

Regulating for Globalization

Trade, Labor and EU Law Perspectives

“The WTO Appellate Body without Legitimacy?”

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Is there any practical value to international agreements without enforcement instruments? And can the multilateral rules of the world trade system hold the trust of the member states, so that they continue to adhere to the mutual benefits and obligations under WTO law – even if the WTO dispute settlement system is totally or even partially incapacitated? One of the key achievements of the Uruguay Round was that the member states provided the world trade system with a two-tiered dispute settlement system comprising of a panel process and a further option to appeal its findings. However, this system is increasingly being challenged: the United States has continued to withhold its consent for the required replacement of vacant positions, thus rendering the WTO Appellate Body indefinitely unable to carry out its function.

The WTO’s ability to function is still under threat

What is the background to this obstruction of the world trade system? A report by the US Trade Representative sought to justify it with a central statement claiming that the Appellate Body exceeds its powers (“overreach”) and lacks legitimacy. This report was published by the United States Trade Representative during President Trump’s term in office. However, the blockade was initiated under President Obama; initial indications are, that for the time being, the Biden administration will maintain the status quo.

This “blockade” has been strongly criticised among the WTO contracting parties. In the negotiations over the establishment of the World Trade Organisation and its legal texts, it was primarily the USA that pushed to introduce an appeal procedure, as a supplement to the single-stage panel procedure that existed at that time. For many years, the WTO’s decision-making practice was met with wide-spread approval and it became an integral part of the world trade system. Why is that assessment changing now?

The “blockade” as a reflection of the changes in international trade relations

My position is that the causes of the “blockade” are not deficiencies in the dispute settlement system and its practice. Rather, the “blockade” should be viewed as the result of causes outside of the dispute settlement process per se, to be found in the changes in international trade relations themselves. The multilateral system has been a forceful instrument for securing export opportunities throughout the past decades. But now, an ever-growing tension is emerging from the liberalization rules of the multilateral system, as it becomes increasingly clear that the interests behind the liberalization rules of the world trading system are changing to a degree not previously

seen, spurred in particular by the increased participation of China.

The growing and far-reaching role of the emerging powers

From the point of view of the affected actors, the increasing participation of the emerging powers now brings threat scenarios that are fundamentally linked to their growing international competitiveness. In the eyes of many observers, competitive asymmetries arise through the use of “non-market-based instruments.” The “market economies” find themselves inadequately equipped to counter these “distortions of competition” under the prevailing conditions of traditional liberalisation concepts.

This leads to the question whether the multilateral system, which has in the past been very successful in many sectors for the industrialized countries, is now increasingly failing to satisfy what is specifically required of it. Consequently, strategies in certain sectors are being altered, with characteristics of restrained but also often open protectionism.^[1] The current trade conflicts, most notably those between the United States and China, can be looked on as an expression of shifting interdependencies of market openings and market foreclosures and the accompanying interest in trade differentiation. Although the world trade system still shapes daily economic life to a significant degree, the interest in the increasing differentiation in trade policy strategies among the WTO parties is leading to a reappraisal of participation in the multilateral system. Even while the WTO parties express the political will to maintain the system as such, it is increasingly being discussed whether the multilateral system has the ability to take the increasingly differentiated liberalisation interests adequately into account. For key players to pursue their differentiated strategies, they are now demanding additional and more far-reaching framework conditions than were previously required.^[2]

Is there a justification for exorbitantly high US tariffs under Art. XXI GATT?

Thus, bilateralism and unilateralism can be seen as strategies that are intended to complement the multilateral approach and expand the range of action and possibilities. Neo-conservative thinkers freely emphasize that the implementation of goals considered to be in the national interest is more important than an orientation towards international law. Experience shows that the increased US tariffs are strategically effective in certain areas and lead to a change in supply chains. As a result, certain industries achieve competitive advantages that would otherwise be out of reach. In this context, the question of whether the exorbitantly high US tariffs, incompatible with fundamental GATT rules, can be justified as measures in the national security interest under Art. XXI GATT takes on special importance.

The Panel report “Russia – Measures Concerning Traffic in Transit” demonstrates that WTO law and its decision-making practice provide mechanisms that both open up and limit the possibilities of national policy, and simultaneously shows how those mechanisms perform that role.^[3] It is fundamentally about the allocation of sovereign powers: from the viewpoint of a contracting party that invokes Art. XXI GATT, an extensive application appears advantageous, to thus justify the broadest possible range of sovereign action. However, such extensive application also brings with it a greater negative impact on others. WTO law provides a substantive regulation for balancing these interdependencies.

WTO Dispute Settlement will remain indispensable in the future

Through WTO dispute settlement, the member states have created an effective instrument for emerging disputes to be assessed in procedures that display a high degree of transparency and independence. In this way they have managed, as far as possible, to replace power-oriented policies with rule-based ones. By “blocking” the Appellate Body, the United States is preventing the sanctioning of potential WTO-incompatible action – and thus invalidates the multilateral control and protection functions, to the detriment of other contracting parties. The functionality of the multilateral system and compliance with international rules provides a fundamental basis, particularly for medium-sized and smaller countries, to realise their export opportunities. It is of enormous importance to the international community that the world trade system continues to provide a forum into the future, where controversial issues can be properly assessed in a rules-based manner.

How will the Biden administration position itself?^[4]

Future advances will depend on how successful the new Biden presidency and the WTO member states will be in transforming conflict-laden protectionist tendencies into cooperative win-win situations.^[5] This will certainly be achieved by maintaining and strengthening, but not by deconstructing the possibilities of supranational institutions. It is important to note here that the texts of the WTO agreements essentially reflect the situation at the time of the founding of the WTO a quarter of a century ago. The world in which the WTO member states currently find themselves is one of emerging powers, increasing conflicts, pressing social and environmental demands and the challenges and opportunities posed by new technologies. In this environment, now more than ever before, they face the task of finding solutions to stabilize and further develop a trading system geared towards international cooperation and, in the process, create a framework that is attractive to all contracting parties.

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