

BLOG POST

THE WTO IN CRISIS : CAN WE DO WITHOUT MULTILATERALISM IN THE DIGITAL AGE?

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Even though we are at a time of urgent need for new multilateral rules that guide the digital transformation and the green transition, the United States is trying to block one of the multilateral system's most important mechanisms: the WTO's court of appeal, called Appellate body (AB). While the paralysis of multilateral negotiations has been widely criticised, many have forgotten that the World Trade Organisation (WTO) also plays an important role to maintain the existing order. As the only multilateral institution with a dispute settlement mechanism (DSM) that ensures compliance with the rules adopted by its 164 members, it acts as a pillar supporting the multilateral rules that have been gradually built over the past seventy years. So what will be the impact of the United States blocking new appointments to the Appellate Body?

The US administration had until 10 December to lift his veto on the appointment of new judges. This would have avoided the halting of ongoing disputes and the settling of new ones. But, as was expected, the final blow was delivered. At the beginning of his presidential re-election campaign, Trump had been struggling to negotiate an early trade arrangement with China and had yet to show some muscle. After his first strikes against the multilateral system (e.g. the violation of the most-favoured-nation principle, the misuse of the national security exception, the reduction of US contributions to various international institutions), will he succeed in unravelling the web of multilateral rules? What is the WTO's capacity for resilience? And how can space for multilateral cooperation be preserved?

Does the US want to reform the system, leave it or dismantle it?

Does the American president want to turn the clock back to 1995 or even 1994? A return to 1995, the date of the creation of the WTO, would be a return to the founding principles of dispute settlement. Washington believes that judges have distanced themselves from these principles, which limits US trade defence capabilities, in particular the use of anti-dumping measures. US criticisms of the functioning of the AB are well known and include judicial activism, *obiter dicta*, *de novo* review, and the setting of precedents.¹ The EU, together with other countries, have made efforts to respond by making specific proposals to reform procedures. They have all been rejected by the United States, which hasn't offered any alternative

1. For an overview of criticisms, cf. 'Saving the WTO Appellate Body or Returning to the Wild West of Trade', Elvire Fabry and Erik Tate, Policy Paper 225, Jacques Delors Institute, 30 May 2018.

proposals that could pave the way for reform. However, the United States has recently filed complaints at the WTO, which indicates at least some desire to preserve the system.

Is it then a question of going back to 1994? This would involve a dismantling of the current system to return to the arrangement under the General Agreement on Tariffs and Trade (GATT), under which there was no binding nature for the parties to the dispute. This would be much more serious in the eyes of Europeans, who had worked hard to establish this major institutional breakthrough for global governance.

However, to assess the current American attraction to be free from multilateral rules, we should pay less attention to the historical criticism of the supranational dimension of the AB and the implications for American sovereignty. Instead, we should focus on the 'Trumpian' method of unilateralism, which poses a risk of uncontrolled dismantling of multilateral rules.

Behind the criticism of the AB's working procedures, the most fundamental concern of the United States is that AB panels have a tendency to compensate for the lack of stronger WTO rules by producing case law that replaces negotiations between the parties to a dispute. Instead, the US argues that the ambiguities of multilateral rules have a specific function, which reflects the lack of consensus of WTO members that cannot be resolved by the AB judges. The facilitator appointed by the WTO, David Walker of New Zealand, issued a point-by-point rebuttal to the American critique. He proposes to establish a mechanism for resolving conflicts that arise from the functioning of the AB, which would enable a dialogue between litigation and negotiation, i.e. to go back to the negotiation of the WTO members.

The EU has understood one thing well: to keep the United States in the WTO, China has to be brought back to the negotiating table. When Trump is attacking AB judges, it is because WTO rules have become insufficient to combat the trade distortions that are caused by assertive Chinese state capitalism. The American criticism of the appellate body was notably crystallised by two contentious decisions in 2011 and 2014 which provided a restrictive definition of public bodies limiting the application of anti-dumping measures against Chinese state-owned companies. Although in the summer of 2019 the AB adopted a broader definition of public bodies, this was not enough to change Washington's position. To obtain tangible guarantees for a reform of the Chinese economy, Trump now relies primarily on an aggressive unilateral method, even if it is currently in vain.

Yet China is looking with favour on the WTO system. After paying a high price when entering the WTO in 2001 and committing to deeper economic liberalisation than other developing countries (such as India and Brazil), it has taken full advantage of the stability offered by the multilateral regulatory framework to develop trade links. China is now a defender of multilateralism and supports the Appellate Body's reform proposals that have been put forward by various members, including the EU. Still, it will take an investment agreement between the EU and China that guarantees fair treatment of foreign and Chinese companies to determine whether the Chinese Communist Party is making a credible pledge that China is converging towards a market economy. However, even then it is unclear if this would be enough to convince Washington to continue on a multilateral path. Beijing is currently adopting a strategic position of patience towards Trump, while his re-election campaign is under way. But without the ability to assess Xi Jinping's real appetite for reform, how can the multilateral system be preserved?

What is the WTO's capacity for resilience?

