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THE EUROPEAN UNION FACES THE CRISIS OF THE WTO DISPUTE SETTLEMENT SYSTEM: TENSIONS BETWEEN MULTILATERALISM AND UNILATERALISM IN INTERNATIONAL TRADE LAW

SUMMARY: 1. Background. The blockage of the Appellate Body. – 2. The EU's reaction at multilateral level: the proposals for a reform of the WTO dispute settlement system. – 3. The EU's reaction at bilateral level: the interim arrangements for a trade appeal arbitration. – 4. The bilateral approach turns multilateral: the “Multi-Party Interim Appeal Arbitration Arrangement” (MPIA) of 27 March 2020. – 5. The EU's reaction at unilateral level: the Commission's proposal for modification of the regulation on trade enforcement and the protection of the EU's trade interests. – 6. Conclusions. International trade relations towards a new era of unilateralism?.

1. *Background. The blockage of the Appellate Body*

This paper explores the reaction that the European Union has put in place in order to face the crisis of the Appellate Body, one of the pillars of the complex mechanism that governs the settlement of international trade disputes in the framework of the World Trade Organization (WTO). Objective of the Union's action is to preserve as much as possible the rule-based character of the system in a very difficult situation where multilateral trade relations based on shared and mutually accepted rules appear in jeopardy. Before going into details on the Union's initiatives, it is necessary to establish the background of the crisis and briefly analyze how the situation progressively deteriorated to the point of making it impossible for the Appellate Body to fulfill its functions.

The World Trade Organization (WTO) system for the settlement of international trade disputes, as is well known, is based on a quasi-judiciary mechanism put in place by the Dispute Settlement Understanding (DSU, Annex 2 to the Final Act of the 1994 Marrakesh Conference). The DSU establishes an integrated procedure for trade dispute settlement, with a substantial evolution from the predominantly diplomatic system of the General Agreement on Tariffs and Trade (GATT) to a quasi-judicial system¹ where the consensus requirement

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¹ See G. SACERDOTI, *The WTO Dispute Settlement System: Consolidating Success and Confronting New Challenges* (June 1, 2016), Bocconi Legal Studies Research Paper No. 2809122; G. SACERDOTI, *The Dispute*

for the adoption of panel and Appellate Body reports by the Dispute Settlement Body (DSB) is reversed to a negative consensus (consensus is required for the DSB to reject the report), thus making the adoption practically automatic. More specifically, under the DSU's provisions, panels of experts are established, upon request by the complaining party after a preliminary consultations stage, to examine disputes; their reports, in order to produce effects for the parties to the disputes, have to be approved by the Dispute Settlement Body (DSB, composed by all the Contracting Parties as provided for in Article 2 of the DSU, in conjunction with Article IV of the WTO Agreement) with negative consensus, as mentioned above. The DSU has introduced also a second level of adjudication with the establishment of an Appellate Body (AB)², a permanent adjudicatory body composed of seven experts in international trade law appointed by the DSB for a four-year term renewable only one more time. As with the panel reports, the appellate report has to be adopted by the DSB by reverse consensus (the report is approved unless the DSB decides by consensus to reject it) in order to become binding for the parties to the dispute. As it appears evident even from this brief description, there is very little flexibility in this system: The WTO Member States are not allowed to subtract themselves from a dispute settlement procedure if the preliminary consultations fail; in addition, the mechanism of reverse consensus makes the rejection of a panel's or Appellate Body's report very unlikely³. In such a situation, the system has indeed acquired the nature of a compulsory jurisdictional⁴ procedure, where the parties are bound to take part in the procedure and must face the consequences if they lose. In this latter case a larger margin of flexibility is allowed to the losing party, ranging from full compliance with the recommendations of the reports (that through the adoption by the DSB become recommendations by all the WTO Members), to compensation, to the decision of non-compliance and the consequent possibility of the adoption of countermeasures in the form of suspension of trade concessions by the winning party under the supervision of the DSB. Despite the said flexibility, the measures adopted by the parties at the implementation stage can also be challenged in a dispute settlement procedure, under Articles 21 and 22 of the DSU.

There is only one "weakness" in the system and it is the provision, under Article 2(4) of the DSU, that «Where the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus», as specified in fn. 1: «DSB shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision». In the absence of any special procedure for the appointment of AB members – as Article 17 (2) of the DSU only states that the DSB «shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once»

Settlement System of the W.T.O.: Structure and Function in the Perspective of the First 10 Years (March 2007), Bocconi Legal Studies Research Paper No. 07-03; G. SACERDOTI (Ed.), *The WTO at Ten: The Contribution of the Dispute Settlement System*, Cambridge, 2006.

² See E. BARONCINI, *Il funzionamento dell'Organo di appello dell'OMC: bilancio e prospettive*, San Lazzaro di Savena, 2018; M. VELLANO, *L'organo d'appello dell'OMC*, Napoli, 2001.

³ See J.H.H. WEILER, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, in *Jour. W. Trade*, 2001, p. 191: According to this author, «the Appellate Body is a court in all but name» (p. 201).

⁴ The mechanism is considered as "quasi-jurisdictional" because the final and binding decision that concludes the procedure is, formally, not the panel or AB report, but rather the adoption of the report by the DSB. In other words, the final decision is still an emanation of the Contracting Parties.

– the appointment or reappointment decisions shall be taken by the DSB by consensus as any other decisions.

Under the Trump administration, the United States has been blocking the appointment and reappointment of AB members for more than two years, making use of the veto (or, more correctly, objection) power conferred on each Member by the cited provisions. The result is that on December 10, 2019, the Appellate Body found itself with only one member left, thus falling under the required quorum of at least three members, necessary to hear appeals⁵, and making it impossible for the body not only to hear new appeals, but also to conclude the pending ones⁶.

The blockage of the AB is bound to have serious consequences for the multilateral trade governance. Under the DSU, in fact, the panel reports become final and may be submitted to the DSB for approval only if none of the parties file notice of appeal within 60 days since the circulation of the report (Article 16(4) of the DSU). The DSB is therefore allowed to approve the panel report only if no appeal is requested. With a deadlocked Appellate Body, losing parties might be encouraged to appeal the panel report, and the appeal will “fall into the void”, thus leaving the dispute in a limbo, where it will stay indefinitely, also because, under Article 16(4) of the DSU, panel reports «shall not be considered for adoption by the DSB until after completion of the appeal»⁷.

In order to better understand the multilateral reaction to this dangerous deadlock, and the EU’s contribution to the elaboration of possible reforms of the system, it is necessary to briefly consider the reasons that, according to the Trump administration, led the U.S. to use such extreme measures in order to block the WTO dispute settlement system⁸. Previously, under the Bush and Obama administrations, the U.S. had a few times blocked the reappointment of AB members, expressing dissatisfaction on how they had operated. The most significant case happened in May 2016, when the Obama administration refused reappointment to an AB member⁹. Only in November 2016 was the DSB able to appoint a new member of the Appellate Body¹⁰. In this and other cases, the criticism expressed by the U.S. representatives was addressed specifically towards the persons who were to be

⁵ Writing in 2018, when the numbers were not yet as dramatic as they are today, E.-U. PETERSMANN noted that as a consequence of the US action, the Appellate Body’s membership was no longer «broadly representative of membership in the WTO», in violation of Article 17(3) DSU, while the workload made the prompt settlement of trade disputes virtually impossible (*Between ‘Member-Driven’ WTO Governance and ‘Constitutional Justice’: Judicial Dilemmas in GATT/WTO Dispute Settlement*, in *Jour. Int. Econ. Law*, 2018, p. 103 ff., at 103).

⁶ The two members whose term of office expired on December 10, 2019 (Mr. Ujal Singh Bhatia from India and Mr. Thomas R. Graham from the U.S.), will only finish the work on those appeals for which oral hearings have been completed (see the letter addressed by Mr. Graham to the President of the DSB Ambassador Walker from New Zealand, on December 3, 2019, doc. WT/DSB/79). This leaves about ten appeals still pending in the void.

⁷ For comments, see E.-U. PETERSMANN, *Op. cit.*, p. 103.

⁸ See E. BARONCINI, *Attacco ai Magnifici Sette: il blocco nella composizione dell’Organo d’appello dell’OMC. Genesi e possibili soluzioni*, in *Archiv. giur.*, 2018, p. 35 ff., for ample and documented details on the deep roots of this crisis and possible avenues of reform.

