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# THE EU AND MULTILATERALISM

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# Multilateralism is in the DNA of the EU



The EU has always been – and still remains – instinctively multilateral. It was born out of an international agreement between 6 countries that eventually grew to 28. The interests of all these countries are balanced within its institutions and drive its decision-making. Respect for the interests third countries and the desire and ability to cooperate and seek compromise therefore come naturally to its institutions and Members.

Another feature of the EU is that the integration of economies that was the focus of what was called the "Common Market" has led to increasing political integration and the activities of the EU now also cover, for example, environmental protection, investment protection, energy security, judicial cooperation, migration and asylum policy. A general Common Foreign and Security Policy evolved out of an informal European Political Cooperation and was formalised in the Maastricht Treaty in 1993.

These characteristics of the EU are reflected in the current Treaty on European Union ("TEU"). In particular, its Article 21 declares that:

*1. The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.*

*The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.*

The main purpose of the EU was to make war in Europe unthinkable. Therefore, Article 3 TEU declares the promotion of peace to be its aim and Article 2 TEU makes the rule of law a fundamental value. In other words, agreed rules should determine outcomes, not brute force. Also, since the EU is a collection of Member States with different histories and outlooks on the world, it is easy and tempting for third parties to seek to sow division. The rule of law and multilateral dispute settlement has helped to keep the EU together.

The same attachment to the rule of law and need for cooperation that was essential for the survival and development of the EU has also been a feature of the EU's external activity. Therefore, for example, the EU was among the strongest backers of the improved dispute settlement system during the Uruguay Round negotiations that led to the creation of the WTO.

Although the EU was on the receiving end of the WTO dispute settlement system at the beginning, losing high profile and politically sensitive disputes over its market organisation for bananas<sup>1</sup> and its prohibition of growth inducing hormones in cattle,<sup>2</sup> it soon realised how the system could be used to progress and develop the multilateral system, which it did enthusiastically. For example, the EU succeeded in neutering the extraterritorial application to the EU of the US sanction regime against Cuba by initiating dispute settlement proceedings in that matter.<sup>3</sup> That was the first "as such" dispute brought by the EU at the WTO where the existence of a legal measure is challenged even before it has ever been applied or had any demonstrable trade impact (as opposed to "as applied" cases which rely on actual trade effects). A further notable "as such" case was brought by the EU against the continued existence of Section 301-310 of the US Trade Act 1974 which allowed for trade countermeasures to be applied against WTO Members even in the absence of authorisation by the Dispute Settlement Body.<sup>4</sup> According to the WTO, the EU has been a complainant in 110 WTO dispute settlement cases while being a respondent in 94 cases.<sup>5</sup>

It was not just in trade that the EU embraced multilateralism. The EU was particularly active in the environmental field and has participated in around 36 multilateral environmental agreements under the auspices of the United Nations.<sup>6</sup> These often become the basis of EU legislation. The United Nations Framework Convention ("UNFCCC") is an instructive example of the EU's engagement since, despite UNFCCC agreements having little binding force, the EU regularly implemented its obligations with binding legislation, ensuring that it complied with – and even exceeded – its emission mitigation targets under the Kyoto Protocol.

1. WTO disputes DS16 and DS27 – *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (1995).
2. WTO disputes DS26 and DS48 – *European Communities – Measures Concerning Meat and Meat Products (Hormones)* (1996).
3. WTO dispute DS38 – *United States – The Cuban Liberty and Democratic Solidarity Act* (1998). Panel constituted but case settled before proceedings commenced.
4. WTO dispute DS152 – *United States – Sections 301-310 of the Trade Act 1974* (1998).
5. See [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_by\\_country\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm) (consulted on 29 February, 2024).
6. For a list see [https://environment.ec.europa.eu/international-cooperation/multilateral-environmental-agreements-meas\\_en](https://environment.ec.europa.eu/international-cooperation/multilateral-environmental-agreements-meas_en) (consulted on 29 February, 2024).



