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The WTO's Crisis: Between a Rock and a Hard Place

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The WTO's Crisis: Between a Rock and a Hard Place

Jelena Bäumler*

Abstract:

The perception of the WTO is currently one of an organisation in crisis. Yet, appraisal varies regarding its extent and seriousness: Is it merely a rough time or are we standing on the edge of destruction? The article will trace developments inside as well as outside the WTO in order to assess the magnitude of the crisis. It will be argued that while certain developments inside the organisation, when seen in accumulation would already warrant serious attention, only together with developments taking place outside of the WTO, the two strands of developments unfold their full potential for the crisis. The overall situation renders the WTO in a difficult position, as it is currently unable to adapt to these challenges, while keeping calm and carrying on might similarly further the crisis. While States might improve and further develop their trade relations in bi- and plurilateral agreements, it is only the WTO that reflects and stands for the multilateral post (cold) war order.

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Introduction

The WTO is not just any international organization. In many ways, it may serve as proof for the development of the post-Cold War era towards an international rule of law, setting regulations for a globalized market order as well as pursuing an unrestrained multilateral approach with an international organization potentially accessible for all States. It bears some of its defining features exactly from its creation during a very special time in history at the end of the Cold War, overcoming some elements that have played out as perceived weaknesses of other international organizations, including its precise and binding rules, a common framework without much room for reservations¹ and a compulsory dispute settlement system including an oversight mechanism for its implementation. And indeed, in the years following its creation, the WTO appeared well-designed, efficient and robust. It attracted ever more members, spanning an almost universal net of economic relations around the globe², its rules being broadly accepted and observed. In case a dispute arose, relatively fast proceedings would settle the dispute peacefully and in the majority of cases, the rulings were actually implemented.³ One could even go as far as claiming that the WTO overcame the ‘compliance trilemma’ of international law by providing for widespread participation, ambitious legal norms and high compliance rates all at the same time.⁴ Criticism, albeit sometimes fierce and loud, rather appeared as a mandate to improve and further develop the organization, than calling into question its general functionality or its very right of existence. Overall, one may say, at least when viewed in isolation⁵, that the WTO was a success story in theory and practice.

These glorious days seem to be over. The WTO has slipped into a deep crisis. The challenges are posed by developments inside as well as outside the WTO and have squeezed the organization into a position that leaves it with little room for manoeuvre. Inside the WTO, the members interact with a changed tone and attitude towards each other and the organization itself. Critique on the design of the rules, both procedural and substantive, constant and undisguised violations, accusations of overreach of the Dispute Settlement Body (hereinafter DSB)’s mandate leading ultimately to the destruction of the Appellate Body (hereinafter AB) as well as the inability to reform existing or to conclude new agreements due to incompatible and uncompromising positions of its members have weakened and undermined the WTO.⁶ At the same time, developments outside the WTO backfire negatively onto the multilateral institution and increasingly relegate it to the side-lines. First, and

¹ Generally, reservations are not allowed according to art XVI:5 of the Agreement Establishing the World Trade Agreement (WTO Agreement) 1994, 1867 UNTS 154, except if provided in the respective agreement (E.g. art 15.1. Technical Barriers to Trade Agreement (hereinafter TBT Agreement), 18.2. Anti-Dumping Agreement (hereinafter ADA), 32.2. of the WTO Agreement on Subsidies and Countervailing Measures 1994, 1867 UNTS 14 (hereinafter SCM), 72 of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 UNTS 299 (hereinafter TRIPS), Annex III 2-4 Custom Valuation Agreement for developing countries, approval is required by the other members). Nevertheless, there is little actual relevance as can be inferred from the list of members’ reservations, Doc G/VAL/W/311.

² Currently 164 members, <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>.

³ DG Azevêdo mentioned in his statement on occasion of the Twenty-fifth anniversary of the conclusion of the Uruguay Round on 12 September 2019; that ‘To date, the WTO has dealt with almost 600 trade disputes. Many disputes are resolved before they reach the litigation stage, but when they do proceed to that stage compliance with rulings is very high, at around 90 per cent.’ <https://www.wto.org/english/news_e/spra_e/spra280_e.htm>.

⁴ JL Dunoff, ‘Is Compliance an Indicator for the State of International Law? Exploring the “Compliance Trilemma”’, in H Krieger, G Nolte and A Zimmermann (eds), *The International Rule of Law: Rise or Decline?* (2019) 183.

⁵ Leaving aside more general aspects such as the fact that it had contributed to the fragmentation of international law, for example, von Bernstorff, *ibid*, 46 et seq.

⁶ Statement by DG Azevêdo (n 3).

foremost, the proliferation of preferential trade agreements⁷, in a quantitative as well as in qualitative dimension, have undermined one of its main principles, namely non-discrimination and have brought about the renationalization of products. Second, this increasingly leads to negotiations and the actual standard setting for international trade outside the WTO. Multilateralism, a global approach and perception of the WTO as the main negotiation forum is thereby considerably put in question.

Has thus, we may wonder, the WTO reached peak-law and will crumble in the years to come? Of course, wise scholars remind us that this is not the first time that serious turbulences and trade wars in the international economic order albeit extremely worrying at the time, did, in the end, not translate into destruction, but eventually even into the next step of integration and a strengthening of the global institution.⁸ A prudent mindset might especially be important in order not to create damage by overemphasizing the 'crises-narrative'. Yet, at the same time, on the edge of disruptive developments sleep wandering by just believing in the resilience of an institution when it is already on the glimpse of collapsing would similarly prevent from comprehending the seriousness of the current state of affairs as well as analysing realistically proposals for a way out of the crisis. For the WTO at least, the accumulation of recent developments warrants a careful assessment.

The analysis will depart from analysing core developments taking place inside (Part One), as well as outside the WTO (Part Two) that led to the current crisis. Against this background, it will be explored whether International Economic Law rather straddles on the rise or decline side (or both) of current international law life and discusses reasons for and ways out of the crisis (Part Three), before offering some concluding remarks.

Part One: Developments inside the WTO

Recently, Director General Roberto Azevêdo conflated that: '[...] the global economic order is under severe strain. Powerful voices claim that national well-being is hurt, not helped, by international rules.'⁹ The reasons for this assessment will be traced along four main developments: First, it is now – at the latest – more probable than not that the Doha Development Agenda (DDA) may never be concluded and consequently, some of the initial promises made during the Uruguay Round towards especially developing countries will not be honoured. At the same time, the failure also diminishes hope for the general 'reformability' of the WTO, rendering the organization with the set of rules as they currently stand, which are regularly perceived by a wide variety of members as unsatisfactory (1). Second, obvious and systemic violations in open disregard of the rules and agreements are unfolding their damaging effects on the ability of the WTO to effectively guarantee fair and open

⁷ Used here as a catch-all phrase, PTA (Preferential Trade Agreements) is the terminology used by WTO in order to refer to reciprocal preferential agreements – regional, bilateral or plurilateral, see WTO, *World Trade Report* (2011) 44 <https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf>.

⁸ E.g. Japan-US trade war in the 80s, J Kurtz, 'Past as Prologue? Historical Parallels and Discontinuities in Modern Trade Wars' (Kings College London Workshop, London, 2020) <<https://ssrn.com/abstract=3469496>>. On Voluntary export restraints, see G Vidigal, 'The Return of Voluntary Export Restraints?: How WTO Law Regulates (and Doesn't Regulate) Bilateral Trade-Restrictive Agreements' (2019) 53 *Journal of World Trade* 187-210 <<https://ssrn.com/abstract=3254196>>.

⁹ Statement from DG Azevêdo of 17 October 2019 >https://www.wto.org/english/news_e/spra_e/spra287_e.htm>.

markets and the perception that most members observe most rules most of the time¹⁰ (2). Third, in the peaceful years, the WTO has failed to clarify its role in situations of increased tensions between its members, rendering security exceptions and countermeasures as two open flanks in the current escalating trade wars (3). Fourth, the destruction of the Appellate Body by one member, paired with the inability of all others to unite against the rioter leave one of its main organs with amputated power that will have negative effects over and above the dispute settlement system, but for the organization as a whole (4).

1. No Progress in the DDA and the forecast of an everlasting ‘Reformstau’

In 2001, when the DDA was launched, the decision appeared timely: not only did it reflect a uniting moment after 9/11, but it was also a strong signal to developing country members that the promises made during the Uruguay Round had an actual chance of being kept.¹¹ The Ministerial Conference expressly stated that ‘[t]he majority of WTO members are developing countries. We seek to place needs and interests at the heart of the Work Programme adopted in this Declaration.’¹²

The beginning of the Round was indeed sanguine: Members expressed priority for improving the situation of developing countries and everyone showed strong motivation to reach compromise.¹³ The initial positive atmosphere became soon overshadowed by disputes over the so-called Singapore issues¹⁴ and the high expectations met with little actual proposals by developed countries, especially the EU and the US, in core sensitive areas such as subsidies and sectors, especially agriculture.¹⁵ As the years went by, the situation turned grimmer. The only agreement that could be achieved ever since the Uruguay Round¹⁶ is the Trade Facilitation Agreement (hereinafter TFA) that was concluded in Bali in 2013¹⁷, eventually entering into force on 22 February 2017.¹⁸ The agreement requires accessibility and transparency of information regarding import and export and aims at smoothing and easing all processes related to cross-border trade.¹⁹ Albeit it features an entire

¹⁰ Borrowed from the famous statement by Louis Hankin: ‘almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time’, *How Nations Behave* (1979) 47.

¹¹ World Trade Organization, Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN (01)/DEC/1. (hereinafter Doha Declaration).

¹² *Ibid*, para 2.

¹³ E.g. Subsidies in agriculture (para 13); market-access for non-agriculture products (para 16); interaction between trade and competition policy (para 24); trade facilitation (para 27); trade and transfer of technology (para 37); technical cooperation and capacity building (paras 38-41); least-developed countries (paras 42-3); special and differential treatment (para 44); see also para 4 for the commitment to the WTO ‘as the unique forum for global trade rule-making’.

¹⁴ ICTSD, 1 Doha Round Briefing Series, 6 ICTS (2003) <<https://www.ictsd.org/sites/default/files/downloads/2008/06/doha6-singaporeissues.pdf>>.

¹⁵ Especially export subsidies are a major part of the broader package in the agriculture negotiations. Yet, the draft text for ministers to agree in Bali (that ended with the 2013 Bali Ministerial Declaration on Export Competition) stops short of making legal commitments <https://www.wto.org/english/thewto_e/minist_e/mc9_e/brief_agneg_e.htm#generalservices> and <https://www.wto.org/english/news_e/news13_e/agng_23_may13_e.htm#export>.

¹⁶ WTO, *The WTO at Twenty: Challenges and achievements* (2015) <https://www.wto.org/english/res_e/booksp_e/wto_at_twenty_e.pdf>, concludes that the WTO has achieved much over its first 20 years but the success of the WTO has inevitably given rise to new challenges.

¹⁷ According to the Decision on 27 November 2014 (WT/L/940), the TFA is a Protocol to WTO Agreement.

¹⁸ After obtaining the two-thirds acceptance of the Agreement from its 164 Members.

¹⁹ See especially arts 1 and 5 (Publication and availability of information) and art 10 (Formalities connected with importation, exportation on transit) of the TFA.

section on special and differential treatment²⁰, it does not tackle or resolve any of the hard questions of the DDA.

