THE AMERICAN "COUP OF FORCE" ON TRADE,
THE WTO AND THE EUROPEAN UNION

The European Union (the Commission and the Member States) will have to listen to its own citizens, including its own industry, in order to make its "voice" heard in a credible way through a 'critical defence' of the WTO. This will require a straightforward statement that everything is not going well in the functioning of the WTO, and that reforms are needed as soon as possible. This is the price to pay in order to avoid being caught up in an unnecessary and devastating crisis, which would reinforce the loss of confidence in supra-national free-trade instruments and mechanisms.

"America has also finally turned the page on decades of unfair trade deals that sacrificed our prosperity and shipped away our companies, our jobs, and our Nation's wealth. The era of economic surrender is over. From now on, we expect trading relationships to be fair and to be reciprocal. We will work to fix bad trade deals and negotiate new ones. And we will protect American workers and American intellectual property, through strong enforcement of our trade rules. " This is how, in his State of the Union address of January 2018, the US President set out his stance on US trade policy.

Since then, the US President has largely begun to do what he promised: ending the Transatlantic Trade and Investment Partnership ("TTIP") and the Trans-Pacific Trade Treaty ("TPP"), launching a renegotiation of the North American Free Trade Agreement ("NAFTA") and of the agreement with South Korea, vigorously applying trade defence instruments, stating the intention to reinforce control over foreign investments, which is already very strong, as well as encouraging and threatening US companies not to outsource their production, or to relocate back to the United States, in addition to tax reforms, and investigations under the national security clause on imports of steel and aluminium.

Central to the criticism of the US President is the World Trade Organisation (the "WTO"). Created in 1947 as the GATT, and then largely modernised and strengthened in 1994, the WTO sets out the rules that govern the resolution of commercial disputes. In 1994, more than twenty years ago, the modernisation of these rules was hailed by all as undeniable progress in international economic law. The WTO was no longer interested solely in tariff issues, it opened the door to international regulation on a broad scope of non-tariff issues (norms, environment, etc.), without directly touching on social, fiscal, and economic issues, and while being cautious on the conditions of competition (through rules on dumping and subsidies). Another revolution was that the use of the panels' decisions no longer required the agreement of the losing party. This became automatic in practice, since reports could only be rejected by consensus, thus bringing the dispute settlement body of the WTO closer to a true Court of International Economic Law, with case law and precedents. It also promoted greater legal certainty for states and companies. However, it is clear that rules are often very general, or in any case ambiguous, and the conclusions of the panels are not always completely comprehensible, even for "experts", making this search for legal certainty quite theoretical.

All attempts to revive the process of negotiating the rules have been futile, from the WTO Ministerial Conference in Seattle in 1999, which is mainly remembered for its anti-globalisation demonstrations, to the one in Buenos Aires in December 2017, which was marked by a broad indifference. Since the

organisation's early formation, the world has undergone intense changes, the end of communism, the rise of China and the "emerging" countries. The global economic equilibrium has been seriously shaken and the traditional landmarks of peoples and their governments have been disrupted.

Meanwhile at the WTO, despite many attempts, it has slowly become clear that this organisation, which now has 164 members, is no longer the most appropriate forum for tariff "bargaining" (unlike bilateral agreements, which have multiplied during this period). There has also been an inability among WTO members to find the strength to adapt the rules of world trade, in the sense of more "market disciplines" or "conditions for competition", to the new global environment. A good example of this is the control of state aid at an international level. While an agreement on subsidies has existed since 1994, this agreement contains so many grey areas that WTO members should urgently regain the drive to regulate international trade by modernising these rules, which also requires an effective notification of subsidies.[1]

In addition to the lack of "legislative" activity of the WTO over the last 25 years, there has been a growing 'judiciarisation' of the dispute settlement system, which is a result of the change that took place in 1994. However, some Members, prime among which is the United States, bring up the issue of limits on the specific nature of the WTO rules. They insist that these rules were accepted as part of a negotiation whose signatories have made commitments beyond which they are not ready to go. All these elements are undoubtedly at the heart of the current crisis of global regulation that the United States is determined to break. It also recalls the situation of the European Union: for a while, the lack of political agreement between Member States led the Court of Justice of the European Union to deliver judgments often considered as "federalist", compensating for the reluctance of the States. Their visceral attachment to the community system meant that the authority of the Court was not seriously questioned before some of the "new" Member States felt aggrieved by its decisions. Why is that? Because there has been so far a broad European consensus around the "values" and basic principles laid down by the European Court. This kind of "consensus" cannot be said to exist at the WTO, and is now being severely tested by the United States' attitude.