# The World is Changing and so is the EU

## The world is losing faith with multilateralism, including in the case of trade.

The WTO was considered a huge advance over the GATT. It was a proper international agreement (the GATT had only been "provisionally" applied) and had a series of governing institutions including the Dispute Settlement Body overseeing a two-stage dispute settlement system involving detailed examination by a panel and possible review by a standing Appellate Body to ensure consistency and rigour. It was designed to be the forum for progressive trade liberalisation.<sup>7</sup>

The WTO was much broader in scope, improving the pre-existing earlier agreements on goods trade and expanding coverage to trade in services (the General Agreement on Trade in Services or GATS) and to issues relating to intellectual property (the Agreement on Trade-Related Aspects of Intellectual Property Rights or TRIPs).

Importantly, WTO membership was greatly expanded compared to that of the GATT.<sup>8</sup> At the creation of the GATT in 1947, developing countries generally did not consider free trade – or progressive liberalisation through "Rounds" of tariff reductions – in their interests. Instead, the United Nations Conference on Trade and Development (UNCTAD) was set up to promote their development. By the 1990s when the WTO was being negotiated, developing countries wanted to be part of the new trade regime. The expanded and more diverse membership has had important consequences for the functioning of the WTO.

Although the WTO makes provision for decision-making by various majorities, all Members insist on consensus decision-making. The result is that it is now virtually impossible to negotiate new trade liberalisation – which was a regular feature of the GATT. There was supposed to be a Millennium Round in 2000 but the Ministerial Conference to launch it ended in riots in Seattle. In 2004, the Doha Round could only be launched once it had been re-named the Doha Development Agenda – which underlined the conflicting objectives.

The Doha Development Agenda failed and there has been little negotiated liberalisation at the WTO since then, with the exception of the relatively modest Trade Facilitation Agreement. Even declaring subsidies to illegal fishing as prohibited has been held hostage many times.

The latest WTO Ministerial Conference ("MC13") was disappointing as regards the adoption of legally binding agreements.<sup>9</sup> The conclusion of the agreement on fisheries subsidies<sup>10</sup> failed yet again and the Members even failed to agree on the inclusion of a proposed plurilateral agreement on Trade Facilitation for Development.<sup>11</sup> The much heralded successes were the inclusion of additional commitments on domestic services regulation (which could not easily be blocked because it works through adoption of additional commitments by individual Members that are applied on an MFN basis), the extension of the moratorium of duties on electronic trade (for a "final" two years)<sup>12</sup> and the noting of progress on future reforms to the dispute settlement system (with nothing on the main issue which is the Appellate Body).<sup>13</sup>

Countries have turned to negotiating regional trade agreements (free trade agreements with ever more elaborate names) and the only hope for future agreements at the WTO seems to be the adoption of plurilateral agreements between subsets of WTO Members. However, even those require the consent of the whole membership before they can be admitted to the WTO framework and that consent can be withheld for negotiating advantage as demonstrated most recently at MC13.

The United States, having been at first an enthusiastic negotiator of regional trade agreements, has now turned against even this form of trade liberalisation as exemplified in its abandonment of the Trans-Pacific Partnership Agreement.

The dispute settlement system of the WTO was initially very successful and stood in sharp contrast to the repeated failures to negotiate new trade liberalising measures.

7. As provided in Article II.1 and III.2 of the Marrakesh Agreement establishing the World Trade Organization.

8. The GATT had been created in 1947 with a membership of 23 while 123 countries signed the Marrakesh Agreement establishing the WTO. Many more have acceded to the WTO since – including China and Russia – bringing its membership to 164.

9. For documentation on the outcome go to [https://www.wto.org/english/thewto\\_e/minist\\_e/mc13\\_e/documents\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/mc13_e/documents_e.htm).

10. For the draft texts see WT/MIN(24)/W/10 and WT/MIN(24)/W/10/Add.1.





11. For the draft text see WT/MIN(24)/W/25.

12. See WT/L/1193; WT/MIN(24)/38.

13. The declaration recording progress is WT/L/1192; WT/MIN(24)/37.

The dispute settlement system had to take the strain of liberalisation and adapting the rules to changing circumstances. It became known as the jewel in the crown of the WTO. The temptation to liberalise through the cases became too great and the Appellate Body certainly took some liberties.