Concerning the important systemic topics of the DDA, by now, it appears more probable than not that compromise for those topics will not be reached any time soon.²¹ For the ongoing every day import and export of goods and services, this might not be overly problematic. The real problem lies in the failure of having delivered on the Round: developing members felt that not even in a negotiation round that had their interest at the heart of the agenda and not even with regard to specific commodities or sectors was there enough determination of developed members to enter into binding commitments that would bring about actual changes to the situation of developing and least-developed members.²² In fact, the single commodity cotton – for which the DSB had even confirmed the incompatibility of US subsidies with current WTO agreements²³ – was often perceived as a litmus test, that had however failed, and with it the entire Round.²⁴ The last Ministerial Conference in Buenos Aires in 2017 ended without a common Ministerial declaration and produced only a small number of Ministerial Decisions on five topics²⁵ as well as several joint statements supported by a varying subgroup of members.²⁶

In a more general way, the unwillingness and inability to conclude the Round almost twenty years after its initiation casts serious doubt on the general ‘reformability’ of the WTO by consensus among the currently 164 members.²⁷ Important areas in which little or no progress could be made in the last decade include digital trade, e-commerce and related aspects of data flows, which are often perceived as some of the most pressing issues for the future development of global trade.²⁸ The

²⁰ Arts 13-22 Section II of the TFA.

²¹ See A Matthews ‘Doha negotiations on agriculture and future of the WTO multilateral Trade System’, *QA - Rivista dell'Associazione Rossi-Doria, Associazione Rossi Doria*, 1 (2014) 26-40 <<http://ageconsearch.umn.edu/record/160370/files/01-Matthews%20-%20EAAE%20135.pdf>>; S Lester, ‘Is the Doha Round Over? The WTO's Negotiating Agenda for 2016 and Beyond’ (2016) 64 *Free Trade Bulletin* 2 <<https://www.cato.org/sites/cato.org/files/pubs/pdf/ftb64.pdf>> and S Cho, *Is the WTO Passé? Exploring the Meaning of the Doha Debacle* (2009) 7 <<http://ssrn.com/abstract=1403464>>.

²² Ministerial Decision of Bali on Cotton (2013), reiterates members’ commitment to ‘on-going dialogue and engagement’ to make progress in the negotiations on cotton according to the 2005 objectives of the Hong Kong Ministerial Conference (WT/MIN(13)/41 WT/L/916).

²³ WTO, United States – Subsidies on Upland Cotton, WT/DS267.

²⁴ The Cotton-4 (Benin, Burkina Faso, Chad and Mali). See K Anderson and E Valenzuela, ‘The World Trade Organization’s Doha Cotton Initiative: A Tale of Two Issues’ (2006) *World Bank Policy Research Working Paper* 3918 <<http://documents.worldbank.org/curated/en/247241468010473451/pdf/wps3918.pdf>> and D Sumner, *Reducing Cotton Subsidies: The DDA Cotton Initiative* (2006) <http://siteresources.worldbank.org/INTRANETTRADE/Resources/239054-1109114763805/Ch10_Sumner.pdf>.

²⁵ Work programmes on Fisheries (WT/MIN(17)/64), e-commerce (WT/MIN(17)/65) and Small Economies (WT/MIN(17)/63) and a decision on the prolongation of TRIPS and non-violation complaints (WT/MIN(17)/66).

²⁶ WT/MIN(17)/61 Joint Ministerial statement on services domestic regulation; WT/MIN(17)/60 Joint statement on Electronic Commerce WT/MIN(17)/59; Joint ministerial statement on Investment Facilitation for Development WT/MIN(17)/58; Joint Ministerial statement - Declaration on the establishment of a WTO informal work programme for MSMEs.

²⁷ See <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>.

²⁸ See <https://www.wto.org/english/tratop_e/ecom_e/ecom_e.htm> and also JP Meltzer, ‘A WTO reform agenda Data flows and international regulatory cooperation’ (2019) *Global Economy & Development Working Paper* 130 <https://www.brookings.edu/wp-content/uploads/2019/09/WTO-Reform-Agenda_final.pdf>; this stands in stark contrast to FTAs having regularly incorporating e-commerce chapters into their coverage; see e.g. M Wu, *Digital Trade-Related Provisions in Regional Trade Agreements: Existing Models and Lessons for the Multilateral Trade System* (2017) RTA Exchange. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and the Inter-American Development Bank (IDB) <https://www.ictsd.org/sites/default/files/research/rta_exchange-digital_trade-mark_wu_-final.pdf>.

General Agreement on Trade in Services (hereinafter GATS) is still to a certain extent opaque and much less powerful than the General Agreement on Tariffs and Trade (hereinafter GATT).²⁹ Any positive effects out of the Trade in Services Agreement (hereinafter TISA) negotiations cannot be expected since the abrupt end of this process.³⁰ The same holds true for rules on currencies, competition and investment. In the same vein, so-called ‘trade and’- issues have not progressed. The initiative on an Environmental Goods Agreements (hereinafter EGA) has not been further developed since 2015.³¹ No reactivation of the former ‘green box’ subsidies under the Subsidies and Countervailing Measures Agreement (hereinafter SCM) has taken place that would enable members to support green energy or environmentally friendly industries on a clear legal basis.³² Similarly, the conclusion of an agreement on fishery subsidies planned for the end of 2019 was again postponed for another year.³³ Human rights and labour rights remain issues outside standing WTO agreements.³⁴ In short, hardly any visible progress was made in any significant core area in the WTO in the last decade. All those topics are currently not effectively regulated by the WTO, furthering the perception that the WTO is to a certain extent incomplete, especially when those areas have the potential of undermining or calling into question the legitimacy of other WTO commitments.³⁵

The perception of incompleteness of the WTO agreements has recently been openly instrumentalised as a core defence argument in the US written statement in the Section 301 dispute with China.³⁶ Besides its rather confusing construction of the relationship between domestic and international law, the US argues that the incompleteness renders the WTO partially illegitimate.³⁷ Consequently, in view of the US, the Panel should allow justification of the measures taken against China under the public morals exception of Art. XX(a) GATT, based on the assumption that,

²⁹ General Agreement on Tariffs and Trade (GATT) 1994, 1867 UNTS 187; General Agreement on Trade in Services (GATS) 1994, 1869 UNTS 183. On the functionality of the GATS generally see M Herdegen, *Principles of international economic law* (2nd ed., 2016) 226-71.

³⁰ In themselves problematic due to their open relationship with WTO. Yet, the negotiations on TISA are now on hold, see <<https://ec.europa.eu/trade/policy/in-focus/tisa/>>.

³¹ See <https://www.wto.org/english/tratop_e/envir_e/ega_e.htm>.

³² A Genest, ‘The Canada—FIT Case and the WTO Subsidies Agreement: Failed Fact-Finding, Needless Complexity, and Missed Judicial Economy’ (2014) McGill IJSDLP, 10 <https://www.mcgill.ca/mjsdl/files/mjsdl/10-2_genest.pdf>.

³³ Negotiations on fisheries subsidies were launched in 2001 at the Doha Ministerial Conference, and at the eleventh Ministerial Conference held in Buenos Aires in 2017, WTO members agreed to conclude the agreement on fisheries subsidies which delivers on Sustainable Development Goal 14.6 by the end of 2019 (now postponed to be agreed in 2020 in Nur-Sultan).

³⁴ E-U Petersmann, ‘How Should the EU and Other WTO Members React to Their WTO Governance and WTO Appellate Body Crises?’ (2018) 9-46, EUI Working Paper, RSCAS 2018/71 <https://cadmus.eui.eu/bitstream/handle/1814/60238/RSCAS_2018_71.pdf?sequence=1&disAllowed=y>.

³⁵ Relation of currency and competition with trade; see further below US argument in WTO, United States — Tariff Measures on Certain Goods from China, WT/DS543, 27 August 2019.

³⁶ WTO, United States — Tariff Measures on Certain Goods from China, WT/DS543 <https://www.wto.org/english/ratop_e/dispu_e/cases_e/ds543_e.htm>.

³⁷ ‘China’s policy and practice of state-sanctioned theft [...] violates prevailing U.S. “standards of right and wrong” as reflected in the state and federal laws of the United States, under which the act of “theft” is universally deemed a criminal offense.’, US Written statement in WT/DS543, para 74 <<https://ustr.gov/sites/default/files/enforcement/DS/US.Sub1.%28DS543%29.fin.%28public%29.pdf>>.

China's morally wrong behaviour further threatens to undermine U.S. society's belief in the fairness and utility of the WTO trading system, if that system creates the conditions for, and fails to address, a fundamentally uneven playing field.³⁸

Although the argument might stand little chance of success, it reflects a deep discontent of a central WTO member about what it perceives as inchoateness and deficient functioning of the WTO rules regarding unfair trade policies not covered by current WTO agreements. Although the WTO never claimed to provide coverage of all aspects relevant for the economic relations among its members, the US position leaves the Panel in a dire situation and tone and arguments by the US certainly hung a Damocles sword over the Panel's head.

On a more general note, an organization that functions on rules that are locked-in in history without an actual chance of adaptation to prevailing challenges in an area that is constantly posing new questions and challenges by a vivid global market and under close scrutiny by national societies might stand an imminent risk of becoming of ever lesser interest to its members over time.³⁹

2. Broken windows in the WTO house: Systemic violations and their effects on the functioning of the WTO

According to the broken windows theory,

if a window in a building is broken and left unrepaired, all the rest of the windows will soon be broken [because] one unrepaired broken window is a signal that no one cares, and so breaking more windows costs nothing.⁴⁰

This section does not focus on violations of particular rules, it will rather aim to identify violations that are signs for broken windows that no one is willing or able to repair in the WTO legal order. In fact, in the last decade and even before trade tensions escalated into full-fledged trade wars, smashing ever more windows of the trade rules house, were worrying signs of systematic violations of agreements by an increasing number of members against each other.

One of the evergreens of WTO in this regard is dumping and the corresponding anti-dumping measures.⁴¹ Regulating dumping is at the heart of a liberal market order, prohibiting members to introduce products into foreign markets below the market value.⁴² In the background of the very technical regulatory framework around the determination of the market value of a product, two main issues keep reappearing in WTO disputes on a more systemic level. First, how can the framework be applied fairly and equally when some members provide for strong state-driven elements in their economy⁴³, especially but not restricted to China? Second, what is the allowed response, including

³⁸ *Ibid.*, para 76.

³⁹ Turning to increasingly covering those issues in bi- and plurilateral agreements, see Part One, 3.

⁴⁰ GL Kelling and JQ Wilson: 'Window-breaking does not necessarily occur on a large scale because some areas are inhabited by determined window-breakers whereas others are populated by window-lovers; rather, one unrepaired broken window is a signal that no one cares, and so breaking more windows costs nothing.' <<https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/>>.

⁴¹ See on the ADA in general <https://www.wto.org/english/tratop_e/adp_e/adp_e.htm>.

⁴² See art VI GATT and ADA <https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm>.

⁴³ 'Market Economy': Economy in which fundamentals of supply and demand provide signals regarding resource utilization, see P Gregory and R Stuart, *Comparing economic systems in the twenty-first century* (2004) 538. On the contrary, a 'state-driven or directed economy' can be defined as a model whereby the State is instrumental

in terms of the obligation and extent of investigations and the fixing of the dumping margin especially with regard to the technique of so-called ‘zeroing’?

The ADA stands as a reflection face and indeed the fault line for the harmonious coexistence of fundamentally different economic models under one common economic legal framework as well as the good faith of the members to observe and abide to the rules of that framework. The ADA is one of the most frequently cited agreement in WTO disputes⁴⁴ and the usage of its instruments has sparked over the last decade. While formerly dumping allegations and imposing of anti-dumping measures occurred among the usual suspects⁴⁵, since a number of years it appears like an all-time favourite instrument by any member against any other member.⁴⁶ An increasing number of products is targeted by anti-dumping measures, often correlating exactly with a domestic market under pressure in the respective member State.⁴⁷ Until 2016 the system at least concerning China⁴⁸ was more or less stable, with its special status according to the accession protocol.⁴⁹ With the expiration of the respective clause, dispute arose between China and several members as to the applicable proceeding for anti-dumping measures against Chinese allegedly dumped products.⁵⁰ Yet, a WTO dispute that could have provided clarity was suspended by China just before the report came out, leaving this important and systemic question unresolved.⁵¹ With regard to calculating the actual dumping margin, the practice of so-called zeroing has been constantly ruled out by Panels and the Appellate Body. The by now more than 30 disputes that have dealt with this particular technique of calculating the dumping margin⁵² and the constant refusal by the US to ultimately adjust its practice of zeroing can by now be categorized as a systemic challenge to the WTO. In fact, violations of the ADA by both exporting and importing members can thus be categorized as one of the broken windows that appears as not receiving reparation.

