Resorting to Article 25 of the DSU to Overcome the WTO Crisis on the Appellate Body: The EU Proposal for an Interim Appeal Arbitration

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Abstract: Il ricorso all'art. 25 DSU per superare la crisi dell'Organo d'appello dell'OMC: la proposta dell'Unione europea per una procedura arbitrale d'appello temporanea – At midnight of 10 December 2019, the WTO Appellate Body ceased to be operational, as the US has been vetoing since May 2016 the selections of the members of the World Trade Court. The WTO dispute settlement system hence risks the paralysis -a scenario that could materialize should the losing party of a panel report appeal the latter "into the void," i.e. before an Appellate Body with less than three judges. In response to this event, the European Union is developing an articulated approach to guarantee a rule-based international trade system and the principle of cooperation as the pillars of the governance of the global economy. One element of the EU approach is the initiative for an interim appeal arbitration procedure based on Article 25 of the DSU, and the present work is devoted to the analysis of this contingency remedy.

Keywords: WTO; Appellate Body; Crisis; Arbitration; European Union.

1. Introduction

As it is well known, and most unfortunate, since May 2016[1] the United States has been blocking appointments of the members of Appellate Body (AB) of the World

[1] See WT/DSB/M/379, *Minutes of the Meeting Held in the Center William Rappard on 23 May 2016*, 29 August 2016, at paras. 6.2 – 6.10 reporting why the United States could not be able to accept the reappointment of Mr. Seung Wha Chang for a second four-year term; WT/DSB/M/400, *Minutes of Meeting Held in the Center William Rappard on 31 August 2017*, 31 October 2017, where it is recorded the US position of blocking any new appointment of AB members until the Dispute Settlement Body (DSB) did not consider the serious systemic implications of former appellate judges still serving as adjudicators after their term in office ended (on the basis of Rule 15 of the Working Procedures for Appellate Review, see WT/AB/WP/6, *Working Procedures for Appellate Review*, 16 August 2010); see also the US President 2018 Trade Policy Agenda, where the US administration finally articulated the full list of criticisms on the Appellate Body practice and case-law (Office of the United States Trade Representative, *The President's 2018 Trade Policy Agenda*, March 2018, at pages 22-28), which were then constantly reported by the US diplomats in their official statements before the DSB (cfr. e.g. WT/DSB/M/417, *Minutes of the Meeting Held in the Center William Rappard on 27 August 2018*, 30 November 2018, paras. 4.2 – 4.17; WT/DSB/M/420, *Minutes of the Meeting Held in the Center William Rappard on 29 October 2018*, 27 February 2019, paras. 4.2 – 4.19; WT/DSB/M/426, *Minutes of the Meeting Held in the Center William Rappard on 25 February 2019*, 20 May 2019, para. 5.26).

Trade Organization (WTO).[2] Such an approach provoked the most serious institutional crisis of the multilateral trade system[3] as significantly and deeply renovated, widened and deepened by the 1986 – 1993 Uruguay Round.[4] In fact, at midnight of 10 December 2019, when the mandates of two of the three remaining judges expired,[5] what has been qualified as "the most successful appellate mechanism in international history"[6] has been finally paralysed: the WTO

[2] See the Marrakesh Agreement Establishing the World Trade Organization, in World Trade Organization, *The Legal Texts - The Results of the Uruguay Round of Multilateral Trade Negotiations*, Cambridge University Press, Cambridge, 2011, p. 4 ff.

[3] The blockage of the Appellate Body and the reasons brought by the US for its approach have been extensively commented: see *inter alia* G. Adinolfi, *Procedural Rules in WTO Dispute Settlement in the Face of the Crisis of the Appellate Body*, in *Questions of International Law*, 2019, p. 39 ff.; J. Bacchus, *Might Unmakes Right: The American Assault on the Rule of Law in World Trade*, CIGI Paper No. 173, May 2018; E. Baroncini, *Il funzionamento dell'Organo d'appello dell'OMC: bilancio e prospettive*, Bologna, 2018; K. Claussen, *The Other Trade War*, in *Minnesota Law Review Headnotes*, 2018, p. 1 ff.; C.D. Creamer, *Can International Trade Law Recover? From the WTO's Crown Jewel to its Crown of Thorns*, in *AJIL Unbound*, 2019, p. 51 ff.; M. Fiorini, B. Hoekman, P. Mavroidis, M. Saluste, R. Wolfe, *WTO Dispute Settlement and the Appellate Body Crisis: Insider Perceptions and Members' Revealed Preferences*, Bertelsmann Stiftung, 2019; J. Hillman, *Independence at the Top of the Triangle: Best Resolution of the Judicial Trilemma*, in *AJIL Unbound*, 2017, p. 364 ff.; B. Hoekman, P. Mavroidis, *Burning Down the House? The Appellate Body in the Centre of the WTO Crisis*, EUI Working Paper RSCAS 2019/56; B. Hoekman, P. Mavroidis, *Party Like It's 1995: Necessary but not Sufficient to Resolve WTO Appellate Body Crisis*, in *Vox*, 26 August 2019; J. Hillman, *Three Approaches to Fixing the World Trade Organization's Appellate Body: the Good, the Bad and the Ugly?*, IIEL Issues Brief, December 2018; R. McDougall, *Impasse in the WTO Dispute Settlement Body: Consequences and Responses*, ECIPE Policy Brief no. 11/2018; R. McDougall, *Crisis in the WTO – Restoring the WTO Dispute Settlement Function*, CIGI Papers no. 194, October 2018; R. McDougal, *The Crisis in WTO Dispute Settlement: Fixing Birth Defects to Restore Balance*, in *Journal of World Trade*, 2018, p. 867 ff.; R. McDougall, *Revitalizing the WTO: Settling Trade Disputes in a Turbulent Multipolar World*, Bertelsmann Stiftung, 2019; T. Payosova, G.C. Hufbauer, J.J. Schott, *The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures*, PIIE Policy Brief No. 18-5, March 2018; J. Pauwelyn, *WTO Dispute Settlement Post 2019: What to Expect?*, in *Journal of International Economic Law*, 2019, p. 297 ff.; E.-U. Petersmann, *Between "Member-Driven" WTO Governance and "Constitutional Justice": Judicial Dilemmas in GATT/WTO Dispute Settlement*, in *Journal of International Economic Law*, 2018, p. 103 ff.; E.-U. Petersmann, *How Should the EU and Other WTO Members React to their WTO Governance and WTO Appellate Body Crises?*, EUI Working Papers, RSCAS 2018/71; E.-U. Petersmann, *The "Crown Jewel" of the WTO Has Been Stolen by US Trade Diplomats – and They Have No Intention of Giving It Back*, in D. Prévost, I. Alexovičocá, J. Hillebrand Pohl (Eds.), *Restoring Trust in Trade, Liber Amicorum in Honour of Peter Van den Bossche*, Oxford, 2019, p. 106 ff.; J.J. Schott, *The United States Relies on the WTO to Settle Trade Disputes More Than Any Other Member*, PIIE Charts, January 2019: G. Sacerdoti, *The WTO Dispute Settlement System: Consolidating Success and Confronting New Challenges*, in M. Elsig, B. Hoekman, J. Pauwelyn (Eds.), *Assessing the World Trade Organization*, Cambridge, 2017, p. 147 ff.; G. Sacerdoti, *The WTO Dispute Settlement System and the Challenges to Multilateralism: Consolidating a "Common Global Good"*, in D. Prévost, I. Alexovičocá, J. Hillebrand Pohl (Eds.), *Restoring Trust in Trade, Liber Amicorum in Honour of Peter Van den Bossche*, Oxford, 2019, p. 87 ff.; T.P. Stewart, *The Broken Multilateral Trade Dispute System*, Asia Society Policy Institute, Feb. 7, 2018.