US criticism of the WTO: decryption

Contrary to its "legislative" activity, which has withered, the "judicial" activity of the WTO has undergone significant development. Since 1994, no less than 520 disputes, (20 per year on average), have been handled by the WTO Dispute Settlement Body (DSB). However, it is precisely on its functioning that the United States has decided to cross swords. What do they have against it? To take over powers that it does not have. To understand this criticism, it should be recalled that the WTO texts provide that the DSB's decisions can in no way "increase or diminish the rights and obligations set forth in the agreements", i.e. those resulting from the 1947 and 1994 WTO negotiations. The United States submits that, in a number of areas, in particular the area of trade defence instruments (essentially anti-dumping and anti-subsidy), the DSB has not merely interpreted the texts for the sole purpose of resolving disputes, but has gone further, creating rules to fill in the gaps left by the negotiators. These criticisms did not start with the current American President, it has been a constant position of the American administration and has been raised in many documents that, if the United States agreed to further liberalise trade in 1994, this was conditioned by the parallel desire to maintain effective trade defence instruments. However, in the face of the

[1] The European Commissioner for Competition recently stated that the control of subsidies in the WTO should even extend to services, and not be limited to goods.

jurisprudential developments mentioned above, the United States considers that it has been deceived by the WTO.

As a means of pressure, the United States has blocked the appointment of new members to three vacant positions on the Appellate Body. This body, however, is crucial for the entire system, which is therefore being put to the test. It must also be mentioned that the 'automatic' departure of some other members at the end of the year will definitely contribute to jamming the system. Paradoxically, this deadlock will also turn against the United States, who is a major user of the system, but such is the nature of political blackmail, which can be double-edged. President Trump, who is keen on making threats, seems perfectly capable of handling the negative implications and to win on merits.

What to think about the American criticism of the WTO?

To criticise a "judge" or "arbitrator" for interpreting the law may be difficult to accept for many observers who are convinced that the 'judiciarisation' of the dispute settlement body of the WTO is a good thing. They consider that it is the characteristic of a judge or an arbitrator to resolve the dispute submitted to them, and to conduct an interpretation of these texts on the basis of the terms, their context or their purpose.

Others, foremost among them the United States, consider that the judiciarisation of the system finds its limits in the hybrid nature of the DSB. It is a system that is already no longer a legal and diplomatic system belonging to the old GATT, and can no longer be considered as a normal court, i.e. as a "supreme court" of international economic law. At the time of its creation, this system was designed to pressure states into changing their practices, without being in a position to demand that they do so in the manner of a national (or European) Court of Justice. The key was the existence of a possibility to adopt "countervailing measures" that "would encourage" the reluctant State to comply with the judgment. In support of the contention that the DSB remain a hybrid body, Article 3.2 of the DSB Dispute Settlement Memorandum requires that "recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements." In the same spirit, in the specific context this time of trade defence, Article 17.6 of the anti-dumping agreement provides that "the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations." In short, there are many requirements that are quite far from the freedoms available to a classic judge.

Even assuming that the DSB is a genuine judicial body, can such a body function properly in the face of a drained "legislative" counterpart? Robespierre would say 'why not?' He believed that: "In a State that has a Constitution, legislation, the jurisprudence of the courts is nothing else than the law ..." On the other hand, Portalis would say 'certainly not', having written that: "A judge is associated with the spirit of legislation; but he cannot share legislative power. A law is an act of sovereignty; a decision is only an act of jurisdiction or magistracy ...." To admit that a Supreme Court of a State (take the Court of Cassation in France) takes a decision that seems to go beyond what the legislator had seemingly conceived, would only be acceptable because the legislator oversees and is constantly able to correct a possible "excess of zeal" of the judge. In the same way, the United

States claims that it had never intended to give the DSB the freedom to fill gaps, without WTO negotiators having the opportunity to correct, amend or supplement the basic WTO texts and restore, if necessary, a balance between the "legislative" and the "judicial" offices. It is undoubtedly the imbalance resulting from an all-powerful DSB and from a drained "legislative" WTO activity that causes concern in the United States, and what it sees in this context as a drift from the DSB mechanism.

