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WTO Appellate Body and the Risk of Paralysis: Possible Solutions to the Impasse of Dispute Settlement

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List of Abbreviations

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AB	Appellate Body
CAP	Common Agricultural Policy
DARIO	Draft Articles on the Responsibility of International Organization
DG	Director-General
DSB	Dispute Settlement Body
DSM	Dispute Settlement Mechanism
DSU	Dispute Settlement Understanding
EC	European Communities
EEC	European Economic Community
GATS	General Agreement on Trade in Service
GATT	General Agreement on Tariffs and Trade
ICJ	International Court of Justice
ITO	International Trade Organization
MNF	Most Favored Nation
MPIA	Multi Party Interim Appeal Arbitration
NGO	Non-Governmental Organization
OECD	Organization for Economic Co-operation and Development
TRIPS	Trade-Related Aspects of Intellectual Property
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
USTR	US Trade Representatives
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

1 Introduction

In the aftermath of the Second World War, international trade became the ultimate protagonist of a long and difficult process of liberalization and integration; a phenomenon which has encountered many obstacles along the way and that currently has not yet ended. Ever since its creation in 1995, the World Trade Organization ('WTO') has been the subject of vocal and sometimes violent, international protest especially concerning the Dispute Settlement Mechanism it has put in place at the end of the Uruguay Round of negotiations. The greatest object of numerous criticisms is undoubtedly the Appellate Body, which soon after the birth of the WTO, has occupied a central and essential position in the governance of international trade to the point of being described by many legal scholars and international jurists as the "Jewel of the Crown". With its prominent position at the top of the entire WTO dispute settlement mechanism, its jurisprudence on values other than economic ones, and its emphasis on the importance of and the need for open and more transparent processes, the Appellate Body has greatly contributed to the improvement of the legitimacy of the World Trade Organization and more specifically to the overall Dispute Settlement Mechanism. Unfortunately, after more than twenty years of honorable work, the "central pillar of the multilateral trading system" as described by the first WTO Director General, Mr. Renato Ruggiero[1], the AB is facing a survival crisis triggered by the refusal of the American Administration to start a new process of selection for the appointment of new Appellate Body Members. In fact, at the midnight of the 10th of December 2019, the Appellate Body of the WTO has lost its minimum quorum required due to the expiration of the four years term of two of the three last standing members, remaining with a single component. The current impasse over the reappointment for the filling of vacancies of the Appellate Body runs the risk of relegating the enormous success achieved over more than twenty years to a historical footnote. The aim of this dissertation is to analyze from a historical and legal point of view, the development of the system of regulation of disputes, starting from the creation of the GATT, through the birth of the WTO and its innovative Dispute Settlement Mechanism, and arriving at the crisis in which it verges today, in order to provide the reader with a detailed analysis of possible solutions to overcome this impasse.

Chapter 1 of this elaborate will focus on the several steps and historical processes through which the World Trade Organization has been established. The historical account will first address the failed attempt at creating an International Trade Organization ('ITO') in the aftermath of the Second World War. In fact, In February 1946, soon after the end of WWII, the Economic and Social Council of the United Nations called for an International Conference

[1] Speech of former WTO Director-General Renato Ruggiero to the Korean Business association delivered on the 17th of April 1997, *The Future Path of the Multilateral Trading System.*

on Trade and Employment setting up a preparatory Committee to elaborate an annotated draft agenda for such conference[2]. The Conference drew up the Havana Charter in 1947 for the establishment of an International Trade Organization to be submitted to the governments represented. It also adopted a resolution for the establishment of an Interim Commission for the ITO. With the stillbirth of ITO caused by the failure of the Congress of America to ratify the Havana Charter, all of this was lost to GATT. The General Agreement on Tariff and Trade came officially into being on January the 1st 1948 marking the beginning of the history of modern trade agreements as we know them today. Its funding principles, structure as well weaknesses will be extensively analyzed in order to provide the reader with the necessary tools to better understand why the World Trade Organization came into being at the conclusion of the Uruguay Round through the signature of the Marrakesh Agreement of 1994. The last section of this chapter will be entirely dedicated to an extensive analysis of the WTO, its core functions, and its objectives within the international trading system realm.