[4] For a complete overview of the Uruguay Round results see P. Mengozzi (Ed.), *International Trade Law on the 50th Anniversary of the Multilateral Trade System*, Milano, 1999.

[5] They are Mr. Ujal Singh Bhatia (India) and Mr. Thomas R. Graham (United States), who were serving as members of the Appellate Body since 11 December 2011.

[6] Statement delivered by Professor James Crawford, judge at the International Court of Justice (ICJ), in the interview given to R. Mizen, *"Back to Square One" if WTO Appeals Body Fails: Judge James Crawford*, in *Financial Review*, 3 August 2018, available at

Permanent Tribunal needs at least three members to hear cases, each appellate adjudicatory section having to be composed by three judges,[7] but now there is only one judge left, Ms. Zhao Hong (China), whose mandate will be over by 30 November 2020.[8]

The Appellate Body cannot anymore be operational until the Dispute Settlement Body (DSB)[9] expresses its positive consensus[10] on a sufficient number of new appellate adjudicators.[11] The WTO dispute settlement mechanism (DSM) thus seriously runs the risk of falling back of seventy years, to the GATT 1947 system, where the unsuccessful party of a panel could impede the adoption of a report by exercising its veto power when that report was put on the agenda for approval by the GATT 1947 Council:[12] under the Marrakech Agreements, characterized by the reverse consensus decision mechanism for the DSB approval of panel and Appellate Body reports, as well as the suspensions of concessions,[13]

www.afr.com/news/economy/trade/back-to-square-one-if-wto-appeals-body-fails-judge-james-crawford-20180802-h13hz0 (access on 11 February 2019).

[7] See Article 17.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU): "A standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, *three of whom shall serve on any one case*. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body," emphasis added. The text of the DSU is available in World Trade Organization, *The Legal Texts - The Results of the Uruguay Round of Multilateral Trade Negotiations*, cit., p. 354 ff..

[8] Not without a trace of irony, it has been underlined that on 13 December 2019 the WTO Secretariat circulated the communication that "the Members of the Appellate Body have elected Ms Zhao Hong to serve as Chair of the Appellate Body as of 1 December 2019 until 30 November2020." See WT/DSB/78, *Election of the Chair of the Appellate Body – Communication from the Appellate Body*, 13 December 2019.

[9] The DSB is the WTO political body conferred with the power of administering the dispute settlement mechanism, as established by Article 2 of the DSU: "the DSB shall have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements."

[10] Pursuant to Article 17.2 of the DSU, "[t]he DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once," and has the duty to fill vacancies "as they arise." When selecting the judges of the Appellate Body, the DSB has to deliberate by positive consensus, which means that "no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision" (Article 2.4 of the DSU, footnote 1).

[11] As just illustrated, the Appellate Body needs a minimum of three members to deliver its adjudicatory activity. On the paralysis of the World Economic Court see the recent comments by G. Di Donfrancesco, *Intervista a Giorgio Sacerdoti: "Per colpa degli Stati Uniti la WTO non è più arbitro del commercio,"* in *Il Sole 24 Ore*, 11 December 2019; S. Nebehay, *U.S. Seals Demise of WTO Appeals Bench: Trade Officials*, Reuters, 9 December 2019; V. Hughes, *What's Next for the WTO?*, *Bennetjones.com*, 12 December 2019; K.J. Pelc, J. Pauwelyn, *The WTO's Trade Dispute Appeal System Could End on Dec. 10. Here's What You Need to Know*, *The Washington Post*, 5 December 2019; N. Poitiers, *High Noon at the Appellate Body*, Bruegel.org, 9 December 2019.

[12] For an analysis of the GATT 1947 dispute settlement mechanism and its evolution into the current WTO DSM cfr. A. Ligustro, *Le controversie tra Stati nel diritto del commercio internazionale: dal GATT all'OMC*, Padova, 1996.

[13] Reverse consensus means that the request for the establishment of a panel, the panel and Appellate Body reports, and the request for suspension of concessions may be rejected by the DSB only provided that the latter "decides by consensus not to adopt" them. See Articles 6.1, 16.4, 17.14, and 22.6 of the DSU. The approval of the constitution of a panel, the recommendations and findings of WTO adjudicators, as well as the trade sanctions in case of

Article 16.4 of the DSU confers each disputant with the right to an appeal review,[14] so that a WTO Member losing panel proceedings could impede the adoption of the panel report by appealing the latter "into the void," i.e. exercising its right of appeal in front of a WTO Permanent Tribunal having less than three judges.

Faced with such an unprecedented multilateral challenge, the European Union (EU) chose to be a major international actor in the WTO reform process, indicating that "solving the Appellate Body crisis [is] a priority" for her.[15] The EU has therefore developed an articulated strategy to deal with the blocking of the World Trade Court, a strategy based on four elements. Firstly, at the end of November 2018, the EU tabled two very interesting institutional proposals to revise the text of the DSU and provide with a formal and appropriate answer each of the critiques the US made on the Appellate Body activity,[16] and guarantee the independence and impartiality of the World Trade Court.[17] Secondly, in order to

no implementations of panel and AB reports is therefore quasi-automatic. On the WTO dispute settlement mechanisms see *inter alia* G. Adinolfi, *La soluzione delle controversie*, in G. Venturini (Ed.), *L'Organizzazione mondiale del commercio*, Milano, 2015, p. 304 ff.; M. Distefano, *Soluzione delle controversie nell'OMC e diritto internazionale*, Padova, 2001; A. Ligustro, P. Picone, *Diritto dell'Organizzazione mondiale del commercio*, Padova, 2002.

