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From 'Global Europe' to trade defence: the EU responds to Trump and China

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Abstract:

The election of Donald Trump and the growing assertiveness of China have raised a double challenge to the EU's Common Commercial Policy (CCP). Since the WTO failed to deliver on strengthening a global rules-based system through the Doha round, the EU and the US became the main promoters of further trade liberalisation outside the WTO framework. Thus, when the new US administration turned its back on free trade in 2017, not only did the EU lose its main ally; it also had to face the potential threat of a meltdown of the multilateral trade order. Whereas China has been eager to fill the vacuum left by the US and to actively shape global trade rules, its understanding of 'free and fair trade' significantly differs from that of the EU.

This paper outlines how the EU's trade policy has adapted to the different challenges that have arisen during the last decade, starting with the 2006 Global Strategy and ending with the 2018 reform of the EU's trade defence instruments. We assess the impacts of these changes both for the EU's position as the world's biggest trading block, as well as for the multilateral trading system based upon the WTO.

Introduction

The decade since the 2008 global financial crisis has seen some important geopolitical and economic power shifts that have strongly affected the EU. The string of crises between 2008 and 2016 (financial, euro, Ukraine, refugees, Brexit) shook the Union to its foundations and put into question some basic assumptions about the EU's role as a global norm-setter. These changes become very apparent if one compares the respective introductions to the 2003 European Security Strategy (ESS) and the 2016 EU Global Strategy (EUGS). The 2003 '*Europe has never been so prosperous, so secure or so free*'[1] was transformed, 13 years later, into: '*The purpose, even the existence, of our Union is being questioned*'.[2] In reaction, the EU announced in the 2016 EUGS that it would reset its own priorities. Henceforth, the balance between exporting its values and defending its own interest would be shifted in favour of the latter.

[1] European Security Strategy "A Secure Europe In a Better World", 12.12.2003.
2 Foreword by Federica Mogherini to "Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign and Security Policy", European External Action Service, 17.6. 2016.

Traditionally, the EU's Common Commercial Policy (CCP, commonly referred to as EU trade policy), has been the main vehicle of the EU's global influence. The oldest and most influential of the Union's external policies,[3] it has traditionally rested on two pillars: 1) the promotion of further trade liberalisation and 2) trade defence measures aimed at protecting EU enterprises against unfair competition from abroad. However, the nature and objectives of the CCP have radically changed. Whereas the efforts of the EU were initially focused on strengthening the multilateral trade architecture and the WTO, the Union began, as of 2006, to conclude a multitude of 'new generation' bilateral and regional Free Trade Agreements (FTAs), which would go beyond addressing tariffs and quotas by focusing on non-tariff barriers and regulatory cooperation. Finally, in 2016, the Union started, after lengthy hesitations, to substantially upgrade its trade defence instruments. In this paper, we analyse how the changes in EU trade policy both anticipate and reflect the need for the Union to better defend its interests in an increasingly hostile global environment. We will also take a closer look at the policy drivers behind these sometimes drastic changes.

What a difference a decade makes: the radical resetting of EU trade policy between 2006 and 2016

In one decade, the EU's trade policy has taken a number of sharp turns, shifting the focus from the 'best' to the 'third best' option. Until 2006, the Union's absolute priority was the 'best option', understood as the promotion of multilateral trade liberalisation under the Doha Round led by the WTO. Between 2006 and 2016, the EU concentrated its efforts on the 'second best 'option, the conclusion of deep and ambitious trade agreements with strategic partners. After 2016, however, the focus had shifted on the 'third best' option, the strengthening of its own trade defence instruments.

I) After 2006: from 'best' to 'second best' option

In the years following the start of the 2001 Doha Round, it became clear that the high hopes of the industrialised nations in the WTO Doha Round as a forum for further trade liberalisation had not been justified. Consequently, in 2006, the Commission announced a first U-turn. While still paying lip service to multilateralism, the Commission endorsed in its 'Global Europe' communication[4] what was then presented as the 'second best option': bilateral and regional free trade agreements (FTAs). Before 2006, the Commission had generally dismissed the idea of concluding bilateral FTAs, since they were seen as a threat to the multilateral system by creating a 'spaghetti bowl' of individual bilateral agreements (as opposed to one set of rules applicable to all). While still expressing overall commitment to the WTO, the Doha Round and multilateral system, the 2006 communication stated that 'Free Trade Agreements (FTAs), if

[3] The CCP was already present in the 1957 EEC Treaty. It is one of the five exclusive competences mentioned in Art. 3 of the Treaty on the Functioning of the EU. As the biggest trading block worldwide, its power to set global standards is, unlike in other areas, widely acknowledged.

