>

Finally, it could be envisaged to replicate the AB's procedures in a separate agreement, signed by a **"coalition of the willing"**³⁶ **determined to preserve the balance of international trade** without renegotiating the entire trade regime. This agreement would then take effect only if the AB were blocked by the United States. While moving the dispute settlement mechanism out of the WTO, this would still constitute an effort to preserve a plurilateral system.³⁷

For these various options to be implemented, the leadership of a critical number of WTO members is required. It would also involve a confrontation with the United States at the risk of inciting Washington to push for greater independence from the multilateral system. Such last resort, however, may be needed if Donald Trump applies his pressure on more than just Chinese distortions. The EU has a vital role to play in this leadership.

CONCLUSION

The current stalemate in the multilateral trading system is the consequence of a dual threat: that posed by United States to the dispute settlement mechanism and that posed by Chinese state capitalism to international trade. **This situation, while presenting major risks, is also an opportunity for the European Union.** The United States considers that over time the Appellate Body has limited the ability of WTO members to adopt retaliatory measures against unauthorised subsidies under WTO rules and opened the way for unfair competition. Only by seriously addressing this issue can US criticisms of the Appellate Body be defused. Blocking the appointment process of judges should only be a means for creating the bargaining power with a China that must demonstrate its own commitment to a multilateral system, the benefits of which Beijing has enjoyed for twenty years. **Preserving the WTO by strengthening its two essential legs – negotiation as well as litigation – will be crucial for the future of the world economy.** If Donald Trump's vision turns out to be short-termist and considers above all the US mid-term elections in the autumn of 2018, it will be up to the other major trading powers including the EU to uphold a framework of plurilateral regulation. Such a course of action would be all the more needed for countering the new disruptive factor that the United States would become.



PRESERVING THE WTO BY STRENGTHENING ITS TWO ESSENTIAL COMPONENTS – NEGOTIATION AS WELL AS LITIGATION – WILL BE CRUCIAL FOR THE FUTURE OF THE WORLD ECONOMY.

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SCM: Subsidies and Countervailing Measures Agreement

USTR: United States Trade Representative

³⁶. "From the Board: The US Attack on the WTO Appellate Body", *Legal Issues of Economic Integration*, Kluwer Law Online, Volume 45 (2018), Issue 1, pp 1-11.

³⁷. "The US Attack on the Appellate Body", Pieter Jan Kuijper, *International Law and Economic Policy* blog, November 2017.

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