In Chapter 2, the reader will be introduced to the Dispute Settlement mechanism both of the ancient GATT and of the modern WTO. Notwithstanding the provisionary nature of the General Agreement, the Contracting Parties[3] never doubted its compulsoriness although it inevitably constituted a limit to the operation of the system as a whole leading to an exponential decrease in the effectiveness of the regulatory provisions spelled in the Agreement. In this light, together with the procedural functions of the dispute settlement under the GATT regime, an analysis will be conducted on its main weaknesses and the major criticism that have been moved to it, with the aim of paving the way to the novelties introduced by today's Dispute Settlement Mechanism of the World Trade Organization. Regulatory flexibility, due to the merely provisional nature of the GATT, constituted one of its greatest weaknesses, which inevitably reflected on the proper functioning and effectiveness of the system in general. In fact, it gave a wide margin for exceptions and justifications for deviant behavior, especially concerning the adoption of protectionist measures by States to protect their national markets. In contrast to the GATT, the WTO has provided for a complex system for the settlement of disputes which is extensively described in the Dispute Settlement Understanding and that will be analyzed in the second section of this Chapter. The final section of Chapter 2 will be devoted to the Appellate Body, the greatest novelty introduced by the Dispute Settlement Understanding of the WTO. Up to these days, the Appellate Body is considered to be one of the most peculiar institutions in the entire World. The intentions of the Uruguay Round negotiators were not that of creating a court, the very idea of creating an appeal mechanism in the dispute settlement

[2] SHUKLA (2000).

[3] During the GATT regimes, participatory States were referred to as Contracting Parties. The term Member States will be later introduced with the establishment of the permanent World Trade Organization.

resolution was considered as a *quid pro quo* for the parties which had lost their power to block the adoption of a panel report through the introduction of the reverse consensus practice. The reader will be provided with a full and detailed analysis of the functions of the Appellate Body together with an exhaustive explanation of the Appellate Review Procedure.

Chapter 3 constitutes the very bulk of this dissertation as it addresses the main criticism moved to the Appellate Body which had eventually led to its impasse and it analyses the proposed reforms put forward by several WTO Members. The chapter is divided into two separate but consequential parts. The first section will provide the reader with a detailed analysis of the reason which have brought the AB to a complete impasse, unable to perform its functions and it will analyze whether or not the funding principle of member-driven governance has been deviated or not. Unfortunately, like all great legends, after 20 years of glory, the Appellate Body's perception has drastically changed. Among its most prominent critics are undoubtedly the United States, which already in 2011, under the Obama administration, began to express their dissent towards the organ, going so far as to veto the reappointment of two members of the AB. This decision not to vote in favor of the reappointment was also carried forward by the subsequent Trump administration, which on several occasions expressed its disagreement with certain aspects of the dispute settlement, claiming it has treated his nation unfairly.[4] The situation reached its maximum point of crisis on the 19th of December, 2019, when due to the decisions of the US government, the Appellate Body found itself with less than three members, the minimum quorum necessary to carry out the appeals process as provided for in Article 17.1[5] of the DSU. This has led then to a complete disruption of the functioning of the Appellate Body, which consequently has led to an overall impasse of the whole dispute settlement mechanism. Within this context the reader will be provided with an in-depth analysis of what has been described by the US Diplomats as "*Judicial Activism*[6]" on behalf of the Appellate Body. First, the US has severely criticized the Appellate Body for failing to respect the expected 90 days deadline, hence failing to comply with Art. 17.5 of the DSU. Second, according to USTR, the Appellate Body Has Repeatedly Violated Article 17.2 of the DSU allowing members to continue to serve on cases after their term had expired. Additionally, according to US diplomats, the WTO has a recurrent tendency to produce finding also on matters which are deemed

[4] White House (2018), *Remarks by President Trump at 2018 White House Business Session with Governors*

[5] Art. 17.1 of the DSU states that: "A standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body".

