Editorial

Who's Minding the Store?

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The date of 30 March 1981 is one of the dark pages in the modern US history. John Hinckley Jr., a deranged man shot President Reagan, thank God, not fatally. When in the hospital, and while he was about to be wheelchaired to the operation room, President Reagan noticed that all his top aides had come to his bedside. He turned around, and in his uncanny ability to provide a ray of optimism even in the bleakest of hours, he asked them ‘who’s minding the store?’ This phrase, probably taken from the 1963 Jerry Lewis movie, can quite appropriately fit in the current World Trade Organization (WTO) context. With the judiciary in abeyance, and the legislative in a moribund state for a couple of decades now, we can legitimately ask the same question: who is minding the WTO store at this very moment?

The short answer is no one. But there is no shortage of ideas floating around as to what needs to be done. Paraphrasing a top Reagan aide, James Baker III, who famously held that ‘there are no amateurs in politics, everybody is an expert,’¹ there is no paucity of recommendations how to fix the crumbly WTO house. Well, these few lines represent an addition to the voices heard, originating in institutional players, such as the Ottawa group,² as well as in academia.

1 Peter Baker and Susan Glasser, *The Man Who Ran Washington: The Life and Times of James A Baker III* (Penguin Random House 2020) 109.

2 The Ottawa group comprises thirteen WTO members (Australia, Brazil, Canada, Chile, European Union, Japan, Kenya, South Korea, Mexico, New Zealand, Norway, Singapore, and Switzerland), who occasionally meet together and suggest improvements to the multilateral regimes, see WTO press release, ‘DDG Wolff Calls on Ottawa Group to Table Formal

1 Rearranging the Furniture of the Deck on the Titanic

In Hoekman and Mavroidis,³ we argued that, even assuming, a most generous assumption as things stand, that the stakeholders manage to solve the judiciary crisis fast, the WTO crisis will continue to loom ahead. At best, the crisis will have been re-dimensioned, but it will definitely not disappear. Unless if the legislative deadlocks have been overcome, the policy relevance of the multilateral trading institution will continue to suffer. And this was the basic message in our article: the legislative and the judiciary crisis are inter-connected, and if they are not both solved, the WTO will see its relevance eviscerated.

The judiciary crisis is probably the easier to solve. Irrespective whether the Appellate Body has been resurrected, or, as we have argued,⁴ we move back to one-instance adjudication while preserving the de-politicized nature of the current dispute adjudication (negative consensus), solving the judiciary crisis seems like the easy part. After all, the demise of the WTO Appellate Body was a whimsical reaction by a very idiosyncratic administration. The legislative crisis, on the other hand, has been going on for a long time, for over two decades to be precise. And, in our view, unless the WTO moves into variable geometry, unless, that is, single undertaking has been abandoned, it will not be easy for the WTO to revive its currently moribund judiciary function. Now this change requires heavy retooling.

For starters, irrespective whether one endorses the rent-seeking, or the terms-of-trade, or the commitment-theory explanation for trade agreements,⁵ trade agreements are necessary for trade liberalization to occur between the members of the world trading community. There is ample evidence that there is appetite for trade deals: the number of free-trade areas (FTAs) have been proliferating, and the World Bank work on deep-trade agreements (DTAs) shows that content-wise, they start looking different from the WTO.⁶ They contain both WTO+ and WTOx obligations.⁷ The WTO, because of its

Reform Proposals at WTO' (23 November 2020) <www.wto.org/english/news_e/news20_e/igo_23nov20_e.htm> accessed 18 February 2021.

3 Bernard Hoekman and Petros C Mavroidis, 'Preventing the Bad from Getting Worse: The End of the World (Trade Organization) as We Know It' (2020) RSCAS Research Paper No 2020/06.

4 Bernard Hoekman and Petros C Mavroidis, 'To AB or Not to AB' (2020) RSCAS Research Paper No 2020/34.

5 We provided a non-technical explanation of the dominant theories for trade agreements, in Petros C Mavroidis, *The Regulation of International Trade*, vols 1 (MIT Press 2016) 26 ff.

6 Aaditya Mattoo, Nadia Rocha and Michele Ruta (eds) *Handbook of Deep Trade Agreements* (World Bank 2020).

7 Henrik Horn, Petros C Mavroidis and Andre Sapir, 'Beyond the WTO? An Anatomy of EU and US Preferential Trade' (2010) 33(11) *The World Economy* 1565–88 first operated this distinction, which is now common currency: WTO+ refers to disciplines which go beyond what

membership-heterogeneity (its 164 members are about to become 168, making the WTO look more and more like the UN), will have to be limited to 'shallow integration' (basically agreements calling for non-discriminatory behavior) at the multilateral level. Still, the WTO legislative activity has been suffering since 1995. This is most likely the case because we have almost exhausted the 'shallow integration' agenda.

