CENTRO STUDI AMERICANI

Research Program and Conference

# Reshaping the WTO: The future of the multilateral trading system in the new international order

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1. Research Papers
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CENTRO STUDI AMERICANI

# Outputs
# 1. Research Papers

# The WTO (and) Appellate Body Crisis: What Ways Forward?

by Ilaria Espa*

## 1. Introduction

Since 11 December 2019, the Appellate Body (AB) of the World Trade Organization (WTO) is paralyzed.[1] The current demise of the Appellate Body is the final result of the systematic blockage of (re)appointments of AB Members by the United States (US) Administration since 2017.[2] Its most direct consequences go well beyond the faith of the Appellate Body as such and that of the appeals that are still pending;[3] they affect the functioning of the whole WTO dispute settlement mechanism, and possibly the very future of the Organization itself.[4]

In light of the critical importance of saving, if not the Appellate Body as we know it, at least the essential 'rules-based' features of dispute settlement in the multilateral trading system,[5] an

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[1] As of 11 December 2019, the Appellate Body is left with only one Member, Ms Hong Zhao (China) due to the expiry of the term of Mr Ujal Singh Bhatia (India) and Mr Thomas R. Graham (US) on 10 January 2019. The Appellate Body is hence no longer operational given that a minimum of three AB members are needed to consider an appeal of a panel report. See Article 17.1 of the Dispute Settlement Understanding (hereinafter 'DSU').

[2] For a detailed overview of the chronological events, see T. Payosova, G. C. Hufbauer and J. J. Schott, 'The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures', Peterson Institute for International Economics, Policy Brief 18-5 (2018), https://www.piie.com/system/files/documents/pb18-5.pdf (accessed 30 April 2020), p. 3. As it is known, the US has been able to block the whole process due to the (positive) consensus rule governing (re)appointments of AB Members (see Article 2.4 DSU).

[3] The Appellate Body decided to issue reports only on the three pending appeals in which the hearing had taken place before 11 December 2019 – that is, *Morocco-Hot Rolled Steel (Turkey)* (DS513), *Canada- Supercalendered Paper* (DS505), and *Australia - Plain Packaging* (DS435,441). The following ten other appeals will therefore remain pending undefinitely (or else until the current stalemate will be solved): *EU - Energy Package* (DS476); *Colombia – Textiles (Article 21.5 (DS461)*; *India - Iron and Steel Imports* (DS518); *Thailand - Cigarettes (Philippines (Article 21.5)* (DS371); U*.S. - Countervailing Measures on Pipe and Tub*e (DS523); *U.S. - Differential Pricing Methodologies on Lumber* (DS534); *U.S. - Renewable Energy* (DS510); *Thailand - Cigarettes (Philippines) (Article 21.5 II)* (DS371); *India - Export Related Measures* (DS541); *EC - Aircraft, (Article 21.5 II)* (DS316); and, *U.S. - Carbon Steel (Article 21.5)* (DS436).

[4] The former risk has to do with the fact that panels reports that get appealed cannot be adopted by the Dispute Settlement Body (DSB) until the appeal is completed. This means that countries may just raise a request for appeal for the sole purpose of blocking the adoption of a panel report (so-called 'appeal into void'). See J. Pauwelyn, 'WTO Dispute Settlement Post 2019: What to Expect? What Choice to Make?' 22 *Journal of International Economic Law* 297 (2019), p. 298. The same holds true when it comes to enforcement to the extent that WTO members cannot retaliate against an infringing WTO member without a binding panel ruling. In other words, the paralysis of the AB risks bringing back the old times of 'vigilante justice'. See G. Sacerdoti, 'The WTO Dispute Settlement System in 2019: The Case Law of The Appellate Body Before Its Demise', in *Italian Yearbook of International Law 2020*, forthcoming. As to the second risk, it was aptly summarized by M. Fiorini et al.: "The main fear is that without the AB, the WTO dispute settlement system will lose much of its predictability, and may eventually, collapse. This in turn has potentially major consequences for future rule-making efforts in the WTO, as the value of negotiated outcomes depends on the ability of signatories to enforce them" (M. Fiorini et al., 'WTO Dispute Settlement and the Appellate Body Crisis: Insider Perceptions and Members' Revealed Preferences', Global Economic Dynamics, Bertelsmann Stiftung, 2019, p. 6). This is even more so if one considers the multiple challenges currently facing the WTO, from the (endless) stalemate of the Doha Round to the advent of preferentialism. For more details, see I. Espa, 'La codificazione nel sistema OMC', in F. Salerno (ed.), *La codificazione nel diritto internazionale ed europeo* (Editoriale Scientifica, 2019), pp. 143-162.

[5] The WTO dispute settlement system has traditionally been recognized as a rule-oriented system, which made possible the triumph of 'right over might'. G. Sheffer, 'A Tragedy in the Making? The Decline of Law and the Return of Power in International Trade Relations', University of California, Irvine, School of Law, Legal Studies Research Paper Series No. 2018-64, p. 1.

impressively high number of proposals have been advanced to try and solve the current crisis.[6] Such proposals have mostly directly addressed US criticisms towards the AB functioning;[7] arguably, and especially at the beginning, attempts focused on removing the reasons of US discontent as a means towards redressing its opposition on the (re)appointment of Members.[8] In other words, proposals have addressed the question of how to reform the Appellate Body as such, either via proposing amendments to the Dispute Settlement Understanding (DSU) or by identifying key controversial features in the appellate proceedings which could be addressed by means of a General Council (GC) decision.[9] The systematic refusal to engage with other WTO members on such proposals has gradually determined a situation whereby Members have also started to look for solutions thart could provide (temporary) alternatives to an appellate review performed by the AB.[10] In parallel, other ad hoc solutions have been advanced to preserve at least the effectiveness of the panel proceedings and hence preserve binding dispute settlement in the WTO.

This brief presents all such proposals and aims at identifying both their strengths and weaknesses as well as their prospects in the short- and/or medium-/long term. Section II illustrates the potential solutions aimed at saving as much as possible of the Appellate Body as we know it, while at the same time improving its most controversial operational features. Section III looks into solutions aimed at 'substituting' the Appellate Body at least temporarily. Section IV analyses other solutions meant to preserve binding dispute settlement in the WTO, even if *minus* the AB review. Section V concludes

[6] All the proposals tabled by WTO members are discussed in the sections below. Furthermore, the Appellate Body crisis has led to a considerable body of scholarly proposals, as well as proposals by former and current WTO officials and practitioners. See, among others, World Trade Institute, 'What Kind of Dispute Settlement for the World Trade Organization?', Proceedings of the Conference organized by the World Trade Institute on 4 February 2019 at the World Trade Organization, Geneva; World Trade Institute, 'WTO Appellate Review: Reform Proposals and Alternatives', Proceedings of the 24 May 2019 World Trade Institute Workshop held at the World Trade Organization, Geneva; Chang-fa Lo, Junji Nakagawa, Tsai-fang Chen (eds.), *The Appellate Body of the WTO and Its Reform* (Springer, 2020); Centre for International Governance Innovation (CIGI), 'Mordernizing the World Trade Organization', CIGI Essay Series on 'Dispute Settlement, 2020, https://www.cigionline.org/wto (accessed 30 April 2020).

[7] The reasons behind the current AB crisis were already discussed in detail in another policy brief written by Dr. Flavio Frasca. They will hence be touched upon only to the extent that this is instrumental to understanding the rationale of the solutions proposed in this brief. Yet, for a complete recollection of US criticisms, see United States Trade Representative (USTR), *Report on the Appellate Body of the World Trade Organization*, February 2020, https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf (accessed 30 April 2020).

[8] With a view to avoid an escalation of the crisis, WTO members were at first rather 'neutral' with respect to US criticisms and avoided to engage into the debate on whether such criticisms could actually be justified or not. See G. Adinolfi, 'Procedural rules in WTO dispute settlement in the face of the crisis of the Appellate Body', 68 *Questions of International Law – Zoom Out* 39 (2019), pp. 54 and 58. The attitude changed when it became clear the US was espousing a "burning down the house" approach (this expression is borrowed from B. Hoekman and P. C. Mavroidis, 'Burning Down the House? The Appellate Body in the Centre of the WTO Crisis', in B. Hoekman and E. Zedillo (eds.), *21st Century Trade Policy: Back to the Past?* (Washington DC: Brookings Institution)).Indeed, M. Fiorini et al. show that, contrary to the conventional wisdom that presents the AB crisis as 'the U.S. against the world..., even though no WTO member would adopt a US-style reaction to express its dissatisfaction with the workings of the AB, there are countries that share some of the grievances that the US delegation has advanced before the WTO' (see Fiorini et al, 'WTO Dispute Settlement and the Appellate Body Crisis', *supra* n. 4, p. 6).

[9] As it is known, the amendment procedure within the WTO is particularly burdensome (see Article X:8 of the Marrakech Agreement establishing the WTO (hereinafter Marakech Agrement)). For this reason, members have soon accepted the idea of advancing an agenda for reform by means of a decision by the General Council. As per Article X:1 of the Marrakech Agreement, a GC decision is adopted by consensus or, when not possible, by majority voting. The identification of possible solutions on key controversial aspects of the functioning of the AB was facilitated by the work of New Zealand's Ambassador David Walker, who was appointed to this end by the President of the General Council at the meeting on 12 and 13 December 2018. Following extensive consultations, Ambassador Walker presented its Report to the General Council proposing a 'Draft GC Decision on the Functioning of the Appellate Body' on 15 October 2019: see WTO doc. JOB/GC/222, General Council, 'Agenda item 4 – Informal process on matters related to the functioning of the Appellate Body – Report by the Facilitator, H.E. Dr. David Walker (New Zealand)', 15 October 2019.

[10] This refers in particular to alternative 'appellate arbitration' under Article 25 DSU. For more details, see Section III.

with some reflections on whether the current AB crisis could induce countries to bypass the multilateral dispute settlement system (for instance, by resorting to dispute settlement under preferential trade agreements (PTAs)) and hence contribute determining the 'obsolescence' of the WTO.

## II. Solutions to Improve (and Save) the Appellate Body

It is clear that the only way to solve the current stalemate and restore the Appellate Body is to unblock the (re)appointment process. A (progressively) large(r) majority of Members have indeed repeatedly advocated for the need to move forward expeditiously with new appointments to the AB in light of 'the urgency and importance of filling the vacancies in the Appellate Body'.[11] The latest of such proposals was presented in late February 2020 by 94 WTO Members (counting the 28 EU member states as one), but the US has once again refused to join it.[12]

Given the consistent opposition by the US to move ahead and appoint the missing judges, proposals to resolve the current impasse have either focused on (i) whether and, if so, how (re)appointments of Appellate Body members could be decided by majority voting or on (ii) whether the functioning of the Appellate Body could be improved in accordance with the DSU in a way that could convince the US to lift its veto on (re)appointments.

### *A. Appointing Missing Appellate Body Members by Majority Voting*

A potentially immediate solution to the current deadlock could consist of bypassing the US blockage by means of deciding on the (re)appointment of AB members by majority voting. This would require the Dispute Settlement Body (DSB) or the General Council to start the (re)appointment procedure. A number of proposals have been advanced to this end,[13] but skepticism remains high for several reasons: first, the legality of both proposals is uncertain;[14] second, members are much hesitant to overrule the US opposition in such a drastic way, also fearing that it may induce the US to simply

[11] See WTO doc. WT/DSB/W/609/Rev.17, 18 February 2020.

[12] Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, 27 January 2020, https://geneva.usmission.gov/wp-content/uploads/sites/290/Jan27.DSB_.Stmt_.as-deliv.fin_.public.pdf (accessed 30 April 2020), p. 11.

[13] See, in particular, P. J. Kuijper, 'The US Attack on the WTO Appellate Body' Amsterdam Law School Legal Studies Research Paper No. 2017-44, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3076399 (accessed 30 April 2020); E.-U. P. Petersmann, 'How Should the EU and Other WTO Members React to Their WTO Governance and WTO Appellate Body Crises?' Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 2018/71, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3300738 (accessed 30 April 2020).

[14] As regards the proposals centered on the DSB, Kuijper (a former director of the WTO Legal Affairs Division) argues that the legal basis for the DSB action could be Article 2.4 DSU, when read in conformity with Article IX:1 of the Marrakech Agreement and against the backdrop of Article XVI:3 of the Marrakesh Agreement, which establishes a hierarchy between the Marrakech Agreement and the other covered agreements, including the DSU, in case of a conflict. By contrast, Petersmann contends that the right (and duty) of the DSB to appoint AB members by a majority vote results out of the collective obligation of all WTO Members to maintain a functioning AB as per Article 17 DSU; yet, he still advises the WTO Ministerial Conference or General Council to adopt an authoritative interpretation confirming that the Members have a collective duty to fill AB vacancies as they arise through majority decisions (E-U P. Petersmann, 'How Should the EU and Other WTO Members React', *supra* n. 13, p. 8). When it comes to the proposals centered on the General Council, Kuijper argues that 'the law of international organizations' allows under exceptional circumstances that an organ of an international organization perform functions that were originally destined to other organs. For a critique of both proposals, see Pauwelyn, 'WTO Dispute Settlement Post 2019', *supra* n. 4, pp. 302-303 and references cited therein.

leave the WTO;[15] third, members are reluctant to 'set a precedent of majority voting that could backfire against them in the future'.[16]

In the light of the foregoing, this category of solutions appears quite difficult to implement irrespective of the fact that they could virtually be acted upon in the near-term. More fundamentally, one needs furthermore to consider that they would run counter to the 'DNA of the WTO';[17] they would hence ideally require a much more substantiated discussion as to whether the practice of the exclusive use of consensus needs to be revisited more generally in the WTO with a view to avoid delays and blockages and, ultimately, institutional irrelevance.

### *B. Improving the AB Functioning to Address US Concerns*

With a view to create the conditions to convince the US to lift its veto on (re)appointments, several proposals have been tabled by WTO members, which attempt at reforming the Appellate Body while at the same time seeking to maintain as much of it as possible.[18] To this end, the proposals mainly address US concerns, namely:

a. the issue of transitional rules for ongoing AB members: this is the question of whether AB members could complete the disposition of appeals assigned to them but still pending at the time of the expiry of their term (as per Rule 15 of the Working Procedures adopted by the AB). The US has questioned the validity and legitimacy of such reports.[19] Proposals have either revolved around recognizing that only WTO members may authorise an AB judge to complete an appeal process after the expiry of his/her term,[20] or proposing that outgoing members may continue to discharge their duties with certain qualifications.[21]
b. the meaning of municipal law as an issue of fact: this item addresses US criticisms about the AB attitude to review the panel findings with regard to the meaning of WTO members' domestic legislation. Proposals have sought to clarify that the AB mandate to review 'issue of law covered in the panel report' and 'legal interpretations developed by the panel' (as per

[15] P. van den Bossche, 'Can We Save the Appellate Body', INTA Public Hearing, European Parliament, 3 December 2019, p. 2.
[16] Pauwelyn, 'WTO Dispute Settlement Post 2019', *supra* n. 4, p. 303.
[17] van den Bossche, 'Can We Save the Appellate Body', *supra* n. 15, p. 2.
[18] See in particular, WTO doc WT/GC/W/752/Rev.2, *Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore, Mexico, Costa Rica and Montenegro to the General Council*, 11 December 2018; WTO doc WT/GC/W/753/Rev.1, *Communication from the European Union, China, India and Montenegro to the General Council*, 11 December 2018; WTO doc WT/GC/W/758 and WT/GC/W/760, WT/GC/W/759, *Fostering a Discussion on the Functioning of the Appellate Body: Communication from Honduras*, 21 January 2019 and 29 January 2019, respectively; WTO doc WT/GC/W/767/Rev.1, *Guidelines for the Work of Panels and the Appellate Body: Communication from Brazil, Paraguay and Uruguay*, 25 April 2019; WTO doc WT/GC/W/768/Rev.1, *Informal Process on Matters Related to the Functioning of the Appellate Body: Communication from Japan, Australia and Chile*, 16 April 2019; WTO doc WT/GC/W/769, *General Council Decision on the Dispute Settlement System of WTO: Communication from Thailand*, 26 April 2019; WTO doc WT/GC/W/776, *Appellate Body Impasse: Communication from the African Group*, 26 June 2019.
[19] See for instance the Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, 31 August 2017, https://geneva.usmission.gov/2017/08/31/statements-bythe-united-states-at-the-august-31-2017-dsb-meeting (accessed 2 November 2019).
[20] See, *inter alia*, see WTO doc WT/GC/W/753/Rev.1, 3; WTO doc WT/GC/W/759, 1 f.; WTO doc WT/GC/W/767/Rev.1, Guideline n. 2; WTO doc WT/GC/W/769, 1 f.; WTO doc WT/GC/W/776, 2.
[21] For instance, the second Communication led by the EU proposes that 'outgoing Appellate Body members should continue discharging their duties until their places have been filled but not longer than for a period of two years following the expiry of the term of office' (see WTO doc WT/GC/W/753/Rev.1, *supra* n. 18, p. 2). This proposal was particularly ambitious to the extent that it suggested to increase the number of AB members (from seven to nine), to provide with one single but longer term (6 to 8 years) with full time appointment, and to set forth a timely and automatic launch of the selection process of AB members to replace outgoing members when vacancies are anticipated or arise.

Article 17.6 DSU) includes looking into the legal characterisation of the measures at issue but not the meaning itself of the municipal measures.[22]

c. findings unnecessary for the resolution of the dispute: this item refers to the use of what US labels '*obiter dicta'* or 'advisory opinions'. Proposals aim at clarifying that the AB is competent to address the issues raised on appeal by the parties to the dispute but only to the extent this is necessary for its resolution in accordance with Article 17.12 DSU.[23]
d. the issue of precedent: this issue concerns the US criticisms towards the increased level of judicialization achieved through the approach developed by the AB according to which adjudicatory bodies are expected to follow previous AB reports 'absent cogent reasons' with a view to ensure 'security and predictability' in the dispute settlement system.[24] Proposals have sought to clarify that AB reports do not create precedents and are solely binding for the parties to the disputes.[25]
e. the 90-days rule: this item addresses US concerns over the timelines for appellate proceedings (mainly due to the increasing number and complexity of cases) and the absence of consultation with the parties when the 90-day timeframe is exceeded. Proposals suggest to amend the 90-days rule laid down under Article 17.5 DSU by providing an enhanced consultation and transparency obligation for the Appellate Body so that it can either get the parties' agreement to the exceeding of the 90-day timeframe or work out some adjustments that would ensure the meeting of the 90-day timeframe (eg by voluntarily focus the scope of the appeal, reduce the length of the report and/or envisage the publication of the report in the language of the appeal only).[26]

WTO members' proposals have mainly been advanced in the form of proposed amendments to the DSU.[27] And yet, members have readily admitted to be open to consider other legal instruments if amendments proved to be impracticable, namely the adoption of an authoritative interpretation or of a General Council decision.[28]

In the same vein, the informal process of consultations led by Ambassador David Walker as 'Facilitator' has also converged towards the formulation of a 'Draft GC Decision on Functioning of the Appellate Body'.[29] Importantly, the Draft GC decision is a distillation of WTO members' proposals and addresses all the main above-mentioned aspects. It also essentially endorses all the major points advanced in the existing proposals while at the same time fine-tuning the solutions proposed therein, namely:

a. transitional rules for ongoing AB members: it confirms that outgoing members may complete the appeals in which the oral hearing has taken place before the normal expiry of their term; it reinstates that only WTO members may appoint AB members, but also declares that the DSB has the responsibility to 'fill vacancies as they arise'; to this end, it proposes a

[22] See, in particular WTO doc WT/GC/W/752/Rev.1, p. 4 4; WTO doc WT/GC/W/760, p. 3; WTO doc WT/GC/W/768/Rev.1, p. 2; WTO doc WT/GC/W/769, p. 2.
[23] See, in particular, WTO doc WT/GC/W/752/Rev.1, p. 4; WTO doc WT/GC/W/760, p. 2; WTO doc WT/GC/W/767/Rev.1, Guideline 5; WTO doc WT/GC/W/769, p. 2.
[24] See Appellate Body Report, *US-Stainless Steel (Mexico)*, adopted on 20 May 2018, WT/DS/344/AB/R, para. 160.
[25] See, in particular, WTO doc WT/GC/W/767/Rev.1, Guideline no. 6; WTO doc WT/GC/W/768/Rev.1, 2.
[26] See, in particular, WTO doc WT/GC/W/752/Rev.2, p. 2.; WTO doc WT/GC/W/759; WTO doc WT/GC/W/767/Rev.1, Guideline no. 3; WTO doc WT/GC/W/768/Rev.1, p. 2; WTO doc WT/GC/W/769, p. 2; WTO doc WT/GC/W/776, p. 2.
[27] Amendments in the WTO regime are governed by Article X:8 of the Marrakech Agreement.
[28] See WTO doc WT/GC/W/752/Rev.1, 1, footnote n. 1. See also the Communication of Thailand suggesting the adoption of a General Council decision: WTO doc WT/GC/W/769, *supra* n. 18. Authoritative interpretations require a majority of three quarters, whereas General Council decisions are preferably adopted by consensus or, when not possible, by majority voting. See Article IX:2 and Article XI:1 of the Marrakech Agreement, respectively.
[29] General Council, 'Agenda item 4 – Informal process on matters related to the functioning of the Appellate Body – Report by the Facilitator, H.E. Dr. David Walker (New Zealand)', 15 October 2019, JOB/GC/222.

mechanism to ensure that the selection process of AB members is lauched automatically in due course.[30]

b. 90-day rule: it accepts that the 90-day deadline may be extended only with the consent of the parties to the disputes or in cases of *force majeure*.

c. municipal law as an issue of fact: it confirms that municipal law is to be considered as an issue of fact, which cannot be subject to appeal.

d. 'advisory opinions': it reinstates that the AB shall not address issues that were not raised by the parties or are not necessary to resolve the dispute;

e. precedent: it confirms that dispute settlement proceedings do not create precedent, but also affirms that previous reports should be taken into account to the extent they are relevant in a subsequent dispute.

f. 'overreach': it reaffirms that panels and the AB cannot add or diminish WTO members rights as per Articles 3.2 and 19.2 DSU.