A similar observation holds true for subsidies and countervailing measures. China is also in the focus for its interwoven economic structure and the constant accusation of subsidies in all kinds of areas.⁵³

in guiding economic development, based on the rule of the market, see L Che, *Concept of State-Directed Economy* (2019).

⁴⁴ A list of disputes citing the ADA can be found here: <https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A6#selected_agreement>.

⁴⁵ Usually of developed countries against certain developing countries. See <[https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=\(%20@Symbol=%20g/adp/d*\)andLanguage=ENGLISHandContext=FomerScriptedSearchandlanguageUIChanged=true#](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(%20@Symbol=%20g/adp/d*)andLanguage=ENGLISHandContext=FomerScriptedSearchandlanguageUIChanged=true#)>.

⁴⁶ See the database on <https://www.wto.org/english/tratop_e/adp_e/adp_e.htm>; <https://www.wto.org/english/tratop_e/adp_e/AD_InitiationsByExpCty.pdf>.

⁴⁷ By mid-2019 a total of 5725 anti-dumping initiations since 1995 have been surveyed with an increasing tendency <https://www.wto.org/english/tratop_e/adp_e/AD_InitiationsByExpCty.pdf>.

⁴⁸ In fact, 90 per cent of products from China were subjected to anti-dumping or countervailing measures before 2019, see C Brown, *The 2018 US-China Trade Conflict After 40 Years of Special Protection* (2019) 16 <<https://www.pii.com/system/files/documents/wp19-7.pdf>>.

⁴⁹ Accession of the People's Republic of China (WT/L/432), Decision of 10 November 2001.

⁵⁰ W Huo, ‘Introduction and Critical Analysis of Anti-dumping Regime and Practice in China Pending Entry of WTO: Transition toward a WTO-Modeled Trade Legal Mechanism’ (2002) *The International Lawyer* 36(1) 197-214 <<http://www.jstor.org/stable/40707651>>.

⁵¹ There can only be speculation about the reasons for China's suspension <<https://www.reuters.com/article/us-usa-china-wto-eu/china-pulls-wto-suit-over-claim-to-be-a-market-economy-idUSKCN1T110A>>.

⁵² See on this P Mavroidis and T Prusa, ‘Die Another Day: Zeroing in on Targeted Dumping—Did the AB Hit the Mark in US–Washing Machines?’ (2018) *World Trade Review* 2018 7 239-64 <<http://econweb.rutgers.edu/prusa/cv/65%20-%20zeroing%20targeted%20dumping.pdf>>.

⁵³ R Eckhaus, ‘China's exports, subsidies to state-owned enterprises and the WTO’ (2006), 17 *China Economic Review* 2006, 1-13.

Yet, systemic challenges with regard to subsidies is not all restricted to China. In several disputes the DSB has confirmed that subsidies even in the agricultural sector can be reviewed and be found illegal under the SCM, at least if they cause injury to another member.⁵⁴ The EU and the US nonetheless, by and large, subsidize their agricultural sector in open and blatant disregard of the rules and findings of the DSB.⁵⁵ The agreement between the US and Brazil following the Upland Cotton dispute⁵⁶ to the detriment of third States, has additionally increased the perception that the DSB is unable to ensure adherence to agreements in general but rather operates as a mechanism to resolve bilateral disputes at which end a bilateral agreement may even worsen the WTO-inconsistent situation for other members.⁵⁷ It left behind another broken window unrepaired.

A third example of violations with a systemic implication is related to intellectual property rights leading to the impression that some members are constantly not playing by the rules to establish a fair market order which values intellectual property rights as agreed upon in the WTO.⁵⁸ Numerous disputes against China have confirmed various Chinese practices to constitute violations of WTO agreements, especially but not limited to TRIPS.⁵⁹ And, while this is nothing uncommon as especially concerning important market powers their policies are more often under review,⁶⁰ the piecemeal approach by China to rectify those shortcomings⁶¹ has led to disappointment over its market-economy commitments, questioning its constructive role for world trade law and the WTO, at least in this particular field.

The steep increase of WTO-inconsistent measures as well as the spark in disputes, but also of countermeasures taken without prior reference to the DSB⁶² may, as has been observed by former Appellate Body Member Sacerdoti, rather not be

an indication of a healthy dispute settlement system. On the contrary, it hints at a looming crisis of the system, and manifests a widespread disrespect of substantive and procedural

⁵⁴ Except there are in conformity with the Agriculture Agreement or do not fulfil the requirements of either arts 3 or 5 SCM.

⁵⁵ V Ancharaz, *Can the Doha Round Be Saved? The Future and The WTO: Confronting The Challenges - A Collection Of Short Essays* (ICTSD Programme on Global Economic Policy and Institutions 2012) para 3 <<https://www.ictsd.org/sites/default/files/research/2012/07/the-future-and-the-wto-confronting-the-challenges.pdf>>.

⁵⁶ WTO, United States – Subsidies on Upland Cotton, WT/DS267.

⁵⁷ The text of the Memorandum of Understanding can be found here: <<https://ustr.gov/sites/default/files/2014/10/1201606893.pdf>>; for an analysis see A Guitchons, *Cotton provisions in the US 2014 Farm Bill, US-Brazil cotton settlement and other major developments in the world cotton market* (2015) <<https://unctad.org/meetings/en/Presentation/SUC%20MYEM2015%20Andrei%20Guitchounts.pdf>>.

⁵⁸ J Bacchus et al., *Disciplining China's Trade Practices at the WTO: How WTO Complaints Can Help Make China More Market-Oriented* (2018) <<https://www.cato.org/publications/policy-analysis/disciplining-chinas-trade-practices-wto-how-wto-complaints-can-help>>.

⁵⁹ See *China TRIPS Cases: WTO, China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights, WT/DS362; WTO, China – Measures Affecting Financial Information Services and Foreign Financial Information Suppliers, WT/DS372; WTO, China – Measures Affecting the Protection of Intellectual Property Rights, WT/DS542; and WTO, China – Certain measures on the transfer of technology, WT/DS549.*

⁶⁰ The EC/EU stood as respondent in 96 cases and the US in 156 cases.

⁶¹ China has in fact quite a good record of implementing WTO reports for the 41 disputes that had been brought between 2004-18, of which 27 had found WTO inconsistent measures, see J Bacchus et al. (n 58); W Zhou, *China's implementation of the rulings of the World Trade Organization* (2019).

⁶² See especially Part Two, 3.

rules, such as resort to unilateral measures and countermeasures without following the DSU⁶³ procedures first.⁶⁴

3. Two Pandora's boxes: Trade wars & security exceptions - and an unhealthy commonality of the two

Resorting to measures and countermeasures has especially led to an escalation of tensions between members in clear violation of WTO rules and agreements in what is now regularly labelled as trade wars, first and foremost between the US and China⁶⁵, but also e.g. between Japan and South Korea⁶⁶ and UEA et al. and Qatar.⁶⁷ The initial measures, but also the resort to countermeasures have disrespected and violated the rules and procedure provided in the DSU.⁶⁸

At the heart of those developments lay two different, but interconnected sets of questions, namely the role of the security exceptions clause and Art. XXI GATT more generally for the wider WTO system and the relationship between WTO law and general international law when it comes to countermeasures.⁶⁹ Both dimensions share the commonality of providing for 'a source of new and unexpected problems'⁷⁰ as with regard to both, WTO members have failed to develop in more harmonious times clear guidelines for the robustness of WTO law for serious tensions and trade wars, in which WTO members resort to measures and countermeasures that may or may not be covered by the WTO agreements.

a) How securely designed is the security exceptions clause?

Art. XXI GATT has long been – depending on the perspective – a sleeping beauty or buried landmine in the GATT. It had been included right at the beginning, but for almost 70 years of GATT's life it played no decisive role in any dispute.⁷¹ Yet, the failure to have a clear understanding of the role and

⁶³ Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter DSU) 1994, 1869 UNTS 40.

⁶⁴ G Sacerdoti, *The WTO in 2018: Systemic Developments, Disputes and Review of the Appellate Body's Reports*, (2019) 6-7 <<https://ssrn.com/abstract=3392194>>.

⁶⁵ Section 301 dispute between US and China (WT/DS543/1).

⁶⁶ Since 2015, latest development is a request for consultation by Korea, see WTO, Japan – Measures related to the Exportation of Products and Technology to Korea, WT/DS590 <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds590_e.htm>.

⁶⁷ See WTO, United Arab Emirates – Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights, WT/DS526.

⁶⁸ Especially in the so called Steel and Aluminium cases, that have also been brought to the attention of the WTO in altogether 12 disputes: WTO, United States – Certain Measures on Steel and Aluminium Products, WT/DS544; WTO, United States – Certain Measures on Steel and Aluminium Products, WT/DS548; WTO, United States – Certain Measures on Steel and Aluminium Products, WT/DS550; WTO, United States – Certain Measures on Steel and Aluminium Products, WT/DS551; WTO, United States – Certain Measures on Steel and Aluminium Products, WT/DS552; WTO, United States – Certain Measures on Steel and Aluminium Products, WT/DS554; WTO, United States – Certain Measures on Steel and Aluminium Products, WT/DS556; WTO, United States – Certain Measures on Steel and Aluminium Products, WT/DS564; WTO, United States – Certain Measures on Steel and Aluminium Products, WT/DS547; WTO, United States – Certain Measures on Steel and Aluminium Products, WT/DS556; WTO, Canada – Additional Duties on Certain Products from the United States, WT/DS557; WTO, European Union – Additional Duties on Certain Products from the United States, WT/DS559.

⁶⁹ Please note that the defence by Japan for its measures is not yet, available and not yet predictable.

⁷⁰ Cambridge dictionary, 'Pandora's Box'.

⁷¹ Under the GATT 47 art XXI (b) (3) became relevant in five disputes, see Analytical Index on art XXI, pp. 602-5; under GATT 94 only in one panel report, namely Russia – Traffic in transit, the provision received broader

meaning of Art. XXI GATT is especially frivolous against the background that even at the time of negotiations of the GATT, it was warned, ‘the atmosphere inside [the organization⁷²] will be the only efficient guarantee against abuse.’⁷³ Even back then – and it is not without a certain cynical turn in history – the US delegate brought forward that

[...]we cannot make it too tight, because we cannot prohibit measures which are needed purely for security reasons. On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial focus.⁷⁴

It appears now as if the actual design of Art. XXI GATT has not efficiently prevented the anticipated risks. A deteriorated atmosphere and increasing invocation of Art. XXI GATT to guise commercial interests seem to have both realized at the same time.