[4] https://trade.ec.europa.eu/doclib/docs/2006/october/tradoc_130376.pdf

approached with care, can build on WTO and other international rules by going further and faster in promoting openness and integration, by tackling issues which are not ready for multilateral discussion and by preparing the ground for the next level of multilateral liberalisation'. Thus, from 2006 on, the EU started negotiating a 'new generation' of FTAs that would go far beyond covering traditional trade measures (such as tariffs, quotas and rules of origin) which were, after seven decades of trade liberalisation through the GATT and the WTO, already at historic lows. At least among industrialised countries, and before Donald Trump came to power, tariffs were no longer considered as a major obstacle to international trade.[5] Instead, these agreements would tackle the so-called 'Singapore issues' promoted by the EU and other industrialised countries.[6]

The first set of 'new generation' trade agreements the EU concluded with a number of countries, like the the 'Cariforum' in 2008 or Colombia and Peru in 2012, already went into 'deep liberalisation' by addressing 'behind-the-border' issues such as regulatory issues (including sanitary and phytosanitary issues) or common rules (such as government procurement and intellectual property). The agreements negotiated with Canada (from 2009 on) and Singapore (from 2010 on, following the failure of EU-ASEAN trade talks) on went even further by addressing the highly intrusive issue of investment protection (also known then as ISDS).

Whereas the trade agreements with Peru, Colombia and Korea raised few eyebrows and went almost unnoticed with the public, the situation was different when the Commission announced in 2013 that it intended to start negotiating the Union's biggest trade agreement ever, an all-encompassing, deep and comprehensive Free Trade Agreement with the US, referred to as the Transatlantic Trade and Investment Partnership (TTIP).

For advocates of trade liberalisation, 2013 indeed seemed like a good year. The EU had started discussing a FTA with its biggest trading partner, the US, which would have covered 30% of global trade. Additionally, the discussions among 12 countries of the Pacific rim, including the US and Japan, adding up to another 40% of global trade, were in full swing. It seemed that industrialised world would be on a fast track towards reaching a new level of trade liberalisation by shortcutting the dysfunctional WTO Doha round.

In the run-up towards TTIP negotiations, the Commission had widely published some rather optimistic assumptions[7] from studies prepared by external consultants. However,

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[5] At least for industrialised goods. When it comes to agricultural goods, tariff barriers are still a major obstacle. However, the willingness of the EU and other industrialised nations to bring down these barriers is strictly limited. This discrepancy between advocating free trade for industrialised goods while maintaining protectionist tariffs in the agricultural sector is the main reason for lack of progress at the multilateral level (Doha round)

[6] These issues were introduced to the WTO agenda at the 1996 Singapore meeting and include trade and investment, trade and competition policy, transparency in government procurement, and trade facilitation.

[7] A widely quoted study conducted by the Center of Economic Policy Research (CEPR) on behalf of the EC put forward an estimate that a European family of four would see their annual disposable income increase by an average of €545 per year as a result of the agreement. This number, the result of a computerized economic modeling based upon the most optimistic scenario, had been dismissed by many experts as unrealistic.

the more these numbers were scrutinised and contested by external stakeholders, the more the Commission shifted the line of arguments from the economic to the political sphere. With China's rise as a trade superpower, both the role of the EU and the US as international trendsetters with the power to lay down the norms and standards of international trade is being challenged. Since, in terms of trade, 'size matters', the biggest trading powers (that is, the US and the EU) had in the past been able to shape international norms by using their normative power: the power to set standards for the rest of the world to follow. The WTO, torn apart between the industrialised countries on one side and the developing and industrialising countries on the other side, had failed to take on this role. Therefore, the assumption had been that it is in the common interest of both the EU and the US to ensure that, in the near future, a EU/US led coalition would continue defining the global gold standard for regulatory cooperation, the protection of intellectual property and private investments. These 'gold standards' would then also be *de facto* binding for emerging trade superpowers such as China. In this way, the EU and the US would remain the *norm makers*, rather than the *norm takers*, of the global trade system for decades to come. Even if standards differ quite substantially on both sides of the Atlantic, the transatlantic common ground would still be much larger than the common ground both sides have with China, from the protection of consumers, public health or the environment to food safety, sustainability and social rights.