The Appellate Body has, for example,

 <p>Extended the scope of its review (in principle limited to issues of law) to the facts by examining whether a panel had conducted an objective assessment of the facts<sup>14</sup></p>	 <p>Treated the meaning of national law as a reviewable issue of law (allowing it to redefine the measures at issue)<sup>15</sup></p>	 <p>Treated other treaty texts as context so as "interpret silence" and fill "gaps"<sup>16</sup></p>	 <p>Held that once it reversed a finding of a panel, its duty to resolve the dispute meant that it could "complete the analysis"<sup>17</sup>.</p>
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Ultimately this led to a re-litigation of cases in front of the Appellate Body whose reports became ever more complex and longer leading to the three-month time limit being completely abandoned.

These developments (which were often argued for and encouraged by the EU) were probably the inevitable consequence of a binding dispute settlement system. As the Appellate Body often emphasised, the purpose of dispute settlement is to resolve disputes and it is not possible to declare a *non-liquet*. The WTO texts are unclear in many respects and reflect unfinished negotiations. If the Appellate Body adopts an interpretation that is not shared by the majority of Members, it is in practice impossible for this to be reversed – unlike in domestic legal systems.

The WTO became judicialised and political control diminished. There has been an unbearable tension in a WTO where the Members are unable to conclude new agreements and a dispute settlement system where differences of opinion are resolved in a binding manner by a sometimes activist and inclined to favouring trade liberalisation Appellate Body. The result is an imbalance between the political and judicial branches of the WTO.

Liberalisation through dispute settlement was even more unpalatable to the United States, accustomed as it is to having its own way, and it has effectively abolished the binding nature of the WTO dispute settlement system by blocking appointments to, and therefore the functioning of, the Appellate Body. The result is that any panel report which the US (or any other party) feels that it cannot accept can be blocked by an appeal to the non-existent

Appellate Body (an "appeal into the void"). The dispute settlement system has effectively become non-binding as it was before the creation of the WTO.<sup>18</sup> The result is a sharply reduced number of cases being referred to panels and a growing resort to self-help (that is unilateral measures).

It is difficult for other WTO Members to resist following the US example of largely ignoring WTO rules and this is especially the case of the EU, which is also an important trader and may consider that it can also benefit from a "might is right" approach. Indeed, the EU has become increasingly conscious of its influence in the world through the much-vaunted "Brussels Effect", whereby EU regulations – conveniently available in 21 languages and balancing different traditions and interests – are adopted throughout the world.<sup>19</sup> Frequently cited examples include the regulation of mobile communications, data protection rules (GDPR) and recently the EU system of COVID certificates.

The result has been a tendency for the EU to turn away from multilateralism. Instead of engaging in endless negotiations on governance rules for the digital economy, for example, why not just adopt the rules and standards and wait for everyone else to copy them? A current test case will be the EU's pending new regulation of artificial intelligence ("AI"). Such rules can only be truly effective in the modern world if applied by a wide range of jurisdictions and the EU AI Regulation is expressly applicable to AI systems throughout the world.<sup>20</sup> The EU is no doubt expecting its AI Regulation to be copied elsewhere.

14. One of the first cases was *EC – Hormones*, AB report in 1998, at para. 132.

15. See *India – Patents (US)*, AB report in 1998 at para. 64.

16. See eg *China – Auto Parts*, AB report in 2008 at para. 151 ("The realm of context as defined in Article 31(2) [VCLT] is broad.")