⁹ For details and comments, see G. SACERDOTI, *The WTO Dispute Settlement System and the Challenge to Multilateralism: is the Rule of Law in Peril?*, in *Bocconi Legal Studies Research Paper*, No. 3343455, 2018.

¹⁰ See H. S. GAO, *Disruptive Construction or Constructive Destruction? Reflections on the Appellate Body Crisis*, in Ch. LO, J. NAKAGAWA, and T. LIN (eds.), *The Appellate Body of the WTO and Its Reform*, Springer, Singapore, 2019, p. 215-238; the author also provides additional details on the subsequent events that ultimately led to the blockage of the AB.

reappointed for a second term in office, who allegedly¹¹ had interpreted trade agreements in a way that led to restrictions of trade rights and expansion of trade obligations upon members. But such criticism was only the symptom of a more widespread uneasiness of the US towards the system, uneasiness that, beyond the contingencies of the specific situation, is deeply rooted in the often difficult relationship the U.S. legal system has with international adjudication¹². The approval of the WTO Agreements in 1994, though largely favored by the administration of the time¹³, was the object of harsh discussions in Congress, for the possible impact of the agreements, and especially of the dispute settlement mechanism¹⁴, on U.S. sovereignty, to the point that it was proposed to establish a commission of federal judges to review WTO panel reports that were adverse to the U.S. and report back to Congress if they were considered contrary to criteria¹⁵ that largely reflect the present concerns voiced by the Trump administration.

In addition, it must be noted that the American dissatisfaction with the way the AB handled cases where the US was a party started with the rise of China as a global trading power, especially when the US happened to lose cases at the WTO regarding the so-called “trade remedies”, namely antidumping, countervailing duties and safeguard measures against what the US administration considers “unfair competition” from Chinese products¹⁶.

The subsequent crisis culminated in 2018, when the Trump administration issued an articulated policy document (the *2018 President's Trade Policy Agenda*¹⁷) on the administration's vision of the trade policy, aggressively oriented towards the advancement of American interests in world trade¹⁸. The U.S. Trade Policy Agenda tends to prefer bilateral agreements rather than multilateral relations, and stresses the need to enhance the application of unilateral enforcement measures (under Section 301 of the U.S. Trade Act of 1974). On the WTO dispute settlement system, the Trade Policy Agenda expresses the concern of the administration over some issues emerging from the AB's practice: «Instead of serving as a negotiating forum where countries can develop new and better rules, it [the WTO] has

¹¹ In the WTO system, decisions by the panels and AB are collective, meaning that it is impossible to know the vote or the contribution to the ruling of an individual member.

¹² There are many examples of such an attitude, which is rooted in the absolute centrality of the Constitution and of the domestic – state and federal – judiciary in the US legal system: For an overview, see A. MIGNOLLI, *Uno sguardo in chiave comparativa: l'azione esterna nel sistema federale degli Stati Uniti d'America*, in A. MIGNOLLI, *L'azione esterna dell'Unione europea e il principio della coerenza*, Napoli, 2009, p. 435-502.

¹³ To the point that the U.S. has been defined as «one of the original architects» of the WTO and of its dispute settlement system (D. C. K. Chow, I. M. Sheldon, W. McGuire, *The Revival of Economic Nationalism and the Global Trading System*, in *Cardozo Law Review*, 2019, p. 2133 ff., at 2167).

¹⁴ See J. J. JACKSON, *The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results*, in *Col. Jour. Trans. Law*, 1997, p. 157 ff., who draws an interesting picture of the issue of sovereignty in relation to international treaty obligations and international adjudication in the congressional debate.

¹⁵ The commission was conceived to evaluate whether the panel had: 1) exceeded its authority or terms of reference; 2) added to the obligations or diminished the rights of the United States; 3) acted arbitrarily or capriciously or engaged in misconduct; or 4) deviated from the applicable standard of review (see J. J. JACKSON, *The Great 1994 Sovereignty Debate*, cit., p. 187). The consequence of multiple cases of negative review by the commission could lead to the ultimate consequence of the withdrawal of the U.S. from the WTO. The establishment of the commission was never approved by Congress.

¹⁶ G. SHAFFER, *A Tragedy in the Making? The Decline of Law and the Return of Power in International Trade Relations*, in *Yale Jour. Int. Law Online*, 2019, p. 1, at 4.

¹⁷ 2018 President's Trade Policy Agenda.

¹⁸ For an overview of U.S. trade policy in the last two decades and the changes produced by the Trump administration, see Ch. O. TAYLOR, *Twenty-First Century Trade Policy: What the U.S. Has Done and What It Might Do*, in *Currents International Trade Law Journal*, 2019, p. 49 ff.

sometimes been dominated by a dispute settlement system where activist ‘judges’ try to impose their own policy preferences on Member States»¹⁹. From this premise, the presidential Agenda identifies some issues of concern, that can be divided into two large categories: A first category includes all the complaints about the AB’s interpretative function with respect to the covered agreements, which in the U.S. view is in contradiction with the exclusive power of authoritative interpretation attributed on the Members under Article IX(2) of the WTO Agreement. The U.S. blames the AB for “making law” through its reports, which tend to autonomously interpret WTO Agreements (the “covered Agreements”) with the effect of adding to or diminishing member States’ rights and obligations under the Agreements, thus disregarding the rules as set by WTO Members and the principle of a “Member-driven” system²⁰. Evidence of such a “law-making” action lays in the claim that AB reports are entitled to be treated as precedents²¹ and on the practice of issuing *obiter dicta* or *advisory opinions*, which the U.S. considers inconsistent with the requirement that appeals should be limited to issues of law covered by the panel report and legal interpretations developed by the panel (Article 17(6) of the DSU). In the U.S. view, *obiter dicta* are arguments and additional interpretations that are not necessary for resolving the dispute²². Another controversial and sensitive issue is the interpretation and review by the AB of the meaning of a Member’s domestic measure as a matter of law. The AB – the U.S. claims – should only acknowledge that this is a matter of fact, already settled by the panel, and as such not a subject for AB review, as the latter should be limited to issues of law.

The second category of concerns is more formal and operational: The U.S. criticizes the almost systematic infringement by the AB of the 90-day deadline established for appeals by the DSU, and the practice to invoke rule 15 of the AB’s Working Procedure²³ in order to allow continued service with the AB for members whose term of office is concluded, a

¹⁹ 2018 President’s Trade Policy Agenda, cit., p. 2.

²⁰ For an analysis of this issue, see H. GAO, W. ZHOU, ‘Overreaching’ or ‘Overreacting’? Reflections on the Judicial Function and Approaches of WTO Appellate Body, in *Jour. W. Trade*, 2019, pp. 951 ff.

²¹ This assumption is disputed and disputable and is probably another testimony of the difficulty the U.S., with a legal system largely based on the Common Law and the *stare decisis* rule, has in confronting a system where the judges have an independent power of interpretation of the law and whose rulings (the reports), although only binding on the parties to the dispute, might constitute a reference for subsequent panels that have to interpret the same provision in similar cases. There is no *stare decisis* rule in the WTO system, as there is no such rule in the EU system, but in both systems the supreme judicial body holds the role of a point of reference. As it has been well explained, the AB’s reports can be considered as “jurisprudence”, rather than as “precedents”. But again, the US legal system is not familiar with this distinction (see H. GAO, *Disruptive Construction*, cit., p.220 ff.). Rachel Brewster observes, in this respect, that the AB does not perform “constitutional review” in the same way that U.S. lawyers understand it, meaning that the AB does not have final say on the meaning of trade law (R. BREWSTER, *Analyzing the Trump Administration’s International Trade Strategy*, in *Fordh. Int. Law Jour.*, 2019, p. 1419, at 1427). See also J. BACCHUS and S. LESTER, *The Rule of Precedent and the Role of the Appellate Body*, in *Jour. W. Trade*, 2020, p. 183 ff.

²² On the issue of *obiter dicta* and its close connection with the problem of the existence of a *stare decisis* rule in the WTO dispute settlement system, see H. GAO, *Dictum on Dicta: Obiter Dicta in WTO Disputes*, in *World Tr. Rev.* (2018), p. 509-533. The author argues that the WTO system, being rigidly based on the “covered agreements”, is to be considered as a Civil Law and not as a Common Law legal system. For this reason, there is no room for a *stare decisis* rule. As a consequence, the problem of *obiter dicta* is in reality a non-problem, since no binding effect can be attributed to the AB’s rulings and *dicta* beyond the parties to the dispute, with the exception of a general “jurisprudence” and reference effect, as explained in fn. 21, above.