[6] Judicial Activism is the term commonly used to summarize the key American concerns about the Dispute Settlement Understanding.

unnecessary for the resolution of the dispute as appeals are only limited to "issues of law covered in the panel report and legal interpretations that have been developed by the panel" and lastly, the US administration has openly accused the Appellate Body of treating previous panel reports as binding precedents although such practice is not provided for in any of the provisions of the DSU.

Last section of Chapter 3 of this dissertation will analyze the proposed reforms aimed at overcoming the crisis of the Appellate Body. In light of such an unprecedented institutional crisis[7], the European Union has decided to step in, and it has chosen to be a pivotal player in the process of the reform of the Appellate Review mechanism of the WTO. Going beyond the presented proposal for the amendment of Art.17 of the DSU, that have never been welcomed positively by the United States, despite their claim being largely taken into consideration in the draft decision presented by Facilitator Ambassador Walker in late 2019, the European Union has launched an attractive provisional solution in order to preserve the right of appeal of states which have triggered the mechanism of dispute settlement: the Multi Party Interim Appeal Arbitration Arrangement.

7 ADINOLFI (2019:33), CHARNOVITZ (2018:1).

1 Chapter 1: Historical Evolution from ITO to GATT to WTO

1.1 The Havana Charter and its demise

Ever since its creation in 1995, the World Trade Organization ('WTO') has been the subject of vocal and sometimes violent, international protest. The majority of the criticism has charged the WTO regime with placing developing countries at various kinds of unfair disadvantage[8]. Such issues had deeply affected the negotiations, in the years immediately after World War Two, which aimed at establishing an international trade organization ('ITO')[9]. Thus, although the attempt to create such an organization failed, its legacy was destined to be long lasting. Not only was the ITO a precursor of today's WTO, but the supposedly "interim" General Agreement on Tariff and Trade ('GATT'), continued as the basis on which world trade was regulated until it was superseded by the WTO.

In February 1946, soon after the end of the Second World War, the Economic and Social Council of the United Nations called for an International Conference on Trade and Employment setting up a preparatory Committee to elaborate an annotated draft agenda for such conference[10]. The first session of the Preparatory Committee was held in London, during the course of which a draft charter for an International Trade Organization was prepared[11]. The document was subsequently submitted to the examination of the participants' States and edited by the Drafting Committee who met in New York in 1947[12].

The United Nations Conference on Trade and Employment, following the resolution adopted by the fifth session of the Economic and Social Council, met in Havana, Cuba, from 21 November 1947 to 24 March 1948. The Conference drew up the Havana Charter for the establishment of an International Trade Organization to be submitted to the governments represented. It also adopted a resolution for the establishment of an Interim Commission for the ITO. At the conclusion of the Conference, a Final Act[13] was signed authenticating the texts of the documents prepared[14].

The Havana Charter is to be considered as the result of a process of multilateralization of what had earlier been a bilateral process formulating a

[8] TOYE (2003:82-83).
[9] FERRO, RAELI (1999).
[10] SHUKLA (2000).
[11] Report of the United Nations Preparatory Committee, 4 November 1946, E/PC/T/C.Il/g *on the International Conference on Trade and Employment.*
[12] WILCOX (1947 :529-541).
[13] Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 15 April 1994, 1867 U.N.T.S. 14, 33 I.L.M. 114, *Final Act.*
[14] NEUMANN (1970).

postwar international trade order[15]. The ITO reflected the global concerns of the moment, this is why great emphasis was placed on issues such as unemployment. In fact, one of the most prominent challenges was "full employment", memories from the inter-war period of extreme depression, trigged in the governments the fear that, in a liberalized economy, damaging trends in the United States would rapidly cause disruption elsewhere[16]. Of fundamental importance was also the issue linked to the industrialization of underdeveloped countries. In this context countries such as Australia together with Lebanon, India, Brazil, and China claimed that developing countries should be allowed to recur to import quotas to jump-start the process of industrialization. The Charter also recognizes the pivotal role played by national governments in providing assistance in order to promote the establishment or reconstruction of particular industries[17], in maintaining high levels of employment, regulating foreign investment, and correcting market failures.