[14] "Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal. This adoption procedure is without prejudice to the right of Members to express their views on a panel report."

[15] See the *Background Brief of 22 May 2019 for the Foreign Affairs Council – Trade Issues of 27 May 2019*, at p. 2, available at the link www.consilium.europa.eu/media/39454/background-fac-trade_en.pdf.

[16] The US accuses the Appellate Body of i) persistent overreaching, i.e. of interpreting WTO law beyond its text; ii) delivering advisory opinions by intervening on issues not necessary to resolve a dispute; iii) asserting that appellate reports have the value of precedent for future panels, although WTO Members did not agree on a system based on the *stare decisis* principle; iv) reviewing panel findings of fact and considering panel findings on municipal law as legal issues rather than issues of fact, thus infringing Article 17.6 of the DSU; v) constantly disregarding Article 17,5 of the DSU, pursuant to which appellate proceedings "[i]n no case shall … exceed 90 days," as the World Trade Court systematically delays the delivery of its reports; vi) too often applying Rule 15 of the Working Procedures of Appellate Review, thus illegitimately allowing a person who has ceased to be an Appellate Body member to continue deciding appeals even if his/her term has not been extended by the DSB. On these highly important and sensitive issues see C. Lo, J. Nakagawa, T. Chen (Eds.), *The Appellate Body of the WTO and its Reform*, Springer, Heidelberg, 2019; J. Lehne, *Crisis at the WTO: Is the Blocking of Appointments to the WTO Appellate Body by the United States Legally Justified?*, Berlin – Berne, 2019; W. Zhou, H. Gao, *"Overreaching" or "Overreacting"? Reflections on the Judicial Function and Approaches of WTO Appellate Body*, in *Journal of World Trade*, 2019, p. 951 ff.

[17] Cfr. WT/GC/W/752, *Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore and Mexico to the General Council*, 23 November 2018, and WT/GC/W/753, *Communication from the European Union, China and India to the General Council*, 23 November 2018. These two communications have been highly considered by Ambassador David Walker, appointed by the General Council as facilitator of the WTO informal process on matters related to the functioning of the Appellate Body, who very recently delivered the draft for a General Council Decision aiming at gathering the positive consensus of the WTO membership to overcome the impasse (WT/GC/W/791, *Draft Decision – Functioning of the Appellate Body*, 28 November 2019; see also JOB/GC/222, *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).

ensure a rule-based international trade in case of blockage of the WTO DSM, the EU activated the dispute settlement mechanisms of her free trade agreements, filing complaints with South-Korea over labour commitments,[18] with Ukraine over the wood export ban of the European Eastern country,[19] and with the Southern African Customs Union (SACU) over safeguard measures affecting trade in poultry.[20] Thirdly, in summer 2019, the EU took the lead in Geneva for the setting up of an interim appeal arbitration capable of guaranteeing to the Marrakech system a dispute settlement mechanism still functioning with a two-level of judgement and preserving the WTO case-law and procedures until the severe Appellate Body deadlock is overcome;[21] and, fourthly, in December 2019, the European Commission unveiled a proposal reviewing the existing EU Enforcement Regulation[22] to enable the Union to adopt unilateral measures in case a WTO Member losing WTO panel proceedings just aims at escaping a negative report by not accepting the EU contingent arbitration arrangement and appealing instead the contested panel report into the void -i.e. when the Appellate Body cannot work because it has fewer than three judges, thus condemning the dispute to remain unsettled and suspended into a legal limbo.[23]

[18] See *Republic of Korea – Compliance with Obligations under Chapter 13 of the EU – Korea Free Trade Agreement, Request for Consultations by the European Union*, 17 December 2018, and *Republic of Korea – Compliance with Obligations under Chapter 13 of the EU – Korea Free Trade Agreement, Request for the establishment of a Panel of Experts by the European Union*, 4 July 2019, available at the links trade.ec.europa.eu/doclib/docs/2018/december/tradoc_157586.pdf and trade.ec.europa.eu/doclib/docs/2019/july/tradoc_157992.pdf, both accessed on 1 December 2019.

[19] See the *Note Verbale* of the Delegation of the European Union in Kiev presented to the Ukrainian Ministry of Foreign Affairs requesting consultations under the EU-Ukraine Association Agreement on 15 January 2019, and the *Note Verbale* of the Delegation of the European Union in Kiev presented to the Ukrainian Ministry of Foreign Affairs requesting the establishment of an arbitration panel under the EU-Ukraine Association Agreement on 20 June 2019, available at the links trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157625.pdf and trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157943.pdf, both accessed on 1 December 2019.

[20] See the *Note Verbale* of the Delegations of the European Union to the Kingdom of Lesotho, the Republic of Botswana, the Kingdom of Eswatini, the Republic of Namibia and the Republic of South Africa requesting consultations with the Southern African Custom Union (SACU) under the Economic Partnership Agreement between the European Union and the Southern African Development Community Member States (SADC), 14 June 2019, available at the link trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157928.pdf, accessed on 1 December 2019.

[21] For the presentation of the EU proposal for an interim appeal arbitration as well the indications of all the relevant documents see *infra* paragraph 3 of the present work.

[22] Regulation (EU) No 654/2014 of the European Parliament and of the Council of 15 May 2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules and amending Council Regulation (EC) No 3286/94 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization, in *OJEU* L 189/50 of 27.6.2014.

