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The crisis of the International Trade System: the WTO and the sui generis case of President Trump "trade war".

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Ai miei genitori, Michela e Roberto,
per essere stati il più chiaro esempio di forza
d'animo che potessi avere, per avermi insegnato
ad accettare le mie debolezze al fine di farle diventare
punti di forza, per avermi capita, sostenuta ed amata.

Alla me del futuro spero finalmente soddisfatta e
realizzata.

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INTRODUCTION

The main purpose of this thesis is to analyze the evolution of the international trade system in decades characterized by changes and developments in both the economic and political scenarios throughout the world.

Of great importance is the consideration of the contemporaneity and utility of the WTO in the modern world and of its adequacy or inadequacy in facing nowadays challenges and in settling disputes arising among its Members.

President Trump trade war against China and the European Union, whose resolution appears to be far from the making, represents a case without precedents and an incredible challenge to the legitimacy and authority of the International legal order. Its *sui generis* and unique pattern makes it a challenging and interesting issue to be analyzed: Why did this war begin? How can it be solved? Is the WTO Dispute Settlement mechanism failing in doing so? These are the main questions that guided me and to which I tried to give answers.

The elements that will constitute the heart of the whole work are different and their analysis has the aim of going into deep in the understanding of how such a challenging situation could originate. Chapter 1 will be focused on the steps and the historical process through which the World Trade Organization was established following the GATT years: the weaknesses of the General Agreement on Trade and Tariffs will be mentioned as a way to better understand why the birth of an International Organization was needed.

Chapter 2, differently, will be based on the consideration of the vital role of interdependence, that characterizes the contemporary International Community and its legal order, as an explanatory variable of the huge global impact had by President Trump trade war: States are linked by strong economic, political and social ties and this is why each of them action reflects automatically on the others. The European Union and its integration process and the recent Agreement with China are analyzed to associate to theory some concrete examples of how and why economic cooperation and integration are fundamental for stable diplomatic and political relations. Finally, Chapter 3 has the aim of explaining, after a formal analysis of its organs and procedures, the weaknesses of the Dispute Settlement Procedure of the World Trade Organization and the gaps that President Trump exploited to raise his claims.

The conclusive part has the final aim of understanding which is the future of the WTO under President Trump administration and if International Law can be considered as being in a decline, destined to see power to prevail over it.

1. THE PLACE OF THE WTO IN THE INTERNATIONAL LEGAL ORDER

1.1Analysis of the birth of the WTO: the weaknesses of the GATT

The effectiveness of the World Trade Organization has been for a long time, and still is, a very debated concept in the international scenario of State relations: according to many intellectuals, scholars and politicians the organization represents a unique opportunity of equality and development, while others strongly disagree considering it as a dysfunctional organization that needs to be reformed. [1]

"There are a number of ways of looking at the WTO. Essentially, the WTO is a place where member governments go, to try to sort out the trade problems they face with each other. The first step is to talk. The WTO was born out of negotiations, and everything the WTO does is the result of negotiations " [2]: as strengthened by these words, the importance of negotiations and of the process that led to the creation of the organization itself are crucial.

The concepts of a free international trade and of the abolition of discriminatory tariffs aimed at reaching a more liberal approach on the economic side, were at the heart of the values of the General Trade Agreement, the first worldwide multilateral free trade agreement that came into existence on October 30th 1947: initially signed by 23 countries on January 1st 1948, the number was destined to grow over the years[3].

As explained by the director of the WTO Pascal Lamy in 2007, and the signatory States were not considered as members, but rather as contracting Parties: the nature of the agreement itself was in fact "purely contractual"[4].

The GATT marked the beginning of the modern history of trade agreements: from here onwards trade would be at the heart of innumerable bilateral and multilateral agreements.

The main contributions of this agreement clearly concerned the growth of world trade and the beginning of a period of peace, prosperity and cooperation preventing the outbreak of hypothetical wars: despite the lack of a legal personality, the GATT represented a sort of alliance that spread feelings of unity and respect among the contracting States.

From a formal point of view the agreement was characterized by eight central provisions influenced by the ambitious Havana Charter: The Charter was supposed to represent the backbone of the International Trade Organization (ITO) before both of them failed leaving space to the already existing GATT.

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[1] D. Rodrik, *The WTO has become dysfunctional*, November 2018

[2] WTO, *What is the World Trade Organization*? January 2019, available at www.wto.org

[3] K. Amadeo, *GATT, its purpose, history with pros and cons*, January 2019, available at www.thebalance.com

[4] P. Lamy, *The place of the WTO and its law in the International Legal Order*, 2007, p. 971

1. The non-discrimination principle imposed that all tariffs on trade had to be imposed on an equal base to all the member States, considering as exceptions falling out of this rule the relations that the Commonwealth had with its "colonies" and those that France, Belgium, The Netherlands and the USA had with theirs[5];
2. Price-based measures, meaning tariffs, were the only permitted ones to restrict and regulate external trade as reported in Art. XI of the General Agreement on Trade and Tariffs[6];
3. The third principle is the one of national treatment that imposes the ban to the use of internal taxes changes as a strategy to counteract tariffs rates of other countries, as written in Art. III[7];
4. The fourth principle the reciprocity that is required during the process of tariff negotiations[8];
5. The fifth provision presents retaliation as the "ultimate weapon" that can be used after all other possibilities have been taken into consideration, as strengthened by Art. XXIII[9].
6. The safeguard mechanism expressed in Art. XIX provides that imports and exports could only be limited under some precise exceptions, such as to protect national security, and finally, the particular necessities of developing countries had to be taken into account to not damage them further: this led the most developed countries to renounce imposing tariffs on imports of economically weaker States[10] [11];
7. The seventh provision concerned the clarification of the area of competence of the GATT, meaning trade of goods only[12];
8. Finally, the eighth principle, described in Articles XXV and XXX, deals with the decision-making process that is at the basis of the legitimization of actions under the umbrella of the GATT[13].

But why did the International Trade Organization and the Havana Chart fail to reach success and be implemented? Before going on with the analysis of the weaknesses of the General Agreement on Trade and Tariffs, it is important to understand the relevance and the influence that the context had on the profile that was finally chosen for it.

Among the several scholars that have analyzed this topic, of great relevance is for sure the opinion of Richard N. Gardner, an American diplomat who served as ambassador of the United States of America in Italy from 1977 to 1981: thanks to his legal and economic academic formation and to his closeness to both the American and European scenarios, his 1969 book "Sterling-Dollar Diplomacy: the origins and the prospects of our international economic order"

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[5] S.P. Shukla, *From GATT to WTO and beyond*, August 2000, available at www.wider.unu.edu
[6] Id.
[7] Id.
[8] Id.
[9] Id.
[10] Id.
[11] K. Amadeo, *GATT, its purpose, history with pros and cons*, January 2019, available at www.thebalance.com
[12] Id. n.5
[13] Id.

represents a unique analysis of the dynamics concerning " the making of international economic policy and the shaping of institutions to implement that policy"[14], as written by Norman Dorsen in his book review for the Harvard Book Review Association.

According to Gardner, following the terrible years of the Second World War in which protectionist measures damaged the world economy, the hopes and feelings of the whole world population were those of a rapid return to peace and stability: however, the threat coming from the communist Russia and the necessity to consolidate Western Europe, made all the principles at the heart of the Havana Charter and of the ITO lose strength following the rejection of the American Congress to approve it to safeguard national economic interests[15].

The institution that was to be created would be based on the making of bodies and rules responding mainly to the needs, such as winning the battle against the spread of communism, of the most powerful countries, architects themselves of the post war trade order[16].

To clarify, the main purpose was to create a cooperative economic environment fertile for the prosperity of capitalist interests that needed to keep expanding: it should not go unnoticed, in fact, that the title of Gardner's book focuses on sterling and dollar diplomacy, hiding the reference to the powerful United Kingdom and United States of America[17].

The huge economic expansion that followed the years after the GATT conclusion mainly showed itself through increases in consumption levels and of industrial production: the leading position of the United States of America both in the formal procedure of the agreement conclusion and in its tangible results, made them particularly enjoy it looking to a further exports growth[18].

By making a simple parallelism between those years and their economic policy and the contemporary international trade scenario, it is easy to notice that the ambitions of being leaders, as well as the one of protecting national economic interests, appear timeless in the American strategy of trade management.

The positive aura that had surrounded the General Agreement on Tariffs and Trade at the beginning of its years, hid crucial lacks for its best functioning leading it to a slow decline: it in fact represented only a provisional agreement which destiny was of disappearing leaving the stage to a real international organization, meaning the World Trade Organization[19].

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[14] N. Dorsen, *Reviewed Work: Sterling-Dollar Diplomacy by Richard N. Gardner*, January 1957, p.571

[15] P. Van Den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, Cambridge University Press, 2012, p.81

[16] Id. n.5

[17] Id.

[18] Id.

[19] P. Lamy, *The place of the WTO and its law in the International Legal Order*, 2007, p.971

First of all, as affirmed by the Finance Secretary of the Government of India S.P. Shukla in 2000, "the GATT was constructed out of old trade agreements and the results were not like the models of trade theory based on the comparative advantage principle"[20].

The lack of an international legal personality that a real International Organization would have, made the GATT to be heavily linked to the will of contracting Parties by being limited in its whole performance;

It did not have the chance to impose its sovereignty over the one of the single signatory states because it was not recognized as an international legal body: as its own name strengthen, it was only a general agreement and, as stated by S. P Shukla, the General Agreement on Trade and Tariffs "existed and shaped itself according to the defining influence of the power structure that supported the institution*"*[21].

The decisions taken under the framework of the GATT hid, then, an important point of weakness, probably the one that would have been its cause of failure: they reflected and strengthened the different levels of power that characterized more and less developed countries among the contracting members[22].

The second main point of weakness was for sure the position of developing countries and of their newborn industries because of the different treatment reserved to them to support their economic development: in the long run feelings of injustice would spread among the contracting GATT states.

More generally speaking, demands for reform in the GATT system were becoming louder.

The values of equity and equality were, then, extraneous and it is here that the World Trade Organization and its unique system of law enter the scene: the new International Organization would be based on important values and pillars such as the one of trade without discrimination, free trade through negotiation, predictability and transparency, fair competition and encouraged development[23].

The history of modern international trade, that began with the creation of the GATT, is characterized by numerous rounds of negotiations that took place on the basis of different themes.

The World Trade organization was established following the Marrakesh Agreement of 1994, an agreement stipulated during the last of these rounds: the Uruguay Round that lasted from 1987 to 1994[24].

But in what did the WTO distinguished itself from the previous Agreement?

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[20] Id. n.5
[21] Id.
[22] P. Lamy, *The place of the WTO and its law in the International Legal Order*, 2007, p.971
[23] Id. n.11
[24] *From the GATT to the WTO a brief overview*, 2019, available at www.guides.ll.georgetown.edu

First of all in its nature and in its organized **unique legal system** (1): it was no more about a General Agreement among contracting parties, but rather about a real International Organization with a separate international legal personality than its member states[25].

Moreover, despite debates concerning whether International Economic Law, because of its peculiarities and dynamics, should have been considered as an autonomous branch of International law, the WTO would be generated as an organization having a unique legal order respectful of the three main principles of the discipline: the **sovereignty equality of states** (2), **international cooperation** (3) and the obligation to resort to **peaceful means for dispute resolution** (4)[26].

(1) Those 50 years that preceded the birth of the WTO under the General Agreement on Trade and Tariffs did not go wasted: the body of legal rules of the Organization, in some of its parts, comprises and is inspired by the practices and decisions of the past (GATT *acquis*).