Nevertheless, even if the promoters of trade liberalisation (in particular the European Commission) could initially ride on the wave of a wide consensus on the merits of free trade, the tide started soon to turn. In the run-up to the opening of negotiations on TTIP, public opinion in the EU became increasingly concerned about the 'boomerang effect' of such an agreement, as the wider public became aware of the fact that regulatory convergence discussed in the TTIP negotiation could produce negative side-effects within the EU. With the US, the EU found itself confronted with a very different negotiation partner, for three reasons:

1) **Challenges to EU governance**. Unlike most other trade agreements negotiated by the EU, where the Union had been the dominant partner, in TTIP both partners were negotiating on a level playing field, where no side would be able to simply 'export' their own norms and standards to the partner country without having to reciprocate.[8] Already before Donald Trump came to power, the US aggressively tried to export its own norms and standards through its trade policy. Striking a deal between the two blocks would therefore mean to take as well as to give – with the EU ending up to sacrifice or soften up of their own standards in order to facilitate a compromise. This process of having to adopt EU rules and regulations due to external pressure had been severely criticized by civil society in the EU, on the grounds that these norms are the result of a democratic process in which EU lawmakers and regulators act on behalf of citizens in order to translate collective preferences[9] into binding rules. For them, it was the 'right to regulate' of the EU and its Member States that was under attack from corporate interests on the other side of the Atlantic.

[8] This is generally seen to be the case in the Economic Partnership Agreements with Developing countries or the "Deep and comprehensive" free trade agreements the EU negotiates with the countries covered by the European Neighbourhood policy (ENP),

[9] Such as in food safety (GMOs, hormone beef, chlorinated chicken…) or environmental standards.

2) **Impact on EU citizens and consumers**. Unlike other (potential) partners, the US economic impact is strong enough to be felt throughout the EU and have consequences for the Union's own citizens/consumers.
3) **Lack of trust.** Already in the pre-Trump area, EU public opinion often perceived the US as being more inclined towards catering to the needs of US enterprises rather than striving towards high levels of environmental and consumer protection, public health and social justice – principles, which are not only important arguments for voters in the EU, but also among the basic values of the Union.[10] Furthermore, the fact that the start of the TTIP negotiations coincided with the NSA scandal[11] in 2013 also contributed to a decrease of trust of EU citizens in the US and its institutions.

In addition, one intra-EU institutional development had a strong impact on trade-related decision-making in the EU. The 2009 Lisbon Treaty had elevated the European Parliament to the rank of a fully-fledged legislative decision maker in trade, on the same level as the EU Council (representing the EU Member States). At the same time, the European Parliament had been given the right to veto any trade agreement.[12] Although it initially supported TTIP, the EP, echoing the mood of the wider public, adopted a more critical position, as reports on chlorinated chicken and multi-billion tort claims of international investors against sovereign states (resulting from previous investment protection agreements) became widely reported in EU media. This culminated in July 2015 in the request of the EP to drop one of the most controversial features of the TTIP, the Investor-State Dispute Settlement Mechanism (ISDS)[13], increasingly seen as undermining the rule of law and the 'right to regulate' of the EU and its Member States.[14]

As TTIP increasingly divided public opinion in Europe, it also started to affect the conclusion of the Canada-EU Free Trade Agreement. Negotiations of this agreement, although of a similar scope as TTIP, had been underway without much public interest and controversy until 2013. It was only in the wake of the TTIP debate that CETA came onto the radar of the anti-TTIP movement. Frequent calls to denounce TTIP were thus increasingly extended to include CETA. A low point for CETA was reached in October 2016, when its signature was put on hold by a veto of the regional Assembly of Wallonia.[15]

10 Art. 3 TFEU.
11 In June 2013, following revelations by whistleblower Edward Snowden, EU media reported that the US National Security Agency had wiretapped for a number of years several high level EU politicians, including the German Chancellor and the French President.
12 According to Art. 207 TFEU, the EP has to give its "consent" to any trade agreement, amounting to a veto right.
13 ISDS gives private investors the right to challenge regulatory decisions of a state before a tribunal of arbitrators selected by the two parties. This mechanism is hardly new: it has been used frequently by the EU Member states under bilateral agreements with mostly developing or transition economies since the 1960s.
14 Short of requesting to drop the idea of investor-state dispute settlement altogether, the Parliament asked the Commission to come up with a new proposal on a more accountable mechanism. As a consequence, the Commission proposed in late 2015 to replace ISDS by an Investment Court System (ICS), where cases would be heard by publicly appointed judges.
15 This standoff was finally resolved in 2017 through a last-minute compromise involving an interpretative declaration and an opinion requested from the ECJ.

