

From the Board, 2019: The Year of ‘the Rule’?

This contributor’s first editorial of 2019 offers an opportunity to reflect on themes more broadly in the quiet pause between old and new. And so it is, that one’s musings turn to the nation state and the international structures states have created to either confine or somehow channel their less honourable instincts. Two years after the tumultuous events of 2016 (Brexit and Donald Trump), how are things shaping up for our regional and multilateral economic institutions that have been created to also somehow address the unforeseeable and unimaginable?

Some consider that 2019 will be the year that the nation state will finally reassert its pre-eminence and what will remain of both the EU and the WTO will lay in tatters, damaged beyond repair. For the EU, it is not just Brexit posing as a sort of unstoppable Dr Strangelove doomsday machine.¹ Other Member States also push to have more freedom to close their borders and challenge not only the substantive core of the internal market, but its institutional fabric in bodies such as the EU Parliament.² Somehow the linkage between unwanted immigration, populism and nationalism becomes part and parcel of a hopeless sense of the EU’s prospects.

One should not necessarily think that things must inevitably go along in the same manner they have since 2016. We know that the EU is not the same international organization it was prior to the 2009 Lisbon Treaty. The Union has assumed many of the features associated with ‘statehood’, and while these features are also being imbedded and exercised, they serve their purpose to hold the EU show together, and possibly even move it along. A telling irony on this point is the recent discovery that the US Administration recently downgraded the Union’s 2016 ambassadorial designation to one of a lesser ‘head of delegation’, a status once held by the Union together with other international organizations, such as the African Union.³ The gesture is certainly a cheap shot, but ask whether the United States is so easily threatened by the status of the EU that it *needs* to demote its ambassadorship? Self-elevation is not flattering for even a smaller state. It is humiliating for a larger one.

One can also argue that the impressive rise of national singularity in some EU Member States may also reach its high-water mark in 2019 as well. Whatever does happen in the Brexit, the outcome is not going to be easy for the UK, and the

¹ T. Harford, *Trump, May and the Art of Political Brinkmanship*, Financial Times (online), 11 Jan. 2019.

² E. Zerofsky, *Viktor Orbán’s Far-Right Vision for Europe*, New Yorker (online), 14 Jan. 2019.

³ K. E. Smith, *The Trump Administration Downgraded the EU’s Diplomatic Status in Washington. That’s Going to Hurt*, Washington Post (online), 8 Jan. 2019.

emerging difficulties of EU extraction cannot help but be a cautionary instructional. As the song lyric from ‘Hotel California’ concludes, ‘You can check out any time you like – But you can never leave!’ At the same time, EU citizens are watching and learning all the elements of what the internal market actually does in the European and global economy. Brexit is a living textbook for everybody.

One may not be able to say the same for the WTO. Its institutional deficiencies are too well known by our readers to even commence the list, but the US double whammy of blocking Appellate Body appointments and invoking the GATT Article XXI security exception for its selective and unilateral steel and aluminium tariffs, are both events that no one – at least not in the US – ever wanted to see happen, and certainly not in this frightening tandem. It is like someone let the crazy uncle out of the attic and he is now running amok in the neighbourhood.⁴ There is no way that a meaningful interpretation of this problematic security exception could be resolved and legitimated without an eventual Appellate Body report. But it too likely appears now that there will be no Appellate Body to consider an appeal and issue a report. Checkmate! Or, should that rather be, ‘Catch 22’? The possibility of an easy exercise of an open-ended and discriminatory GATT security exception could morph to be the exception that consumes all the rules.

Does the WTO have the institutional or substantive fabric to fix this? The EU’s effort to corral some critical mass to generate institutional reforms for the Dispute Settlement Understanding is a worthy one, and to the extent it draws support from other WTO Members, it is certainly not a fruitless exercise. Unfortunately, we know too well that even a widely accepted proposal is likely to confront the consensus problem. As if we are trying to lure the crazy uncle back into the house. While one can suggest that the EU can ride its own storm out, more pessimism is called for in the case of the WTO. Even if this situation goes along for only one more year, the damage may well be irreparable.

So how does the WTO get out of this? Gravity is one reconciling force. Trade wars are dangerous and for all their other negative ancillary effects, one of them is that trade itself – and the countries that trade – get hurt. There can be a self-corrective that suggests ‘our nation first’ may be just great, until our nation is on its back and crying for help. The US is a big country and, as we have seen, can threaten a lot of trade. But opposition to unilateral protectionism also grows in the US. Farmers care about and understand international trade. They watch commodity prices and they know what is happening to their exports. One cannot assume that the trade facet of ‘Make America Great’ has an infinitely long shelf life. Its ‘sell-by’ date may well be closer than we think.

⁴ C. Giles, *Emerging Economies Warn on US Trade Aggression*, Financial Times (online), 23 Jan. 2019.

Of course, gravity can take a while and the WTO system does not have 'a while'. At this writing, the process of informal consultations in the WTO General Council has commenced on the EU and other Member proposals.⁵ This is the consensus route and being the WTO way, this will have to run its natural course. For how long, one does not know. But while it proceeds, the alternative ground-work should be now visibly commenced for the US (and others) to see in order to help leverage the potential for consensus. This means scoping the terms of reference for the contingency of majority voting to fill Appellate Body vacancies according to Article IX of the WTO Agreement, as supported by framing the other alternative arbitral or 'Appellate Body-like' arrangements that could be plurilaterally fashioned, either in or out of the WTO.⁶

The text of Article IX:1 also suggests that the WTO might have a bit more institutional spine than we give it credit for. As Petersmann reminds us, the text calling for majority voting is not *optional*, but instead, *mandatory*: 'where a decision cannot be arrived at by consensus, the matter at issue *shall* be decided by voting'.⁷ In other words, the WTO preference for consensus decision making is not intended to allow the absence of it to destroy the lawful functioning of the WTO. What was an ominous prospect in January of 2018 is now a patent reality.⁸ Since the clock is ticking on the WTO's already hampered functionality, Article IX clearly states the course forward. It is due time to get on with it.

Welcome to 2019.

J.H.M.,
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The Editorial Board of the journal offers its sincere thanks and best wishes to Professor René Smits for his service as a dedicated member of the Board since 2007. René's expertise and guidance in all monetary matters, the ECB and the EMU, the IMF and the World Bank, have made an invaluable contribution to the quality of this journal. His kind spirit and sense of cooperation – and his good friendship – will be missed by all of us. We thank you René and wish you all good success in your future endeavours.

The Editorial Board

⁵ K. Raja, *Process to Address AB Crisis Kicks off, Facilitator Appointed*, TWN Info Service, SUNS 8828, 21 Jan. 2019.

⁶ P. J. K. *From the Board: The US Attack on the WTO Appellate Body*, LIEI 45:1, Nov. 2018.

⁷ E.U. Petersmann, *How Should the EU and Other WTO Members react to Their WTO Governance and WTO Appellate Body crises?* EUI Working Papers, RSCAS 2018/71, at 8 (emphasis added).

⁸ 'At a meeting of the WTO Dispute Settlement Body (DSB) on Monday (28 Jan.), the US again said that it was not in a position to agree to a joint proposal sponsored by some seventy-one WTO Members that called for the simultaneous launch of the selection processes'. K. Raja, *Impasse over AB Appointments Continues into the New year* TWN Info Service, SUNS 8836, 31 Jan. 2019.