Organization and coherence are crucial elements in the management of the WTO legal system, since every single rule and decision are aimed at being integrated into a "single undertaking": this means that the different multilateral trade agreements that are negotiated under the framework of the Organization by the Member States are an integral part of the Marrakesh Agreement, and, consequently, binding[27].

Even though the WTO bodies do not have the power of imposing binding decisions, they can adopt effective decisions aimed at efficiently solve specific issues: the lack of respect and compliance with the established rules can be prosecuted in the framework of the Dispute Settlement Body[28].

The legal framework under which the Organization has been created, also provided for a clear subdivision of duties among its bodies: following an organization chart published on the official website of the WTO, showing this structure[29].

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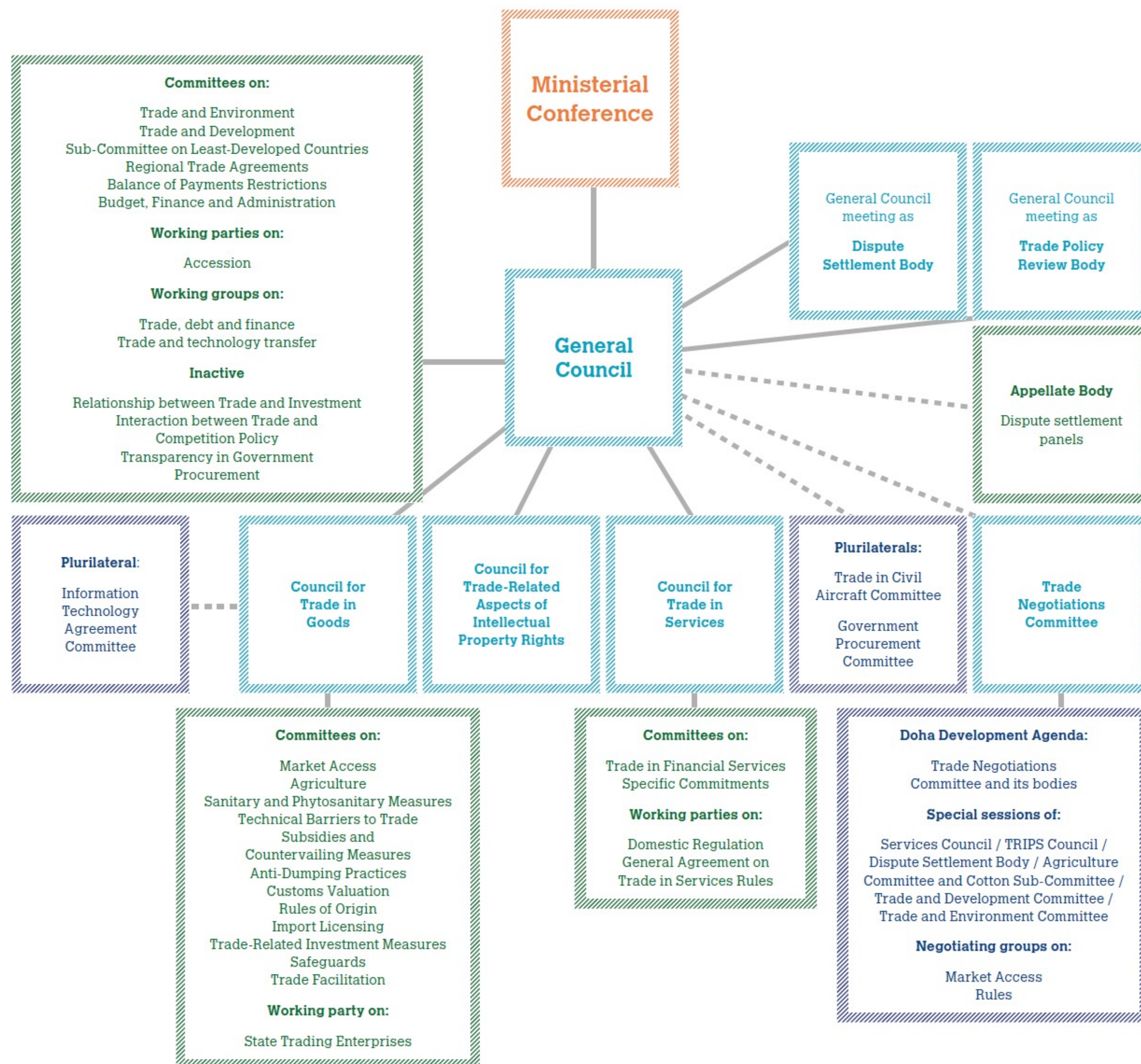
[25] P. Lamy, *The place of the WTO and its law in the International Legal Order*, 2007, p.981
[26] P. Lamy, *The place of the WTO and its law in the International Legal Order*, 2007, p.975
[27] P. Lamy, *The place of the WTO and its law in the International Legal Order*, 2007, p.972
[28] Id.
[29] WTO,*What is the World Trade Organization*? January 2019, available at www.wto.org



(2) To have an in-depth comprehension of the spirit of the WTO, the different nature of the terms "equity" and "equality" of state sovereignty should be analyzed: the World Trade Organization does not produce equity, but produces legality through the respect of equality of state sovereignty despite their sizes and powers ensuring the respect of the principle "one government/one vote"[30].

To clarify this concept it should be pointed out that under public international law, the term "equity" "refers to what is fair and reasonable in the administration of justice"[31], while equality of state sovereignty is a "necessary corollary of the principle of sovereignty which provides that states have supreme authority within their territory, it sustains the plenitude of internal

[30] P. Lamy, *The place of the WTO and its law in the International Legal Order*, 2007, p.973

[31] F. Francioni, *Equity in International Law*, June 2013, available at www.opil.ouplaw.com

jurisdiction, their immunity from other states' own jurisdiction and their freedom from other states' intervention on their territory, but also their equal rank to other sovereign states"[32].

Equality is crucial in the World Trade Organization which weighs real equality more than the formal one. As it is observable from the above organization chart, the bodies that constitute the formal structure of the Organization are numerous, but the particularity is that the Member States are active participants in all of them, starting from the Ministerial Conference, to the General Council, to the different committees up to the Dispute Settlement Body which will be at the heart of Chapter 3[33].

As stated by Pascal Lamy, in fact, the WTO shows its uniqueness through the coexistence of two concepts of international law: "it is a permanent negotiating forum between sovereign states and is therefore a cooperation organization, but it also comprises a sophisticated dispute settlement mechanism which makes it an "integration organization"[34].

States are treated as equals in the Organization also following the respect for the principles of non-discrimination and reciprocity.

The first one has its clearest expression in the Most Favored Nation Clause that, considering its timeless importance, was also the first article of the General Agreement on Trade and Tariffs: as stated in the official website of the WTO "Under WTO agreements, countries cannot normally discriminate between their trading partners. Grant someone a special favor and you have to do the same for all the other WTO members"[35].

However, an exception exists to this principle, the Enabling Clause: the WTO considers as crucial the equality in the treatment of states, but also its rightfulness and this is why less developed countries can be facilitated with more advantageous tariffs levels[36].

The centrality of the second principle in the rule of law was strengthened by the UN Secretary General before the General Assembly of the United Nations in 2004: in the press release of the Department of Public Information of the UN it is possible to read that "At the international level, all states, strong and weak, big and small, need a framework of fair rules which each can be confident that others will obey"[37].

What follows is that for an international system of Law in its general meaning, what is required is that a state respects the rules being aware that the others will do the same: if this principle does not hold, the whole system collapses.

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[32] S. Bossom, *Sovereignty*, April 2011, available at www.opil.ouplaw.com

[33] P. Lamy, *The place of the WTO and its law in the International Legal Order*, 2007, p.976

[34] P. Lamy, *The place of the WTO and its law in the International Legal Order*, 2007, p.970

[35] WTO, *What is the World Trade Organization*? January 2019, available at www.wto.org

[36] P. Lamy, *The place of the WTO and its law in the International Legal Order*, 2007, p.974

[37] UN Department of Public Information, *Communique by Council of Presidents of General Assembly*, 19th November 2004, available at www.unispal.un.org

(3) As other International Organizations, the WTO is made of states, but despite this a particularity strengthens its innovative character: still remaining an inter-state negotiating and cooperative framework, the World Trade Organization allows the participation of Communities and NGOs[38].

This decision is consequent to an important reasoning according to which to achieve greater transparency in the work and function of the organization itself, it is fundamental to give a voice also to non-state actors and other representatives of the civil society to have a broader and more complete view of the interests of the whole international community[39].

Of great relevance is the analysis that the law professor John H. Jackson gave of the WTO cooperation side in his 2006 book "Sovereignty, the WTO and changing fundamentals of International Law": the WTO is here used as a case study illustrating the important progresses done by international relations in addressing in a cooperative way new challenges.

As stated by the former Chief Economist at the WTO Secretariat Patrick Low in his 2007 World Trade Review, in fact, "Professor Jackson brings life-long expertise to his analysis of an institution that he believes is one of the most impressive examples in history of cooperation among a multiplicity of diverse nations"[40].

But where does the authority for this level of cooperation come from? According to Jackson's analysis the tight relationships of mutual interdependence among states, especially in the economic field after the triumph of market economics over communism, lead them to be in need for maintaining a cooperative environment: if the interest of a single state prevails over those of the whole community, the disrupting effects will be felt worldwide[41].

From a figurative point of view this concept could be expressed through the image of a marble on a beam: the marble will be stable and in equilibrium in the center of the beam if all the states cooperate together, while an eventual deviation in their *modus operandi* would make it fall and break.

(4) Finally, the last pillar of international law upon which the WTO has been based is the obligation to resort to peaceful means for dispute resolution.

As stated in the official website of the WTO "Resolving trade disputes is one of the core activities of the WTO. A dispute arises when a member government believes another member government is violating an agreement or commitment that it has made in the WTO. The WTO has one of the most active international dispute settlement mechanisms in the world"[42].

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[38] P. Lamy, *The place of the WTO and its law in the International Legal Order*, 2007, p.974
[39] Id.
[40] P. Low, *World Trade Review*, November 2007, available at www.cambridge.org
[41] Id.
[42] WTO, *What is the World Trade Organization*? January 2019, available at www.wto.org

The functioning of the Dispute Settlement Procedure of the WTO is ensured by the impossibility for any of the Members to oppose its commencement due to the compulsory character of the jurisdiction[43].

The World Trade Organization probably stands as the clearest example of what the American academics Robert Keohane and Joseph Nye put at the heart of many of their works that are still crucial in the world of International Relations, meaning Complex Interdependence. The concept of complex interdependence is an expression of the neoliberal approach in the analysis of International Relations and is strongly opposed to the Realist stream of thought: according to realism, in fact, states relations are driven by different levels of power and actors have an " innate drive for domination and power which leads to conflict, emphasizing the conflictual aspect of international transactions consequently focusing on the causes of war rather than on international cooperation"[44].

Differently, the theory of Complex Interdependence "stresses the complex ways in which, as a result of growing ties, transnational actors become mutually dependent, vulnerable to each other's actions and sensitive to each other's needs"[45]: the key characteristics of complex interdependence can be easily linked to the principles sustaining the World Trade Organization, emphasizing even more how the Organization itself is its contemporary most famous embodiment.

What should in fact be mentioned is the existence of multiple channels in politics, not limited anymore to the single interaction among states, but spread also towards non-state actors, the absence of hierarchy among issues since domestic issues are automatically translated in the foreign and international sphere and the minor role of military force substituted by the monopoly of peaceful means for dispute resolution[46].

