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## **EU multilateral trade policy in a changing, multipolar world: The way forward**

**Wolfgang Weiß**

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**Abstract** This chapter identifies the most pressing challenges for the EU multilaterally oriented trade policy due to the changing global context for international trade and investment, caused by the shift of the US towards unilateralism and protectionism and by the re-orientation of China's exceptionalism towards becoming a more influential actor. It explores and assesses how EU trade policy copes with the new polarities and finally formulates proposals for the way forward for the EU multilateral trade policy. It will be shown that the current challenges are more fundamental in character and may last longer than currently anticipated. It will also highlight that maintaining unity in the EU determination of trade policy is of pivotal importance for addressing the challenges, which however might become more difficult.

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### **1 Introduction: US Unilateralism, China's Exceptionalism and Russia's "Disruptivism" as Current Challenges for the EU's Multilateral Trade Policy**

The realities of trade policy have changed fundamentally in the recent past. Whereas until a few years ago the multilateral approach to regulating international trade, and above all the WTO, was the preferred venue for trade negotiations and disputes, but also for reform efforts between states, we have recently observed a new unilateralism. It is true that the lack of progress in the Doha Round in the WTO has driven many states, and also the EU, to switch to bilateral trade agreements. But this is not a categorical departure from the WTO, especially since the EU's more recent free trade agreements are based on WTO rules, thus reaffirming their relevance.<sup>1</sup> Any new EU free trade agreement can therefore be seen as a commitment to a rules-based international trading system and, thus, ultimately as a confirmation of the WTO's fundamental mission to organise world trade accordingly.

However, the last WTO Ministerial Conferences in Nairobi and Buenos Aires in 2015 and 2017, whose results were poor, clearly demonstrated that the WTO's decision-making mechanisms and its tasks, and in particular the dispute settlement mechanism, need to be reoriented and therefore urgently reformed.<sup>2</sup> Fundamentally critical discussions about the WTO took place very early on in social circles and NGOs critical of globalization, and criticism of the WTO has never ceased from the ranks of WTO members, especially from developing countries. But the current challenges to the multilateral trade regime threaten its functioning much more profoundly. For the first time, the WTO is threatened to be blocked, if not destroyed, from within, by one of its founding members and creators of today's world trade system<sup>3</sup> and, at the same time, the world's most important economy. The US trade policy under Trump threatens the functioning of the WTO on several levels. The dispute settlement, the crown jewel of the WTO, will no longer work in the foreseeable future due to paralysis caused by the USA. The US criticism of the functioning of the Appellate Body<sup>4</sup> did not start with the current administration, but it was Trump who goes as far as blocking the composition of its bench. The USA dodges proposals to resolve the blockade of the Appellate Body, let alone its reform. Compliance with basic trade rules, notably most-favoured-nation treatment and non-discrimination as fundamental principles of international trade, is also undermined.

Another attack on the functioning of multilateral trade rules comes from China. While China does not go so far as to question the WTO and the basic principles of international trade law, Chinese exceptionalism is a no less dangerous attitude for ensuring equal trading conditions for all. Finally, while Russia is not an economic superpower, it challenges the EU through its actions destabilising the

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<sup>1</sup> Michael Hahn, 'We'll Always have Geneva: The Existential Crisis of the US-led Multilateral Trading System' in Inge Govaere/Sascha Garben (eds) *The Interface Between EU and International Law* (Hart Publishing 2019) 269 at 270. For an empirical affirmation s. Todd Allee/Manfred Elsig/Andrew Lugg, 'The Ties between WTO and Preferential Trade Agreements' (2017) 20 JIEL 2, 333.

<sup>2</sup> S. most recently the G20 Osaka Leaders' Declaration (28/29 June 2019): "We reaffirm our support for the necessary reform of the World Trade Organization (WTO) to improve its functions. We will work constructively with other WTO members, including in the lead up to the 12th WTO Ministerial Conference. We agree that action is necessary regarding the functioning of the dispute settlement system consistent with the rules as negotiated by WTO members. Furthermore, we recognize the complementary roles of bilateral and regional free trade agreements that are WTO-consistent. We will work to ensure a level playing field to foster an enabling business environment."

<sup>3</sup> Cf. the Fourth Clause of the Atlantic Charter 1941: "they will endeavor ... to further the enjoyment by all States, great or small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world" <<https://www.unmultimedia.org/searchers/yearbook/page.jsp?volume=1946-47&page=2&searchType=advanced>>.

<sup>4</sup> See USTR, *2018 Trade Policy Agenda and 2017 Annual Report of the President of the United States on the Trade Agreements Program* (2018) <<https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2018/2018-trade-policy-agenda-and-2017>> pp. 22-28.

political situation in the immediate vicinity of the EU, such as the occupation of the Crimea or influencing the formation of public opinion in favour of authoritarian and right-wing groups, and its interest in weakening cohesion within the EU itself. Russia's foreign policy is characterized by disruptive interference. This has trade policy relevance for the EU due to the great importance of energy supplies from Russia, especially to Eastern European countries and Germany.

The present chapter first of all outlines the concrete challenges for the multilateral orientation of EU trade policy and its counter-reactions. This is followed by an evaluation, which also outlines proposals for how these challenges should be addressed more comprehensively in the future. Finally, the unity of the EU is identified as the central condition for success in dealing with the challenges.

## 2 The US Unilateralism

The new reality of the US departure from multilateralism began with the assumption of office by President Trump. Within the framework of a generally isolationist policy of "Make America Great Again", he turned away from international agreements in the name of national, especially economic interests. The USA withdrew from the Paris Climate Convention,<sup>5</sup> the TTIP negotiations with the EU and the TPP. It also terminated the nuclear deal with Iran in May 2018<sup>6</sup> and imposed extensive trade sanctions against Iran in August 2018.

In terms of trade policy, the Trump Administration is pursuing a course of turning away from a multilateral order of international trade within the framework of the WTO, aimed at reconciling interests and seeking common solutions to pressing issues. The US now blocks multilateral trade regulation, adopts protectionist and discriminatory unilateral measures and masks them as a security issue. Multilateral approaches are replaced by a one-sided emphasis on US trade interests,<sup>7</sup> which is expressed in concrete and rather protectionist steps. Under the threat and imposition of "added tariffs", the USA under Trump is trying to wring unilateral concessions from its trading partners.<sup>8</sup> While the trade war with China started in January 2018 with the adoption of safeguard measures against solar panels and washing machines, the imposition of "additional tariffs" was initiated in March 2018 on steel and aluminium imports (which have also applied to the EU since June 1, 2018<sup>9</sup>) and was justified by security interests in maintaining a separate steel industry (therefore the measure was based on Section 232 of the US Trade Expansion Act 1962 rather than on Section 201 of the Trade Act 1974 concerning safeguards).<sup>10</sup> However, their purely economic policy motivation is visible. The need

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<sup>5</sup> G20 Leaders' Declaration 2017 <<https://www.consilium.europa.eu/media/23955/g20-hamburg-leaders-communiqu%C3%A9.pdf>> p. 10.

<sup>6</sup> The US withdrew from the *Joint Comprehensive Plan of Action* (JCPOA) adopted by the United Nations Security Council in Resolution 2231 (2015).