The judicial challenge to deep trade liberalisation

Public opinion was not the only challenge to TTIP and CETA. A second challenge came from the European Court of Justice, which had started looking at some of the elements of certain EU treaties, in particular the question of investment protection and its compatibility with the EU legal order.

The EU—Singapore Free Trade Agreement, initialled in 2013, had been the first EU 'new generation' trade agreement that included the protection of foreign investments, also known under the acronym ISDS (Investor-State Dispute Settlement). Investment protection in international agreements goes back to the 1960s,[16] when investors (generally coming from developed countries) were keen to receive guarantees that their physical investments abroad (generally in developing countries) would not be subject to arbitrary expropriations. Rather than relying on courts of these countries (often seen by investors as being dysfunctional and lacking independence), a mechanism would be set up by which investment disputes would be settled before a mutually agreed arbitration panel consisting of international business lawyers acting as arbitrators. This was generally accepted by the receiving countries, as they considered it a 'price to pay' for attracting foreign investment.

The 2009 Lisbon Treaty included foreign direct investment as an exclusive competence to be exercised by the EU on behalf of the Member States. However, the Lisbon Treaty had not been specific as to whether this exclusive competence[17] should also extend to investment protection/ISDS. In the process of concluding the Singapore agreement, this question had been submitted as an opinion to the ECJ. The court was asked to establish whether the agreement could be concluded as an 'EU-only' agreement, with just the Commission and Council signing on behalf of the Union (as suggested by the Commission), or whether it should be signed and ratified as a 'mixed agreement', involving the 28 Member States individually.[18]

The ambitions of the Commission of getting the Singapore agreement adopted as EU-only agreement were finally brought down in May 2017 with Opinion 2/15 of the ECJ. In its opinion, the court ruled that neither non-direct foreign investment (that is, portfolio investments) nor investment protection could be regarded as EU exclusive competences. This would make both signing and ratifying the agreement by the 28 Member States mandatory. This opinion was even more significant as it would also stipulate the need to submit both the controversial TTIP and CETA (both including various mechanisms of investment protection)[19] to national ratification procedures.

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[16] A first Investment Agreement was signed between Germany and Pakistan in 1959. Since then about 3000 of such bilateral agreements have been signed up to now. EU Member States are signatories of about 1500 of these arrangements.

[17] Foreign direct investment is mentioned under art 207 TFEU (Common Commercial Policy) which is an exclusive EU competence

[18] EU international agreements are generally concluded as "mixed agreements", since they mostly cover a number of "shared" competences (as opposed to "exclusive" EU competences) between the EU and its Member States.

[19] Unlike the Singapore agreement, CETA does not contain an ISDS mechanism involving private business lawyers. Instead, it stipulates the setting up of an Investment Court System (ICS) involving publicly appointed judges.

As a consequence of the opinion of the Court, the Commission decided to separate in future the investment protection agreements from the remainder of the free trade agreements, so that the latter could enter into force on an interim basis while awaiting full ratification by the Member States, as had been common practice in the past.

The Commission received a second damper from the ECJ in April 2018 with the *Achmea* ruling, where the Court had to pronounce itself on the compatibility of an investment protection treaty between the Netherlands and the Slovak Republic. In its ruling, the Court considered that the Dutch-Slovak ISDS provisions were incompatible with the autonomy of the EU's legal order, since they provided for an arbitrational tribunal - not considered as part of the EU legal order - to interpret the application of EU law. This ruling obviously raised the question of the legality of the Investment Court System (ICS), the EU's 'soft' version of ISDS, stipulated in CETA. Already in 2016, as part of a compromise intended to defuse the threat of a veto on CETA by the Walloon regional government, the Court had been called upon to pronounce itself on the legality of the EU-Canada agreement, which is expected to be delivered as opinion 1/17 during the second half of 2018. Since ICS is one of the pillars of CETA, and since the EU takes much pride in the ICS, which it had presented as a modern alternative addressing the failures of the classical ISDS system, a negative verdict on the ICS's compatibility with EU law would without doubt negatively impact the ability of the EU to set global standards through the conclusion of far-reaching future trade agreements.