17. For the first time in *US – Reformulated Gasoline*, AB report in 1996 at para. 18.

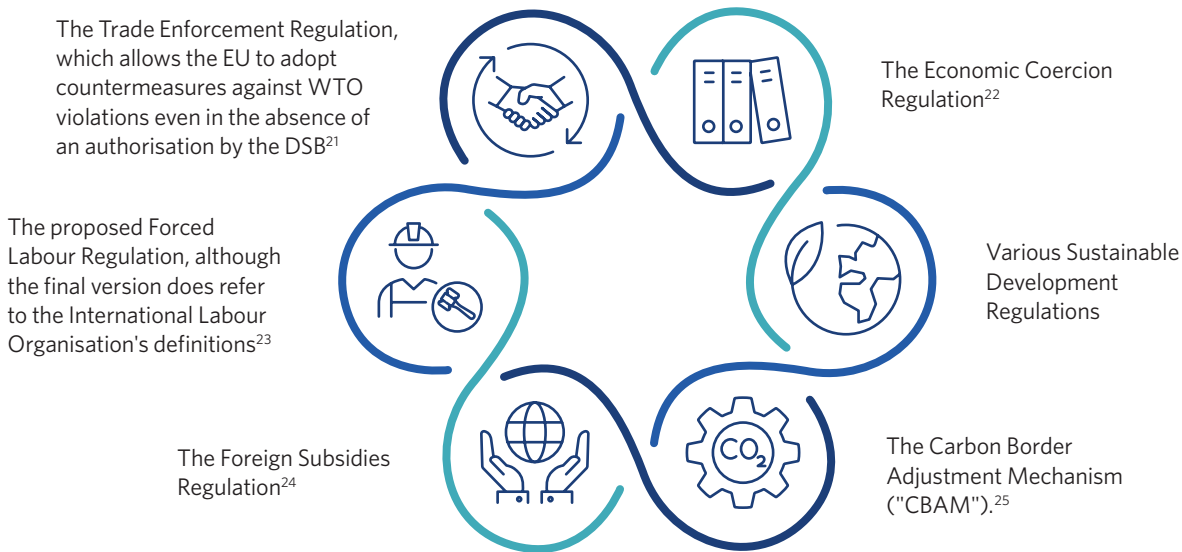
18. For a discussion of the US attack on the Appellate Body see P.J. Kuijper in *Legal Issues of Economic Integration*, Vol. 45, Issue 1.

19. See *The Brussels Effect: How the European Union Rules the World* by Anu Bradford, Columbia Law School published by Oxford University Press.

20. See Article 2(1)(a) of the adopted regulation available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST\\_7536\\_2024\\_INIT](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_7536_2024_INIT) (it is undergoing legal scrubbing and is not yet published in the Official Journal).



Also, in trade, it is now considered that the EU must be assertive and have other tools than multilateralism in its toolbox. There have been a whole series of recent "autonomous" (or unilateral) EU initiatives. For example:



Many of these seek to export EU rules and standards to other countries. Arguably this goes one step beyond the Brussels Effect and approaches another traditional bugbear of the EU - extraterritoriality.

The rest of this article will provide some comments on what may be considered the most important development in the EU's approach to multilateralism - the climate policy of the EU.

However, there is no encouragement to third countries to follow the EU in adopting something similar to the Anti-Coercion Regulation - indeed the opposite.

21. Regulation (EU) 654/2014 available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02014R0654-20210213&from=EN>

22. Regulation (EU) 2023/2675 on the protection of the Union and its Member States from economic coercion by third countries available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L\\_202302675&qid=1709659649417](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202302675&qid=1709659649417)

23. Not yet adopted. The latest draft of March 2024 is available at [https://www.europarl.europa.eu/meetdocs/2014\\_2019/plmrep/COMMITTEES/CJ33/AG/2024/03-20/1298958EN.pdf](https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/CJ33/AG/2024/03-20/1298958EN.pdf)

24. Regulation (EU) 2022/2560 on foreign subsidies distorting the internal market available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R2560&qid=1694701251914>

25. Regulation (EU) 2023/956 establishing a carbon border adjustment mechanism available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32023R0956&qid=1694701656964>

# Climate Action

Climate action is the area where multilateral cooperation is most vital and the EU, as one might expect, has been the leader in taking climate action itself and in promoting climate action multilaterally.