<sup>7</sup> Cf. his inaugural address: "Every decision on trade ... will be made to benefit American workers and American families ... Protection will lead to great prosperity and strength. ... We will follow two simple rules: Buy American and Hire American", <[www.whitehouse.gov/inaugural-address](http://www.whitehouse.gov/inaugural-address)>.

<sup>8</sup> Bernard Hoekman/Laura Puccio, *EU Trade Policy: Challenges and Opportunities* (RSCAS Policy Papers 2019/06, 2019) 1.

<sup>9</sup> Presidential Proclamation on Adjusting Imports of Steel into the US, clause 1. <<https://www.whitehouse.gov/presidential-actions/proclamation-adjusting-imports-steel-united-states-2/>>.

<sup>10</sup> "steel (aluminium) articles are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States". (cf. Presidential Proclamation on Adjusting Imports of Steel into the US). For the requirements for recourse to the WTO national security

to preserve jobs in the US steel industry is emphasized, and President Trump clearly complains about excessive US trade deficits and "unfair" trade practices by others.<sup>11</sup> The fact that Trump was not really concerned about national security when imposing the additional duties on steel and aluminium was also shown by talks with some trading partners in which Trump agreed to permanently renounce the additional duties in return for unilateral tariff reductions or voluntary export restrictions. In fact, Trump has permanently exempted some states from the additional duties, and did so in exchange for different compensatory measures. For example, Korea agreed to limit steel exports to 70% of current level and to increase access for US vehicles under the revised trade agreement with the US; Argentina was limited to current import figures. Trump clearly differentiates its measures according to trade policy interests, which, among other WTO violations, is contrary to the principle of equal treatment of all trading partners required by the most-favoured-nation principle, and is not in conformity with the WTO mechanisms for changing US tariff rates.<sup>12</sup>

For Trump, however, departure from multilateralism does not mean turning away from international agreements altogether. Trump only prefers bilateral or regional agreements over multilateral ones within the WTO framework.<sup>13</sup> Existing US bilateral trade agreements will be replaced by agreements which, in the eyes of the US administration under Trump, better serve the economic interests of the US, but also the geopolitical objective of isolating China. An example of this is the renegotiated NAFTA (now "United States-Mexico-Canada Agreement" - USMCA), which in its new version provides for more restrictive rules of origin, grants US farmers better market access in Canada and lays down higher occupational health and safety standards in the automotive industry in order to prevent further relocation of production, for example to Mexico.<sup>14</sup> Furthermore, Article 32.10 of the USMCA states that in the case of negotiations by one contracting party with a non-market economy country (i.e. China in particular), the others have a right of termination and may continue this agreement between themselves. This forces Canada and Mexico to choose between China and the USA.<sup>15</sup> The new US approach to trade policy of tailoring it solely to the economic interests of the USA is also reflected in the negotiations with the EU, which are limited to certain areas (see below). Trump considers the current international, multilateral trade rules, in particular those of the WTO, to which the USA has also agreed, as being too disadvantageous to the US economy. Trump interprets the high US trade deficits, especially with China and the EU,<sup>16</sup> as an exploitation to the detriment of the USA. Trade is no longer perceived as a win-win situation, but instead as a game producing winners and losers. Defining common interests and seeking constructive solutions together with trading partners to identified problems is not a way for the USA under the Trump Administration.

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exceptions see the last chapter in this volume. For a timeline and detailed references on the US trade wars see <<https://www.piie.com/blogs/trade-investment-policy-watch/trump-trade-war-china-date-guide>>.

<sup>11</sup> See the Section 232 Investigations report, p. 4: 'Excessive steel imports have adversely impacted the steel industry. Numerous U.S. steel mill closures, a substantial decline in employment, lost domestic sales and market share, and marginal annual net income for U.S.-based steel companies illustrate the decline of the U.S. steel industry.', <[https://www.commerce.gov/sites/default/files/the\\_effect\\_of\\_imports\\_of\\_steel\\_on\\_the\\_national\\_security\\_-with\\_redactions\\_-\\_20180111.pdf](https://www.commerce.gov/sites/default/files/the_effect_of_imports_of_steel_on_the_national_security_-with_redactions_-_20180111.pdf)>.

<sup>12</sup> See Geraldo Vidigal, 'WTO Adjudication and the Security Exception' (2019) 46 Legal Issues of Economic Integration 203 at 218 f.

<sup>13</sup> Cf. Craig VanGrasstek, *The Trade Policy of the US under the Trump Administration* (EUI RSCAS Working Paper 2019/11, 2019), 17.

<sup>14</sup> S. <<https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement>>.

<sup>15</sup> Craig VanGrasstek, *supra* note 13 at 18.

<sup>16</sup> However, the trade balance is more balanced if services are included.

The USA is thus adopting an attitude that shakes the very foundations of the internationally recognised rules for global trade, which also apply independently of the WTO. These rules are the result of a willingness of the states to conduct international trade in accordance with legal rules that are in the interest of all, that ensure mutual equilibrium and that are observed even if their application has negative repercussions on national interests in individual cases. The clear orientation of US foreign (economic) policy under Trump solely towards the effective assertion of its national interests with the aid of protectionist and discriminatory instruments is diametrically opposed to this. An US impetus for reform discussions within the framework of the established structures, of course, would not be problematic. But this is not the new US stance. Trump lacks the interest to seek common, equitable solutions to alleged or real trade problems with the partners concerned. The USA's willingness to find at best limited, only bilateral solutions is poisonous for the very idea of international rules that apply equally, and for any international cooperation. Trump is replacing them with the ruthless enforcement of US interests alone through unilateral measures in order to obtain additional trade benefits free of charge. Thus he deliberately leaves the WTO's framework for mutual reconciliation of interests. It is along this line that the USA, as recently in the G20 meeting in Osaka, is preventing a commitment to rule-based world trade and against protectionism.<sup>17</sup>

The EU is thus not only losing an important and pivotal companion in the multilateral approach to international trade regulation, but is itself becoming the focus of this US unilateral protectionist trade policy. The EU's attempt to prevent 25% additional tariffs on EU steel and aluminium imports into the US failed. Additionally, Trump threatens with equally high additional duties against the import of automobiles from the EU into the USA, which in turn would be justified by allegation of national security interests.<sup>18</sup> That threat is not off the table yet. The temporary waiver depends on the course of the bilateral trade negotiations between the EU and the USA, which, following a Juncker and Trump summit in July 2018,<sup>19</sup> were initiated only with considerable delay<sup>20</sup> and which are primarily concerned with reducing industrial tariffs and facilitating conformity assessments.<sup>21</sup> The fact that the EU does not want to talk about opening up the agricultural market puts a great strain on its chances of success. In the meantime, the EU had been promised a final waiver of additional duties on automobiles in return for a unilateral export restriction in this area, i.e. by entering into a WTO-incompatible "voluntary export restraint".

The conflict with the EU has now somewhat receded into the background as Trump devotes his special attention to China. A significant proportion of US imports from China were subject to additional duties.