While formally addressing all the main 'systemic concerns' expressed by the US along with those relating to the alleged misapplication of 'agreed dispute settlement rules',[31] Ambassador Walker's proposed decision has been considered inadequate by the US as for its substantial content. At a recent meeting of the DSB, held on 27 January 2020, the United States again reiterated that it is 'not in a position to support the proposed decision'.[32] Against this backdrop, the possibility that the selection procedure to appoint new Appellate body members be reactivated, and the Appellate Body as we know it resurrected, seems quite unlikely.

## III. (Temporary) Alternative Solutions to the Appellate Body Review: Appellate Arbitration under Article 25 DSU

To the extent that there is not apparent near-term solution to the Appellate Body crisis, a coalition of WTO willing members, led by the European Union, has worked towards alternative solutions that could still ensure the availability of an independent and impartial appeal stage. To this end, it designed an interim appellate arbitration agreement within the purview of Article 25 DSU,[33] which could be resorted to resolve pending and future disputes in lieu of the non-functioning Appellate Body.

[30] This reflects what was proposed in the second Communication led by the EU: see WTO doc WT/GC/W/753/Rev.1, *supra* n. 21.

[31] This classification borrows from Pauwelyn, 'WTO Dispute Settlement Post 2019', *supra* n. 4, p. 301.

[32] Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, 27 January 2020, *supra* n. 12, p. 11.

[33] Article XXV:1 was introduced with the aim to provide for an expeditious means of adjudication in alternative to the mainstream two-tier dispute settlement process at the WTO in those cases where disputes concerned issues that are clearly defined by both parties. Interestingly, the proposal to envisage such alternative mechanism was advanced during the Uruguay Round by the US: see GATT doc No MTN.GNG/NG13/W/6, *Improved Dispute Settlement: Elements for Consideration. Discussion Paper Prepared by United States Delegation*, 25 June 1987. Up until now, recourse to aribitration within the purview of Article 25 DSU has occurred only once (that is, in the case *United States - Section 110(5) of US Copyright Act*). For more information, see E. Baroncini, *Il funzionamento dell'Organo di Appello dell'OMC: Bilancio e Prospettive* (Bonomo Editore, 2018), p. 140.

Within a matter of a few months, the initiative was joined by 16 WTO members (including major non-U.S. users of the dispute settlement system),[34] leading to the conclusion of the so-called 'Multi-Party Interim Appeal Arbitration Arrangement pursuant to Article 25 DSU' (MPIA).[35] Most recently, three further WTO members joined the plurilateral agreement (that is, Iceland, Pakistan and Ukraine) and the MPIA was subsequently finalized and notified to the DSB on 30 April 2020.[36]

Making use of the flexibility provided under Article 25 DSU,[37] the arrangement largely mirrors the essential features of the Appellate Body proceedings (*inter alia*, the pool of (ten) arbitrators can also include former Appellate Body members). It is expected to govern any disputes among the 19 parties pending as of 30 April 2020, except if the interim panel report, in the relevant stage of that dispute, has already been issued on that date. Members can also mutually decide to deviate from the arrangement in specific disputes.

Although the MPIA is not a permanent solution, members defined it as a necessary 'stopgap measure' to preserve binding dispute settlement.[38] And yet, a number of major users of the dispute settlement system – the US *in primis*, but also Japan, India and South Korea – remain out of the picture at the time of writing. As aptly noted by Professor Sacerdoti, this state of things 'would lead to a bifurcated regime within the WTO, with some countries on the one hand remaining subject to a binding dispute settlement system, and some on the other hand escaping effective enforcement of its rules'.[39]

Nothing in principle prevents that the US and other (major) users of the dispute settlement system join in the future. And indeed the initiative is reportedly set to garner further participation, especially since Annex 2 to the MPIA, which sets the rules for the 'Composition of the Pool of Arbitrators', envisages that parties have 30 days after notifying to nominate potential arbitrators for the pool of arbitrator.[40] Until then, however, it cannot but remain a second-best solution.

## IV. Solutions to preserve binding dispute settlement in the WTO

Another set of solutions has been advanced with a view to preserve more directly the effectiveness of the panel proceedings as a means to save the very existence of binding dispute settlement in the WTO (and hence the enforceability of WTO rights and obligations), even without an appellate review. In other words, the rationale behind these solutions is to avoid that the stalemate of the Appellate Body determines the paralysis of the whole dispute settlement system due to the block on panel reports determined by so-called appeals 'into the void'.[41]

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[34] The joining members are Australia, Brazil, Canada, Chile, China, Colombia, Costa Rica, European Union, Guatemala, Hong Kong, Mexico, New Zealand, Norway, Singapore, Switzerland and Uruguay. See Inside US Trade, 'EU, 15 other WTO members secure interim appellate agreement', 27 March 2020.

[35] See WTO doc JOB/DSB/1/Add.12, *Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes*, 25 July 2019.

[36] European Commission, 'Interim appeal arrangement for WTO disputes becomes effective', https://trade.ec.europa.eu/doclib/press/index.cfm?id=2143 (accessed 30 April 2020).

[37] This flexibility has been praised in a number of scholarly contributions. See, among others, S. Andersen et al., 'Using Arbitration under Article 25 of the DSU to Ensure the Availability of Appeals'. Centre for Trade and Economic Integration Working Papers, CTEI Working Paper 2017-17, https://repository.graduateinstitute.ch/record/295745 (accessed 30 April 2020), paras 3 and 12-14; A. Raina, 'Mediation in an Emergency: The Appellate Body Deadlock. What It Is, Why It Is a Problem, and What to Do About It', 13 *Global Trade and Customs Journal* 376 (2018); and J. Bacchus, 'Saving the WTO's Appeals Process', CATO Institute Blog Post, 12 October 2018, https://www.cato.org/blog/saving-wtos-appeals-process (accessed 30 April 2020).

[38] Inside US Trade, 'Interim WTO appellate deal notified to DSB; 19 members on board so far' (30 April 2020).

[39] Sacerdoti, 'The WTO Dispute Settlement System in 2019', *supra* n. 4.

[40] See WTO doc JOB/DSB/1/Add. 12, Annex 2, paras 1-2.

[41] This expression was first used by Pauwelyn, 'WTO Dispute Settlement Post 2019', *supra* n. 4, p. 299.

A first proposal to this end was made by Professor Charnowitz. He suggested that the AB Working Procedures be amended to make the Appellate Body unable to accept any new appeals in the event of three or more expired terms in its membership.[42] This would allow the panel reports to be adopted by the DSB irrespective of the parties' intention to file an appeal. While such proposal dates back to November 2017 (that is, at a time where the Appellate Body still counted 5 members), it still in principle remains applicable today to the extent that it requires at the very least one Appellate Body member (the mandate of the last member ends, however, on 30 November 2020).[43] And yet, two main factors make it virtually impossibile to implement: on the legal side, it would be tantamount to taking away Members' right of appeal, that is, a power that belongs to Member States;[44] on the political side, as aptly noted by Professor Pauwelyn, 'it is hard to imagine that Appellate Body members, in the current climate where they face relentless critique of 'persistent overreach', would change their Working Procedures' to this end.[45] An alternative could be that the same result be achieved by means of an authoritative interpretation: and yet again, chances are very slim in light of the sensitivity of the matter.[46]

A second proposal is that disputing parties conclude ad hoc agreements to refrain from appeal.[47] The solution has already been implemented in two cases concerning a safeguard measure imposed by Indonesia on imports of certain flat-rolled iron or steel products from Vietnam and Chinese Taipei.[48] Following the adoption of the Appellate Body report on the case(s) and the determination of the reasonable period of time to implement its recommendations and rulings, the parties concluded an understanding for the purpose of 'facilitat[ing ] a satisfactory resolution to the dispute in a cooperative manner and to reduce the scope for procedural disagreements'; according to the understanding, in particular, they agreed that 'if, on the date of the circulation of the panel report under Article 21.5 of the DSU, the Appellate Body is composed of fewer than three Members available to serve on a division in an appeal in these proceedings, they will not appeal that report under Articles 16.4 and 17 of the DSU.'[49] The conclusion of similar ah hoc agreements may to a certain extent limit the prospects of a block on the adoption of panel reports; and yet, it is difficult to see such agreements be adopted systematically by parties, since they may frequently have a greater interest in 'not tying their hands'. WTO members' attitude has indeed seemingly aligned to the latter scenario since 12 December 2019.[50]

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[42] S Charnowitz, 'How to Save WTO Dispute Settlement from the Trump Administration' International Economic Law and Policy Blog, 3 November 2017, https://worldtradelaw.typepad.com/ielpblog/2017/11/how-to-save-wto-dispute-settlement-from-the-trump-administration.html (accessed 30 April 2020). The Rule at issue here is Rule 20 of the AB Working Procedures (see WTO doc WT/AB/WP/6, 16 August 2010).

[43] Importantly, Article 17.9 of the DSU grants the AB the power to draw up its own Working Procedures without the need for DSB approval and does *not* require a quorum.

[44] E. Baroncini, *Il funzionamento dell'Organo d'Appello*, *supra* n. 33, p. 117.

[45] Importantly, Article 17.9 of the DSU grants the AB the power to draw up its own Working Procedures without the need for DSB approval and does *not* require a quorum.

[46] See in particular *supra*, Section II.A.

[47] See, among others, L. E. Salles, 'Bilateral Agreements as an Option to Living Through the WTO AB Crisis' International Economic Law and Policy blog, 23 November 2017, https://worldtradelaw.typepad.com/ielpblog/2017/11/guest-post-on-bilateral-agreements-as-an-option-to-living-through-the-wto-ab-crisis.html (accessed 30 April 2020) and V. Hughes, 'Moving Forward from the Dispute Settlement Paralysis', Centre for International Governance Innovation (CIGI), 'Mordernizing the World Trade Organization', A CIGI Essay Series https://www.cigionline.org/multimedia/video-moving-forward-wtos-dispute-settlement-paralysis (accessed 30 April 2020).

[48] See Appellate Body Report, *Indonesia - Safeguard on Certain Iron or Steel Products*, adopted on 27 August 2018, WT/DS490/AB/R, WT/DS496/AB/R.

[49] See WTO doc WT/DS490/13, 15 April 2019, para. 7 and WTO doc WT/DS496/14, 27 March 2019, para. 7.

[50] For instance, in *US – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, the panel report was appealed by the US on 18 December 2019. In the notification of appeal, the US announced that it "will confer with India so the parties may determine the way forward in this dispute, including whether the matters at issue

## V. Conclusions

The Appellate Body as we know it is no longer operational since 11 December 2019. A number of proposals have been tabled so far with a view to either resurrecting it, improve it, or replace it. While the unfolding of the crisis has been exceptionally rapid, especially considering that at stake was the destiny of what used to be commonly referred to as the 'jewel in the crown' of the multilateral trading system, the quest for an effective solution of the crisis does not seem to be attainable in the near-term. Proposals have nevertheless mushroomed in the last few years and months with a view to preserve the binding and automatic nature of dispute settlement in the WTO – that is, its quintessential features as a 'rules-based' dispute settlement system. Whether such features are defendeable or not in a multilateral setting, however, is still to be determined. For now, those are seemingly to be treasured within a coalition of WTO willing members committed to the MPIA, whereas the rest of the WTO membership seems prone to go back to an old GATT-style dispute settlement.

Very significantly, Ambassador Ujal Bhatia, one of the last Appellate Body members, declared in a 2019 speech that 'the crisis of the AB is the crisis of trade multilateralism … The choices that are made will define the prospects for international cooperation in trade for the next decades'.[51] The challenge is monumental and timing is most probably against the WTO, especially now that the outbreak of the COVID-19 pandemic has made all other items on the WTO as well as national agendas virtually disappear. The risk is that the demise of the Appellate Body determines a more general paralysis of the whole WTO dispute settlement system and perhaps contributes accelerating the tendency of members to look at preferential trade agreements as a suitable alternative, not only for adopting more advanced trade rules but for enforcing them too. Indeed, trade disputes initiated under PTAs are seemingly on the rise (the latest in time being *Restrictions applied by Ukraine on Exports of certain Wood Products to the European Union* under the EU-Ukraine Association Agreement).[52] While it is too early to speak of a trend, it is already worth-noting that such mechanisms are not a real substitute to WTO dispute settlement inasmuch as coverage of world trade under PTAs remains still relatively low.[53] Dispute settlement in a multilateral setting remains therefore indispensable to ensure the rule of law in international trade relations. It is much of an open question, however, whether this is still an achievable and desirable outcome for countries in the current geopolitical and geoeconomic circumstances.

may be resolved at this stage or to consider alternatives to the appellate process". See WTO doc. WTO doc WT/DS436/21, *US – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India: Notification of an Appeal by the United States under Article 16 of the DSU*, 18 December 2019. Shortly thereafter, both parties announced that they would keep any appeal and cross-appeal on hold until 'an Appellate Body Division can be established'. See WTO doc WT/DS436/22, *Joint Communication from India and the United States*, 16 January 2020.

[51] See Address by Ambassador Ujal Singh Bhatia, 2018 Chair of the Appellate Body, 'Launch of the WTO Appellate Body's Annual Report for 2018', 28 May 2019, https://www.wto.org/english/tr p_e/dispu_e/ab_report_launch_e.htm (accessed 30 April 2020).

[52] See the Note Verbale made available here: https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157943.pdf (accessed 30 April 2020).

[53] See WTO World Trade Report 2011, *The WTO and Preferential Trade Agreements: From Co-existence to Coherence*, https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf (accessed 30 April 2020), p. 6.

**OMC, crisi dell'Appellate Body e necessità di riforma.**

**Flavio Frasca**

L'istituzione dell'Organizzazione Mondiale del Commercio (OMC), avvenuta con la firma dell'atto finale della conferenza di Marrakech, il 15 aprile del 1994, è stata applaudita come uno dei maggiori successi raggiunti nell'ambito della regolamentazione degli scambi internazionali. Come può apprezzarsi dalle parole pronunciate dall'allora Direttore Generale del GATT - accordo definibile come immediato precursore dell'OMC- "the world has chosen openness and co-operation instead of uncertainty and conflict…important new areas of world economy have been brought under multilateral disciplines, and added together, the achievements amount to a major renewal of the world trading system"; insomma, si trattava di un formidabile, e all'apparenza definitivo, passo in avanti per il sistema commerciale internazionale.

Proprio in ragione dell'enorme successo attribuito all'OMC, desta una seria preoccupazione la situazione di grave crisi in cui tale sistema si trova oggi, una crisi che riguarda la sua credibilità, effettività e funzionamento. Si assiste infatti ad un sostanziale stallo dell'Organizzazione, che non sembra più in grado di svolgere due delle principali funzioni per cui essa è stata creata: quella di foro negoziale privilegiato per la conclusione di accordi commerciali, esplicitata dall'art. III par. 2 dell'Accordo istitutivo, e quella di meccanismo di risoluzione delle controversie, anch'essa prevista dal citato Art. III. Tale situazione – in particolare in relazione alla crisi dell'Organo di risoluzione delle controversie - si è manifestata soprattutto a seguito dell'atteggiamento di fatto ostruzionistico assunto dagli Stati Uniti, ossia dalla nazione che figurava tra i maggiori promotori dei negoziati che portarono alla nascita dell'OMC e artefici dell'incardinamento di un organo quasi- giurisdizionale all'interno del sistema.

Le critiche rivolte dall'attuale amministrazione americana, ma anche dalle precedenti, nei confronti dell'Organizzazione, sono numerose. Allo stato attuale, il culmine, dal punto di vista simbolico, degli attacchi statunitensi all'OMC può rinvenirsi nelle minacce avanzate dall'amministrazione americana di recedere dall'Organizzazione. Più nello specifico, per quel che concerne il principale oggetto del presente *paper*, la politica americana – finalizzata ad ottenere una serie di mutamenti della struttura e della normativa OMC - ha avuto, quale concreta ed immediata conseguenza, la paralisi dell'Organo di Appello dell'OMC. Quest'ultimo è infatti oggi composto da un solo giudice, nonostante a norma dell'art 17 par. 1 del DSU (*Dispute Settlement Understanding*) esso dovrebbe essere formato da sette membri, tre dei quali dovrebbero di volta in volta andare a costituire la formazione competente ad occuparsi del singolo caso posto all'attenzione dell'Organo.

A ben vedere è il sistema complessivo di risoluzione delle controversie dell'OMC, fiore all'occhiello dell'Organizzazione, o *jewel in the crown* – come definito da Michael Moore, Direttore Generale dell'OMC dal 1999 al 2002 – che rischia di rimanere inattivo per un periodo prolungato, se non addirittura in via permanente. La previsione di un secondo grado di giudizio - aspetto peculiare del meccanismo di soluzione delle controversie dell'OMC ma piuttosto atipico nell'ambito dei tribunali internazionali - ha infatti condizionato le modalità mediante le quali le decisioni di primo grado assunte dai panel acquistano efficacia vincolante. Ciò in quanto la notifica di un ricorso in appello effettuata al DSB (*Dispute Settlement Body*) da uno Stato parte di una controversia sembra precludere – stando al tenore letterale dell'art. 16 DSU e alla interpretazione fornitane nella prassi – al DSB di poter adottare mediante la regola del *consensus* negativo la "decisione di primo grado", il rapporto del *panel*. In definitiva, dunque, il blocco dell'Organo di Appello si ripercuote sulle prime fasi del procedimento perché, proprio in ragione del fatto che una proposizione in appello rimarrebbe inevasa, tale secondo grado verrebbe sistematicamente ricercato da tutte le parti soccombenti per evitare di dare seguito al

rapporto del Panel, e godendo in tal modo di una sorta di diritto di "autoveto".

Se questa risulta, a grandi linee, la situazione in cui versa l'OMC attualmente, vale la pena ripercorrere le principali tappe che hanno contribuito a determinarla. Al contempo vanno evidenziati i principali tentativi messi in atto al fine di superare la crisi. Ciò può essere di valido aiuto non solo per comprendere pienamente le ragioni dell'azione statunitense, ma anche per cercare di valutare la reale efficacia delle soluzioni percorribili.