In its first invocation in 2017 by Russia, the ‘security measures’ actually related to a dispute that was more to the heart of the initial conceptualization of Art. XXI GATT, as the Russian measures were indeed imposed at a time of serious dispute over Eastern Ukraine and Crimea between the two members, arguably qualifying as a ‘time of war or other emergency in international relations’ as stipulated by Art. XXI (b) (iii) GATT. Russia prohibited traffic in transit through its territory for Ukrainian products to reach other States.⁷⁵ Russia prevailed in the case based on the fulfilment of the preconditions for this subparagraph. The Panel applied an objective-subjective-objective test, in which it examined the objective circumstances for invoking Art. XXI GATT, i.e. whether the situation was one of ‘war or other emergency in international relations’ and more on a subjective level whether the member presented arguments for the measures to be taken in order to respond to the security threat and again more objectively whether this argument was not implausible.⁷⁶

However, the more problematic issue related to Russia’s primary line of reasoning in that Russia had argued that the panel lacked jurisdiction for even determining the preconditions of Art. XXI GATT, as this provision, in the eyes of Russia was a self-judging clause.⁷⁷ In view of the wording ‘nothing in this Agreement shall prevent’ in Art. XXI GATT, a member may only provide information on the measures it had imposed for security reasons, while any determination

what essential security interests of a Member are, what actions are necessary for protection of such essential security interests, disclosure of what information may be contrary to the essential security interests of a Member, what constitutes an emergency in international

discussion and was decisive for the outcome of the dispute, see Analytical Index GATT 1994 – art XXI (Jurisprudence), paras 10-14.

⁷² International Trade Organization at the time.

⁷³ Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), 21 (US-41).

⁷⁴ EPCT/A/PV/33, 20-1 and Corr.3.

⁷⁵ WTO, Russia –Traffic in Transit – Report of the Panel, WT/DS512/R, para 2.1.

⁷⁶ Ibid, para 7.56.

⁷⁷ WTO, Russia –Traffic in Transit - First Executive Summary of the Arguments of the Russian Federation, WT/DS512/R/Add.1, para 47: ‘The Russian Federation is of the view that Article XXI (a) and (b) of the GATT is of a self-judging nature. Each of the WTO Members individually and without any external involvement determines what its essential security interests are and how to protect them. Other reading of this Article will result in interference in internal and external affairs of a sovereign state’.

relations, and whether such emergency exists in a particular case [...] all [...] are outside the scope of the WTO.⁷⁸

The only member that supported Russia's view at the time was the USA, now following the same line of argumentation as the defendant in the steel and aluminium cases⁷⁹ and in other cases as a third party⁸⁰. Following the report in *Russia – Traffic in Transit*, the US has argued that the panel had totally misconstrued Art. XXI GATT in that it is upon the member invoking that clause - and that member alone - to apply this provision rendering the dispute outside the scope of jurisdiction of any panel.⁸¹ In comparison to Russia, the US in its defence statements in the steel and aluminium disputes⁸² did not even argue the cases further in substance.⁸³ The US, similarly relies strongly on the wording (especially the word '*considers*') and the negotiating history as well as on a disputed subsequent agreement that in their view confirmed the status of the self-judging character of Art. XXI GATT.⁸⁴ The panel in *Russia – Traffic in Transit*, in turn, relied mainly on the object and purpose of the GATT and the DSU of providing security and predictability in international trade relations. Indeed, if all members were allowed to invoke a provision to their own gusto, without any option of jurisdictional oversight that would be a Trojan Horse for any (trade) agreement. Additionally, the Panel considered that any subparagraphs would indeed be superfluous if the only requirement was a declaration of the respective member of having taken the measure for alleged security reasons.⁸⁵

While both arguments have stronger and weaker points, the established instruments of interpretation reach their limits in terms of the underlying question of both views, namely the overall perception and role of the WTO and its agreements more generally. It is this underlying conceptualization that renders the question so delicate: has the WTO come close to a legal trade order that was not and cannot be meant to have left room for a self-judging clause outside of the jurisdiction of panels and the AB? Or is it still merely an agreement between international sovereigns that finds its boundaries in the exercise of sovereignty of its members when it comes to their security interests? The Panel decided this aspect in the former way, relying on Art. 3.2 DSU, the object and purpose of the WTO and the GATT in general and the limitation that follows from that for the interpretation of Art. XXI GATT in particular. The US and to a lesser extent Russia openly question this understanding of the GATT and DSU and the US, similarly to its arguments with regard to the role of the DSU⁸⁶, calls upon the members and the DSB to return to a more constrained interpretation on matters related to sovereignty and geopolitics.⁸⁷

⁷⁸ Ibid, para 60.

⁷⁹ See footnote 68 for a list of all steel and aluminium disputes.

⁸⁰ WTO, United Arab Emirates – Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights, WT/DS 526.

⁸¹ WTO, Russia – Measures Concerning Traffic in Transit- Ukraine Written Statement, WT/DS512/1 G/L/1151.

⁸² See (n 68).

⁸³ E.g. WTO, United States – Certain Measures on Steel and Aluminium Products, US Written Statement, WT/DS552.

⁸⁴ Namely Decision concerning art XXI of the General Agreement, L/5426, see *ibid*, 6.

⁸⁵ WTO, Russia – Traffic in Transit – Report of the Panel, WT/DS512/R.

⁸⁶ See Part One, 2.

⁸⁷ Statements Delivered to the General Council by Ambassador Dennis Shea U.S. Permanent Representative to the World Trade Organization <<https://geneva.usmission.gov/2019/10/15/statements-by-the-united-states-at-the-wto-general-council-meeting/>>.

Three additional aspects require attention: first, the panel report has not been appealed and, there is not and – as will be seen shortly – there will most probably not be a final and authoritative decision by the AB on the issue any time soon. Of course it is possible that all panels concerned with the question may apply the same reasoning as the one in *Russia-Traffic in Transit*. Yet, it can be expected that ultimately, other members will keep on pursuing the Russia/US-line of argumentation and portray the initial decision as a mere erroneous panel decision without any meaning for other disputes thereby constantly putting in question the legitimate exercise of jurisdiction by a panel in a GATT Art. XXI-dispute.⁸⁸ Yet, even though quite unlikely for several reasons, due to the lack of an AB ruling, it is also not impossible that a panel might actually follow the line of reasoning of a defendant and denounce its jurisdiction, which would set a critical example.

Second, there are very few incidences in which the US and Russia have concurring views.⁸⁹ Most interestingly and maybe counter-intuitive, China in its third party submission did not share the view that the panel lacked jurisdiction to review Art. XXI GATT and argued that indeed the preparatory work as well as the Decision on Art. XXI taken on 30 November 1982⁹⁰ supported the general reviewability of this provision.⁹¹ Yet, although China and other States agreed on the jurisdiction over Art. XXI GATT,⁹² it together with a number of other States indeed supported a restrained review of a panel due to the sensitive issues involved.⁹³ Indeed, it can be presumed that even more members will at least argue for a limited standard of review, once they have invoked Art. XXI GATT for measures taken for alleged security reasons.⁹⁴

Third, in comparison to the Russia/Ukraine state of affairs, invocation of the US in the relations between e.g. the US and the EU – a situation that not even *prima facie*, albeit those States had more harmonious times in their history, come close to a situation of war or other emergency in their bilateral relations, warrants concern. The US reliance on Art. XXI GATT for additional tariffs on steel and aluminium products by the US is thus, on its face, an attempt to justify these tariffs on specific products with regard to which the domestic industry came under pressure. Quite obviously, none of the alternatives of Art. XXI (b) (i)-(iii) GATT is fulfilled.⁹⁵ Yet, with regard to the US position and despite non-fulfilment of the preconditions of Art. XXI (b) GATT, it stands to reason that the US, having not even argued the case further, will not accept or implement a panel decision that confirms jurisdiction on Art. XXI GATT and ultimately finds that its preconditions were not met.

⁸⁸ See WTO, United States – Certain Measures on Steel and Aluminium Products, US Written Statement, WT/DS552, 42.

⁸⁹ See WTO, Russia – Traffic in transit- US Third Party Statement, WT/DS512/ANNEX D, 106. <<https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Pty.Stmt.%28as%20delivered%29.fin.%28public%29.pdf>>.

⁹⁰ Decision concerning art XXI of the General Agreement, L/5426.

⁹¹ WTO, Russia –Traffic in Transit – Report of the Panel, WT/DS512/R/Add.1, 82.

⁹² *Ibid.*, e.g. Australia (69); Brazil (73); Canada (76); EU (84); Japan (89); Singapore (99).

⁹³ E.g. Australia, 72; Turkey, 103; to a lesser extent Brazil.

⁹⁴ The written Statement by the United Arab Emirates (UAE) is not yet available, but it can be expected that UEA will bring forward a similar argument, see WTO, United Arab Emirates – Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights, WT/DS526.

⁹⁵ The text of art XXI lit. b GATT reads: '(i) relating to fissionable materials or the materials from which they are derived; (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; (iii) taken in time of war or other emergency in international relations'.

However, if really Art. XXI GATT was to be accepted as an all-out-option, either by lack of jurisdiction or by a very broad discretion upon its application, this would considerably weaken the WTO.⁹⁶ Invocation, as envisaged by the US, would allow any State to, with regard to a particular economic sector and without the situation coming close to a serious disturbance in the international relations between two states, impose protectionist measures by simply relying on some kind of security interests. The obvious way of overcoming these uncertainties related to Art. XXI GATT at once would be a change of its wording or a general interpretation according to Art. XI.2 WTO Agreement, both not very realistic options at present.

b) Countermeasures in trade wars

In the defence in its Section 301 dispute with China the US did not ground its measure in a justification based on a particular GATT provision, but it rather argued that the US' measures were lawful countermeasures against what it perceives as 'unfair trade practices' by China.⁹⁷ The US frankly construed the *US – China Section 301* dispute in essence as follows:

Fundamentally, both the United States and China have recognized that this matter is not a WTO issue: China has taken the unilateral decision to adopt aggressive industrial policy measures to steal or otherwise unfairly acquire the technology of its trading partners; the United States has adopted tariff measures to try to obtain the elimination of China's unfair and distortive technology-transfer policies; and China has chosen to respond – not by addressing the legitimate concerns of the United States – but by adopting its own tariff measures in an attempt to pressure the United States to abandon its concerns, and thus in an effort to maintain its unfair policies indefinitely.⁹⁸

Thus, according to the US:

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. Accordingly, there in fact is no live dispute involving WTO rights and obligations.

The US argument requires attention in two ways: first, the US does not clearly establish that China has been violating international law, rendering a countermeasure argument without merit.⁹⁹ Second, and more relevant with regard to its actual perception of the role of the WTO, it argues that measures that by themselves are covered by WTO agreements, namely a tariff increase on Chinese products, but that respond to measures outside the scope of WTO agreements, were also to fall outside the WTO *ratione materiae* because of their characterization as countermeasures.¹⁰⁰

⁹⁶ Voon argues that '...the security exception lies at the center of multiple explosive disputes, posing a potential threat to the WTO's very existence', T Voon, 'The Security Exception In WTO Law: Entering a New Era.' *AJIL Unbound*, 113, (2019) 45-50 <<https://www.cambridge.org/core/journals/american-journal-of-international-law/article/security-exception-in-wto-law-entering-a-new%20era/CF8C3DCDF2CD924CAEEDD147840668F9>>.

⁹⁷ WTO, *United States – Tariff Measures on Certain Goods from China*, US Written Statement, WT/DS543 (n 36).

⁹⁸ *Ibid.*, para 9.

⁹⁹ It has been argued that forced technology transfer could be partially covered by art 39 TRIPS, see J Bacchus and S Lester (n 58).

¹⁰⁰ WTO, WT/DS543 (n 36).

