

WTO suffers collateral damage

From Trump and China

*With its rule book undermined by Beijing and its judicial arm
Criticised by the US, can the body restore its reputation?*

Alan Beattie

Wanted: a credible mediator to bring a global trade war to armistice. **Must have:** the trust of the aggressors, the law on its side and the clout to get things done.

The US, for years the dominant power in the world trading system, and its upstart Chinese challenger are at battle stations.

The other big trading economies, particularly the EU and Japan, are trying to talk them down from a full-on conflict in which their own economies are already suffering collateral damage.

But nothing has so far deterred President Donald Trump from unilaterally hitting more than \$200bn of imports from China with emergency tariffs and threatening more.

If the need is clear then so is the obvious vehicle for de-escalating the conflict — the World Trade Organization. In principle it could resolve the antagonism between Washington and Beijing through providing the forum for litigation and negotiation. But its weaknesses make it an awkward arbiter. At the time the WTO is most needed, its failings become ever more manifest. Without reform, the organisation itself will suffer severe, possibly fatal, collateral damage from the US-China struggle.

“Whether we like Trump or not — and I do not like Trump,” Pascal Lamy, a former head of the WTO, told a recent conference at the European University Institute, “I think he must be credited with one thing, which is to have put this issue of WTO reform on the table.”

The WTO was created in 1995 but its founding treaty, the General Agreement on Tariffs and Trade, dates from 1947. The Geneva-based organisation, which now has 164 member

countries — China joined only in 2001 — sets the basic global rule book for trade and the arbitration of conflicts. True, its negotiating function has not produced a meaningful multilateral deal since its creation. The laborious legislative process, which Mr Lamy once described as “medieval”, requires unanimity, and the WTO’s secretariat, the closest it has to an executive, has very little power. Member governments’ last attempt at a deal, the “Doha round” of negotiations, collapsed in 2008 after seven years of acrimony.

Flashpoints: Lack of Agreement -- The only trade deal agreed by all WTO members since the “Uruguay round” was completed in 1994 is a minor pact on trade facilitation, or reducing bureaucracy at borders, which entered into force in 2017. Smaller “plurilateral” deals have been agreed between a number of countries on government procurement and information technology. But recent attempts to negotiate such pacts on services and on environmental goods, such as wind turbines and solar panels, have stalled. Some countries, both emerging and developed, have balked at extensive liberalisation.

By contrast, its dispute settlement process has functioned reasonably well. Panels of arbiters rule on breaches of existing WTO law in cases brought by one member country against another and can authorise retaliation in the form of higher tariffs. Its rulings limiting trade-distorting subsidies, for example, have helped contain the transatlantic dispute over government handouts to Boeing and Airbus.

Governments are still using the dispute settlement system as best they can. Last week a group including the EU, China, Russia, Turkey and Canada started a case against the US over Mr Trump’s tariffs on their steel and aluminium exports.

Yet several factors inhibit the organisation playing a mediating role in the US-China antagonism. One is the rapid escalation by Mr Trump of a long established American uneasiness about the WTO dispute settlement, despite Washington continuing to file cases against other governments. Second, the US and other advanced economies say the WTO’s rule book, not substantially changed since 1994, is out of date. But China — and other emerging markets — reject any WTO reform that looks like bullying by the richer countries.

In a speech earlier this month, Roberto Azevêdo, the WTO’s director-general, called for reform and said bluntly: “Without action to ease tensions and recommit to co-operation in trade, we could see serious harm done to the multilateral trading system.”

Successive US administrations, and malcontents on Capitol Hill, have criticised WTO dispute settlement decisions. Much of the fire is concentrated on its appellate body, a tribunal

of three judges that reviews rulings by a lower panel. US officials say the AB, which heard nine cases last year, displays undue judicial activism, seeking to fill holes in the WTO rule book rather than interpreting existing law.

Warren Maruyama, a former general counsel of the US Trade Representative's office, once summed up the issue: it was problematic, he said, if the AB was "making up law out of whole cloth". In 2011, Barack Obama's administration blocked particular judges' reappointment to the AB, including that of Jennifer Hillman, a US law professor and also once general counsel at the USTR, apparently for taking what it saw as an unduly expansive view of its role.

The US complains that the AB repeatedly rules against Washington's use of "trade defence" — especially anti-dumping and anti-subsidy duties — regarding imports that are alleged to be priced unfairly low.

This animus has sharpened under Mr Trump. Robert Lighthizer, the current USTR, and several senior colleagues are veteran lawyers for the steel industry, one of the biggest users of trade defence. Blaming judicial over-reach, the US has blocked the appointment of any judges at all to the AB, which will next year bring the system to a halt.

Flashpoints: *Litigating China* -- The US has successfully pursued a number of cases at the WTO against Chinese trade-distorting subsidies, including forcing Beijing to abolish handouts to wind turbine manufacturers. But Washington complains that, partly thanks to an inadequate definition of what constitutes a "public body" for the purposes of assessing government handouts, many such interventions slip through loopholes in the law. Delays in the notification of subsidies by China to the WTO, with few means of forcing Beijing to speed up, also prevents effective legal scrutiny. The WTO's secretariat has no effective powers to ensure compliance in notification.

This approach feeds into a wider area of concern. "There are a fair number in the US administration, I suspect including Bob Lighthizer, who want to go back to the old GATT system with non-binding dispute settlement," says Prof Hillman, now at Georgetown University. "That appeals to a wider view, held by people like John Bolton [Mr Trump's national security adviser], that the US should not be subject to supranational courts.