²³ «A person who ceases to be a Member of the Appellate Body may, with the authorization of the Appellate Body and upon notification to the DSB, complete the disposition of any appeal to which that person was assigned while a Member, and that person shall, for that purpose only, be deemed to continue to be a Member of the Appellate Body».

practice that the Administration considers an abuse of a rule conceived only for exceptional cases and very short periods of time²⁴.

This is not the place to analyze in a critical perspective the merits and the consequences of the U.S. positions as it has already been done by prominent scholars²⁵, but to consider the reactions put in place by the other WTO Members and in particular the role of the European Union in trying to preserve the functioning and effectiveness of the multilateral system of international trade and, as will be later explained, its own interests.

2. The EU's reaction at multilateral level: the proposals for a reform of the WTO dispute settlement system

In a recent paper Joost Pauwelyn²⁶ analyzed four likely scenarios that could arise as consequences of the AB blockage. The first one is the already described default risk of appeals “into the void”, where the panel report cannot be approved, and the dispute remains unsolved, unless the parties decide, with the members of the DSB, to adopt them despite the wording of Article 16(4) of the DSU. In this latter case, which can be described as a return to the old GATT system, the panel report should be adopted by consensus, i.e. with the (unlikely) agreement of the losing party. If the panel report is not adopted by consensus, the appeal will fall “into the void”, without any possible binding solution to the dispute. The second scenario is the possibility of agreements between the parties to a dispute not to appeal and to accept the adoption of the panel report by negative consensus. Such an agreement could be signed for a single dispute before the circulation of the report, or for all future disputes between the same parties, and it is very similar to an arbitration agreement, as it confers on the panel the power to give a final solution of the controversy. The third scenario is provided by Article 25 of the DSU, which allows Member States to establish «expeditious arbitration within the WTO as an alternative means of dispute settlement». As this is one of the paths the EU is following to address this crisis, it will be discussed extensively later. A fourth scenario, evocatively called «pulling the plug»²⁷, is probably the most attractive for the U.S., at least according to the views – expressed by USTR (U.S. Trade Representative) Robert Lighthizer in multiple occasions – that the WTO trade dispute settlement system should be an element in a political negotiation between the parties to the dispute, and only a means to help parties solve their dispute, as stated by the letter of the DSU in Article 3(7). In this scenario, panel reports are neither appealed into the void, nor adopted. They remain floating, depriving the system of all binding character, but can be used by the parties as the basis for further negotiations and will thus become nothing more than the report of a conciliation commission. Under this scenario, even more than in the others, the system would dangerously shift towards a power-driven rather than rule-driven process. It is evident that powerful economies will have much more bargaining power and leverage than small and less developed countries in order to solve trade disputes to their own advantage.

²⁴ See G. SACERDOTI, *The WTO Dispute Settlement System and the Challenge to Multilateralism*, cit., for an extensive criticism of this US position.

²⁵ See, among many, the studies by E. BARONCINI, H. GAO, E.-U. PETERSMANN, G. SACERDOTI, cited above; A. BAHRI, ‘*Appellate Body Held Hostage: Is Judicial Activism at Fair Trial?*’, in *Jour. W. Trade*, 2019, pp. 293 ff.. They all agree on the dangerous consequences of the direct attack brought by the US to the cornerstone of the multilateral governance of international trade, as the dispute settlement system is widely considered.

²⁶ J. PAUWELYN, *WTO Dispute Settlement Post 2019: What to Expect?*, in *Jour. Int. Econ. Law*, 2019, p. 297 ff.

²⁷ J. PAUWELYN, *WTO Dispute Settlement Post 2019*, cit., p. 313.

That the crisis would not be smoothly solved anytime soon was confirmed by the DSB meeting held on January 27, 2020, where the EU and a large number of other WTO Members again proposed the adoption of a decision to start the appointment process of the AB members in replacement of those whose term of office had expired²⁸. It was probably just a due action on the part of those Members which strongly support the effectiveness of the system, as it is likely that no one really expected the U.S. to agree to the proposal. The statement by the U.S. representative was, in fact, very clear in rejecting it: «As we have explained in prior meetings, we are not in a position to support the proposed decision. The systemic concerns that we have identified remain unaddressed». The U.S. reiterated its complaint that the AB has been overreaching and abusing of its authority and stressed the view the administration has of the WTO dispute settlement system: an instrument to assist the parties in finding a solution to their dispute. Between the lines, it is possible to read a clear preference for diplomatic, political and bilateral methods for the solution of disputes²⁹.

The statement by the American representative that the U.S. concerns have remained unaddressed is however not entirely correct.

In November 2018, a communication by the EU³⁰ supported by other WTO Members³¹ was circulated among the Members of the WTO, to be discussed during the WTO General Council meeting of 12-13 December 2018, in an effort to suggest possible solutions to the matters raised by the U.S. government³². The communication, without directly mentioning the U.S., suggested some amendments to the DSU that could address the major issues that had been put forward against the current functioning of the AB, including a more transparent and stricter application of rule 15 on the extension of terms of office for AB members – that should be limited to what is strictly necessary to conclude appeals for which hearings have already been held –; more stringent rules for the issue of the 90-days deadline for appeals; the limitation of matters that can be addressed in appeal, in order to restrict the scope for *obiter dicta*; and the exclusion from the matters that can be discussed in appeal of the panel findings with regard to the meaning of the municipal measures of a party, with the exception of those panel findings that address the legal characterization of domestic measures under the covered agreements.

The proposal included some additional suggestions in a separated communication supported by a smaller number of WTO Members³³, aimed at enhancing the independence of AB members by introducing an extended single term of office (6-8 years) without the possibility of reappointment and at improving the efficiency of the AB by increasing the number of members from 7 to 9. The described proposals led, after further negotiations, to a draft decision³⁴, presented by Ambassador David Walker of New Zealand as Chairman of

²⁸ WT/DSB/W/609/Rev.16, 27 January 2020, *Appellate Body Appointments*.

²⁹ Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, January 27, 2020.

³⁰ With the full support of the European Parliament: see European Parliament Resolution of 28 November 2019 on the crisis of the WTO Appellate Body (2019/2918/RSP).

³¹ WT/GC/W/752, 26 November 2018, communication to the General Council circulated at the request of the delegations of European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore and Mexico.

³² For details on the negotiations and the different proposals, see G. DEEPAK, *WTO Dispute Settlement: The Road Ahead*, in *NY Univ. Jour. Int. Law and Policy*, 2019, p. 981 ff.

³³ WT/GC/753, 10 December 2018, circulated at the request of the European Union, China, India and Montenegro.

³⁴ WT/GC/W/791 of 28 November 2019.

the DSB, at the 9 December 2019 meeting of the General Council of the WTO. The draft decision, which had the support of the EU's representatives, did not propose to amend the text of the DSU as the EU communication did, but suggested to adopt a declaration on the authoritative interpretation of the relevant texts, aimed at clarifying the most controversial points. This draft decision took many suggestions from the EU's documents, going even further in meeting the requests expressed by the U.S.³⁵, but no consensus was reached³⁶. The impression is that the U.S. Administration is pursuing a wider agenda of reforms of the WTO and its rule-based international trading system, in order to stress the role of the Organization as a flexible negotiating forum. In this context, the AB blockage is used as leverage to trigger more comprehensive negotiations with a wider scope than minor adjustments to the dispute settlement procedures³⁷. And it's clear to everyone how difficult and lengthy a process a comprehensive reform of a global institution like the WTO can be.

3. *The EU's reaction at bilateral level: the interim arrangements for a trade appeal arbitration*

Against this challenging background, the EU's reaction pursued, as described in the previous paragraph, the multilateral approach as a first step in the direction of saving the existence of a rule-based dispute settlement system. In the prevision of the failure, in the short term at least, of this approach, the EU started acting on the next-best option, the bilateral one, in application of the opportunity provided by Article 25 of the DSU of establishing arbitrations between WTO Members as an alternative means of dispute settlement³⁸. Arbitrations under Article 25 have the advantage of being embedded in the legal framework of the WTO and subjected to the same rules for the monitoring of compliance and of compensation and suspension of concessions (Articles 21 and 22 of the DSU), as ordinary panel and AB reports, as stated in Article 25(4) of the DSU. Of the establishment of an arbitral procedure the other WTO Members have to be informed, and arbitral awards have to be notified to the DSB and other relevant committees within the WTO. The DSB has no power of approval of the awards, since their binding nature derives from the agreement between the parties to the dispute and not from the DSU, but only the power to

³⁵ Especially on the issues related to the scope of appeals: The meaning of municipal law is completely excluded from the appeal; no advisory opinion or *obiter dicta* can be included in the appellate report; no precedent is created through WTO dispute settlement proceedings.