1.2 The outdated Westphalian definition of Sovereignty: the contemporary challenge of external intervention and state interdependence

To a certain extent, the concept of Complex Interdependence ends by being for another time on the top of the stage and this is so because the past, as well as the contemporary political, economic and social challenges, have become more invasive through the phenomenon of Globalization: it is no longer possible for a state to care only for its own interests because the contemporary era requires abilities to look especially beyond the borders.

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[43] P. Lamy, *The place of the WTO and its law in the International Legal Order*, 2007, p.976

[44] W. Rana, *Theory of Complex interdependence: a comparative analysis of realist and neoliberal thoughts*, February 2015, available at www.pdfs.sematicscholar.org

[45] Id.

[46] Id.

By focusing for a second on the name that was decided for the World Trade Organization, the principle of state interdependence appears as clear as ever: it is about an international organization concerning not the trade relationships between a few states, but between the entire world.

As previously mentioned, the concept of equality of state sovereignty is of fundamental importance among the WTO main principles; however, to better understand how the word "sovereignty" was interpreted when the Organization was born, an analysis of the evolution of its meaning should be done.

One of the elements that are crucial in John Jackson's book is exactly how the concept of sovereignty in international law and in the WTO should be addressed: starting from the explication of why the Westphalian definition of the concept is an outdated one, he subsequently points out the importance of understanding how power is allocated among nations[47].

The Peace of Westphalia of 1648 is a pillar in the European History since it ended the Eighty Years' War between Spain and the Dutch as well as the Thirty Years War that involved different European nations: other than having completely reshaped the division of the contemporary European territories, the Peace main contribution has been the definition of the concept of State Sovereignty[48].

States were defined as "entities possessing the monopoly of force within their mutually recognized territories. Relations between states were conducted by means of formal diplomatic ties between head of state and governments, and international law consisted of treaties made, and broken, by those sovereign entities. The term also implies a separation of the domestic and international spheres"[49].

This realist definition also implies the hidden concept according to which the full sovereignty and full independence of states allow them to be completely free from any external intervention[50], something that would be in huge contrast with the purposes of nowadays international Organizations such as the WTO.

As John Jackson strengthens in his book, in fact, such a definition was elaborated during a time in which the state in its entity was the most supreme expression of power and the idea of legitimizing the authority of International Law through state consent derives therefrom[51].

The evolution of the concept itself reached an ending point, leading to the development of modern International Law, with the distinction between internal and external sovereignty

[47] P. Low, *World Trade Review*, November 2007, available at www.cambridge.org
[48] Encyclopedia Britannica, July 1998, available at www.britannica.com
[49] R. Coggins, *Westphalian State System*, 2019, available at www.oxfordreference.com
[50] P. Lamy, *The place of the WTO and its law in the International Legal Order*, 2007, p.970
[51] P. Low, *World Trade Review*, November 2007, available at www.cambridge.org

and the deeper analysis of the latter: while internal sovereignty refers to the idea of exercising the state authority and administrative powers within its national borders, external sovereignty refers to the independence of states in the administration of their functions without enduring foreign and external powers influence. It also includes the right to international self-help and the authority to participate in international society, as affirmed by professor M.P. Ferreira-Snyman[52].

From the above consideration it is possible to infer that since the foundation of the United Nations in 1945, since the creation of an international community aimed at cooperating for the good of the world and, more generally speaking, since the prevalence of diplomacy over wars as a peaceful means of dispute settlement, a new age of International Law had begun[53].

As the German Law educator Bardo Fassbender stated, the concept of state sovereignty got hid by the presence in Article 2(1) of the United Nations Charter of the term "equality": in his words "In this combination, sovereignty meant to exclude legal superiority of any State over another, but not to exclude a greater role of the International Community played vis-à-vis all its members. Sovereignty is in a process of progressive erosion, inasmuch as the international community places even more constraints on the freedom of action of States. We witness a development toward greater community discipline"[54].

What does this practically mean? It means that States enjoy sovereign equality before the law, being considered all as equals and having the same rights and duties, but it also means that the Westphalian conception of full sovereignty of states is no more compatible with the necessities of an International Community tight by strong interdependence and cooperation[55].

The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations of 1970, more simply known as " Friendly Relations Declaration", confirms this view by specifying the duty of States in recognizing the personality, sovereignty, territorial integrity and political independence of others, but also, and especially, " the duty to comply fully and in good faith with its international obligations and to live in peace with other States"[56].

In conclusion, according to professor M.P. Ferreira-Snyman the most significant way of looking to sovereignty is the one of perceiving states as not only the most important subjects of International Law, but also as entities that "do not claim that they are above the law or that international law does not bind them"[57].

[52] M.P. Ferreira-Snyman, *The evolution of state sovereignty: an historical overview*, 2006
[53] Id.
[54] Id.
[55] Id.
[56] Id.
[57] Id.

1.3 *What is an International Organization and why the WTO is one: The Marrakesh Agreement and the International Law Commission definition*

As previously analyzed, two of the weakest elements of the General Agreement on Trade and Tariffs were the lack of its legal personality and the perception of states not as members, but rather as contracting parties of a provisional agreement: the GATT was not an International Organization and this is the main difference with the existing World Trade Organization.
The main limit of the GATT, that derived from these weaknesses, was the fact that the lack of distinction between its eventual legal personality and the one of the contracting parties, made the GATT to be subordinated to the will and interests of the latter[58].

The establishing Agreement of the WTO, meaning the Marrakesh Agreement of 1994, under Article VIII clearly specifies the *status quo* of the WTO: of great relevance are for sure paragraphs 1 and 2 which state "1. The WTO shall have legal personality, and shall be accorded by each of its Members such legal capacity as may be necessary for the exercise of its functions. 2. The WTO shall be accorded by each of its Members such privileges and immunities as are necessary for the exercise of its functions"[59].
As stated by Pascal Lamy, the implications of this status are numerous because it comprises not only the acceptance by Members of the international facet of the Organization, but also of its internal personality which allows it to conclude contracts and operate to better achieve the purposes for which it was created: other than the explicit competences stated in the Agreement, the status quo of the World Trade Organization also provides for some implicit and fundamental competencies that allow it to have its own will, free from the influence or eventual power impositions of the Member States[60].
This scenario might be considered as a conscious surrender of trust and sovereignty by states to the Organization itself, in the knowledge of the achievement of positive and greater results.

To strengthen even more the correct suitability of the definition of the WTO as an International Organization, the definition given by the International Law Commission should be analyzed. The ILC is a permanent subsidiary Commission of the United Nations which was established by the General Assembly in 1947 with the aim of "initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification" as stated under Article 13(1)(a) of the United Nations Charter.

[58] P. Lamy, *The place of the WTO and its law in the International Legal Order*, 2007, p.971
[59] WTO, *What is the World Trade Organization*? January 2019, available at www.wto.org
[60] P. Lamy, *The place of the WTO and its law in the International Legal Order*, 2007, p.971

When mentioning the purpose of "encouraging the development of International law" among the competences of the ILC, what can be deduced is that giving a clear definition and description of those that are the subjects of international law, upon which the law itself is exercised, is required: other than the statement present in the Marrakesh Agreement defining the WTO as an International Organization, of great relevance is also the definition of International Organization given by the ILC.

Even if the International Law Commission has for a long time been engaged in the analysis of what constitutes the International Responsibility of a State, the relevance of International Organizations was clear, considering that States can be prosecuted for breaches of obligations that they had towards not only other states, but also towards International Organizations[61].

In 2011 the ILC adopted the articles on the responsibility of International Organizations.

Article 2(a) presents the definition given by the International Law Commission of what an International Organization is: "international organization means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities"[62]

Does the World Trade Organization fall within this definition? Let's analyze it, step by step.

For what concerns the first requirement, meaning the necessity of being established by a treaty or other instrument, it must be recalled that the World Trade Organization was created after different rounds of negotiations, the last of which has been the Uruguay Round: after eight long years it culminated with the Marrakesh Agreement of 1994.

Going on to the second requirement, meaning the necessity of being governed by international law, the words of Pascal Lamy, former Director General of the WTO are clarifying: "The WTO is an international organization that brings together two concepts of International Law. It is a permanent negotiating forum between sovereign states and is therefore a cooperation organization akin to international conferences established under traditional International Law. But is also comprises a sophisticated dispute settlement mechanism which makes it an integration organization, rooted in contemporary International Law"[63]

Considering the third element, meaning having an international legal personality, as previously stated the WTO differentiated itself from the GATT exactly for the possession of its own legal

[61] G. Gaja, *Articles on the Responsibility of International Organzizations*, 2014, available at www.legal.un.org

[62] Id. n.61

[63] P. Lamy, *The place of the WTO and its law in the International Legal Order*, 2007, p. 970

personality: as stated in the Yale Journal of Law, to have a legal personality means “to be subject of rights and duties and to have the capacity for legal relations”[64].

The official website of the WTO remarks this aspect by describing the main activities that see as protagonist the Organization: it is not only about administering WTO trade agreements, but also about providing a forum for trade negotiations and trade peaceful dispute settlement, monitoring national trade policies and providing assistance for less developed countries while cooperating, at the same time, with other international organizations[65].

In conclusion, the World Trade Organization respects all the requirements established by the International Law Commission and it is for this reason rightfully considered and treated as an International Organization.

[64] B. Smith, *Legal Personality*, 1928, available at www.digitalcommons.law.yale.edu

[65] WTO, *What is the World Trade Organization*? January 2019, available at www.wto.org

2. THE VITAL ROLE OF INTERDEPENDENCE BETWEEN STATES IN INTERNATIONAL RELATIONS

2.1 Globalization and Interdependence among states: strengths and weaknesses. The origin of Trump claims against China and Europe.

Which is the relevance of interdependence in a globalized world? Starting from the assumption that the concept of interdependence can be analyzed from different perspectives, when focusing on the one of Economic Interdependence we should refer to the "sensitivity of economic behavior in one country to development or policies originating outside its own borders"[66]: this is so because every political, economic or social decision has reciprocal impacts on other countries as a direct effect of interconnections arising from globalization[67].

As previously stated in Chapter 1, the theory of Complex Interdependence developed by Keohane and Nye represents an important backbone in the field of International Relations that shows the existence of costly effects as a consequence of interactions among states.

The idea of fully independent states in their decision-making capacity and in their relations with the foreign environment, has by now been surpassed on the basis of the events and developments of International Law and International Relations that have led the world, as we know it today, to take shape. Examples are not only concerned to the legal field with the birth of International Organizations whose aim is the one of seeing states to cooperate for the better achievement of a common goal, but also to the economic one with the diffusion of International Trade and with the spread of dependency relations among states: the concept of autarchy has never been more utopic than now since mutual dependence is a necessary reality of life[68]. There exists no state who can feel fully free from the influences of the others.

Omajarabu Wasiu Femi in his paper concerning the relevance of Interdependence Theory in the age of Globalization, pointed out the words of the American Secretary of State, during the second presidential mandate of President Clinton, Madeleine Albright, who while describing the effects of interdependence used the following words: "Today the greatest problem to America is not some foreign enemy, it is the possibility…that we will crawl into a shell…and forget the fundamental lessons of the century, which is that problems abroad, if left unattended,

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[66] W. Marina, "*Reflections of Interdependence: Issues for Economic Theory and United States Policy*", 1979, available at www.academia.edu

[67] Omojarabi Wasiu Femi, "*The relevance of Interdependence Theory in the age of Globalization*". Available at www.academia.edu

[68] Id

will all too often come home to America"[69]. What can easily be inferred after reading these words is that in the contemporary globalized era states need to consider the wellbeing, the prosperity or the deterioration of other states as variables that can influence the outcome of their policy decisions.

Having considered this preamble, it is important to go deeper into the analysis of the strengths and weaknesses that the theory, and concrete existence, of Complex Interdependence among states carries with it, understanding how it is correlated to the phenomenon of Globalization.