"The Trump administration's criticism of the WTO goes beyond dispute settlement. It regards China as a broad-ranging geopolitical and economic rival and its growth model as a threat to the world trading system. Dennis Shea, US trade ambassador in Geneva, said in July: "If the WTO is to remain relevant to the international trading system, change is

necessary.” China, he added, has “[used] WTO membership to become one of the WTO’s largest traders, while largely retaining its state-led, mercantilist approach to trade and investment”.

The US says WTO rules do not sufficiently limit Beijing from intervening to subsidise Chinese industry, support state-owned enterprises and discriminate against foreign investors, including the forced transfer of technology. “The ideal would be a fundamental rethink of the entire approach to subsidies,” Prof Hillman says, “determining which are acceptable and which are not.”

That is a tall order. Attempts at quiet diplomacy by other powers — notably the EU and Japan — to bring the US back into the multilateral fold are politically delicate. Trade officials say Brussels and Tokyo are aware of the need to triangulate between Beijing and Washington.

The EU, for example, which has already had US tariffs slapped on its steel and aluminium industries, entered bilateral talks with Washington in July to avoid duties being extended to cars. At the same time, Brussels has opened a regular dialogue with Beijing about WTO reform. An EU official says of the US and China: “We are trying to persuade them to embed their confrontation into the rules-based system rather than through pure power relations.”

Shinzo Abe’s government in Japan, despite successfully leading the revival of the Trans-Pacific Partnership trade deal after the US pulled out, in September also gave in to pressure to start direct talks with Washington.

Tokyo has spearheaded the creation of a trilateral initiative involving itself, the US and EU to campaign against trade-distorting subsidies and other state interventions — an effort directed, quite clearly, at China.

Earlier this year, despite US criticisms of the dispute settlement process, the three members launched more or less co-ordinated legal action at the WTO against China over technology transfer. But at the same time, Mr Abe, in a sign of warming relations with Beijing, will visit China this month to work on preserving and updating the global trading system.

Reform is proceeding slowly. In September the EU floated proposals to make dispute settlement more efficient, agree new rules on investment, competition and tech transfer and make subsidies more transparent. Canada, which is hosting a meeting on Wednesday of governments that support WTO reform — for now excluding the US and China — has made similar proposals.

Major rule changes would require new negotiations, precisely the task that WTO members have struggled to complete for nearly a quarter of a century. One possible model is a “plurilateral” agreement, which brings together a smaller group of countries willing to make a deal among themselves. Such deals already exist, including one on government procurement between nearly 20 countries as well as the EU. But Mr Lamy speaks for many when he says: “For God’s sake please let’s avoid . . . what the normal temptation will be in

Geneva, which is engaging a hundred ambassadors into a scoping exercise. That's the best recipe for immediate death."

Flashpoints: *Defining a developing country* --WTO agreements, mindful of the different effects of liberalisation on rich and poor countries, have long given so-called "special and differential treatment" to developing economies, including longer transition periods. But the status of developing country is self-defining, with no objective criteria. China continues to define itself as such, based on its level of income before it joined the WTO. Politically, it enables Beijing to position the country as part of a group of lower-income nations opposed to radical demands for liberalisation from the US and other richer nations. The US finds this irritating, and President Donald Trump tweeted critically on the subject earlier this year.

Yet too small a group will result in countries outside of it benefiting from subsidy reductions without having to cut their own handouts. Moreover, it will have to be large enough that Beijing does not feel it is being encircled by rich economies. China fears a return to the old days of the GATT when deals were essentially cooked up by the "quad" — the US, EU, Japan and Canada.

Lu Xiankun, a former senior Chinese trade negotiator and now professor at the University of International Business and Economics and Wuhan University, says the rulemaking parts of the EU's WTO reform proposals are widely viewed in China as "appeasement" of Washington, "a vivid reflection of what Mr Trump wants". As for the dispute settlement body, he says officials in China are asking: "Are we creating a dangerous precedent where one member can hold up the whole system?"

Chinese officialdom quietly admits there is need for reform. Zhou Xiaochuan, a former governor of the People's Bank of China, signalled some flexibility in a recent speech in Geneva, when he was reported as saying that China needed to address "loopholes" in its implementation of rules against subsidies and forced tech transfer.

But at the same time, Chinese officials insist any deal must be balanced, with the US addressing its own agricultural subsidies. Beijing is still sensitive about the liberalisation it had to undertake as a condition of acceding to the WTO in 2001. "The proposition to China is that new rules will apply to everyone," the EU official says, "and China will be at the table helping to craft them, not having to swallow them as part of an accession process."

However, any deal will have to include the larger emerging markets, such as India and South Africa. "Generally speaking, it will be very hard for China to sell reform at home if it is the only emerging country to participate in plurilaterals," Prof Lu says. "But one doesn't yet see a clear willingness from other emerging markets to take part."

Whoever is in the White House, WTO reform, in the context of Sino-American tension, is likely to recur. Future US presidents will find it hard to drop the issue without being accused of selling out to globalism.“

Even under a different administration, I don't see the problems with dispute settlement being resolved without the US getting something of what it wants,” Prof Hillman says. “The question is whether there is anything that satisfies the US while not alienating all other members of the WTO.”