What is the positioning for the European Union in this context?

In the turmoil ahead in the future of the WTO, the positioning of the European Union will be key and we must expect serious discussions.

The European Union's commitment to the WTO is an act of political faith and a commitment to defend our economic interests, or rather that should be able to defend them, if properly used. In terms of broad principles, a WTO-type organisation corresponds to its worldview in which economic relations are based on freely-negotiated and periodically-updated rules, and not on brute force.

Europe will have to oppose the "America First" and protectionist behaviours that the US President has promised his electorate, as in the case of steel and aluminium. At the same time, it will have to fight for the defence of the WTO, a vital part of the global trading system, taking into account criticism coming from America and from civil societies, which cannot be dismissed. Without the WTO, each country could emancipate itself from the common rules and enter into a protectionist spiral from which no one would benefit in the long run. It would be naïve not to be alarmed by the means sometimes used for certain programmes (massive state intervention, protection of the local market, restrictions on investment involving the transfer of technology, subsidies, commercial practices of state-owned companies, etc.) that are often not compatible with WTO rules or with those of the market economy. The European Union (or at least some of its leaders) recognises this and intends to no longer be naïve in this way. The fact remains that the WTO, if used wisely, can be an extremely powerful bulwark against the expansionist ambitions of countries whose state interference in some sectors may potentially be dangerous for their competitors, especially in Europe. However, the crucial importance of the WTO and the fear of China go a long way to explaining the joint statement at the last Ministerial of Buenos Aires, in which Europe, the United States and Japan all clearly recalled their commitment to uphold the rules of international trade.[2]

However, the European Union (both the Commission and the Member States) will also have to listen to its own citizens, including its own industry, to make its "voice" heard in a credible way by critically defending the WTO. This will go through a frank explanation that not everything is going well in the way the WTO works, that reforms are needed and that it is better to push for them as soon as possible to avoid sinking into an unnecessarily devastating crisis that would reinforce the people's loss of confidence, already well under way, in supra-national free-trade mechanisms. Because the European Union cannot afford to go without criticising the WTO system, which, combined with a European trade policy considered dogmatically "neo-liberal" for a long time, has

[2] This joint statement reads: "We shared the view that severe excess capacity in key sectors exacerbated by government-financed and supported capacity expansion, unfair competitive conditions caused by large market-distorting subsidies and state owned enterprises, forced technology transfer, and local content requirements and preferences are serious concerns for the proper functioning of international trade, the creation of innovative technologies and the sustainable growth of the global economy." "We, to address this critical concern, agreed to enhance trilateral cooperation in the WTO and in other forums, as appropriate, to eliminate these and other unfair market distorting and protectionist practices by third countries."

caused terrible industrial damage, often echoed in recent studies in the United States[3] as well as in Europe.[4]

The scenario described above leads to the following conclusions for the WTO and European trade policy:

- The WTO, having abandoned the "legislative" sphere for twenty years, has moved to an exclusively "judicial" sphere, whose hybrid nature has been recalled above.
- In addition to the important and necessary body of case law the WTO has put in place, it is also necessary to measure the sometimes negative consequences for global and European trade policy. The dispute settlement system at the WTO is showing signs of meltdown, with interpretations that have never been legislatively ratified by Members, extremely long Panel decisions that are often indistinct and sometimes incomprehensible to all but a few experts, and yet give some an exorbitant power without a "legislative net".
- For too long, only the undeniable benefits of globalisation have been put forward, and we preferred to silence the damage while avoiding talk about the disciplines supposed to remedy it.[5] The drift in the interpretation of the WTO texts relating to trade defence has led inexorably to reducing the scope of these instruments, which are the only effective instruments today, and which allow some regulation of the conditions of competition at an international level.
- The objective is not to put everything at the door of the WTO. Our national and European authorities also bear their share of responsibility, adopting dogmatic attitudes, a kind of competition to be the most "liberal" and the most virtuous. There are therefore many acute problems that globalisation has made dramatically obvious, requiring adequate responses. This is the case, for example, in respect of trade defence for the registration of imports in order to avoid (through the threat of the retroactivity of rights) a situation whereby further damage is caused to European industry before measures are adopted. This is also the case with the retroactivity of anti-dumping or anti-subsidy duties in cases where importers try to take advantage of the length of European procedures to store products before duties falls. It is also the application of the "lesser duty rule", where the injury margin is clearly not sufficient to counter the negative effects of dumping or subsidisation. Many of these measures have been used by our trading partners for a long time, primarily by the United States, in full compliance with the WTO. Why should Europe forbid itself from using them?