With the stillbirth of ITO, all of this was lost to GATT. During the course of the years, numerous scholars have tried to analyze the causes that brought to the demise of the International Trade Organization[18]. The failure of foreign ministers of the allied powers at the Moscow conference in 1947 to move toward a peace treaty gave the Americans the decisive motive for introducing the Marshall Plan, a massive regional initiative. Although the United States of America was one of the first countries to propose and support the project, Congress never wanted to approve the agreement fearing that the organization could interfere with the internal economic policy of the country. The Truman administration, after more than two years of continuous attempts, officially announced the failure to reach an agreement within the Congress and temporarily ended the project to establish the ITO[19]. Following the failure to establish the ITO, 23 States, at the end of the second session of the Preparatory Commission for the United Nations Conference on Trade and Employment, decided to sign on October 30, 1947 "the General Agreement on Tariffs and Trade"[20]. The GATT thus represented a partial and provisional application of certain principles contained in the ITO's establishment project.

[15] IRWIN (1995).
[16] TOYE (2003).
[17] Chapter IV, articles 10-13.
[18] *Supra Note* 8.
[19] DIEBOLD (1952).
[20] BRONZ (1956).

1.2 The General Agreement on Tariffs and Trade

Born in an era of both economic and political turmoil, the General Agreement on Tariffs and Trade came officially into being on January the 1st 1948 marking the beginning of the history of modern trade agreements as we know them today; from that moment onwards, trade would be the cornerstone of countless bilateral and multilateral agreements[21]. The institutional arrangement embodied in the GATT which for almost fifty years served as a multilateral forum for negotiations mirrors the vision of the post-war world order envisioned by the United States and the United Kingdom[22]. Diplomats from both countries wanted to establish a set of common rules and to create an international organization to prevent what already had happened in the past with the adoption on behalf of the US of the Smooth-Hawley Tariff Act[23] which resulted in an exacerbation of the Great Depression. Cordell Hull, American Secretary of State at the time, was firmly convinced of the existence of an unbreakable link between liberal trade and national security. He strongly promoted a philosophy of fair treatment among sovereign States, as well as equal opportunities and exchanges in national markets for the promotion of world peace. In his view, the creation of an open-door commercial system, inherently based on multilateral negotiations would prevent countries from turning back into old situations which brought to the outbreak of war across the globe and to the suppression of human rights. On the other hand, as a direct consequence endured after the Second World War, the United Kingdom reluctantly stomached discriminatory policies despite the fact that they held into the same philosophy of seeking to reduce trade barriers for the promotion of global prosperity.

Functionally, the United States and the United Kingdom converged not on a set of substantive rules and procedure on sheer free trade, but rather on a system designed to move in a liberal direction, with ongoing efforts to reduce tariffs and to commit to those tariffs reduction while simultaneously maintaining various forms of protection. The driving force behind the GATT was the same that motivated the Bretton Wood conference in 1944: the interwar disaster. The inter-war period should not be viewed just as a series of domestic economic failures, but as an international economic failure as well[24]. Just as the architects of the Bretton Woods system envisioned restoring the international monetary system to a sound footing, the purpose of the GATT was to roll back trade barriers and end discriminatory trade policies. The final

[21] IRWIN (1999).
[22] NAKILAR, DAUTON, STERN (2014).
[23] An Act of Public Law of the USA, 13 March 1930, Pub.L. 71-311, *to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, to protect American labor, and for the purposes*, hereinafter, the Tariff Act of 1930; it was a law that implemented protectionist trade policies in the United States. The Act raised US tariffs on over 20,000 imported goods.
[24] IRWIN (2003).

agreement, reached in 1948 was drafted in two versions, one in English and one in French. Since GATT was not, strictly speaking, an international organization, the countries that had signed the agreement would not have been considered "members", but "Contracting Parties"; whereas the countries adhering to the agreement after October 30, 1947, were called "Adherent Parties".

