

A Washington wake-up call and hybrid governance for world trade

Peter-Tobias Stoll

1. Introduction

For more than twenty years, we – the international economic law scholars and practitioners – have lived comfortably alongside the World Trade Organization (WTO) dispute settlement system. While at the same time, the trade community has also enjoyed an unprecedented period of stability in the stormy history of international economic relations following World War II. Now we are confronted with the erratic course of trade policies of an important WTO member, ‘trade wars,’ and with the shutdown of appellate review. In addressing these threatening developments, we should not forget the larger context. The stalemate of the Doha Round is one example – dating back to the very early days of the WTO. The mushrooming of ever-more complex trade agreements is another. This paper shall first discuss the resilience of the WTO system in view of the trade policies of the US, before tackling more general issues facing world trade and concluding with some general remarks and suggestions.

2. The wake-up call in perspective

The current discussion relating to the future of the WTO is hardly imaginable without, at the very least, touching upon the sudden, unforeseen, and bold changes in the United States (US) trade policy, brought forward by the current administration. Such a policy has introduced: the

* Prof Dr Peter-Tobias Stoll holds the Jean Monnet Chair for European Union and Global Sustainable Development through Law and is a Professor for Public International Law at the University of Göttingen. He co-directs the Institute for International Law and European Law and heads the Department for International Economic and Environmental Law.

unilateral imposition of tariffs on steel, aluminium and possibly cars, a promise of ‘trade deals,’ a bold stand against the People’s Republic of China, and the refusal to consent to the nomination of new AB members – all accompanied by related rhetoric.

In short, the current trade policy approach is rooted in the conviction that the WTO, trade agreements and trade more generally are unfair and work contrary to the US interest. This interest has ‘workers’ and ‘businesses’ in focus and is measured by, amongst other factors, the trade balance figures. A strong national economy is considered a core element of national security and the US is resolved to engage its economic power in changing the world trade system.¹

A vivid discussion is underway regarding the legality of each of the actions listed above, as well as regarding the potential outcome of the various disputes and possible solutions and workarounds. All of these discussions are important. However, what we see is more than the sum of highly problematic and contestable actions and legal reasoning, each worth a separate and thorough discussion. In the situation of a large and important WTO member going against the rules of the system as such, analysis cannot be confined to issues of legality of singular measures but has to probe into the ability of the system itself to withstand such a turn-around.

3. Unilateral tariffs for ‘national security’ and trade wars

Imposing additional import duties on steel, aluminium and possibly on cars from a larger group of exporting Members is a major element of contemporary US trade policy. Its aim is to provide relief from import pressure for related US industries and to facilitate the eventual conclusion of ‘deals.’ Most notably, the measures were founded on the ‘national security’ exception. In turn, and perhaps unsurprisingly, the affected exporting members, relying on the Safeguards Agreement, took tariff measures against imports from the US. And, consequently, a number of

¹ WTO, Trade Policy Review – Report by the United States, WT/TPR/G/382 (12 November 2018) 4: ‘1.2. U.S. trade policy rests on five major pillars: supporting U.S. national security, strengthening the U.S. economy, negotiating better trade deals, aggressive enforcement of U.S. trade laws, and reforming the multilateral trading system.’

disputes have arisen in this context. Altogether, these actions have rightly been labelled as a trade war. Can the WTO cope with these challenges?

a. *National security exceptionalism in US perspective*

‘National security’² is a trigger term both nationally and internationally. Under US law it triggers the application of Section 232 of the Trade Expansion Act of 1962,³ called the ‘national security clause’.⁴ The provision entitles the President to take action on the basis of an investigation to be conducted by the US Department of Commerce. A key question in the investigations is whether any article ‘is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security’⁵ – language not altogether uncommon to trade remedies and safeguards.⁶ In its report on steel, the Secretary of Commerce found that national security includes projected national defence requirements and critical infrastructure sectors and that domestic production is essential in this regard. Furthermore, the report stated that for the US industry to remain capable of serving defence purposes, some relief from import pressure is needed.⁷ The application of Section 232 in place of the other trade authorisations sends a bold signal.

² It should be noted that the use of the national security exemption has to be seen be seen as a part of a larger conceptual frame. As the above quotation from the national report of the US in trade policy review indicates, ‘supporting U.S. national security’ is mentioned as the first of ‘five major pillars’ on which the current US trade policy rests.

³ As amended, 19 USC s 1862.

⁴ US Congressional Research Service, Section 232 of the Trade Expansion Act of 1962, 23 February 2018.

⁵ 19 USC s 1862(b)(3)(A).

⁶ The legislation further mandates to ‘recognize the close relation of the economic welfare of the Nation to our national security, and ... take into consideration the impact of foreign competition on the economic welfare of individual domestic industries’ by examining whether any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports, or other factors, result in a ‘weakening of our internal economy’ that may impair the national security. See 19 USC s 1862(d).

⁷ US Department of Commerce Bureau of Industry and Security Office of Technology Evaluation, ‘The Effect of Imports of Steel on the National Security. An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, as Amended’ (26 October 2019) <www.commerce.gov/sites/default/files/the_effect_of_imports_of_steel_on_the_national_security_-_with_redactions_-_20180111.pdf>.