³⁶ It is worth quoting the very harsh statement by the EU Portuguese Presidency at the General Council on December 9, 2019, a striking shift from the conciliatory and diplomatic attitude demonstrated just a month before when a compromise still appeared possible: «Let us be clear about what in fact will happen in two days. The actions of one Member will deprive other Members of their right to a binding and 2-step dispute settlement system even though this right is specifically envisaged in the WTO contract. The actions of one Member will have that result for the rights of all other Members» and «While the European Union itself is the world's largest trading block, it will not support, and will not condone, a system slipping into power-based economic relationships». At the end of his statement, the EU's ambassador concludes opening the way to alternative solutions: «We will therefore continue preparing contingency measures that would apply in case the appointments remain blocked. We owe it to our citizens and our businesses, because it is them, ultimately, that benefit from the system» (EU Statement by Ambassador João Aguiar Machado at the General Council meeting, 9 December 2019).

³⁷ One of the issues at stake here is the qualification of “developing countries” in the WTO, especially the position of China.

³⁸ See E. BARONCINI, *Attacco ai Magnifici Sette*, cit. and *Il funzionamento dell'Organo d'appello*, cit.

monitor the implementation of the award and supervise the possible cases of compensation or suspension of concessions deriving from the implementation of the award. The disadvantage of this option is the fact that it is bilateral and requires an *ad hoc* agreement between the parties to each dispute. The EU tries to overcome the latter flaw by establishing appeal arbitrations that start automatically upon request by one of the parties to the dispute by the means of arbitration agreements that cover all future appeals between the contracting parties in relation to a specific dispute, on the basis of a general commitment to not initiate AB appeals (into the void). In this way, the automaticity of the appeal is guaranteed, although limited to the specific dispute the arbitration agreement refers to.

The first draft for bilateral agreements on an interim appeal arbitration pursuant to Article 25 of the DSU was circulated by the EU among WTO Members in May 2019³⁹, and in the following months arrangements were concluded with Canada in July⁴⁰ and with Norway in October⁴¹.

In the following pages I will analyze the principles that the Union has repeatedly stressed as fundamental in the WTO dispute settlement system and the procedures established for the interim arbitral appeals in relation to the existing DSU system.

The EU made it clear from the beginning that there are three cornerstones of the WTO dispute settlement system that cannot be changed or discussed⁴²: the binding character of the dispute settlement system; two levels of adjudication; independence and impartiality of the appellate review⁴³. A fourth principle is worth noting as well, and it is the interim nature of all solutions that can be adopted in the present extraordinary circumstances. The premise is that it is necessary to go back to a fully functioning AB, which represents the only way to guarantee a truly multilateral, rule-based system for the settlement of international trade disputes and the only way to preserve the backbone of the multilateral trade regime. In this perspective, the agreements make it clear that the arbitration scheme will stop being operative the moment the AB is ready to resume its functions.

In order to preserve the first three principles, the solution provided by Article 25 of the DSU is probably the best, as it allows the establishment of arbitral appeals maintaining the two-stage dispute settlement process in place, it is binding under the concluded arrangements between the contracting parties for all future appeals – although subject to the conclusion of *ad hoc* arbitration agreements for each dispute –, and it preserves the independence and impartiality of appellate adjudicators.

The two bilateral arrangements are composed of two separate parts: a communication by the parties to the DSB, by which the parties «envisage» resorting to the interim arbitration arrangement, and establish the principles and criteria thereof; and an annexed agreed procedures for arbitration, to give effect to the communication for a specific dispute: it is the latter that makes the arbitration operative for each single dispute. Once the arbitration agreement for a dispute has been signed and circulated among WTO Members,

³⁹ J. PAUWELYN, *WTO Dispute Settlement Post 2019*, cit., p. 311.

⁴⁰ JOB/DSB/1/Add.11.

⁴¹ JOB/DSB/1/Add.11/Suppl.1.

⁴² See the documents cited above, fn. 40 and 41: «Determined to preserve the essential principles and features of the WTO dispute settlement system which include its binding character and two levels of adjudication through an independent and impartial appellate review of panel reports» (this is the preamble of the Canada agreement, but this premise is the same in all the declarations and proposals circulated by the EU during the last difficult months of negotiations).

⁴³ On these principles, described as “red lines”, see also J. PAUWELYN, *WTO Dispute Settlement Post 2019*, cit. p. 312.

which must happen within 60 days after the date of establishment of the panel (point 4 of the communication), all appeals relative to that dispute will be governed by the arbitration agreement.

According to the arrangements, the arbitrators will be designated by the WTO Director-General from a pool of former AB members, and will follow the same substantive and procedural rules as AB appeals under Article 17 of the DSU. The objective of the arrangement is to put in place a system that can temporarily replace the AB, being as much as possible “institutionalized” in the WTO structure. This is confirmed by Paragraph 2 of the Canada communication⁴⁴: «Under the appeal arbitration procedure Canada and the European Union intend to replicate as closely as possible all substantive and procedural aspects as well as the practice of Appellate Review pursuant to Article 17 of the DSU including the provision of appropriate administrative and legal support to the arbitrators by the Appellate Body Secretariat».

Pursuant to the arrangement, in case of impossibility for the AB to hear appeals because the number of its members has fallen below the minimum threshold of three (the circumstance that triggers the application of the arrangement), any party may initiate an arbitral appeal following the issuance of the panel report to the parties but before it is circulated among DSB members. The request for an arbitration appeal will suspend the panel proceedings and, consequently, the panel report will not be discussed in the DSB. Obviously, the parties take the commitment to not initiate an appeal at the AB (which would fall into the void). The three arbitrators, appointed, as mentioned above, by the Director-General who will choose in a pool of available former AB members, will follow, *mutatis mutandis*, the same rules and procedures as ordinary AB proceedings, including the possibility for third parties that had expressed interest in the case at the panel stage, to make written submissions to the arbitrators.

From a substantial point of view, the arbitral appeal «shall be limited to issues of law covered by the panel report and legal interpretations developed by the panel. The arbitrators may uphold, modify or reverse the legal findings and conclusions of the panel. Where applicable, the arbitration award shall include recommendations, as envisaged in Article 19 of the DSU. The findings of the panel which have not been appealed shall be deemed to form an integral part of the arbitration award» (Paragraph 9 of the agreed procedures). Another interesting provision can be found in Paragraph 8: «Awards of other arbitrators under similar appeal arbitration procedures shall be deemed to constitute Appellate Body reports adopted by the DSB for the purposes of interpretation of the covered agreements». This is another clue of the effort to incorporate arbitral appeal awards in the same body of jurisprudence as AB reports, avoiding as much as possible a disruption in the system. The disruption is produced, however, by the simple fact that this provision only applies to the parties of the interim arbitral appeal arrangements, thus potentially creating differentiated jurisprudential lines for different groups of Members, according to their participation to arbitration schemes. In this perspective, an important feature envisaged by the EU proposal is to create a network of identical arrangements that can replicate the WTO appellate system. In addition, Paragraph 11 of the agreed procedures allows the participation of third parties («Third parties which have notified the DSB of a substantial interest in the matter before the panel pursuant to Article 10.2 of the DSU may make written submissions to, and shall be given an opportunity to be heard by, the arbitrator»). It is not specified that the interested

⁴⁴ I'm referring, for convenience, to the text of the Canada agreement, but the text of the Norway one is identical.

third parties must also be parties of an arbitral arrangement, so it is safe to interpret the provision as permitting the intervention of WTO parties that are not involved in any interim arbitration arrangements. This allows for a wider participation of WTO Members to the proceedings.

This approach is in any case probably the best solution to the current, exceptional circumstances, especially considering the possibility of a long period of suspension of the activity of the AB pending discussions and negotiations involving a difficult general reform of the WTO⁴⁵. There is, nevertheless, at least one major problem: The bilateral nature of the arrangements results in the need to establish a network, the wider the better, of bilateral interim appeal arbitration arrangements with all the WTO Members that might be available to enter into one, both with the EU and *inter se*. This could be not appealing for those States that might consider more useful for their interests to have the possibility to opt for blocking the dispute by appealing into the void, taking advantage of the present circumstances.