The EU (together with its Member States) has been a key driver of action under the United Nations Framework Convention on Climate Change ("UNFCCC") and has been the most constructive participant in its Conferences of the Parties (COPs), volunteering the furthest-reaching commitments for itself and concessions to other parties and offering the most in financial assistance to developing countries to assist them in not only reducing or avoiding emissions (mitigation), but also in dealing with the consequences (adaptation).

The first attempt to implement the UNFCCC was with the Kyoto Protocol that was concluded in 1997 but only entered into force in 2005. It imposed reduction commitments on developed countries together with an obligation to help developing countries adapt. It included a complex set of "market-based mechanisms" allowing Joint Implementation of developed country commitments and a Clean Development Mechanism whereby emission reductions in developing countries would give rise to credits that could be purchased by developed countries to set off against their reduction commitments.<sup>26</sup> The EU implemented the Kyoto Protocol enthusiastically even before its entry into force, setting up in 2003 its emissions trading scheme ("ETS") in order to realise its commitments and accepting international credits issued by other parties.<sup>27</sup> The US President signed the Kyoto Protocol but the US Congress refused to ratify it on the grounds that it would disadvantage the US.<sup>28</sup> Amongst other developed countries, compliance was mixed, with Canada withdrawing when it realised that it would not comply.<sup>29</sup> The system of international credits was destroyed by widespread cheating and an absence of enforcement.

Despite the adoption of a second more ambitious commitment period in 2015 (ratified by the EU<sup>30</sup>), the Kyoto Protocol was considered a failure and was effectively replaced by the Paris Agreement in 2016.<sup>31</sup>

The Paris Agreement is based on voluntary "nationally-determined contributions" whereby each party is able to determine for itself the non-binding commitments that are appropriate to its development status and responsibility for carbon emissions. Importantly, both developed and developing countries are called on to make nationally-determined contributions but those made vary enormously. The nationally-determined contributions are however the subject of periodic review and are intended to be revised upwards progressively.<sup>32</sup> The EU's are the most ambitious.

The EU has set itself a target of net zero carbon emissions in 2050 with an intermediate target of 55% reduction of over 1990 levels by 2030 in its legally-binding Climate Law.<sup>33</sup> To achieve this, it has severely increased the planned decreases in the "cap" on emissions imposed via the ETS.

The increasingly stringent EU climate policy is contributing to a competitiveness crisis that can endanger the public acceptance of the policy. The price of ETS allowances has increased from very low levels (for a long time it was below €10/tonne CO<sub>2</sub>e) to approaching €100/tonne CO<sub>2</sub>e. The price of ETS allowances will have to increase much further if it is to provide sufficient incentives to reach the EU's emission reduction goals.

26. The Kyoto Protocol can be accessed at <https://unfccc.int/resource/docs/convkp/kpeng.pdf>. Joint Implementation is provided for in its Article 3 and the Clean Development Mechanism is set out in its Article 12.

27. Directive 2003/87/EC. The ETS has been the subject of constant refinement and development over the years and the latest text with an indication of all the amendments can be found at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02003L0087-20230605&qid=1712139664883>.

28. The US Senate had passed the Byrd-Hagel resolution that declared that the United States should not be a signatory to any protocol that mandated the reduction of greenhouse gas emissions unless it also required reductions from developing countries during the same time period.

29. See Depository Notification C.N.796.2011.TREATIES-1 dated 16 December 2011 available in English (<https://treaties.un.org/doc/Publication/CN/2011/CN.796.2011-Eng.pdf>) and in French (<https://treaties.un.org/doc/Publication/CN/2011/CN.796.2011-Frn.pdf>).

30. Council Decision (EU) 2015/1339 of 13 July 2015 on the conclusion, on behalf of the European Union, of the Doha Amendment to the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015D1339&qid=1712140167280>

31. Concluded by the EU with Council Decision (EU) 2016/1841 of 5 October 2016 which recognised that the Kyoto Protocol regime would not be continued. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016D1841&qid=1712141349973>

32. The Paris Agreement is available at [https://unfccc.int/sites/default/files/english\\_paris\\_agreement.pdf](https://unfccc.int/sites/default/files/english_paris_agreement.pdf).