II) 2016: from 'second best' to 'third best'

With the political and legal clouds casting shadows on the EU's efforts to promote trade liberalisation through comprehensive FTAs, the general enthusiasm about trade liberalisation of a few years earlier had given way towards a more cautious approach. In particular the 2014 annexation of Crimea by Russia, the 2015 refugee crisis have shown the limits of the EU's value-based approach to global challenges, a fact that was also reflected upon in the EU's 2016 Global Strategy. The Wallonian CETA challenge in late 2016 also highlighted the difficulties for the EU to act strategically in pursuit of its own interests. However, not all challenges to the EU's trade policy came from within the EU. Also externally, the EU came under pressure from two sides: from China, in the form of important overcapacities in steel production, linked to the thorny question of China's Market Economy Status (MES), and from a U-turn in US foreign and trade policy. Both events prompted the EU to shift their efforts towards upgrading its trade defence instruments.

Whereas Free Trade Agreements are both offensive and consensual, trade defence instruments (TDIs) are defensive and confrontational. Since its early days, the EU's trade policy toolbox contains a number of measures designed to protect EU producers against

unfair competition from foreign producers, in particular through anti-dumping and anti-subsidy (also called countervailing) measures.[20]
The EU's anti-dumping rules had been significantly amended in 1996 following the conclusion of the Uruguay Round in 1994, when the EU *acquis* had to be brought in line with the rules of the newly founded WTO. They had been amended several times since then,[21] but had never been substantially overhauled. Adapting the trade defence *acquis* to external developments (such as the rise of China and the increase of unfair trade practices from that country) has proven more difficult than pursuing further trade liberalisation.

In 2013 the Commission had proposed a package of measures to upgrade the Union's trade defence toolbox. However the proposal was shelved shortly afterwards due to a lack of agreement among the Member States, with a majority of countries wanting to focus on further trade facilitation rather than on fortifying defense walls. Thus, the proposal remained, in the Commission's jargon, a 'sleeping beauty' or a proposal put on ice due to lacking perspectives for progress.

It was not until 2016 that the issue re-emerged on the EU's agenda. Even before the election of Donald Trump, which announced rough weather conditions for international trade, the renewed interest of the Member States in trade defence was basically fueled by two (connected) events: the approaching deadline set by the WTO to recognise China as a market economy and a Commission Communication of March 2016 ('Steel Communication') painting an alarming picture of the future of the European steel industry.[22]

III) The policy drivers behind the fortification of EU trade protection mechanisms

The 2016 Steel Communication contained strong warnings about the future of the European Steel Industry, which accounts for 1.3 % of EU GDP and 328,000 direct jobs, but which had deteriorated over the last years, mainly due to large overcapacities in China (amounting to more than twice the EU's annual production). These overcapacities had led to a price collapse on global markets and had prompted an unprecedented wave of unfair trading practices.

It was after the Commission Communication of March 2016 that the Slovak presidency in the second half of 2016 put the 2013 proposal back on the agenda. In addition, the Commission published on 9 November 2016 (the day after the election of Donald Trump to the US Presidency) a proposal for a new methodology for calculating anti-dumping

[20] These two measures are closely related and seen as two faces of the same coin, although in practice the former by far outnumber the latter. Based on Article VI of the GATT, they are regulated by two EU regulations, the 2016 basic anti-dumping regulation (2016/1036) and the basic anti subsidy regulation(2016/1037), which are themselves updates of two 1994 regulations bringing the acquis in line with WTO requirements.

[21] For example after the 2009 Lisbon Treaty, which shifted the power to impose definitive anti-dumping duties from the Council to the Commission.

[22] Communication from the European Commission "Steel: Preserving sustainable jobs and growth in Europe" COM(2016) 155 final

duties, particularly targeted at addressing the challenge raised by the issue of the China market economy status (MES).

In the following section we look at a) the importance of the China market economy status for the EU, b) the content of the 2013 proposal on the reform of the EU's trade defence instruments and 3) the impact of the US elections on the EU's trade policy,

a) The issue of China's Market Economy Status (MES) and the EU's 'new methodology'

China has always been the elephant in the room when discussing trade defence in the EU. The country is certainly not the worst violator of international trade rules. However the sheer size of its economy and its key role in the global supply chain, combined with its system of state capitalism and the dominance of state owned enterprises (SOEs),[23] have made China regularly appear at the top of the list of countries targeted by trade defence measures (anti-dumping and countervailing measures), both for the EU and for the US, which made them appear natural allies. The 2016 Steel Communication once again highlighted the impact of China on EU industry.