4. *The bilateral approach turns to multilateral: the “Multi-Party Interim Appeal Arbitration Arrangement” of 27 March 2020*

In an effort to overcome the problem of the bilateral nature of the scheme described above, the EU has proposed a multilateral (or, more correctly, multi-party, as the scheme is still based on bilateral relations inscribed in a multilateral framework, as will be better explained in the following pages) arrangement for the establishment of interim arbitral appeals between all the WTO Member States who are willing to adhere. In a joint statement⁴⁶, delivered during a meeting in Davos, Switzerland, on January 24, 2020, the EU and representatives from other 16 WTO Members (Australia, Brazil, Canada, China, Chile, Colombia, Costa Rica, Guatemala, Republic of Korea, Mexico, New Zealand, Norway, Panama, Singapore, Switzerland, Uruguay) expressed their commitment to put in place «contingency measures that would allow for appeals of WTO panel reports in disputes among ourselves, in the form of a multi-party interim appeal arrangement based on Article 25 of the WTO Dispute Settlement Understanding, and which would be in place only and until a reformed WTO Appellate Body becomes fully operational»⁴⁷. As it appears with clarity from the Davos statement, a multi-party arrangement should follow the same pattern and the same principles as the bilateral ones.

On March 27, 2020, a joint ministerial statement delivered⁴⁸ by the governments of 16 WTO Members (the same that had shared the Davos declaration with the exclusion of the Republic of Korea and Panama, plus Hong Kong and Singapore), announced the conclusion of a Multi-Party Interim Appeal Arbitration Arrangement (MPIA)⁴⁹ pursuant to Article 25 of the DSU. The arrangement is structured in three parts: A communication, which will be notified to the DSB after the participating Members have completed the national

⁴⁵ Of course, until and if a change of administration in the U.S. leads to a different and more conciliatory approach to the matter.

⁴⁶ Statement by Ministers, Davos, Switzerland, 24 January 2020.

⁴⁷ *Ibidem*.

⁴⁸ Joint ministerial statement (March 27, 2020).

⁴⁹ Multi-Party Interim Appeal Arbitration Arrangement (MPIA).

procedures required by their respective domestic constitutional systems⁵⁰, establishes the commitments of the participating Members and the general criteria and principles at the basis of the MPIA; the attached Annex 1, which provides the “Agreed Procedures for Arbitration under Article 25 of the DSU” in a specific dispute, is a template for the arbitral agreement which will make the whole mechanism operational in a specific dispute; finally, Annex 2 provides the criteria and procedure for the composition of the pool of 10 arbitrators from which the three appeal arbitrators for each appeal case will have to be selected under paragraph 4 of the communication. The latter provision is a major difference from the bilateral arrangements, as the MPIA reproduces the AB system of a permanent pool of persons⁵¹ among whom it is possible to form the panel of arbitrators that will hear a case. The same principles and methods apply as those that govern the selection of the members of an AB division, under Article 17.1 of the DSU and Rule 6(2) of the Working Procedures for Appellate Review (random selection by the WTO Director-General based on rotation).

The agreed procedures for arbitration contained in Annex 1 to the communication constitute the template for the appeal arbitration agreement, necessary to render the appeal arbitration procedure operational in a particular dispute. The appeal arbitration is established by the notification of the agreement entered into by the parties to the dispute to all WTO Members pursuant to Article 25.2 of the DSU within 60 days after the date of establishment of the panel (paragraph 10 of the communication). The arbitration agreement covers all possible appeals arising from a specific dispute, including those related to panel reports issued in compliance proceedings⁵². The actual appeal arbitration shall be initiated by one of the parties to the dispute by filing a notice of appeal with the WTO Secretariat no later than 20 days after the suspension of the panel proceedings, necessary to establish an appeal. The panel suspension happens upon request by the parties before the report is circulated to the rest of the Membership (paragraphs 5 and 16, first sentence, of Annex 1). If no arbitration is initiated by that time, the parties shall be deemed to have agreed to not appeal the panel report, with a view to its adoption by the DSB with negative consensus (paragraph 6 of Annex 1). This commitment excludes the possibility of an appeal into the void and makes it possible to resume the panel proceedings and to conclude the dispute with the adoption of the panel report with negative consensus⁵³.

⁵⁰ For the European Union, the arrangement was approved by the Council on April 15, 2020, by written procedure: see the Press Release.

⁵¹ The 10 arbitrators must be selected by consensus by the participating States among persons who demonstrate expertise in law, international trade and the subject matter of the covered agreements. In addition, they must be persons of «recognized authority», they will be unaffiliated with any government and will not participate in the consideration of any disputes that would create a direct or indirect conflict of interest. It is also required that the composition of the pool of arbitrators «will ensure an appropriate overall balance» (paragraph 4 of the communication). It is not specified what kind of balance is required: Probably the provision refers primarily to criteria such as geography and development status, but it would be appropriate to consider, for example, also gender balance. The candidates nominated by each participating Member will undergo a pre-selection process, which is excluded only for present or former members of the AB (paragraph 1 of Annex 2, fn. 12). It is important to consider that arbitrators must not necessarily be nationals of the MPIA participating Members. It is also worth mentioning that the pool of arbitrators will be periodically recomposed, starting two years after composition, should the interim arrangement need to be in place for a longer period of time due to the persistent blockage of the AB.

⁵² Agreed procedures, paragraph 1 and fn. 4.

⁵³ On this point, see also the fourth recital in the preamble of the communication: «Desiring to also preserve the possibility of a binding resolution of disputes at panel stage, if no party chooses to appeal under this arrangement, through the adoption of panel reports by the DSB by negative consensus».

The MPIA is designed in a way to mirror as much as possible the AB system, including the collegiality of the discussion of a specific case: According to paragraph 5 of the communication, «members of the pool of arbitrators will stay abreast of WTO dispute settlement activities and will receive all documents relating to appeal arbitration proceedings under the MPIA. In order to promote consistency and coherence in decision-making, the members of the pool of arbitrators will discuss amongst themselves matters of interpretation, practice and procedure, to the extent practicable». Paragraph 8 of Annex 1 makes it clear that the designated arbitrators may discuss their decisions relating to the appeal with all of the other members of pool of arbitrators, emphasizing at the same time the principle that they bear exclusive responsibility and enjoy complete freedom with respect to the decision of the appeal they are assigned to. Collegiality and sharing of discussion among all the members of the pool of arbitrators of the legal points addressed in a case are instrumental in guaranteeing one of the main principles at the basis of the MPIA, as stated in the preamble: «Reaffirming that consistency and predictability in the interpretation of rights and obligations under the covered agreements is of significant value to Members and that arbitration awards cannot add to or diminish the rights and obligations provided in the covered agreements».

In the perspective of institutionalizing the arbitration in the WTO framework, the proceedings shall be governed, *mutatis mutandis*, by the provisions of the DSU and other rules and procedures applicable to appellate review, notably the Working Procedures for Appellate Review (paragraph 11 of the agreed procedures).

The scope of the appeal, as in the bilateral arrangements, is limited to «issues of law covered by the panel report and legal interpretations developed by the panel (...). Where applicable, the arbitration award shall include recommendations» (paragraph 9 of the agreed procedures). The following paragraph makes it clear that «the arbitrators shall only address those issues that are necessary for the resolution of the dispute» and that «they shall address only those issues that have been raised by the parties, without prejudice to their obligation to rule on jurisdictional issues». The latter provision, not present in the bilateral arrangements, implies the power (and possibly the obligation) for the arbitrators to rule – also *motu proprio* if necessary – on the interpretation of the communication and of the agreed procedures, when such a ruling is instrumental to the definition of jurisdictional issues.

Unlike the bilateral arrangements⁵⁴, neither the communication, nor the agreed procedures mention the relevance of the arbitral awards for future arbitrations. Probably the provision was considered no longer necessary under the new arrangement, which establishes a pool of arbitrators and a shared discussion of each case to ensure a large measure of coherence and consistency of interpretations. In any case, no effect should be attributed to arbitral awards beyond the parties to the dispute.

The MPIA confirms the required 90-day deadline for the conclusion of appeal arbitrations (Paragraph 12 of Annex 1), and makes it more stringent than it is in the DSU, in particular requesting the arbitrators to «take appropriate organizational measures to streamline the proceedings (...). Such measures may include decisions on page limits, time limits and deadlines as well as on the length and number of hearings required».