Giova premettere che un certo sentimento di malcontento e sfiducia circolava negli Stati Uniti sin dalla creazione dell'OMC. A riprova di ciò basti ricordare le profetiche affermazioni di Alan Wolff, in una sua dichiarazione di fronte al Comitato finanziario del Senato americano il 10 maggio 1995: «We have really significant risks, because this WTO system has no checks and balances. Yes, there is an appellate review panel, but if a panel goes off the tracks and it is not corrected by the appellate body, it is going to benearly impossible to get the members of the WTO to correct it because everyone has to agree. It is just not going to happen very readily. And it is going to be a whole new negotiation».

Tali timori americani venivano in parte recepiti nella dichiarazione adottata a Marrakech, nella quale si prevedeva una revisione del meccanismo di risoluzione delle controversie entro quattro anni. Tale revisione non è intervenuta, anche in ragione delle difficoltà derivanti dal *consensus* quale regola decisionale, il quale richiede l'unanimità tra i membri per apportare modifiche agli Accordi.
Nel 2001, alla Conferenza Ministeriale di Doha furono avviati i negoziati relativi alla c.d. *Doha Development Agenda* (DDA) e ci si accordò, al contempo, per proseguire i negoziati per la revisione del DSU pur mantenendo questi ultimi al di fuori del c.d. *single undertaking approach*. Se la scelta di non vincolare i negoziati per la modifica del DSU agli ambiziosi negoziati sui temi sostanziali avviati a Doha sia stata dettata dall'incertezza sulle prospettive di riuscita dell'una o dell'altra riforma non è chiaro. Ad ogni modo entrambi i negoziati non hanno portato ad alcun esito concreto. Da un lato, infatti, il DSU è rimasto immutato, contribuendo in un certo senso al verificarsi dell'attuale paralisi dell'Appellate Body. D'altra parte, la DDA o Doha *round* ha costituito l'ultimo tentativo di avviare negoziati commerciali multilaterali al fine di ridurre le barriere commerciali e modificare le norme esistenti. Esso copre circa 20 aree differenti del commercio internazionale – tra cui possono menzionarsi i prodotti agricoli, i servizi, le misure anti dumping, i sussidi. Allo stato attuale, l'unico risultato concreto che sembra potersi ascrivere al *Doha round* è quello di aver reso ancor più palese la crisi del sistema del commercio multilaterale, ed in particolare l'incapacità dell'OMC di svolgere la funzione di foro per la negoziazione e conclusione di accordi commerciali multilaterali.

L'incapacità dell'OMC di fungere da foro per i negoziati multilaterali può essere attribuita ad una moltitudine di fattori. Può rilevarsi in sintesi che l'elevato numero di Stati Membri, portatori di interessi spesso eterogenei, ha reso particolarmente complesso concludere accordi rilevanti sulla liberalizzazione commerciale. Inoltre, contemporaneamente alla nascita dell'OMC, i maggiori attori economici mondiali (soprattutto UE e Stati Uniti, cui si è aggiunta in seguito la Cina) hanno determinato quella che è stata definita la seconda ondata di regionalismo[1], ossia la conclusione di accordi commerciali su base regionale, al di fuori del contesto OMC. Le cause di tale mutamento di prospettiva – che predilige il regionalismo al multilateralismo – sono state variamente individuate. Tra queste possono menzionarsi le ricordate difficoltà delle negoziazioni multilaterali, il progressivo mutamento della posizionestatunitense, in precedenza strenuamente a favore della liberalizzazione multilaterale, e l'incapacità della disciplina OMC di regolamentare le nuove esigenze di liberalizzazione insite nel c.d.

[1] Cfr., J. BHAGWATI e A. PANAGARIYA; The Theory of Preferential Trade Agreements: Historical Evolution and Current Trends, in The American economic review, vol. 86, no. 2, 1996; P. KRUGMAN, Regionalism vs. Multilateralism: Analytical Notes, in J. DE MELO and A. PANAGARIYA (eds.), New Dimensions in Regional Integration, Cambridge University Press, 1993; A. FABBRICOTTI, The Political Economy of Regional Trade Agreements, in A. FABBRICOTTI (ed.), The Political Economy of Internaitonal Law: A European Perspective, Edward Elgar, 2016, pp. 311-328.

secondo *unbundling* della globalizzazione[2], vale a dire una fase in cui l'interesse dei maggiori paesi industrializzati non è tanto quello di liberalizzare semplicemente il commercio di prodotti, ma disciplinare la frammentazione della catena produttiva mediante accordi che regolamentino aspetti della produzione effettuata su scala mondiale.

Il 2001 ha segnato, oltre all'avvio del Doha round, anche il verificarsi di un avvenimento che potrebbe dirsi epocale per l'OMC: l'ingresso della Cina nell'organizzazione, a seguito di negoziati durati quasi quindici anni. Le problematiche sollevate dall'ingresso della Cina sono di molteplice natura. Esse attengono non solo alla "questione cinese", per cui si è reso necessario approvare contestualmente il Protocollo di adesione della Cina all'OMC e quello relativo a Taiwan, entrato a far parte dell'OMC dal 2002 come regione doganale autonoma. Le problematiche attengono soprattutto ad aspetti economici. Le preoccupazioni rispetto all'economia cinese ed alla sua partecipazione all'OMC si riflettono infatti nel protocollo di adesione, nel quale sono previsti una serie di obblighi aggiuntivi per la Cina. L'art. 15 del Protocollo di Adesione contiene inoltre una clausola finalizzata a legittimare gli altri paesi ad imporre dazi su prodotti provenienti dalla Cina qualora rientrino in un settore del mercato cinese in cui non prevalgono condizioni di mercato. Tale clausola sembrava formalmente destinata a perdere efficacia trascorsi quindici anni dall'ingresso nell'OMC. Ciononostante ancora oggi numerosi membri dell'OMC, tra cui Stati Uniti e Unione Europea, non riconoscono alla Cina lo status di economia di mercato in ragione delle pratiche dirigiste e di aiuti statali vigenti tutt'oggi.

Le conseguenze derivanti dall'ingresso della Cina nell'OMC ben possono comprendersi se si considera che l'economia cinese ha vissuto una fase di crescita esponenziale negli ultimi 20 anni, divenendo il più grande esportatore al mondo, ed accumulando, al contempo, un rilevante attivo commerciale nei confronti degli Stati Uniti – che ha superato i 400 miliardi nel 2018. Tale situazione è strettamente connessa alle critiche statunitensi nei confronti dell'OMC. Ciò è desumibile dalle dichiarazioni dell'amministrazione americana, secondo cui: «instead of constraining market distorting countries like China, the WTO has in some cases given them an unfair advantage over the United States and other market based economies»[3]. Alcune delle critiche statunitensi attengono infatti l'interpretazione del concetto di *public body* fornita dall'Organo di Appello[4], che restringerebbe la possibilità di contrastare i sussidi forniti attraverso le *State-owned enterprises* (SOEs); l'interpretazione dell'art. XIX par. 3 dell'Accordo sui sussidi, per cui la possibilità di imporre misure di compensazione e misure antidumping nei confronti di paesi come la Cina – il cui status di economia di mercato è fonte di dibattito – verrebbe irragionevolmente limitata[5]. Sembra dunque che gli Stati Uniti abbiano messo in atto una strategia finalizzata a ridurre i vincoli normativi derivanti dalla partecipazione all'OMC al fine di poter pienamente sfruttare il proprio potere negoziale – e tutti i mezzi a disposizione – per cercare di mantenere la loro posizione di supremazia economica, ritenendola insidiata dalla sorprendente crescita economica di un paese la cui popolazione ammonta a circa 1,380 miliardi di abitanti.

In particolare, gli Stati Uniti, dal 2007, hanno iniziato ad opporre il proprio veto all'elezione dei membri dell'*Appellate Body*, riducendone progressivamente il numero. Fino al 10 dicembre tale organo risultava formato da soli tre membri, a fronte dei sette previsti dall'art XVII par. 1 del DSU. In tale data è però spirato il termine del mandato per due dei tre membri rimasti in carica, l'americano Thomas Graham e l'indiano Uial Sinh Bhatia. Dal 10 dicembre, perciò, è rimasto in carica il solo membro cinese, Hong Zhao, situazione che ha di fatto paralizzato l'attività dell'*Appellate Body*.

A nulla sono valse le azioni intraprese da vari Stati al fine di scongiurare tale stallo. Tra queste possono

[2] R. BALDWIN, *Globalisation: The Great Unbundling(s*); Economic Council of Finland, 2006, Geneva, pp. 22-34.
[3] *The President's Trade Policy Agenda, Executive Summary*, March 2018. Consultabile sul sito, https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20I.pdf, pagina da ultimo consultata il 26/02/2020.
[4] Ad esempio nel caso *U.S. Countervailing Duty Measures on Certain products from China* (DS379).

[5] Cfr., United States Trade Representative, *Report on the Appellate Body of the World Trade Organization*, 02/2020 p. 118.

ricordarsi le numerose proposte, avanzate da numerosi Stati Membri, di avviare un processo di selezione per eleggere i membri mancanti dell'*Appellate Body* [6].
Si è anche cercato di esercitare pressioni sugli Stati Uniti argomentando che l'art. XVII par. 2 del DSU dovrebbe interpretarsi come una norma che impone, in capo agli Stati membri, un vero e proprio obbligo di eleggere i membri dell'*Appellate Body* nel momento in cui vi siano delle posizioni scoperte.[7] Gli Stati Uniti hanno dal canto loro obiettato che, volendo interpretare tale norma come un obbligo in capo agli Stati, allo stesso modo dovrebbero interpretarsi le norme concernenti il ruolo dell'*Appellate Body*, e tale ruolo sarebbe stato violato da parte dei medesimi membri dell'*Appellate Body*. Entrambe le posizioni, pur avendo un certo fondamento giuridico, sembrano piuttosto pretestuose, e mirano in primo luogo a sostenere le divergenti posizioni degli Stati che vorrebbero immediatamente eleggere i nuovi membri dell'*Appellate Body* e quelli che –gli Stati Uniti in particolare – condizionano in sostanza tale elezione ad una serie di mutamenti istituzionali e normativi.

Ad ogni modo bisogna sottolineare che circa il 70% dei Membri dell'Organizzazione ha sostenuto le proposte finalizzate ad avviare le consultazioni per l'elezione dei membri dell'*Appellate Body*, ma, ciononostante, l'impasse non è stata superata, e non sembra che gli Stati Uniti muteranno la loro posizione di intransigenza in un futuro prevedibile. A riprova di ciò può evidenziarsi che un elevato numero di membri dell'OMC, in risposta alla fermezza statunitense nell'opporre il veto all'avvio di consultazioni, hanno presentato proposte atte a modificare la normativa relativa al funzionamento dell'Organo, recependo in buona parte le istanze di riforma avanzate dagli Stati Uniti.

L'Unione Europea occupa un posto di primo piano nelle discussioni concernenti la riforma dell'OMC. Nel giugno 2018, il Consiglio europeo ha investito la Commissione del compito di stimolare la riforma e modernizzazione dell'OMC. La Commissione ha presentato un *concept paper* contenente una serie di linee guida da adottare nel perseguire la riforma dell'OMC[8]. Tale documento è piuttosto ambizioso, in quanto propone una revisione complessiva dell'OMC, individuando quali temi centrali: la riforma della normativa sostanziale al fine di adattarla alla realtà economica globale odierna, il rafforzamento della funzione di controllo svolta dall'OMC, e il superamento della situazione di stallo dell'*Appellate Body*.

Sulla base di tale *concept paper*, l'Unione Europea ha elaborato una proposta di riforma, poi presentata alla seduta del Consiglio Generale del 12 e 13 dicembre 2018, insieme ad altri ventidue membri dell'OMC.[9] Tale proposta di riforma affronta per lo più aspetti procedurali, rispondendo, in linea di massima, alle maggiori critiche statunitensi. Ciononostante, la reazione statunitense è stata piuttosto disinteressata. Essi hanno infatti respinto la proposta senza però entrare nel merito delle questioni in essa trattate, limitandosi ad affermare genericamente che essa non risolve in modo soddisfacente le problematiche sollevate.

Le critiche statunitensi hanno avuto ad oggetto, come ricordato, vari aspetti del sistema OMC. Riprendendo quanto affermato nel *Report on the Appellate Body of the WTO*, recentemente rilasciato dal rappresentante per il commercio R. Lighthizer[10], tali critiche mostrano una duplice natura: da un

[6] Tra tali proposte può ricordarsi quella avanzata nel documento: *Proposal by Argentina, Australia, Benin et al*., Appellate Body Appointments, WT/DSB/W/609/Rev. 11, 13 June 2019.
[7] Il riferimento è al testo inglese delle norme, e all'interpretazione dello stesso. L'art. XVII par. 2 del DSU recita testualmente che, con riguardo all'Appellate Body, «vacancies shall be filled as they arise».
[8] EU Commission, *Concept Paper: WTO Modernisation, Introduction to Future EU Proposal*. Consultabile sul sito *https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf*, pagina da ultimo consultata il 11/05/2020.
[9] Communication from the European Union, China, Canada, India et al. to the General Council, WT/GC/W/752. Consultabile sul sito, http://trade.ec.europa.eu/doclib/docs/2018/november/tradoc_157514.pdf, pagina da ultimo consultata il 11/05/2020.

[10]Consultabile sul sito,
https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.p df, pagina da ultimo consultata il 12/05/2020.

lato quelle concernenti aspetti procedurali e sistemici e, dall'altro, quelle relative ad aspetti più propriamente sostanziali, ed in particolare alle interpretazioni adottate dall'*Appellate Body* con riguardo a norme particolarmente sensibili. Queste seconde critiche possono in certi casi ritenersi come conseguenze delle prime, le quali riguardano appunto l'estensione delle prerogative concretamente esercitabili dall'Organo di Appello.

Tra gli aspetti di natura procedurale – i soli oggetto della proposta di riforma presentata – figura la questione concernente la durata del procedimento di appello. Gli Stati Uniti censurano infatti la violazione dell'art. XVII par. 5 DSU il quale prescrive una durata, per il procedimento in appello, di novanta giorni. Secondo la lettura statunitense tale termine sarebbe da considerarsi perentorio. Più nello specifico, gli Stati Uniti sostengono che a partire dal 2011 tale scadenza è stata sistematicamente superata, e ciò è tanto più grave se si considera che i membri dell'*Appellate Body* hanno anche abbandonato la pratica di ottenere dalle parti nella disputa il loro previo consenso sul prolungamento del termine. La proposta di riforma presentata dai membri OMC affronta tale questione cercando di garantire una maggiore trasparenza e partecipazione degli Stati in causa circa il prolungamento dei termini di conclusione del procedimento. In sostanza viene introdotto un obbligo di consultazione delle parti in capo all'*Appellate Body*, il quale deve adempiervi già dal momento in cui lo stesso si rende conto dell'impossibilità di pubblicare il Report finale, e dunque concludere la controversia, entro i termini previsti. Nell'evenienza in cui le parti non acconsentano al prolungamento dei termini sono previsti alcuni correttivi per cercare di ridurre i tempi di conclusione del procedimento: la richiesta alle parti di restringere la portata delle contestazioni effettuate dalle parti; la limitazione della lunghezza dei documenti e delle memorie allegate; la riduzione della lunghezza del Report finale o la redazione di questo nella sola lingua dell'appello per poi tradurlo e pubblicarlo nelle altre lingue solo in seguito.

Altro aspetto fortemente criticato dagli Stati Uniti concerne la durata del mandato dei membri dell'*Appellate Body*, ed in particolare la pratica seguita dall'Organo di prolungare il mandato di membri il cui termine è scaduto[11]. Gli Stati Uniti contestano tale pratica, affermando che questa non è stata approvata dagli Stati Membri dell'OMC, ma che sarebbe piuttosto in contrasto con la disciplina del DSU, che affida ai Membri dell'OMC riuniti in seno al DSB, il compito di eleggere i membri dell'*Appellate Body*.

La proposta presentata dall'UE cerca di mediare tra le diverse esigenze in gioco. La prassi di prolungare informalmente il mandato dei membri dell'*Appellate Body* è funzionale a garantire la celerità ed efficienza del procedimento, permettendo ad un giudice di portare a conclusione i procedimenti dallo stesso già avviati ed istruiti. In sostanza la soluzione ammette il prolungamento del mandato al solo fine di permettere ai membri dell'Organo di Appello di concludere i procedimenti di cui si occupavano e per i soli procedimenti in cui la fase orale era già stata svolta[12].

Un aspetto particolarmente delicato e con implicazioni piuttosto ampie tra quelli oggetto di critica riguarda l'esatta estensione della competenza e del mandato dell'*Appellate Body*. In particolare gli Stati Uniti hanno fortemente avversato la possibilità di revisione in appello degli aspetti di fatto già esaminati dal panel in primo grado, con particolare riguardo alle normative di diritto interno degli Stati, le quali vengono considerate dall'*Appellate Body* come questioni di diritto, contrariamente a quanto sarebbe previsto dalla normativa OMC che le qualificherebbe come questioni di fatto ai fini del giudizio in appello. Al fine di venire incontro a tali critiche la proposta di riforma cerca di rendere più esplicito ed univoco l'art. XVII DSU, escludendo dalle questioni di diritto l'interpretazione delle norme di diritto interno fornita dal panel, ammettendo però che *their legal characterization under the covered agreements* è da considerarsi una questione di diritto sottoposta allo scrutinio dell'Organo di Appello. È evidente che la questione risulta particolarmente controversa e di difficile risoluzione, data la

[11] Tale prassi è peraltro supportata dalla Rule 15 delle Working Procedures dell'Appellate Body.

[12] Nello specifico si propone l'inserimento nell'art. XVII di un paragrafo 2, dal testo: «The outgoing person shall complete the disposition of an appeal in which the oral hearing has been held».

delicatezza dell'interpretazione di talune regolamentazioni, quali ad esempio quelle sulle barriere non tariffarie al commercio, destinate ad incidere fortemente sulle normative nazionali.

Infine, tra gli aspetti censurati dagli Stati Uniti figura la prassi dell'*Appellate Body* di pronunciarsi su questioni non necessarie alla risoluzione della controversia oggetto della pronuncia[13] – i c.d. *obiter dicta*. Le ragioni sulle quali si fondano tali critiche sono molteplici. Tra queste possono ricordarsi il fatto che tale pratica rallenterebbe lo svolgimento dell'appello, renderebbe più complesso il Report finale e rischierebbe di provocare un accrescimento o una diminuzione dei diritti degli Stati membri dell'OMC.

Parte della dottrina ha rilevato, al contrario, che l'inclusione degli *obiter dicta* nelle pronunce dell'Organo di Appello - chiarificando norme e principi giuridici controversi - contribuirebbe a rendere maggiormente prevedibile e più facilmente interpretabile il diritto OMC, facilitando la partecipazione in giudizio dei PVS e di quei paesi che non godono di adeguate risorse finanziarie e competenze giuridiche[14].

La proposta di riforma prevede l'emendamento dell'art. XVII par. 12 DSU, attraverso l'inserimento di una clausola che vieti esplicitamente all'*Appellate Body* la trattazione di questioni non necessarie alla risoluzione della controversia davanti a sé.

La questione degli *obiter dicta* è strettamente connessa ad altro aspetto oggetto di rimostranze. Si tratta dell'attribuzione del valore di precedente quasi-vincolante alle pronunce dell'Appellate Body.
Gli Stati Uniti hanno infatti fortemente osteggiato tale pratica richiamando, a sostegno delle critiche, le previsioni degli accordi OMC e del DSU che riservano al Consiglio Generale l'autorità esclusiva di fornire interpretazioni autentiche degli Accordi[15]. Tali critiche prendono le mosse da una serie di pronunce dell'Appellate Body nelle quali lo stesso ha attribuito alle proprie pronunce valore di quasi-precedente[16]. Più precisamente è stato specificato che i panel devono uniformarsi alle pronunce dell'*Appellate Body* nel caso in cui siano chiamati a pronunciarsi su questioni analoghe, a meno che non ricorrano ragioni cogenti che richiedono di discostarsene. L'*Appellate Body* ha dunque individuato, in via esemplificativa, una serie di circostanze in cui si ritengono sussistenti le suddette ragioni cogenti. Tra queste figurano le seguenti circostanze: l'esistenza di una interpretazione autentica adottata sul piano multilaterale, l'interpretazione precedente si dimostra come inattuabile, l'interpretazione è in contrasto con un accordo, l'interpretazione è fondata su un'errata interpretazione fattuale.