[23] See COM(2019) 623 final, *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 654/2014 of the European Parliament and of the Council concerning the exercise of the Union's rights for the application and enforcement of international trade rules*, Brussels, 12.12.2019. Cfr. also the Report by the European Commission on the EU Enforcement Regulation (COM(2019) 639 final, *Report from the Commission to the European*

The purpose of this article is to present the EU interim appeal arbitration arrangement, which is based on Article 25 of the DSU, the provision shaped during the Uruguay Round in order to make available for the WTO Members an arbitration mechanism as an alternative means of dispute settlement to facilitate the solution of certain WTO disputes. The present work will thus first provide an overview of arbitration proceedings in the history of the GATT 1947 system and under Article 25 of the DSU, also considering the only controversy where WTO Members had recourse to the alternative means of multilateral dispute settlement at issue, in the case *US — Section 110(5) Copyright Act*.[24] Attention will then be devoted to the analysis of the EU interim appeal arbitration arrangement, for subsequently developing some final considerations on the chances of the EU contingency measure of being endorsed by a significant part of the WTO membership and thus representing an adequate interim mechanism capable of keeping the judicial review stage in the multilateral trade system while discussions continue to successfully overcome the blocking of the Appellate Body.

2. Arbitration within the multilateral trade system: from GATT 1947 until Article 25 of the DSU

Arbitration as a peaceful means for settling disputes has a long tradition in international inter-State dispute settlement mechanisms. The possibility of concurring in the selection of the adjudicators as well as the definition of the applicable law, and the guarantee of a binding award for resolving the controversy determined the success of arbitration proceedings among the disputants, because of their flexibility combined with the indispensable mandatory character of the final decision.[25] Within the international trade law system, the Havana Charter contemplated the possibility for the contracting parties of resorting to arbitration, but it was only during the Uruguay Round that arbitration was formally introduced in the so called "Montreal Rules" or "Montreal Package,"[26] contemplating a provision very similar to what would become Article 25 of the

Parliament and the Council – Review of the scope of the Regulation No 654/2014 of the European Parliament and of the Council of 15 May 2014 Brussels, 12 December 2019), together with the official press releases by the European Commission accompanying the proposal for strengthening the EU trade toolbox (*Commission reinforces tools to ensure Europe's interests in international trade*, Brussels, 12 December 2019; *Commission proposes new tools to enforce Europe's rights in international trade*, Brussels, 12 December 2019). For a first comment on the EU proposal for trade enforcement see Z. Radosavljevic, *EU Leaders to Call for Strengthening of Trade Sanction Toolbox*, *Euractiv*, 11 December 2019; S. Cho, *Is the European Union Outsourcing Public International Law to Save the WTO Dispute Settlement System?*, *IELP Blog*, 12 December 2019.

[24] See WT/DS160/ARB25/1, *United States - Section 110(5) of the US Copyrights Act - Recourse to Arbitration under Article 25 of the DSU*, Award of the Arbitrators, 9 November 2001.

[25] See *inter alia* Y. Tanaka, *The Peaceful Settlement of International Disputes*, Cambridge University Press, Cambridge, 2018, pp. 105-127 and the doctrine therein recalled.

[26] With these expressions are indicated the set of new rules developed for the multilateral dispute settlement mechanism during the Ministerial Meeting held in Montreal from 5 to 8 December 1988, which was the mid-term review of the Uruguay Round. See Eric White, *Reforming the Dispute Settlement System through Practice*, in H. Hohmann (Ed.), *Agreeing and Implementing the Doha Round of the WTO*, Cambridge, 2010, p. 261 ff.

DSU. In fact, paragraph E of the 1989 Improvements to the GATT Dispute Settlement Rules and Procedures established that "[e]xpeditious arbitration within GATT as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties," and went on clarifying that resort to arbitration was to be "subject to mutual agreement of the parties which [had to] agree on the procedures to be followed," notify of their arrangement to "all contracting parties sufficiently in advance of the actual commencement of the arbitration process" and consider as binding the arbitration award, while preserving the disputants' discretion on the participation of other contracting parties to their arbitration proceedings.[27]

Similarly, under Article 25 of the DSU WTO Member may employ "[e]xpeditious arbitration within the WTO as an alternative means of dispute settlement … [to] facilitate the solution of certain disputes that concern issues that are clearly defined by both parties."[28] The arbitration proceedings require the "mutual agreement of the parties," which has to "be notified to all Members sufficiently in advance of the actual commencement of the arbitration process," a transparency obligation aimed at allowing the WTO membership to know, consider and comment the WTO issues at the basis of the controversy, and thus also assess whether to become party to the arbitral alternative means of dispute settlement. A questionable aspect of Article 25 proceedings is the tighter treatment of third parties by comparison to the status conferred on them in DSU panel and appellate disputes:[29] in fact, pursuant to Article 25.3 of the DSU, "[o]ther Members may become party to an arbitration proceeding only upon the agreement of the parties which have agreed to have recourse to arbitration." Such a limitation to the participation of third parties may be understood on general terms, i.e. in the light of the greater flexibility and discretion that DSU negotiators aimed to reserve to arbitration disputants. However, the multilateral and complex

[27] GATT L/6489, *Improvements to the GATT Dispute Settlement Rules and Procedures*, Decision of the CONTRACTING PARTIES of 12 April 1989, in *BISD* 36S/61. On these historical aspects of arbitration within the multilateral trade system cfr. V. Hughes, *Arbitration within the WTO*, in F. Ortino, E.-U. Petersmann (Eds.), *The WTO Dispute Settlement System 1995-2003*, The Hague, Kluwer Law International, 2004, p. 75 ff.

[28] Article 25.1 of the DSU. On arbitration proceedings under Article 25 of the DSU see L. Boisson De Chazournes, *Arbitration at the WTO: A Terra Incognita to Be Further Explored*, in S. Charnovitz, D.P. Steger, P. Van Den Bossche (Eds.), *Law in the Service of Human Dignity: Essays in Honour of Florentino Feliciano*, Cambridge, 2005, p. 181 ff.; D. Jacyk, *The Integration of Article 25 Arbitration in WTO Dispute Settlement: The Past, Present and Future*, in *Australian International Law Journal*, 2008, p. 235 ff.; C.-fa Lo, *The Shrinking Role of Article 25 Arbitration in DSU: A Proper Understanding of "Clearly Defined" Issues to Enhance Efficiency of WTO Dispute Settlement Procedure*, in *US-China Law Review*, 2011, p. 879 ff.; B.H. Malkawi, *Arbitration and the World Trade Organization – The Forgotten Provisions of Article 25 of the Dispute Settlement Understanding*, in *Journal of International Arbitration*, 2007, p. 173 ff.; P. Monnier, *Working Procedures before Panels, the Appellate Body and Other Adjudicating Bodies of the WTO*, in *Law and Practice of International Courts and Tribunals*, 2002, pp. 481-538; R. Wolfrum, *Article 25 DSU – Arbitration*, in R. Wolfrum, P.T. Stoll, K. Kaiser (Eds.), *WTO - Institutions and Dispute Settlement*, Leiden / Boston, 2006, p. 566 ff.