Even if positive aspects can hide negative elements and vice versa, making the interpretation possibly double, the vital role of Interdependence and Globalization appear clear in the increasing power of International Institutions and Organizations and of their regimes and in the prevalence of bargaining power and negotiations over force; differently, the negative aspects mainly concern weaknesses linked to asymmetric interdependence[70].

- For what concerns the growth of power of International Organizations and Institutions, the explicative variables behind it are that they provide for norms, bodies of rule, agreements among states but, most importantly, certainty[71]. It is clear that behind the status of Member of an International Organization, interconnection and interdependence are destined to grow more and more among countries since their relations and their exchange become tighter; the rationale behind the recognition of sovereignty and supremacy over certain areas of International Organization, such as the World Trade Organization, coming from Member States, allows to create a more cooperative environment in which every country relies on the Organization as an institution internationally recognized, having the duty itself to enforce its law and protect the interests of the whole community. "United Nations, European Union, World Trade Organization use the rule of the game as set by themselves to influence governmental decisions"[72]. In fact, the "failure" of the WTO in facing and resolving President Trump trade war will be analyzed more deeply in chapter 3, considering not only the reasons behind this inefficiency, but also the impact that such failure had on the role that IO have always had as guarantors of the functioning of the International System.
- The abandoning of military force to attain results and to solve disputes has for sure been one of the greatest achievements of all times: Democratic Peace Theory holds that democracies are more peaceful in their foreign relations than other forms of government, spreading the idea that global democracy would provide a solid foundation for global peace[73]. The bargaining power

[69] Id
[70] Id
[71] Id
[72] Id
[73] D. Reiter, *Democratic Peace Theory*, 2012, available at www.oxfordbibliographies.com

of states in International Organizations, defined by the Cambridge Dictionary as "The ability of a person or of a group to get what they want"[74], "functions as an enabling condition when it provides occasions for weak members to exercise political influence that far exceeds their status" as inferred by Christina J. Schneider from the University of California[75]. Damaging a nation through the use of military force does not necessarily ensure the achievement of the goal and involves challenges such as the security dilemma linked to the lack of knowledge about the capability of responding to the attack of other States, as the history of the Cold War teaches us[76]. The evolution of the International Legal order has allowed for the recognition of the vital role of reciprocity among nations: since linked and interconnected economically, politically and socially, States respect its expecting others to do the same reciprocally acknowledging that not doing so would lead to mirrored detriments.

By recalling Montesquieu's words "The natural effect of commerce is to lead to peace. Two nations that trade together become mutually dependent: if one has an interest in buying, the other has an interest in selling; and all unions are based on mutual needs[77]": apparently, then, the economic interests arising from a cooperative relationship between nations should be a deterrent to war and conflict, but this is not always the case. While allowing States to increase their presence in the international trade field, international economic interdependence also leads to vulnerability since any kind of deviation from the pre-established field might not be limited to a circumscribed area, but could easily expand to an entire community. Globalization and interdependence are also strongly criticized especially by the realist approach in the analysis of International Relations: what is mostly seen as negative is the actual inexistence of the independency of International Organizations which are perceived as being managed by the efforts of contributors and most powerful nations[78]. What is argued is that the real ambitions of States concern absolute gains, protection of their interests and power status: following the realist approach if partners are likely to benefit more from the mutually and reciprocal beneficial cooperation than them, States will abandon it[79]. As long as every Member State has the same gains of the others the reciprocity and cooperation will hold, differently they would fall. This is probably the key of the whole reading of the focus case of this dissertation, meaning the trade war of President Trump against China and the EU: when the status of a nation and its

[74] Cambridge Advanced Learner's Dictionary & Thesaurus, *Bargaining Power*, available at www.dictionary.cambridge.org
[75] C. J. Schneider, *Weak States and Institutionalized Bargaining power in International Organizations*, 2011, available at www.jstor.it
[76] Omojarabi Wasiu Femi, "*The relevance of Interdependence Theory in the age of Globalization*". Available at www.academia.edu
[77] Id
[78] Id
[79] Id

interests and power are threatened, the International Legal Order as in this case the one of the WTO, gets downgraded and the decisional sovereignty of the single State is put first.

Derek Braddon in his article "The Role of Economic Interdependence in the Origins and Resolution of Conflict" analyzes the relationships between economic interdependence, conflict and political choices of States that are interconnected among themselves not only thanks to the process of Globalization, but also because of the membership in International Organizations: stating his own words "Two schools of thoughts dominate the discussion. One school argues that increased level of economic interdependence encourage good political relationships and wards off possible conflict…: two potential warring factions have too much to lose through their economic ties to put it at risk by allowing a state of conflict to develop between them. The opposing school of thought suggests that excessive interdependence may actually create resentment, intensify rivalry and, ultimately, political discontent leading to conflict"[80]. When one nation perceives one of its partners as the cause of its economic deprivation and of the deterioration of its status symbol as the strongest economic power, conflict prevails[81]. When this is the case, economic dimensions of cooperation may be brushed aside by the desire of prevailing securing proper interests through the first mover advantage[82].

It is exactly here that President Trump's claims against China and Europe get origin. The existing multilateral and global commercial system has been in fact challenged by the trade war, which appears to be aimed at dismantling WTO rules, started by President Trump against China and Europe: American tariffs imposed on imported goods mainly concerns steel and aluminum and have showed their first effects on the car industry[83]. China and Europe have answered with both political and economic maneuvers aimed at fighting the protectionist measures of the United States of America. Going into the deep of the arguments sustained by the President of the U.S.A, what should be considered is not only reciprocity, but also transparency; the World Trade Organization stands for the sustainment of less developed countries through greater flexibility and special privileges aimed at allowing them to develop and grow without being in disadvantaged positions (principle of non-reciprocity) : one of the strongest claims of the American President is in fact aimed at achieving reciprocity through the request of seeing American exports to enjoy the same advantages that America offers[84]. Finally, President Trump accuses China to adopt an unlawful conduct in the areas of technology, innovation and intellectual property rights, accusing the country of not being transparent in its

[80] D. Breddon, *The Role of Economic Interdependence in the Origins and Resolution of Conflict*, Revue d'économie politique, 2012.
[81] Id
[82] Id
[83] R. Salzano, *Dazi doganali e regole della WTO: Usa contro UE e Cina*, 2018, available at www.iusinitinere.it
[84] WTO official website, *What we stand for*, 2019, available at www.wto.org

practices and of attempting to undermine American economy[85]. Another reason of resentment comes from the trade deficit in which the United States see themselves compared to China: this means that the United States buy more from China than how China buys from the States. Finally, President Trump also accuses China to put at risk American internal security through actions of espionage[86].

From its side, the European Union has challenged the legality of tariffs on European cars imposed by the United States of America by lodging a complaint to the World Trade Organization[87], as provided for in the Havana Charter at Art. 50 which concerns the Obligations of Member States of the World Trade Organization: " Each Member shall make adequate arrangements for presenting complaints, conducting investigations…Each Member shall report fully any action taken, independently or in concert with other Members, to comply with the requests and carry out the recommendations of the Organization…"[88]. The European trade Commissioner Cecilia Malström, before the imposition of tariffs against Europe by President Trump, during an interview concerning the response that Europe would give to such a challenge, affirmed "We hope for the best, but we prepare for the worst…we are already preparing a list of possible items. If it happens (that President Trump imposes tariffs on European Goods), I still hope it will not, then we will publish that list as you have to according to WTO rules and do the final consultations"[89]. Consequently, following the imposition of tariffs, to justify the European decision of retaliation, she affirmed that Europe did not want to find itself in that position, but that the unilateral and unjustified decision of the USA of imposing tariffs on steel and aluminum means that no choice is left. She then continued sustaining the proportionality of European measures in respect of the rules of the World Trade Organization, concluding that retaliation will cease as soon as the United States withdraws their tariffs[90].

How are these claims more precisely violating the International Legal order established by the WTO and its rules? Starting from the simplest imposition of tariffs not agreed upon following negotiations, is a clear violation of the *status quo* of the Organization itself since, as it is possible to read in its official website, "lowering trade barriers is one of the most obvious means of encouraging trade. The barriers concerned include custom duties (or tariffs) …"[91]. As previously stated, President Trump justifies his decisions by evoking security exceptions

[85] R. Salzano, "*Dazi doganali e regole della WTO: Usa contro UE e Cina"*, 2018, available at www.iusinitinere.it
[86] Sky tg24, *Dazi USA, l'Europa prepara le contromisure: non avevamo altra scelta*, 2018, available at www.tg24.sky.it
[87] R. Salzano, *Dazi doganali e regole della WTO: Usa contro UE e Cina*, 2018, available at www.iusinitinere.it
[88]Havana Charter for an International Trade Organization of1948
[89] Bloomerang Markets and Finance, *EU is ready to retaliate quite rapidly to US tariffs: Malmström*, May 2019, available at www.youtube.com
[90] R. Salzano, *Dazi doganali e regole della WTO: Usa contro UE e Cina*, 2018, available at www.iusinitinere.it
[91] WTO, Freer trade: gradually, through negotiation, 2019, available at www.wto.org

provided for in Art.XXI of the General Agreement on Trade and Tariffs which states that "Nothing in the Agreement shall be construed to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests"[92]. Even if this article appears to leave a great margin of application of protectionist measures if justified by the necessity of protecting the national security of a certain country, an important sentence, concerning the resolution of a Russian dispute, of the WTO Panel and Appellate Body of April 29th 2019, has ruled that "WTO panels have jurisdiction to review aspects of a member's invocation of Article XXI(b)(iii). While the chapeau of Article XXI(b) allows a Member to take action which it considers necessary for the protection of its essential security interests, this discretion is limited to circumstances that objectively fall within the scope of the Article"[93].

2.2 *The European Union case: economic integration before political integration*

Is economic integration as important as political integration for the best functioning of the International Community? Following the rationale behind the creation of the World Trade Organization the answer would be positive: to sustain even more the complementarity of the two integrations, the European Union case should be analyzed.

In the past literature the possibility of having an economic integration was not mentioned or perceived as a successful option since only political integration was seen as propaedeutic for the future economic growth of a nation: the latter appeared to be the sole possible path to follow in order to achieve greater results, underestimating the importance of the former, deepened, however, by subsequent literature[94].

As the history of European Integration teaches us, the roots for the creation of the European Union as we know it today, were located in the ambition of achieving the great result of economic integration through the creation of an open common internal market.

Following a reflection on the themes of fluid borders and developed connecting links among nations, Daniel Brou from Columbia University and Michele Ruta from the European University Institute, wrote about the above mentioned topic: "International political along with economic integration has occurred in Europe, where nation states have imposed limits on their sovereign use of certain policies (e.g. fiscal policy), have delegated control over some relevant competencies, such as trade policy and antitrust, to the European Union and are debating further political integration"[95].

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[92] WTO, *Article XXI: Security Exceptions*, available at www.wto.org

[93] WTO, *Dispute Settlement 512. Russia-measures concerning Traffic in transit*, 2019, available at www.wto.org

[94] D. Brou, M. Ruta, "*Economic integration, Political integration or both?",* 2007, available at www.wto.org

[95] Id

After the years following World War II the strongest desire of the whole community was the one of working to avoid the spread of any other future world conflict: it is exactly in this context and in the light of these hopes that the predecessor of the EU was created trying to foster economic cooperation. The European Economic Community (EEC) was established in 1958 with the Treaties of Rome following the idea that countries which develop economic relations, becoming more interconnected among themselves, are less likely to develop conflicts[96].