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<sup>17</sup> See the text of the Declaration on WTO Reform in footnote 2, which lacks a reference to the importance of rule-based trade and the defence against protectionism. The G20 Declaration of 2017 contained a statement against protectionism on page 3 <<https://www.consilium.europa.eu/media/23955/g20-hamburg-leaders-communiqu%C3%A9.pdf>>.

<sup>18</sup> <<https://www.commerce.gov/news/press-releases/2018/05/us-department-commerce-initiates-section-232-investigation-auto-imports>>.

<sup>19</sup> Joint EU-U.S. Statement following President Juncker's visit to the White House <[http://europa.eu/rapid/press-release\\_STATEMENT-18-4687\\_en.htm](http://europa.eu/rapid/press-release_STATEMENT-18-4687_en.htm)> and <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1898>>.

<sup>20</sup> The negotiating mandates for the Commission were not adopted by the Council until April 2019, <<https://www.consilium.europa.eu/media/39180/st06052-en19.pdf>> and <<https://www.consilium.europa.eu/media/39178/st06053-en19.pdf>>. For the guidelines for the negotiations see <<https://www.consilium.europa.eu/media/39181/st06052-ad01-en19.pdf>> and <<https://www.consilium.europa.eu/media/39179/st06053-ad01-en19.pdf>>.

<sup>21</sup> <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=2010>>.

In this way, based on Section 301 of the US Trade Act, Trump is trying to persuade China to open up its markets, respect intellectual property and defend against technology theft.<sup>22</sup> It also calls on China to play by fair rules and to refrain from the huge domestic subsidies for Chinese companies and in particular state owned enterprises, which then try to sell their overproduction on world markets. These concerns about systemic issues that China's different economic system raises for WTO rules<sup>23</sup> and that are not addressed by them are shared by other nations and the EU. The EU is trying to resolve part of these issues pivotally within the WTO framework.<sup>24</sup> In this respect, the USA is participating in a working group together with the EU and Japan that aims at changing and modernising the WTO rules against subsidies and concerning state owned enterprises, and strengthening the protection of intellectual property and against forced technology transfer.<sup>25</sup> Besides its unilateral measures, the US administration has also initiated dispute settlement proceedings against China.<sup>26</sup> Recently, the USA also imposed sanctions on individual Chinese companies, above all Huawei. Huawei has been placed on a blacklist of companies to which for national security reasons no US technology may be sold. In particular, US companies are prohibited from supplying US high technology such as software. The US administration also tried to persuade partner countries to an embargo against Huawei. However, at the 2019 G20 Summit in Osaka, US President Trump promised to allow supplies again. This is one more example of how Trump only pretends security concerns until the other side makes trade concessions. China had previously announced its intention to import US agricultural products on a large scale.<sup>27</sup>

Another facet of US trade policy is the effort to persuade EU companies to comply with US sanctions against others. This concerns in particular sanctions against Iran and trade with Chinese companies. This type of extraterritorial action not only undermines multilateral rules, but in the long run the US is also likely to pursue a division of interdependent world trade and thus a cutting of global supply chains and the associated globally distributed added value in the exchange of goods and services. On the horizon, therefore, there is a danger that world trade could be divided into a US zone and a Chinese zone, in complete contradiction to basic principles of international trade and its underlying commitment to the benefits of international division of labour.

This reveals the other essential driving force behind US policy under Trump. As indicated, the US measures go beyond purely economic motives and also pursue the geostrategic goal of isolating or at least containing China,<sup>28</sup> which played a role already under the Obama administration. At that time the

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<sup>22</sup> S. Michael Hahn *supra* note 1 at 280.

<sup>23</sup> Cf. the US Communication „China's Trade Disruptive Economic Model“ WT/GC/W/745; USTR (ed) *2018 Report to Congress On China's WTO Compliance* (2019) <<https://ustr.gov/sites/default/files/2018-USTR-Report-to-Congress-on-China%27s-WTO-Compliance.pdf>>.

<sup>24</sup> For EU approaches to resolving transfer of technology concerns under existing WTO agreements by giving a novel reading to WTO disciplines, see its request for consultations WT/DS549/1/Rev.1.

<sup>25</sup> Cf. the Joint Statement on Trilateral Meeting of the Trade Ministers of the United States, Japan, and the European Union (September 2018) <<https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/september/joint-statement-trilateral>>. On the role of subsidies in the build-up of overcapacity, see the Communication of the USA, EU, Japan and others of 12.4.2018 Subsidies and Overcapacity: The Role of below-market financing, G/SCM/W/575.

<sup>26</sup> WT/DS542 – China – Certain Measures Concerning the Protection of Intellectual Property Rights.

<sup>27</sup> For the continuation of talks between US and China <<https://www.vox.com/world/2019/6/29/19870814/us-china-trade-negotiations-restart-donald-trump-tariff-huawei-concessions>>. For the national security issues posed by measures against Huawei see Tania Voon and Andrew Mitchell, 'Australia's Huawei Ban Raises Difficult Questions for the WTO', E. ASIA FORUM, Apr. 22, 2019, <https://bit.ly/2YfJG4d>.

<sup>28</sup> See Craig VanGrasstek, *supra* note 13 at 2 et seq, 12 et seq. The establishment of the US Interagency Trade Enforcement Center by Obama was already marked by the tightening of trade policy towards China, cf. Li Xiaoxue, 'US to Continue Tightening Trade Policy on China' (2012) *China's Foreign Trade* 5, pp. 64-65.

USA wanted to contain China's position in world trade through the TPP and TTIP negotiations. China's continued rise and in particular the significant expansion of its market position in the area of high technology and important raw materials (for the "Made in China 2025 Plan" see below) is to be counteracted. The USA wants to prevent China from further strengthening its already prominent position on the world markets through its forced industrial and economic policy and from strategically exploiting the advantages of its different economic system, which, compared to a market economy, relies heavily on state control, support and guidance of Chinese companies. To this end, trade and geostrategic goals and instruments, and in particular security policy goals and instruments, once again merge.<sup>29</sup> This development adds to the use of economic, in particular protectionist measures for geostrategic objectives by the US, which one could categorize as a new type of national security policy, directed towards safeguarding economic security.<sup>30</sup>

However, the attitude of the USA under the Trump administration is not carried by the effort to establish a joint alliance and a unified line of argument of the larger trading nations against China. Rather, the US tries to fight alone on several fronts simultaneously, isolating itself and thus acting against its own goals. TPP and TTIP as counterweights to China were buried by Trump. The lack of joint action against China, for which the USA is primarily responsible, lowers the chances of successfully finding a solution together with China for the problems posed by its economic system to multilateral trade rules in the WTO. These will be explained in more detail in what follows.

### 3 China's Exceptionalism

China's foreign policy in recent years and decades has been driven by the goal of securing a respected position on the world stage by its own efforts and on its own terms. In any case, we are in a time of a great shift of power from West to East, from America and Europe to Asia. Asia's economic expansion is reflected above all in China's rise to prosperity, with an ever-increasing proportion of the population becoming affluent and experiencing a sharp increase in its economic output and its share of world trade. In the last ten years, China has outranked Germany as export world champion. China's annual trade surplus has remained stable at over 400 billion US dollars for several years. China's national economic output now amounts to almost one fifth of the world's economic output; in e-commerce, the share is as high as 40%.<sup>31</sup>

This outstanding economic position is accompanied by a change in self-perception and foreign policy. China is changing from a rule-taker, who adopts the given international rules and participates in their framework at the international level,<sup>32</sup> to an influential actor and a rule-maker<sup>33</sup>, who wants to co-determine the rules himself. While earlier analyses hypothesized that China will adapt to Western values, more recent research has underlined China's focus on its own culture and history. China therefore not only considers Western values as unsuitable for itself and opposes their adoption.