The underlying question of whether countermeasures are possible by resorting to general international law or whether the GATT is (still in this sense) a self-contained regime is contested.¹⁰¹ It has generally been rejected for a number of reasons.¹⁰² Leaving aside the question whether actually the preconditions for countermeasures under general international law were fulfilled in the US-China relations or not, from the viewpoint of WTO-law, two arguments oppose this suggestion outright: first, members according to the WTO rules are required to follow a sequence of steps before imposing measures to counter WTO-inconsistent measures.¹⁰³ Yet, the direct resort to countermeasures would open a second path unforeseen by the rules in the WTO agreements. Second, if members were allowed to respond to violations that undoubtedly are outside the scope of current WTO agreements, by resorting to measures regulated within the WTO thereby violating their WTO commitments, this would open the economic toolbox despite having committed to certain e.g. tariffs with regard to a certain product towards all members.¹⁰⁴ The immediate question would be whether members could only react to measures related to economic aspects or whether they could also rely on other international law violations, such as violations of environmental obligations or the law of the sea. Yet, allowance of instrumentalization of economic measures as response to any kind of international law violation or even measures not in breach of international law and ultimately for reaching geopolitical aims would exactly weaken a stable and predictable legal framework for international trade relations.

c) An uncomfortable commonality

Another dimension of the current trade conflicts signals a decrease in respect for the WTO framework, namely the reactions by those against which the measures were addressed, reacting WTO inconsistent themselves, albeit maybe less from a moral but from a legal point of view.

The WTO order is based on a strict sequence of steps to be followed in case of a WTO violation by a member before allowing resort to countermeasures.¹⁰⁵ After consultations, a panel is established, an appeal must be awaited and only after a reasonable period of time and an actual determination as to the non-compliance, a member may request permission to react to violations by a suspension of concessions, while over the appropriate level once more an arbitrator has to decide.¹⁰⁶ In comparison to general international law,¹⁰⁷ a member may not take things into its own hands and react by immediately imposing countermeasures. Only after all the steps have been followed through of a formal procedure and adoption of the reports by the DSB, may a member suspend concessions in the form of raising of tariffs or cross-retaliation in other sectors.¹⁰⁸ This process had for around 25

¹⁰¹ J Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?' 95 AJIL 3, 535-78.

¹⁰² A Bianchi and L Gradoni, *Developing Countries, Countermeasures and WTO Law: Reinterpreting the DSU against the Background of International Law* (2008) 4 <https://www.ictsd.org/sites/default/files/downloads/2009/02/reinterpreting_dsu.pdf>.

¹⁰³ See Part One, 3.

¹⁰⁴ See the schedules of concessions of each member here: <https://www.wto.org/english/tratop_e/schedules_e/goods_schedules_table_e.htm>.

¹⁰⁵ According to the DSU included in Annex 2 of the WTO Agreement.

¹⁰⁶ Arts 4, 6, 12, and 22 (especially 22.2) DSU.

¹⁰⁷ Especially art 49 ILC Articles on the responsibility of States, GA/RES 56/83.

¹⁰⁸ If, within 20 days after the expiry of the reasonable period of time, the parties have not agreed, the complainant may ask the DSB for permission to impose trade sanctions against the respondent that has failed to implement. Technically, this is called 'suspending concessions or other obligations under the covered agreements' (art 22.2 of the DSU). Concessions are, for example, tariff reduction commitments.

years, by and large, been accepted and followed by the members.¹⁰⁹ Even when members had fierce disputes over WTO-inconsistent measures, they would usually await panel proceedings before imposing retaliatory measures.¹¹⁰

Neither the US in its initial measures nor the EU¹¹¹ and China have followed this sequence of steps as outlined, but have reacted unilaterally by increasing duties on certain products to offset the tariffs imposed by the other side immediately.¹¹² Lamp argues with regard to the EU, that

[t]he most plausible answer is that they [the responding members] perceived the US measures as an attempt to coerce them and saw immediate retaliation as necessary to deny the US any opportunity to use the measures as negotiating leverage.¹¹³

While the observation might hold true, it does not cure the problem, that also the EU and other members that like to portray themselves as adhering to the rule of law and proclaim to strengthen the multilateral order¹¹⁴ similarly damage it by resorting to unilateral measures driven by a comparable logic of power play. Additionally, it instigates other members to do the same, implying it to be a legitimate policy option in order to protect national interests.¹¹⁵

In a somewhat twisted logic, the US argued that China's resort to the DSB constitutes a misuse of the dispute settlement mechanism requesting the panel to make a finding that the parties found their own solution according to Article 12.7 DSU, basically by imposing measures and countermeasures¹¹⁶, including some covered by the WTO and some not. Under this perception, it would not anymore be the claimant who would be in a position to define the subject matter of the dispute, but the behaviour prior to the dispute that could render a dispute outside of the scope of jurisdiction. This stands in contradiction to the wording of Article 23.1 and Article 6.1 DSU, which state: 'If the complaining party so requests [...]'.¹¹⁷ The position is overall not in line with the design of the WTO dispute settlement system, introduces an alien clean-hands argument and would ultimately mean a return to jungle law (or 'might is right'), where parties act based on their strength and power without the ability to resort to the rule of law and the DSB.

¹⁰⁹ R Brewster, 'WTO Dispute Settlement: Can We Go Back Again?' 113 *AJIL Unbound* 61, 62-3 <<https://www.cambridge.org/core/journals/american-journal-of-international-law/article/wto-dispute-settlement-can-we-go-back-again/BA9985348C5BE20F8EF11FD620A48BEF#>>.

¹¹⁰ For example, the US patiently awaited the required decisions in WTO, European Communities – Measures Concerning Meat and Meat Products (Hormones), WT/DS26, to retaliate against the WTO-inconsistent import prohibition of hormone treated beef from the US. See R Brewster (n 109).

¹¹¹ The EU justifies these additional duties by relying on the Safeguards Agreement (arts 8.2 and 8.3) while the USA has not itself officially qualified their measures as falling under the Safeguards Agreement, WT/DS559, see EU written statement <https://trade.ec.europa.eu/doclib/docs/2019/october/tradoc_158389.pdf>.

¹¹² See reactions of EU and China, <<https://edition.cnn.com/2019/07/02/economy/us-tariffs-on-eu/index.html>>; <<https://fortune.com/2019/10/08/trump-china-tariffs-trade-war-us-economy-impact/>>.

¹¹³ N Lamp, 'At the Vanishing Point of Law: Rebalancing, Non-Violation Claims, and the Role of the Multilateral Trade Regime in Trade Wars' (2019) Queen's University Research Papers 2019-02, 7.

¹¹⁴ See e.g. the Alliance for Multilateralism, <<https://new-york-un.diplo.de/un-en/news-corner/alliance-multilateralism/2250628>>.

¹¹⁵ See R Brewster (n 109).

¹¹⁶ US First Written Statement (n 36) 14.

¹¹⁷ See also J Bäuml, 'WTO' in G Krenzler, C Herrmann and M Niestedt (eds), *EU-Außenwirtschafts- und Zollrecht* (C.H. Beck 2019), para 216.

4. Destruction of the AB: Sounding the death knell for the WTO?

A common introduction to the WTO dispute settlement system is a reference to it as the ‘crown jewel’ of the WTO.¹¹⁸ And due to its distinctive features, one tends to think that rightly so: it was compulsory, efficient and, in most cases, due to its strict adherence to the rule of law highly authoritative. Many panel and AB reports could, due to their fine and careful crafting and commendable examination of interpretation methods, serve as study cases in legal exercise books. In at least two major aspects, the WTO dispute settlement system is distinct from that of international law dispute settlement in general and the system during the GATT-time in particular: its compulsory nature and the effectively automatic adoption of reports as well as the increase in authority and coherence by a second instance.¹¹⁹ These features enabled small and economically weak States to sue even much more powerful members¹²⁰ and reassured all members that despite imperfection of some of the rules and agreements, at least it could be trusted that the existing ones were enforceable. In 2009, after failure on finalizing the DDA, it was contested that ‘[...] one might suspect, the WTO’s dispute settlement system would remain intact regardless of Doha’s destiny.’¹²¹ This does not hold true as of 11 December 2019.

It is well known that the US has for quite some time criticised the AB and the reappointment blockage of particular judges in 2003, 2011 and 2016, especially when it concerned a non-US judge,¹²² was regarded as a strong sign of increasing discontent.¹²³ In the latter case, open accusations of adopting reports in excess of rights and obligations of WTO members served as explanation for the US position.¹²⁴ Under the *Trump* administration, the level of systematic attack and criticism paired with actively allowing the running out of time for reappointment of new judges below the minimum amount of three judges and finally led to the discontinuity of the AB on 11 December 2019. With only one judge left, no more cases can be appealed, with the mandate of the last judges to – and even that is disputed – allowing only to finish cases that had been appealed prior to the termination date.¹²⁵

The most prominent arguments of the US were the overreach of the mandate and competencies of the AB and the DSB more generally, exceeding of timeframes as set out in the DSU, the characterization as precedence of AB decisions as well as the treatment of domestic law.¹²⁶ But the

¹¹⁸ A Reich, *The Effectiveness of the WTO Dispute Settlement System: A Statistical Analysis* (2018) 1 <<https://ssrn.com/abstract=2997094>>.

¹¹⁹ See on the functioning of the Dispute Settlement system, P Van den Bossche and W Zdouc, *The Law and Policy of the World Trade Organization* (2016) 156.

¹²⁰ E.g. WTO, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (Complainant Antigua and Barbuda), WT/DS285.

¹²¹ S Cho, (n 21), at 7.

¹²² E Fabry and E Tate, ‘Saving the WTO Appellate Body or returning to the wild west of trade?’ Jacques Delors Institute, (2018), 6 <<http://institutdelors.eu/wp-content/uploads/2018/05/SavingtheWTOAppellateBody-FabryTate-June2018.pdf>>.

¹²³ E-U Petersmann, (n 34).

¹²⁴ E Fabry and E Tate (n 122).

¹²⁵ See Rule 15 Working Procedures for Appellate Review, WT/AB/WP/6.

¹²⁶ Statements by the United States at the WTO General Council Meeting on 15 October 2019 <<https://geneva.usmission.gov/2019/10/15/statements-by-the-united-states-at-the-wto-general-council-meeting/>>; see for a critical assessment of the role of the secretariat J Pauwelyn, *The Role of the Secretariat in WTO Dispute Settlement (and the AB Crisis)* (2019) <<https://ielp.worldtradelaw.net/2019/09/the-role-of-the-secretariat-in-wto-dispute-settlement-and-the-ab-crisis.html>>.

US has also raised even more systemic aspects, such as that an impasse at negotiations has led to ‘unchecked “institutional creep” by the Appellate Body as Members push to achieve through litigation what they haven’t achieved or can’t achieve at the negotiating table’; that in the US view the perception of the AB as an international court with judges that produces jurisprudence is a total misconception against the backdrop that panels and the AB were intended to act as agents of the parties directly involved in the dispute and that authoritative interpretation¹²⁷ can only be provided by the members and not the AB.¹²⁸ Moreover, it conceives the overreach of timeframes by panels and the AB as a sign for the agents (i.e. panels and the AB) of disobeying their masters, disregarding of the complexity of the facts and legal questions involved.

Of course, the role of panels and the AB¹²⁹ and the development their reports have taken, is significant when seen over time. It was largely their achievement to resolve some of the open tensions e.g. with respect to environmental questions to, by way of interpretation and especially by an evolutive interpretation of e.g. Article XX GATT¹³⁰ or the SCM¹³¹. Yet, a comprehensive study recently accomplished, did not – except regarding the excess of timeframes – confirm any violation of provisions of the DSU by panels or the AB concerning their mandate.¹³² This further warrants the impression that the decision to deconstruct the AB had more political than tangible legal reasons.¹³³

Following the criticism of the US, a number of reform proposals were put on the table.¹³⁴ None of them has found enough supporters and the discussions reach in all kinds of directions. While some of the proposals might stand real potential to actually improve detected aberrations, the prompt option to have saved the AB immediately would have been uniting against the US and vote according to the majority voting option of Article IX.1 WTO Agreement, when it was clear that consensus was blocked by the US.¹³⁵ Petersmann argues:

The text of Article IX:1 (‘where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting’) confirms that WTO members are legally required (‘shall’) to overcome illegal ‘blocking’ of the filling of AB vacancies by such majority decisions in order to meet their collective legal duties to maintain the AB as prescribed in Article 17 DSU, similar to

¹²⁷ Art 17 of the DSU.