La proposta di riforma non affronta in modo diretto tale tema, ma cerca di trovare un rimedio in maniera indiretta, venendo peraltro incontro alle richieste statunitensi di stabilire un contatto diretto tra i membri dell'Organo di Appello e gli Stati Membri dell'OMC. Ciò viene perseguito mediante l'inserimento di un paragrafo 15 all'art. XVII del DSU. Tale paragrafo dovrebbe prevedere lo svolgimento annuale di un incontro tra i membri dell'*Appellate Body* ed i membri del DSB che ritengano di parteciparvi.
Viene inoltre precisato che nel corso di tali incontri gli Stati membri partecipanti avrebbero la possibilità di esprimere le proprie posizioni ed opinioni «in a manner unrelated to the adoption of particular

[13] Cfr., A. BAHRI, *Appellate Body Held Hostage: Is Judicial Activism at Fair Trial*, Institute of European Law, Working Papers 03/2019, p. 8.
[14] Ibid., p. 12.
[15] Cfr., Art. III par. 9 DSU, Art. IX par. 2 Accordo istitutivo dell'OMC.
[16] Gli Stati Uniti hanno osservato che la giurisprudenza dell'Appellate Body si è evoluta sotto questo profilo, senza che vi sia stato alcun mutamento delle rilevanti disposizioni in materia, e segnatamente del DSU. Più specificamente, nel caso *Alcoholic Beverages II* del 1996 l'Appellate Body negò che le proprie pronunce possedessero valore di precedente. All'opposto, nel 2008, nel caso *USA- Stainless Steel (Mexico)*, lo stesso organo ha asserito che il valore di quasi-precedente delle proprie pronunce avrebbe garantito una maggiore prevedibilità e certezza. Sul punto cfr., United States Trade Representative, *Report on the Appellate Body of the World Trade Organization*, 02/2020 p, 59. Consultabile sul sito https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.p df, pagina da ultimo consultata in data 11/05/2020.

reports»[17]. A dispetto di tale ultima locuzione, la previsione di siffatte riunioni sembra andare proprio nella direzione auspicata dagli Stati Uniti, ossia quella di permettere una sorta di controllo da parte degli Stati Membri dell'OMC sull'operato degli organi di risoluzione delle controversie. Ciò, se da un lato faciliterebbe il consolidamento di una certa fiducia reciproca tra Stati e membri dell'organo di risoluzione delle controversie e contribuire a scongiurare situazioni quali quella attuale, dall'altro lato condurrebbe ad una irrimediabile lesione dell'imparzialità ed indipendenza dei membri dell'Organo di Appello, i quali si troverebbero a fare i conti con le critiche e rimostranze avanzate dagli Stati membri dell'Organizzazione.

Nonostante la proposta di riforma presentata in sede di Consiglio Generale – come emerge dalle modifiche che della stessa sono state qui riportate – cerchi di dare una risposta concreta alle problematiche sollevate dagli Stati Uniti, questi ultimi hanno dimostrato un totale disinteresse verso la stessa, alimentando il dibattito circa le ragioni di fondo di un tale atteggiamento.
Un'altra iniziativa da tempo intrapresa all'interno dell'OMC è il processo di consultazioni informali affidato alla supervisione dell'Ambasciatore neozelandese David Walker[18]. Nel corso di tali negoziazioni i temi di discussione sono vari. Da un lato si dovrebbe cercare di raggiungere una convergenza di posizioni al fine di pervenire ad una riforma più o meno radicale del DSU che, se accettata dagli Stati Uniti, possa determinare la "rinascita" dell'*Appellate Body*. Allo stesso tempo, però, essendo consapevoli dei molteplici fattori, non solo giuridici –ma soprattutto economici, politici e geopolitici – che determinano le scelte americane, e la conseguente improbabilità che l'*impasse* possa superarsi mediante una semplice riforma circoscritta ad aspetti procedurali, si sta cercando di trovare un accordo sulla sorte delle procedure di appello pendenti e non risolte[19], in assenza del numero minimo di membri dell'*Appellate Body* per permettere la conclusione delle stesse.

Come emerge da quanto esposto, la situazione ha determinato la presa d'atto, da parte dei membri OMC, dell'intransigenza statunitense, e del conseguente stallo dell'*Appellate Body*, la cui continuazione rimane altamente incerta. In un tale clima, l'Unione Europea, nel dicembre 2019, dopo la scadenza del mandato dei due membri dell'*Appellate Body*, ha deciso di ricorrere all'art. 25 DSU quale mezzo provvisorio capace di garantire la permanenza di un doppio grado di giudizio nel sistema OMC, quantomeno per gli Stati membri che decideranno di aderirvi. L'art. 25 DSU disciplina la procedura di arbitrato quale possibile mezzo di risoluzione delle controversie, previo accordo tra le parti. La bozza di accordo inizialmente presentata prevede che l'UE e ogni eventuale Stato Membro che firmerà tale accordo si impegnano a non adottare le procedure di appello previste dagli artt. 16.4 e 17 del DSU. Si afferma inoltre che l'arbitrato sarà modellato, per quanto possibile, sulla procedura d'appello. Il lodo arbitrale sarà vincolante per le parti una volta emanato. Non essendo ovviamente richiesta l'approvazione del DSB, sarà necessaria solo la notifica del lodo all'Organo, ex art. 25 par. 3 DSU.
L'obbligatorietà dei lodi arbitrali è garantita dal fatto che essi, a norma dell'art. 25 par. 4 DSU, sono soggetti alle procedure di sorveglianza, monitoraggio e ritorsione previste dagli artt. 21 e 22 del DSU, le quali si applicano anche alle decisioni definitive dell'Organo di Appello.

Ad ogni modo, il concreto funzionamento di un simile meccanismo dipende in primo luogo dalla volontà degli Stati. Infatti solo se vi sarà un largo consenso tra i membri dell'OMC a vincolarsi ad un simile meccanismo esso potrà fungere, quantomeno in via provvisoria, da rimedio per il blocco dell'*Appellate Body*. Allo stato attuale 16 membri dell'OMC[20] si sono accordati il 24 gennaio 2020, al

[17] Cfr., *Communication from the European Union, China, Canada, India et al. to the General Council*, WT/GC/W/752. Consultabile sul sito, http://trade.ec.europa.eu/doclib/docs/2018/november/tradoc_157514.pdf

[18] Più precisamente, il 12 dicembre del 2019, i Membri dell'OMC si accordarono, in Consiglio Generale, affinché fosse avviato un processo informale di negoziazioni. Il presidente del Consiglio Generale, M. Ihara ha designato, con il consenso dei delegati degli altri Stati Membri, l'ambasciatore Walker affinché supervisionasse e mediasse le negoziazioni.
[19] Nello specifico, allo scadere del mandato di due dei tre membri rimanenti, le procedure di appello pendenti erano tredici.
[20] Australia, Brasile, Canada, Cina, Cile, Colombia, Costa Rica, Guatemala, Repubblica di Corea, Messico, Nuova Zelanda, Norvegia, Panama, Singapore, Svizzera, Unione Europea ed Uruguay.

forum di Davos, per ricorrere alla sopra descritta procedura di arbitrato.Il ricorso ad accordi di arbitrato non è tuttavia una soluzione esente da critiche. Come rilevato, non è improbabile il rischio che esso assuma una natura sostanzialmente permanente, in ragione dell'assenza di progressi sulle riforme del sistema OMC [21]. Peraltro, se si considera l'assenza degli Stati Uniti tra i firmatari dell'accordo, e che essi difficilmente aderiranno in futuro, emerge la situazione di disparità e asimmetria che si verrebbe a creare. I maggiori utilizzatori del sistema di risoluzione delle controversie[22], chiaramente insieme a tutti gli altri Stati che non concluderanno degli accordi di ricorso all'arbitrato, godrebbero di una posizione peculiare all'interno del sistema. Essi sarebbero infatti formalmente vincolati dalla disciplina OMC, rimanendo al contempo immuni da ogni meccanismo di controllo vincolante che assicuri il rispetto delle regole sostanziali del sistema OMC.

Da quanto esposto emerge la delicatezza della situazione, intendendosi con ciò la difficoltà nel conciliare le divergenti posizioni e interessi dei Membri dell'Organizzazione. Come è stato rilevato, la questione di fondo attiene non solo – e non tanto –ad aspetti tecnico- giuridici, ma piuttosto, al contrasto intercorrente tra una concezione prettamente neoliberale ed una concezione ordoliberale[23] dell'economia e del ruolo dello Stato nel regolarla. E, più specificamente, alla rilevanza che assumono – in particolare per la concezione ordoliberale – la correzione dei fallimenti di mercato, la tutela dei consumatori e dei diritti individuali e l'attenzione ad aspetti redistributivi. Concezioni spesso contrastanti dal punto di vista sistemico tra i differenti Membri dell'OMC rendono particolarmente difficoltoso raggiungere il consenso necessario perché si riesca a mettere in atto una riforma tale da rendere l'OMC confacente ai diversi e divergenti interessi dei singoli Stati. Ciononostante sembra oggi più che mai necessario trovare un minimo comun denominatore capace di tutelare i traguardi raggiunti con l'istituzione dell'OMC e del suo sistema di risoluzione delle controversie. Infatti, l'esplosione della pandemia di COVID-19 e la rapidità con cui essa si è diffusa nel mondo ha palesato quanto importante sia adottare politiche improntate al multilateralismo, anche in ragione della consapevolezza del livello di interdipendenza ed interconnessione raggiunti. Se da un lato tale pandemia ha messo in evidenza i rischi derivanti dalla globalizzazione e dalla sempre più stretta integrazione internazionale – peraltro sotto certi aspetti ineliminabili – essa ha anche evidenziato come la globalizzazione fornisca strumenti fondamentali per far fronte a problemi che non possono oggi non considerarsi di portata globale. In particolare può menzionarsi la funzione svolta dalle catene globali del valore, le quali hanno generalmente permesso l'approvvigionamento di beni alimentari e di altro genere anche in momenti in cui la produzione nazionale era pressoché nulla o ridotta al minimo. Data la centralità dell'OMC nel sistema del commercio internazionale essa può svolgere un ruolo di primo piano nel prevenire ed attenuare i rischi protezionistici - i quali sembrano oggi meno remoti che in passato - e la presenza di un efficace sistema di risoluzione delle controversie costituisce elemento indispensabile affinché tali obiettivi siano perseguiti in maniera incisiva.

[21] Cfr., G. SACERDOTI, *The Stalemate Concerning the Appellate Body of the WTO: Any Way Out*, in *QIL* 63, pp. 37 ss., 2019.

[22] Gli Stati Uniti sono stati parti nel 68% circa dei rapporti emanati dall'*Appellate Body*.

[23] Sul punto, cfr., E.U. PETERSMANN, *Guest Post: Are the "Lester Principles" too "Neo Liberal" for a WTO Consensus*? International and Economic Law and Policy Blog, consultabile sul sito, https://ielp.worldtradelaw.net/2020/04/guest-post-are-the-lester-principles-too-neo-liberal-for-a-wto- consensus.html, da ultimo consultato in data 11/05/2020.

**Rethinking Development in the WTO.**

**Beyond the Self-election Debate without Breaking Developing Coalitions**

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**Abstract**

The evolution of international relations and dramatic changes in economics call for a reform of the multilateral trading system. Since the Uruguay Round, several countries transformed their markets in various ways, determining a complex scenario in the WTO membership. What is more, the organization has to deal with the international commitment towards the achievement of the Sustainable Development Goals.

In this context, the issue of reforming the developing country notion in the WTO framework goes beyond the contention between US and China on the status of the latter. In fact, the provision of special and differential treatment is essentially an accession issue for less developed nations, resulting from negotiations among the parties involved.

This paper will argue that the benefits related to the developing country status within the WTO and their implementation depend essentially on the bargaining power of the nations involved rather than on the self-election mechanism. Conversely, alternatives to self-declaration that introduce differentiations among developing members could have the negative effect to break coalitions which are crucial to weaker players in negotiations.

Today, developing countries are the larger number of WTO members and sustainable development is a pivotal issue in every international forum. Therefore, any proposal of reform in the WTO should address the issue of substantial and active participation of all its membership to legitimate the system as a starting point for any further institutional change.

## I. Introduction

In recent times, the WTO has been called to an evolution by many international actors, proving its capability to reform in the face of the evolving economic and political circumstances. Indeed, since Bretton Woods, the international arena has been transforming in many ways leading to major changes in trade and economics.

Through decades, the interest and commitment of the UN and, broadly, of the international community towards development issues has grown exponentially, culminating in the adoption of the Sustainable Development Goals in 2015. The engagement of institutional and private stakeholders for development has inevitably a substantial impact on the public debate about international trade, rising important questions about the role of the WTO in balancing commerce with developing countries' needs and instances.

This work will contend that the benefits related to the developing country status within the WTO and their implementation hinge on the bargaining power of the nations involved rather than on the self-election mechanism. Conversely, proposals that introduce differentiations among developing members could have divisive effects and break crucial coalitions that involve weaker players in negotiations.

In the absence of a definition, the practice of self-election as "developing country" has been long debated in the history of the GATT. The next paragraph will briefly draw the legal recognition of developing countries' specificity within the WTO framework. Section III will address the ongoing debate about the self-designation mechanism in the international arena and, notably, between US and China. Subsequently, the paper will examine current issues with special and differential treatment, arguing that its implementation is flawed by an imbalance in bargaining power rather than by the lack of a legal definition for developing countries. The V section will discuss some reform proposals aimed at defining and grading developing nations, contending that they may not ultimately address the issue of bargaining power asymmetries in negotiations that affect the process. Conversely, differentiations could have a divisive effect in the construction and functioning of developing countries' collective action while the WTO represents a crucial opportunity for weaker parties to increase their bargain power in international trade by pursuing coalitions.

Lastly, the concluding paragraph will provide some perspectives about an institutional reform of the WTO. Indeed, it will be important to rethink active participation tools and collective action for every member, pursuing development objectives and legitimating the multilateral trading system with an inclusive decision-process.

## II. Background

Discussions on the interaction between trade and development started since the adoption of the GATT in 1947. They become more extensive with the publication of the *Haberler Report* in 1958, shining a light on the fact that the current regime was not equally benefitting all parties and calling for targeted actions to help countries in need.[24]

However, in its original formulation, the GATT was essentially blind to development issues and negotiations were influenced by the neoliberal believe that open markets and tariffs' abolition would have automatically led to better economic conditions for all parties. Therefore, its art. XVIII was the only provision mentioning "less developed countries" with very little targeted actions envisaged.[25]

[24] Hoekman, B. M. and Mavroidis, P. C. (2007) *The World Trade Organization: Law, Economics, and Politics*. London: Routledge, p.91.
[25] Picone, P. and Ligustro, A. (2002) *Diritto dell'Organizzazione mondiale del commercio*. Padova: CEDAM.

In 1979, the enhancement of the developing community and a new awareness towards the problems of the so-called Third World led to the introduction in the GATT framework of the Enabling Clause, providing the permanent legal basis for exceptions to the most favorite nation treatment to the advantage of less developed economies.

However, the notion of "developing country" was nowhere provided in the text, leaving it to the self-election of nations that wished to gain preferences in trade from developed parties. This void was not addressed later in the Uruguay Round, surviving in the WTO and consolidating the existing Generalized Systems of Preferences (GSP). In this framework, industrialized countries unilaterally grant concessions to developing countries on an individual basis, following schemes that are often very different from one to another.

While the status of developing country is not defined by international law and by the WTO legal system, nations seeking to access to special benefits for Least Developed Countries[26] must fulfill specific criteria set by the UN.[27]

The WTO framework provides developing countries with benefits in terms of market access, longer transition periods and technical assistance. For example, the Dispute Settlement Understanding sets a range of regulations, but these are not considered to be very significant in order to offset the imbalance in favor of economically stronger countries.[28] On the other side, the most relevant provisions regarding development are those devoted to facilitating market access and, particularly, the non-reciprocal preferential treatment granted to products originated in developing countries. Under the Enabling Clause, these schemes are granted by developed nations, deciding unilaterally what goods and countries are included.[29] This provision allows also regional agreements[30] among developing countries and the Global System of Trade Preferences (GSTP), involving trade concessions among these nations.

Due to the unilateral nature of the granted preferences, the implementation of special and differential treatment[31] under the Enabling Clause determines a "patchwork" scenario in which more powerful parties may exert their influence on developing countries, at times overturning the issue of self-election in their favor.[32]

## III. Defining Developing Countries Today: US, China and the Self-election Debate

In last years, the debate on developing economies and international trade has been oscillating between a new sensitivity towards development goals and a suspicion of the self-election mechanism. Indeed,

[26] Hereinafter referred to as LCDs.
[27] Rolland, S. E. (2012) *Development at the World Trade Organization*. Oxford: Oxford University Press. (pp. 82-83)
[28] Horn, H. and Mavroidis, P. C. (1999) 'Remedies in the WTO Dispute Settlement System and Developing Country Interests', World Bank Policy Research Working Paper, Washington DC: World Bank.
[29] For the Database on Preferential Agreements: http://ptadb.wto.org/ (accessed May, 18th, 2020).
[30] For the Database on Regional Agreements: http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx (accessed May, 18th, 2020).
[31] Hereinafter referred to as S&D treatment.
[32] Broude, T (2006), 'The Rule(s) of Trade and the Rhetos of Development: Reflections on the Functional and Aspirational Legitimacy of the WTO', in *Columbia Journal of Transnational Law*, 27(4); Hebrew University International Law Research Paper No. 01-06, p. 11.

the failure of the Doha Round highlighted the need for a new conceptualization of the implications of development for the multilateral trading system and *vice versa*.

In September 2018, the European Commission published a Concept Paper arguing that the dichotomy between developed and developing world was not keeping up with emerging economies and that the absence of nuance in this distinction was hampering negotiations within the WTO. What is more, according to the note, this circumstance was essentially obscuring nations that really need development assistance and special derogations[33]. Few days later, EU, US and Japan released a Joint Statement declaring that self-designation, along with too broad notions of development, were hindering negotiations and undermining the implementation of trade agreements under the WTO[34].

Among the industrialized countries, the US has showed the clearest stand in favor of reforming the developing country definition under the WTO, arguing resolutely that some of the wealthiest and most significant players are still claiming the developing status for themselves.

In February 2019, United States issued a Communication to the WTO (WT/GC/W/757), reiterating the argument presented in the Joint Statement that self-elections have somehow the effect of diluting benefits for LDCs and making negotiations difficult for weaker parties[35].

More recently, the Trump administration pushed again for new provisions on this matter and, on July 26th, 2019, the White House released a Memorandum for the United States Trade Representative on the Reforming Developing-Country Status in the WTO. The presidential statement affirms that rich economies that self-declare themselves as developing "harm not only other developed economies but also economies that truly require special and differential treatment. Such disregard for adherence to WTO rules, including the likely disregard of any future rules, cannot continue to go unchecked"[36].

Moreover, the Memorandum targets China to be the country that "most dramatically illustrates the point. Since joining the WTO in 2001, China has continued to insist that it is a developing country and thus has the right to avail itself of flexibilities under any new WTO rules. The United States has never accepted China's claim to developing-country status, and virtually every current economic indicator belies China's claim". Indeed, the US objection to China developing-status dates back to 1987, during negotiations for China accession to the GATT. In those years, United States, along with EU, repeatedly contended such self-declaration, pointing at the extensive Chinese export capacity.[37]

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[33] For the full text of the Concept Paper "WTO modernization. Introduction to future EU proposals" is available at https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf (accessed May, 18th, 2020) .

