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The Trump tariffs on steel and aluminium: the end of the WTO?

By Stuart Harbinson, Senior Fellow at ECIPE

There is no doubt that the recent announcement by the U.S. Administration of tariff hikes on steel and aluminium, justified on national security grounds, presents the real threat of an extremely damaging tit-for-tat trade war.

If the tariffs are challenged at the WTO, there is the unwelcome prospect of the WTO having to rule on whether the U.S.'s "essential security interests", taken in time of an "emergency in international relations", constitute a justification of the measures under Article XXI of the GATT ("Security Exceptions").

A ruling that the WTO cannot second guess the nature of a Member's essential security interests could open the floodgates for similar action by other Members. On the other hand, ruling against the U.S. would cause a furore in Washington and possibly even lead to the U.S. leaving the Organization. The resultant fracture in the trading system would have extremely damaging consequences for the global economy.

This is why the tariff hikes have been described by some commentators as the "nuclear option".

Despite the now rather hollow-sounding pronouncements of the G20 over the years, protectionist sentiment – and action – is rising in nearly all major economies. This self-defeating trend is certainly to be abhorred by supporters of international economic cooperation and the rules-based trading system represented by the WTO. But is it an existential threat?

Without underestimating the potentially dire economic consequences of a downward protectionist spiral, it is important to recognise what the WTO is, and what it is not.

First, what it is not, and never has been, is an international court. The dispute settlement system is often described as "binding" but it was designed with clear limitations. Its judgements are not enforceable. The Dispute Settlement Understanding stresses that mutually acceptable solutions consistent with WTO provisions are the preferred outcome.

Where negotiations fail to solve a dispute, issues can be argued through specially constituted panels and the Appellate Body. If an offending measure is not removed, there are provisions for "compensation" or the suspension of an equivalent degree of "concessions" by adversely affected parties. But the losing party still has a choice as to whether to bring its offending measure into line with WTO rules or not. It may choose, as the EU did in at least one important case, to maintain the measure and to pay a certain price for doing so.

Second, it follows from the above that the WTO's dispute settlement system is essentially a mechanism for encouraging compliance with WTO norms. It stops short of infringing national sovereignty. There is no specific mechanism for expelling a Member for egregious breaches of its rules. It may be penalised by other directly affected Members but it is ultimately for each Member to decide where, on balance, its national interest lies.

There is a danger in current circumstances that the WTO may be seen a victim of its own success, since its establishment in 1995, in defusing many trade disputes. But expectations should be more realistic. There are clear limitations on its ability to influence decision-making at the national level. It is not responsible for rising protectionism and its mechanisms to cope with the fallout are constrained by the nature and the boundaries of the agreements into which its Members have voluntarily entered.

This is not to say that the WTO is not at present in danger. However, it should not be judged against standards which it was never designed to meet. Indeed, if there is any silver lining at all in the current situation, it may be that a more realistic view may in future be taken of its capabilities and limitations.

While the WTO represents a major advance in the rule of international law, we now need a pause for reflection. For a start, the membership may wish to consider the extent to which their increasingly legalistic, litigious and adversarial approach to trade disputes over the last 20 years has contributed to the current quandary. Insufficient space has been given for negotiation, mediation and conciliation.

Major economies are not ready to agree to surrender vital national economic policy choices to a supranational authority. Indeed, it could be regarded as surprising that they have, of their own volition, agreed to bind themselves to international norms to the degree that they already have. They do so partly because technology is driving integration whether they like it or not, and partly because they still see value in having one system for all, within limitations.

The unwritten condition is that they – and other WTO Members – should exercise appropriate self-restraint both in departing from these norms and in the way they challenge such departures. The organs of the WTO in turn should also exercise self-restraint in pushing the legal boundaries of the covered agreements. The danger in the present situation is that this self-restraint is almost entirely absent on all sides. Adversarial rhetoric is constantly being ramped up.

The WTO has been over-hyped as the international policeman, judge and jury in international trade. The fact is that it cannot make progress without the collective consent and support of its membership. We need to recognise this reality, moderate expectations, and focus on what the WTO can pragmatically achieve. The track record may not be as good as some originally hoped, but it is still very substantial.

It would be self-defeating folly of the highest order to allow the multilateral trading system to disintegrate. All things considered, there must be grounds for hoping that the big players who are the main guardians of the system will, in their own interests, stop short of the abyss; that the WTO will survive the current spasm of economic nationalism; and that it will emerge in better shape to face future challenges.