The question of granting China Market Economy Status (MES) in the WTO has been a major concern for both EU and US. When China joined the WTO in 2001, it had negotiated in its accession protocol a provision that, not later than 15 years after its accession, it had to be recognized by its fellow WTO partners as a market economy. But, within the WTO, the status of market economy is more than just a label. According to WTO rules, being classified a non-market economy makes it easier for a country's trading partners to impose anti-dumping duties on goods imported from that country. According to standard WTO procedures, the proof of dumping and the consequent amount of the anti-dumping duties is established according to the difference of the price of a good on the producing country's internal market and the export price for that good. In the case of a non-market economy however, the importing country has much more liberty to define what could be considered a 'normal price'. Generally, this 'normal price' is defined by referring to the price of the same good in a third country as reference value. Since the price of most goods tend to have some variations even in market economies (taking into account, for example purchasing power within a country), the defending country has a wider margin of appreciation as to what would be the normal price; the bottom line is that, through the choice of a reference price, it is far easier to prove the existence of dumping and the justification of an anti-dumping duty.

When China entered the WTO in 2001, a general consensus existed within the WTO that, although it was quite clear that China could not be considered a market economy yet, the country had already made huge progress on its way of transforming its economy by introducing free market-driven reforms. The political gain of having China 'on board'

[23] Chinese market distortions due to the intervention of the state were extensively highlighted in a 2017 Commission report "Significant distortions in the economy of the PR of China for the purpose of trade defence investigations SWD(2017) 483 final/2, 20.12.2017

seemed to outweigh in 2001 the potential risk of having an assertive and powerful member flouting the rules 15 years later on. Thus, the country was accepted on the assumption (others might say: wishful thinking) of the WTO members that China would honour its commitment to making itself a real market economy by the end of 2016.

In the WTO, the terms of accession are to be negotiated freely between the candidate and the organisation, subject to consent of all its members. Even if there is often talk about a 'WTO *acquis*', accession to the WTO can by no means be compared to accession to the EU. In the EU, the *acquis* is written in stone and provides for derogations only in a very restricted way on a temporary basis. There are strict benchmarks to fulfill, under the watchful eye of the Commission, and the candidate has to implement the entire acquis before joining, after having obtained a unanimous vote by the EU member states and a green light ('consent') from the European Parliament. In the WTO, by contrast, the *acquis* is much more fluid, and would be more appropriately referred to as guidelines or best practice. Since the decision to welcome a new member is taken by consensus among the existing members (currently 164), and since the organisation and the candidate are free to agree on whatever is mutually acceptable, minimal compliance followed by commitments to move into the 'right' direction can be considered sufficient to become a member.

Consequently, in late 2016, the WTO was confronted again with the commitment made to China 15 years earlier. At that moment the WTO and its members realized that the hopes that the country would have concluded its transformation had been overoptimistic: few outside China were indeed convinced that the country could be considered a market economy. For most Member States, supported by their key industries, and the European Parliament, the recognition of China as a market economy was a red line not to be crossed. For China, which favoured a literal reading of the accession protocol, the situation was clear: in 2016, the other WTO countries had to give it an unconditional MES, whatever the real situation on the ground.

This interpretation had been rejected on both sides of the Atlantic. For the US and many Member States, as well as for the EP, it was inconceivable to consider MES for China and thus give away a powerful weapon for protecting domestic industries against unfair trade practices.

The 'new methodology' for calculating anti-dumping margins

Since the question of the MES was a binary one (to grant or not to grant…), the room for compromise seemed limited: one of the sides had to give in at the end. With neither wanting to give in, both EU and China were heading towards a clash – until the Commission floated, the day after the US elections, a proposal with the potential to give both sides the opportunity to save face, while drafting around the fundamental question.