The 90-day time-frame can be extended if necessary, but only with the consent of the parties on the basis of a proposal from the arbitrators (paragraph 14 of Annex 1). If the arbitrators foresee that the appeal's duration will extend beyond the 90-day deadline, in order to expedite the proceedings they can propose «substantive measures to the parties, such as

⁵⁴ Paragraph 8 of the bilateral agreed procedures, discussed above.

an exclusion of claims based on the alleged lack of an objective assessment of the facts pursuant to Article 11 of the DSU». The acceptance of such substantive measures, which affect the scope of the appeals from the point of view of an assessment of the facts of the case, depends on the agreement of the parties, which can, in alternative, opt for the concession to the arbitrators of an extension of the deadline⁵⁵. In this way, the parties share responsibility with the arbitrators with respect to the duration of the appeal proceedings.

An interesting provision, in paragraph 7 of the communication, addresses the issue of the administrative structure of the appeal arbitration. It is established that the arbitrators «will be provided with appropriate administrative and legal support» necessary to ensure quality and independence of their work. At the same time, and unlike the bilateral arrangements, the participating Members «envisage that the support structure will be entirely separate from the WTO Secretariat staff». The WTO Director-General will be requested to ensure the availability of such a support structure, which will presumably be established and run at the exclusive expenses of the participating Members. The MPIA is thus destined to become a structure in the structure, connected to the WTO and to its dispute settlement system but at the same time separated and even provided with an independent administrative body within the wider institutional organization of the WTO.

As soon as the MPIA will become operative, it will replace the bilateral arrangements, since both Canada and Norway are parties to the new arrangement. The MPIA is in effect since April 30, 2020, date when the participant WTO Members (at the time of writing 18 plus the EU⁵⁶) have circulated a notification on their intention to resort to interim arbitration under Article 25 of the DSU⁵⁷. Then, on March 13, the EU has nominated Professor Joost Pauwelyn as its candidate for the pool of 10 arbitrators under the MPIA. The intention of the participant States is to have the pool of arbitrators ready by the end of July 2020, so to have the arrangement fully operative and ready to hear appeals.

The MPIA is not the solution to the current crisis, as it was conceived only as a response to the need to «put in place contingency measures (...) in order to preserve the essential principles and features of the WTO dispute settlement system»⁵⁸ and is based on the interim nature of the envisaged scheme, which will remain in effect only until the Appellate Body is again fully functional (paragraph 15 of the communication). It cannot be denied, however, that in the present circumstances the MPIA offers a viable answer to the current crisis, as it allows to preserve the key principles of the settlement of trade disputes as identified by the EU as essential (binding character, two levels of adjudication, independence and impartiality). Its effectiveness, though, depends on the condition that it is accepted by a large number of WTO countries (the presence of China among the participating States is, in this respect, encouraging, as this country is largely involved in WTO dispute settlement cases). To address the crucial issue of participation, the communication makes it clear that it is open to the accession of all WTO Members, who are welcome, at any time, to join the MPIA simply by notifying the DSB that they endorse the communication (paragraph 12).

The second major problem is the likely absence, also in the future, of the U.S. from the envisaged scheme, considering that the U.S. is the largest and most powerful global trade actor and the WTO Member that is involved in the largest number of trade disputes. The

⁵⁵ See paragraph 13 of the agreed procedures and fn. 9.

⁵⁶ Iceland, Pakistan and Ukraine have joined the original group.

⁵⁷ Statement On a Mechanism For Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes, April 30, 2020 (JOB/DSB/1/Add.12).

⁵⁸ MPIA preamble, recital 4.

only thing that can be said in this respect, and without considering political dynamics that are outside the scope of these pages, is that the establishment of an arbitration scheme with a very wide participation from the other major trade powers could at least put some pressure on the U.S. administration to contribute to finding a shared solution to the crisis.

A third problem derives from the scheme itself, and how it is conceived. The automaticity it puts in place, as a matter of fact, is more apparent than real as it largely depends on the willingness of the parties to a dispute to enter into an appeal arbitration agreement with respect to that specific dispute. The Communication itself doesn't determine any obligation for the parties to do so, as formally it only declares the intention of the participant States. Nevertheless, it is clear that an interpretation and implementation in good faith of the arrangement requires that the States party to a dispute do not refuse to subscribe the arbitration agreement. Such a situation, nevertheless, cannot be excluded, especially in particularly sensitive cases where States might choose to have more flexibility in the dispute settlement process.

4. The EU's reaction at unilateral level: the Commission's proposal for modification of the regulation on trade enforcement and the protection of the EU's trade interests

Since the beginning of the crisis the European Union has been a very active protagonist in the multilateral approach to the problem under consideration, as has been illustrated in the previous sections of this paper. At the same time, nonetheless, the EU is very well aware of the risks posed to its trade interests by the current stalling situation. For this reason, while still strongly committed to the multilateral approach, it is also pursuing a unilateral reaction through the reinforcement of the instruments of protection of the EU's interests in international trade.

This section provides an analysis of the proposal the Commission has submitted to the EU legislators with the aim of amending, in the light of the present circumstances, EU Regulation No. 654/2014⁵⁹, the so-called "Enforcement Regulation", which provides rules and procedures to ensure the exercise of the Union's rights under international trade agreements. The mentioned regulation is the European counterpart of Section 301 of the 1974 U.S. Trade Act, which allows the U.S. Trade Representative (USTR) to take action against conduct by third countries that are either in violation of trade agreements or are «unjustifiable», or have the effect of burdening or restricting U.S. commerce, on the basis of a determination made by the USTR autonomously or under the direction of the President⁶⁰. In its original version the European Enforcement Regulation is much stricter than the American provision: The latter confers on the administration a large flexibility and discretionary power in determining the existence of a violation of trade agreements or a

⁵⁹ Regulation (EU) No 654/2014 of the European Parliament and of the Council of 15 May 2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules (OJ L 189 27.6.2014, p. 50).

⁶⁰ For an overview of the USTR's powers under Section 301, and the recent unilateral use by President Trump of Section 301, see A. B. SCHWARZENBERG, Section 301 of the Trade Act of 1974, January 27, 2020, Congressional Research Service. On the U.S. trade policy and the use of Section 301 as an instrument for the protection of the domestic industries, see G. ADINOLFI, Le misure USA per la protezione dei mercati nazionali dell'acciaio e dell'alluminio: un nuovo capitolo della crisi dell'Organizzazione mondiale del commercio, in SIDIBlog, April 13, 2018.

burden or restriction of commerce. A wide margin of flexibility remains even if Section 301, as amended after the entry into force of the WTO agreements, excludes the application of measures in cases where dispute settlement proceedings under the WTO DSU have established that no agreement has been violated, no U.S. rights have been denied, and no nullification or impairment of U.S. trade benefits was produced by the other country's measures or actions. Conversely, the EU Regulation No 654/2014 currently in force establishes in a very strict manner, on the basis of consistency with WTO rules, the conditions and the procedure for the adoption by the Union of trade countermeasures, in the form of suspension of concessions or other obligations, in order to protect its trade interests. The regulation confers on the Commission the delegated power to adopt such measures through the means of implementing acts, following an investigation and the consultation of the stakeholders in order to acquire the necessary information on the impact of the measures on European trade and, more in general, on the European economy⁶¹. The system is completely based on the multilateral rules as set out in the WTO agreements. This is clear from the wording of Article 3(a) of the regulation, which provides the scope within which the power of the Commission to adopt trade measures against a third country can be exercised: «Following the adjudication of trade disputes under the WTO Dispute Settlement Understanding, when the Union has been authorized to suspend concessions or other obligations under the multilateral and plurilateral agreements covered by the WTO Dispute Settlement Understanding». The regulation's framework is entirely based on the assumption that the WTO dispute settlement system is fully working and able to render binding decisions, including the AB review, and to authorize and supervise the adoption by Members of compensatory measures or countermeasures in cases of non-compliance with the DSB's recommendations by the losing party, as established in Articles 21 and 22 of the DSU⁶². In the present circumstances, though, all this is not guaranteed, and the EU might in the near future find itself exposed to the unfair conduct by third countries that, in presence of a panel report favorable to the Union, appeal into the void while not agreeing to an interim appeal arbitration pursuant to Article 25 of the DSU. As the Commission itself acknowledged in its 2019 report on the proposal for amendment of the Enforcement Regulation, in such a situation there will be no binding outcome to the dispute settlement process⁶³. It is also interesting to note that the Commission decided to submit its proposal for a revision of the Enforcement Regulation on December 12, 2019, just two days after the term of office of two AB members came to an end, downing the AB to just one member. The impression is that the Commission already had stored in a drawer the proposal and the review of the

⁶¹ The preliminary procedure, i.e. the investigation the Commission has to conduct on allegedly illicit commercial practices by third countries, is disciplined in Council Regulation (EC) No 3286/94 of 22 December 1994, laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization, in *OJ*, L 349 of 31.12.1994, p. 71.