Article 2 of the Treaty of Rome states that "The Community shall have as its task…to promote a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it"[97].

It follows that among the values upon which the European Union has been established there are the enhancement of economic, social and territorial cohesion and solidarity among EU countries, but also the establishment of an economic and monetary union whose currency is the euro[98]: starting from the economic area and the internal market, States started to see themselves not anymore as possible enemies, but as cooperators for the best functioning of the whole community. This led the EEC to evolve into a new Organization spanning policy areas such as external relations and security, justice, environment and health, meaning the European Union, which came into existence following the Maastricht Treaty of 1992[99].

Going into a deeper analysis one of the first examples of post war integration, it is possible to find some similarities between the rationale of avoiding tariffs and duties standing behind the WTO and the EU itself: Article 3 of the Treaty of Rome, at paragraphs (a) and (b), states that "The activities of the Community shall include the elimination, as between Member States, of customs duties and of quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect; the establishment of common custom tariff and of common commercial policy towards third countries"[100].

How are the World Trade Organization and the European Union related?

Of great relevance is Article 113 of the Treaty of the Functioning of the European Union since its attributes full competences to the Union in the above considered fields: "The Council shall…adopt provisions for the harmonization of legislation concerning turnover taxes, exercise duties and other forms of indirect taxation to the extent that such harmonization is necessary to

[96] European Union, *Goals and values of the EU*, available at www.europa.eu
[97] The Treaty of Rome, *Article 2*, 1957, available at www.ec.europa.eu
[98] European Union, *Goals and values of the EU*, available at www.europa.eu
[99] European Union, *From economic to political union*, available at www.europa.eu
[100] The Treaty of Rome, *Article 3*, 1957, available at www.ec.europa.eu

ensure the establishment and the functioning of the internal market and to avoid distortion of competition"[101].

Despite the attribution of full competences to the Union bodies for what concerns commercial policy, it is important to remember that the World Trade Organization is the leading International Organization that sets international trade rules and that both the European Union and its Member States are members of it[102]: as Members they recognize the *status* of the Organization, renouncing to part of their sovereignty in the decision making and policy implementation process.

2.3 *China- European Union 2019 agreement: One Belt One Road*

As previously analyzed, the two economic powers directly affected by the imposition of custom duties and tariffs by the Trump Administration are the European Union and China.

In addition to this, the two Powers have worked together to make their economic relations stronger and more reciprocal, maybe also pursuing the aim of sending a message to the United States by recalling that behind the best functioning of the International Trade system, there are cooperation and respect of the rules of the WTO.

The agreement, known as "One Belt One Road" was announced by the Chinese President Xi Jinping in 2013 who described it as having the final goal of creating new networks around the economies of the world[103].

How did this project originate? Following the Great Recession of 2008, China found itself facing new challenges: despite the fact of coming from a positive increase of the national GDP in the previous years that allowed it to financially sustain United States enterprises by buying them, the financial crisis represented a slowdown in the percentage of growth of the Chinese economy. To dynamically face this problem, the Chinese government introduced a system of economic stimulus that throughout the years caused an excess in the productive capacity. Following then this excess that could not be easily absorbed by the market, the slowdown in the economic growth and the growing desire of competing with the United States of America for the position of "leader" in the International Economy System, ultimately led to the draft of one of the most important trade projects in history[104].

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[101] TFEU, *Article 113*, available at www.jus.uio.no

[102] European Commission, *World Trade Organization*, available at www.ec.europe.eu

[103] A. Rago, *One Belt One Road: come nasce e dove può portarci*, 2018, available at www.tesi.cab.unipd.it

[104] Id

From a geographical point of view, One Belt One Road will involve 64 countries and its concrete realization will be financed not only by financial institutions, but also by foreign funds, involving, then, a large majority of the International Community[105].

Among the involved countries, of great relevance is for sure the European Union: in the framework of the Belt and Road Initiative, the two will have the possibility of sustaining the growth of the economy through the creation of new employment opportunities thanks to the strengthening of the infrastructures that connect the Member States of the European Union and China. Trade relations are then destined to grow in the light of an increased cooperation[106].
According to Donald Tusk, former President of the European Council, the understanding reached with China stands for the common desire to work and cooperate for the strengthening of international rules and for a reform for a better WTO for the purpose of covering State aid to national industries. He then continued sustaining the strong economic interest of both the Powers to maintain substantial trade flows, allowed only by the existence of clear and respected rules[107].
Of great relevance is also the opinion of the German Economy Minister Peter Altmaier, who during an interview denounced the struggle of many European companies in the attempt of dealing with Chinese regulations: he then continues affirming the strong and positives expectations towards the new One Belt One Road project to remove all the existing obstacles, fundamental condition for the best functioning of the International Trade system. European companies in China and Chinese companies in Europe need to cooperate in a fair and stable framework, through the grant of the same opportunities and privileges, he finally added[108].

Even if not directly involved, the United States of America will be involved by the concrete realization of the One Belt One Road project: China would finally reach the requirements to be considered as an economic pair in the one that would cease to be a monopoly, becoming a duopoly between two strong economic powers[109]. As previously stated, many different countries are sustaining the Chinese initiative, looking at it as an extraordinary opportunity for a cooperative development: The United States of America, however, differ in a protectionist approach aimed at sustaining national industries, opposing foreign competition and slowing down the economic growth of the Chinese economy[110]. As already analyzed, the imposition of custom duties and tariffs on international trade involve also the European market,

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[105] Id
[106] Id
[107] T. Di Giovannandrea, *Ue e Cina: raggiunta intesa su riforma dell'Organizzazione Mondiale del Commercio*, 2019, available at www.rainews.it
[108] P. Altmaier, *Europe prepared to be part of China's Belt and Road: Germany economy minister*, 2019, available at www.youtube.it
[109] A. Rago, *One Belt One Road: come nasce e dove può portarci*, 2018, available at www.tesi.cab.unipd.it
[110] Id

reason for which, in case of failure of President Trump initiatives, might lead to the unavoidable consequence of making the main economic powers of the world to rely on Chinese cooperation[111]. The One Belt One Road is the clearest example of the beginning of this interconnecting process.

3.THE WTO DISPUTE SETTLEMENT REMEDIES

3.1 Security and Predictability: The WTO dispute settlement mechanisms and organs

One of the main differences between the WTO and the GATT lies in the dispute settlement mechanism: while the GATT provided for separate and numerous dispute settlement rules, the WTO is characterized by a single set of rules and procedures aimed at making the whole system more coherent and clear[112]. "The WTO's procedure for solving trade quarrels under the Dispute Settlement Understanding is vital for enforcing the rules and therefore for ensuring that trade flows smoothly. Countries bring disputes to the WTO if they think their rights under the agreements are being infringed. Judgements by specially appointed independent experts are based on interpretations of the agreements and individual countries commitments"[113]: these words describe the active involvement of the World Trade Organization in the settlement of disputes aimed at providing security and predictability to the multilateral trading system[114]. The referring article is Art. 3.2 of the Dispute Settlement Understanding, the legal text containing the rules for dispute settlements under the WTO framework: "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements…"[115].

The WTO was established as relying on some basic principles concerning the procedure for settling disputes, meaning clarity, discipline and organization: the Uruguay Round Agreement provided for all the rules concerning the modalities and timetables to be followed to ensure an effective functioning of the mechanism, whose past inefficiency during the years of the GATT needed to be reformed[116]. Despite the existence of independent bodies such as the Panels and the Appellate Bodies that are concerned with the examination of disputes and their settlement,

[111] Id
[112] WTO, *Substantive scope of the dispute settlement system*, available at www.wto.org
[113] WTO, *Dispute Settlement*, 2019, available at www.wto.org
[114] WTO, *Functions, objectives and key features of the dispute settlement system*, 2019
[115] Article 3.2 of the Dispute Settlement Understanding (Annex 2 of the WTO Agreement), *General Provisions* of April 15th 1994, available at www.wto.org
[116] Ibidem

it should not go unnoticed that the WTO rationale sustains the importance of reaching agreed solutions among Member States in an environment of cooperation and negotiation: if this scenario does not realize, however, as previously stated, the WTO dispute settlement procedure is involved with the final goal of "securing the withdrawal of the measure found to be inconsistent with the WTO agreement"[117].

How is then the trading system made secure, predictable, efficient and rule oriented? First of all, the **democratic principle** always holds: under the WTO legal framework, Member States not only have duties, but also rights, reason for which the respondent can defend itself if it disagrees with the claim raised by the complainant[118]. Moreover, all Member states have the rights to take part in the dispute settlement decision making process[119]. To have a better understanding of the whole procedure, it is fundamental to analyze the involved bodies and their *modus operandi*. Different bodies are in fact involved in the dispute settlement process and they can be distinguished among a political institution, represented by the Dispute Settlement Body, and independent quasi-judicial institutions such as panels and the Appellate Body, both of which work in the adjudicatory part of the dispute settlement system[120].

- Let's start from the first institution meaning the **DSB**, considered as political because of its composition of representatives of the WTO Member States: they clearly receive directives from the different governments on how to behave or on which positions partake or not, inevitably assuming a political character. Article IV paragraph 3 of the Marrakesh Agreement states that "The General Council shall convene as appropriate to discharge the responsibilities of the Dispute Settlement Body provided for in the Dispute Settlement Understanding. The Dispute Settlement Body may have its own chairman and shall establish such rules of procedure as it deems necessary for the fulfilment of those responsibilities"[121]: the main functions of this body concern the administration of the DSU, the establishment of panels, the adoption of reports making decisions binding, the supervision of the implementation of recommendations and rulings and, more generally, of the whole dispute settlement process.

  Decision making in the Dispute Settlement Body follows the consensus rule as stated by Article 2 paragraph 4 of the DSU: in the WTO framework consensus is achieved if no Member among the presents formally opposes to the decision itself. An exception in the consensus rule is done at the three stages of dispute settlement, meaning establishment, adoption and retaliation: following the reverse consensus rule, in fact, the Dispute Settlement Body automatically decides the action *a priori* unless Members express of being in disagreement.

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[117] WTO, *Introduction to the WTO dispute settlement system*, 2019, available at www.wto.org
[118] Id
[119] WTO, *The Dispute Settlement Body*, available at www.wto.org
[120] *WTO Bodies involved in the dispute settlement process*, available at www.wto.org
[121] WTO, Article IV (3) of the Marrakesh Agreement of April 15th 1994, available at www.wto.org

- **Panels** are the second kind of institution with a quasi-judicial nature. Their role is of adjudicating disputes between Members in the first instance and to elaborate a report on them: the particularity of panels is that they are not permanent and are established for every single dispute, being different any time. To perform their role, panels have to check on the validity of the factual and legal aspects of the examined case, reporting everything to the Dispute Settlement Body and expressing its positive or negative conclusions for what concerns the inconsistency of actions with the WTO legal order or the lack of foundation of the subject of the case[122]. This function is clearly described in Article 11 of the Dispute Settlement Understanding: "…A panel should make an objective assessment of the matter before if (the DSB), including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DBS in making the recommendations or in giving the rulings provided for in the covered agreements"[123].
- **The Appellate Body**, differently from panels, is a permanent body composed of seven members whose duty is of review the legal aspects of the reports issued by panels[124]. It is clear that the seven members are appointed on the basis of their expertise in the fields of law and international trade[125]. The creation of the Appellate Body is of fundamental importance for a more direct and automatic adoption of panels reports: as stated in Article 17.13 of the Dispute Settlement Understanding, in fact, if a single Member of the WTO express its disagreement with a panel report, the Appellate Body has to review and check the operate of the panel to consequently uphold, reverse or modify it.[126]

After the description of the most involved bodies in the dispute settlement procedure, the analysis of the mechanism and of the typical stages followed in a WTO dispute settlement case will follow both in words and in an explanatory and resuming chart.