¹²⁸ Statement by the United States at the WTO General Council Meeting on 15 October 2019, (n 126).

¹²⁹ J Pauwelyn and K Pelc, Who Writes the Rulings of the World Trade Organization? A Critical Assessment of the Role of the Secretariat in WTO Dispute Settlement (2019) <<https://ssrn.com/abstract=3458872>>.

¹³⁰ See e.g. WTO, United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, WT/DS381; WTO, Canada – Measures Relating to the Feed-in Tariff Program, WT/DS426; WTO, European Communities – Measures Affecting Asbestos and Products Containing Asbestos, WT/DS135; WTO, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/DS61; GATT, United States – Restrictions on Imports of Tuna, (Not adopted, circulated on 3 September 1991) and GATT, United States – Prohibition of Imports of Tuna and Tuna Products from Canada (Panel finding adopted on 22 February 1982).

¹³¹ WTO, Canada – Measures Relating to the Feed-in tariff Program, WT/DS426.

¹³² J Lehne, Crisis at the WTO: Is the Blocking of Appointments to the WTO Appellate Body by the United States Legally Justified? (Carl Grossmann, 2019), passim.

¹³³ J Lehne, ‘Guest Post: Is the Blocking of Appointments to the WTO Appellate Body by the United States Legally Justified?’ (IELP, 10 November 2019) <<https://ielp.worldtradelaw.net/2019/11/guest-post-is-the-blocking-of-appointments-to-the-wto-appellate-body-by-the-united-states-legally-ju.html>>.

¹³⁴ E.g. the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore and Mexico raised concerns with the AB’s approach to treat its own reports effectively as precedent that panels are to follow absent ‘cogent reasons’ (WT/GC/W/752); see also R Brewster, ‘The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement’ (2011) 80 *George Washington Law Review* 1, 102, <<https://ssrn.com/abstract=2146121>>.

¹³⁵ E-U Petersmann (n 34).

the existing WTO procedures for appointing the WTO Director-General through a majority decision 'where a decision cannot be arrived at by consensus'.¹³⁶

This would have been a strong sign of all members that they would not allow one member to threaten and deconstruct the multilateral legal order. Yet, contrary to the usual perception of the US against the rest, a recent survey concluded that also other WTO members shared the US position that the AB had been going beyond its mandate at times.¹³⁷ Members used the opportunity and started to discuss reform options, thereby allowing the crisis to deepen and to unfold its full destructive potential. Individual members commenced concluding agreements to bilaterally resolve the appeals impasse, providing for options for particular cases and particular members, but leaving unresolved the future of the AB as a systemic issue, falling into the trap of bilateralism instead of a strict upholding of multilateralism for the WTO in general and the AB in particular.¹³⁸ Especially the EU has not been able to unite enough members behind its positions and to fight for the multilateral system without restrictions.¹³⁹ At least, a new effort to find an interim solution among 17 members based on Article 25 DSU ensures a two-step mechanism, albeit any eventual decisions will not carry the same weight as those of the AB and have also not yet found wider support among WTO members.¹⁴⁰

What to make out of the disappearance of the AB? After all, other international organizations and tribunals also function without an appeals mechanism. Many States still resort to the DSB for their disputes, even in face of the AB's absence and will probably continue to do so, including the US¹⁴¹, indicating that the DSB might also function with the panel as first and last instance. Yet, the dangers of 'appeals in the void'¹⁴² describing the possibility of members to appeal a panel report that will never receive a report by the disabled AB, might even lead to a prevention tool for the adoption of a panel report and thus contains a real potential of providing members with a veto against a

¹³⁶ Ibid, 8; of course, this suggestion is in light of the footnote to art IX WTO Agreement, providing that the rule of art 2 para 4 DSU requiring consensus regarding any decision taken by the DSB, not unproblematic. Yet, it is rather an appointment than a decision and Petersmann rightly points out that the obligation to maintain the AB might render a reference to majority voting possible. In support also HS Gao, 'Disruptive Construction or Constructive Destruction? Reflections on the Appellate Body Crisis' (2019) Singapore Management University School of Law Research Paper 29/2019, 20-21 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3422025>; J Hillmann, Three Approaches to Fixing the World Trade Organization's Appellate Body: The Good, the Bad and the Ugly, 11 <<https://www.law.georgetown.edu/wp-content/uploads/2018/12/Hillman-Good-Bad-Ugly-Fix-to-WTO-AB.pdf>>.

¹³⁷ M Fiorini et al., WTO Dispute Settlement and the Appellate Body Crisis: Insider Perceptions and Members' Revealed Preferences (2019) 19 et seqq. <https://www.bertelsmann-stiftung.de/fileadmin/files/BSt/Publikationen/GrauePublikationen/MT_WTO_Dispute_Settlement_and_the_Appellate_Body_Crisis_Survey.pdf>.

¹³⁸ See e.g. the agreement EU-Canada Interim Appeal Arbitration Pursuant to art 25 <https://trade.ec.europa.eu/doclib/docs/2019/july/tradoc_158273.pdf>.

¹³⁹ A Gonzalez and N Veron, 'EU Trade Policy Amid the China-US Clash: Caught in the Cross-Fire?' (2019) Peterson Institute for International Economics Working Paper 19/2019, 13 <<https://ssrn.com/abstract=3431323>>.

¹⁴⁰ The declaration of the EU and 16 members can be found here: <https://ec.europa.eu/commission/presscorner/detail/en/IP_20_113>.

¹⁴¹ In 2019, the US brought only one case to the DSB (India – Additional duties on certain products from the United States, WT/DS585).

¹⁴² J Pauwelyn, WTO Dispute Settlement Post 2019: What to Expect? What Choice to Make? (2019) <<https://ssrn.com/abstract=3415964>>.

detrimental panel decision.¹⁴³ Thus, the dysfunctionality of the AB might also affect the functioning of the panel stage and eventually unravel the entire dispute settlement system.

Part Two: Developments outside of the WTO

The WTO is not only under pressure by developments taking place at the inside, but also by activities at the outside. In fact, the two spheres interact: the less capable the WTO appears of regulating international trade relations effectively and comprehensively, the more members resort to other fora and negotiate agreements among a smaller group of like-minded States. This is exactly what has happened since 2006, when the US increased its efforts for bi- or plurilateral trade negotiations, with the EU soon to follow this approach. It is by now almost a commonplace to complain about the proliferation of preferential trade agreements (PTAs) that has led to the famous Spaghetti-Bowl image of *Baghwati*.¹⁴⁴ Yet, the problem is not only restricted to the sheer number of PTAs, but extends to their content in a qualitative sense, regulating aspects beyond and differently than the WTO agreements. Additionally, to the legal problems arising with regard to WTO-plus, minus and extra obligations from the viewpoint of the WTO, another element warrants further consideration, namely that of standard setting taking place outside of the WTO and particularly according to the conception of the most powerful parties at the negotiating table.

Those backlashes from the outside shall be traced along the following three lines: First, the proliferation of bi- or plurilateral trade agreements marginalizes the WTO from a sheer quantitative point of view and questions its core pillar MFN (1). Second, the undefined legal relationship between the WTO and deviating obligations in PTAs challenges WTO obligations also from a qualitative point of view (2). Closely related and as a consequence, with large PTAs standard setting increasingly takes place outside the WTO, negotiated by a handful powerful States with carefully selected like-minded friends and to the detriment of concentrating negotiations in the WTO forum with a more participatory and equal negotiation setting (3).

1. Proliferation of Preferential Trade Agreements – Is most-favoured nation turning from the rule to the exception?

The GATT has always operated against the background of PTAs between two or more of its members.¹⁴⁵ Article XXIV GATT allows free trade agreements based on the perception that trade liberalization first in smaller, often regional settings, will eventually lead to further trade liberalization on the global level.¹⁴⁶ Yet, the inherent tension between the most-favoured nation

¹⁴³ The US has in fact notified the DSB of an appeal on 18 December 2019 of the panel report in United States – Countervailing Duty Measure on Certain Hot-Rolled Carbon Steel Flat Products from India: Recourse to art 21.5 DSU by India, WT/DS436/RW, see WT/DS436/21; that communication was followed by another joint communication by India and the US the legal meaning of which is however unclear, see WT/DS436/22.

¹⁴⁴ The term was first used by J Bhagwati in ‘US Trade policy: The infatuation with free trade agreements’ (1995), Discussion Paper Series No 726 <<https://core.ac.uk/download/pdf/161436448.pdf>>.

¹⁴⁵ G Vidigal (n 8), Issue 2 at 19.

¹⁴⁶ Art XXIV: 4 GATT: ‘The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories’.

principle as enshrined in Article I GATT (requiring to treat like products from all members equally) and better treatment between two or more members only, already played a significant role during the negotiations at the ITO conferences.¹⁴⁷ The outcome is a rather complex design of Article XXIV GATT with a number of preconditions that have to be met by PTAs in order to be compatible with the GATT.¹⁴⁸

As of 17 January 2020, 483 free trade agreements have been notified to the WTO and 303 are actually in force.¹⁴⁹ By now, Djibouti and Sao Tomé and Príncipe are the only two States not member to a notified RTA.¹⁵⁰ The high number of PTAs has led to only about 50 per cent of goods still being traded under the WTO-MFN tariff.¹⁵¹ Against the background that MFN is one of the core principles of the GATT, the steep increase in PTAs seriously erodes one of the founding pillars of the WTO and will eventually render MFN as the exception and not the rule in the future.

Despite efforts to increase transparency of PTAs under the WTO regime, the forest of PTAs gets thicker and more opaque by the year. The members as well as the DSB, similarly to having missed clarifying Article XXI GATT, have failed to set clear and straightforward preconditions for PTAs when the number was relatively manageable.¹⁵² In fact, the WTO DSB has not, with regard to any PTA, ever made a clear statement as to its compatibility with Article XXIV GATT or not.¹⁵³ For some reason or the other, members have rarely challenged other PTAs and appear to accept inconsistent PTAs, not willing to break the stalemate that prevails with regard to questions of compatibility of PTAs with the WTO agreements.

In former times, members at least complied with the requirement that substantially all the trade was required to be covered in order to be in line with Article XXIV:8 GATT¹⁵⁴. Nowadays, some agreements not even on their face, comply with the requirements as laid out by Article XXIV GATT. For example the recent US-Japan deal that was just signed, covers a limited number of products and aims at ensuring better access for US agricultural products to the Japanese market only.¹⁵⁵ Similarly, the US-China deal has a very limited coverage and serves the purpose of securing quotas for US agricultural products to the Chinese market.¹⁵⁶ In the same vein, the agreement currently negotiated between the US and the EU to prevent the US from imposing additional tariffs on cars from Europe, sometimes embellished as TTIP-light, does not even aim at covering 'substantially all the trade' between the EU

¹⁴⁷ WTO discussion paper, 'RTAs and the WTO: A troublesome relationship', 26-7 <https://www.wto.org/english/res_e/booksp_e/discussion_papers12b_e.pdf>.

¹⁴⁸ See on the interpretation of Art XXIV GATT, Analytical Index, Art XXI GATT <https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art24_jur.pdf>; see also P Hilpold, Regional Integration According to Article XXIV GATT - Between Law and Politics (2003) <>; JH Mathis, Regional Trade Agreements in the GATT/WTO: Article XXIV and Internal Trade (2001) 39 et seqq.

¹⁴⁹ WTO, Regional Trade Agreements <https://www.wto.org/english/tratop_e/region_e/region_e.htm>.

¹⁵⁰ See <<http://rtais.wto.org/UI/publicPreDefRepByCountry.aspx>>.