<sup>29</sup> For the USA's criticism of "Made in China 2025" <<https://www.cfr.org/backgrounder/made-china-2025-threat-global-trade>>. The US Pentagon's security policy criticism points out that China's investments in face recognition, 3D printing and virtual reality systems as well as autonomous driving blur the border to militarily usable technology acquisition.

<sup>30</sup> For the economic security rationale in Trump's invocation of national security justifications see in more detail the last chapter of this volume.

<sup>31</sup> WTO, *World Trade Report 2018* (2018), 51, 52.

<sup>32</sup> Alastair Iain Johnston, *Social States. China in International Institutions* (Princeton University Press 2008).

<sup>33</sup> Chris Alden/Daniel Large, 'On Becoming a Norms Maker: Chinese Foreign Policy, Norms Evolution and the Challenges of Security in Africa' (2015) 221 *The China Quarterly*, 123.

Rather, China emphasizes the peculiarities of its experiences and development. The starting point for this, in addition to other cultural traditions, is the observation that Asia, unlike Europe, was remarkably stable and peaceful between 1300 and 1900.<sup>34</sup> This emphasis on the special development in Asia and the specific principles of foreign policy deriving therefrom for the China as the Asian hegemon is called Chinese Exceptionalism, which is characterised by "great power reformism, benevolent pacifism and harmonious inclusionism"<sup>35</sup>. In the discussion about China's foreign policy positions, attempts are being made to develop therefrom certain guiding ideas for China's independent influence in international relations.<sup>36</sup> This approach, however, is criticised as being far too idealistic, as China's behaviour as a great power had also previously been shaped by realism and power politics and therefore did not pursue fundamentally different approaches than other great powers.<sup>37</sup>

This debate does not need to be deepened here. What suffices is it to note that presently China - based on whatever philosophical or ideational approaches - is assuming an independent position on the world stage and intends to shape the rules of globalization according to its own ideas, interests and values.<sup>38</sup> This autonomy also determines China's trade and economic policy, especially after the reorientation of its domestic and foreign policy under state and party leader Xi Jinping since 2012. One striking feature of this reorientation is the adherence to a particular economic system of a different kind that is not a market economy, but characterised by a strong government interventionism into the economy and close government ties of companies. Another one is the "Made in China 2025 Plan" of 2015 which brought about a long-term, targeted, strategic orientation of the Chinese economy towards assuming a leading role worldwide in key areas of technology and industry in a few years' time and thus a much larger share of the global added value of high-tech products.<sup>39</sup> It complements the 2013 Belt and Road Initiative (BRI),<sup>40</sup> which promotes cross-border infrastructure projects, such as roads, ports, railway and energy networks in Asia, Africa and Europe with massive use of Chinese resources in order to ensure the distribution channels for Chinese goods, to sell the overproduction of the Chinese steel and cement industry, and also to secure ways to meet China's energy needs. More than 80 nations take part in this initiative, which is clearly also determined by security and power interests.<sup>41</sup> Meanwhile, China has also gained a significant world market share in rare earths trade,

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<sup>34</sup> Cf. William Callahan, 'Sino-speak: Chinese Exceptionalism and the Politics of History' (2012) *The Journal of Asian Studies* p. 33 at 41.

<sup>35</sup> Feng Zhang, 'Chinese Exceptionalism in the Intellectual World of China's Foreign Policy', in Rosemary Foot (ed.) *China across the Divide: The Domestic and Global in Politics and Society* (Oxford University Press 2013) p. 43 at 64.

<sup>36</sup> David C. Kang, *China Rising: Peace, Power and Order in East Asia* (Columbia University Press 2007); more plainly Feng Zhang *supra* note 35 at 47 et seq; idem, 'The rise of Chinese exceptionalism in international relations' (2011) 19 *European Journal of International Relations* 2, 305 at 322, 323, who regards this as one normative theory besides others for the shaping of Chinese foreign policy. For criticism s. William Callahan, *supra* note 34 at 42 et seq.

<sup>37</sup> Yuan-kang Wang, *Harmony and War: Confucian Culture and Chinese Power Politics* (Columbia University Press 2011); idem, 'The Myth of Chinese Exceptionalism: A Historical Perspective on China's Rise', in Vinod K. Aggarwal/Sarah Newland (eds.) *Responding to China's Rise* (Springer 2015) pp. 51-74.

<sup>38</sup> William Callahan, *supra* note 34 at 34.

<sup>39</sup> Max Zenglein/Anna Holzmann, *EVOLVING MADE IN CHINA 2025: China's industrial policy in the quest for global tech leadership* (Merics Papers on China No 8, July 2019); Anton Malkin, *Made in China 2025 as a Challenge in Global Trade Governance* (CIGI Papers No. 183, August 2018); see also <[http://english.gov.cn/policies/latest\\_releases/2015/05/19/content\\_281475110703534.htm](http://english.gov.cn/policies/latest_releases/2015/05/19/content_281475110703534.htm)>.

<sup>40</sup> Cf. Peter Frankopan, *The New Silk Roads* (Bloomsbury 2019) p. 62 ff.

<sup>41</sup> [Bruno Maçães](#), *Belt and Road: A Chinese World Order* (C. Hurst 2019).

which is a cause of further concern for other countries, as these metals are required for producing high-tech products.

The inherent contradiction between China's interventionist and mercantilist, at least hybrid economic system internally, on the one hand, and its dependence on open world markets to maintain national economic growth and its commitment to a rule-based international trade law and to the WTO, on the other hand, leads to a peculiar challenge for China's implementation of the WTO rules that are based on non-discrimination of all market actors and on reciprocity. On the one hand, China needs open markets of its trading partners, and uses the accessibility of liberal market economies, with which it wants to trade under the conditions of WTO rules, at least according to the letter. China's economic rise would not have been possible without the existing liberal world economic system.<sup>42</sup> Therefore, being aware of its own needs and benefits China is committed to the existing world trade system.

