

ZOOM OUT

The question:

‘In Clinical Isolation.’ Is there a meaningful place for the World Trade Organization in the future of International Economic Law?

Introduced by Paolo Turrini and Angelica Bonfanti

What the heck. The girl was young, so lively and, what is more, socially accepted. Everyone wanted to date her. And all of a sudden, she fell ill. With the disease came the solitude – or was it the other way round? Now her conditions are stable but critical, and we must be prepared for the worst.

This existential downturn could pretty much describe the unpleasant situation the World Trade Organization (WTO) is now enduring. From highly-successful creation of concerted economic policy and well-attended forum of the international community to progressively sidelined actor of inter-State trade relations, the symptoms of its withering are many and quite visible. However, since the aggravation of its conditions has been a matter of just few years, only recently have international law scholars begun to tackle the question by looking at the full picture. A picture that can well go under the name of ‘crisis.’

Early indicia of the WTO’s loss of sheen can perhaps be traced back to the start of the century, when an ambitious new round of negotiations – known as the Doha round – was promoted to address the issues raised by developing countries. It turned to be an unfinished quest that has yet to deliver something substantial. Year after year, the awareness grew larger that no advance could be made within the WTO. Thus, many of its members decided to walk a different path by arranging *inter se* bilateral or regional trade agreements: a move that is not formally in breach of WTO rules but *de facto* undermines the unity of the system and its world-scale multilateral premises.

However, some States went further and did take stances that possibly constitute violations of the fundamental norms of the organisation, or at least, interpretations of them aimed at curbing their potential. For

instance, the recent trade ‘war’ between the United States, on the one hand, and China, on the other, saw the former taking retaliatory measures against the latter without abiding by the procedural conditions laid down by the WTO rules. According to the United States, China’s behaviour is not embraced, to a large extent, by WTO obligations,¹ so that denial of benefits due under the WTO agreements is not required to undergo the scrutiny of the Dispute Settlement Body (DSB). Put differently, trade countermeasures would always be possible in the wake of commercial controversies not covered by the organisation’s rules – therefore, in a wide variety of circumstances. Similarly, and on the same occasion, the United States justified its sanctions against China and other States by invoking alleged national security reasons, that is, a motivation that finds a legal basis in Article XXI of the General Agreement on Tariffs and Trade but whose application in the given situation is doubtful to say the least. After all, nearly anything can fall within the umbrella of security, so that attributing to Article XXI unrestrained self-judging nature amounts to making the WTO treaties an *à la carte* menu.

Quite bravely, the WTO ‘judges’ have recently contested this latter view by claiming their right to decide cases where necessity is invoked.² This judicial opposition might not last long, though. Indeed – as if the above were not enough – the Appellate Body, which is one of the main institutional pillars of the WTO and its core adjudicative organ, is now experiencing a stalemate, as the United States is resolute in blocking the appointment of the missing members. Should this deadlock continue, the dispute resolution mechanism of the WTO would be seriously impaired. This would be even more grave given the current, burdensome caseload of the WTO adjudicative bodies and the greater complexity of recent cases. In this regard, a further sign of disillusionment by WTO member States towards their organisation can be discovered in the fact that, until very recently at least, such caseload was mainly composed of appeals and follow-up disputes, mirroring a decreased submission over time, starting

¹ See the ‘Statements by the United States at the Meeting of the WTO Dispute Settlement Body’ (27 March 2018) 14–15 <https://geneva.usmission.gov/wp-content/uploads/sites/290/Mar27.DSB_Stmt_as-delivered.fin_rev_-1.pdf>.

² The justiciability of security claims was affirmed in Panel Report, *Russia – Measures Concerning Traffic in Transit* (2019).



from 2000, of new disputes to the DSB.³ Now figures appear to be on the rise again, but it is perhaps too early to tell whether this confirms trust in the system.

The overall impression is that the WTO is under siege. Somewhat paradoxically, this attack on it can hardly be interpreted as an attack on free trade as such. True, we witness a resurgence of protectionist attitudes on the part of some Governments but, on the whole, the belief in freedom of commerce seems to be fairly solid worldwide. This is also attested by the abovementioned proliferation of regional and bilateral trade agreements, as only very few of them are contested and prevented from entering into force. Thus, the loss of centrality of the WTO and the unspoken rejection of its most fundamental values – the principle of non-discrimination between members and the substantial intangibility of tariff concessions under the DSB’s guardianship – might be framed as ‘selective liberalisation of trade.’ In other words, most States are still willing to pursue an open market policy; however, some of them are more and more ill-disposed towards external constraints about who should join such market and the conditions of participation.

The above is just one of the possible narratives about what is going on at the WTO and around it. It is the narrative of the ‘clinical isolation’ of the organisation – to use an expression well known in trade law circles.⁴ Some might argue that the lively legal developments occurring outside the WTO and, conversely, the relative stasis the organisation is living are just signs of a passing malaise, the result of episodic events that are bound to end (as recalled, many of the hardships the WTO is experiencing are due to the antagonistic approach taken by the current United States administration).⁵ Therefore, one must wonder whether the decline

³ J Pauwelyn, W Zhang, ‘Busier than Ever? A Data-Driven Assessment and Forecast of WTO Caseload’ (2018) 21(3) *J Intl Economic L*. For the full list of cases pending before panels or the Appellate Body see <www.wto.org/english/tratop_e/dispu_e/dispu_current_status_e.htm>.

⁴ Of course, here we use it to convey a different idea, that is, that the WTO is a declining tool in the governing of world trade.

⁵ At the other end of the spectrum lies the conviction that not just the WTO, but international trade law as a whole is under siege, also because the losses caused by globalisation are not easily offset, in the voters’ minds, by the gains – even if the latter are greater: J Kurtz, ‘Past as Prologue? Historical Parallels and Discontinuities in Modern



of the organisation is just a *trompe-l'œil* or, instead, international trade law is actually moving away from the institution that once stood at its centre. If the latter option is deemed more credible, then, is there a hope for the WTO? Are there reforms that are urgently needed to revitalize it, and are there chances for these to be enacted? Can such reforms be inspired by what is happening outside the WTO, both in international trade law (such as the solutions adopted by bilateral and mega-regional agreements) and in other fields of international law (such as the profound transformations international investment law is now undergoing)? Most importantly, can trade law do without a strong, nearly universal institution claiming control of international trade relations? Or, on the contrary, we can imagine what was unimaginable until recent times, that is, life without the WTO?⁶

These questions have been brought to the attention of a group of renowned International Trade Law experts, who have kindly accepted to provide their views to QIL.

Trade Wars' (draft of 14 October 2019) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3469496>.

⁶ See, eg, M Fakhri, 'Life Without the WTO – Part I: Stop all this Crisis-Talk' *EJIL: Talk!* (25 April 2019) <www.ejiltalk.org/life-without-the-wto-part-i-stop-all-this-crisis-talk/> and 'Life Without the WTO – Part II: Looking to the Everyday' *EJIL: Talk!* (26 April 2019) <www.ejiltalk.org/life-without-the-wto-part-ii-looking-to-the-everyday/>.

