

THE PROBLEM AT THE WTO

Relevant for: International Relations | Topic: World Trade Organisation (WTO)

While Bretton Woods institutions were to embed the new financial trade order, U.S. Treasury department official, Harry Dexter White, and economist John Maynard Keynes had more than just the regulation of the international monetary system in mind at the time. An International Trade Organisation (ITO) was also to be created to establish multilateral rules for the settlement of trade disputes. Adherence to the rules of an international trade organisation was expected to serve as an important domestic incentive (and imperative) for governments by allowing them to resist protectionist demands and provide for greater legal certainty. Successive multilateral conferences were held between 1946 and 1948, and led to the adoption of the Havana Charter, a draft agreement for the creation of the ITO. But the ITO never came into existence as it was eventually rejected by the U.S. when, in 1950, President Harry Truman announced that he would not submit the Havana Charter to the Congress. The General Agreement on Tariffs and Trade (GATT) came to replace the ITO, interestingly as an ad hoc and provisional mechanism.

Four decades later, the U.S. drove the agenda to establish the World Trade Organisation (WTO) purely to pursue its own commercial interests. The U.S. has been long proven isolationist and has never truly embraced the idea of a multilateral system in which its leadership could be contested. So the recent ire against its very creations, from the North American Free Trade Agreement (NAFTA) to the Trans-Pacific Partnership (TPP), and the less recent disenchantment with NATO or UNESCO, is not surprising.

A closer look at the Doha round of trade negotiations shows that the U.S. may well have consciously (or not) destroyed the negotiation process in formulating excessive demands that no country was prepared to meet. After all, the priority of the Obama administration was not to revive a dying WTO negotiation, but to concentrate on its newly created alternative, the TPP, to contain its competitors: Europe and China. So much so that the current crisis with the WTO dispute settlement system does not come as a surprise. In trade wars, the objective is not to settle a dispute; it is to win the battle.

For years now, the multilateral system for the settlement of trade dispute has been under intense scrutiny and constant criticism. The U.S. has systematically blocked the appointment of new Appellate Body members ("judges") and de facto impeded the work of the WTO appeal mechanism. With only four working members out of seven normally serving office in July 2018, the institution is under great stress. If no appointment is made, it will simply be destroyed by December 2019, with only one remaining member to tackle a massive number of disputes that are also increasingly hypertechnical. Importantly, the Appellate Body requires a core of three members to decide a dispute.

Criticism against the dispute settlement system is not the monopoly of the U.S. Other WTO members are expressing concerns over the politicisation of the Appellate Body appointment and reappointment process; and the quasi-attribution of permanent Appellate Body seats to the U.S. and the European Union (EU). There is concern that China may be on its way to having a permanent seat.

But the main critique of the U.S. relates to "overreaching" or judicial activism. The WTO Dispute Settlement Understanding stresses that the dispute panels cannot "add to or diminish the rights and obligations" provided for by the WTO agreements. The U.S. has relentlessly attacked the practice of some Appellate Body members continuing to hear cases which have been assigned

to them during their tenure. However, the U.S. has to be blamed for this situation. With no fresh filling up of vacancies and reappointment of members whose terms are expiring, Washington is deliberately pushing the WTO legal mechanism to the brink. It is more than evident that the U.S. is not willing to be judged by an independent multilateral quasi-judicial institution. One needs to bear in mind that the WTO dispute settlement mechanism is not a world trade court. The process remains political and diplomatic. The very existence of an appeal mechanism is now paradoxically questioned at a time the global community criticises the absence of the same mechanism in Investor-State Dispute Settlement (ISDS). Solutions are proposed to ease the work of a congested body from the establishment of committees to arbitration, but the roots of the problems are not seriously addressed.

Since 2013, a Chinese-style garden welcomes the visitor to the WTO. As always with China, the metaphor illustrates a profound reality and is not short of pragmatism. Beijing might well be the new WTO leader and China's growing assertiveness may be the reason for the U.S.'s hard posturing. Since its accession to the Organisation, in 2001, and despite an extremely demanding protocol of accession designed by the U.S. and the EU to literally constrain its emerging power and limit the impact of its commercial domination on their own economies, China has largely benefited from the rules-based WTO system. In less than a decade since its first dispute, China has accumulated a vast experience close to that of the U.S. or Europe. This strategic and selective normative acculturation has been an empowering one — so much so that Beijing, together with a few others, the EU, and to some extent India, is now the main supporter of multilateralism. But does an undemocratic and statist China hold the legitimacy to take the lead while its genuine adherence to the market economy is very much challenged by its main trading partners? The recent EU-China proposal to promote the reform of the WTO is said to combat “unilateralism and protectionism” but might well fail to address unfair trade issues raised against China itself. Beijing is unlikely to unite with Brussels against Washington.

But the world has changed and multilateral institutions now have to embed these changes. Today's WTO crisis might well be the last ditch battle to retain control over a Western-centric organisation. The time has come for the emerging economies and the developing world to have a greater say in how to shape multilateralism and its institutions.

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