1.2.1 The Objectives and the Structures of the Agreement

The adoption and development of the GATT stem from the fear of a turning back to the "beggar-thy-neighbor" principle, which had extensively been applied during the Great Depression. National governments wanted to find a way to bring about recovery and restoration in their own countries[25]. As mentioned before, the primary objectives of the General Agreement on Tariffs and trade were to liberalize and progressively expand international trade through reciprocal agreements between the contracting parties. The GATT's mission was complexly simple and straightforward. Its main purpose was to contribute to raising the standards of living and full employment by "entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce"[26].

The agreement was originally signed only by 23 states on the date it came into existence on October 30th, 1947 but the number was destined to grow over the years[27]. All Western European countries took part in the three separate negotiation rounds which had expanded GATT membership and further reduced imports tariffs. The very first round was held in Geneva in 1947, and up until this day, it is considered a tremendous success. All participants countries which accounted for almost 80 percent of world trade, implemented tariff cuts on a Most Favored Nation ('MFN') basis.

The General Agreement of 1947 comprised 35 articles grouped into different sections. Only in 1965, a further section will be added that will address trade relations with developing countries, a subject that is still considered controversial today[28]. The first section, containing the key principles of the agreement, is composed of two articles that are considered to be the central obligations of the treaty. Without any doubt, Article 1 is one of the pivotal provisions of the GATT as it includes the Most Favored Nation clause, while Article 2 refers to the list of concessions.

[25] IRWIN, MAVROIDIS, SYKES (2007).
[26] IRWIN (1995:323-328).
[27] AMADEO (2019).
[28] NAKILAR, DAUTON, STERN (2014).

The MFN principle even in the interwar period had been deemed as "an essential condition of the free and healthy development of commerce between States"[29]. During the negotiation for the creation of the ITO, the Unites States claimed such principle as fundamental, asking for it to be included in the draft of the charter, later becoming the very first paragraph of GATT Article I. The Most Favored Nation principle is a relevant and revolutionary norm that emphasizes the willingness of the founding fathers of the agreement to create a new world trade[30]. Its most primary purpose is to transform the old bilateral regime, which thus enshrined the mutual benefits between two countries, to a multilateral regime in which all contracting parties can benefit from the elimination of the barriers established in previous negotiations. It intrinsically reflects the belief that a multilateral trading system can only function if it is governed by the principle of non-discrimination, thus creating an environment in which all contracting parties enjoy equality and competitive opportunities.

The second section of the general agreement comprising articles III through XXIII addresses the fiscal discipline of national production[31]. The articles provide for a comprehensive description of all the obligations of the contracting parts aimed at the reduction of tariff barriers and the liberalization of trade by applying transparent and non-discriminatory conditions. Section number three ranging from article XXIV to article XXXV groups together the different general provisions of the GATT and their possible link with what is stated in the Havana Charter. The above-mentioned regime not only includes the basic rules but also describes all the appropriate derogations for the trade regimes of some countries and regional areas. These exceptions allow for the establishment of customs unions and free trade areas, also allowing the parties to modify or even suspend some of the concessions previously provided.

Lastly, the fourth section, which includes the last three articles added to the agreement between 1965 and 1966, represents the willingness of the contracting states to highlight the interest that international trade had for developing countries. In this context, it is of paramount importance to emphasize how active developing countries have been during all phases of negotiations in which they were heavily involved. Their participation in the first rounds of tariff reduction was crucial as they were the first countries which tried to secure agreements that would bring them greater benefits and that could better reflect their interests. Although very often their requests were given short shrift, it is undeniable how essential their contribution was in making the institutions as close as possible to their needs[32].