So, what happened? Well, the membership voted with its feet. It moved its legislative activity to the FTA context, and, thus, paraphrasing Somin,⁸ chose the political regime where it wanted to live. It did not move its judiciary function, or not in big numbers anyway. Many DTAs, and especially those signed across the Organisation for Economic Co-operation and Development (OECD) members, include provisions which are legally enforceable. Still, many of these FTAs do not provide for dispute adjudication. Is this a sign of times? It is probably too early to tell, as we need to first observe how, in practice, disputes in DTAs with and without dispute adjudication regimes will be resolved. Because of the asymmetric preferences of trading partners, we have before our eyes a treatment and a control group. What is clear at this stage is that the membership did not vote with its feet when it was addressing its qualms with the WTO judiciary. There is no observed forum diversion, at this moment at least, the crisis notwithstanding.⁹

There is no forum diversion, but there has been a direct confrontation between the United States and the WTO judiciary. The crown jewel of the WTO system tarnished, in the eyes of those inside the Beltway at least, very fast. Baker and Glasser¹⁰ quote former Secretary of State James Baker III, saying that 'in DC after swearing in, sooner or later comes the swearing at'. Well, the WTO judiciary got used to 'swearing at'. But there has not been a direct affront between the membership and the WTO legislator. One might retort that this is an oxymoron, since the membership is the WTO legislator. True, but the membership in a way is also the WTO judiciary, or at least a very substantial part thereof. The difference is, of course, that there is no way of blocking the unfavorable outcome when the judiciary decides. Because of consensus

already exists in the WTO, whereas WTOx, to disciplines which are not germane to the WTO contract.

8 Ilya Somin, 'Foot Voting, Federalism, and Political Freedom' in James Fleming and Jacob Levy (eds) *Federalism and Subsidiarity* (Nomos 2014) 83–119.

9 There are few exceptions. The EU and Ukraine, for example, had recourse to their FTA mechanism to resolve a dispute between them regarding certification for timber exports, see European Commission, 'EU Requests Bilateral Dispute Settlement Consultations with Ukraine over Wood Export Ban' (16 January 2019) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1968>> accessed 18 February 2021.

10 Baker and Glasser (n 1) 324.

voting, there will be no decision, unless all membership has agreed to it. The membership owns the legislative, but not the judicial outcome.

It is a close contest when it comes to deciding what is worse: contempt or affront? And we have already stated that we limit our observations to what is needed to address the extreme reaction of the membership, even though we understand that, by not addressing both, we might be simply re-arranging the furniture on the deck of the Titanic. Well, there is a silver lining in this exercise. The judicial function has to be re-established, even if we continue to observe the membership voting with its feet. Disputes originating in the Uruguay round agreements continue to emerge, and have to be addressed somewhere. As things stand, the forum is missing, as appeals into the void are possible. The Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU (MPIA),¹¹ the fruit of a negotiation between the EU and some of the heavy users of the WTO dispute settlement system, was conceived as a 'stop-gap Appellate Body', some interim appeals court, where signatories could launch appeals against panel reports issued. Its membership remembers very limited and has not entertained any cases at the moment of writing.¹² It bears repetition, though, that even if the judiciary crisis was solved, judges would be adjudicating disputes under agreements concluded 25 years ago. The new trade agreements are not negotiated in Geneva anymore. How can the trend be reversed?

2 The Options

As the WTO now stands, it contains three layers of obligations, embedded in:

- The multilateral agreements, which bind all WTO members (layer 1);
- The plurilateral agreements, which bind only their signatories (layer 2);
- The protocols of accession, which are idiosyncratic, and bind the acceding country only (layer 3).

Layers 1 and 3 do not need to change. The question is all about layer 2. This layer overlaps to some extent with the content of FTAs and DTAs, but the

¹¹ The Dispute Settlement Body (DSB) circulated it as WTO, 'Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes – Addendum: Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU' (14 April 2020) JOB/DSB/1/Add.12. Elisa Baroncini, 'Saving the Right to Appeal at the WTO: The EU and the Multi-Party Interim Appeal Arbitration Arrangement' (7 July 2020) 22 *Federalismi.it* 1–33 provides a very comprehensive presentation of the MPIA initiative.