It is a significant shift in the ‘checks and balances’ system, allowing the President to act without the support of the Congress.

b. *National security in WTO perspective*

‘National security’ is also a trigger term within WTO law. It activates a special norm – Article XXI GATT. Again, that norm represents a ‘constitutional’ shift. In contrast to Article XX GATT – its fellow exception clause – Article XXI contains rather broad language and lacks a ‘*chapeau*’ with its disciplining function. In general, the terms and conditions in Article XXI clearly appeal to the understanding of ‘security’ in addressing situations of war or emergency or in dealing with weapons or military procurement. Indeed, in most cases, the provision has ever been used in such circumstances.⁸

Such cases stand far from the current US tariff measures, which are said to aim at keeping the US steel, aluminium and car industries healthy enough to, someday, supply the US military. While otherwise drafted in quite clear terms, Article XXI has one weak part. Although ‘relating to the traffic in arms, ammunition and implements of war’ in Article XXI(b)(ii) can be seen as being appropriately drafted for its purpose, the provision has a second part, which extends the exception ‘to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment.’ Read in the context of Article XXI(b) GATT, a WTO member is allowed to take ‘any action which it considers necessary for the protection of its essential security interests’ in this regard. There is, of course, a good reason to believe that military acquisition and procurement is special and merits some special treatment in view of economic law disciplines. To some extent, this is also taken care of by Article XXIII(1) of the Agreement on Government Procurement. Nevertheless, the GATT provision is pretty broad as it covers a whole range of goods and activities, particularly when taking into account the term ‘indirectly.’ In literal reading, the second part of Article XXI(b)(iii) may even cover the granting of import protection to whole

⁸ H Hestermeyer, ‘Art. XXI’ in R Wolfrum, P-T Stoll, H Hestermeyer (eds) *Max-Planck-Commentaries on World Trade Law* vol 5 (*Trade in Goods*) (Brill 2011) para 5; M Matsushita, TJ Schoenbaum, PC Mavroidis, *The World Trade Organization: Law, Practice and Policy* (2nd edn, OUP 2006) 594-97.

industries and branches of products, even those without any specific or direct defence purposes. In sum, one may conclude that while the drafters of the GATT have employed careful language in other clauses of Article XXI, they were considerably broad at this point.⁹

Evidently, such uses of the security exemption could noticeably undermine the whole system and the example at hand is proof for this – especially if we think about the enormous scale of trade being subjected to additional duties and the number of exporting Members concerned. This goes far beyond the only other reported case of the application of this clause, where Sweden imposed quotas for certain footwear, which met with much scepticism regarding its legality in the GATT Council, persuading Sweden to terminate the measure soon after.¹⁰

The broad terms used in Article XXI(b)(iii) have to be seen in context with the *chapeau* of Article XXI(b), according to which actions of a Member are only exempt where they are ‘necessary for the protection of its essential security interests.’ Article XXI(b) contains an element of self-judgement, as it states, that ‘any contracting party’ may take ‘any action, *which it considers necessary* for the protection of its essential security interests.’¹¹ The meaning of this self-judging element, its relationship to the various parts of Article XXI (b), and the standard of review in dispute settlement have been the subject of quite some debate in academia and practice. The US has originally argued that no review should take place at all. However, and for obvious reasons, this is hardly a convincing argument. After all, it would result in giving Members a *carte blanche* allowing them to exempt themselves from trade disciplines by simply raising the national security issue. The recent panel on *Russia – Measures Concerning Traffic in Transit* while dealing with Article XXI(b)(iii) and thus a distinctly different situation of ‘war and other emergency in international relations’ developed a sound and rather restrictive understanding. It stated:

‘that the adjectival clause “which it considers” in the chapeau of Article XXI(b) does not extend to the determination of the circumstances in

⁹ Hestermeyer (n 8) 33.

¹⁰ ‘GATT Article XXI – Security Exceptions’, in *The GATT Analytical Index: Guide to GATT Law and Practice* 603 <www.wto.org/english/res_e/booksp_e/gatt_ai_e/art21_e.pdf>.

¹¹ Emphasis added.



each subparagraph. Rather, for action to fall within the scope of Article XXI(b), it must objectively be found to meet the requirements in one of the enumerated subparagraphs of that provision.¹²

In the case at hand, this would imply that it could be seen in dispute settlement whether the action indeed relates:

'to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment.'

Furthermore, and regarding the *chapeau* of Article XXI (b), the Panel found that:

'the discretion of a Member to designate particular concerns as "essential security interests" is limited by its obligation to interpret and apply Article XXI(b)(iii) of the GATT 1994 in good faith. The Panel recalls that the obligation of good faith is a general principle of law and a principle of general international law which underlies all treaties, as codified in Article 31(1) ... and Article 26 of the Vienna Convention.'¹³

The Panel even adds what is highly relevant in the case at hand:

'The obligation of good faith requires that Members not use the exceptions in Article XXI as a means to circumvent their obligations under the GATT 1994. A glaring example of this would be where a Member sought to release itself from the structure of "reciprocal and mutually advantageous arrangements" that constitutes the multilateral trading system ... simply by re-labelling trade interests that it had agreed to protect and promote within the system, as "essential security interests", falling outside the reach of that system.'¹⁴

It might be added that the *chapeau* of Article XXI(b) contains the word 'for' and as such requires a connection to exist between the essential security interest and the action at hand. According to the sound findings of the Panel, the use of the US of Article XXI to justify tariff increases appears to be more than questionable.

¹² *Russia – Measures Concerning Traffic in Transit*, Panel report, WT/DS512/R (5 April 2019) para 7.101.

¹³ *ibid* para 7.132.

¹⁴ *ibid* para 7.133.

c. Reactions of affected exporting States

Another issue concerns the reaction of the affected WTO Members. These Members have imposed tariffs for imports of certain goods from the US on the basis of Article 8(2) of the Safeguards Agreement. Under the provision, affected exporting Members may unilaterally suspend concessions and thus raise tariffs in trade with Member having applied safeguard measures, where no agreement has been reached as to a compensation. Indeed, and in contrast to the usage of Article XXI GATT, the WTO Safeguards Agreement envisages that compensation has to be awarded to affected Members if import restrictions are taken to protect domestic industries. In substance, much of the arguments and findings of the US Trade Representative report issued as a basis for the US tariffs are in line with conditions defined for measures under the WTO Safeguards Agreement. Thus, the reactions of other Members are well-grounded, even though the US insist on having used the distinctively different procedure on national security measures under Sect. 232. This is so because first, Section 232 of the Trade Expansion Act and Section 201 of the Trade Act of 1974,¹⁵ which are the relevant provisions for safeguard measures have striking similarities. Second, the determination of a measure and related authority under domestic law, while surely having evidential value, is not binding from the point of view of WTO dispute settlement and its focus on international law.

d. Is the WTO fit to cope with the challenge? And at what price?