[34] For the full text of the Joint Statement on Trilateral Meeting of the Trade Ministers of the United States, Japan, and the European Union (09.25.2018) https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/september/joint-statement-trilateral (accessed May, 18th, 2020).

[35] US Communication "An Undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance" (WT/GC/W/757).

[36] For the full text of the "Memorandum on Reforming Developing-Country Status in the World Trade Organization": https://www.whitehouse.gov/presidential-actions/memorandum-reforming-developing-country-status-world-trade-organization/ (accessed May, 18th, 2020).

[37] Xinquan, T. and Huiping, M. (2015), 'China's Developing Country Identity – Challenges and Future Prospects', in Freeman, C. P. (Ed.), *Handbook on China and Developing Countries. Handbooks of Research on Contemporary China series* (pp. 89-108) Cheltenham: Edward Elgar Publishing.

On their part, developing countries have disputed these arguments, replying that the development divide is still very sharp and almost all international organizations adopt the developed-developing dichotomy.

In a Joint Communication entitled *The Continued Relevance of Special and Differential Treatment in favor of Developing Members to Promote Development and Ensure Inclusiveness* by China, India, South Africa, Venezuela, Laos, Bolivia, Kenya and Cuba, the group argued that domestic transformation needs the full understanding of local conditions and ongoing practice. For developing countries, a proper policy space would be essential in order to reap the benefits from an opened market and denying this right would qualify as a gross violation of fairness in the international arena. Moreover, the Joint Communication contends that today development is conceptualized in its human dimension, therefore any classification disregarding *per capita* indicators would be flawed[38].

Among developing nations, China has strongly opposed criticism to its self-election, stating that "China will never agree to be deprived of its entitlement to special and differential treatment as a developing member".[39] In the same document, China also declared that, even if it is willing to engage in commitment consistent with its economy, it would fight any attempt to reform the WTO aimed at eliminating S&D treatment for some countries.

Clearly, US and China are the biggest players involved in this contention and the trade war engaged by the two countries in recent times has obviously a pivotal role in leading the debate. However, it has to be pointed out that the issue of developing countries status, as discussed above, has a long history in the GATT and concerns today about two thirds of the WTO's members. Moreover, nations that are seeking accession to the organization or that will do it in the future are essentially all developing countries or LDCs. These circumstances make the discussion about self-declaration and, in general, the attitude towards development goals a critical issue in the multilateral trading system for the days to come.

## IV. Beyond the Self-Election *Querelle*: Issues with S&D Treatment and the Importance of Negotiations for Developing Countries

As previously stated, the self-election mechanism has proved to be a controversial issue both in its conceptualization and implementation. As a matter of fact, the Dispute Settlement Body itself avoided to address directly questions about the developing status of a particular WTO Member and its legal effects.[40] More precisely, in a dispute between USA and China on the Agreement on Safeguards

[38] For the full text of "The Continued Relevance of Special and Differential Treatment in favor of Developing Members to Promote Development and Ensure Inclusiveness" see: https://webcache.googleusercontent.com/search?q=cache:LSpQmslykooJ:https://docs.wto.org/dol2fe/Pages/FE_Search/DDFDocuments/251793/q/WT/GC/W765R1.pdf+&cd=1&hl=it&ct=clnk&gl=it (accessed May, 18th, 2020).
[39] For the full text of the China's Position Paper on WTO Reform: http://kw2.mofcom.gov.cn/article/chinanews/201812/20181202818679.shtml (accessed May, 18th, 2020).
[40] Broude, T. (2006), cit., p. 32.

occurring in 2003, the panel and the Appellate Body adjudicated the case[41] without specifically answering the question about China's status.[42]

However, the lack of a definition for "developing country" is only one of many problems related to S&D treatment and probably not the biggest. Among other things, as noted above, trade preferences are provided on a unilateral and discretional basis by developed nations who grant them. Moreover, S&D provisions, even once agreed among parties, lack of enforceability in their implementation, functioning essentially through "best endeavour" clauses. These norms are quite broad and undefined in their formulation and, even if they are included in legally binding agreements, their practical fulfillment is not regulated nor, consequently, guaranteed.[43] Beneficiaries fully recognized as developing actors have in fact no mean to enforce these schemes, generating a certain level of dissatisfaction among them.[44] Indeed, they do not have a "legally enforceable right to these preferences".[45]

In last decades, the introduction of conditionality by developed counterparts in their GSP programs determined an even more complex scenario. Conditionality is essentially a legal mechanism through which the concession of trade preferences is linked to the fulfillment of "non-trade-related" requirements such as human rights, environmental or democracy standards. Conditional clauses may be negative, that is they withdraw vested trade benefits when the standards are not meet, or positive, when they provide additional preferences if the applying countries comply with required standards[46]. Therefore, along with pursuing the objective of increased marked access for developing countries, GSP schemes nowadays target also social and political development goals[47] . In practice, while this is undoubtedly a remarkable evolution in the relationship between international trade and development policy, conditionality has not been free from criticism on its effectiveness and it has been pointed out that this strategy has sometimes availed a certain level of intrusion by most powerful counterparts[48].

These considerations support the idea that the benefits related to developing country status within the WTO and their implementation depend substantially on the bargaining power of the countries involved rather than on the self-election mechanism. As a matter of fact, the access to S&D treatment provisions revolve around accession, when they are negotiated for each agreement on the table. This

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[41] *United States – Definitive Safeguard Measures On Imports Of Certain Steel Products* Appellate Body Reports and Panel Reports. For the full text see: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds252_e.htm (accessed May, 18th, 2020).

[42] Rolland, S. E. (2012), cit., p. 83.

[43] Tortora, M. (2009) 'Special and Differential Treatment and Development Issues in the Multilateral Trade Negotiations: the Skeleton in the Closet', Geneva: UNCTAD, WEB/CDP/BKGD/16, (p.7).

[44] Kessie, E. (2000), 'Enforceability of the Legal Provisions Relating to Special and Differential Treatment under the WTO Agreements', in *Journal of World Intellectual Property*, 3(6), pp. 955-975.

[45] Laird, S, Safadi, R. and Turrini, A. (2004), 'The WTO and Development', in Nelson, D. (Ed.) *The Political Economy of Policy Reform: Essays in Honor of J. Michael Finger (Contributions to Economic Analysis, Vol. 270)*, Bingley: Emerald Group Publishing Limited, Bingley, pp. 221-262.

[46] Bartels, L. (2003) 'The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program', in *Journal of International Economic Law*, 6(2), pp. 507-532.

[47] Ebert, F. C. (2003) 'Between Political Goodwill and WTO-Law: Human Rights Conditionality in the Community's New
Scheme of Generalised Tariff Preferences (GSP)', *ZERP-Arbeitspapier* (8) Bremen: Zentrum für Europäische Rechtspolitik Universität Bremen.

[48] This debate involves not only GSP programmes. The conditional policy pursued by the IMF has been one of the most controversial issues of its activity.

means that, even if an acceding country is always free to designate itself as a developing one, during the accession process it could anyway make commitments far more onerous than those envisaged within the S&D treatment.[49]

In this regard, the commitments undertaken by China in its accession package have been considered far more demanding than those made by many other WTO members.[50] Even if, as noted above, China has been very keen in declaring itself as a developing country, during its accession process developed counterparts argued that the peculiar characteristics of the Chinese economy and its market size had to be considered in order to determine its trade commitments.[51] In fact, some members of the Working Party on China Accession argued that, according to them, "because of the significant size, rapid growth and transitional nature of the Chinese economy, a pragmatic approach should be taken in determining China's need for recourse to transitional periods and other special provisions in the WTO".[52] Eventually, China acceded with quite demanding and specific commitments, far more onerous than those allowed under the S&D treatment.[53]

While, in recent years, many developing countries joined the WTO and several others will, there are studies that point out that accession costs in "mercantilist terms" are relatively high and growing. In fact, market access concessions made by acceding countries in agriculture and manufacture are broadening since the Uruguay Round.[54] In this regard, it has been pointed out that accession is essentially an asymmetrical process in which the price of entry is represented by tariff concessions required to applicants, that are often developing countries.[55] In addition, after the Uruguay Round, every member accepts all the WTO agreements together as a bundle (single undertaking approach) and the S&D treatment is seen more like a transitional stage towards a unique set of obligations for everyone rather than a development tool.[56]

To complicate the accession process and its power-based attitude, then, there is the issue of low human and economic means available to developing countries. Sometimes, negotiators are not fully trained or experienced and the budgets for national trade departments are not sufficient to support long and complex negotiations.[57] While all acceding members have to confront one-sided aspects of negotiations, developing countries are often disadvantaged by the power mechanism that underlies the process and this is the reason why technical assistance is so crucial for poor nations applying to membership.[58]

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[49] Rolland, S. E. (2012), cit., pp. 84-87.
[50] Halverson, K. (2004) 'China's WTO Accession: Economic, Legal, and Political Implications', in *Boston College International and Comparative Law review*, 27(2), pp. 319-370.
[51] Hu, W. (2019) 'China as a WTO Developing Member, Is It a Problem?', CEPS Papers 25627, Brussels: Centre for European Policy Studies.
[52] https://faculty.washington.edu/karyiu/WTO/ChinaAccessionReport.pdf (accessed May, 18th, 2020.
[53] Hu, W. (2019), cit., p.7; Rolland, S. E. (2012), cit., p. 86. For example, China Concessions in the Agricultural Sector are Larger than Developing Countries' Previous Accessions, Rumbaugh, T. and Blancher, N. (2004) 'China: International Trade and WTO Accession', IMF Working Paper, WP/04/36, Washington DC: IMF.
[54] Evenett, S. J. and Primo Braga, C. A. (2005) 'WTO Accession: Lessons from Experience', World Bank Trade Note n.33127, Washington DC: World Bank.
[55] Pelc, K. J. (2011) 'Why Do Some Countries Get Better WTO Accession Terms Than Others', in *International Organization*, 65(4), pp. 639-672.
[56] Laird, S, Safadi, R. and Turrini, A. (2004), cit., p. 227.
[57] Cattaneo, O. and Primo Braga, C. A. (2009) 'Everything You Always Wanted to Know about WTO Accession (but Were Afraid to Ask)', Policy Research Working Paper Series 5116, Washington DC:The World Bank.
[58]Stiglitz, J. E. and Charlton, A. (2005) *Fair Trade for All. How Trade Can Promote Development*, Oxford: Oxford University Press.

Moreover, the unilateral nature of preferences and their patchworked implementation had the result that the three principles ruling the GSP, which state that such agreements have to be non-discriminatory, generalized and non-reciprocal, have been in practice applied to different degrees and heterogeneously.[59] Indeed, the proliferation of regional agreements may complicate things for developing countries trying to expand their industrial policy in order to improve their productive capacity. As a matter of fact, it has been argued that bilateral agreements would be far more restrictive than multilateral obligations as WTO members because they leave very little policy space to developing countries to increase their comparative advantage through industrial policy, considered fundamental to pursue development goals.[60]

Beyond the *querelle* about self-election, all these issues suggest not only that the current system is somehow flawed but also that probably it is not, at least today, fitted for the very ambitious development goals that the international community has set in the 2030 Agenda.

## V. The Opportunity to Reform: Why "Developing Country" Is More than Just a Name

The considerations noted above support the conclusion that accession negotiations are crucial for developing countries to obtain trade preferences. However, also multilateral negotiations during trade rounds are extremely important to less powerful players because they provide the occasion to take collective action in order to reach mutual commitments by exchanging reciprocal offers and requests in specific areas[61]. Indeed, the WTO allows the formation of coalitions that "speak with one voice"[62] representing groups of countries with respect to different issues such as agriculture, TRIPS and non-agricultural market access negotiations. While coalitions are largely used also by developed countries, there is no doubt that for less powerful players the opportunity to put their weight together is extremely crucial to obtain results that would have been unthinkable if they were alone. However, the effectiveness of groups in improving bargain power depends on their construction, coherence and strategy which, as it has been pointed out, are not easy to achieve and may sometimes be flawed[63].

Thus, in the current situation, the dispute about the appropriateness of setting new standards for developing country status probably does not have much impact since preferences, market access, further regulation and conditionalities are negotiated during accessions and rounds. On the other hand, however, it is reasonable to argue that the multilateral forum provided by the WTO is a crucial opportunity for developing countries to pursue collective action to increase their bargain power in international trade. Even if this conclusion cannot be applied easily to accession negotiations which are substantially bilateral, it is revealing of how self-election as developing country is relevant for diplomacy and alliances among weaker players that may have needs and goals in common. Indeed, as Bartels argued, in this perspective, "developing country status is no more than a shorthand

[59] Laird, S, Safadi, R. and Turrini, A. (2004), cit., p. 231.
[60] Shadlen, K. C. (2005) 'Exchanging Development for Market Access? Deep Integration and Industrial Policy under Multilateral and Regional-bilateral Trade Agreements, in *Review of International Political Economy*, 12(5), pp. 750-775.
[61] Pelc, K. J. (2011), cit., p.3.
[62] For a full report on groups: https://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.htm (accessed May, 18th, 2020).
[63] Narlikar, A. (2003) *International Trade and Developing Countries Bargaining coalitions in the GATT & WTO*, London: Routledge.

description of a negotiating position, and its validity will rise or fall with the strength of that position".[64]

Regarding the issue of S&D treatment in multilateral negotiations, it has been suggested that country-based graduation, focused only on general and quantitative countries' characteristics, may in practice be easier to conceive but not very effective in leading the debate towards evolving development tools and trade objectives. Rather, it would be better to work on policy space and development strategies in international trade with an issue-based approach graduating S&D treatment by national conditions in any specific trade area[65]. However, this solution may not be very easy to implement because of the lack of data and limited capacity of bureaucracy in many countries.

While some researchers recognized the need for differentiation between different levels of development, they also pointed out that further graduation would have a divisive effect, implying that progressive improvement in development would lead to a reduction of vested benefits. This issue is due to the fact that the WTO has been conceived as a system aimed purely at achieving further trade liberalization and S&D treatment is essentially a transitional means to bring developing countries to the same level of market liberalization rather than towards the achievement of development goals.[66].

In this scenario, different proposals have been submitted with a view to overcome the issue of vague differentiation and self-election criticism. It has been suggested to restrict the list of countries eligible to S&D treatment to a smaller group composed by LDCs and few more weak economies in order to get more substantial benefits due to the inverse relations between the depth of concessions and the number of beneficiaries.[67] Another possibility would be to tailor S&D treatment measures to differentiated groups of countries, adjusting these provisions to specific conditions and needs.[68] Both approaches, however, seems to be potentially divisive for the developing community of States, breaking coalitions among countries that, eventually, would have to go through difficult bilateral negotiations in order to be added to this or that group to get better S&D provisions.

These options may certainly lead to more development-oriented arrangements. Nonetheless, they would not ultimately address the issue of bargain power asymmetries in negotiations that affect the GSP system. Conversely, differentiations could indeed have the negative effect to hamper the construction and functioning of developing countries' collective action. As argued before, coalitions are extremely important in the WTO framework, which is not only a law-based system but also a negotiation forum, and they are crucial for weaker players to expand their opportunities and fully participate in the life of the organization.

Thus, the WTO should empower developing countries within its institutional framework in order to effectively pursue development objectives and legitimate itself by including all its members in the decision-process. There is evidence that developing counties' coalitions are already changing WTO dynamics and, at the same time, they are somehow shaped by the organization legal and institutional

[64] Bartels, L. (2019) 'WTO Reform Proposals: Implications for Developing Countries. In Soobramanien', in T. Y., Vickers, B. and Enos-Edu, H. (Eds), *WTO Reform. Reshaping Global Trade Governance for 21st Century Challenges*, London: Commonwealth Secretariat.
[65] Tortora, M. (2009), cit. pp.12-13.
[66] Laird, S, Safadi, R. and Turrini, A. (2004), cit., p. 259.
[67] Hoekman, B., Michalopoulos, C. and Winters, L. A. (2004) 'Special and Differential Treatment of Developing Countries in the WTO: Moving Forward after Cancun', in *The World Economy*, 27(4), pp. 481-506.
[68] Laird, S, Safadi, R. and Turrini, A. (2004), cit., p. 247.

structure. However, the WTO regulation is not consistent in favoring collective action of developing countries and, sometimes, it may hamper the capacity of weaker members to act collectively.[69] What is worse, the unilateral nature of the GSP and the uncontrolled proliferation of regional agreements have the consequence to break coalitions among the developing community, essentially forcing weaker players to negotiate individually. [70]

While actions have been undertaken in order to improve technical capacity and assistance for less developed nations in the WTO framework, there is still a lot of space to provide legal and institutional tools to better assure developing countries' participation in the process through coalitions and groupings.[71] Therefore, the core of any reform should not focus on a quantitative differentiation of developing countries nor on a new, exclusive definition. What seems to be crucial, instead, it is the reconsideration of participation tools and collective action for weaker members. Certainly, this would only be a kick-start to radically rethink development within international trade through the empowerment and the voice of the countries involved.

In this perspective, the debate about self-election does not seems to be very relevant: while belonging to the developing community is part of the identity and diplomacy of many countries regardless of their undeniable different economic and social conditions, groups and coalitions are built around issues and areas that may put together stronger and weaker players, amplifying the voice of the latter. To this end, breaking the developing community through the introduction of fixed categories could be a mistake.

Developing countries are today the larger part of WTO membership and nowadays sustainable development is a pivotal issue in every international forum. Therefore, any proposal of reform in the WTO should address the issue of substantial and active participation of all its membership to legitimate the system as a starting point for any further institutional change.

## VI. Conclusions

The commitment of the international community towards development goals has grown in the last decades, rising important questions about the role of the WTO and the relationship between international trade and developing countries' aspirations and needs. Indeed, the multilateral trading system has been called to a reform by many actors in order to revitalize its legitimacy and face effectively the evolving international scenario.

The issues of inclusion and support to less developed members rely on the Enabling Clause that provides the permanent legal basis for exceptions to the most favorite nation treatment to the advantage of weaker economies. However, this provision does not include a definition of developing country that, instead, has been traditionally left to the practice of self-election. Under the Enabling Clause, the unilateral nature of the granted preferences and the implementation of S&D treatment

[69] Rolland, S. E. (2007) 'Developing Country Coalitions at the WTO: In Search of Legal Support', in *Harvard International Law Journal*, 48(2), Northeastern University School of Law Research Paper, pp. 483-551.
[70] *Ivi*.
[71] *Ivi*.

determine a "patchwork" scenario in which more powerful parties may exert their influence, essentially overturning the issue of self-election to their advantage.

EU, US and Japan demanded a reform of the self-election mechanism, arguing that it hampers negotiations to the detriment of less developed countries. On their part, several developing countries contend this argument, replying that the development divide is still very sharp and that the developed-developing dichotomy well grounded. US and China are the main players involved in this debate and the trade war engaged by the two has a crucial role in leading the discussion. However, the contention dates back to the GATT and involves today about two thirds of the WTO membership. Indeed, the commitment towards development goals will be a critical issue in the multilateral trading system for the days to come.

Nonetheless, the lack of a definition for developing countries is only one of the many problems related to S&D treatment. In fact, this paper argued that the benefits related to developing country status within the WTO and their implementation depend substantially on the bargaining power of the countries involved rather than on the self-election mechanism. As a matter of fact, the accession process is a crucial point to exchange commitments regardless of S&D provisions. Multilateral negotiations during trade rounds are extremely important too because they provide the forum for developing countries to act collectively and put their weight together with a view to reach mutual commitments by exchanging reciprocal offers and requests in specific areas.

In the light of these considerations, the dispute about the appropriateness of setting new standards for developing country status does not seem to be that relevant. On the other hand, however, this paper argued that the multilateral forum created by the WTO is a crucial opportunity for less powerful players to increase their bargaining power in international trade negotiations.

Proposals that introduce further differentiation among developing countries may have the negative effect to break coalitions among weaker countries that, eventually, would have to go through difficult bilateral negotiations, while collective action is critical to expand their opportunities and participate actively in the life of the WTO.