¹² End of December 2020.

latter contain WTO+ and WTOx obligations which are known in layers 1 and 3.¹³ Just like layer 2, though, FTAs (DTAs) are selective clubs. The question then, for the WTO to continue its policy-relevance in the future as well, could be phrased in the following manner:

- Should it allow deep integration (WTO+, WTOx) to continue to flourish outside its confines? or
- Should it attempt to bring it within its four doors? What does it take to (re-)divert the appetite for trade agreements within the confines of the multilateral edifice? Or, put more simply, how can the WTO mimic the attractiveness of FTAs (DTAs)?

If the latter, it will have to make its layer 2 more attractive. If the former, the WTO will have to find ways to build bridges to the trade community (FTAs, DTAs), which continues to legislate away from Geneva. There must be some low-hanging fruits in this context that could, for example, be multilateralized. And the dialogue between the FTAs and DTAs, on the one hand, and the WTO, on the other, must be ongoing. One thing is clear: unless the legislative function of the WTO has been revitalized, any improvements in the judiciary risk being of marginal value. We risk rearranging the furniture on the deck of the Titanic, doing nothing to divert the ship from its course and the consequential direct collision with the iceberg.

In a 1962 speech at the West Point military academy, Dean Acheson, the great American statesman, famously quipped that 'Great Britain has lost an Empire and not yet found a role.'¹⁴ All proportions guarded, this is where the WTO now is. FTAs have moved away with a substantial part of its agenda, while the WTO is still debating how it can stay relevant.

3 It Takes (More Than) Two to Tango, Nowadays

We started this editorial asking who minds the (WTO) store? As things are, there is a caretaker, an interim manager, or to be more precise, four of them, the four deputy-directors general (DDGs): Alan Wolff (United States), Yonov Frederick Agah (Nigeria), Karl Brauner (Germany), and Yi Xiaonzhun (China). The new director-general (DG) will be appointed shortly, and her hands will be full. She will have to address the issues discussed here, but no matter how competent she proves to be, she cannot do it without the active support of the

¹³ Horn, Mavoroidis and Sapir (n 7).

¹⁴ 'Britain's Role in the World' *Guardian* (London, 6 December 1962).

membership. All membership should be behind the efforts to re-start the WTO engine, but some more than others.

Up to the Uruguay round, the old two-step would do: as long as the European Union and the United States shared a worldview, and were dancing in the same direction, the world trading community would follow. It is not the case anymore. We have now moved to a multi-polar world. Voices are multiplying, and worse diversifying. We are experiencing a cacophony when a single tune is required. This is no cakewalk, but one key piece of the jigsaw puzzle seems to be abandoning its previous centrifugal tendency and moving towards the orbit in a centripetal manner this time: President Joseph Biden's call to arms is in favor of working with the other nations towards healing and uniting America – and also the world.¹⁵ Hopefully, the WTO is high up there in his world agenda. The grievances of the United States have not gone away, and some of them will not go away either. And it is important to distinguish between substance and process here. The abrupt manner in which the Trump Administration dismantled the Appellate Body, and threw the entire WTO dispute settlement system into jeopardy, should not be confused with the substantive criticism that successive US administrations have voiced. Even though the United States was alone in disregarding the Dispute Settlement Understanding (DSU) disciplines, it was not alone in voicing criticism: there is a list of simmering points that Fiorini and others¹⁶ have revealed.

Surely, the worldview of the Trump Administration (its trade policy included) is an oddity when compared to the traditional US Weltanschauung, as Nye¹⁷ has shown. In an op-ed in the *Financial Times*, Francis Fukuyama, went so far as to state that 'America's choice signifies a switching of sides from the liberal internationalist camp, to the populist nationalist one.'¹⁸

15 Stephen Collinson, 'Biden Stakes out His Anti-Trump Presidency' (*CNN*, 25 November 2020) <<https://edition.cnn.com/2020/11/25/politics/joe-biden-donald-trump-cabinet/index.html>> accessed 18 February 2021.

16 Matteo Fiorini and others, 'WTO Dispute Settlement and the Appellate Body Crisis: Insider Perceptions and Members' Revealed Preferences' (2020) 55 *Journal of World Trade* 667–98.