[29] See Articles 10 and 17.4 of the DSU, Appendix 3 of the DSU on the Working Procedures for panels, and Rule 24 of the Working Procedures for Appellate Review (WT/AB/WP/6, cit.).

character of the WTO system, based on the principle of non-discrimination, demands for the constant possibility of participation of any interested WTO Member to the discussion, interpretation, litigation concerning a multilateral trade issue, an aspect fully understood by WTO adjudicators since the beginning of the functioning of the Marrakech dispute settlement mechanism when they applied the DSU provisions and shaped the procedural rules concerning third parties and third participants in panel and appellate proceedings.[30]

Last but not least, Article 25.3 of the DSU confers automatic binding nature to the arbitration award, as "[t]he parties to the proceeding … [have to] agree to abide by" the latter. The arbitration award has also to be "notified to the DSB and the Council or Committee of any relevant agreement where any Member may raise any point relating thereto," thus confirming that Article 25 rulings are part of the Marrakech case-law, which any WTO Member has the right to comment within the DSB or any other relevant WTO body. Finally, Article 25.4 of the DSU extends to the arbitration awards the remedies of the suspension of concessions or other obligations enshrined in Articles 21 and 22 of the DSU.

So far, WTO Members resorted to the remedy of Article 25 of the DSU only once, and only for determining the amount of compensation due by the losing party because of its infringement of some TRIPs (Agreement on Trade-Related Aspects of Intellectual Property Rights)[31] obligations found by a panel report already approved by the DSB.[32] In the *US — Section 110(5) Copyright Act* case, the disputants asked the arbitrators to establish the damage suffered by the EU because of the infringement by the US legislation of copyrights of European musicians and performers. This first -and up to now unique- Article 25 arbitration award authoritatively declared the *kompetenz-kompetenz* principle, recalling the Appellate Body finding in the *US — 1916 Act (EC)* case pursuant to which "it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative."[33] The WTO arbitrators therefore stated that "[i]n the absence of a multilateral control over recourse to [Article 25 of the DSU] … it is incumbent on the Arbitrators themselves to ensure that [such provision] is applied in accordance with the rules and principles governing the WTO system."[34]

[30] On the role for third parties and third participants in WTO litigation developed in particular by the case-law of the Appellate Body see E. Baroncini, *L'approccio inclusivo dell'Organo d'appello dell'OMC per una giurisprudenza informata, partecipata, ed aperta*, in *Liber Amicorum Angelo Davì, La vita giuridica internazionale nell'età della globalizzazione*, Vol. III, Napoli, 2019, p. 1767 ff.

[31] The text of the TRIPs Agreement is available in World Trade Organization, *The Legal Texts - The Results of the Uruguay Round of Multilateral Trade Negotiations*, cit., p. 321 ff.

[32] Panel Report, *United States - Section 110(5) of the US Copyright Act*, WT/DS160/R, adopted 27 July 2000.

[33] Appellate Body Report, *United States - Anti-Dumping Act of 1916 (US — 1916 Act (EC))*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, para. 54,

[34] WT/DS160/ARB25/1, *United States - Section 110(5) of the US Copyright Act, Award of the Arbitrators*, 9 November 2001, para. 2.1. On this award see G.M. Grossman, P.C. Mavroidis, *US – Section 110(5) Copyright Act United States – Section 110(5) of the US Copyright Act, Recourse to Arbitration under Article 25 of the DSU: Would've or Should've? Impaired Benefits Due to Copyright Infringement*, in *World Trade Review*, 2003, p. 281 ff.

While recourse to arbitration under Article 25 of the DSU remained confined, within the WTO practice, to the just reported case, the importance and value of this alternative means for settling disputes emerged in the mid of the institutional crisis caused by the blocking of the AB members' appointment due to the US approach. Various scholars started to suggest recourse to the use of arbitration under Article 25 of the DSU "as a temporary avenue to enable appeals of panel reports."[35] The EU developed a very effective formula of bilateral arbitration arrangement modelled on Article 25 of the DSU, a formula which may be easily endorsed by any willing WTO Member. The continuation of the present work will thus be devoted to the analysis of the EU interim appeal arbitration, which could represent a most effective tool to temporarily overcome the impossibility to adjudicate of the WTO Appellate Body.

3. The Interim Appeal Arbitration Agreement based on Article 25 of the DSU proposed by the European Union

In May 2019, it was reported by the specialized press that the EU was planning to propose the use of arbitration proceedings under Article 25 of the DSU to provide a temporary solution to the AB crisis.[36] The European Commission was in fact preparing an arbitration model under Article 25 of the DSU, which would have been the basis of negotiations to be launched with other WTO Members after having obtained the mandate to lead such consultations from the EU Council.[37] The latter, in the configuration "Foreign Affairs – Trade Issues," endorsed the European Commission's approach on 27 May 2019, declaring that "[a]s regards the Appellate Body crisis … the EU should reach out to other WTO members to work on an interim solution that preserves the binding character and the two levels of adjudication of the WTO dispute settlement system."[38]

The draft text of the joint communication containing the WTO interim appeal arbitration agreement -already leaked by the media at the beginning of June 2019-[39] was presented by the European Commission at the EU Trade Policy

[35] S. Andersen, T. Friedbacher, C. Lau, N. Lockhart, J.Y. Remy, I. Sandford, *Using Arbitration under Article 25 of the DSU to Ensure the Availability of Appeals*, CTEI Working Papers CTEI-2017-17, at p. 1. See also J. Bacchus, *Saving the WTO's Appeals Process*, www.cato.org/blog,19 October 2018; J. Hillebrand Pohl, *Blueprint for a Plurilateral WTO Arbitration Agreement under Article 25 of the Dispute Settlement Understanding*, in D. Prévost, I. Alexovičocá, J. Hillebrand Pohl (Eds.), *Restoring Trust in Trade, Liber Amicorum in Honour of Peter Van den Bossche*, Oxford, 2019, p. 139 ff.

[36] See World Trade Online, *EU Moving Forward with WTO Appellate Body Backup Plan*, 28 May 2019.

[37] Cfr. Council of the European Union, doc. 9506/19, *WTO Appellate Body*, 20 May 2019. See also I. Dreyer, *EU to Launch Talks for Alternative WTO Appellate Mechanism*, *Borderlex*, 22 May 2019.