The current international debate seems somehow to miss the point in focusing on self-election. Indeed, rather than quantitative differentiation or exclusive definitions, it is important to rethink participation tools and collective action for every member. In this way, the WTO could empower developing countries, pursuing development objectives and legitimating itself with an inclusive decision-process. The developing community is populated by countries in very different economic and social conditions, and coalitions may be built around sectors and issues that combine stronger and weaker players, hopefully strengthening the position of the latter. In this perspective, breaking groups through the introduction of fixed categories or definitions could be a mistake.

Developing countries are the larger part of WTO membership and their number is expected to grow in the future. What is more, sustainable development is today a pivotal issue in every international forum and the multilateral trading system has to evolve in order to achieve ambitious targets. Therefore, any reform proposal in the WTO should address firstly the issue of the substantial and active participation of all its membership to legitimate the system as a starting point for any further institutional change.

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CENTRO STUDI AMERICANI

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2. Background Paper

# "Quo Vadis WTO" after Covid 19?

Giorgio Sacerdoti

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# *"QUO VADIS" WTO AFTER COVID-19?*

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**"Quo vadis" WTO after Covid-19?**

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**Abstract**

*The global spread of the COVID-19 pandemic has brought as an immediate response the introduction of national restrictive measures to international trade favored by a progressive mistrust in the benefits of globalization and reliance on national solutions, yet incapable of resolving problems which have an inherent global dimension. Although public interest exceptions in the WTO Agreement may allow such limitations, the need of multilateral cooperation has been broadly recognized also as a method to ensure open trade in medical devices and pharmaceuticals The negative impact of the sanitary emergency on international growth, economic development and trade aggravates the existing crisis of the WTO and of the multilateral trade system. One the one hand, the shortcomings of existing rules to tackle new dimensions of trade, such as e-commerce, is not being addressed by negotiations. On the other hand, the attack of the Trump administration on the WTO in general and on the dispute settlement system specifically, has not found an adequate forward-looking response by other WTO members notwithstanding their declared trust in multilateral solutions. The US-China rift, which goes well beyond bilateral trade and economic and technological competition, aggravates the risks of fragmentation and paralysis of the multilateral cooperative trading system, which remains in any case a precious common good of the international community.*

1.The unexpected global spreading of the Covid-19 pandemic in early 2020 has given a blow to world trade and has imperiled multilateralism even beyond the damage previously inflicted to the latter by the Trump administration's pursuit of unilateralism (protectionism) and bilateralism in United States (US) trade relations, disregarding WTO obligations and compliance with its rule-based dispute settlement system.[2]

The WTO has signaled that the volume of international trade in merchandise may plunge in 2020 by between 13% and 32%.[3] This retreat has been amplified by travel bans and the plummeting of transportation facilities available for the movement of both persons and goods.[4] According to IMF forecasts, world production (GDP) may decline by 3% on average ( up to 7,5% as to the eurozone) in 2020 with scant perspective that any 2021 recovery may fill the loss.[5]

At the same time, in order to increase the domestic availability of medical supplies many countries introduced immediate export bans when they realized the lack of domestic availability and production of these supplies and their dependence on foreign sources.[6] As a consequence, self-sufficiency in the production of many key goods and primary products has been advocated, especially with a view to ensuring food security (notably by developing countries) thus reducing reliance on international trade but putting international cooperation at risk. Disruption of production due to the paralysis of factories and border closings because of fear of the pandemic has led to calls to reshoring manufacturing in industrialized countries that had relied on global value chains and offshoring, especially in China.

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[2]See the WTO website with a link to relevant information and statistical data: COVID-19 and world trade, "The COVID-19 pandemic represents an unprecedented disruption to the global economy and world trade, as production and consumption are scaled back across the globe" https://www.wto.org/english/tratop_e/covid19_e/covid19_e.htm

[3] https://www.wto.org/english/news_e/pres20_e/pr855_e.htm, *Trade set to plunge as COVID-19 pandemic upends global economy*, 8 April 2020. The prediction is that sectors relying most on global value chains, such as electronic and automotive products, will be hit hardest, and that exports from North America and Asia will suffer the most.

[4]https://www.iata.org/en/programs/safety/health/diseases/government-measures-related-to-coronavirus/

[5] See IMF, *World Economic Outlook*, April 2020.

[6] https://www.wto.org/english/news_e/news20_e/rese_03apr20_e.pdf; World Custom Organization, "List of national legislation of countries that adopted temporary export restrictions on certain categories of critical medical supplies in response to COVID-19" http://www.wcoomd.org/en/topics/facilitation/activities-and-programmes/natural-disaster. Only 13 Members out of 46 which have introduced such restrictions have notified these restrictions to the WTO under the 2012 "Decision on Notification Procedures for Quantitative Restrictions" (QR Decision) ttp://www.wcoomd.org/en/topics/facilitation/activities-and-programmes/natural-disaster/list-of-countries-coronavirus.aspx

A parallel development has been the increase of controls on dual-use technological exports and on the acquisition of domestic firms by foreign investors, mainly in the US and in Europe, based on a more expansive definition of strategic industries.[7]

Some of these trade-restrictive measures may be short term, so that once the pandemic has been tamed export restrictions such as those on medical supplies and protective devices may be lifted.[8] Other restrictions and policies are most likely here to stay. They are supported by a less benign view of the benefits of globalization and of the operation of markets. There has been a widespread call for a more robust role for governments ("the State") as the protectors of last instance of the well-being of their people.

Against this inward-looking involution, influential personalities, such as French President Emmanuel Macron, former US Treasury Secretary Henry Paulson and Bill Gates[9], have raised their voices advocating for more multilateralism, concerted action and cooperation in order to tackle global problems such as health security and assistance to vulnerable developing countries, which require maintaining trade flows.[10] The negative experience of unilateral beggar-your-neighbor protectionist responses of the 1930s to the 1929 crisis has been evoked as an example not to be followed. Organizations such as the WHO, WTO and IMF should see their roles enhanced rather than being sidelined. In fact, bodies as diverse as the EU, the G-7 and G-20 have expressed themselves, with different tones and determination, to be in favor of strengthening global cooperation.[11] The UN General Assembly on 2 April 2020 approved a resolution calling for "international cooperation" and "multilateralism" in the fight against Covid-19. The UN General Assembly issued on 2 April 2020 Resolution 74/270 on "Global solidarity to fight the coronavirus disease 2019 (COVID-19)"[12] Meeting global challenges such as those stemming from climate change (global warming), protecting the environment, meeting sustainable development goals, ensuring basic needs and respecting fundamental rights for all should not be relegated to second place. To the contrary, ensuring health and appropriate sanitary conditions worldwide has to be added to the list since viruses know no border.

2. The COVID-19 economic and trade crisis has hit the WTO at a moment in which the organization was certainly not in good health. The respect of its rules has reached a low level, due to recourse to unilateral measures and bilateral agreements in disregard of multilateral obligations; the dispute system is half paralyzed due to the demise of the Appellate Body at the end of 2019; proposals to update or "modernize" WTO rules, including by negotiating agreements in sectors up to now not effectively covered, which were put, at least nominally, on the multilateral agenda in the last 2017 WTO Ministerial Conference in Buenos Aires (e-commerce, data circulation and protection, outlawing subsidies to illegal fishing) are going nowhere. The cancellation of the Ministerial Conference, to be held in June 2020

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[7] See *Communication from the EU Commission, Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation)*, 25 March 2020, C(2020) 1981 final, https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158676.pdf. See also UNCTAD, *Investment Policy Responses To The Covid-19 Pandemic,* Investment Policy Monitor, Special Issue No.4, May 2020.

[8] https://www.wto.org/english/news_e/news20_e/igo_15apr20_e.htm, *IMF and WTO heads call for lifting trade restrictions on medical supplies and food.*

[9] See Emmanuel Macron, interview to FT 16 April 2020; Henry Paulson, *Save globalisation to secure the future. The world will be a very dangerous place if we do not fix multilateral institutions*, FT 17 April 2020; Bill Gates, *The first modern pandemic. The scientific advances we need to stop COVID-19,* 23 April 2020, https://www.gatesnotes.com/Health/Pandemic-Innovation

[10] See also the contributions collected in the timely ebook by RE. Baldwin and S. Evenett (eds.), *COVID-19 and Trade Policy: Why Turning Inward Won't Work,* CEPR Press 2020, www.cepr.org.

[11] See *G20 leaders issue pledge to do 'whatever it takes' on coronavirus*, https://www.theguardian.com/world/2020/mar/26/; Press release by Presidents Michel and von der Leyen after the G7 Leaders' videoconference on COVID-19, https://www.consilium.europa.eu/en/press/press-releases/2020/04/16/press-release. Also, groups of WTO members have tabled proposals in the same direction at the WTO General Council in April 2020, notably with a view to ensure open and predictable trade in agricultural and food products (WT/GC/208)

[12] See also Res/74/274 of 20 April "International cooperation to ensure global access to medicines, vaccines and medical equipment to face COVID-19"

in Kazakhstan and now postponed to 2021 because of the pandemic, has avoided a public showing that "the king is naked". The little impetus that might have subsisted at the beginning of 2020 to tackle some of these issues and discuss proposals tabled by a number of members to improve the functioning of the WTO has dissolved due to the pandemic and the ensuing paralysis of WTO activity. It is difficult to anticipate whether, once the crisis will have hopefully been surmounted, a collective effort will develop to resolve the conflicts between divergent national trade policies that have undermined respect and trust in multilateral rules.

Regional free trade agreements (FTAs) do not seem to be an alternative, notwithstanding the sustained pace in which they are being negotiated and concluded, the most recent being the one between the EU and Mexico in April 2020. Opposition against the further opening of trade relations, even limited to bilateral and regional relationships, has been voiced by a variety of different domestic interests. Their influence has led to political difficulties that are hampering the ratification of CETA between EU-Canada and have delayed the entry into force of USMCA in North America. Moreover, the globality of supply chains tends to show that regionalization is only a partial response since those chains extend over the whole earth. From an economic and commercial point of view, regional trade cannot replace global trading relations between geographically distant economies which have grown exponentially in recent decades, notwithstanding the recent calls for reshoring and diversification.[13] On the other hand FTAs, possibly because reciprocal liberalization is more "tailor-made", are more resilient and less exposed to breaches than multilateral rules. It is to be expected that human and social rights and sustainable development conditionality will increase in FTAs, making them more acceptable to public opinion in the North and more attentive to the pursuit of non-trade objectives.[14]

3.Looking at the pre-pandemic context, let us recall the situation concerning both the application of substantive rules and the functioning of the WTO, on the one hand, and the paralysis of the dispute settlement system as of the beginning of 2020.

The challenge to the multilateral rule-based system started in 2018 with the US turning its back on a 70-year old support of multilateralism in principle and practice. The major features of the 'trade wars' launched by the US administration on a multiplicity of fronts have been, firstly, the unilateral increase of US import custom duties on steel and aluminum from all sources, invoking the security exception of Article XXI GATT, with the threat of imposition of extra duties on car imports (notably from the EU), also to be based on the same exception. Secondly, the introduction of a 10% surcharge on imports from China worth $250 billion, with a threatened increase to 25% (which materialized in May 2019) should China not be amenable to a bilateral agreement acceptable to US concerns as to investments, protection of industrial property (against "technology theft"), subsidies and the role of State-owned-enterprises (matters in part beyond the purview of WTO rules).

The current US Administration has focused its trade policy on the protection of US domestic enterprises, 'bringing back' manufacturing jobs in the US and rebalancing the US trade deficit in the import-export of goods.[15] Under this policy, major trading partners are induced to (re)negotiate bilateral 'deals', even if this entails renouncing previously agreed commitments under the threat of unilateral limitations of their products' access to the US market through 'punitive tariffs,' irrespective of existing bilateral, regional and multilateral obligations. Trade relations and negotiations are not viewed as a win-win exercise any more, but as a zero-sum-game where the advantages gained by other countries indicate that, due to previous 'negative' agreements, the US has suffered losses that must be redressed.

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[13] About one third of Italy's interchange is with countries outside Europe, while 60% is within the EU, https://www.mise.gov.it/images/stories/commercio_internazionale/osservatorio_commercio_internazionale/statistiche_import_export/completo.pdf

[14] See Financial Times, 4 May 2020, *France and Netherlands jointly call for tougher EU trade conditions.*

[15] See the US 2018 Trade Policy Agenda which envisages 'a new era in American trade policy' (Office of the United States Trade Representative, '2018 Trade Policy Agenda and 2017 Annual Report' (March 2018), (https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20FINAL.PDF). The Agenda places significant importance on US sovereignty and on the leverage that the US market offers in trade negotiations based on five major pillars: supporting US national security; strengthening US trade laws; negotiating 'better' trade deals; reforming the multilateral trading system; and aggressively enforcing US trade laws.

As a consequence of these tariff increases, of the additional tariffs on exports from the US introduced as a response by a number of target countries, and a creeping introduction of various restrictions by other countries, expansion of world trade stalled in 2018-2019.[16] Uncertainty as to the opening of existing markets and the stability of the world trade regime has led to the disruption of inter-national value chains: offshoring and delocalization is being replaced by reshoring and decoupling.

The US has shown a similar attitude towards its regional agreements in force: the withdrawal from the not-yet-in force TPP; renegotiation of KORUS limiting previously agreed access for Korean trucks into the US; replacement of NAFTA by a new agreement (USMCA) concluded in October 2018 but whose entry into force has been delayed by opposition in the US Congress until mid-2020. USMCA has subjected to a number of stringent conditions (such as minimum wages for Mexican automotive workers and more restrictive rules of origin) the previously NAFTA-based preferential market access to the US market for Canada and Mexico. It has also reduced the protection previously afforded to regional investors by Chapter 11 of NAFTA, both in substance and as to the availability of investor-state arbitration of disputes (which has been cancelled altogether in US-Canada relations).

As to the WTO, besides its attacks on the functioning of the dispute settlement system (DSS), specifically the Appellate Body (AB), the US has addressed its criticisms on specific shortcomings it perceives in the operation of the WTO and on the inadequacy of existing agreements in covering current issues.[17] The US has refrained however from engaging with other members in order to seek agreement on mutually acceptable reforms based on its own proposals.

The US has raised the issue of non-compliance by many WTO members with various obligations of transparency, such as promptly notifying subsidies, and the lack of remedies and sanctions to enforce these obligations. In this respect, the US and other WTO members have proposed sanctions to members 'with notification delays' in the form of suspension of certain participation rights.[18] As to the second aspect, the US has especially pointed out the shortcomings in the existing discipline on subsidies in dealing with overcapacity in the steel industry in China and in the rules of conduct for State-owned-enterprises (SOE). The US has also attacked the current practice of self-designation of WTO members as developing countries, entitled as such to a special and differential treatment in various respects. The US has proposed replacing this practice with objective criteria which would exclude any important participant to world trade and all members of the G-20 (such as China, India, Brazil) from this status. No formal negotiations however have yet been triggered by these mostly informal proposals.

On the other hand, in a number of official statements, within and outside the WTO, the EU and the generality of the other members have restated their confidence in multilateralism and in the WTO as a forum of negotiation, surveillance of implementation of commitments and for solving disputes.[19]

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[16] See the WTO Director General Report of 12 December 2019 showing trade restrictions by WTO members having reached an historically high level while international trade volumes and value have decreased for the first time since the 1950s, https://www.wto.org/english/news_e/news19_e/dgra_12dec19_e.htm.

[17] The Working Paper of the Peterson Institute of March 2020 by C. Bown and S. Keynes *Why Trump Shot the Sheriffs: The End of WTO Dispute Settlement 1.0*, https://www.piie.com/publications/working-papers/why-trump-shot-sheriffs-end-wto-dispute-settlement-10 aims at explaining why "although the creation of the WTO resolved some concerns about American unilateralism in the short term, its system of handling disputes turned out to be politically unsustainable". However, the same authors' research shows (*Why did Trump end the WTO's Appellate Body? Tariffs*, https://www.piie.com/blogs/trade-and-investment-policy-watch/why-did-trump-end-wtos-appellate-body-tariffs, of 4 March 2020) that less than 5% of US imports were protected by American trade remedies in 2019, less than half of which were challenged at the WTO.

[18] "Procedures to Enhance Transparency and Strengthen Notification Requirements under WTO Agreements": Communication from Argentina, Costa Rica, the European Union, Japan, and the United States (2018), JOB/GC/204, JOB/CTG/14; and Procedures to Enhance Transparency and Strengthen Notification Requirements under WTO Agreements: Communication from the United States (2017) JOB/GC/148, JOB/CTG/10. On this issue see L. Borlini, " Crisis Looming in the Dark: Some Remarks on the Reform Proposals on Notifications and Transparency", QIL, Zoom-out 63 (2019), Bocconi Legal Studies Research Pape, SSRN No. 3525423, 23 February 2020.

[19] See f.i. the final communiqué of the meeting held in Ottawa in October 2018 among Australia, Brazil, Canada, the EU, Japan, Kenya, Korea, Mexico, New Zealand, Norway, Singapore and Switzerland) <www.canada.ca/en/global-affairs/news/2018/10/joint-communique-of-the-ottawa-ministerial-on-wto-reform.html>. The participants reaffirmed

The EU initiated high-level political bilateral contacts with the US in mid-2018 on industrial tariffs also as a way to avert the Damocle's sword of US extra tariffs on cars. The results have been however inconclusive, also because the US aims rather for easier access of its agricultural products into the EU market. In response to the US critiques of the functioning of the WTO, the EU has tabled a 'concept paper' with proposals for the 'modernisation' of the WTO, most of which would not require amendments of the WTO Agreements. [20] These proposals focus on 'updating the rule books' on international trade to capture today's global economy (including resorting to plurilateral agreements); strengthening the monitoring role of the WTO, transparency and notification obligations; and overcoming the deadlock on the AB.

While these initiatives have not lead to any outcomes, the US managed to conclude with China a "phase 1" agreement in January 2020 to resolve some of the bilateral trade frictions.[21] The criticisms of the US to certain structural restrictions by China in respect of access to the Chinese market by exporters and investors have been thereby only partially resolved by an engagement by China to reform in the medium-term certain restrictive practices (such as in respect to intellectual property protection and joint-venture requirements). The thrust of the agreement has been rather "mercantilistic": China undertaking to renew its massive buying of US agricultural products (soya, pork) against a partial lifting of US additional duties on Chinese exports (with some reduction of the Chinese additional duties introduced in response).[22]

What has not been resolved by these bilateral negotiations is the criticism of the US (and other WTO members) of China concerning its widespread use (or abuse) of subsidies to and through its state-owned enterprises (SOEs) which distort international competition and are not adequately dealt with by the special provisions of China's Access Protocol to the WTO (a criticism that China of course rejects).[23] Reform of substantive provisions of the WTO Agreement on Subsidies and Countervailing Measures (ASCM) had been advocated in a joint statement of the United States, the European Union and Japan in January 2020.[24] The proposals include broadening the concept of state-owned enterprises and sidelining the current AB restrictive interpretation of the term "public body" in the ASCM — another ground for complaint by the US against the AB.

Even ruling out further liberalization of trade in goods and services, which protectionist and populist sectors of public opinion reject, it is difficult to envisage even modest focused reforms through majority voting or plurilateral agreements, since leaving out important players would defeat the very purpose of the exercise. On the other hand, reform of important rules (such as the obligations on SOE's, relaxing anti-dumping disciplines, or expanding the

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their 'clear and strong support for the rules-based multilateral trading system and stress[ed] the indispensable role that the WTO plays in facilitating and safeguarding trade,' including 'the dispute settlement system as a central pillar of the WTO.' The participants undertook to have 'their officials continue to engage in discussions to advance ideas to safe-guard and strengthen the dispute settlement system,' 'to reinvigorate the negotiating function of the WTO,' and to 'strengthen the monitoring and transparency of members' trade policies. See also Canada's Discussion paper on 'Strengthening and modernizing the WTO' (21 September 2018) < https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=248327&CurrentCatalogueIdIndex=0&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True>

[20] See *European Commission presents comprehensive approach for the modernisation of the WTO*, https://ec.europa.eu/commission/presscorner/detail/en/IP_18_5786, 18 September 2018.

