HANG TOGETHER: THE EU SHOULD BUILD AN ENFORCEMENT COALITION TO REVITALISE THE RULE OF LAW

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> *"We must indeed all hang together or, most assuredly, we shall all hang separately." - Benjamin Franklin*

Benjamin Franklin reportedly made this remark on 4 July 1776, as the American rebels signed the Declaration of Independence. Two and a half centuries later, the wisdom of his words remains as we slip into a world where power rules: the less powerful need to band together, or they will hang alone.

Following the devastation of the Second World War, the United States (US) and others rejected a world of power for the rule of law, a tenet based on a universal principle: respect for the dignity of the individual. This principle undergirds democratic governance, where governments serve the people, and market economies, where property rights are protected.

For 75 years, this "system" of the international rule of law and the institutions built to implement it functioned well, with countries generally observing the rules they created in the treaties underlying the United Nations and its related organisations, including the International Monetary Fund, the World Bank, and the World Trade Organization (WTO).

Today, that system is collapsing, as three of the most powerful actors — China, Russia, and the US — now refuse to be bound by international law. For the European Union (EU), itself a creation of international law through the treaties that bind together its 27 Member States, this erosion is an existential threat. The bloc and other 'middle powers' cannot play in a world of power against these three. It is on the EU to lead the effort to rebuild the rule of law with a coalition of countries that realise they must work together to enforce that tenet. Or face of the consequences of going it alone.

There are many dimensions to the 'outlaw' behaviour the world is experiencing, with Russia's invasion of Ukraine the most painful. This essay focuses on the economic dimension, as repairing the rule of law here can even help resolve the more daunting problems.

China and now the US are the main culprits roiling the global economy, with the American President's tariff tantrums grabbing the headlines. But Washington's decision to throw off its WTO commitments is largely a reaction to China's behaviour and the WTO's inability to deal with that – which is why the Biden administration continued and indeed intensified Trump's initial China tariffs. But the second Trump administration has now brought what began as America's tariff war on China to the world.

It is important to understand why China is also outside the law, even when it is not openly dynamiting the system the way Washington now is. When China acceded to the WTO, it undertook commitments to become a "socialist market economy" within 15 years. WTO members clearly saw the potential danger of giving Most Favoured Nation status to a large country that had begun to follow the export-oriented growth model that Japan, Taiwan, and others had adopted. China's Protocol of Accession accordingly spelled out the steps it would take to achieve this "market economy", such as having state-owned enterprises operate on a commercial basis, eliminating performance requirements on investments, reforming the banking and credit allocation system, and liberalising capital controls.

In the end, China grew faster than expected, thriving on global demand for its products. But it did not reform as it had promised. And for decades now, China's trade and current account surpluses have been pumping money into the economy, even as capital controls have prevented that money from flowing out.

This macroeconomic 'systemic subsidisation' funds the immense over-capacity in China's economy. It does not violate WTO rules as such, but it - and so many of the other policies that power Beijing's export juggernaut - do go against China's Protocol of Accession commitments. Unfortunately, WTO members did not go after the systemic problem, as they could and should have. If they had started to do so in 2016, that might have encouraged earlier reforms in China, perhaps eliminating the basis for Trumpian tariffs.

The lack of enforcement – against Beijing as well as against Washington - is *the* issue that needs to be addressed if the rule of law is to be saved. Law is meaningful only if enforced.

The global community recognised the importance of enforcing international economic law when it created the WTO, which significantly strengthened trade dispute settlement by removing the right of a defendant country to block a judgement against it, establishing an Appellate Body to ensure judgements were sound, and allowing a complainant country to 'punish' a defendant found guilty of violating its WTO obligations by "withdrawing concessions" from the violator. This strengthened system has now collapsed in large part as the US (with reason) believed the Appellate Body had far exceeded its mandate. But it also failed as too often the "withdrawal of concessions" was akin to a slap on the wrist, insufficient to deter violations of the rules.

Confronted with the US' bullying tactics on international trade, Canadian Prime Minister Mark Carney suggested earlier this year that "middle powers" need to unite to respond to the weakening of the international system. But he did not spell out exactly what they should do.

A common approach to enforcing the rule of law would be a good place to start. One country may not have the weight to raise the costs sufficiently to compel a country to again respect the law, but an 'enforcement coalition' of countries acting together might be able to do so. A critical mass of countries mirroring Mr. Trump's tariff actions against the US, for instance, might cause him to re-consider the wisdom of his favourite policy instrument. Other collective sanctions against a systemic violator of WTO rules could also be envisioned. These include punitive tariffs on select exports, the withdrawal of other rights that come with WTO membership, and sanctions in areas outside the scope of WTO law, including tax and investment policy.

The key point behind an enforcement coalition is that it would be a group of countries acting together to preserve the rule of law, not just acting to retaliate against a country that violates it. While acting collectively to enforce the law against a WTO member would be inconsistent with WTO rules as written, doing so is better than giving up on the WTO and its key tenets entirely, as the EU and others are thinking of doing in response to the pressure from the US and China. More importantly, if a country flagrantly (in the US case) or systemically (China) violates its WTO commitments, it no longer merits the protections WTO rules provide. Just as our societies permit the use of force against criminals, force that we otherwise do not allow.

Carney may have launched the "middle power" process, but the EU could take the reins in forming the coalition. It has a hook to do so as Beijing is suing the bloc in the WTO for anti-dumping duties imposed on Chinese electric vehicles. Brussels should recruit countries to support its defence, one that can and should be directed against the systemic distortions in the Chinese economy related to its failure to fulfil its Protocol of Accession commitments. That coalition can and should put pressure on Washington as well, in the hope it will return to the rule of law and work collectively with others to enforce it against China. Even working

openly to build the coalition and talking of the need to suspend WTO protections for the US would have an impact in Washington.

As it seeks to build an enforcement coalition, Brussels should identify prospective allies based on a series of concentric circles. At the centre would be the EU *and* its Member States, which together have diplomatic networks that are more extensive than the EU's. Beyond that come the other non-US members of the G7 (Canada, Japan, and the United Kingdom); Norway and Switzerland (which have special economic relationships with the EU); and other non-US members of the Organisation for Economic Co-operation and Development who have committed to market economies and democratic governance, including Australia, Chile, Colombia, Costa Rica, Israel, Mexico, New Zealand, South Korea, and Türkiye. Other countries to be considered could be remaining members of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, other countries with which the EU has concluded free trade agreements (and provisional agreements), and perhaps select remaining BRICS such as India.

The EU can build this coalition. It is the creation of international law, and the sanctity of that law is existential issue for it. In that sense, the EU is an authentic advocate for the rule of law and its enforcement. Brussels also has leverage from the size and power of its market. And the EU and the Member States have an immense and important global footprint. If they decide to pursue a policy that demands a law-based system, that recognises that enforcing such a system key to its success, and that acknowledges common action by "middle powers" is the best approach to enforcement, then they should be able to lead the effort to achieve it.

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