On the other hand, China does not shape its internal economic order according to the economic imperatives of effective distribution of resources, open markets and non-discriminatory participation in competition, but rather primarily according to political and geostrategic interests. The commitments to liberalisation, rule of law-based procedures and strict regulation of state subsidies made in the context of China's WTO accession have not been fully implemented.<sup>43</sup> The result of this tension is that China supports the WTO rules because and as long as they are in its national interest. China is therefore particularly challenging the EU because it is oriented towards a different kind of multilateralism,<sup>44</sup> which is far less driven by liberal values than by national sovereignty and economic growth and development objectives that should remain unaffected by environmental, social or democracy concerns, and which is much less altruistic than the EU's foreign (trade) policy.<sup>45</sup> Non-binding government agreements and voluntary commitments are preferred instruments. In multilateral regulatory efforts, China's position is characterized by great restraint.<sup>46</sup>

China's commitment to multilateralism and existing WTO rules is therefore ambivalent. While China supports the multilateral commitment of the EU, its commitment to the WTO leaves unanswered the central question of how to resolve the tensions created by China's special hybrid economic model in the WTO, where otherwise mainly Western liberal economic systems prevail (at least among the major trading nations), and whose rules are therefore based on the comparability of the economic systems and the internal competitive conditions created by them. Neither does China offer any solutions for this, nor does it seem to be particularly willing to discuss in this direction at all. The demands by WTO members to open up Chinese markets and to reduce state interventionism in China

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<sup>42</sup> Cf. in more detail WTO, *World Trade Report 2017* (2017) 14; Craig VanGrasstek, *Trade and American Leadership* (Cambridge University Press 2019) 321 et seq.

<sup>43</sup> Hanns Günther Hilpert, *China's Trade Policy* (SWP Research Paper 2014) pp. 12, 17, 18.

<sup>44</sup> David A. Scott, 'Multipolarity, Multilateralism and Beyond ....? EU-China Understandings of the International System' (2013) 21 International Relations 1, pp. 30-51; Stephan Keukeleire/Tom De Bruyn 'The European Union, the BRICS, and Other Emerging Powers: A New World Order?' in Christopher Hill/Michael Smith/Sophie Vanhoonacker (eds.) *International Relations and the EU* (Oxford University Press 2017) p. 418 at 423, 436.

<sup>45</sup> Since 2006 at the latest, EU trade policy has also been pursuing its own economic interests with the reorientation by Global Europe, cf. Wolfgang Weiß, 'Vertragliche Handelspolitik der EU' in Andreas von Arnould (ed) *Europäische Außenbeziehungen*, (Nomos 2014), § 10, para. 174. However, the EU's commitment to sustainability, development and equality goals is internationally exemplary. On the development policy and sustainable dimension of EU trade policy see also Wolfgang Weiß 'Die entwicklungspolitische Dimension der EU-Handelspolitik auswirtschaftsvölkerrechtlicher und EU-rechtlicher Sicht' in Gabriel J Felbermayr/ Daniel Göler/ Christoph Herrmann/ Andreas Kalina (eds.) *Multilateralismus und Regionalismus in der EU Handelspolitik* (Nomos 2017) p. 301, 312 et seq.

<sup>46</sup> Hanns Günther Hilpert *supra* note 43 at 15.

have not achieved much so far; the fundamental problem of the tension between an international regulatory system based on equal treatment and extensive market opening on the one hand and China's continuing state interventionist economic order on the other remains unresolved.

Interestingly, however, China unilaterally reduced its import tariffs in 2018 for many products, but not for goods originating in the USA. The current conflict between the US and China therefore offers business opportunities for the EU to replace the US as a supplier, but to a limited extent, as the overall weakening of global trade dynamics also affects domestic demand in China. Conversely, a solution to the US-China dispute could be detrimental to the EU, because in order to accommodate the USA and eliminate its trade deficit with China, China could increasingly cover its demand with US products. Due to its peculiar economic system, the Chinese government can easily decree such shifts in trade relations.

## 4 EU reactions

### 4.1 A firm commitment to the WTO and its reform

The EU's response in this multipolar, uncertain environment for international trade is first and foremost based on a continuing commitment to the importance of the WTO and its dispute settlement system and the underlying idea of a rule-based trading system based on multilateralism.<sup>47</sup> The EU remains deeply committed to the WTO and is pressing for reforms to maintain its viability, also in face of the challenges to the multilateral world trade order posed both by US protectionism and by China's exceptionalism that presses for increased strength and forging ahead.

In addition to the efforts to further develop the substantive rules of the WTO so that new rules be adopted to strengthen the competitive equality of domestic regulation and subsidiasation, this also includes the continuation of dispute settlement and, in particular, a reform of the Appellate Body.<sup>48</sup> In response to the foreseeable end or at least suspension of the functioning of the WTO Appellate Body, the EU has proposed a switch to ad hoc arbitration under Article 25 DSU and has taken the initiative to negotiate an agreement with the - quite numerous - supporters of this idea. Even if the use of this mechanism only provides a way out for those WTO members who are willing to do so (meaning that the US, which has so far rejected the EU's reform proposals,<sup>49</sup> can easily evade it), it shows a viable

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<sup>47</sup> See the priorities of the Finnish Council Presidency for the second half of 2019 *Sustainable Europe - Sustainable Future* p. 8 f <<https://eu2019.fi/documents/11707387/14346258/EU2019FI-EU-puheenjohtajakauden-ohjelma-en.pdf/3556b7f1-16df-148c-6f59-2b2816611b36/EU2019FI-EU-puheenjohtajakauden-ohjelma-en.pdf.pdf>>; Michael Hahn, *supra* note 1 at 275.

<sup>48</sup> On the EU's proposals for reform of the WTO <[http://europa.eu/rapid/press-release\\_IP-18-5786\\_en.htm](http://europa.eu/rapid/press-release_IP-18-5786_en.htm)> and the policy paper <[http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc\\_157331.pdf](http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf)>. On reform proposals of the EU, together with China, India, Canada, etc. regarding the Appellate Body see the joint communication WT/GC/W/752, <[http://trade.ec.europa.eu/doclib/docs/2018/november/tradoc\\_157514.pdf](http://trade.ec.europa.eu/doclib/docs/2018/november/tradoc_157514.pdf)>

<sup>49</sup> Bryce Baschuk 'U.S. Rejects the EU's Trade Reform Proposal, Putting WTO at Risk' *Bloomberg* (2018) <<https://www.bloomberg.com/news/articles/2018-12-12/u-s-rejects-the-eu-s-trade-reform-proposal-putting-wto-at-risk>>. Meanwhile EU and Canada established a bilateral Appellate Body replacement, see <[http://trade.ec.europa.eu/doclib/docs/2019/july/tradoc\\_158273.pdf](http://trade.ec.europa.eu/doclib/docs/2019/july/tradoc_158273.pdf)>.

way to continue the function of an appeal instance to the WTO panel reports until the Appellate Body is revived.<sup>50</sup>

The unilateral US stance can in the medium term increase awareness of the need for multilateral rules in the WTO in the interests of all. In light of this one might even welcome the blockade of negotiations outside the WTO (e.g. on TiSA) by the USA.

## **4.2 Negotiating free trade agreements**

The EU must also continue to counter pressure from the US in particular on the WTO by continuing bilateral trade talks in order to safeguard and further develop the EU trade relations irrespective of the fate of the WTO. The EU's policy of concluding ever new free trade and investment protection treaties is the right response to the challenges the EU is facing from the US and China. Surprisingly, the interest of some negotiating partners in an agreement with the EU seems to have been revived by the protectionist policy of the USA. In any case, negotiations with the Mercosur states had almost come to a standstill after more than 15 years and regained momentum only when Trump took office, so that a "political agreement for an ambitious, balanced and comprehensive trade agreement" could be reached end of June 2019.<sup>51</sup> Further free trade agreements should be sought, in particular with Asian and Pacific countries; EU participation in the CPTPP<sup>52</sup> should be examined.<sup>53</sup> If the EU's commitment to the WTO is to remain credible in view of the EU's numerous free trade agreements, it is advisable, however, to ensure that they are compatible with WTO requirements under Art XXIV GATT, especially in the negotiations with the USA.