[38] EU Council Conclusions 9753/19, *Outcome of the Council Meeting - 3695th Council meeting, Foreign Affairs - Trade issues*, Brussels, 27 May 2019, at p. 3.

[39] See the post by Tom Miles, Chief Correspondent at the Reuters Geneva Bureau, dated 6 June 2019, appeared as a comment to S. Charnovitz, *The WTO Appellate Body Crisis: A Critique of the EU's Article 25 Proposal*, in *IELP Blog*, June 2019, at the link

Committee (Deputies) in early July 2019, and then immediately brought to the attention of the EU Council, who was invited to authorise that text.[40] On 15 July 2019, the EU "Agriculture and Fisheries" Council hence "endorsed a model communication relating to interim arrangements that the EU will seek to put in place to preserve its … [WTO] rights pending the resolution of the blockage of appointments to the WTO Appellate Body," emphasising that "[t]hese arrangements will provide for arbitration, on the basis of Article 25 of the [DSU] … to decide on appeals from panel reports if, and as long as, the Appellate Body is non-operational due to the blockage of new appointments."[41]

As first partner with which to agree on the proposed joint communication, the EU chose Canada, because of their common "strong support for the multilateral trading system"[42] and recognition of "the indispensable role that the World Trade Organization … plays in facilitating and safeguarding international rules-based trade."[43] At the 17th Bilateral EU-Canada Summit, held in Montreal on 17-18 July 2019, the two WTO Members therefore announced that they were "finalizing an interim appeal arbitration arrangement based on existing WTO rules which could apply until the WTO Appellate Body is able to hear new appeals again"[44]: it was thus possible for the European Commission to officially present in Geneva the "Interim Appeal Arbitration Pursuant to Article 25 of the DSU," combined with its Annex on "Agreed Procedures," as an agreement with Canada, notified to the WTO Secretariat on 25 July 2019.[45] Subsequently, in September 2019, the European Commission decided to confer the Commissioner in charge for Trade with the power "to adopt, on behalf of the Commission and under its responsibility, certain measures concerning the interim appeal arbitrations at the World Trade Organization,"[46] i.e. to enter into bilateral arrangements to

ielp.worldtradelaw.net/2019/06/the-wto-appellate-body-crisis-a-critique-of-the-eus-article-25-proposal.html, accessed on 30 October 2019.

[40] See Council of the European Union, doc. 10905/19, *WTO Appellate Body – Interim Arrangement – Endorsement*, 5 July 2019. The EU procedure just described in the text represents the application of the "Arrangements for Non-Binding Instruments" agreed among the Secretary Generals of the Council, the Commission and the EEAS as a follow-up to the judgment of the EU Court of Justice in case C-660/13, *Council of the European Union v European Commission*, EU:C:2016:616. See Council of the European Union, doc. 15367/17, *Follow up to Judgment in Case C-660/13 – Arrangements between Secretaries General on Non-Binding Instruments*, 4 December 2017.

[41] EU Council Conclusions 11255/19, *Outcome of the Council Meeting - 3708th Council meeting, Agriculture and Fisheries*, Brussels, 15 July 2019, at p. 11.

[42] *Canada-EU Summit Joint Declaration, July 17-18, 2019, Montreal*, para. 12.

[43] *Ibid.*

[44] *Ibid.* See also L. Sevunts, *Canada and EU Work on 'Interim Fix' to Save Global Trade Body*, *Radio Canada International*, 18 July 2019.

[45] JOB/DSB/1/Add.11, *Statement on A Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes – Interim Appeal Arbitration Pursuant to Article 25 of the DSU*, Communication circulated at the request of the Delegations of Canada and the European Union, 25 July 2019. Paragraph 8 of the EU/Canada agreed procedures for arbitration under Article 25 of the DSU was slightly modified on 21 October 2019 by the WTO document JOB/DSB/1/Add.11/Rev.1.

[46] PV(2019) 2306 final, *European Commission, Minutes of the 2306th meeting of the Commission held in Brussels (Berlaymont) on Wednesday 4 September 2019 (morning)*, at p. 10.

provisionally overcome the crisis of the blockage of the Appellate Body with any other willing WTO Member. The EU institution hence set up the necessary legal tools and framework for moving forward with the European strategy of preserving a two-tier quasi-judicial mechanism for the multilateral trade system in case the World Trade Court were stopped being operational on 11 December 2019.[47]

As already hinted, the EU/Canada arrangement, which was copy-pasted and also concluded with Norway on 21 October 2019,[48] is composed of two parts: the "Interim Appeal Arbitration pursuant to Article 25 of the DSU," and the "Agreed Procedures for Arbitration under Article 25 of the DSU in Dispute DS X," annexed to the first part of the bilateral understanding. The introductory section expresses the "utmost concern"[49] of the EU and her partner because of "the enduring absence of consensus in the Dispute Settlement Body for the proposals made to fill the vacancies"[50] of the World Trade Court, and formulates the joint political vision on which the "appeal arbitration procedure" is based, also codifying the basic principles having to characterize the interim Article 25 appeal arbitration. In the preambular part it is thus "acknowledg[ed] the successful contribution of the WTO dispute settlement system to the security and predictability of the multilateral trading system,"[51] and reaffirmed the commitment of the contracting parties "to a multilateral rules-based trading system;"[52] the "role of the Appellate Body within the WTO dispute settlement system"[53] is considered "essential,"[54] thus coherently underlining "the urgency and importance of filling the vacancies on the Appellate Body so that it can carry on its functions as envisaged by the DSU;"[55] and it is finally and consistently declared the determination of the two contracting parties "to preserve the essential principles and features of the WTO dispute settlement system which include its binding character and the two levels of adjudication through an independent and impartial appellate review of panel reports."[56] The joint communication therefore clearly states the provisional nature of the appeal arbitration procedure: the latter may be used only in the case that the Appellate Body will not be able "to hear