Altogether, the reaction of the WTO to these developments can be seen as a mixed blessing. Just in time, the Russian-Ukraine panel has developed a sound interpretation of Article XXI GATT which sets reasonable limits to the use of the national security exemption. Any panel charged to oversee the complaints against the US measures can be expected to draw from these findings. In this way, once again, the dispute settlement system has proven to be able to effectively apply and enforce the rules. However, it is an open question whether the dispute settlement performed adequately in view of the ‘trade wars,’ which developed when

¹⁵ US Congressional Research Service, ‘Safeguards: Section 201 of the Trade Act of 1974’ (22 August 2018) <<https://fas.org/sgp/crs/row/IF10786.pdf>>.

affected Members reacted to the bold and worrisome actions of the US. These Members can plausibly rely on Article 8(2) of the Safeguards Agreement and their related right to compensation. However, the point can be made that WTO dispute settlement was meant to prevent such *tit for tat* from taking place. For a dispute settlement system to effectively address such situation and to ask both parties to stand still, would require means of preliminary procedure which, while available in front of other international courts and tribunals, are still missing in WTO dispute settlement.¹⁶

4. Deals and their limits: Effective WTO rules against 'bilateralism'

Another objective of US trade policy is to conclude 'better deals.'¹⁷ In line with US trade policies in the 1980s, such deals aim to restrict imports while also promoting US exports. Deals in this sense are bilateral and the tariff measures discussed above are certainly supposed to persuade other WTO Members to agree. Such idea of 'deals' runs counter to the idea of multilateralism and non-discrimination which, as the fundaments of the WTO, aim to secure fair competition and limit the exercise of power.

In pursuing this policy, the US has successfully persuaded its partners to amend existing trade agreements, as is true for the US–South Korea trade agreement (KORUS)¹⁸ and the NAFTA (now called USMCA)¹⁹. Most observers agree that in substance the amendment of the KORUS

¹⁶ JR Ram, 'Revisiting the Idea of Provisional Measures in the WTO Dispute Settlement Mechanism' (2014) 26 *Florida J Intl L* 197; G Cavalier, 'A Call for Interim Relief at the WTO Level: Dispute Settlement and International Trade Diplomacy' (1999) 22 *World Competition* 103-13.

¹⁷ As the US have noted in their report in Trade Policy Review: 'For too long, the rules of global trade have been tilted against U.S. workers and businesses. The United States has demonstrated that it will alter – or terminate – old trade deals that are not in the U.S. national interest.' (WTO (n 1) 4).

¹⁸ S Lester, I Manak, K Kim, 'Trump's First Trade Deal: The Slightly Revised Korea-U.S. Free Trade Agreement' (13 June 2019) 73 *Free Trade Bulletin*; Congressional Research Service, US–South Korea (KORUS) FTA (28 December 2018).

¹⁹ That is, the US-Mexico-Canada-Agreement; RH Folsom, *Principles of Free Trade Agreements from GATT 1947 Through NAFTA Re-Negotiated 2018* (West Academic Publishing 2019) s 6.7 (*NAFTA Re-Negotiated: The 2018 USMCA Agreement*).

and NAFTA did not entail dramatic changes and could even be welcomed for featuring innovative new elements such as chapters on digital trade.²⁰ This is true for the growing number of preferential trade agreements (PTAs) between various Members. Still, such agreements must meet the requirements of Article XXIV GATT / Article V GATS. As far as can be seen, there is little doubt that the agreements originally met these criteria and that amendments to such agreements are certainly permissible.

The US is also pressing for ‘deals’ with the European Union (EU) and China to remedy what they see as an unfair trade imbalance. As has been reported, China and the EU have pledged to buy certain quantities of soya to contribute to the reduction of trade imbalances, without explaining how that would be done.²¹ Also, the EU has been understood to have reflected about facilitating the import of cars from the US. However, it is difficult to see that such measures could work as ‘bilateral deals’ as they award preferences exclusively to the US. Measures intended to promote imports from the US will most likely be subject to the most-favoured nation (MFN) principle according to Article I(1) GATT.²² Third States will have an eye on such measures and may demand similar treatment for themselves and eventually may even bring a case to dispute settlement. Thus, those measures could hardly afford an exclusive competitive advantage to the US. Such exclusivity could only be attained by concluding a full trade agreement under Article XXIV GATT / Article V GATS, where trade barriers are eliminated for substantially all trade. However,

²⁰ Congressional Research Service, ‘In Focus: Digital Trade’ (29 March 2019). See generally and especially analysing the Comprehensive Agreement for Trans-Pacific Partnership, M Burri, ‘Understanding and Shaping Trade Rules for the Digital Era’ in M Elsig, M Hahn, G Spilker (eds), *The Shifting Landscape of Global Trade Governance* (CUP 2019) 73.

²¹ Apparently, China has pledged to boost imports on agricultural goods to reach a deal with the US, see ‘China to Waive Tariffs on Some US Soybeans, Pork in Goodwill Gesture’ *CNBC* (6 December 2019); ‘Trump halts new tariffs in US China trade war’ *BBC News* (13 December 2019). The EU has already in 2018 pledged to boost soybean imports, see ‘Joint U.S.-EU Statement following President Juncker’s Visit to the White House’ (25 July 2018). The US has since become the biggest importer of soybeans to the EU, see European Commission, Press Release: ‘EU-U.S. Joint Statement: The United States is Europe’s main soya beans supplier with imports up 121%’ (16 April 2019).