- The first step is represented by **consultations**: as previously stated, in fact, the WTO legal order strongly encourages Member States to settle disputes following bilateral consultations in an environment of positive cooperation. The importance of this step is strengthened by the mandatory nature of consultations. What is provided for by the consultation stage is the possibility of negotiating a solution without arriving to litigation, as stated by Article 4 of the DSU.[127] When consultations do not lead to any positive outcome, the complainant can request the intervention of a panel within 60 days[128].

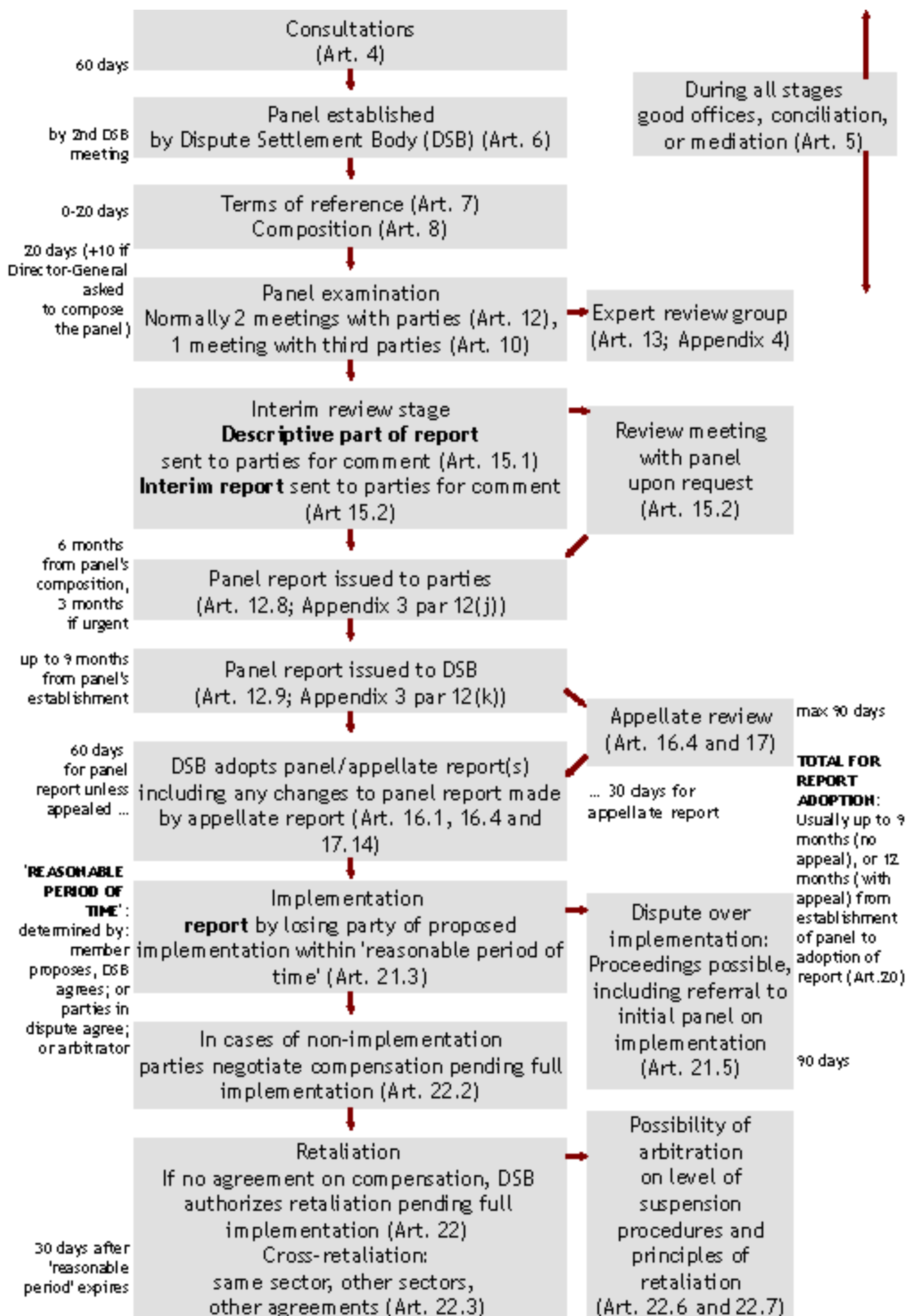
[122] WTO, *Panels*, available at www.wto.org
[123] WTO, *Article 11 of the Dispute Settlement Understanding*, 1994-1995, available at www.wto.org
[124] WTO, *Appellate Body*, available at www.wto.org
[125] Id
[126] Id
[127] WTO, *The process: stages in a typical WTO dispute settlement case*, available at www.wto.org
[128] Id

- The second step is in fact the one which sees as protagonist the **Panel**, and, as an adjudicative stage of dispute settlement, the established rulings hold as binding to the involved parties[129]. This second step is of fundamental importance because it gives the opportunity to the parties to uphold their rights and defend themselves as provided for by the WTO agreement. The establishment of a panel lies under the competences of the Dispute Settlement Body and, as previously argued, follows the failure of the consultation stage and so the failure of the attempt of the parties to solve the dispute amicably[130].
- **Adoption of Panel/ Appellate Body reports**: The Dispute Settlement Understanding describes the function of panels and Appellate Body as supporting the work of the Dispute Settlement Body through the elaboration of reports containing the findings and conclusions ruling the substance of the dispute: however, the ultimate authority of the DSB is remarked by the fact that the binding character of the report is determined upon adoption or rejection of it by the DSB itself[131].
- **Implementation by the "losing" Member**: in case of adoption of the report by the Dispute Settlement Body, the losing Member has the obligation to comply with WTO law. As stated by Article 3.7 of the Dispute Settlement understanding, in fact, if an agreement is not reached at the consultation stage, the main purpose to be followed by the DSB is of securing the withdrawal of the measured that are found to breach the WTO legal order and of supervising it[132]: "…A solution mutually acceptable to the parties to a dispute and consistent with the covered agreement is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements…"[133].
- The "**Non-implementation**" step verifies when the losing Member does not act in conformity with the above described WTO obligations. If this is the case, the winning Member has the right to resort to measures such as **compensation** or **suspension of WTO obligation**[134]. Compensations are discussed in Article 22.2 of the DSU and do not refer to monetary compensations that the respondent owes to the claimant, but rather to the offer of some benefits under the international trade framework (i.e. reduction of tariffs) by it to the damaged party[135]. The second mentioned measure concerns the suspension of obligations: the prevailing State, can request to the Dispute Settlement Body the permission to impose trade sanctions,

[129] WTO, *The panel stage*, available at www.wto.org
[130] Id
[131] WTO, *Adoption of panel reports*, available at www.wto.org
[132] WTO, *Implementation by the losing Member*, available at www.wto.org
[133] Dispute Settlement Understanding, *Article 3.7*, 1995, available at www.wto.org
[134] WTO, *Non-implementation*, available at www.wto.org
[135] WTO, *Compensation*, available at www.wto.org

suspending in fact its obligations towards the WTO agreement, against the other involved Member[136].

- In conclusion, the final step requires the Dispute Settlement Body to **check** on the implementation of the measures decided during the Dispute Settlement procedure.



[136] WTO, *Countermeasures by the prevailing Member*, available at www.wto.org

3.2 The WTO weaknesses: the dispute settlement system as the ground of President Trump's claims

Basing on what does President Trump challenge the World Trade Organization legal system through the beginning of a trade war? To better understand the grounds of the American President claims, three important articles should be taken into consideration: Article XIX of the General Agreement on Trade and Tariffs, Article IX.2 of the Marrakesh Agreement and Article 3.2 of the WTO Dispute Settlement Understanding.

Trump's 2018 Trade Policy Agenda posed the basis for what would later become a real trade war as it is possible to understand from the following quote of the Agenda itself: "The United States will not allow the WTO, or any other multilateral organization, to prevent us from taking actions that are essential to the economic well-being of the American people[137]". What can be easily understood is the complete lack of recognition of the authority of the WTO legal system and a clear declaration that, if required, the current American administration will go against it. Moreover, the United States accuses the Appellate Body, that is the Dispute Resolution proceeding body most affected by Trump's allegations, of continuously going against the agreed WTO text by failing in the text-based interpretation of Article XIX of the GATT: this first Article on the Emergency Action on Imports of Particular Products is also known as the "Escape Clause" and it gives the possibility to Members to limit the import of certain foreign goods if they cause damage to the domestic economy[138]. The Article states that "If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free…to suspend the obligation in whole or in part or to withdraw or modify concession"[139]. As already analyzed in the previous Chapters, President Trump sustains the necessity of imposing custom duties and tariffs, especially on Chinese goods, to protect the American economy and its industries. The United States position also shows to be based on another legal element, meaning Article IX.2 of the Marrakesh Agreement which "reserves to the Ministerial Conference and the General Council…the exclusive authority to adopt interpretations of this Agreement and of the

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[137] P. Ala'i, *The vital role of the WTO Appellate body in the promotion of Rule of Law and International Cooperation: A case study*, in *The Yale Journal of International Law Online*, 2019, available at www.yjil.yale.edu
[138] Id
[139] *Article XIX* GATT, 1994 available at www.wto.org

Multilateral Trade Agreements"[140]: as it is known, the above mentioned organs are composed by representatives of the WTO Members and it is exactly upon this particularity that President Trump bases his reasons insisting on the right of Members to interpret the Agreement and implement it consequently. The last Article of interest in the matter is Article 3.2 of the Dispute Settlement Understanding which states the rulings of the Dispute Settlement Body cannot add to or diminish the rights and obligations provided in the covered agreements[141]: on the basis of these words, the American President rejects the WTO position on his decisions, defending them on the basis of the impossibility to limit to such an extent the decisional rights of a Member State.

The main purpose of the Dispute Settlement System, as established and organized by the WTO, is of providing security and predictability to the multilateral trading system but as it is possible to notice, the cavils to which States can cling are multiple[142]. As perfectly expressed by Padideh Ala'I in the Yale Journal of International Law "the dispute settlement panels and Appellate Body have the difficult, if not impossible, task of (1) clarifying but not adopting interpretations of the WTO agreements; and (2) preserving, but not adding or diminishing rights and obligations under WTO Agreements"[143].

Despite the noble reasons behind the DSU and the performances of the DSB, they both show several inefficiencies that lead to the non-optimal functioning of the whole system: for example, other States than the United States have been critical of the dispute settlement system. The strong American criticism towards the Appellate Body appeared clear with the blocking by the United States of the nomination of new members to replace those whose terms had expired: this strategic move leads to the halving of the members working in the Appellate body that from seven are currently 3, making even harder the performance of their tasks. If just one of the member disagrees on a particular case with the other two, the whole body ceases to function[144]. The right of Members to appeal stands not only for the respect of the democratic principle, but also hides the explication of the possible inefficiency of the whole Dispute Settlement Procedure[145].

The second critique moved by the United States, following the one on the performance of the Appellate Body and its non-text interpretation of WTO agreements, concerns the will of seeing the Dispute Settlement procedure to work as initially agreed by the United States and the other

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[140] P. Ala'i, *The vital role of the WTO Appellate body in the promotion of Rule of Law and International Cooperation: A case study*, The Yale Journal of International Law Online, 2019, available at www.yjil.yale.edu

[141] Id

[142] Id

[143] Id

[144] Id

[145] Id

WTO Members, not allowing for deviations or interpretations different from those initially granted[146] .

