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Triage? Assessing the EU's Modernisation Proposals for the WTO

This paper critically evaluates the proposal of the European Commission to modernise the World Trade Organization (WTO) circulated to European Union Member States on 5 July 2018. The three elements of that proposal differ in their specificity perhaps reflecting the urgency with which different threats are unfolding to the world trading system. The proposals identify proximate rather than root causes of the current malaise and give the impression that a World War I

style triage of the rules-based trading system is ultimately being contemplated.

According to the European Commission (EC), the WTO is struggling to credibly remain the go-to place for trade negotiations.¹ Indeed, after the Commission stated its concerns, EU-Ambassador to the WTO Marc Vanheukelen comment-

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¹ "With its negotiating function paralysed and its dispute settlement system challenged, the WTO post-MC11 is in an existential struggle to remain a credible basis for trade relationships." See European Commission: WTO – EU's proposals for WTO modernisation, Note for the Attention of the Trade Policy Committee, Brussels, 5 July 2018, p. 10.

ed that if the organisation does not take measures to move forward, the result would be “the demise of the rules-based trading system”.²

If the possibility of American tariffs being imposed in September or October 2018 on imports of cars and car parts and on another 200 billion USD of Chinese exports were not enough to justify the fears of EC officials, on 31 August 2018 President Trump threatened to withdraw the US from the WTO if the organisation did not “shape up”.³

The prospect of further trade tensions follows the imposition of tariffs on imported steel and aluminium earlier this year due to purported national security grounds, which has affected 6.4 billion euros of European Union exports.

As a “committed global trader”, to use Commissioner Cecilia Malmström’s phrase, the EU sees a WTO in crisis as inimical to its interests and has therefore formulated proposals that it hopes will “modernise” that organisation. These proposals are due to be shared with other members of the WTO in September 2018. As the EU’s plans were leaked to its member states in July 2018, however, it is possible to offer an assessment now.

But on what basis should that assessment of the proposals be made? What outcome would constitute success? Or is it better to think of different degrees of success? Would proposals that persuade the US government to stop blocking appointments to the WTO Appellate Body be enough? Would offering the Americans a sufficiently compelling alternative to pause or abandon their investigations in car imports and Chinese intellectual property practices constitute success? Would an agreed agenda in Geneva to revive the deliberation and negotiation functions be sufficient or must the EU proposals hold out the promise of commercially meaningful changes in government policies around the world?

These questions are best suited for an *ex post* assessment of the EC’s proposals. At this early stage, however, a different approach is merited. Here, the manner in which the current WTO woes are characterised is assessed to see what, if anything, it reveals about the root causes of the problem.

2 “Today we face a simple choice: either we take a significant step forward in the organisation or we accept the demise of the rules-based trading system. It is a dangerous illusion to believe that the status quo is an option.” See EU Mission to the World Trade Organization (WTO): EU statement by Ambassador Marc Vanheukelen at the Informal TNC and HoDs meeting, Geneva, 24 July 2018, available at https://eeas.europa.eu/delegations/world-trade-organization-wto/48778/eu-statement-ambassador-marc-vanheukelen-informal-tnc-and-hods-meeting-24-july-2018_en.

3 Trump Threatens to Pull Out of WTO, Bloomberg, 31 August 2018, available at <https://www.bloomberg.com/news/videos/2018-08-30/trump-threatens-to-pull-out-of-wto-video>.

This sets the scene for the subsequent discussion. I provide a summary of key elements of the modernisation proposals of the WTO in the third section. And finally, an overall assessment of the EC’s proposals which draws upon a historical parallel that some may find provocative – the triage of soldiers in World War I – concludes this paper.

Characterising the causes of the current WTO crisis

Albert Einstein once remarked: “The framing of a problem is often far more essential than its solution”. So how has the European Commission framed the problem? In a speech at a conference hosted by the German Marshall Fund of the United States on 19 July 2018, Commissioner Cecilia Malmström talked about the “root causes” of the current crisis at the WTO:

Having said this, let’s also acknowledge that there are problems in the international trading system. That much we can agree on. However, US measures on steel and aluminium will not solve overcapacity in China. The same goes for the use of the so-called Section 301 – the measures the US has taken against China on forced technology transfers. Trying to force the hand of China with illegal actions will not work, and the US might end up breaking the multilateral system. Our view is that another approach is needed. We need to come together to reform and strengthen the WTO.⁴

Two comments are worth making at this stage. First, notice the *emphasis* is on Chinese government policy as the *underlying* problem. Second, the *trigger* for the current tensions is said to be US government action. Since those actions reflect unforced choices by the US government, what really matters are the factors that drove those choices. One is left, then, with the impression that Commissioner Malmström has identified one potential proximate cause (US actions this year) and one potential root cause (Chinese government action). Of course, before subscribing to the latter argument, one would want to assess the evidence on the magnitude of the harm done to China’s trading partners by Chinese sectoral overcapacity and forced technology transfers.