²² The MFN treatment obligation covers also internal measures, see P van den Bossche, W Zdouc, *The Law and Policy of the World Trade Organization* (3rd edn, CUP 2013) 321.

the prospects for the conclusion of such ambitious trade agreements are doubtful, as the necessary elimination of trade barriers across the board appears to be at odds with the current US objective to control imports in a number of areas. Besides, it is difficult to see how such agreements could be concluded in the present situation of heated controversy and distrust.

Altogether, WTO disciplines appear to be quite effective in preventing Members to persuade others to ‘bilaterally’ agree to restrict exports to the US or to promote imports of US products.²³ This is particularly so as Article 11(1)(b) of the Safeguards Agreement also explicitly states that ‘a Member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side.’ That provision did rule out the earlier US practice under the GATT to conclude such agreements, which at the time were called ‘grey area’ measures. In response to such practices, the Safeguards Agreement makes it clear that the only way to seek relief from import pressure is by using safeguards, which in turn allow exporting Members to ask for compensation under Article 8(1) of the Safeguards Agreement.

5. China: Old and new questions about technology, innovation and fairness in world economic relations

Aside from tariff measures in the area of steel and aluminium products undertaken under Section 232 Trade Expansion Act and Article XXI GATT, the US also initiated action against China in view of various of its policies regarding intellectual property, technology, and innovation on the basis of Section 301 Trade Expansion Act. After an investigation was concluded, special tariffs were imposed on a broad range of products from China.

As a reaction, on her side China imposed tariffs on imports from the US. Meanwhile, both sides have brought complaints to WTO dispute settlement. In terms of WTO rules and dispute settlement, these devel-

²³ A study by the European Parliament takes into consideration the possibility of the EU to agree on ‘voluntary restraints,’ but admits that this would violate WTO rules and does not follow the idea further. European Parliament, Policy Department, ‘Consequences of US trade policy on EU-US trade relations and the global trading system’ EP/EXPO/B/INTA/FWC/2013-08/Lot3/07/ (2018) 40.

opments add to the concerns mentioned above. Again, the US makes extensive use of GATT exceptions to justify the unilateral tariff measures. In her first written submission, Article XX(a) GATT is referred to by stating that stealing intellectual property would go against strong public morals anchored in US society and reflected in US legislation.²⁴ It is difficult to see the sufficient relationship between the objective to protect public morals and imposing tariffs on a broad range of products.²⁵ Also, China is in compliance with the standards of the Trade-Related Aspects of Intellectual Property Rights (TRIPs)Agreement, which can be considered to exhaustively define the obligations of WTO Members in view of intellectual property rights.

Even more concerning is a statement in the US first submission according to which both parties agree that:

‘fundamentally, both the United States and China have recognized that this matter is not a WTO issue.’²⁶

and that:

‘by taking actions in their own sovereign interests, both parties have recognized that this matter does not involve the WTO and have settled the matter themselves.’²⁷

At the time of writing, no information was available as to the position of China in this matter. The statement reflects an understanding according to which trade measures would be exempt from WTO disciplines and dispute settlement, where they are related to a conflict on issues which

²⁴ *United States – Tariff Measures on Certain Goods from China*, DS543, First Written Submission of the United States of America (27 August 2019) 20 <<https://ustr.gov/sites/default/files/enforcement/DS/US/Sub1.%28DS543%29.fin.%28public%29.pdf>>.

²⁵ Similarly, *United States – Tariff Measures on Certain Goods from China*, DS543, Third Party Submission by the European Union (10 September 2019) <<https://trade.ec.europa.eu/doclib/docs/2019/september/tradoc158335.pdf>>, and Oral Statement by the European Union, 30 October 2019 <<https://trade.ec.europa.eu/doclib/docs/2019/november/tradoc158420.pdf>>.

²⁶ *United States – Tariff Measures on Certain Goods from China*, DS543, First Written Submission of the United States of America (n 24) para 9.

²⁷ *ibid* para 10.



are deemed to lay outside the substantial reach of the WTO.²⁸ This is, of course, evidently misguided as, for instance, the Panel in *Mexico – Soft Drinks* has explained.²⁹ Even more so, however, it fundamentally overlooks that this is by no means a ‘bilateral’ affair outside the WTO but that the tariff measures also affect third Members and their trade.

The inclusion of a fast-growing trade bloc, which emerged to the second strongest economy in the world within little more than three decades, certainly creates tensions. This is particularly true given the fact that China pursues a strategic policy, including currency issues and the engagement of state-owned enterprises and projects like the Belt and Road Initiative. Beyond the bold rhetoric, in substance, some of the concerns about China’s role in the world economy and the ability of the WTO to cope with it are shared by other WTO Members.

In overview, it becomes apparent that changing trade patterns, often brought about by progress in the world trading system, economic developments, and innovations impact the competitive relationships among countries and frequently raise concerns as to ‘fairness.’ As history tells, the world trading system has continuously reacted to such concerns, as the creation of the TRIPs Agreement on the initiative from the US may exemplify. It is important to highlight that while the rules on world trade are hardly ever perfect, they nevertheless need to be observed. Naturally, the stability of that system of rules and institutions depends on its ability to respond to the ever-changing circumstances and to provide for an effective process to do so.

6. *The AB crisis: A blind spot in the juridification of international trade*

For lawyers, however, perhaps the most concerning issue about the recent US trade policy shift is the veto of the US to the nomination of

²⁸ A Raina, M Kempynck, ‘Guest Post: US Narrative on Trade Unilateralism: Insights from DS543’ International Economic Law and Policy Blog (29 October 2019) <<https://ielp.worldtradelaw.net/2019/10/guest-post-us-narrative-on-trade-unilateralism-insights-from-ds543.html>>.