⁶² Such an approach is confirmed by Article 4(2)(a) of the regulation currently in force: «Where concessions or other obligations are suspended following the adjudication of a trade dispute under the WTO Dispute Settlement Understanding, their level shall not exceed the level authorized by the WTO Dispute Settlement Body».

⁶³ Commission proposal of 12 December 2019, COM(2019)623 final, for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 654/2014 of the European Parliament and of the Council concerning the exercise of the Union's rights for the application and enforcement of international trade rules. A similar problem may arise also in the framework of bilateral or regional trade agreements, if the third State concerned does not cooperate in the dispute settlement mechanism established by the agreement (*Ibidem*).

regulation that expresses the mentioned concerns⁶⁴, standing by, and waited for the catastrophe to actually happen before making it public, as this represents, in the EU's perspective, a solution of last resort, to be followed only in the worst-case scenario.

In the view of the Commission it has become necessary to shift to a more unilateral approach in order to make it possible for the Union to effectively and promptly protect its commercial interests in an international context where the multilateral rules are compromised. The proposed amendments try to keep the process for the adoption of countermeasures as much as possible embedded in the multilateral legal framework, but at the same time they are aimed at providing the Commission with more flexibility for unilateral action. In addition, the proposed amendments should also have a deterrent effect: In the Commission's view, if the Union opted for not taking action «this would even create an incentive for third countries to thwart adjudication when the Union has rights under an international trade agreement, which the third country infringes»⁶⁵. The solution proposed by the Commission, on which the Union's co-legislators will have to decide in the coming months⁶⁶, is a very limited modification of the Enforcement Regulation, in order to expand the scope of the Union's action to include the situations consequent to the blocking of dispute settlement procedures. In this perspective, the regulation should be integrated by adding two new paragraphs in Article 3 (scope) and a new paragraph in Article 4 (exercise of the Union's rights). The new paragraph (aa) of Article 3 is constructed to allow the Union's unilateral adoption of trade countermeasures «(aa) following the circulation of a WTO panel report upholding, in whole or in part, the claims brought by the European Union, if an appeal under Article 17 of the WTO Dispute Settlement Understanding cannot be completed and if the third country has not agreed to interim appeal arbitration under Article 25 of the WTO Dispute Settlement Understanding»⁶⁷. The proposed provision puts the Union in the condition to react as an *extrema ratio* in those cases where all avenues of institutionalized dispute settlement are closed. This opens another problem, which was virtually non-existent with a fully functioning DSU⁶⁸: the issue of the legality of unilateral countermeasures under general international law⁶⁹. The proposal addresses this issue firstly by conditioning the adoption of measures to the circulation of a WTO panel report upholding the Union's claims and recognizing the other party's violations, thus creating a *prima facie* legal justification of the countermeasures. Secondly, stressing the strict application of the principle of proportionality which constitutes, as is well known, one of the conditions for the legal

⁶⁴ Report from the Commission to the European Parliament and the Council – Review of the scope of the Regulation No 654/2014 of the European Parliament and of the Council of 15 May 2014, 12 December 2019, COM(2019)639 final.

⁶⁵ Commission proposal of 12 December 2019, cit., point 4.

⁶⁶ At the time of writing, the ordinary legislative procedure for adoption is at first reading stage.

⁶⁷ The proposed paragraph 3 (bb) includes also the other situation of «trade disputes relating to other international trade agreements, including regional or bilateral agreements, if adjudication is not possible because the third country is not taking the steps that are necessary for a dispute settlement procedure to function».

⁶⁸ In that framework, countermeasures, besides being authorized and monitored by the DSB, can be challenged in the dispute settlement procedure.

⁶⁹ The Commission addresses this important issue in the report that accompanies the proposal. It relies on the findings of the International Law Commission – International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, General Assembly, Official Records, Fifty-fifth Session, Supplement No. 10 (A/56/10), chp.IV.E.1, Chapter II and, in particular, introductory commentary (1) – , to point out that whenever the dispute settlement procedures fail or are blocked, States may resume their original rights under general international law to resort to countermeasures (see Commission proposal of 12 December 2019, cit, p. 5).

adoption of countermeasures under international law. This is accomplished with the addition of paragraph (bb) to Article 4 of the regulation: «Where measures are taken to restrict the trade with a third country in situations under Article 3(aa) or Article 3(bb), such measures shall be commensurate to the nullification or impairment of the Union's commercial interests caused by the measures of that third country».

The structure of the regulation as will result from the proposed amendments, if they are approved by the Union's legislators, brings the European system of enforcement of trade interests in line with U.S. Section 301, which provides the administration with a flexible and widely discretionary delegation of the power to put in place unilateral countermeasures in the field of international trade. The connection with the WTO dispute settlement scheme will still be present in the new regulation, but the Commission will gain a larger margin of maneuver in reacting unilaterally against the action of States that might try to take advantage of the impossibility for the AB to work, deliberately leaving disputes in a limbo. Despite the caution with which the proposal is worded, and the attention it pays to institutional correctness and international law obligations and legality requirements, the shift towards unilateralism is very clear, and cannot be considered good news for the future of international trade relations.

5. *Conclusions. International trade relations towards a new era of unilateralism?*

All this leads to some final and more general considerations about the current crisis of the WTO Appellate Body and the reactions the EU has put in place. It has been observed that in the last decade the WTO has developed an imbalance between the consensus-based legislative power or political process, and the adjudicatory power, the latter being largely based on the AB authority⁷⁰. Negotiations for new agreements are systematically failing due to the lack of consensus, thus weakening the political decision-making of the institution. As a matter of fact, the WTO as a negotiating forum suffered a severe blow with the failure of the ambitious Doha Round. This failure was significant also from a symbolic point of view, as it has been seen as a «negative referendum»⁷¹ on multilateralism. In contrast, the AB has continued to exercise its independent authority, with the result that in the WTO the balance of powers is in favor of the judiciary, where the States have no veto power. In this situation, where it is unlikely that the Members will agree on a profound revision of the political processes in the WTO⁷², including majority decisions, States like the U.S. tend to find an alternative for achieving a rebalancing of powers in a retrenchment of the judicial authority⁷³. While this consideration might somehow explain some of the reasons of the current crisis, it does not remove the consequences in terms of regression of the WTO from an ambitious

⁷⁰ G. SHAFFER, *A Tragedy in the Making?*, cit., p. 9.

⁷¹ D. C. K. CHOW, *United States Unilateralism and the World Trade Organization*, in *Boston Un. Int. Law Jour.*, 2019, p. 1 ff., at 31.

⁷² This circumstance has led some scholars to consider the possibility of abandoning the “single undertaking” approach in the WTO, by which all Members should accept all agreements, and return to a “pick and choose” approach, typical of the so-called “plurilateral agreements” (Ch. O. Taylor, *Twenty-First Century Trade Policy: What the U.S. Has Done and What It Might Do*, in *Currents Int. Tr. Law Jour.*, 2019, 49). Such an approach would preserve some degree of multilateralism, while making it easier to have a progress in the decision-making process in the WTO, but at the expense of the uniformity and coherence of the legal system as a whole.

⁷³ G. SHAFFER, *A Tragedy in the Making?*, cit., p. 9.

“rule-oriented” institution to a “power-oriented”⁷⁴ one, dominated by the strongest economies. On the fragility of the AB’s apparently strong authority scholars have been writing for years⁷⁵, fearing precisely that the WTO Members at a certain moment might suffer the automaticity and binding character of the appellate reports and decide to take back control of their power of unilateral intervention in international trade. At the same time, though, such automaticity and binding nature of the WTO dispute settlement scheme is (was) there to protect all Members, developed and developing countries, and to safeguard the correct implementation of the common rules, introducing a measure of equal treatment to a fundamentally unequal system.