Meanwhile the characterisation found in the European Commission’s proposals is different:

For the EU, the current crisis and the ongoing marginalisation of the WTO have their roots in the inefficiencies of the current system. The WTO’s negotiating function has

4 European Commission: Transatlantic Trade in Turbulent Times – Speech by Cecilia Malmström, European Commissioner for Trade, Brussels, 19 July 2018, available at http://europa.eu/rapid/press-release_SPEECH-18-4604_en.htm.

not been able to deliver any significant improvements in the trade rulebook apart from the agreements reached on Trade Facilitation and Export Competition. The system remains blocked by an antiquated approach to flexibilities which allows over 2/3 of the membership including the world's largest and most dynamic economies to claim special treatment. The WTO's monitoring function is crippled by ineffective and repetitive committee procedures which are based on insufficient transparency. And, the core of the dispute settlement system is being challenged, with the distinct possibility of its paralysis in the near term. These problems are compounded by the broader geo-strategic developments. In essence, since 1995 the world has changed; the WTO has not.⁵

Apart from the potentially significant, unelaborated comment about geo-strategic developments, notice the diagnosis above is organised along the lines of the three main functions of the WTO. Moreover, the emphasis is on procedures and rules rather than on asking hard questions about behaviour, in this case why WTO members invoke or criticise certain rules. For instance, why do so many governments claim special treatment? What does that say about the political viability of, or perceived rewards from, signing binding trade accords? Why are governments insufficiently transparent? What deters them from supplying high-quality information either on time or at all? What led governments, notably the United States, to challenge the dispute settlement system? Why is that system seen as such a threat that it is worth paralysing?

These are uncomfortable questions for those of us who support the multilateral trading system. Without answers to these questions, it is unlikely that we will identify the root causes of the current WTO's woes. Put differently, if the EU finds certain WTO rules suboptimal, they must be preferred by some other WTO members otherwise they would have been changed. Understanding the associated government positions is key.

Further reflection on the questions above leads to two more observations. First, the government choices we seek to understand better are likely to have been heavily influenced by context. For example, the question about why so many governments claimed special treatment in large part relates to stances taken during the Doha Round negotiations. Furthermore, could there be any connection between a government's lack of transparency and its reaction to the global financial crisis and the growth slowdowns witnessed in so many countries in the decade that followed?

⁵ European Commission: WTO, op. cit., p. 3.

Second, the deeper question is why the WTO struggles to retain its centrality in the way that governments seek to advance their trade relations with other nations? Governments have options so why demote, in relative if not absolute terms, the multilateral track? Since trade relations at the WTO are based – in large part – on binding trade obligations, the question really becomes: Why are some governments reluctant to sustain, let alone develop, obligations that require them to (a) tie their hands, (b) subject their policy choices to scrutiny through transparency provisions and (c) accept judgements from a dispute settlement system that may go against them?

The point here is not that binding trade rules have no value. Rather, the point is that governments have different vehicles for advancing their commercial policy interests and we need to ask whether there are reasons to believe that the non-WTO options have gained in favour. Context is probably important here, too; the stalled Doha Round is a millstone around the neck of advocates for WTO centrality. This question is all the more important as senior officials only have a certain amount of attention (“bandwidth”) for commercial relations. They cannot pursue every option with equal vigour. Why has the WTO option lost the battle in so many national capitals?

Here is an example: Imagine deliberations in Beijing around five years ago about how to advance its commercial interests. Proponents of the blending of financing of transportation infrastructure and trade facilitation measures, in what is now termed the Belt and Road Initiative, may have been helped because proponents of any WTO alternative would have had to convince jaded senior decisionmakers that the neverending Doha Round could be concluded on terms sufficiently favourable to China.

Given the well-deserved reputation for technocratic competence among the European Commission's trade experts, no doubt much thought has been given to the root causes of the current malaise. While it may not be diplomatic to make public statements about every root cause, it is also not useful to frame deliberations in narrow functional terms driven only by recent developments. Multilateral trade cooperation has both a past and rivals – and its pursuit, or lack thereof, is a deliberate choice by each WTO member.