The November 2016 proposal,[24] generally referred to as the 'new methodology', mentions China only once. In substance, it proposed to abolish, at EU level, the existing

[24] Regulation (EU) 2017/2321 of the European Parliament and the Council amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union

categories of 'market-economy countries' and 'non-market economy countries'. Instead, the Commission proposed to treat all countries equally by defining a number of indicators that would be taken into account when determining whether a country is using unfair trade practices. In this way, the politically sensitive question of MES/non MES would be defused, even if, at the end, the benchmarks applied by the Commission to establish the existence of unfair trade practices are very similar to the benchmarks used to define if a country is eligible for the MES. In other words, the Commission would come to the same result, as the countries that are likely to fail the 'unfair trade practices test' are most likely to be the same countries classified as NMES under the old methodology. Yet, since the binary question MES/Non-MES is off the table, the proposed offered gives both sides the possibility to save face: China will be able to claim that it is no longer considered a 'non-market economy' by the EU, whereas the EU can claim that it has neither recognised China as a market economy nor softened up its own trade defence methodology. China understood that the 'new methodology' would change very little in practice and initiated in December 2016 a complaint before the WTO[25] to be recognized as a market economy (which it maintained also after the EU's definitive adoption of the 'new methodology' in December 2017). However, since China is currently more preoccupied with the trade barriers erected by the US after 2016 and is keen to avoid a trade war on two fronts, it has kept a rather low profile on this issue and seems to have accepted, for the time being, the option of dodging the question, allowing both sides to save face.

b) The reform of the EU's trade defence instruments

This proposal to reform the EU's trade defence instruments (TDI) had been adopted by the Barroso II Commission in April 2013, motivated by the fact that the basic anti-dumping (AD) and anti-subsidy (AS) regulations[26] had remained largely unchanged for 15 years and were therefore outdated. Whereas former trade Commissioner de Gucht had still suggested in 2010 to postpone this revision until after the conclusion of the WTO Doha Round, the same Commissioner came to the conclusion three years later that these talks had stalled without reasonable hope for reviving them any time soon and that therefore the time had come for the EU to modernize its TDIs. After having been blocked in the Council for almost 4 years, where member states with different trade traditions disagreed over the methods for calculating anti-dumping duties, the proposal was finally adopted in May 2018.[27]

Among the components of the April 2013 proposal were in particular:

- **plugging the 'maritime loophole'.** This loophole allowed in particular steel used for pipelines, drilling platforms etc. outside the importing countries territorial waters to avoid both customs duties and trade defence measures;

[25] https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds516_e.htm

[26] There is a third TDI, the safeguard instrument, which was not at issue in this initiative, not least because the EU had very rarely used it.

[27] Regulation (EU) 2018/825 of the European Parliament and of the Council of 30 May 2018, OJ L 143

- factoring in **environmental and social standards** when calculating the injury margin (used to define the amount of the anti-dumping duty);
- providing for an **early warning mechanism** to avoid importers being taken by surprise and incurring damage as result of anti-dumping duties;
- redefining rules for applying the **'lesser duty rule'** (LDR), a rule which prevented the EU from slapping the full amount[28] of anti-dumping duties on an imported product.

It was in particular the reform of the 'lesser duty rule' that proved to be a stumbling block among Member States. The 'lesser duty rule' is one of the so-called 'WTO+' elements of the EU system and is used when calculating the anti-dumping margin to be slapped on imported goods if a dumping practice is established by the Commission. Whereas, according to WTO rules, the anti-dumping margin amounts to the difference between the export price and the 'normal price', the Commission would calculate an 'injury margin' instead, a price that is high enough to avoid damages to local producers but which is still often below the 'normal' price. Therefore it is sometimes referred to as a 'rebate' on an anti-dumping duty.

In the EU, a coalition of countries traditionally strongly attached to free trade (UK, Netherlands, the Nordic countries) saw the LDR as something the EU could take pride in, since it had the effect of de-escalating trade disputes by obliging the EU to restrain itself when imposing anti-dumping duties. Thus, the danger of abusing anti-dumping rules for protectionist reasons (by imposing higher duties than necessary) was strictly limited. This argument had been rejected by a coalition of countries favouring stronger EU trade defence tools (in particular the Mediterranean countries) that preferred to have greater firepower in the EU's anti-dumping arsenal. As a result, no qualified majority could be achieved in the Council and the proposal was shelved in 2014 by the newly appointed Juncker Commission since it was then seen as lacking potential for progress.