²⁹ *Mexico – Taxes on Soft Drinks*, Appellate Body report, WT/DS/308 (24 March 2006) paras 51-53; see generally P Mavroidis, *The Regulation of International Trade* vol 1 (GATT) (MIT Press 2016) 315 ff; D Gantz, ‘Regional Trade Agreements’ in D Bethlehem, D McRae, R Neufeld, I van Damme (eds), *The Oxford Handbook of International Trade* (OUP 2009) 256-64.

new Appellate Body (AB) members. As a consequence, the AB became inoperable when the term of two members came to an end on 11 December 2019. This affects not only any future disputes but also cases, that are already pending before the AB and panel cases, where an appellate review has been requested.

The US justifies her conduct with a harsh critique of the work of the AB both in procedural and substantial terms.³⁰ Taken together, the criticism is about the AB overstepping its disciplines and limits. From US perspective, the proper task of the AB is confined to protecting and enforcing the original consensus as reflected in the rules at hand and shall leave it to negotiations among Members to address possible inconsistencies, ambiguities or the need to adapt rules to new circumstances.³¹

The US has been a major force behind the considerable legalisation and juridification by the WTO. However, the US lawmakers have regarded WTO dispute settlement with quite some distrust and concern regarding the proper use of its judicial powers.³²

A number of WTO Members have made concrete proposals to comfort some of the concerns of the US. In fact, various solutions and work-arounds have been proposed and even put into practice already. In particular, some arrangements have been made among Members to settle disputes by means of arbitration according to Article 25 of the Dispute Settlement Understanding (DSU).³³

³⁰ See C Lo, J Nakagawa, T Chen (eds), *The Appellate Body of the WTO and Its Reform* (Springer 2020) *passim*.

³¹ PJ Kuijper, 'The US Attack on the WTO Appellate Body', Amsterdam Law School Research Paper No 2017-4; S Charnovitz, 'A Defense of the Beleaguered WTO Appellate Body' International Economic Law and Policy Blog (9 May 2019) <<https://ielp.worldtradelaw.net/2019/05/a-defense-of-the-beleaguered-wto-appellate-body.html>>.

³² The critical view of US lawmakers is reflected in the US Uruguay Round Implementation Act, which envisages, that US Congress should review the activities of the WTO dispute settlement from the point of view of US trade interests and eventually propose the withdrawal of the United States from the WTO. Furthermore, press releases issued by the United States Trade Representative repeatedly criticise the decisions by the WTO dispute settlement bodies. For an historical perspective, see CP Brown, 'Can we save the WTO Appellate Body?' testimony before the European Parliament Committee on International Trade hearing (3 December 2019) <www.piie.com/sites/default/files/documents/bown20191203.pdf>.

³³ EU–Canada, Agreement on Interim Appeal Arbitration Pursuant to Article 25 of the DSU (25 July 2019); EU–Norway, Agreement on Interim Appeal Arbitration Pursuant to Article 25 of the DSU (21 October 2019); EU Statement by Ambassador João

Beyond the legal details of the US criticism and possible solutions, the AB crisis merits a more systemic view. WTO dispute settlement had, from early on, been praised as the most effective system for dispute settlement and rule enforcement in international law. This might be true for the really unique appellate institution and the system's functions at the level of implementation and retaliation. However, when looking at its adjudicatory functions and powers more closely, it appears that they are quite limited under DSU, particularly when compared with other international courts and tribunals.³⁴ But as we now learn, the most relevant deficit is the consensus-requirement for the nomination of new members. None of the more important international courts and tribunals feature such a risky procedure, by which in effect a single Member can veto the functioning of the whole system.³⁵ This has been largely neglected when WTO dispute settlement has been praised for doing away with veto powers available to parties in the various steps in a particular dispute – in a move from a power-based to a rules-based system.³⁶ Establishing such an ambitious system, including the first-ever appellate review at the international level without precaution against a blocking veto is remarkable. In reality, using that veto to the extent of a blockade, as exercised by the US, amounts to taking hostage other Members, who continue to accept and rely on the system. If the US is to turn away from appellate review once and forever, an opt-out may be a more favourable option rather than risking a full breakdown of the system for everyone. Ultimately and in view of the fact that Members are threatened with being deprived of their right to justice, the nomination of AB members by a majority decision may be considered.³⁷

Aguiar Machado at the General Council meeting (15 and 16 October 2019); EU Statement by Ambassador João Aguiar Machado at the General Council meeting (9 December 2019).

³⁴ C Walter, 'Art. 17 DSU' in R Wolfrum, P-T Stoll, K Kaiser (eds), *Max-Planck-Commentaries on World Trade Law* vol 2 (*Institutions and Dispute Settlement*) (Brill 2006).

³⁵ Art 10 ICJ Statute, art 4(4) ITLOS Statute, art 22 ECHR, and arts 7(1), 9(1) Statute of the Inter-American Court of Human Rights.

³⁶ G Sacerdoti, 'The Dispute Settlement System of the WTO: Structure and Function in the Perspective of the First 10 Years' (2006) 5 L & Practice of Intl Courts and Tribunals 49-75.

³⁷ Kuijper (n 31) 12-14; E-U Petersmann, 'Between "Member-Driven" WTO Governance and "Constitutional Justice": Judicial Dilemmas in GATT/WTO Dispute Settlement' (2018) 21 J Intl Economic L 116.