17 Joseph S Nye Jr, *Do Morals Matter?* (OUP 2020).

18 Francis Fukuyama, 'US Against the World, Trump's America and the New Global Order' (*Financial Times*, 11 November 2016) <www.ft.com/content/6a43cf54-a75d-1e6-8b69-02899e8bd9d1> accessed 18 February 2021. On this score, Meade has expressed similar views, see Walter Russell Meade, 'The Jacksonian Revolt: American Populism and the Liberal World Order' (2017) 96 *Foreign Affairs* 2–14. Bob Davis and Lingling Wei, *Superpower Showdown: How the Battle Between Trump and Xi Threatens a New Cold War* (HarperCollins 2020) have held the view that President Trump did not want to be associated with anything that the Obama Administration had contributed, and this explains

Borrowing from Haass,¹⁹ the view of the Trump Administration is that foreign policy is an 'expensive distraction'. Where previous presidents have invested in building coalitions and establishing international cooperation, President Trump has divested. The Trump Administration has been a largely transactional administration, when building a system and/or keeping it in place, requires the exact opposite attitude. A transactional attitude is highly consistent with populist tendencies. Giving in to populism means giving up compulsory third-party adjudication, the foundational element of WTO adjudication. The United States did that.

The embedded mechanism to address grievances, the DSU Review, proved to be an inadequate forum to help dissipate the US concerns. And, to some extent, the unfortunate initiative of DG Azevedo to abandon the 'Green Room' meetings, a self-inflicted damage for sure, deprived the membership of a potentially useful forum where similar concerns could have been entertained. All this is to state that President Biden might turn a page when it comes to this attitude but will most likely take a couple of pages from the US book of expressed grievances when moving forward on the trade front.

The first step for President Biden, will be to request the renewal of his trade promotion authority (TPA) so that he can negotiate at the international plane.²⁰ He will then have to bring to the table a few important stakeholders, starting with the number one foe of the Trump Administration, China.

4 A New Dawn in Geneva

Reading Acheson,²¹ one can only admire the hard work and investment that the US leadership had put behind a project aiming to establish a peaceful world order. Benjamin Franklin, the American polymath and founding father of the nation, captured in one sentence what world leaders of today fail to realize: 'We must, indeed, all hang together, or, most assuredly, we shall hang separately.' In this order, a trade liberalizing organization has a special place – as

its attitude in international trade relations as well (ibid 18 ff). On the US attitude in the post WWII-years, see the excellent account of G John Ikenberry, *Liberal Leviathan: The Origins, Crisis, and Transformation of the American World Order* (Princeton UP 2011).

19 Richard N Haass, 'Present at the Disruption: How Trump Unmade US Foreign Policy' (2020) 99 *Foreign Affairs* 22–34.

20 The current TPA expires on 1 July 2021, see <<https://crsreports.congress.gov/product/pdf/IF/IF10038>> accessed 18 February 2021.

21 Dean Acheson, *Present at the Creation: My Years in the State Department* (WW Norton and Co Inc 1969).

the argument for free trade rests on solid foundations: it is not a zero-sum game, it is a win-win.²²

Alas, the counterpart to Acheson's account is Thucydides' trap, eloquently discussed recently again in Allison.²³ A great deal hinges on the manner in which the new Biden Administration will go about its mandate. Will it be a new call for re-establishing the world order? Or, facing the fear that pax americana will give rise to pax sinica, will a non-cooperative attitude emerge?

The history of the Cold War has been approached through different angles and has taught different people different lessons.²⁴ The liberal order was probably celebrated too soon by Fukuyama in 1992,²⁵ but has shown remarkable resilience against adversity in the post WWII-era. In Mavroidis and Sapir,²⁶ we argued that multilateralism matters more than any previous time in the recent history. Trade has been a foundational component of the scaffolding. It deserves a renewed commitment.

Biographical Note

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22 For some reason, some analysts tend to overlook that hegemons do not necessarily produce a liberal world order. There is no automaticity in this respect. The profile of the hegemon, and its world outlook will largely define the nature of the order produced. Low wrote an excellent account to this effect, at a comparable moment, when the world trading community was oscillating between concluding the Uruguay round and going back to the era of aggressive unilateralism, which all wanted to leave behind; see Patrick Low, *Trading Free: The GATT and US Trade Policy* (Twentieth Century Fund 1993).

23 Graham Allison, *Destined for War, Can America and China Escape Thucydides's Trap?* (Houghton Mifflin Harcourt 2017).

24 Odd Arne Westad, *The Cold War: A World History* (Basic Books 2017) provides an excellent account on this score.

25 Francis Fukuyama, *The End of History and the Last Man* (Free Press 1992).

26 Petros C Mavroidis and André Sapir, *China and the WTO: Why Multilateralism Still Matters* (Princeton UP 2021).