It has been pointed out that the disruptive events that hit an already fragile system were on the one hand the rise of China as a global power and the 2008 economic crisis⁷⁶, together with the Doha Round failure mentioned before, and on the other hand the election of Donald Trump as President of the United States in 2016⁷⁷. It cannot be denied that the world has changed significantly since the establishment of the WTO in 1994, and that globalization has affected the international economic balance of power, with the rise of China and other emerging economies, in a way neither the U.S. nor any other Member State could foresee at the time of the conclusion of the Marrakesh Agreements, but it is also true that, as showed before, the disaffection of the U.S. towards international adjudication and international limitations of its autonomy has deep roots and dates back in time⁷⁸. Nevertheless, it is also clear to the most attentive commentators that the recent aggressive policy against international law in general⁷⁹ and against international trade law in particular,

⁷⁴ The expressions were first used by John JACKSON, *The World Trading System*, 2nd ed., Cambridge (Mass.)/London, 1997, p. 111.

⁷⁵ G. SHAFFER, Manfred ELSIG, Sergio PUIG, *The Extensive (But Fragile) Authority of the WTO Appellate Body*, in *Law Cont. Prob.*, 2016, p. 237 ff.

⁷⁶ G. SHAFFER, *A Tragedy in the Making?*, cit., p. 8.

⁷⁷ See R. BREWSTER, *The Trump Administration and the Future of the WTO*, in *Yale Jour. Int. Law Online*, 2019; H. H. KOH, *Trump Change: Unilateralism and the “Disruption Myth” in International Trade*, in *Yale Jour. Int. Law Online*, 2019. See also, more in general, S. TALMON, *The United States Under President Trump: Gravedigger of International Law*, in *Chin. Jour. Int. Law*, 2019, p. 645 ff.

⁷⁸ See also the considerations made by E. BARONCINI, *Il funzionamento dell’Organo d’appello*, cit.

⁷⁹ See the interesting considerations of E. J. CRIDDLE and E. FOX-DECENT, *Mandatory Multilateralism: Mandatory Multilateralism*, in *Am. Jour. Int. Law*, 2019, p. 272 ff.: the authors challenge the voluntarist view that States are always free to decide for themselves whether they will engage in international cooperation. According to this theory, mandatory multilateralism applies in all situations where the common interests of the international community are at stake: Protection of peace and security, protection of human rights, management of common resources, territorial disputes are some of them. This interpretation brings to mind the theory of *erga omnes* obligations, that looks at the same issue from a different perspective: In areas that involve common and fundamental interests of the international community, States should be under the obligation (towards the international community at large) to act in protection of such interests, even unilaterally, if necessary (see P. PICONE, *Comunità internazionale e obblighi “erga omnes”*, Naples, 2006). The difference between the two theories is basically that the *erga omnes* obligations theory does not exclude unilateral action as an *extrema ratio*, while the mandatory multilateralism one is based on the prohibition of unilateral action and the necessity and consequent obligation to cooperate. Could mandatory multilateralism be extended to a field like international trade law? According to the cited authors the answer is no, since States are free to choose isolationism in the field of trade or foreign investment. I don’t entirely agree with this conclusion, as it seems to adopt an old vision of international commercial relations. If we accept the premise of the authors that mandatory multilateralism is based on the principles of sovereign equality of States and of joint stewardship for common concerns, it must be considered that in the contemporary globalized world it has become virtually impossible for States to choose a policy of isolationism, and international trade has become an essential feature not only of interstate relations, but also a crucial element for the development of countries and the wellbeing of peoples. In this sense, it could

characteristic of the Trump administration is bound to damage the long-term interests of the United States and of the international community at large⁸⁰.

The perspective of a long crisis of the international trading system as institutionalized and regulated by the WTO is dangerous for the international community, and especially for small, developing and least developed countries that do not have the bargaining power to react and to resist to the display of economic power by the biggest economies⁸¹. They will likely be easy victims of the leverage put in place by the largest and most powerful economies, eager to get the best trade deals for their own interests. This scenario can bring the world back to a division in blocks, not along ideological lines as in the past, but on the basis of economic and political affinity, or regional proximity, around the major economic powers (the U.S., China, the EU, Russia), that are in the condition to use economic leverage to build up new networks of bilateral free trade agreements. The result, in the worst-case scenario, could even be a new “cold war”⁸² based on economic power, technological production and export, where the centrality of the rule of law could be sensibly reduced. In this scenario, an important part could be played, and is already being played, by the European Union, an economic power itself, but with very peculiar characteristics derived from its very nature, first of all its unwavering support for multilateralism and international cooperation and the values upon which it is founded and rooted: rule of law, solidarity, protection of democracy and human rights. As this paper tried to demonstrate, the EU has been engaged at multiple levels in the response to the AB crisis, from the multilateral one through negotiations and proposals in the framework of the WTO, to the bilateral and multi-party interim arbitration arrangements, also rooted in the WTO system under Article 25 of the DSU, to the conferral on the Commission of new and more flexible powers of adoption of unilateral trade countermeasures. The Union wants to be fully equipped for the possible changes that lay ahead and to be able to effectively protect the interests of its Member States and of its citizens. At the same time, it has also been taking action in the last years to build its own network of bilateral free trade agreements with many third States, both developed (like Canada and Japan) and developing countries (like the ACP countries), while being committed to negotiations at the WTO for a multilateral solution to the crisis and for preserving the WTO legal framework based on the rule of law. In this multi-faceted context, provided that it maintains unity and coherence in the elaboration and implementation of its policies, based on the understanding that individual Member States have no relevance acting on their own, the Union is in the position to play a significant role in a power-driven scenario like the one that the world is currently facing. The EU can have an important function in the global system, not only for the protection of its own interests, but also for the protection of the rule of law in the international community, exercising its influence as a rules- and rights-driven institution. The shift towards a power-driven system, based exclusively on the pursuit on nationalistic interests and leaving behind all sense of public good, respect for the rule of law principles, human rights, labor rights, environmental protection and equitable use of natural resources, affects all States of the international community in a way that can lead to

be argued that States have an obligation to engage in cooperation with the other members of the international community also in the field of international trade. In such a context, an independent and rules-based international adjudication mechanism plays a pivotal role.

⁸⁰ H. HONGJU KOH, *Trump Change*, cit., p. 5.

⁸¹ It is only a hunch, but I cannot help suspecting an influence of the U.S. in the decision by South Korea and Panama to withdraw from the MPIA after accepting the Davos Declaration.

⁸² Feared by G. SHAFFER, *A Tragedy in the Making?*, cit, p. 1.

a complete change of the international legal system as it was created in the aftermath of the second world war. This is a time of change⁸³, where it is crucial to keep a steady route in the direction of the protection of the international rule of law. Growing nationalisms and protectionisms pose a threat not only to the globalized world as we have known it for the last two decades and more, but risk to sweep away all the achievements in terms of human rights that have been accomplished so far⁸⁴. The WTO crisis is just a symptom of a much more diffuse disease of the international, multilateral and institutionalized legal system. In this difficult context the EU needs to be ambitious. It is appropriate and understandable that it enhances its unilateral firepower, but at the same time it must exercise at the maximum level the influence it derives from its unique experience as a legal system based on an integrated and multilevel approach to policy making and human rights protection⁸⁵. While closing this article in locked-down Rome, with Europe struggling to find a path for recovery, I can't help feeling the dread that the Covid-19 pandemic currently spreading globally – no country has been spared – will inflict the fatal blow on the world we knew and bring even more dramatic changes and uncertain times⁸⁶. Today more than ever in the last century, Europe and the world need to face these challenges with the only weapon available: solidarity.

⁸³ See D. A. DESERTO, *Shifting Sands in the International Economic System: 'Arbitrage' in International Economic Law and International Human Rights*, in *Georgetown Jour. Int. Law*, 2018, p. 1019 ff.; this author includes in the equation also the role of non-State actors like multinational corporations and private investors, whose legal framework of reference is becoming more and more fragmented and incoherent.

⁸⁴ See the considerations by E.-U. PETERSMANN, *Between 'Member-Driven' WTO Governance and 'Constitutional Justice'*, cit., on the necessary relationship between different levels of jurisprudence in a necessarily multilevel and multilateral legal system for the protection of individual rights, also in the framework of the WTO.

⁸⁵ For examples of EU policies aimed at integrating trade with sustainable development, human rights and sustainable management of natural resources, often on the edge between multilateralism and unilateralism, see A. MIGNOLLI, *The European Union and Sustainable Development*, Rome, 2018.

⁸⁶ See the not so optimistic considerations by G. SACERDOTI, *"Quo Vadis" WTO after Covid-19?* (May 25, 2020). Bocconi Legal Studies Research Paper No. 3610617 (SSRN: <https://ssrn.com/abstract=3610617>).