The undermining of the functioning and efficiency of the system, while sustaining its importance, seems therefore to be a distinctive feature of the Trump administration which appears to reach a more and more power based system in the hands of the most powerful nations of the world: more reflections on this point will find space in the concluding part of the dissertation.

3.3 A sui generis case: is Trump trade war not solved by the WTO dispute settlement procedure?

After having analyzed the structure and the procedures behind the Dispute Settlement mechanism of the World Trade Organization, one question arises spontaneously: is Trump trade war not solved by the procedure itself? And if so, which are the reasons behind this failure? Despite the encouraging statistics concerning the solving of disputes by the DSB, this one appears to be different as if it had reached a too high stage to be faced: between 1995 and 2015, in fact, more than 500 cases were presented to the WTO and more than half of it was solved without reaching the litigation stage, following consultations between the involved parties and an agreed solution[147].

Despite the strong position taken by the WTO on President Trump policies and tweet "Trade Wars are good, and easy to win", in concrete terms no result has yet been revealed. The Director General of the WTO expressed himself very clearly on the matter by saying that "A trade war is in no one's interests. The WTO will be watching the situation very closely"[148]. As analyzed in the previous Chapter, president Trump's claims rely on the national security concerns: the possibility of claiming exceptions from trade obligations if national security is challenged has always been a debated issue, since it might lead to a situation in which Member States can take advantage of by easily triggering trade disputes under this framework, making WTO meaningless as different cases show[149]. A scenario similar to the one created by the United States, in fact, in the past saw as protagonists Saudi Arabia, Bahrain, United Arab Emirates and Qatar: the latter was object of economic sanctions by the other three which justified their action under the claim of national security. The dispute got easily solved also because of the intervention of other WTO Members to sustain Qatar and the unspoken rule of

[146] Id
[147] R. Noack, How trade wars end and why Trump's will be different, *The Washington Post*, April 4th 2018, available at www.wasnhingtonpost.com
[148] Id
[149] Id

avoiding national security claims[150]. The main difference from then and now, however, relies on the involvement of WTO two biggest Members: no one seems to feel the duty to express their disappointment and Chinese and American tit-for-tat tariff announcements appear as not having an end, but rather as an attempt to show which, among the two economies, is the strongest one and can resist more. The main risk now is the continuation of this uncertain situation that damages not only the economic growth of the whole international community following its interconnection, but also the stability and credibility of the WTO Dispute Settlement mechanism: as Rick Noack states in his article for the Washington Post "In the long run, the options will come down to an unlikely acknowledgment of defeat or a more likely face-saving agreement, especially if economic costs mount"[151].

Trump perception of the contemporary international trade system is that it is exploitative, reason for which his trade policy appears to be a "disruptive innovation", but what does this mean? President Trump's administration distinguishes itself for the imposition of unilateral acts aimed at liberating the United States from bad deals, as the President himself stated: "trade unilateralism forces exploitative trading partners to choose between mutually destructive tit-for-tat tariff escalation and coerced renegotiations that end up allowing for a better deal"[152]. It is exactly in these words that we can find the explication of the failure of the WTO dispute settlement mechanism to solve the contemporary American-Chinese-European trade war: the American President, aware of the strength of the United States economy, has adopted a particular strategy whose *modus operandi* has no precedent. In the past American administrations, in fact, both Democrats and Republicans, relied on approaches based on "International Law as a Smart Power": invoke multilateral compliance with International Law rules as a source of smart power and global leadership[153]. This strategy always led to American engagement with allies on common values that easily led to a ruled-based system of global governance and to the strengthen of multilateral diplomacy[154].

The so called "Trump change" strategy relies on the idea of making the whole international community understand that power, in the majority of cases, weights more than law, but even if apparently the WTO Dispute Settlement procedure is failing in solving the President's trade war, optimism about its legitimacy and its performances must not be lost. A transnational legal process cannot be so easily overwhelmed and as the professor of Harvard Law School Mark Wu has written, "on the surface, it may appear that faith in the utility of transnational legal processes has collapsed in the domain of international trade. But if one

[150] Id
[151] Id
[152] H. Hongju Koh, *Trump Change: Unilateralism and the "Disruption Myth" in International Trade*, The Yale journal of International law, 2019, available at www. yjil.yale.edu
[153] Id
[154] Id

examines beyond the headlines…the influence of transnational legal process is still very much at work…"[155].

CONCLUSION

Which is the future of the World Trade Organization under President Trump's administration? Contemporary American trade policy with its escalating trade war with China, its combative relationship with European trading partners and with its block on the appointment of Appellate body members at the WTO, has challenged trade politics as never happened before[156]: President's decisions stand for an attempt to damage, criticize and weaken the values and norms essential to the WTO agreements, basing on whom the whole system of International Trade was established, attacking its legitimacy and authority[157].

The possibility of the collapse of the institution that the WTO represents is a concern for many; some scholars sustain the necessity of reaching a substantive Institutional Innovation in the WTO framework, aimed at strengthening the Dispute Settlement Process: the European Commission, for example, has proposed to extend the term of the Appellate Body members from 4 to 6/8 years with the inclusion of a clause allowing some of the WTO Members to prevent the block of AB members by other States[158].

Even if this war appears to only have a winner who with his decision is challenging and involving the whole International Community, the reality hides more: trade wars have no winners in the long run. The United States will surely have to face huge costs due to their change of course despite the globally accepted ruled of international trade[159]. The risk that the United States are facing, as analyzed by Rachel Brewster, researcher and professor at Duke University School of Law, is that China will increase its influence, leadership and bargaining power in global trade, exploiting the possibility given by Trump Administration to rewrite trade policies and rules making them more accommodating for the Chinese economy dynamics. President Trump, in fact, has put under the spotlight some gaps of the legal system of the WTO that lead to the weakening of the system itself: what the American President has exploited to reach his objectives, might become the reasons for his failure making him regret the demise of the system[160]. What should not go unnoticed is that the WTO system enforces rules which reflect the American economic model, the occidental one, and in the case in which they will

[155] M. Wu, *Trump vs International Law: Trade Unilateralism in Pursuit of What?* 2018, available at www.opiniojuris.org

[156] R. Brewster, *The Trump Administration and the future of the WTO,* 2018, available at www.yjil.yale.edu

[157] Id

[158] Id

[159] Id

[160] Id

not be dominant anymore the likely outcome is the spread of new, different and opposed systems[161].

As affirmed by Harold Hongju Koh in his article "Trump Change: Unilateralism and the disruption Myth in International Trade" on the Yale Journal of International Law, "Although Trump would resign from global leadership, the United States is so deeply enmeshed with the laws, norms and institutions of international trade law that it can no more resign from the global trading system in an increasingly integrated world that would make as easy as for a human being to resign from the human race"[162]. Potentially the contemporary trade war might seem to represent the end of the era of efficient cooperation, negotiations and diplomacy but also of the authority of the rule of law in international trade relations, representing the return of power in international relations[163].

In conclusion, what should be taken into consideration is the important process that, as described by the trade law scholar John Jackson, allowed the International community to move from a power-oriented technique, to a more evolved and cooperative rule-oriented one through the creation of the WTO dispute settlement system[164]; International law and power have always had an asymmetric relation since the latter can easily undermine the former's legitimacy and authority as this trade war shows: the challenge now is not to allow this asymmetry to weaken a solid international system like the one created by the World Trade Organization.
Power shall never prevail over law.

[161] Id

[162] H. Hongju Koh, *Trump Change: Unilateralism and the "Disruption Myth" in International Trade*, The Yale journal of International law, 2019, available at www. poseidon01.ssrn.com

[163] G. Shaffer, *A tragedy in the making? The Decline of Law and the return of Power in International Trade Relations*, 2018, available at www.yjil.yale.edu

[164] Id

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ITALIAN RESUME

L'efficienza dell'Organizzazione Mondiale del Commercio è stata per molto tempo oggetto di dibattiti, portando quest'ultima ad essere spesso vista come disfunzionale e necessitante di una riforma, tutto ciò nonostante i grandi progressi da essa favoriti e ottenuti nell'ambito del commercio internazionale e della cooperazione tra Stati.

Al fine di meglio comprendere il funzionamento, la struttura, ma soprattutto i valori alla base dell'Organizzazione stessa, è necessario ripercorrerne l'evoluzione storica: l'antenato per eccellenza dell'OMC è, infatti, l'Accordo Generale sul commercio e sulle tariffe (GATT), entrato in vigore nel 1947 sulla base giuridica dell'*Havana Charter*. L'Accordo fu firmato in virtù delle volontà congiunte degli Stati di intraprendere rapporti multilaterali all'insegna dell'abolizione di tariffe e dazi, finalizzati alla miglior circolazione delle merci ed al conseguente rafforzamento della loro intesa. Le particolarità di tale accordo, tuttavia, risiedevano nella posizione ricoperta dagli Stati firmatari e nell'assenza di una personalità giuridica: come affermato dal Direttore dell'Organizzazione Mondiale del Commercio Pascal Lamy nel 2007, infatti, essi erano parti contraenti di una sorta di alleanza di cui, però, non erano Membri. L'aurea di estrema positività e crescita che circondò i primi anni dell' appena istituito sistema economico internazionale, mise in secondo piano delle lacune che avrebbero successivamente portato alla necessità di istituire una vera e propria Organizzazione Internazionale: la mancanza di una personalità giuridica internazionale, in quanto tratto caratteristico di un'Organizzazione Internazionale e non di un accordo, rendeva l'accordo strettamente dipendente dalle volontà degli stati firmatari, seguendone molto spesso le dinamiche di potere. Questa problematica vedeva strettamente collegata a sé l'assenza della percezione di un'Istituzione sovrana in materia di commercio internazionale, con conseguente impossibilità nel vedere effettivamente rispettati e riconosciuti alcuni principi cardine. Uguaglianza ed equità erano valori assenti ed è proprio in queste circostanze, in cui le decisioni prese riflettevano unicamente il potere economico ed il livello di sviluppo di uno Stato, che l'Organizzazione Mondiale del Commercio venne istituita: era il 1994 e l'Accordo di Marrakech ufficializzò questo passo in avanti verso un sistema ancora più coeso, interdipendente e cooperante.

Le differenze tra l'Organizzazione e l'Accordo furono da subito evidenti: l'OMC era regolamentata da un sistema legale unico rispettoso dei maggiori tre principi del Diritto Internazionale: l'uguaglianza della sovranità degli Stati, la cooperazione internazionale e la ricorrenza a modalità pacifiche per la risoluzione delle dispute; era inoltre previsto che gli Stati godessero dello *status* di Membri e non più di parti contraenti. Ogni decisione presa dagli organi dell'OMC doveva essere interpretata e gestita sotto un'ottica di coerenza, al fine di ottenere un

solido sistema giuridico che, essendo stato negoziato e ratificato dagli Stati Membri, li obbligava giuridicamente alla sua osservanza.

Per meglio comprendere la natura dell'OMC è necessario riflettere sul significato dei concetti di equità ed uguaglianza della sovranità degli Stati: l'Organizzazione, infatti non produce equità, ma permette alla legalità di essere al centro della performance delle sue operazioni, rispettando la sovranità dei vari Stati nonostante le differenze in ambito politico, economico e di potere. L'unicità dell'organizzazione appare inoltre evidente dal rispetto dei due importanti principi di non discriminazione e reciprocità, rispettivamente inerenti all'importanza di riservare a tutti gli Stati un uguale, ma giusto, trattamento ed alla necessità di essere certi del rispetto altrui delle regole stabilite in modo reciproco.