7. Does the WTO stand the pressure?

In overview, it appears that the WTO system has only partly proven fit to withstand the pressures. It can be believed to have barred more bilateral persuasion and ‘deals’ and thus, protected other Members and the MFN principle. Furthermore, the dispute settlement mechanism has disciplined the use of the national security exemption. However, the dispute settlement system, praised for having closed any loopholes for Members to veto particular proceedings going against their interests, has proven to be extremely vulnerable. Nominating AB members by consensus turns out to be a formidable invitation to block the entire system for everyone.

In a more abstract perspective, this is telling. We can understand the WTO as an impressive project of legalisation that had been consented and in part even importantly helped by the US – as is also true for the TRIPs Agreement and dispute settlement. On the other side, and as part of the bargain, it has been considerably disciplining the US, as is true for safeguards and unilateral action. With these stricter rules the temptation to veto AB nominations becomes even more obvious. Requiring consensus in such a systemic issue as is the continuous presence of at least three AB members might appear to be almost careless. However, the way we see it depends on how we see the WTO more generally. If, beyond all complexities, we see the fabric of the WTO to still be made out of ‘deals’ with varying degrees of reciprocity, the consensus for AB members might look as a due reflection of the idea that what the WTO boils down in the end is a *quid pro quo*.

One can, however, see the WTO with all its important achievements also as a system destined to work for a common objective and ultimately a common good.³⁸ Consensus – or to put it more clearly: veto power – is not a good recommendation for the core device of any system designed to provide services to all. Such system would need to have efficient safeguards in place to prevent a breakdown in case when one member turns

³⁸ See P-T Stoll, ‘The World Trade Organization as a Club: Rethinking Reciprocity and Common Interest’ in U Fastenrath, R Geiger, D-E Khan, A Paulus, S von Schorleme, C Vedder (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (OUP 2011) 172–83.

away. If not – as is the case at present - one would expect the other members to stand up and take action in defence. Proposals have been made in this context, going as far as arguing for a parallel appellate review system established by something akin to a coalition of the willing.³⁹ However, this has been met with much hesitation in Geneva, and this is why it has been argued here that giving the US an opt-out option would be preferable to a total breakdown of the system.

8. Stability through innovation – Another blind spot

Indeed, there is hardly anyone proposing to let the US go or to produce a pretext for her to leave. The political weight of this Member is considerable, given its economic strength, or more precisely the size of its economy, the share in world trade – and its limited vulnerability. Also, and most importantly, for better or for worse, the US has been the driving force behind most developments in the world trading system after World War II. This holds true for promoting and eventually abandoning the Havana Charter and more recently for pressing for the TRIPs Agreement and for advocating a strong dispute settlement. While it is highly debatable whether the current course of US trade policy can be seen as something of a Schumpeterian creative destruction, it cannot be overlooked that development and change is another blind spot in the WTO's overall success story. And indeed, WTO Members would have a much stronger stand in defending the WTO as their common achievement, if they could point to developments and improvements in substantive rules, procedures, and institutions. This way they could demonstrate that any Member has a fair chance to have its needs met and preferences addressed. Ultimately, the stability and legitimacy of the WTO rest on its ability to organise such a change. This is particularly so as the world trading system itself generates a constant need for adaptation and further development. The elimination of trade barriers, after all, promotes globalisation with

³⁹ Kuijpers (n 31) 14. Other authors have suggested a ‘non-appeal pact,’ see S Charnovitz, ‘The WTO Appellate Body in Crisis: A Critique of the EU’s Article 25 Proposal’ International Economic Law and Policy Blog (2 June 2019) <<https://ielp.worldtradelaw.net/2019/06/the-wto-appellate-body-crisis-a-critique-of-the-eus-article-25-proposal.html>>.

all its intended and unintended, beneficial and detrimental consequences, all of which need to be addressed. However, in spite of some successful projects and developments, as can be said of the Trade Facilitation Agreement and the negotiations on a Trade in Services Agreement, the overall situation is worrisome.

When asked for the single most grave concern regarding the WTO, beyond the current ‘trade wars,’ most observers would point to the stalemate of the Doha Round. Indeed, high ambitions meet with a growing sense of helplessness here. The evident lack of progress and its underlying causes have long been neglected and covered by repetitious optimist rhetoric. To date, no one can earnestly believe that the Round will be concluded, and no one has a recipe for how to achieve this.⁴⁰

The Doha Round, initiated at the fourth Ministerial Conference in Doha, Qatar in November 2001 had an impressive agenda and was meant to be a comprehensive new round to further develop the WTO and its rules. It pursues an all-encompassing ‘single undertaking’ approach and is based on the consensus principle. Sure, the world trading system had a tradition of negotiating ‘rounds,’ where a lot of issues were put on the table. And yes, the Uruguay Round, which succeeded in establishing the WTO was a ‘single undertaking’ and aimed at surmounting the fragmentation resulting from the 1967 Tokyo Round, which produced a whole number of agreements with different membership. But history amply shows that a ‘constitutional moment’ can and should not be repeated and that, in other words, the procedures once used to bring about a legal regime do not necessarily lend themselves as good practice for the continuous operation of such a regime. It suffices here to point to the situation following the fall of the Berlin Wall as an exceptional setting which helped to bring about the establishment of the WTO.

Indeed, setting up a negotiation project with full coverage, where anybody has to agree on anything looks like a formidable invitation for veto players of some sort. In addition, and with more time passing by, it creates a temptation to link any novel issue with the ongoing negotiations or to postpone addressing it altogether.

It is no secret that the WTO would urgently need to unravel the ‘single undertaking’ and also to facilitate progress by a smaller group of

⁴⁰ A Martin, B Mercurio, ‘Doha Dead and Buried in Nairobi: Lessons for the WTO’ (2017) 16 J Intl Trade Law L & Policy 49-66.

