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The Post-Millennium Travails of the World Trade Organisation



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The election of President Biden in place of President Trump has created an opportunity for the World Trade Organization to begin its recovery from the state of looming crisis and virtual paralysis in which it has laboured for much of the past decade. This is vital. For over 70 years the GATT/WTO system, through successive rounds of negotiation, has facilitated the vast growth of world trade. And through its functions of rule-making and dispute settlement it has kept the peace as great trading powers, in Europe and Japan, have arisen to compete with the post-war hegemon, the United States. These functions are still essential, perhaps, with the accession of China and Russia to the system, even more so.

But since the Millennium the WTO has succeeded in no multilateral trade negotiation except the Trade Facilitation Agreement in 2014, because of inability to achieve multilateral consensus. The Doha Round, launched in 2001 above all to liberalize market access in agriculture and services, was stultified by disagreement over the contribution to be made by the more advanced developing countries such as China, India and South Africa, and it was effectively dead by 2006. None of the seven previous rounds under the GATT, the WTO's predecessor, had failed. Since then a number of widely-supported initiatives have failed over the same problem of development flexibilities for advanced developing countries, which is again the critical issue in the negotiation to establish disciplines on fisheries subsidies, the only multilateral negotiation currently active

If the WTO cannot move forward in negotiations the multilateral system is likely to be replaced by plurilateral, regional and bilateral agreements, as indeed is already happening. This gives rise to two systemic questions. One is whether the rule of consensus is still a viable basis for decision making in a system with 164 Members, since it gives every Member the power to veto any initiative. The second is whether the GATT/WTO principle of multilateral non-discrimination, particularly most-favoured nation treatment, can continue to be the basis for negotiations on market access and new rules when this permits individual Members to free-ride the system. A partial answer was given at the Ministerial Conference of 2017, when it was agreed that groups of Members could proceed with "Joint Initiatives" to negotiate plurilateral agreements in which benefits and obligations are shared only by willing

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participants. Negotiations on this basis are in progress on the important issue of Electronic Commerce, and this may be the way of the future.

Another cornerstone of the system, the dispute settlement function, is currently dysfunctional because the USA has vetoed the appointment of new members to the Appellate Body, which adjudicates appeals on matters of law and legal interpretation arising from reports of dispute settlement panels. The Appellate Body has seven members, each with a four-year term of office, and a minimum of three is required to review each case. Since 2015 the USA has refused to replace retiring members, so that the AB is now reduced to a single member and can no longer function. This has greatly exacerbated tensions between Members.

The USA has several concerns, long predating the advent of Mr Trump, about the activities of the Appellate Body. The most important of these is about judicial “overreach”, particularly the alleged practice of the AB to “fill in gaps in WTO rules” if it considers the rules are insufficiently clear, and then to treat its rulings as precedents for future cases. There is some basis for this complaint. Politically negotiated texts may contain ambiguities, even deliberate ones, and the USA may be right to insist that only WTO Members have authority to make and if necessary clarify the rules.

There has been no progress in consultations on how to satisfy the US concerns. The EU and 21 other Members, including China, have signed up to an Interim Appeals Arbitration Agreement to act as a temporary substitute for the AB, but it is struggling to obtain support from other Members in the face of US opposition. Meanwhile panel findings are increasingly appealed “into the void” since there is no Appellate Body to treat them, and disputes remain unresolved. This could threaten the entire dispute settlement process.

Under the administration of President Trump the USA effectively withdrew from its perennial role as the leader and champion of the multilateral trading system. Mr. Trump’s position was frankly hostile. In 2018 the USA formally stated that “The United States will not allow any multilateral organisation to prevent us from taking actions that are essential to the economic wellbeing of the American people”. Previous to this the US had imposed heavy unilateral tariffs on imports of steel and aluminium, justifying them on “national security” grounds that other Members regarded as spurious. The EU, Canada, Japan and China imposed retaliatory tariffs and challenged the US measures in WTO dispute settlement. This creates the potential for a major confrontation if and when the panels report, since the US has always maintained that invocation of the national security exceptions in WTO Agreements cannot be challenged in dispute settlement.

In June 2020 US Trade Representative Robert Lighthizer announced that in reaction to the perceived imbalance of WTO commitments the administration planned to “reset” US tariffs, which are now bound at an average of 3.4 percent as a result of decades of negotiations in the GATT, to raise them to levels reciprocal to the high tariffs of major trading partners – meaning the more advanced developing countries. If implemented, this would have threatened a reversion to the catastrophic trade policies of the 1930s.

The need for serious reform of the WTO is generally accepted, but there is no common ground as to which elements of WTO rules need reform. The USA, the EU and Japan have jointly proposed strong new rules to discipline the activities of State-owned enterprises and the industrial subsidies with which they have been associated, particularly in China. Developed countries have also proposed limiting the eligibility of advanced developing countries to benefit from development flexibilities. China has proposed to limit the use of agricultural subsidies by developed countries. None of these have been accepted.

China's accession to the WTO in 2001, followed by that of Russia in 2012, was seen by many as the victory of the rules-based liberal world order that assumes the existence of free market-oriented economies. The first ten years of China's membership appeared to confirm its commitment to convergence with the rules-based market economy. These hopes have been disappointed by China's formal espousal in 2012, as an alternative to the liberal global order, of a "new era" of "socialism with Chinese characteristics", with expanded state ownership and control and intervention by the Chinese Communist Party. The EU has stated that China has failed to transform into a market economy as expected at the time of its accession and that the resulting competitive distortions cannot be sufficiently addressed by current WTO rules. This is also the US position. The EU sees the election of Mr. Biden as an opportunity for closer transatlantic cooperation on all aspects of WTO reform and in facing the growing influence of China.

There is no doubt that the WTO is deeply in need of leadership and engagement from the United States. President Biden started well by lifting the US veto on the appointment of the new WTO Director-General, Dr Ngozi Okonjo-Iweala, the first woman and the first African Director-General. He has also indicated US support for the proposal by India and South Africa for a temporary waiver from certain obligations under the WTO Agreement on intellectual property rights, to facilitate treatment of Covid-19, which the USA, along with the EU, Japan, the UK and other developed countries, has hitherto opposed. But he has not yet indicated willingness to reinstate the Appellate Body or to rescind or recast the import duties imposed by President Trump on "national security" grounds.

However, much will depend on the US estimate of the WTO's value as a forum in which to deal with China and other countries where "state capitalism" plays a central role. If it is decided that the transactional bilateral approach to China espoused by Mr. Trump remains the first preference, the WTO is likely to remain in the doldrums. The post-1945 international order will be the worse for that.

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