L'Organizzazione mondiale del Commercio, come sostenuto dal professore di legge John H. Jackson, è probabilmente l'esempio chiave espressione degli immensi progressi fatti dalle relazioni internazionali tra Stati per gestire e reagire a situazioni possibilmente dannose in maniera cooperativa: il prevalere di questa linea come caratteristica di quello che sarebbe stato l'intero operato dell'OMC da quel momento in poi, risulta perfettamente sposare ideologicamente la teoria neoliberale dell'interdipendenza complessa descritta dagli accademici Robert Keohane e Joseph Nye.

Tuttavia, la forte interdipendenza creatasi tra gli Stati e incrementata dalle loro continue relazioni economiche, politiche e sociali, portano alla forzata considerazione di come il concetto di sovranità vada considerato e sia stato interpretato dai padri fondatori dell'Organizzazione stessa: sorpassata la limitante definizione di sovranità fornita durante la pace di Westphalia del 1648, il concetto è stato al centro di svariate evoluzioni. Successivamente alla nascita delle Nazioni Unite nel 1945, della creazione di una comunità internazionale finalizzata alla cooperazione ed alla crescita d'importanza della diplomazia, il Diritto Internazionale ha visto l'inizio di una nuova era: il rispetto dell'uguaglianza della sovranità degli Stati si riferisce all'accettazione della personalità giuridica di ognuno di essi, alla loro considerazione di pari di fronte alla legge ed all'accettazione del fatto che non siano unicamente i principali soggetti del Diritto Internazionale stesso, ma che ne siano anche le entità che ne riconoscono l'autorità.

Come precedentemente menzionato, uno degli elementi di maggior differenza tra il GATT e l'Organizzazione Mondiale del Commercio risultata proprio essere il fatto che la prima non godesse dello *status* di Organizzazione Internazionale e pertanto nemmeno di personalità giuridica internazionale. L'Accordo istitutivo dell'OMC, ovvero l'accordo di Marrakech del 1994, fa riferimento a questo concetto all'Articolo VIII in cui è possibile leggere che l'OMC deve avere personalità giuridica che le deve essere accordata da ogni Stato membro al fine di permetterle di svolgere appieno le sue funzioni; la Commissione di Diritto Internazionale,

inoltre, ha rafforzato ulteriormente lo status dell'OMC attraverso la definizione fornita di Organizzazione Internazionale secondo cui un'organizzazione internazionale è un'organizzazione istituita da un trattato governato dalla legge internazionale, che possieda personalità giuridica internazionale e che comprenda come membri, oltre agli Stati, anche altre entità.

La rilevanza della teoria dell'interdipendenza nell'era della globalizzazione risulta essere tale da non poter essere ignorata: nell'età contemporanea i forti legami istituitesi tra gli Stati e la loro correlazione in svariati ambiti, porta alla necessità che essi, nello sviluppare le proprie politiche e nel determinare i loro piani d'azione, debbano anche prendere in considerazione l'impatto che potrebbero avere sulla comunità internazionale.

Le parole della Segretaria di Stato Americana durante la Presidenza Clinton chiariscono infatti questo concetto: "Oggi il più grande problema per l'America non sono i nemici stranieri, ma la possibilità di dimenticare le lezioni del passato, ovvero che problemi all'estero, se non affrontati, arriveranno inevitabilmente all'America".

Montesquieu sosteneva che il naturale effetto del commercio fosse quello di portare alla pace in quanto due nazioni che commerciano vicendevolmente diventano mutualmente dipendenti: queste parole e questo pensiero non furono sicuramente ignorati dai padri fondatori della Comunità Economica Europea, destinata successivamente ad evolversi nell'attuale Unione Europea, i quali ritennero di fondamentale importanza dare priorità al raggiungimento di un'integrazione economica ancor prima di raggiungerne une politica. La realizzazione del progetto del quale siamo attualmente protagonisti fu possibile e realizzabile grazie all'imposizione da parte degli Stati stessi di alcuni limiti alla loro sovranità con il fine di delegare il controllo, ed alcune competenze, ad un'istituzione superiore.

È esattamente in questo scenario estremamente interconnesso in cui gli Stati risultano spesso essere uno dipendente dall'altro che la guerra dei dazi iniziata dal Presidente Trump, a danno di Cina ed Unione Europea, deve essere calata ed analizzata.

L'evoluzione del sistema giuridico internazionale ha portato alla presa di coscienza dell'intera comunità dell'importanza del rispetto delle regole, del principio di reciprocità e dello stato di diritto al fine di evitare danni congiunti irreparabili: se da un lato, infatti, quest'integrazione economica è ragione di crescita, sviluppo ed arricchimento, dall'altro aspetti negativi come il perenne ed imminente rischio che l'azione di un singolo possa avere conseguenze globali non deve essere ignorata.

Le decisioni del Presidente Trump sembrano essere basate sulla necessità di rinvigorire e sostenere l'incredibile *status* di potenza degli Stati Uniti d'America, non permettendo più ad un'Organizzazione come l'OMC di accettare che le Nazioni non godano più reciprocamente ed egualmente degli aspetti positivi di tale interconnessione: è noto, infatti, come il Presidente

accusi la Cina, in particolar modo, di tenere comportamenti illeciti e sleali non solo nell'ambito della proprietà intellettuale, ma anche nella gestione dei flussi di scambio tra i due paesi, portando gli Stati Uniti ad importare dalla Cina molto più di quanto la Cina non importi dagli States.

Come analizzato da Derek Braddon, infatti, quando una Nazione percepisce un altro Stato come la causa del suo deterioramento economico e politico su scala internazionale, il conflitto prevale.

Come denunciato dall'Organizzazione Mondiale del Commercio stessa, il conflitto iniziato dal Presidente Trump viola il regime giuridico vigente nell'Organizzazione in diverse maniere, ma nonostante questo alcuni cavilli sembrano impedire una concreta reazione: il Presidente, infatti, nel sostenere le sue ragioni si appella all'Articolo XXI del GATT il quale prevede che gli Stati firmatari possano, in caso di necessità per motivi di sicurezza nazionale, essere esenti dal rispetto del regime stesso.

L'importanza e la centralità della cooperazione non sono passate inosservate a Cina ed Unione Europea che, nonostante le attuali tensioni, nel 2019 hanno siglato un accordo finalizzato all'incremento delle attività commerciali tra le due, al fornimento di sussidi alle industrie ed al rafforzamento della reciprocità. Grazie alla futura realizzazione del progetto Cinese della nuova via della seta, fortemente sostenuto dall'Europa, la Cina potrebbe finalmente raggiungere le caratteristiche per far diventare quello che ora è un monopolio del potere economico detenuto dagli Stati Uniti, un duopolio presentandosi alla comunità internazionale come una potenza sulla quale poter fare riferimento.

Ancora una volta quindi, la doppia faccia della medaglia dell'interdipendenza risulta essere di centrale importanza per una completa chiave di lettura degli scenari mondiali.

Attraverso un'analisi più approfondita di quelli che sono i meccanismi e le competenze dei vari organi responsabili della risoluzione delle dispute, all'interno dello scenario dell'Organizzazione Mondiale del Commercio, è possibile comprendere le ragioni alla base dell'apparente impossibilità da parte di questi ultimi di trovare una soluzione alla guerra dei dazi iniziata dal Presidente Trump. Innanzitutto è di fondamentale importanza prendere in considerazione il cosiddetto *Dispute Settlement Understanding*, ovvero la base giuridica che regolamenta proprio la risoluzione delle dispute commerciali tra Membri: sicuramente rilevante è l'Articolo 3.2 in cui viene sancita l'importanza del sistema risolutivo previsto dall'OMC nell'assicurare sicurezza e predicibilità al sistema multilaterale del commercio, i cui diritti che ne conseguono ed i principi fondamentali sono stati accettati dagli Stati Membri al momento della ratifica del documento stesso. Gli organi centrali nella procedura sono il *Dispute Settlement Body*, che riveste indubbiamente il ruolo di maggiore importanza con mansioni inerenti all'adozione di *reports* vincolanti giuridicamente gli Stati o alla supervisione ed

implementazione di regolamentazioni, i *Panels* e *l'Appellate Body*, che, come verrà chiarificato successivamente, rappresenta la variabile la cui manipolazione da parte degli Stati Uniti rende statica la risoluzione della disputa soggetto di questa tesi. *L'Appellate Body*, infatti, svolge una funzione di sostegno all'operato del *Dispute Settlement Body* attraverso l'elaborazione di *reports* contenenti l'analisi della fondatezza delle accuse e le conseguenti conclusioni inerenti alla regolamentazione della sostanza della disputa stessa.

È proprio nella performance di tali mansioni che le critica del Presidente Trump e le sue azioni trovano rifugio, bloccando interamente il sistema: il Presidente ha infatti recentemente bloccato la nomina dei nuovi membri *dell'Appellate Body* il cui termine era scaduto. Così facendo forza l'organo a svolgere le proprie mansioni con meno della metà dei Membri previsti dal *Dispute Settlement Understanding*, ovvero 3, rendendo inevitabilmente molto difficile l'accordo in ambito decisionale tra essi: il disaccordo di un solo membro blocca le funzioni dell'intero organo.

L'amministrazione Trump si è inoltre contraddistinta, oltre che per le critiche mosse a Cina ed Unione Europea, il ricorso *all'escape clause* giustificando le sue azioni sulla base di necessità di sicurezza nazionale, anche per la critica all'interpretazione degli accordi fondatori della OMC da parte dei suoi stessi organi operanti: è nuovamente *l'Appellate Body*, infatti, ad essere preso di mira, ma questa volta per la sua ipotetica non interpretazione letterale degli accordi. Ciò a cui auspica il Presidente è quindi l'esistenza di un sistema rappresentativo di quanto descritto a parole negli accordi firmati dagli Stati Membri.

Proprio sulla base di queste considerazioni è possibile capire come l'Organizzazione Mondiale del Commercio si trovi in una situazione di stallo di fronte a questa minaccia contemporanea: come il Presidente stesso ha affermato "l'adozione di misure unilaterali in ambito commerciale obbliga i partner commerciali sfruttatori a scegliere tra un'*escalation* di tariffe reciproche oppure rinegoziazioni forzate che permettano il sorgere di un miglior accordo".

Apparentemente la strategia di Trump sembra voler trasmettere all'intera comunità internazionale il messaggio di quanto gli Stati Uniti siano forti e godano di una posizione privilegiata in cui la legge viene declassata dal potere, ma quale sarà il futuro dell'Organizzazione Mondiale del Commercio sotto l'amministrazione Trump?

La possibilità di collasso dell'Istituzione stessa rappresenta una grande preoccupazione per molti, tanto da aver portato all'affermazione della necessità di rafforzarla e di rafforzare il procedimento per la risoluzione delle dispute al fine di evitare il ripresentarsi di situazioni simili. Un'altra possibilità, quella descritta dalla ricercatrice e professoressa Rachel Brewster della *Duke University School of Law*, è invece rappresentata dall'ascesa della Cina e dal suo presentarsi al mondo intero come il nuovo perfetto alleato commerciale con maggior potere di negoziazione ed una leadership più forte.

Qualunque siano il destino ed il futuro dell'Organizzazione Mondiale del Commercio, ciò che dovrebbe essere preso in considerazione è l'importante processo che, come descritto dall'esperto in diritto commerciale internazionale John Jackson, ha permesso alla comunità internazionale di evolvere e passare da una tecnica orientata al potere ad una orientata alla cooperazione nell'ambito della risoluzione delle dispute.

La relazione asimmetrica che ha sempre caratterizzato il rapporto tra potere e legge e che, ora come ora sembra minare alla stabilità di un solido sistema internazionale come quello istituito dall'Organizzazione in questione, deve essere affrontata al fine di non permettere mai e poi mai al primo di prevalere sulla seconda.