[21] See US-China Economic and Trade Agreement, https://ustr.gov/sites/default/files/files/agreements, 15 January 2020

[22] The EU has immediately expressed its reservations as to the WTO-consistency of such a bilateral deal, see *EU trade commissioner criticises US-China trade deal*, FT 17 January 2020.

[23] The massive State aid granted by most countries to their enterprises to cope with the impact of the Covid-19 crisis is weakening the call for more market-orientation by China. As to the EU, see the Commission's relaxation of Art.107 TFEU disciplines under the "Temporary Framework for State Aid measures in the Covid-19 outbreak" from 31 March to 31 December 2020, COM(2020) 1863 of 19 March 2020.

[24]Office of the US Trade Representative, "Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union" (14 January 2020), online: press release < https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/january/joint-statement-trilateral-meeting-trade-ministers-japan-united-states-and-european-union >.

availability of the security exception) would require some give-and-take *(do ut des)* within multilateral, multi-sector negotiations, something that the prevailing confrontational climate does not favor.

At the beginning of 2020 the WTO appears thus to be on the verge of paralysis, risking irrelevance and of being sidestepped by bilateral agreements that are not compatible with the principles of multilateralism. The announced resignation of Mr. Azevêdo from his position as Director-General effective September 2020 will not help. Valuable proposals notwithstanding[25], for the time being it appears unlikely that the WTO will be able to soon regain its institutional role as a rule settler, permanent negotiation forum, implementation watchdog and effective adjudicator on a global scale. Temporary export restrictions introduced on the trade of personal protective devices, medical equipment and pharmaceuticals by a number of countries during the pandemic have added tensions, although their legitimacy may be justified in principle under the various public interest exceptions found in Article XI.2, XX (a) and (b) of GATT (no one having invoked the security exception of Art. XXI).[26] Unilateral import or export restrictions are however not a long term answer for resolving global problems.

4. As to the *dispute settlement system*, the persistent abusive blockage by the US of the selection process for appointing the members of the WTO Appellate Body has brought about the latter's demise in December 2019 when just one AB member remained in office. As a consequence, the AB is for all purposes inoperative or non-existing. The US goes on withholding its consent to the launching of the selection process for new members that more than 120 WTO members propose at each monthly DSB meeting.

Irrespective of this latest development, the DSS was surely not meant to cope with a high number of acrimonious and sensitive disputes involving most major trading nations such as those introduced in 2018-2019, with no hope of final resolution, involving, for example, US restrictions where the US has invoked the security exception of Article XXI GATT.[27] This situation is not an indication of a healthy dispute settlement system. On the contrary, it hints at a crisis of the system, equipped to decide a limited number of disputes and issue decisions which would be normally complied with in good faith. It was not meant to operate in the context of widespread disrespect of substantive and procedural rules, such as resorting to unilateral measures and countermeasures without following the DSU procedures first.[28]

Appeals against first instance panel decisions can still be made but in the absence of an appeal adjudicator, disputes remain pending and successful petitioners cannot obtain redress against breaches hampering their access to foreign markets. The whole dispute settlement system and its rule-based binding adjudication risk becoming irrelevant, weakening in turn respect for, and trust in, the multilateral trading rules by WTO members, possibly the ultimate objective of the Trump administration. The US has consistently refused to engage in negotiations notwithstanding the availability of other members to take into account US "systemic concerns" as to AB operations, although they do not

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[25] See Centre for International Governance, *Modernizing the WTO*, April 2020, https://www.cigionline.org/articles/modernizing-world-trade-organization

[26] See S. Aatreya, "Are COVID-19 Related Trade Restrictions WTO-Consistent?" https://www.ejiltalk.org/ 25 April 2020, https://www.ejiltalk.org/are-covid-19-related-trade-restrictions-wto-consistent/ ; C. Glöckle, "Export restrictions under scrutiny – the legal dimensions of export restrictions on personal protective equipment" https://www.ejiltalk.org/ 7 April 2020; https://www.ejiltalk.org/export-restrictions-under-scrutiny-the-legal-dimensions-of-export-restrictions-on-personal-protective-equipment/

[27] See the cases brought separately by China, India, the EU, Canada, Mexico, Norway, Russia, Switzerland and Turkey against the US in 2018-2019 (DS 544, 547, 548, 550, 551, 552, 554, 556 and 564, respectively). Some of these WTO members have adopted trade restrictions against the US as countermeasures under Article 8 of the Safeguards Agreement, having considered the US measures to be in reality disguised safeguards. The US has in turn challenged these countermeasures as unjustified, claiming that its own measures are bona fide security-based, starting proceedings against Canada, China, the EU, Mexico and Turkey (DS 557, 558, 559, 560 and 561 respectively).

[28] For a critical legal evaluation of both the US measures ('black lies') and the countermeasures by targeted countries, labelled as a response of dubious legality under the WTO ('white lies'), see JJ Weiler, 'Black Lies, White Lies and Some Uncomfortable Truths in and of the International Trading System' (EJIL:Talk!, 25 July 2018) <www.ejiltalk.org/black-lies-white-lies-and-some-uncomfortable-truths-in-and-of-the-international-trading-system/>.

share the US view that the AB has engaged in improper "judicial activism". [29] Reforming the appellate stage in a way that may satisfy the US without debilitating the whole WTO rule-based impartial DSS, which has by and large for a quarter of a century ensured the respect for the multilateral trading system, appears problematic.

In order to try to reach an agreement the General Council at the end of 2018 appointed as a "Facilitator" the senior New Zealand ambassador David Walker, currently chairman of the DSB. His report (October 2019) includes compromise proposals which address the mostly procedural "concerns" raised by the US and would tackle them without impairing the operations of the AB.[30]

Even Walker's modest ("quick-fix") proposals have not been taken into consideration by the US as a basis for negotiations.[31] The stranglehold on the AB is liable in turn to also paralyze the panel phase, since panel reports appealed "in the void" cannot be adopted by the DSB. Disputes would remain unresolved and breaches would not be sanctioned.[32] The whole WTO system of reciprocal rights and duties risks becoming unenforceable. The view has been thereby reinforced that such paralysis of the binding WTO rule-based DSS is precisely an objective of the current US administration. In the present situation no authority will be able to review and sanction any such WTO non-compliant measures. Moreover, the US's criticisms of the interpretation by the AB of certain WTO Agreement which are politically sensitive for the US administration (notably in the field of trade remedies, such as the anti-dumping and ASCM Agreements) should be addressed by clarification or amendments to the provisions at issue by the WTO members rather than through attacks to the adjudicators because of their interpretation.

An alternative interim solution has been proposed by the EU and accepted by other 19 WTO members in March 2020. [33] This "Multi-party Interim Appeal Arbitration Arrangement" (MPIA) envisages an alternative "appeal arbitration" between the participants within the DSS. The scheme is based on the option laid down in Article 25 of the Dispute Settlement Understanding (DSU), to opt for arbitration instead of the regular dispute settlement proceedings but still within the WTO DSS. According to the MPIA, arbitration for the appeal phase would be resorted to at the end of the panel stage in lieu of appeal to the AB by virtue of specific bilateral agreements between the signatories in dispute as long as the AB is inoperative.

However, even if accepted by the bulk of WTO members, this mechanism would leave out the US and result in a fragmented regime in which the US would loosen itself from the compliance obligations stemming from the WTO dispute settlement system.

Renouncing independent rule-based adjudication and going back to the GATT system, where ad hoc panel reports did not establish a consistent jurisprudence and were little more than advisory opinions or non-binding conciliation

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[29] The criticism expressed by the US on various practices of the AB at almost all DSB meetings in 2018-2019 has been assembled in a lengthy report of USTR in February 2020, see <https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf>

[30] WTO General Council, 15 October 2019, 'Agenda item 4 – Informal process on matters related to the functioning of the Appellate Body – Report by the Facilitator, H.E. Dr. David Walker (New Zealand)', 15 October 2019, OB/GC/222.

[31] The proposal addresses as follows the issue raised by the US:
- transitional rules for outgoing AB members (who could complete a case only if the hearing has taken place within their term);
- 90-day deadline (to be extended only with the consent of the litigants or in case of force majeure);
- municipal law (to be considered as an issue of fact not re-viewable on appeal);
- 'advisory opinions' (the AB shall not address issues not raised by the parties or not necessary to resolve the dispute);
- precedent (dispute settlement proceedings do not create precedent, and previous reports should be taken into account to the extent they are relevant in a subsequent dispute);
- 'overreach' (panels and AB cannot add or diminish WTO members rights as stipulated in Articles 3(2) and 19(2) DSU; panels and the AB shall interpret the Anti-Dumping Agreement in accordance with its Article 17(6)(ii)).

[32] Since the Appellate Body has decided before its paralysis in December 2019 to issue reports only on the three pending appeals in which the hearing had taken place before 11 December 2019, ten other appeals have remained pending.

[33] EU press release 15 April 2020, https://www.consilium.europa.eu/en/press/press-releases/2020/04/15/council-approves-a-multi-party-interim-appeal-arbitration-arrangement-to-solve-trade-disputes/ (with text attached).

proposals, would not be effective within a complex multilateral system comprising many agreements and participants. Nor would such an approach be consistent with the carrying out of international trade under a legally predictable framework, as the current "trade wars" *a contrario* demonstrate.

The first reality check will be the fate of pending appeals: will appellants renounce them, possibly against some negotiated compensation with the winning party? Will the parties agree on arbitration, or will they wait to see whether the AB stalemate will be resolved? Or will they appeal future panel reports "in the void" to a non-operative appellate body thus frustrating rule-based resolution of the disputes?[34]

Changes – even substantial ones – of the DSS rules would be possible without amending the complexity of the WTO Agreements and with no need of cumbersome domestic parliamentary ratification.[35]

The real issue is of course substance. Assuming rejection of the AB by the US persists, would WTO members accept abolishing appellate review, thus living with possibly contradictory panel decisions? Would such a situation, which would be similar to that of the much-criticized investment arbitration system under bilateral investment treaties (BITs), be acceptable within a multilateral framework such as that of the WTO, with or without a partial MPIA in force as second best? Can one seriously envisage replacing the AB and its rule-based adjudicatory function with a looser form of non-binding review, such as by a committee of non-independent ambassadors or experts? Wouldn't this mean throwing the baby out with bathwater (in a context where the bathwater is not really dirty) bowing to US pressure?

A fundamental requirement of any revision should in any case be that of preserving the compulsory, impartial, rule-based, enforceable nature of the WTO DSS of which the appellate review is an integral element. Also in case of emergencies, such as the COVID-19 pandemic, a functioning multilateral system is a barrier against unchecked unilateralism while allowing the protection of paramount health imperatives, but without sacrificing the principles of international cooperation.[36]

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[34] The EU has announced that in such a case by an opposing party in a dispute with the EU, it would resort immediately to countermeasures, relying on general international law principles in the area of State responsibility, see "Commission reinforces tools to ensure Europe's interests in international trade", 12 December 2019, https://trade.ec.europa.eu/doclib/press/index.cfm?id=2091&title=Commission-reinforces-tools-to-ensure-Europes-interests-in-international-trade (Proposal for a Regulation 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)

[35] There are two avenues to this end, should there be political will. First, minor changes to any WTO agreement (including the DSU) are possible through majority-adopted "authoritative" binding interpretations by the Ministerial Conference and the General Council under Article IX(2) of the WTO Agreement. This could be a proper instrument to adopt Ambassador Walker's proposals, as possibly revised, preferably by consensus. Secondly, the DSU itself can be amended through a facilitated procedure set forth in a Ministerial Decision taken within the Uruguay Round negotiations in 1993, which allows DSU modifications by the WTO Ministerial Conference.

[36]COVID-19 related export restrictions have been notified to the WTO by a number of countries in accordance with the 2012 "Decision on Notification Procedures for Quantitative Restrictions", see WTO Information Note on Export Prohibition and Restrictions of 23 April 2020, available at https://www.wto.org/english/tratop_e/covid19_e/export_prohibitions_report_e.pdf.

CENTRO STUDI AMERICANI

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# Reshaping the WTO: The future of the multilateral trading system in the new international order

Rome – June 18th, 2020

Edited by Giorgio Catania and Michela Lampone

SAPIENZA UNIVERSITÀ DI ROMA

Ministry of Foreign Affairs and International Cooperation

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## *Welcome Remarks*

**Armando Barucco,** Ministro Plenipotenziario, Capo dell'Unità Analisi e Programmazione,

Ministero degli Affari Esteri e della Cooperazione Internazionale

According to Richard Haass, one of the earliest victims of the Covid crisis was multilateralism and international cooperation. If we look at the first weeks of the crisis, we all remember the scramble between European countries for masks and ventilators (not only Europeans of course). That was actually a very poor display of cooperation and multilateralism, as well as blow for EU solidarity.

As far as the impact of Covid's on the current volatile order, at the *Policy-Planning Unit* of the Ministry of Foreign Affairs and International Cooperation we have interpreted Coronavirus as a fragilizer of international scenarios and as an accelerator of trends which have been emerging in the past decade.

A special concern for our country has to do with the impact of Covid on our neighbouring countries on the southern shores of the Mediterranean – as well as in Africa – and with the combined effects related to oil prices and commodities dynamics, remittances and social-economic tensions arising from the coming Covid recession/depression: the worst since 1929.

A large part of the post-Covid order debate deals with multilateralism and the future of global economy.

Surely the WTO was not in a good shape before the crisis and it is even in worse shape now. We must be very careful in making things worst with proposals and decisions that, though taken in good faith and with the best of intentions, could be devastating in the medium-long term.

Just a historical reminder. Italy fought a very difficult battle within the European Union about the granting of the "Market Economy Status" to China. The argument was simple: China was not a market economy because the State and the Party play a dominant role in the economy; just the opposite of what we mean by market economy.

Today, there is a paradox in what is happening in relation to the proposals and initiatives to fight the economic impact of Covid. By monitoring the current debate in most of the Western countries after Coronavirus, we see that most of the measures taken or proposed are part of the anti-globalisation (and anti-Chinese) narrative: relaxation of state aids, suspension of the stability pact, protection of strategic sectors, regionalization or on-shoring of supply chains, nationalization of failing companies, sky-rocketing public budgets and debts.

As I said, there are excellent reasons for all these proposals, and I personally share most of them. At the same time, I cannot help noticing a certain irony in what is happening: we (the west, US and the EU) are changing radically the balance between the public and the private sectors in favour of the former; and some of the measures are very similar to those applied in the Chinese economy.

Therefore, a lot of balance and fine-tuning is necessary on the part of all main international actors. We must be aware of unintended consequences and the impact that some of the decisions we are

taking could have on international trade. The key for recovery after the Covid crisis - especially for countries like Italy whose public debt will reach 160% of GDP and plus – is the relaunch of global growth. And any possible relaunch of global growth is consubstantial with the relaunch of trade, and it is unimaginable without common work and cooperation among the three economic and trade superpowers: US, China and the EU.

One final word about the EU. After some hesitations, we have shown strength and courage in adopting a very ambitious internal package to tackle the social and economic impact of the Covid induced recession.

More work is needed on the external dimension and the impact of the crisis on areas whose stability and prosperity are essential for our own stability and prosperity, especially the Balkans and the enlarged Mediterranean and Africa.

And more work and ambition are needed on multilateralism and trade to counter the current strong anti-globalization and sovereignist narrative.

In this context, the European Union – which represents currently the main pillar of the multilateral trade order – pride itself, and rightly so, of being a normative superpower. Reforming the WTO is not a simple task. But we have all the instruments and skills to do so, and bringing the WTO out of its crisis should be a fundamental part of our post-Covid strategy.

## First Session

### *The future of WTO between institutional reform and new challenges*

**1.1 Giuliano Amato**, Giudice della Corte Costituzionale e Presidente Onorario del Centro Studi Americani

We tend to think that multilateralism – of which the WTO is one of the main expressions – and leadership are somehow not compatible with each other. Nonetheless, it is not so simple. Our experience tells us that the best condition for multilateralism is a world where there is a leading country which shares the sense and the goals of cooperation, as it was years ago when the United States were the leading country of the world. Nowadays – in a world where that has no leaders – multilateralism itself is very much difficult to practice, because what is prevailing is the multiplication of conflicts. Conflicts damage multilateral governance much more than leaders can do. Today, the United States are playing a role which openly goes against the WTO and multilateral institutions.

The position of the US is specifically aimed at paralysing the functionality of the WTO. The Appellate Body of the WTO – whose importance is crucial – has been strangled through the opposition of the United States to the appointment of the new members. Without the Appellate Body, the entire structure of the WTO is seriously injured. National interests frequently tend to prevail over the research of a common interest and will never be eliminated by International Organizations.

I think that we will not go anywhere before the American elections. Not only because a new President could change this state of affairs, but also because President Trump – if re-elected – could see the world in a different way. The starting point for a reform of the WTO has to be the basket of complains that the US has repeatedly raised against the shortcomings of the WTO. The rate of non-compliance has become high. In particular, there is a relationship between non-compliance and sanctions against those who don't comply that is objectionable.

Subsidies – hidden subsidies – do exist. This is something in relation to which President Trump is right: the world economy is somehow distorted by companies that compete availing themselves with state subsidies that are hidden somewhere. There is a problem with State-Owned Enterprises and China is a great protagonist, from this point of view. We are witnesses of a distortion related to the concept of "Developing Country". I understand the objection because if a State qualifies itself as a "Developing Country" it has advantages over the other countries. Third-parties opinions on this condition should be considered as fair.

We have to be prepared to a world in which the possible conflicts are not necessarily between overall free trade and protectionist barriers. The pandemic has offered us some suggestions. I believe that countries should implement a differentiation of risk when they become part of trade negotiations. The aim would be to preserve different possible producers of the same good, in order to create a balance between the benefits of the global market and the protection of some basic interests that require a differentiation of risk.

**1.2 James Bacchus,** Distinguished University Professor of Global Affairs, Direttore Center for Global Economic and Environmental Opportunity, University of Central Florida e già Membro dell'Appellate Body, WTO

Our trading system is a multilateral system that involves 164 countries and probably corresponds to 98% of all commerce. It was in 1995 that we achieved our goal of transforming the GATT into the WTO. Twenty-five years after, it should not be overlooked that most of the rules – that were written at the end of the XX Century – are still working quite well. Every day, in every part of the world, trade occurs with WTO rules. But now, in 2020, some of those rules need to be adapted to the current global context.

The premise is that United States should not act unilaterally. Nowadays, the ideology in Trump Administration is the so-called "Realist view", according to which International Law exists only if the US say it does. This means that Americans should comply with International Law when it meets their interests and ignore International Law when it does not. Beyond this, I think that – even in the absence of the Trump Administration – we would see a situation of crisis affecting the WTO.

In order to successfully reform the WTO, we should continue with our efforts to do what we tried and failed to do through the Doha Development Round. From the Uruguay Round – that established the WTO – we inherited a building agenda. We should do something about distortions in agricultural trade, that disadvantage developing countries denying their rightful comparative advantage. We should do much more in terms of liberalising trade and services where we have basic rules but few concessions. We should continue what we did when we established intellectual property rules within the trading system, with a focus on the updating of those commitments and on technology transfer to developing countries. This agenda is extraordinary significant. But if we look at the so-called 21st Century Trade Agenda, we realize that some crucial measures are not considered in WTO mechanisms. A clear example is given by the fact that there are no rules in the WTO on digital trade.

The rules on subsidies should be updated, taking into account the distortions that are caused by state-owned enterprises in the marketplace. Moreover, we should be looking at some additional areas. One of these is represented by the changed nature of the global marketplace. There is the need to reform and modernize WTO rules in order to make them fully affirmative in serving and fulfilling the objectives that were set out in the very first age of the Marrakesh Agreement in 1995. These objectives are the objectives of sustainable development. Reimagining WTO rules would be a crucial way to help us in the battle against Climate Change.

In this regard, every single WTO Member State has agreed to the United Nations Development Goals, showing a high degree of commitment. My view is the so-called "Idealistic view". It states that International Law does exist and we must improve international cooperation in order to better face all the current transnational issues including pandemics, climate change and ecosystems jeopardy. We are facing a historic challenge in terms of biodiversity, with issues related to water, forests, oceans, marine resources. These issues can be affected by trade. That is why it is necessary to rebuild trade rules in ways that will see economy, environment and social issues as one in the same.