Members – as is provided for in the format of ‘plurilateral’ agreements under conditions which might be overly restrictive.⁴¹ But here again, the consensus culture comes into play. As long as Members insist on their position in agricultural subsidies as a condition for moving forward with improvements of the dispute settlement or trade and environment in the sense of a *quid pro quo*, the WTO is unlikely to become a healthy regime.⁴² For that to come about, an understanding about this common interest would have to emerge and WTO members would have to act accordingly.

9. Preferential trade agreements: Embarking onto a hybrid trade order

Because of the stalemate of the Doha Round, WTO Members tend to turn to preferential trade agreements to further develop their trade relations. Accordingly, a high number of such agreements was negotiated and concluded.⁴³ Many see these agreements with their innovative features as a welcome addition to the WTO system.

Nowadays, nearly all WTO Members are parties to at least one trade agreement and recently, we have even witnessed the establishment of links between ‘trade blocs.’ Beyond the rapidly growing number of such agreements, their substance and structure are remarkable. In addition to specifics of well-established WTO disciplines, the agreements also address new topics, such as digital trade.⁴⁴ They also integrate issues that so far have been left outside the WTO, such as investment and competition

⁴¹ WTO, ‘Understanding the WTO: The Agreements – Plurilaterals: of minority interest’ <https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm10_e.htm>.

⁴² KA Elliot, ‘The WTO, Agriculture and Development: A Lost Cause?’ ICSTD 7(1) Bridges Africa (15 February 2018) <www.ictsd.org/bridges-news/bridges-africa/news/the-wto-agriculture-and-development-a-lost-cause>.

⁴³ In 2015, a report by UNCTAD stated that more than 250 PTAs were in force, see UNCTAD, ‘Key Statistics and Trends in Trade Policy 2015’ <https://unctad.org/en/PublicationsLibrary/ditctab2015d2_en.pdf>. On the development of PTAs, see generally SW Hartman, ‘The WTO, the Doha Round Impasse, PTAs and FTAs/RTAs’ (2013) 27(5) *The Intl Trade J* 11; H Horn, P Mavroidis, A Sapir, ‘Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements’ (2010) 33 *The World Economy* 1565.

⁴⁴ S Wunsch-Vincent, A Hold, ‘Towards Coherent Rules for Digital Trade: Building on Efforts in Multilateral versus Preferential Trade Negotiations’ in M Burri, T Cottier (eds), *Trade Governance in the Digital Age* (CUP 2012) 179.

law. On top of this, they often contain chapters on the interrelationship between trade and other fields, such as sustainable development, environmental protection, and labour standards.⁴⁵ In this way, they respond to a long-standing demand to better accommodate these issues in international trade regulation. Altogether, they are often said to show what can be achieved in a small group of selected participants.

The downside of such ‘coalitions of the willing,’ however, is that they are exclusive and grant preferences only within the group. In this way, they depart from the WTO’s general logic of non-discrimination and inclusiveness which, in economic terms, is about providing for fair competition in a world market and, in political terms, builds on consensus among all Members. This is true even though it must be acknowledged that such ‘preferential’ regimes also deliver some benefits to third parties through spillover effects.⁴⁶

Beyond this more general perspective, preferential trade agreements, while containing innovative and even visionary elements, often lack ambition in detail. Much of the text is copied from WTO agreements with few additions. Moreover, only a small number of agreements envisage a customs union, while the majority of agreements stick to the less ambitious format of a free trade area with a number of shortcomings, including complex rule of origin issues and the resulting spaghetti bowl problem.⁴⁷

Furthermore, the institutional design, while impressive at first glance, still has to meet the reality test. The complex dispute settlement systems have a limited scope and the problem of parallel proceedings with WTO dispute settlement remains to be solved. Also, the mission and effectiveness of the vast administrative and political machinery (including civil society mechanisms), is not absolutely clear. It is an open question how

⁴⁵ Eg ch 23 on Labour of the CETA Agreement; ch 16 on Trade and sustainable development of the EU–Japan FTA; ch 19 on Labour of the KORUS Agreement; ch 23 on Labour of the USMCA.

⁴⁶ J Pauwelyn, ‘Taking the Preferences Out of Preferential Trade Agreements: TTIP as a Provider of Public Goods?’ in J-F Morin, T Novotná, F Ponjaert, M Telò (eds), *The Politics of Transatlantic Trade Negotiations: TTIP in a Globalized World* (Routledge 2015) 187–96.

⁴⁷ M Donner Abreu, ‘Preferential Rules of Origins in Regional Trade Agreements’ (2013) WTO Staff Working Paper ERSD-2013-05; U Schüle, T Kleisinger, ‘The “Spaghetti Bowl”: A Case Study on Processing Rules of Origin and Rules of Cumulation’ (2016) UASM Discussion Paper Series No 2.

even the stronger WTO Members could effectively care about multiple institutions if they were a party to various international trade agreements.

Altogether, the number of new trade agreements is an important challenge for the WTO. Many observers have addressed the question of whether the agreements are stumbling blocks or stepping stones.⁴⁸ WTO rules and procedures fail to provide a clear answer. Article XXIV GATT and Article V GATS in principle signal that the WTO is aware of and not hostile to such agreements. In substance, the provisions also give guidance in view of the degree of exclusiveness tolerated in a multilateral system which in principle is based on non-discrimination and inclusiveness. We can read the famous ‘substantially all trade’ threshold in Article XXIV GATT as a yardstick on how many pioneering steps towards further liberalisation the ‘coalitions of the willing’ have to undertake in order to be allowed to deviate from the MFN standard and enjoy exclusivity. However, the guidance given in these two landmark provisions hardly accommodates the full complexity of these agreements, their potential, and their challenges. Furthermore, the Committee on Regional Trade Agreements charged with overseeing the developments cannot be seen as a highly effective institutional watchdog, as it has difficulty in reaching consensus⁴⁹ and only very few disputes addressed the issue.⁵⁰

From a more general perspective, it should be noted that such trade agreements have a long history – dating back to the GATT days. Perhaps international economic law discourses have overlooked these realities and focused too much on the WTO itself. At least when taking into account the mushrooming of agreements in the last and current decade, it appears to be appropriate to conceptualise world trade governance as a hybrid structure, where the WTO as a core is accompanied by trade

⁴⁸ See eg R Senti, ‘Regional Trade Agreements: “Stepping Stones” or “Stumbling Blocks” of the WTO?’ in M Cremona, P Hilpold, N Lavranos, S Staiger Schneider, A Ziegler (eds), *Reflections on the Constitutionalisation of International Economic Law: Liber Amicorum for Ernst-Ulrich Petersmann* (Brill/Nijhoff 2014) 441.