[47] See *European Commission Adopts Mandate to Extend Interim Appeal Arbitration Arrangement*, Brussels, 4 September 2019.
[48] JOB/DSB/1/Add.11/Suppl.1, *Statement on A Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes - Interim Appeal Arbitration Pursuant to Article 25 of the DSU*, Communication circulated at the request of the Delegations of the European Union and Norway, 21 October 2019; see also *EU and Norway Agree in Interim Appeal System in Wake of World Trade Organization Appellate Body Blockage*, Brussels, 21 October 2019.
[49] JOB/DSB/1/Add.11/Rev.1, *Interim Appeal Arbitration pursuant to Article 25 of the DSU*, cit., at p. 1.
[50] *Ibid.*
[51] *Ibid.*
[52] *Ibid.*
[53] *Ibid.*
[54] *Ibid.*
[55] *Ibid.*
[56] *Ibid.*

appeals of panel reports in any future dispute between [the third country] and the European Union due to an insufficient number of its members;"[57] and the interim Article 25 arbitration has "to replicate as closely as possible all substantive and procedural aspects as well as the practice of Appellate Review pursuant to Article 17 of the DSU,"[58] foreseeing also "the provision of appropriate administrative and legal support to the arbitrators by the Appellate Body Secretariat."[59] As a guarantee that the "substantive and procedural aspects" of the WTO appellate procedures are observed in the interim Article 25 arbitration, the bilateral agreement establishes that the arbitrators of the interim procedure will be "selected by the Director General from the pool of available former members of the Appellate Body,"[60] also clearly declaring that recourse to the appeal arbitration procedure "will cease … as soon as the Appellate Body is again fully composed."[61]

In the Annex, the specific procedures for the interim Article 25 arbitration are considered. Once again it is clearly stated that "[t]he arbitration may only be initiated if the Appellate Body is not able to hear an appeal in [the dispute at hand] under Article 16.4 and 17 of the DSU,"[62] a situation which "is deemed to arise where, on the date of issuance of the final panel report to the parties, there are fewer than three Appellate Body members."[63] Before the circulation of the final panel report to the WTO membership, any party may start the interim appeal arbitration procedure by requesting the panel to suspend panel proceedings for 12 months pursuant to Article 12.12 of the DSU. Therefore, "no later than 10 days after the suspension of the panel proceedings,"[64] the Notice of Appeal has to be filed with the WTO Secretariat. Such Notice of Appeal "shall include the final panel report in the official languages of the WTO,"[65] and has to be "simultaneously notified to the other party and to the third parties in the panel proceedings."[66] Furthermore, the Annex establishes that "[t]hird parties which have notified the DSB of a substantial interest in the matter before the panel pursuant to Article 10.2 of the DSU may make written submissions to, and shall be given an opportunity to be heard by, the arbitrator,"[67] applying *mutatis mutandis* Rule 24 of the Working Procedures for

[57] JOB/DSB/1/Add.11/Rev.1, *Interim Appeal Arbitration pursuant to Article 25 of the DSU*, cit., para. 1.
[58] JOB/DSB/1/Add.11/Rev.1, *Interim Appeal Arbitration pursuant to Article 25 of the DSU*, cit., para. 2.
[59] *Ibid.*
[60] JOB/DSB/1/Add.11/Rev.1, *Interim Appeal Arbitration pursuant to Article 25 of the DSU*, cit., para. 3.
[61] JOB/DSB/1/Add.11/Rev.1, *Interim Appeal Arbitration pursuant to Article 25 of the DSU*, cit., para. 6.
[62] JOB/DSB/1/Add.11/Rev.1, *Agreed Procedures for Arbitration under Article 25 of the DSU in Dispute DS X*, cit., para. 2.
[63] *Ibid.*
[64] JOB/DSB/1/Add.11/Rev.1, *Agreed Procedures for Arbitration under Article 25 of the DSU in Dispute DS X*, cit., para. 5.
[65] *Ibid.*
[66] *Ibid.*
[67] JOB/DSB/1/Add.11/Rev.1, *Agreed Procedures for Arbitration under Article 25 of the DSU in Dispute DS X*, cit., para. 11.

Appellate Review.[68] In this way, the EU interim appeal arbitration procedure overcomes the problematic aspect highlighted above on Article 25.3 of the DSU, where the latter provides that the disputants have the power to decide on the participation of other WTO Members to the arbitration proceedings: by introducing the obligstion of accepting in advance the presence of third parties, the EU appeal arbitration maintains the important inclusive institutional feature of the role of third parties characterizing panel and AB adjudicatory activities.[69] Paragraph 9 of the Agreed Procedures clarifies another fundamental aspect of the interim appeal arbitration, i.e. that such appeal, similarly to what foreseen for the Appellate Body by Article 17.6 of the DSU, "shall be limited to issues of law covered by the panel report and legal interpretations developed by the panel,"[70] so that "[t]he arbitrators may uphold, modify or reverse the legal findings and conclusions of the panel."[71] Last but not least, it is foreseen that the findings of the panel report which have not been appealed through the interim arbitration will become binding because those panel findings "shall be deemed to form an integral part of the arbitration award,"[72] and that awards issued under the interim appeal arbitration procedure "shall be deemed to constitute Appellate Body reports adopted by the DSB for the purposes of interpretation of the covered agreements."[73] Of course, the Annex reiterates the immediate binding nature of the arbitration award, as the parties agree to observe the latter and consider it final, and also have the duty to notify it "to the DSB and to the Council or Committee of any relevant agreement,"[74] where any WTO Member has the right to deliver statements on any aspect of the award.

4. Reactions of the WTO membership to the EU *ad hoc* arbitration proposal

Geneva trade experts announced that the EU interim appeal arbitration proposal, beyond Canada and Norway, could be accepted by other WTO Members such as Australia, Argentina, Brazil, Chile, China, India, Japan and Turkey, developed and developing countries sharing with the EU the view of the need to "continue to rely on binding dispute settlement in future,"[75] and the overall positive assessment of the Appellate Body's activity in shaping and preserving a multilateral trade system which is stable and predictable because it is rules-based and capable of issuing dispute settlement decisions that will be respected by both the disputants "as binding and final."[76] The Chinese Ambassador to the WTO, in particular, just on

[68] See WT/AB/WP/6, cit.
[69] See *supra*, paragraph 2.
[70] JOB/DSB/1/Add.11/Rev.1, *Agreed Procedures for Arbitration under Article 25 of the DSU in Dispute DS X*, cit., para. 9.
[71] *Ibid.*
[72] *Ibid.*
[73] JOB/DSB/1/Add.11/Rev.1, *Agreed Procedures for Arbitration under Article 25 of the DSU in Dispute DS X*, cit., para. 8.
[74] JOB/DSB/1/Add.11/Rev.1, *Agreed Procedures for Arbitration under Article 25 of the DSU in Dispute DS X*, cit., para. 10.
[75] See T. Miles, *EU, Canada Agree First Workaround to Avoid U.S. Block on WTO Judges*, Reuters Business News, 25 July 2019.
[76] *Ibid.*

the eve of the Appellate Body's paralysis, has already declared that "Beijing is actively working to support the EU's vision of an appeal-arbitration model."[77]