**1.3 Giorgio Sacerdoti,** Professore Emerito di Diritto Internazionale all'Università Bocconi e già Membro dell'Appellate Body, WTO

The World Trade Organization epitomizes an effort which goes back to GATT and then to the establishment of a multilateral framework. One of the features is somehow to depoliticize trade disputes and to create a framework in which trade relations would be stable and predictable, providing a clear mechanism to solve any kind of conflict between different Member States. Now all this framework has changed. Suffice it to mention the trade war between the USA and China, that goes completely against the original spirit of the WTO.

The Appellate Body has the function to ensure the stability of trade relations for the benefits of consumers and producers, who can organize the Supply Chain. Normally, it could settle disputes but it is now paralysed by the United States, which is sabotaging the system and is going on accusing the judges of undermining the whole initial design. It is clear to me that – in today's world – Trump Administration is not interested at all in a multilateral system made of negotiations and win-win agreements. The only focus is on a unilateral agenda.

Despite the US posture, other powers such as the European Union, China and Japan do not come forward with significant proposals and adopt somehow a defensive position in order to avoid being victims of the illegal unilateral measures implemented by Trump. President Trump wants to go back to a GATT system – a power-based and not a rule-based system – in which the most powerful State can decide whether to comply or not with a judgement.

The rules of the WTO have not been updated but I think it is unjust to accuse the Organisation. It should be noticed that the member countries are not able to find a common agreement. Indeed, we live in a time in which countries believe that – by preserving their position – they may obtain more advantages or they may prevent other parties to succeed in their aims. Surely there is a risk of fragmentation and probably the real developing countries (not China or India) are somehow the losers in this situation. The huge problem today is that there are some parties which do not believe at all in multilateralism or hope in a different multilateralism and the EU – which has a kind of soft power – is facing difficulties in this context.

## Second Session

***The crisis of the multilateral trading system. US, China, Europe and the global arena***

**2.1 Franco Bernabè**, Presidente Cellnex

The reform of the WTO. The problem of how the international trade system should evolve has been around for almost 20 years to no avail. It took 8 years of negotiations to show the world that an agreement on the terms set by the Doha round could not be reached and after the breakdown of the Doha negotiations it took as many years of discussions to reach the conclusion that the conditions for a recovery of the Doha round did not exist. Finally the US decided that the WTO needed a reform. The question was initially raised in the WTO general council in July 2017 and was formally promoted by the three main partners: the United States, the European Union and China at the ministerial conference in Buenos Aires in December 2017. The process has been however very slow because of the different positions of the three main trade blocs on the objectives they wanted to pursue. The stalemate has worsened since the end of 2019 when the United States decided to stop the appointment of the commissioners in charge of deciding on the WTO dispute resolution mechanism, decision that effectively paralyzes one of the most important aspects of the international trade system.

The three main trade blocs diverge on the issue of State aids which sees China on very different positions from that of other countries. On this issue, the position of the European Union has become particularly rigid. For the European Union, China is no longer a strategic partner but a competitor who uses state capitalism to gain industrial and technological supremacy by abusing of the open markets guaranteed by Europe. The level of attention of Europe on state aid by China was raised during the pandemic due to the risk that Chinese entities acquire European industries of great strategic importance in a moment of particular weakness. The question of state aid is particularly complex. While it is relatively simple to identify the subsidies that promote aggressive commercial practices for certain categories of goods, it is difficult to identify the tools through which the state intervenes to support particular industries. Among the various instruments available to the state in countries like China there is above all the state controlled financial system, but also research funding and public procurement used for commercial aggression purposes and not for legitimate industrial policy objectives. For this reason the European Commission wants to have the possibility of exercising control over the branches of non-EU companies to verify the granting of subsidies.

There is no doubt that these concerns, together with the consequences of the pandemic, have been an important factor behind the decision of the European Commission to stop the intra-European state aid procedures. Europe wants to deal with the crisis of entire industrial sectors caused by the consequences of the pandemic with more flexible tools. The decision meets also the increasingly insistent requests by numerous politicians from different countries to structurally review the rules on concentrations and state aid in order to encourage the emergence of global European companies able to compete with Chinese and American giants.

The United States and Europe have not been able to create a common front on the issue of negotiations with China, even if the two blocs have largely similar problems. On Trump's impulse the United States wants to proceed with bilateral negotiations with China, probably because Trump believes he can obtain privileged conditions of access for particular categories of American goods and services. Trump has two urgent problems that he needs to address in dealing with China: the first is represented

by unemployment that has dramatically increased during the recession. Contrary to the expectations of economists in the late 1990s when China's entry into the WTO was seen as a great opportunity and job losses in low-tech sectors were justified with the prospect of their growth in more advanced sectors, the massive replacement of local production with imports from China has created enormous social problems. Many industrial areas of the country have suffered an irreversible decline resulting in a strong growth in poverty. The second is that American technology companies depend on the Chinese supply chain which, in a period of growing geopolitical tensions, represent a risk for the American leadership. Trump cannot do very much about this in the short to medium term. China has achieved a high level of technological independence in many sectors. The semiconductor issue was particularly critical. China imports about 250 bn USD of semiconductors. Locally produced chips are less than 20% of the global requirement. In the plan called Made in China 2025 launched 5 years ago, Beijng has given a strong boost to high-tech sectors with the aim of reducing dependence on low-value and high-intensity sectors to become independent in advanced technology sectors . Initially, the western industry has looked at the plan favorably for the massive increase in exports to China, but later on it got concerned about the speed with which China was becoming autonomous. One example is the recent decision by the Chinese government to finance Tsinghua Unigroup , the industrial spin off of the University of Beijing, in the construction of a huge microprocessor production plant.

In Europe, Ursula von der Leyen addressed the topic of the trade negotiations related to the reform of the WTO in the mission letter to Phil Hogan, the EU commissioner for trade. According to the Commission, Hogan has the task of restarting the WTO reform project with particular reference to the solution of the state subsidies, to the forced transfer of technologies and to the dispute resolution mechanisms. The chairwoman of the Commission also asked to include e- commerce in the WTO context, a topic that affects both relations with China and the United States.

Looking at the attitude of the three main players, it is unlikely that the WTO reform will take place. Considering that the Doha Round started 20 years ago and the negotiations stopped in 2008 at the beginning of the great financial crisis, it is clear that the liberalization of international trade is no longer a priority for governments especially in advanced countries. I therefore do not believe that the spirit that guided the first negotiations that led to the liberalization of the Uruguay Round and the creation of the WTO can return. The birth of sovereignist leadership in many countries of the world testifies a deep change in public opinion. People no longer see the benefits promised by economists in opening trade and markets. Many people are now convinced that each nation should maintain the necessary tools to protect its social contract . This idea was implicit in the multilateral agreements that had led to the creation of the GATT after the Second World War. At the time the tools were represented by the control of capital movements and by restrictions on international trade in politically sensitive sectors such as agriculture and textiles. However, this approach had been reversed since the 1980s with the spread of the neoliberal ideas which shaped the political agenda in Anglo-Saxon countries and in most of the western world. It was this ideological movement that called for the elimination of any transaction costs that limited the development of international trade and the freedom of movement of capital that led to the creation of the WTO. While the GATT was designed for goods produced by the manufacturing industry in countries that had an industrial base, the WTO extended the concept of free trade to include areas which previously were of exclusive domestic competence. In this way, however, the problem no longer concerned the competitiveness of individual industries but the competitiveness of entire social models and institutional systems. A much more delicate sphere because it concerns political preferences and ultimately the social contract of a country.

The trade negotiations of the past have underestimated the role of the difference between institutions of democratic and non-democratic regimes but also the differences within democratic regimes. Although the United States and the European Union and Japan are democratic regimes with market economies, the institutions that regulate them are very different. There is not a single model for a successful market economy. There are differences in the labor market regimes, corporate governance mechanisms, social protection systems, the approach to regulation. There is not a best practice in terms of institutions. There is no objective criterion that allows someone to choose between different alternatives to maximize a country's preference function. It is impossible to choose whether it is better to create development opportunities or to promote equality, whether it is better to guarantee safety or to encourage innovation, whether it can be better social development or economic development. It is for this reason that the discussions on the reform of the WTO are bound to drag on for a long time without finding an acceptable solution for all participants.

**2.2 Giorgia Giovannetti,** Professoressa di Economia, Università di Firenze

Quando parliamo del WTO, dobbiamo distinguere due fasi: una prima fase in cui l'Organizzazione si è resa protagonista di alcuni successi e una seconda fase in cui gli insuccessi hanno preso il sopravvento. Il WTO non è riuscito a cambiare abbastanza per assecondare le modifiche del commercio mondiale degli ultimi anni. Proprio per questo è stato soggetto a critiche da tutti i movimenti no-global e soprattutto dagli Stati Uniti. Le norme del WTO sono importanti per ridurre l'incertezza che le imprese che esportano o investono sui mercati esteri si trovano davanti. La riduzione dell'incertezza è uno dei prodotti principali del WTO e anche grazie ad essa gli scambi internazionali negli ultimi decenni sono cresciuti in modo continuato.

Quando è nato nel 1995, il WTO accoglieva 123 Paesi e gli attori principali erano Stati Uniti ed Europa. La Cina – al tempo fuori dal WTO – stava cominciando a diventare un giocatore importante ed è entrata nel 2001. Oggi i Paesi sono 164 ed il WTO è in crisi perché non si è saputo adeguare ai cambiamenti. Innanzi tutto, c'è stata una forte riduzione di peso delle attività agricole e soprattutto della produzione manifatturiera tradizionale. Questo perché la produzione non è più nazionale ma viene realizzata in reti internazionali disperse geograficamente, che corrispondono alle catene globali del valore. Inoltre, è aumentato il valore aggiunto creato dai servizi. La frammentazione della produzione odierna produce un effetto: le politiche commerciali tradizionali riguardano una parte sempre minore dei flussi commerciali internazionali e le politiche – che prima venivano considerate interne ad un Paese – hanno un impatto molto forte sulla penetrabilità dei mercati nei vari paesi. In questo clima, gli Stati Uniti sono diventati sempre più critici nei confronti del WTO, anche prima dell'avvento di Trump. Altri paesi ritengono che l'Organizzazione dovrebbe includere nuove questioni: l'e-commerce; le politiche relative agli investimenti; gli SDG's.

La difficoltà di compiere progressi nella negoziazione di nuovi accordi multilaterali ha incentivato la produzione degli accordi commerciali preferenziali, il cui numero è aumentato costantemente a partire dal 2000. Questo tipo di accordi non rappresenta tuttavia un'alternativa valida alla negoziazione multilaterale perché rischia di frammentare regole e di creare dei sistemi di produzione separati e difficilmente integrabili. Il ruolo delle catene del valore è in questo contesto molto importante. Basti pensare che nel corso degli anni hanno rappresentato uno strumento attraverso cui i Paesi in via di sviluppo e le piccole e medie imprese riuscivano a internazionalizzarsi.

Credo che il sistema decisionale del WTO abbia dei tempi troppo lunghi. Ci sono troppe deleghe, troppi passaggi che impediscono ai Paesi di trattare liberamente e di cooperare realmente. Sono convinta che l'Organizzazione abbia svolto e continui a svolgere un ruolo centrale nella governance degli scambi ma deve adeguarsi in modo consistente ai cambiamenti odierni. Per questo Cina, Stati Uniti ed Europa dovrebbero trovare e perseguire una causa comune, anche per ridurre le distorsioni della globalizzazione in termini di disuguaglianze. La critica maggiore che si può rivolgere alla globalizzazione è infatti quella di aver diminuito la disuguaglianza fra paesi incrementando la disuguaglianza all'interno dei paesi. Le regole del commercio mondiale dovrebbero evitare che la disuguaglianza all'interno dei Paesi continui a crescere.

**2.3 Giulio Sapelli,** Professore di Storia Economica, Università Statale di Milano

È in atto da una ventina di anni una decelerazione dell'interscambio commerciale mondiale, che è rimasto sostanzialmente ancorato alle stesse aggregazioni della congiuntura coreana (1950-1960). Da circa 50 anni import ed export mondiale mantengono gli stessi connotati: il 46% del totale è nelle mani di tantissimi paesi diversi mentre la restante percentuale è nelle mani di grandi Stati, come Cina, Stati Uniti, seguiti da Germania, Francia, Giappone, Regno Unito e Corea del Sud. Le discussioni odierne sul multilateralismo sono il riflesso del concetto kantiano di "Pace Perpetua", che esprime un mondo regolabile in assenza di uno "spirito di potenza".

Da circa 40 anni non riusciamo a stipulare un accordo commerciale multilaterale. L'ostacolo davanti ad un accordo multilaterale è dato dal fatto che gli agricoltori sono in grande misura protezionisti e gli industrialisti sono in grande misura libero-scambisti. Tre grandi potenze mondiali – Stati Uniti, Francia e India – sono sia potenze industrialiste sia potenze agricole. Accordo commerciale multilaterale è praticamente impossibile. Basti pensare che abbiamo impiegato circa 35 anni per fare in modo che il MERCOSUR cominciasse una negoziazione con l'Unione Europea.

Siamo in una situazione molto grave. Il WTO non ha capito che il passaggio è dai dazi agli standard tecnici. La concorrenza si fa sugli standard tecnici e non ha nulla a che vedere con il nazionalismo. Il commercio mondiale avviene tra imprese, non tra Stati, altrimenti oggi non parleremmo di *supply chains*. La catena del valore deve fare i conti con una tendenza in atto per la quale la concentrazione è crescente: crescono le piccole e medie imprese e si concentra il capitale. I problemi del WTO sono riconducibili soprattutto alla struttura del meccanismo economico. Il commercio ha sempre seguito gli accordi internazionali tra potenze. Dopo il crollo dell'Unione Sovietica non è stato organizzato un Congresso di Vienna o un Congresso di Yalta. Senza di questi, non possiamo sperare che le tecno-strutture cambino il gioco di potenza.

L'ordine globale ha fatto i conti con un lento processo di de-globalizzazione, che continuerà ancora. Dal 2004 ad oggi il reshoring ha ricoperto un ruolo cruciale negli Stati Uniti, come dimostrato dalla creazione di 750.000 posti di lavoro in seguito al rientro di circa 1000 aziende dalla Cina. Ciò che segnerà il futuro è la "Deflazione Secolare". Il commercio dipende da quello che fanno le banche centrali. Considerando che la BCE non si comporta come una vera e propria banca centrale e le altre banche sono meno potenti, ci avvieremo verso una "Sud-Americanizzazione" ed una "Dollarificazione" del mondo. L'unica conseguenza positiva della pandemia sul commercio sarà il cambiamento della politica economica europea. La Germania sta infatti gradualmente modificando la sua impostazione sull'ordo-liberismo e sta realizzando che lo sviluppo di Italia e Spagna è vitale per un buon funzionamento dell'industria tedesca.

**2.4 Lapo Pistelli,** International Affairs Executive Vice President, Eni

Concretamente quest'anno faremo i conti con un calo degli investimenti diretti esteri del 40%. Mesi fa si parlava di una recessione intorno al -2%, mentre oggi i dati parlano di un -4.5%. Gli unici due paesi che chiuderanno in segno positivo saranno India e Cina.

Se facciamo riferimento agli anni che precedono la nascita del WTO, il mondo era completamente diverso. Metà del globo non partecipava al commercio mondiale e di conseguenza il sistema era molto più ordinato e poco "multilaterale". Dal punto di vista dei contenuti, il WTO è nato su un'onda politica di grande ottimismo post-1989. Tuttavia, se prendiamo come parametro gli ultimi 20 anni – aldilà della grand strategy degli SDGs – possiamo vedere come ci siano più paesi, più differenze dentro e fra i paesi. C'è il Capitalismo di Stato dei nuovi protagonisti e ci sono temi assolutamente nuovi come l'e-commerce. Mentre l'economia avanzava velocemente, la politica arrancava.

Ritengo necessario descrivere l'arena politica che determinerebbe una possibile riforma del WTO. C'è una contestazione dei fenomeni di globalizzazione che può essere attribuita non solo ai movimenti no-global ma anche e soprattutto a noi stessi, che siamo contemporaneamente consumatori globali e lavoratori nazionali. Quando siamo consumatori siamo molti soddisfatti della globalizzazione e dei suoi frutti, mentre quando siamo lavoratori nazionali la globalizzazione diventa indigesta, specialmente quando avviene lo spostamento di manifatture.

Quando ancora esisteva il GATT c'era il QUAD: Stati Uniti, UE, Giappone e Canada conducevano il gioco del libero commercio. Oggi invece non c'è nessun Paese che ha voglia di condividere delle responsabilità o di lavorare per un compromesso. È il tempo delle leadership "Me First". Non esiste dunque la condizione minima per poter realizzare riforme più consistenti. Anche in caso di vittoria di Joe Biden, non mi aspetterei una rivoluzione copernicana in questo campo. Il tempo dei democratici favorevoli a multilateralismo e *free trade* è alle spalle da molto tempo, come dimostra il forte supporto bipartisan che il protezionismo riceve nel Congresso americano, già da molti anni.

I pacchetti di stimolo economico attualmente in campo per fronteggiare la crisi Covid stanno accelerando delle dinamiche già in atto: reshoring e regionalizzazione delle catene del valore, con l'accorciamento delle filiere produttive. Per quanto concerne l'Unione Europea, la Commissione vuole utilizzare i fondi del Recovery Fund per una trasformazione industriale. Il continente europeo resta un mercato ricchissimo di consumatori, tenuto in grande considerazione dalle altre potenze. Nella riorganizzazione dell'ordine commerciale che si verrà a creare l'UE potrà contare su un formidabile potere regolatorio che – anche se regionale – si rivelerà molto utile.

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# CENTRO STUDI AMERICANI

*Web live conference*

## Reshaping the WTO

### The future of the multilateral trading system in the new international order

**Welcome Remarks**

**Carlotta Ventura**
Direttore Centro Studi Americani

**Armando Barucco**
Ministro Plenipotenziario, Capo dell'Unità Analisi e Programmazione, Ministero degli Affari Esteri e della Cooperazione Internazionale

**17.15 - Session I: The future of WTO between institutional reform and new challenges (in inglese)**

**Giuliano Amato**
Giudice della Corte Costituzionale e Presidente Emerito del Centro Studi Americani

**James Bacchus**
Distinguished University Professor of Global Affairs, Direttore Center for Global Economic and Environmental Opportunity, University of Central Florida e già Membro dell'Appellate Body, WTO

**Giorgio Sacerdoti**
Professore Emerito di Diritto Internazionale all'Università Bocconi e già Membro dell'Appellate Body, WTO

Chair: **Alberta Fabbricotti**
Professoressa di Diritto Internazionale, Sapienza Università di Roma

**18.15 - Session II: The crisis of the multilateral trading system. US, China, Europe and the global arena**

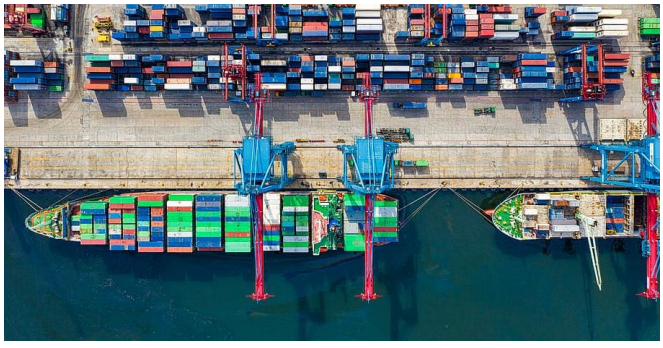
**Franco Bernabè**
Presidente Cellnex

**Giorgia Giovannetti**
Professoressa di Economia, Università di Firenze

**Lapo Pistelli**
International Affairs Executive Vice President, ENI

**Giulio Sapelli**
Professore di Storia Economica, Università Statale di Milano

Chair: **Arturo Varvelli**
Head of the Rome Office and Senior Policy Fellow for the European Council on Foreign Relations (ECFR)



18|06|2020
ore 17.00
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