## **4.3 Counter-reaction to US protectionism**

The EU has rightly not left the US additional tariffs on EU steel and aluminium products unanswered. The EU first used the instruments available at WTO level to counter-react and initiated a dispute settlement procedure, as did China.<sup>54</sup> Even if Trump might no longer be president when the proceedings against the USA are concluded in two to three years' time, they make it clear that the partners adhere to the WTO rules and allow constant exertion of pressure. The EU, like China, has also taken compensatory measures under the safeguard regime.<sup>55</sup> Whether these are WTO-compliant is

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<sup>50</sup> Vgl. Michael Hahn, *supra* note 1 at 277; <<https://www.csis.org/analysis/article-25-effective-way-avert-wto-crisis>>.

<sup>51</sup> <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=2039>>.

<sup>52</sup> Comprehensive and Progressive Agreement for Transpacific Partnership.

<sup>53</sup> Bernard Hoekman and Laura Puccio, *supra* note 8 at 5.

<sup>54</sup> China initiated a dispute settlement procedure, WT/DS544 - US - Certain Measures on Steel and Aluminium Products. The EU procedure is known as WT/DS548 - US - Certain Measures on Steel and Aluminium Products.

<sup>55</sup> Article XIX GATT in conjunction with the SG Agreement. Safeguard measures were initially provisionally imposed by the EU as of July 2018 and were converted into definitive measures upon completion of the procedure, see Commission Implementing Regulation 2019/159 imposing definitive safeguard measures against imports of certain steel products, OJ 2019 L 31/27; for notification to the WTO, see WTO document

doubtful,<sup>56</sup> not least for the fact that safeguard measures (it appears that there are no other suitable legal provisions to which the EU could have recourse) are bound by conditions that are unlikely to apply to measures taken in response of security exceptions (if one accepts the invocation of security interests by the US as legal, which in turn is doubtful). The EU can face the WTO's legal clarification of the issues with the same composure as the USA for its "additional tariffs". If the Appellate Body is paralyzed, the dispute settlement procedures do not come to an end (Rule 15 of its Working Procedures states that AB Members, after expiry of their terms, can continue to hear the AB proceedings they already started, but this is no help where AB proceedings could not be started as panel reports will be adopted only in 2020); at least, a sufficiently long time will elapse as even under normal circumstances, the procedures would take until the end of the Trump Administration.

The central problem of such counter-reactions is the danger of a spiral of sanctions, which must be prevented. Such measures should therefore be taken with great caution, with a certain delay and with a constant offer for dialogue. On the one hand, the EU must make it clear to the USA that US unilateralism will not remain unanswered; on the other hand, an escalation - such as is taking place in the relationship between China and the USA<sup>57</sup> - must be avoided as far as possible.

Not least for reasons of conformity with WTO rules, it is necessary to evade the desire of the USA for unilateral commitments from the EU. Nor must the EU accept an invitation from the USA or from China to take targeted joint action against each other. Unfortunately, as mentioned above, some states have already agreed to make unilateral concessions to the USA. Under no circumstances should the EU agree to such. This undermines WTO rules on tariff renegotiation procedures and on reciprocal free trade areas and contradicts the idea of reciprocity also prevailing in WTO disciplines. Commitments to the USA in the form of "voluntary export restrictions" only lead to further violations of WTO law; the EU has so far rightly rejected this.<sup>58</sup>

The EU has also tried to defend itself against the Iran sanctions which the USA has reinstated following the termination of the Iran nuclear deal and which may also affect EU companies which continue to trade with Iran. As the conformity with international law of the extraterritorial application vis-à-vis EU companies of US sanctions against Iran is also doubtful<sup>59</sup>, the EU has revived<sup>60</sup> its regulation on protection against extraterritorial effects of legal acts adopted by a third country.<sup>61</sup> This will prohibit EU companies from complying with US sanctions and will allow compensation actions to be brought before European courts. The measure was supposed to be complemented by an autonomous international payment mechanism independent of the US based system. However, as in the past, all

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G/SG/N/8/EU/1 and Commission press release <[https://ec.europa.eu/info/news/commission-publishes-its-findings-steel-safeguard-investigation-2019-jan-04\\_en](https://ec.europa.eu/info/news/commission-publishes-its-findings-steel-safeguard-investigation-2019-jan-04_en)>. For safeguards against the US see Commission Implementation Regulation 2018/886 (2018) OJ L 158/5.

<sup>56</sup> For more on this see the chapter by Edwin Vermulst and Juhi Sud in this volume; Christoph Herrmann and Carolin Glöckle 'Der drohende transatlantische Handelskrieg um Stahlerzeugnisse und das handelspolitische "Waffenarsenal" der EU' (2018) EuZW, 477 at 481, 482.

<sup>57</sup> See on this Alicia Garcia Herrero, *Europe in the midst of China-US strategic economic competition: What are our options?*, (Cesifo Forum 1/2019) 11 at 12, Table 1; Gabriel Felbermayr and Marina Steininger, *Trump's trade attack on China – who will have the last laugh?* (Cesifo Forum 1/2019) 27-33.

<sup>58</sup> Cf. <<https://www.atlanticcouncil.org/blogs/new-atlanticist/europe-ready-to-help-with-wto-reform>>.

<sup>59</sup> For the exterritoriality issue of WTO exceptions see the last chapter of this volume.

<sup>60</sup> Commission Delegated Regulation 2018/1100 amending the Annex to Regulation 2271/96, 2018 OJEU L 199 I/1.

<sup>61</sup> Council Regulation 2271/96 on protection against the effects of the extra-territorial application of instruments adopted by a third country, 1996 OJEU L 309/1.

these measures proved ineffective.<sup>62</sup> EU companies largely withdrew from doing business with Iran for fear of the US administration. In any event, the EU measures do not affect the right of undertakings to reorient themselves for economic reasons.

As already indicated, the EU also has certain advantages from US protectionism, which, however, by no means outweigh the disadvantages and which can be reversed immediately if the US attitude towards China changes. The willingness of other states to enter into trade agreements with the EU is increasing. The EU also benefits from China's unilateral tariff reductions and thus gains an advantage over US competitors. The EU's commitment to multilateralism is more clearly perceived and, in contrast to Trump, has the chance of being received with increased credibility.

#### **4.4 Counter-reaction to China's Exceptionalism**

In its political and trade relations with China, the EU initially sought to enforce conditionalities in the areas of human rights, minority protection, the rule of law and democracy, in line with its value-based approach, particularly after the strategic partnership with China was introduced in 2003.<sup>63</sup> In this way, Beijing should be persuaded to initiate internal reforms, which China has increasingly resisted. It does not perceive a change into an open pluralistic society based on the rule of law and the validity of fundamental rights as its path.<sup>64</sup> Efforts by the European Parliament in particular to enshrine human rights clauses in the envisaged EU-China Partnership and Cooperation Agreement were futile.