Key elements of the EU's proposals on WTO modernisation

The EU's proposals from July 2018 contain suggestions for both a future negotiating agenda as well as procedural changes to the deliberation and dispute settlement functions of the WTO. Dwelling on the cure more than its ailments and lacking a focus on advancing a negotiating text,

these proposals seek to inform ongoing “talks about talks” on reforming the WTO.

With respect to updating the WTO rule book, the EU makes two proposals. First, a number of policy areas are identified where new or stronger rules are advocated. These policy areas include subsidies and state-owned enterprises (the so-called “level playing field” agenda), regulation of services, treatment of foreign investors, technology transfer requirements and barriers to digital trade. Mention is also made of furthering the sustainability objectives of the international community and new rules relating to flexibilities afforded to developing countries.

Second, the EU advocates “flexible multilateralism, where members interested in pursuing a certain issue which is not yet ready for a full multilateral consensus, should be able to advance the issue and reach an agreement if its benefits are made available to other WTO members on a MFN basis”.⁶ Upon elaboration, this amounts to pursuing more plurilateral negotiations among the WTO membership, greater support from the WTO Secretariat for plurilateral accords, and “building greater political support and engagement in the WTO, including possible options as to the frequency of Ministerial Conferences as well as intensifying Senior Official processes”.⁷

Four proposals are made concerning the EU’s ongoing work and transparency. The greatest emphasis is placed on strengthening the incentives for WTO members to supply complete notifications on time, committee-level monitoring and deliberation of those notifications. In addition, the EU seeks to encourage further solutions to market access disputes before resorting to WTO dispute settlement. This would make greater use of WTO councils and committees to clarify and adjust incrementally existing WTO accords, and to reallocate resources to committees that are most active rather than dormant bodies.

The EU’s discussion of dispute settlement reform is organised differently. In this section, the ‘context’ and ‘the nature of the current crisis’ are laid out, including a lengthy account of several American criticisms of the current system of WTO dispute settlement. As such, on the current trajectory, there will be fewer than three Appellate Body members in office – the minimum number for that Body to hear an appeal – by December 2019. Unlike the other two issues discussed above, failure to address this matter soon will result in the suspension of one pillar of the current multilateral trading system.

The EU proposes a two-pronged solution. The first phase is comprised of six measures relating to functioning of the Appellate Body, such as timely reports that focus exclusively on the matter at hand and a move towards longer, single-term appointments to that Body. In the second phase, ‘substantive issues’ would be discussed, including some of the Appellate Body’s interpretations that the US considers judicial ‘over-reach’.

While it would be wrong to argue that the proposals relating to new rules, transparency and notification lack any specificity, they do pale in comparison to the explicit steps the EU has proposed for addressing concerns about WTO dispute settlement. Generally, the EU’s proposals are more detailed when addressing procedural matters compared to substantive areas of negotiation of new or existing trade rules. In terms of commerce involved, the impact on living standards, and the nature and extent of cross-border harm created by government policies, all matters that ought to influence an assessment of the case for negotiations on new or current rules, the EU proposals are silent.

Conclusion

It is noteworthy that the EU’s proposals contain greater specificity on important procedural matters. The proposals imply that others can stand aside when they allow for groups of WTO members to forge ahead. Taken together, these proposals are redolent of World War I triage. At that time, wounded soldiers were divided into three groups. The first group, the lightly injured or quickly healed, were treated immediately and then sent back to fight. This is similar to the EU’s specific proposals concerning WTO dispute settlement. But will the trade doctors agree on which medicine to take and in time?

The second group of soldiers, more seriously wounded but expected to live, were sent to hospital for treatment. The EU’s proposals for reforming the WTO’s deliberative functions and negotiating new rules fall into this category. Whether the patient ‘shapes up’ fast enough for some is an open question. Here, the misalignment of political and trade negotiating timetables is a concern.

The third group of soldiers, those beyond help, were made comfortable but were given relatively little treatment. Here the EU’s proposals allow what some might view as the ‘awkward squad’ of WTO members to opt out of negotiating new rules with their existing rights intact. Does this amount to implicit recognition of many governments’ limited valuation of the new global trade rules that the European Commission seeks? If so, the problem may be that of the content of those new rules, the binding enforceable nature of those rules, or the long shadow of unfinished business.

⁶ European Commission: WTO, op. cit., p. 8.

⁷ Ibid., p. 9.