In this context, accepting the view of the United States, as unattractive as it may seem to be under present conditions, may turn out to be particularly desirable. This is both to find an appropriate and effective response to the current problems of the international trading system, including that

[3] American Economic Review, 2013.

[4] Le Monde, Thursday 1 March 2018 "Une étude mesure l'impact de la concurrence chinoise sur l'emploi (la montée en puissance de la Chine serait responsable d'environ 13% du déclin de l'emploi manufacturier français entre 2001 et 2007."

[5] In the 2000s, for example, the WTO Secretariat, like the EU's DG Trade, did everything possible to avoid talking about the number of anti-dumping or anti-subsidy measures put in place. It was almost a competition of who could demonstrate that these measures represented only a tiny fraction of world trade. This is precisely what the population expected: to understand that globalisation can be a great means of growth, but it must also be regulated, in particular through the instruments of trade defence, the only instruments that are effective today. Why hide them?

of the imbalance caused by the expansion of Chinese exports, as well as to exert a moderating influence on US positions, by not allowing them to give way to the temptation of unchecked unilateralism. It will require, in Europe at least, the rejection of a certain philosophy that has long prevailed, and which has denied the reality of damage that can be caused by globalisation. Above all, it is important not to be carried away by rejecting everything that Trump represents and which is at the antipodes of our values: Trump is not the United States, he is just the president, for another three years (at least), but when it comes down to it, who are we closer to, the United States or China?

Continuing on the basis of the current functioning of the Appellate Body, which is characterised by contested judicial activism with regard to the founding texts, an absence of a "legislative" aspect, a dogmatic and anti-trade defence position of a majority of the Appellate Body members and a certain microcosm, means that there is a very high risk that, within two or three years after the Appellate Body rules on a number of ongoing or future cases, the European Union and the United States could be deprived of any effective weapon against certain practices. Two points can be raised: a country like China will accept a compromise under pressure from the United States, or at worst, the United States will leave the WTO. To imagine that the WTO without the United States would be worth anything would be an illusion. We would be faced with countries as "liberal" as China, Russia and India. Europe and the United States remain the two indispensable pillars of the whole system.

With the US president's tough stance on steel, the European Union and China find each other in the same boat again, as these two countries already faced measures in 2002 (still on steel) under President George W. Bush. A firm and fast reaction is again required, but it is also essential to think about the long-term repercussions for the regulation of international trade. Is regulation still possible? How many times have we heard that it is too late; that China would no longer be interested in returning to the negotiating table, or that Europeans are afraid of retaliation. So yes, that will not happen, not without clashes, without tensions, or conflicts, but let us stop being afraid. Europe must play its role in reviving the WTO rule-making process. It must do so, not to bargain for customs duties (this is done very well in bilateral agreements), but to complete the work towards building multilateral rules adapted to the new configuration of world trade. Europe must be at the heart of multilateralism in the WTO and must make sense of globalisation, while also seeking consensus on a dispute settlement system on which real debate should take place. Europe cannot look passive, as people lose confidence in international regulatory systems – be they bilateral (see the CETA case) or multilateral, such as the WTO – which all too often are seen exclusively as "machines for liberalisation" and not enough like "machines for regulation". It is necessary to adopt a new ambition, such as that of the pioneers of the GATT in 1947, or their successors in 1994; namely that France and Germany in Europe should be loud and clear, remembering the words of he who declared, in front of the European Parliament in November 2014: "The time has come for us to abandon the idea of a Europe that is fearful and self-absorbed, in order to revive and encourage a Europe of leadership (...); A Europe that bestrides the earth surely and securely, a precious point of reference for all humanity! " [6]

[6] Pope Francis, Address to the European Parliament, 25 November 2014