The EU proposal thus seems to be gradually persuading different major actors of the multilateral trade system. Should the net of bilateral appeal arbitration arrangements start to persistently win the favour of various WTO Members, a sort of *de facto* plurilateral dispute settlement agreement could materialize. Such an important outcome could gain diplomatic space for the discussions to reform the DSU and thus make the Appellate Body operational again, and would be smoothly achieved, overcoming all the legal difficulties of setting up a formal plurilateral agreement on dispute settlement within the WTO legal framework,[78] as well as the political and legal perplexities on the legitimate feasibility of a treaty of "The Real Friends of Dispute Settlement" outside the multilateral trade system.[79] Furthermore, the EU choice to base her interim arbitration solution on the existing mechanism contemplated in Article 25 of the DSU, combined with the already-in-force WTO Working Appellate Procedures[80] and Rules of Conduct,[81] allows avoiding the thorny issue of which procedural rules would be advisable to choose to guarantee WTO compatible proceedings and awards.[82] What's more, by recalling that the interim Article 25 arbitration has "to replicate as closely as possible all substantive and procedural aspects as well as the practice of Appellate Review pursuant to Article 17 of the DSU,"[83] and expressly foreseeing that awards issued under the interim appeal arbitration procedure have to be "deemed to constitute Appellate Body reports adopted by the DSB for the purposes of interpretation of the covered agreements,"[84] the EU interim arbitration arrangement preserves and strengthen the consideration -and respect- of the most appreciated WTO case-law, together with its harmonious and further constructive development.

5. Conclusions

In the very delicate institutional crisis triggered by the United States on the Appellate Body composition -appearing as most peculiar since the World Trade Court "has over the years served as a point of reference in different academic and

[77] B. Baschuk, *China May Back EU's Trade-Dispute 'Plan B' as Trump Hobbles WTO*, Bloomberg, 10 December 2019.
[78] On these aspects cfr. Q. Kong, S. Guo, *Towards a Mega-Plurilateral Dispute Settlement Mechanism for the WTO?*, in *Journal of World Trade*, 2019, p. 273 ff.
[79] See P.J. Kujiper, *From the Board: The US Attack on the WTO Appellate Body*, in *Legal Issues of Economic Integration*, 2018, p. 1 ff., in particular at pp. 10-11.
[80] WT/AB/WP/6, cit.
[81] WT/DSB/RC/1, *Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes*, 11 December 1996.
[82] See A. Hazarika, P. Van Vaerenbergh, *"One Rule to Rule Them All": Rules for Article 25 DSU Arbitration*, in *Journal of International Arbitration*, 2019, p. 595 ff.
[83] JOB/DSB/1/Add.11/Rev.1, *Interim Appeal Arbitration pursuant to Article 25 of the DSU*, cit., para. 2.
[84] JOB/DSB/1/Add.11/Rev.1, *Agreed Procedures for Arbitration under Article 25 of the DSU in Dispute DS X*, cit., para. 8.

policy debates about efficient institutional design for international dispute resolution"-[85] the EU proposal for an interim appeal arbitration expresses without doubt high technical quality capable of attracting the WTO Members most committed to maintaining and strengthening the rule of law in the multilateral trade system also through a two-tier level of adjudication. While it seems unlikely, at least in the short time, to assist to a favourable approach by Washington to the EU initiative, the EU Interim Appeal Arbitration Pursuant to Article 25 of the DSU could nevertheless provide for vital diplomatic space to fix the WTO dispute settlement mechanism, or devise *ex novo* a new multilateral legal framework, thus preserving the principle of cooperation as the central pillar of the international governance necessary for a free and fair global economy.

The US approach seems more and more characterized by the intent of disarticulating the WTO jurisdictional pillar, as most recently witnessed by the US decision to introduce drastic cuts in the WTO budget for the expenses of the functioning of the Appellate Body.[86] Nonetheless the EU is showing the strongest determination "to preserve its rights as enshrined in the WTO Agreements, notably the right to an appeal review," and thus not to renounce to "a rules based multilateral trading system," considering that such approach is "owe[d] … to our citizens and our businesses, because it is them, ultimately, that benefit from the system."[87] The greatest attention has therefore to be reserved to the constructive initiatives proposed by the EU, as the latter is the world's largest trading block and the expression of a process of a unique political integration which, in spite of its current internal challenges, could well advance a most significant contribution for governing international trade with transparent, inclusive and fair mechanisms and rules.

[85] J. Lam, *WTO AB as a Model for Other Adjudicatory Bodies – The Case of EU's Investment Court System*, in C. Lo, J. Nakagawa, T. Chen (Eds.), *The Appellate Body of the WTO and its Reform*, Heidelberg, 2019, p. 331 ff.

[86] Originally threatening to veto the entire 2020 WTO budget, the US administration conditioned its endorsement to the latter to the acceptance by the rest of the WTO membership of drastic cuts of the Appellate Body's expenses: "[t]he deal limits annual spending for appellate body members to no more than 100,000 francs, an 87% reduction from the full allotment, and caps spending by the body's operating fund to 100,000 francs, a 95% reduction" (B. Baschuk, *WTO Members Agree on a 2020 Budget, Averting Jan. 1 Shutdown*, Bloomberg, 5 December 2019). See also the statement of the US Ambassador Dennis Shea on Appellate Body members' compensation delivered at the DSB meeting of 22 November 2019: *Statements by the United States at the Meeting of the WTO Dispute Settlement Body Delivered by Ambassador Dennis Shea, U.S. Permanent Representative to the World Trade Organization*, Geneva, November 22, 2019, available at the link geneva.usmission.gov/wp-content/uploads/sites/290/Nov22.DSB_.Stmt_.as-deliv.fin_.public.pdf, accessed on 16 December 2019. For a comment, cfr. M. Becker, *Might Makes Right? Donald Trump Damages America By Defanging WTO*, *Spiegel online*, 10 December 2019.

[87] *Statements by the European Union at the WTO General Council Meeting, 9-10 December 2019*, available at eeas.europa.eu/delegations/world-trade-organization-wto/71834/statements-european-union-wto-general-council-meeting-9-10-december-2019_en, accessed on 16 December 2019.