⁴⁹ A do Amaral Júnior, ‘Is Trade Governance Changing?’ (2015) 12 Brazil J Int L 373-74; E Baroncini, ‘The WTO Case-Law on the Relation Between the Marrakesh System and Regional Trade Agreements’ (2017) 1 EuR Beiheft 60-62.

⁵⁰ See eg *Turkey – Textiles*, Appellate Body report, WT/DS34/AB (22 October 1999); G Marceau, J Wyatt, ‘Dispute Settlement Regimes Intermingled: Regional Trade Agreements and the WTO’ (2010) 1 Journal of Intl Dispute Settlement 67; Baroncini (n 49).

agreements of different sizes, relevance, and design. Important and inspiring questions emanate from such a perspective. Such a hybrid structure could help us see the potential for a beneficial regulatory competition and to assess the potential contribution of trade agreements in coping with shocks as those caused by the recent US trade policy. Above all, however, such view can be instrumental in exploring the appropriate interaction between the WTO and such agreements. As far as dispute settlement is concerned, the preferential trade agreements could have a larger role and responsibility.⁵¹ At the moment, the jurisdiction of the WTO dispute settlement mechanism is far reaching and considerably limits the scope for dispute settlement in a preferential trade agreement in the frequent cases of measures which may give rise to complaints under both the WTO and the particular agreements. By some way or other, WTO dispute settlement could be limited in reach so as to allow for meaningful activities at regional level. In this regard, one might think of WTO dispute settlement exploring ways of deference to acknowledge the jurisdiction and decisions of PTA dispute settlement, where it has appropriately dealt with claims based on WTO law. Also, one might think about the role of the WTO AB as the central appellate court for dispute settlement under preferential trade agreements.

Furthermore, in view of a mutually supportive relationship one could imagine an exchange of views among trade agreements and the WTO to address common challenges and opportunities. The WTO could provide for such a forum if its mandate, which so far is restricted to multilateral trade issues, were to be extended with a view to world trade governance more generally.

10. Conclusion

The erratic actions of the current US administration have served as a wake-up call for the WTO community which has, for far too long, seen

⁵¹ P-T Stoll, 'The WTO Dispute Settlement System and Regional Trade Tribunals: The Potential for Conflict and Solutions' in A do Amaral Júnior, LM de Oliveira Sá Pires, C Lucena Carneiro (eds), *The WTO Dispute Settlement Mechanism: A Developing Country Perspective* (Springer 2019) 229.

the WTO and its rules as a given and delved into details instead of thinking outside the box. A healthy world trade system has to stand the test of an important Member going against the rules and the spirit of the whole system. However, such system has to also be fit for the job and particularly adapt to new challenges that arise as a consequence of its unprecedented success in opening markets. Both aspects are related.

As regards to the challenges ensuing from recent US trade actions, the WTO has done reasonably well in responding to the use of the national security exception. Also, its MFN principle has clearly prevented the US from engaging others in bilateral deals.

However, in blocking the nomination of new AB members, the US administration has hit a sensitive spot. The WTO dispute settlement has been praised as a historical turn away from a power-driven to a rules-based system. Indeed, the veto option as practiced in several GATT cases has been eliminated. However, ironically, nominating AB members by consensus amounts to a far more powerful veto position – as it brings down any dispute settlement activity at once and for all those involved. Nomination by consensus is unparalleled among world courts and it indeed expresses a big caveat and a surprising neglect of the needs to protect a common good against obstruction by few. It is hard to see how the WTO Members could abandon this historical achievement. Therefore, it is submitted here that a possible solution could be to allow for the opting out of appellate review for Members who wish to do so.

The US action against China is outrageous, unfounded and largely contradicts rules and the spirit of the international trade order. However, the impressive integration of China in the world economy raises many issues of fairness – issues that are worthy of the extended discussions afforded to them by others.

Also, populist rhetoric about fair trade could become a toxic and lasting fallout in a world where populism and nationalism spread and meet with silence from the trade community – one concerned with a number of details but historically reluctant to develop and communicate its own proper understanding about the merits of trade and the role of international institutions and the WTO.

It would be too much to solely blame US exceptionalism for the current situation and concerns of the WTO. Sixteen years of fruitless discussions in the Doha Round tell us that the constitutional movement cannot be repeated. Consensus and a single undertaking worked once in a time

in a historical situation, but it is obviously not a good recipe for keeping a running system up to date. At the last, the Tokyo Round in 1973–1979 has shown, that the world trading system is challenged by its own success. The elimination of tariff barriers and the resulting dynamics of the markets fuels the desire to remove non-tariff barriers, calls for fairness and raises a whole lot of issues ranging from subsidies to competition and – more recently – the carbon leakage.

At this point, PTAs come into play. The impressive number of new and very comprehensive agreements deal with a number of issues which were stuck in the WTO machinery, including regulatory cooperation, competition, investment, digital trade, and sustainable development. However, it should be noted, that these agreements mark a departure from the principle of most-favoured nations, cause fragmentation and that it is an open question, if they stand the test of time.