¹⁵¹ World Tariff Profiles, publication by WTO, ITC and UNCTAD, (2019).

¹⁵² On the disputed aspects of art XXIV GATT see generally P Van den Bossche and W Zdouc (n 119), 648-72.

¹⁵³ Not even in the Turkey – Restrictions on Imports of Textile and Clothing, WT/DS34.

¹⁵⁴ Equivalent in Art V GATS.

¹⁵⁵ S Lester, 'The U.S.-Japan Trade Deal: Can a Political Agreement Liberalize Trade Without Institutions?' (IELP, 07 October 2019) <<https://ielp.worldtradelaw.net/2019/10/the-us-japan-trade-deal-can-a-political-agreement-liberalize-trade-without-institutions.html>>.

¹⁵⁶ The Guardian 'US-China trade deal "totally done", Trump aide Lighthizer says' (15 December 2019) <<https://www.theguardian.com/us-news/2019/dec/15/us-china-trade-deal-trump-lighthizer>>.

and the US.¹⁵⁷ These agreements will have detrimental effects for other States by altering fair competition, especially when granting certain quotas for products from one country, and are thus not in line with Article XXIV GATT requiring that third members are not negatively affected by a PTA.¹⁵⁸ Additionally, it can be expected that these agreements will encourage other members to foster agreements for certain sectors and products only, without having to undergo the complications of liberalizing substantially all the trade between the parties.

Another side effect comes with the proliferation of PTAs, namely that the application of different rules and tariffs for different products increasingly requires the determination of the origin of a particular product. Birth certificates of products thus become incrementally important. Under MFN, the origin of the product mainly revolved around the question whether the product derived from a WTO member or not.¹⁵⁹ With the increase of PTAs, punitive tariffs and countermeasure duties requiring different treatment for those products at the border, the renationalisation of products features prominently. This creates an impediment for trade, especially since the Rules of Origin in the WTO are rudimentary and leave a wide margin of discretion to the members.¹⁶⁰ It is for those reasons that *Jagdish Bhagwati* contested, that the world, when infested with these PTA ‘termites’ is prone to an interwar economic balkanization redux.¹⁶¹

2. Plus, -minus, -extra obligations and how they relate to the WTO

On the other side of the spectrum of product and sector specific PTAs sit comprehensive economic and trade agreements that regulate, in line with their title, a wide range of topics related to international economic relations between the parties. Some of these issues are covered by WTO agreements and some are not.¹⁶² In relation to the WTO, they are usually referred to as WTO-plus, -minus and extra provisions, depending on their respective design with regard to the corresponding WTO obligation.¹⁶³ What makes them tricky is their uncertain relationship with WTO obligations, especially concerning WTO-plus and -extra obligations, but also WTO-minus obligations. While WTO-minus obligations provide for less obligations than what parties had committed themselves to in the WTO, WTO-plus obligations go beyond commitments on the multilateral level.¹⁶⁴ WTO-extra

¹⁵⁷ See <<http://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-eu-us-trade-talks>>.

¹⁵⁸ Especially an RTA shall not raise trade barriers for third parties, art XXIV:4 GATT, see WTO, Turkey – Restrictions on Imports of Textile and Clothing Products- Appellate Body Report, WT/DS34/11, 25 February 2000, para 57.

¹⁵⁹ Of course, for Anti-dumping and anti-circumventing measures the origin is similarly of concern, see e.g. the results of the Committee on Anti-Dumping Practices - Informal Group on Anti-Circumvention – Formal Meeting on the Meeting of 25 October 2017, where some members raised concerns in specific anti-dumping actions listed in semi-annual notifications.

¹⁶⁰ See on rules of Origin <https://www.wto.org/english/docs_e/legal_e/22-roo_e.htm>.

¹⁶¹ J Bhagwati, *Termites in the Trading System: How Preferential Agreements Undermine Free Trade* (Oxford University Press 2008).

¹⁶² See e.g. the table of contents the Comprehensive and Economic Trade Agreement (CETA) <<https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/>>.

¹⁶³ On these terms, J Ya Qin, *The Challenge of Interpreting 'WTO-Plus' Provisions* (2010) <<https://pdfs.semanticscholar.org/a553/9b418f4feec666d515b5a4e02bad37e5cf0e.pdf>> and M Ruta, ‘Preferential trade agreements and global value chains: Theory, evidence, and open questions.’ (2017) *Global Value Chain Development Report*, 1 (WPS8190) <<http://documents.worldbank.org/curated/en/991871505132824059/Preferential-trade-agreements-and-global-value-chains-theory-evidence-and-open-questions>>.

¹⁶⁴ H Horn et al., *Beyond the WTO? An anatomy of EU and US preferential trade agreements* (2009) 4 <https://bruegel.org/wp-content/uploads/imported/publications/bp_trade_jan09.pdf>.

obligations concern aspects currently not covered by the WTO and beyond its current mandate and therefore do not directly relate to WTO obligations.¹⁶⁵

In a number of disputes the DSB had before it the question of the compatibility and effects of WTO-minus obligations, including the question whether Article 41 (1) VCLT was applicable¹⁶⁶, but never came to a straight answer.¹⁶⁷ So called voluntary export restraint agreements are an increasingly relevant example of WTO-minus agreements. Therein a member, more or less voluntarily, agrees to export less than the market would allow in order to spare another member's domestic market from competition.¹⁶⁸ While presumably not in conformity with WTO agreements, especially the safeguards agreement,¹⁶⁹ it is uncommon for a panel or the AB to get into a position of making a finding on a clause that is part of an agreement outside of the WTO. Those clauses and agreements will rarely reach dispute settlement, as neither party may have an interest in subjecting them to dispute settlement resolution. Yet, they have an effect on global trade in making trade less free and allowing geopolitics to re-enter economic relations in which market access and tariffs to a great extent depend on the relative power between the parties involved.

The same holds true for WTO-plus and -extra obligations in that they not only undercut the WTO agreements, but also change the members terms of trade in agreements outside the scope of jurisdiction of the WTO. They lead to a diversification of rules and render the field of international economic law unclear and convoluted.

Vidigal rightly observes

WTO-extra provisions challenge the WTO not so much because they conflict with WTO rules as because they establish an alternative institutional setting for the development of new trade rules. Institutional competition and fragmented rules could end up making trade more difficult rather than easier.¹⁷⁰

3. Standard setting or why weaker States will suffer mostly from bi- and plurilateral trade negotiation settings

Very closely related to the last aspect and going hand in hand with comprehensive coverage and new approaches in economic agreements, new standards for international trade are increasingly set outside the WTO.¹⁷¹ The WTO Sanitary and Phytosanitary Measures agreement (hereinafter SPS Agreement) and Technical Barriers to Trade agreement (TBT) were main achievements because of their incorporation and dissemination of international standards.¹⁷² The WTO set the legal framework

¹⁶⁵ M Ruta (n 163).

¹⁶⁶ According to WTO, Appellate Body Report, Peru–Agricultural Products, WT/DS457, para 5.112, it does not seem to be the case.

¹⁶⁷ See especially WTO, Mexico – Tax Measures on Soft Drinks and Other Beverages, WT/DS308 and WTO, Peru – Additional Duty on Imports of Certain Agricultural Products, WT/DS457 (n 166).

¹⁶⁸ Vidigal (n 8), Issue 2, 187–210.

¹⁶⁹ Especially art 11.1(b) Safeguards Agreement, *ibid*, 196–8.

¹⁷⁰ *Ibid*, 191–2.

¹⁷¹ Especially argued with regard to TRIPS; A Taubman, *The Variable Geometry of Geography: Multilateral Rules and Bilateral Deals on Geographical Indications* (2019) <<https://ssrn.com/abstract=3372740>>.

¹⁷² Although many aspects are still left to the discretion of members.

for trade taking place internationally and provided for a common set of rules for all members to be followed.

Yet, in the last decade, the four central actors in the WTO, generally referred to as the 'quad' consisting of the US, Europe, Canada and Japan have started to push for new standards in their FTAs,¹⁷³ especially concerning 'trade and'-issues, including sustainable development, environment, labour and human rights, but also e.g. rules on competition and currency manipulations.¹⁷⁴ The comprehensive agreements negotiated and agreed upon reflect the incorporation of many more topics and aspects and broaden the regulatory scope of trade agreements.¹⁷⁵ With the negotiations in more intimate settings, often between a limited number of States, power can be and in fact is exerted more directly and immediate, especially if one of the major powers, EU, China or the US is involved in the process. The three have different ways of pushing their will. While the EU follows a softer approach, yet insisting on including considerably more WTO-plus and -extra provisions, which are in turn not to the same extent enforceable; the US postulates less demands, yet more directly and it ensures their enforceability.¹⁷⁶ China, in turn, tends to have a rather subtle seductive way of negotiating and concluding agreements based on economic incentives provided to its partners.

Yet, all those strategies have in common to push their own regulatory approaches and to ensure spheres of power and influence.¹⁷⁷ In any case, the other side is often in a weaker position. The negotiating forum of the WTO not only gave members such as the African-Caribbean-Pacific¹⁷⁸ group an opportunity to align their position and thereby support each other, but also to benefit from big power negotiations by way of MFN and the making of agreements to the benefit of all members. In short, 'as powerful countries "devalue" the WTO's authority, smaller countries will be stripped of the rule of law protection under the WTO system.'¹⁷⁹ Additionally, the power imbalance often leads to unequal negotiation settings and to less influence of the weaker power on the design of the rules and the topics included.¹⁸⁰ Overall, the approach of PTAs between smaller groups of States stands in stark contrast to the multilateral approach of the WTO.

¹⁷³ B Condon, *To Dystopia and Beyond: The WTO in a Warming Megaregional World*, (2019) <<https://ssrn.com/abstract=3384248>>.

¹⁷⁴ EU-Singapore and EU-Vietnam FTA (Sustainable development provisions), EU-Mexico Global Agreement (Environment provisions), EU-South Korea FTA (Labour provisions), EU-Chile FTA (Competition provision), United States-Mexico-Canada Agreement (Currency provisions).

¹⁷⁵ See e.g. CETA, the proposed chapters for the EU-Mercosur agreement or the negotiations on the Regional Comprehensive Economic Partnership.

¹⁷⁶ S Jinnah, 'Strategic Linkages: The Evolving Role of Trade Agreements in Global Environmental Governance' (2011), 20 *Journal of Environment and Development*, 191-215.

¹⁷⁷ Explicitly for the US and EU: H Horn et al. (n 164) 2.

¹⁷⁸ Glossary Term WTO: 'African, Caribbean and Pacific countries. Group of countries with preferential trading relations with the EU under the former Lomé Treaty now called the Cotonou Agreement'.

¹⁷⁹ S Cho, (n 21) 32.

¹⁸⁰ See already R Axelrod and RO Keohane, 'Achieving cooperation under anarchy: Strategies and institutions' (1985) 38 *World Politics*, 239.

Part Three: Fixing the WTO – Why and how?

The developments inside and outside the WTO evoked the picture of the rock and the hard place, rendering the multilateral trade organization in its current uncomfortable position. Especially when seen in accumulation, the overall picture allows an assessment of the current path for the WTO and international economic law more generally (1). Against this background, it is worth asking whether it is actually worth saving the WTO (2). In answering in the affirmative, it will be discussed whether the WTO could not again be at the forefront of international law, by reverting to majority voting in order to overcome the current crisis of the multilateral order (3).