The suspension of the Appellate Body does not necessarily lead to a standstill of the WTO. The rest of the WTO's institutional machinery will continue to operate with deliberations on many topics in its committees, which provide a complementary consultative role to plurilateral negotiations, as does the trade policy review mechanism and the related review of national trade-related policies. However, while the implementation of dispute resolution decisions may have been unsatisfactory, it has served as a safeguard and promoted compliance with multilateral rules. On the other hand, in the absence of a binding mechanism for implementing the rules, the suspension of the AB also blocks the Dispute Settlement Mechanism (DSM), so how much credibility can be given to new multilateral rules?² Will WTO members still be ready to invest a lot of political capital in complex negotiations?

Avoid the unwinding of multilateral rules

In the summer of 2019, the EU signed an agreement with Canada and Norway to set up a provisional appeal system based on the WTO model. Other countries, including China, have asked to 'plurilateralise' the European initiative in order to find new ground for cooperation with the United States. Indonesia and Vietnam have also jointly decided not to appeal to settle their ongoing disputes. Initiatives are multiplying in an attempt to preserve the 'multilateral acquis', understood as the legacy of all WTO agreements. This is first of all based on a number of principles, such as transparency, consultation, and non-discrimination, which are at the heart of international cooperation. But are these principles sufficient to prevent other states from following the example of the United States to gradually escape from multilateral rules, which would provoke beggar-thy-neighbour policies? Small and least developed countries know that they have much to lose by returning to simple balance of power politics. While it is difficult to assess the ripple effect of American unilateralism, it is more apparent which impact it would have on the international stage at a time of renewed fragmentation.

What arrangements can ensure peaceful coexistence?

In an era of global connectivity, trade is set to develop more around digital flows than on maritime routes. Risks from monopolies, inequalities and global imbalances will be amplified by artificial intelligence, which all calls for more multilateral regulation. Data storage, data localisation and discriminatory access to data create distortions for competition and security risks for states, companies, and individuals. The fight against climate change makes it necessary to put sustainable development objectives on the WTO agenda to develop greater compatibility between trade and the greening of the global economy. Many other issues, including investment, also deserve more multilateral regulation. In a time of total connectivity, there is only marginal room for isolationism. The decoupling of the US and Chinese economies, initiated by the Trump administration as part of its trade war, will meet with resistance beyond the technology sector. Moreover, the objective to achieve strategic autonomy concerns first and foremost the desire to preserve access to key technologies and raw materials (such as rare earths). It is not aimed at isolation, but it endeavours to organise interdependence on the basis of rules governing fairer competition, that is, by creating a level playing field.

². In the absence of the minimum number of three judges for the AB to function, it will be sufficient for any country that has lost the decision of a DSM panel, to send it back to appeal and proceedings would effectively be blocked.

While convergence towards the model of a liberal market economy has not been automatic, there is need to seek peaceful coexistence that better integrates the rise of new actors. On the one hand, there are emerging economies in a multilateral trading system which distributes trade preferences between developing and developed countries on an overly binary basis. On the other hand, there is a rise of a greater diversity of private or public actors in a more complex system of multi-level governance. The field of cyber security, in which states are exposed to the growing influence of private companies, criminal networks or other foreign powers, illustrates in itself the shift of power from states to other power centres and a greater role of non-State actors in the regulation of the sector. How, then, can we preserve a space for international cooperation and regulation?

Pluralisation by default or better adapted to regulatory cooperation?

More than fifty states have responded to the call from Canada, Chile, France, Germany, Ghana, Mexico, and Singapore to reaffirm the priority needs to be given to multilateralism. But in parallel, we must actively invest in the plurilateral level, while putting in place principles that ensure that intermediate steps for differentiation leave the door open to multilateralise later on.

The WTO already allows for plurilateral agreements with sectoral preferences (such as environmental goods or e-commerce) that are limited to their signatories. But to become binding, there must be consensus among all WTO members and openness of the plurilateral for all those who wish to join later (if they comply with the conditions). Three such agreements are in place, concerning public procurement, trade in civil aircraft and information technology.

In addition, the new generation of regional trade agreements has a stronger regulatory component which allows to move from negative trade integration (removal of tariff barriers) to positive trade integration (regulatory cooperation that ensures a more level playing field). While the latter requires comparable collective preferences, the development of plurilateral regulation amongst countries sharing the same preferences makes all the more sense in the context of the confrontation between the three major regional groups in Europe, China and the United States. The attractiveness of the EU GDPR standards for personal data protection in countries that have adopted equivalent legislation should encourage Europeans to develop a plurilateral negotiating space in which they can promote their digital regulatory standards.

The continued negotiations by some fifty WTO members for a trade in services agreement (TISA) outside the multilateral framework (while Doha Round negotiations were stalled), leads to the search for some principles that would guarantee an inclusive dynamic for multilateralisation: promoting a plurilateral negotiating framework at the WTO with the possibility of support from the WTO Secretariat or ensuring transparency in the negotiations that could encourage a greater number of countries to join the plurilateral. The marginalisation of developing or least developed countries that could lead to a new fragmentation of multilateralism should also carefully be avoided.

To preserve the multilateral acquis and space for international cooperation, it will be necessary to restore a system for settling disputes between states and to actively engage in plurilateral negotiations. Nevertheless, we can clearly see the pitfall of a plurilateral commitment that would only reproduce the deadlocks of



multilateralism, if the big powers – United States, China, European Union and even India – don't meet at the negotiating table. The ability of the EU to engage China in plurilateral formats will thus be more crucial than ever and requires much more coordination and cohesion between European capitals.