33. Regulation (EU) 2021/1119 - <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32021R1119&qid=1711987480889>.



This is leading to "carbon leakage" whereby the price impact arising from the need to purchase and surrender ETS allowances leads to carbon intensive production moving outside the EU. That is not only painful but also counterproductive, since emission standards are generally lower outside the EU and that, combined with transport costs, increases global emissions.

To deal with this dilemma, the EU has introduced what it calls a Carbon Border Adjustment Mechanism ("CBAM") that will impose on certain carbon-intensive imports a charge to compensate for that borne by EU producers. The name itself recognises the problem by recalling the WTO principle that internal taxes (such as Value Added Tax) may be adjusted at the border by taxing imports and exempting exports. ETS allowances are however explicitly not a tax but a cost of production (and is not paid by companies that manage their affairs so as to avoid emitting more than can be covered by their free allocations). The WTO has traditionally not allowed imports to bear a charge to compensate for differences in costs of production – known to economists as comparative advantage. Indeed, if an adjustment can be imposed for differences in carbon costs, why could not also charges be imposed to compensate for other environmental costs, social costs, transport costs and even wage costs?

The WTO does allow derogations for certain specific good reasons (including protecting the environment) but these must not constitute unjustified restrictions on trade or arbitrary discrimination.

The CBAM is intended to equalise the carbon price borne by all the covered products when imported into the EU. Installations throughout the world are told to monitor, verify and report their emissions according to EU rules and importers must declare the embedded carbon content of products and buy CBAM certificates to compensate for the difference in carbon price borne by those products compared to EU products.

That stands in contradiction to what the EU agreed to in the Paris Agreement – that each country should determine its own contribution to climate action – taking into consideration its possibilities and responsibility. Whether CBAM is "justified" and not a disguised restriction on trade may have to be determined in WTO dispute settlement.<sup>34</sup>

Certain features of CBAM reflect a new kind of multilateralism. The EU is going to extraordinary lengths to adapt a unilateral measure (its system of reporting and emission allowance trading established under the ETS) to circumstances prevailing outside the EU. CBAM is an immensely complex instrument designed to equalise carbon prices and avoid discrimination. It requires monitoring, reporting and verification of emissions throughout the world in order to measure the precise embedded carbon content of imports and to impose a corresponding charge equivalent to that borne in the EU. It also allows a rebate for the carbon price in the country of production.

This is exceedingly complicated, and one can doubt whether it is feasible. The simple solution would have been to replace the ETS with a carbon tax that could legitimately also be imposed on imports. However, the EU has always sought to avoid imposing a tax since this would require unanimity amongst its Member States and could have led to blockage and low ambition.

The preferred outcome of the attempt to introduce CBAM may well be a negotiated multilateral solution. Indeed, the recitals speak of the EU setting up a "Climate Club" of countries with equivalent emission standards. The Regulation itself has built-in flexibility to allow adaptation through agreements with third countries. This may be an example of a unilateral measure that is designed to transform itself into a multilateral solution.

34. For a discussion of the WTO issues see Marín Durán G. SECURING COMPATIBILITY OF CARBON BORDER ADJUSTMENTS WITH THE MULTILATERAL CLIMATE AND TRADE REGIMES. *International and Comparative Law Quarterly*, 2023;72(1):73-103. doi:10.1017/S0020589322000501

# Conclusion

The way in which countries interact is evolving and the traditional multilateral approach built on consensus is giving way to greater use of assertive and unilateral measures. The EU is not immune from this trend. Of course, unilateral measures create disorder and multilateral solutions based on international cooperation are to be preferred if they are possible.

The Hague Conventions on the peaceful settlement of disputes arose out of great power rivalry in the 19<sup>th</sup> Century. The League of Nations arose out of the First World War. The United Nations and the Breton Woods institutions (including the GATT) out of the Second World War.

We should all hope that we do not need another world war to restore international cooperation and multilateral solutions to common problems.

However, a continuation of the current trend to unilateralism – in an increasingly multipolar world – will inevitably lead to diminishing returns and hopefully to a realisation that there is a better way of doing things – even if it is slow and frustrating.

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