In recent years, the EU has therefore been seeking to adopt a much more sober policy, geared to achieving specific objectives rather than enforcing societal values.<sup>65</sup> In terms of trade, the EU aims to achieve a more balanced trade relationship with China in order to provide EU companies with better market access and a more balanced competition.<sup>66</sup> The initial mutual enthusiasm, especially after China's accession to the WTO in 2001, gave way to disillusionment with persisting trade imbalances and other bilateral problems. China's economic policy continues to rely on a strong position of its large state-owned companies or companies with close government links, especially in strategic sectors such as energy, transport, utilities, education and healthcare.<sup>67</sup>

The EU has subsequently adopted unilateral measures to address the imbalances in trade and investment relations with China. Following the expiry of China's non-market economy status in the WTO, the EU anti-dumping law was amended in order to be able to effectively take anti-dumping measures against imports from China in the future.<sup>68</sup> Furthermore, the EU has issued the so-called Investment Screening Regulation 2019/452,<sup>69</sup> which allows fending off direct investments from third countries on grounds of public policy or public security. This mechanism is not only directed against

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<sup>62</sup> Sascha Lohmann, *Extraterritorial US Sanctions* (SWP Comment 2019/C 05, 2019), <<https://www.swp-berlin.org/10.18449/2019C05/>>.

<sup>63</sup> "A maturing partnership – shared interests and challenges in EU China relations", COM (2003) 533 final.

<sup>64</sup> Stephan Keukeleire and Tom De Bruyn, *supra* note 44 at 432.

<sup>65</sup> Sunghoon Park 'EU's strategic partnership with Asian countries' (2019) Asia Europe Journal 1, 3.

<sup>66</sup> See Finnish Presidency *supra* note 47 at 9.

<sup>67</sup> Trade Policy Review - China 2016, WT/TPR/S/342, pp. 20, 95 et seq.

<sup>68</sup> For an analysis also with regards to their WTO compatibility see the chapters by Frank Hoffmeister and by Edwin Vermulst and Juhi Sud in this volume.

<sup>69</sup> Regulation 2019/452 of the European Parliament and of the Council establishing a framework for the screening of foreign direct investments into the Union, OJ 2019 L 79/1.

China, as it must provide for non-discriminatory criteria. However, the strongly increasing direct investments from China, along with Russia and India, play a central role here.<sup>70</sup> The EU also plans to enforce stronger reciprocity requirements when opening up public procurement markets, i.e. in public procurement law.<sup>71</sup>

The EU should also place its competition policy more at the service of external trade policy and use it to ensure a level playing field with competitors from third markets. This applies in particular to EU state aid rules, the scope of which must be broadened accordingly. The EU has now become aware of this need.<sup>72</sup> It has stressed this in its New Strategic Agenda 2019-2024: "In a world where common rules and standards are increasingly questioned, it will be vital to promote a level playing field, including in the area of trade. This means ensuring fair competition within the EU and on the global stage, promoting market access, fighting unfair practices, extraterritorial measures and security risks from third countries, and securing our strategic supply chains. We will continue to update our European competition framework to new technological and global market developments. ... An ambitious and robust trade policy ensuring fair competition, reciprocity and mutual benefits is a central element in that respect, both at the multilateral level in a reformed WTO and in bilateral relations between the EU and its partners."<sup>73</sup>

## 5 The way forward for the EU's multilateral trade policy in between China and the US

The EU's reactions to the challenges for multilateralism and the EU's trade policy, which is committed to it, posed by US unilateralism and China's exceptionalism have so far had little success in changing the course of both major powers, even though at least US trade policy is unattractive for other states. Trump makes no friends by his approach, and net benefits of his policy for the USA are hardly recognizable. However, Trump's trade policy is widely and by all parties accepted in the US Congress. China's Belt and Road Initiative, on the other hand, is supported by many states. However, China's commitments to the WTO do not help the EU much. The danger of the EU being crushed between the US and China is more than just theoretical. In addition, there is the increasing importance of e-commerce in World trade, which is also massively changing the determinants of trade flows for world trade; Chinese and US companies are more likely to further expand their leading position in this area.<sup>74</sup>

It can therefore be assumed that the existing challenges to EU trade policy posed by US unilateralism and Chinese exceptionalism are more fundamental in character than merely being problems posed by the current leaders. They will last longer, and hence the EU must be ready to adopt a long-sighted position. The systemic tensions that China's peculiar economic model triggers for compliance with WTO rules are of a fundamental nature and not easily eliminated. The EU therefore

<sup>70</sup> See Commission Staff Working Document on Foreign Direct Investment in the EU, SWP (2019) 108, pp. 13, 15, 23.

<sup>71</sup> Commission, Amended proposal for a Regulation of the European Parliament and of the Council on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries COM(2016) 34.

<sup>72</sup> Alicia Garcia Herrero, *supra* note 56 at 11, 18, 19.

<sup>73</sup> New Strategic Agenda 2019-2024 <<https://www.consilium.europa.eu/media/39914/a-new-strategic-agenda-2019-2024.pdf>> pp. 4, 6.

<sup>74</sup> World Trade Report 2018, *supra* note 31 at 101.

is well advised to prepare for dealing with these challenges for the long term and not to join either side, including the US.<sup>75</sup> It must adopt a balanced and balancing attitude of mediating between the two, maintaining its spirit of partnership with both, and constantly seek to win both over to its multilateral approach. A more rational US government should be receptive to the idea that the fundamental tensions China's economic model places to the founding principles of multilateral trade rules can only be addressed effectively if partners join forces.

In principle, the EU is on the right track. As its reactions show, it is in a position to protect itself to a large extent vis-à-vis both sides and, together with like-minded states, to respond to the challenges and present alternatives. However, the EU's power-political limits were clearly shown by the US sanctions against Iran. Due to its constitutional obligation and its export orientation, there is no alternative for the EU to the continued emphasis on the importance of the WTO and a willingness to reform it. The EU must insist on compliance with WTO law in its relations with the USA as it does with China and Russia, also in order to prevent the triggering of a spiral of sanctions. However, the EU is called upon to position itself by proposing solutions that take greater account of other sides' concerns<sup>76</sup> and seek to develop the existing WTO rules on state-owned enterprises and internal subsidies, and to amend them with obligations that in a better way respond to the challenges peculiar domestic economic systems place for the equality of competitive conditions so central to WTO rules.<sup>77</sup> The weaknesses of current WTO rules to address the concerns with regard to state owned enterprises are also caused by some WTO dispute settlement reports which need to be rectified.<sup>78</sup>

Conversational diplomacy will have to increase. In relation to China, the dialogue must constantly emphasize that the changes demanded by other WTO members on China's course are in China's own interest and advantage, as China must accept that it also has to contribute to the continued existence of fundamentally open markets. The EU should persuade as many states as possible to emphasise this to China time and again, but at the same time should not isolate China any more than the USA. The EU's commitment to the WTO rules will be put to the test in the forthcoming negotiations with the USA, as the limited scope of the negotiations makes the WTO conformity of the intended reciprocal preferences which may result in a considerably thin free trade agreement highly doubtful.<sup>79</sup> The EU must counter a horror scenario in which the WTO is replaced by two (or maybe three) regional entities around the USA/North America and China (and maybe the EU), as the EU could become increasingly isolated between the poles. Against this background, the multilateral orientation of the EU might regain credibility also for third states.