1. Is International Economic Law in general or only the WTO in particular in decline?

What overall picture appears, when putting the pieces together? Relevant factors for a reflection about the course a subfield in international law is taking, might include ‘systematically relevant disregard for international law, structural and institutional developments, which challenge its integrity, as well as contestations or rejections of a value-based international law’.¹⁸¹ These indicators help to analyse whether ultimately ‘the contemporary “type” of international law is being transformed into another type of international law.’¹⁸²

The analysis above has shown that inside the WTO all reform efforts have failed in the last years; members constantly and increasingly violate especially the agreements related to trade remedies to the extent of systemic disregard; trade tensions and violations of the WTO agreements have escalated into trade wars and exposed systemic open legal questions regarding the security exceptions clause and countermeasures; and finally the destruction of the AB marks a significant shift in the functioning of the WTO dispute settlement mechanism. These developments are not merely isolated incidences but reflective of a systemically relevant disregard for WTO law by more than a few members, ultimately challenging the integrity of the organization, accompanied by contestations and rejections of the values on which the WTO was founded, including the international rule of law. At the same time, members have turned away from the WTO and towards alternative agreements and fora, in which they pursue different aims with different strategies. The negative impact for the WTO results from the obvious disregard for preconditions of PTAs set by WTO agreements, the diversion of interest and effort away from the WTO, the renationalisation of products and standard setting increasingly taking place outside of the WTO subject to the spheres of influence by major powers, especially the US, China and the EU. For the WTO the developments indicate a gradual return to the GATT-era in terms of disposing the compulsory dispute settlement system for a more power-based system in which an instrumentalization of economic means for strategic aims is under way.

From a different angle though, it could also be argued that International Economic Law is in fact an area in which international law is flourishing. Every year, new comprehensive agreements are negotiated and agreed upon and indeed the recent trade agreements deepen economic cooperation and include topics such as environment, labour rights and sustainable development in a way further

¹⁸¹ H Krieger et al., *The international rule of law* (OUP 2019) 18.

¹⁸² *Ibid*, 20 [footnote omitted].

developing the international economic legal framework and international law more generally.¹⁸³ These approaches appear timely and in many ways necessary for a contemporary economic order reflective of factors such as systematic human rights violations, a deteriorating environment or climate change. In fact, the subordination of economic objectives for other important aims can best be achieved if an agreement provides for these goals to be achieved simultaneously instead of having to resolve all those tensions by way of interpretation.¹⁸⁴ Seen from this angle, International Economic Law is further developing and shaping international law in a positive way.

2. Is the WTO worth saving?

If the WTO is outdated, ‘unreformable’ and weakened, is then a world with refined and enhanced bi- and plurilateral agreements not the preferable scenario and all efforts to save the WTO a waste of time? Or could the WTO not just continue operating in the background and later be reformed? Or is there more WTO than setting rules and regulations for international trade?

Of course, the WTO was never perfect. Its rules and regulations were also negotiated and agreed upon by a limited number of States, first at the ITO negotiations and later during the Uruguay Round.¹⁸⁵ It was also always reflective of market power and political strength and the ability of the negotiators at the table to translate their interests into the actual outcome of the agreement. Especially the Uruguay Round and later the DDA were not able to overcome power imbalances and certain shortcomings of the design of the agreements, in particular for those areas that were of particular importance to developing members. At the same time, it holds true that much needed concepts especially for the better protection of human rights and the environment, that are increasingly incorporated into bi- and plurilateral agreements, systemically integrate different pillars of international law and have the potential to improve the conditions for both humans and the environment along the production chains.

Yet, and the fundamental shift for the international legal order is significant, those are agreements among different subgroups of States. It will ultimately lead to a world of friends and better friends on the one side and foes and enemies on the other side, with maybe a number of neutral relationships less cared about. The new agreements might reflect much needed concepts and developments, but they come at a high price in at least two regards. First, the WTO had a strict rule of law approach, including that all rules and regulations were equally enforceable under the dispute settlement mechanism. The more recent bi- and plurilateral agreements often provide for less stringent approaches in their formulation as well as with regard to the enforcement, especially in the ‘trade and’-sections and certainly will not have an oversight mechanism similarly bound to the rule of law and comparable to that of the AB overall weakening the rule of law in International Economic Law. Second, and even more important, those agreements undermine the post-World War II and post-Cold War era that had a global legal framework at the heart of their agenda. The positive aspects of modern PTAs among a limited number of States might not outweigh the value the WTO has brought to the global order. Only the WTO provides for a global legal framework for trade

¹⁸³ See e.g. B Condon and T Sinha, ‘The role of international economic law in addressing climate change’ (2014) <https://www.wto.org/english/res_e/booksp_e/cmark_chap8_e.pdf>.

¹⁸⁴ See on systemic integration C McLachlan, ‘The Principle of Systemic Integration, and art 31(3)(c) of the Vienna Convention’ 54 ICLQ 2005 (2019) 279-320.

¹⁸⁵ E H Preeg, *The Uruguay Round Negotiations and the Creation of the WTO*, in: M Daunton, A Narilkar and R M Stern, *The Oxford Handbook on the World Trade Organization* (OUP 2012) 1978.

relations even among those States that would not dare or care to conclude an agreement between each other, yielding the rule of law to international relationships that would otherwise be inimical or not relevant enough for conclusion of an agreement. The latter ones bear an inherent potential to deteriorate at any time. The WTO is potentially open to all members of the international community with an appeasing and fencing effect especially for global and regional hegemonic powers and truly reflective of the multilateral approach. In sum, the WTO, as rightly summarized by Osakwe, 'is one of the central pillars of the global order. The institution has delivered global public goods and welfare, which is more than economic: it has delivered the public goods of security, peace and stability.'¹⁸⁶ Yet, if it is not treated and cared for, it might turn into a 'Zombie' organization¹⁸⁷, not really alive but also not entirely dead either.

3. Majority voting as a way out or a further step into the crisis?

How than could the WTO be saved from further slipping into a comatose condition, inoperable and without ever reaching compromises on anything, eventually becoming of ever lesser importance over time? One of the most important proposals for overcoming the current crisis has been the suggestion to activate the majority voting mechanism.¹⁸⁸ It is not something alien to the WTO agreement that would need to be implemented, but it is already there: Art. IX.1 WTO agreement especially foresees the option that 'where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting'.

The design and actual voting mechanism is a long-standing issue in international law especially regarding decision making in international organizations.¹⁸⁹ An organization may operate well on consensus when composed of a limited number of parties thereby preserving the sovereignty of States to the greatest extent possible.¹⁹⁰ Yet, with destructive States acting in bad faith, the reliance on consensus appears preposterous and threatens the WTO as well as the sovereignty of all other members. The WTO provides for and even requires ("*shall*") majority voting in case consensus cannot be reached. In the current crisis, it might be regarded as necessary to activate this mechanism in order to oppose those members taking the WTO hostage in their blockage position. For WTO members it requires yielding to two consequences: for one, it necessitates accepting the chance of being overruled by majority in votings to come. Yet, this might be the price to pay in further developing International Economic Law in a WTO with currently 164 member States. Second, it might lead to fierce opposition by some members. Yet, at least for now, presumably no member can allow itself to withdraw¹⁹¹ from the WTO, not even the most powerful ones. That should strengthen the back of the WTO and the supporters of the organization in overcoming blockages and by activating a mechanism that is provided for in the founding document of the WTO. The majority voting should first be used to revive the AB and should become the default option for any decision.¹⁹²

¹⁸⁶ C Osakwe, 'Future of the Multilateral Trading System: Why the WTO remains indispensable?' (2015) Asian Journal of WTO & International Health Law and Policy, 10:1 5 <<https://ssrn.com/abstract=2599404>>.

¹⁸⁷ J Gray, 'Life, Death, or Zombie? The Vitality of International Organizations', 62 International Studies Quarterly (2018) 1-13.

¹⁸⁸ See supra Part One, 4.

¹⁸⁹ LB Sohn, 'Voting Procedures in United Nations Conferences for the Codification of International Law', 69 AJIL (1975) 310-353; S Zemora, 'Voting in International Economic Organizations', 74 AJIL (1980) 556-608.

¹⁹⁰ Zemora (n 188) 574.

¹⁹¹ Possible at any time with a six months' notice, art XV WTO Agreement.

¹⁹² If no other voting mechanism is provided for in the agreements, art IX:1 2 WTO Agreement.

Would members of the WTO want and accept majority voting? Can they withstand political pressure to abstain from promoting majority voting? Defining for a position that is perceived as between a rock and hard place is that any solution might require having to refer to a very hard solution. Of course, there is a high risk that members would not accept majority voting decisions, that societies would not want their governments to be outvoted in Geneva and that States would ultimately withdraw from the WTO. At the same time, the WTO members desiring to keep the WTO working, cannot further sit and wait while the WTO is paralysed and gradually fading.

If the WTO became an organization that reverts to majority voting in areas of concern to the organization and the member as a whole, it could serve as an example for further developing and giving effect to international law also in other areas, in which States cling onto their sovereignty while constantly assuring that global problems can only be resolved by global approaches. In fact, majority voting appears as an effective solution for overcoming an impasse of finding consensus. In the past, International Economic Law has often been - similarly to international environmental law - at the forefront of developments later taken up in other areas of international law. International Economic Law then has the potential to play a leading role again and function as a stepping-stone for the international legal order more generally, emerging out of the crisis in a more robust way than before.

Conclusion

The 1st of January 2020 marked the WTO's twenty-fifth anniversary since the agreement for its establishment entered into force. The past year has however left the organization not exactly in a great condition for celebrations. The WTO is not just any organization, but also a symbol for a globalized world with global rules for a globalized market. If the WTO were to disappear, the global market would remain, only the global rules would have gone. They would be replaced by a complicated net of rules and agreements among friends and allies diverting trade along the lines of power and influence.

For some, the post-WTO might not look altogether grim, but rather bear great potential. Almost enthusiastically, it was suggested:

If the WTO were to disappear, the simplest answer for what to do in a post-WTO world is to recreate the WTO. We have a model that works. Let's just replicate it. But as it is sometimes said, 'Why let a good crisis go to waste?' If the WTO disappears or is no longer functioning, and we then have the opportunity to start fresh, let's aim high. Why not strive for perfection, or, at the least, excellence, rather than just muddling through as we usually do?¹⁹³

It might be true that every crisis bares the potential for something new and better. Yet, the risk for a steep deepening of the crisis of global relations before we reach a point of return again, might be greatly underestimated. There might be little chance for developing a new and better WTO, when compromise is already difficult to be reached for individual rules and agreements. With regard to the WTO it might then feel as though you don't know what you had until you lost it.¹⁹⁴ Answers and solutions should thus be searched within and for the WTO. Hope and effort to save the WTO and

¹⁹³ S Lester, In Search of the Next Cordell Hull, (2019) <<https://ssrn.com/abstract=3405637>>.

¹⁹⁴ Ral Donner - You Don't Know What You've Got (Until You Lose It) (1961).

develop it further, strengthening it to be better equipped for the challenges currently posed by its members and to the earth in its entirety, should thus prevail over ideas to establish relations based on power and influence or on recreating something that might prove very difficult to be rebuild.

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The Kolleg-Forschungsgruppe “The International Rule of Law – Rise or Decline?” examines the role of international law in a changing global order. We assume that a systemically relevant crisis of international law of unusual proportions is currently taking place which requires a reassessment of the state and the role of the international legal order. Do the challenges which have arisen in recent years lead to a new type of international law? Do we witness the return of a ‘classical’ type of international law in which States have more political leeway? Or are we simply observing a slump in the development of an international rule of law based on a universal understanding of values? What role can, and should, international law play in the future?

The Research Group brings together international lawyers and political scientists from three institutions in the Berlin-Brandenburg region: Freie Universität Berlin, Humboldt-Universität zu Berlin and Universität Potsdam. An important pillar of the Research Group consists of the fellow programme for international researchers who visit the Research Group for periods up to two years. Individual research projects pursued benefit from dense interdisciplinary exchanges among senior scholars, practitioners, postdoctoral fellows and doctoral students from diverse academic backgrounds.