It was only after the Commission rang the alarm bells with regard to the EU steel industry in early 2016 that the mood of the Member States changed. In the context of the 2015 refugee crisis and the 2016 Brexit referendum, the Member States realized that the EU, if it wanted to enjoy legitimacy among its citizens, had to deliver in areas that were of strategic importance for their own economy and their citizens, thus shifting the balance from promoting global values towards defending its own interest.[29] Against this background, the Commission's proposal was adopted by the Member States in May 2018.

c) The impact of the 2016 US elections on the EU's trade policy

Looking at the timing of the EU's trade defence reform, one can easily notice a correlation with events on the other side of the Atlantic. The fact that the 'new methodology' was proposed by the Commission the day after Donald Trump was elected

[28] According to WTO rules, the importing country (in the case of the EU: the Commission) can impose anti-dumping duties on imported goods that amount to the difference between the "normal price" or market price and the price to which this product has been imported into a given market.
29 As explicitly acknowledged in the EU Global Strategy of June 2016.

to the US Presidency, and the fact that the Member States had reached an agreement on the reform of the trade defence instruments in December 2016 (and thus between the election and the inauguration of the new US President) could lead to the conclusion that the President, who made 'America first' his campaign slogan and who alienated Europeans on highly sensitive matters such as climate change, had managed to push Europeans towards forgetting their divisions when faced with a common threat.

This reasoning is more plausible with regards to the 'new methodology' than with regard to the reform of the TDIs. Whereas the EU-US trade war of 2018 could not yet be anticipated in late 2016, it was already clear then that the prospect of making progress on the TTIP (which had been sluggish during the course of that year) would tend towards zero under the Trump Presidency. Brussels had been keen in the past not to be perceived by the US as going soft on China on market economy status, since the Obama administration had taken a hardline position towards Beijing on this issue. Being seen as too accommodating to China by the US could therefore, according to Brussels, have the potential of undermining the TTIP negotiations. However, since TTIP was off the agenda anyway after the US elections, the EU came to the conclusion that to further playing hardball with China would bring the risk of a conflict on two fronts. The EU therefore decided to offer Beijing a solution that would give both sides the possibility to save face.

On the other hand, the breakthrough on the reform of the TDIs cannot be explained by the 'Trump factor' alone. This proposal saw its comeback already months before the US elections when few seriously considered the possibility of Donald Trump winning the elections. The change of mood in the Council – where the file had remained blocked since 2013 – seems to have occurred because of the Commission's Steel Communication of March 2016 and the Brexit referendum, which would remove the leader of the block of countries opposing the reform. Brexit also highlighted the need for the EU to show its *raison d'être* through protecting the interests of EU citizens and businesses. Still, it cannot be dismissed that the 'Trump factor' may have contributed to nudging the still hesitating Member States towards consensus in December 2016.

Conclusion:

The 2016 EU Global Strategy highlighted the need for the Union to pay more attention to its own interests, more or less directly acknowledging that sometimes interests would have to come before values. However in trade policy this balance had been adjusted already a decade earlier, when the EU in 2006 started to shift its priorities from multilateralism towards bilateral free trade agreements. After the 'annus horribilis' of 2016, in which the EU, besides Brexit and the election of Donald Trump, was challenged economically by an ever more assertive China, the Union has finally shown its ability to bounce back. The example of the EU's trade defence reform has illustrated that the Brussel decision making machinery can best deliver results under outside pressure.

Given the destructive attitude of the US - the EU's biggest trading partner – towards free trade displayed in the 2018 tariff war with the Union, the EU's approach has been vindicated. Although the US under Trump has declined to assume global leadership, there is a chance that this retreat will be only temporary and that the US will go 'back to normal' under a future administration. China, on the other hand, seems willing to fill the void left by the US but unwilling to fundamentally alter its economic model based on

state intervention, and can therefore hardly expect to rise to a global leadership role outside a (limited) number of likeminded countries. Therefore, for the years to come, the Union will have to act as the engine of the multilateral trade system and prevent the WTO from becoming meaningless. Increasing its own resilience through the reform of its trade defence system was certainly a good start.

The fact that the EU's main preoccupation is now with the 'third best option' (trade defence) is, in itself, not a negative development, as the Union has given up neither on the 'first 'nor on the 'second best' options. In 2018, the EU is more than ever committed to the WTO, while actively pursuing bilateral trade agreements with like-minded countries (Mexico, Australia, New Zealand…). It is also likely that, under a future US administration, the TTIP will reappear on the agenda. Whereas the chances for a new round of multilateral trade talks are weaker, they are not impossible. In the 1980s, US punitive trade measures against Japan managed to rally the rest of the word around stronger trade enforcement rules which, in the end, led to the creation of the WTO's system of dispute settlement. In this light, maybe future generations of trade experts will regard the Trump presidency as a useful reminder to the rest of the world about the danger of trade protectionism and about the merits of a rules based multilateral trade system.