The EU's continued bilateral path towards deep and comprehensive free trade negotiations with its main trading partners, where the EU works with these partners to remove persistent barriers to trade in many areas and to bring their values to fruition, is also the right approach. In doing so, the EU is

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<sup>75</sup> As to the reasons against taking side with the US, see Alicia Garcia Herrero *supra* note 57 at 11, 16, 17.

<sup>76</sup> Cf. with regard to China Stephan Keukeleire and Tom De Bruyn, *supra* note 44 at 437, 438.

<sup>77</sup> Cf. Alicia Garcia Herrero, *supra* note 57 at 11, 15, 16.

<sup>78</sup> One example: The interpretation of public bodies so central for Article 1.1 and hence the scope of application of the WTO SCM agreement was conceived rather narrow by WT/DS379/AB/R, para. 317 – US – Anti-Dumping and Countervailing Duties (China): A public body is not “any entity controlled by a government” as decided by the panel and proposed by the US, but only “an entity that possesses, exercises or is vested with governmental authority”. For criticism see the separate opinion in Appellate Body, WT/DS437/AB/RW, para. 5.242 et seq – US – Countervailing Duty Measures on Certain Products from China.

<sup>79</sup> See Iulianna Romanchyshyna, ‘Is the US EU potential cooperation on industrial goods consistent with Article XXIV GATT?’ (EUTiP 2019) <<https://more.bham.ac.uk/eutip/is-the-us-eu-potential-cooperation-on-industrial-goods-consistent-with-article-xxiv-gatt/>>.

building a network of stable trade relations that will last in the event of WTO failure. In order to prevent the EU's commitments to the WTO and to multilateralism in general from becoming untrustworthy as a result of this conduct, the EU must make it clear why free trade agreements do not contradict a living WTO. It should also make this clear in the agreements themselves and actively pursue ways of multilateralising liberalisation steps in its trade agreements which go beyond WTO disciplines (so-called WTOx and WTO+ obligations), for example by opening them up to third parties. In addition, the EU would do well to include or refer in its free trade agreements to the international rules on climate protection, such as the Paris Convention on Climate Change, on sustainability such as the UN Sustainable Development Goals<sup>80</sup> and, in the area of worker protection, the central ILO conventions on occupational health and safety, as is already partly the case in the chapters on trade and sustainable development. In this way, the EU would place its trade policy in the context of other global regulatory frameworks and make it clear that trade policy today can no longer be pursued in isolation from other global issues for which internationally agreed solutions are also being found. More attention needs to be paid to the implementation and effective enforcement of these commitments.<sup>81</sup>

Overall, the solution for the EU is to continue negotiations and dialogues with the US and China, to pursue WTO reform and additionally - not alternatively - to continue bilateral agreements.

## 6 Persistent threats to EU unity

Nevertheless, the mechanisms and solutions described above can only stabilise the EU's position in global trade if the EU stands united. But this is precisely what might become the greatest internal challenge. The strengthening of EU competences in trade policy, particularly as an exclusive EU competence, was accompanied by the expectation that a more centralised policy would enable the EU to act more effectively together and to agree more easily on negotiating positions.<sup>82</sup> Meeting the current challenges in the ways described above, however, requires unity in the EU, but simultaneously increases the danger that even though only EU institutions may decide in the area of trade policy, first and foremost the Council of the EU and the European Parliament, the requisite unanimity or majority, respectively, are not achieved. The challenges posed by US isolationism and Chinese exceptionalism lead to the danger that unity in the Council on trade policy will crumble. Compared to the USA with its strong presidential system and China's authoritarianism, the EU with its complex decision-making structures is at a considerable disadvantage in terms of its ability to make decisions and formulate policies quickly and to do so in a way that conforms to the need for a long-sighted position. France, for example, recently did not consent to the mandate to negotiate with the USA because of the latter's withdrawal from the Paris Climate Agreement. The intricate problem of finding multilateral solutions, which has become even more complex and almost impossible due to US isolationism and Chinese exceptionalism, has been successfully circumvented by the EU through bilateral agreements. But even the successful conclusion of bilateral negotiations is not guaranteed: The new government in Italy raises concerns about the already provisionally applied CETA and ponders about denying ratification.

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<sup>80</sup> <<https://www.un.org/sustainabledevelopment/sustainable-development-goals/>>.

<sup>81</sup> S. also Bernard Hoekman and Laura Puccio, *supra* note 8 at 6.

<sup>82</sup> Cf. Alasdair Young 'European Trade Policy in Interesting Times' (2017) 39 Journal of European Integration 7, 909 at 912.

Despite the recent political agreement of entering into an EU free trade agreement with the Mercosur states, France shows some signs of resistance because of inadequate safeguards for EU agricultural production and climate protection commitments, which indeed are important for safeguarding the Brazilian rainforest whose significance for global climate change is well-known. In the past, at least trade treaty making policy had been largely spared the difficulties of decision-making in the Council. The increasingly comprehensive, and thus more policy-inclusive bilateral EU trade agreements and the current contestation of the EU's trade policy multilateral orientation by the US suggest that the capacity of the EU Council to find agreement in determining the course of EU trade policy should not be taken for granted. By expanding the internal policies affected by comprehensive EU trade agreement making - 21st century trade policy is a combination of several different policy areas<sup>83</sup> - differences in political choices and clashes of interest between EU Member States in addressing climate, environmental or consumer protection policies can increasingly jeopardise unity in trade policy. In addition, the results of the last election for the European Parliament led to a more fragmented composition. There is no clear centre right or centre left majority in Parliament, but an assembly of different political groups spanning from the far left to the far right, each comprising a considerable share of the seats. This will increase the complexities of finding sufficient majority for a clear stance in trade policymaking in which the Parliament also participates as legislation and treaty-making is subject to its consent.

A no less serious source of potential threats to unity in the Council is the way in which China is treated. China has managed to persuade some EU Member States (such as Greece and Italy) to participate in BRI and/or the related 16+1 format<sup>84</sup>, while the large industrialised countries such as France and Germany are very reluctant to do so.

To respond to the challenges posed by the USA and China, the EU and its Member States must act even more closely together and consistently coordinate their position with third parties as well. The fact that the USA hardly coordinates its attitude towards China with its European partners must motivate the EU to take the opposite approach. Only a united EU has a chance of being accepted and acting fruitfully as mediator between the USA and China.

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<sup>83</sup> For the "trade politics as policy sub-system approach" cf. Alasdair Young and John Peterson, *Parochial Global Europe. 21<sup>st</sup> century trade politics* (Oxford University Press 2014) 23 et seq.

<sup>84</sup> The 16+1 format is a Chinese initiative aiming at intensifying and expanding cooperation with 11 EU Member States (Bulgaria, Croatia, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia) and 5 Balkan countries (Albania, Bosnia and Herzegovina, Macedonia, Montenegro, Serbia) concerning i.a. investments, transport, science. For China, infrastructure and high as well as green technologies are priorities in economic cooperation.

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