[29] SELEIMENOVA (2019).
[30] COUTAIN (2009).
[31] The General Agreement on Tariff and Trade, (1947).
[32] SMITH (2004).

1.2.2 The guiding principles of GATT and its "institutional" structure

The international trade regime is governed by rules and norms inspired by the principles of market liberalism. More precisely, the belief that an open trade system where goods can be freely exchanged is inevitably better than all those regimes where no limits are placed on the freedom of states to adopt protectionist measures[33]. This deep conviction is rooted mainly in the criteria of economic rationality, i.e., the idea that an open trading system in which there are no obstacles to the free unfolding of the logic of comparative advantages is the best instrument to ensure greater economic growth and undoubtedly also better standards of living at the aggregate level and at the level of individual states.

In addition to purely economic reasons, political considerations must also be added. After the terrible experience of the Second World War, the founding fathers of the international trade regime were firmly convinced that increasing economic interdependence would undoubtedly reduce the risks of further conflicts between member states. The principle of market liberalism finds its operational foundation in the two fundamental principles on which the whole GATT system of rules is based: *non-discrimination* and *reciprocity*.[34]

a. The principle of non-discrimination consists of the fundamental idea that each individual member state should have equal opportunities in trade relations with other member states. This principle is implemented through the Most Favored Nation clause and the national treatment principle. The principle of the MFN is enshrined, as already mentioned, in Article 1 of the GATT, according to which a given signatory state granting any trade or financial advantage to another one shall grant it all other signatory states as well. It is therefore prohibited to adopt any trade policy that favors some countries to the detriment of others. If hypothetically the U.S. were to decide to reduce the customs tariffs that are applied to imports of textile products from India, this reduction should be automatically extended to all imports from other member countries. This principle, therefore, ensures that all signatory states are guaranteed equal opportunities to access the markets of their partners. States are allowed to break this rule when it is expressly provided for in the treaties, or if the states create or become part of a regional trade agreement or in the case of the so-called Generalized System of Tariffs Preferences[35]. On the other hand, the principle of national

[33] KOGSTAD (2015).
[34] BAGWELL, STAIGER (2015).

treatment, enshrined in article 3, aims to prevent member states from using various instruments at their disposal, such as tax laws and regulatory instruments, to give domestic producers an advantage over foreign ones. it is considered a complementary principle to the clause of the Most Favored Nation. its purpose is to guarantee the compliance with the non-discrimination rule in foreign trade.

b. The principle of reciprocity plays a crucial role in negotiations as one of the fundamental means of reducing trade restrictions when a country has an interest in maintaining its own barriers and eliminating those of its trading partners[36]. For a state to consider it advantageous to negotiate certain rules for trade liberalization, the expected gains must be greater than those derived from a unilateral liberalization process. According to various provisions of the GATT, all negotiations are to be concluded: "on a reciprocal and mutually advantageous basis". That is to say, that to a country which takes new steps towards liberalization granting trade advantages to another member state is to be granted in turn "reciprocally" equivalent privileges by the favored state. In this way, it is possible for states to maintain their trade balance in a stable position and at the same time counterbalance various and possible increases in imports directly resulting from the reduction of their trade tariffs with increases in exports as a result of the reduction of trade tariffs of third countries. Also, in this case, exceptions to the general rule are allowed, and this especially true concerning developing countries. The *Enabling Clause* permits member states to accept less than full reciprocity from their developing trading partners. By doing so, a country also complies with the principle of solidarity[37]. The above-mentioned principles deeply affect one another but above all, they constitute the lintel on which the whole system is based.

In this context, it is also important to underline the importance of other principles such as that of *liberalization through negotiation[38]*. As already pointed out several times, the MFN clause expresses the willingness to move from a bilateral regime to a system of multilateral negotiation. The implementation of multilateral liberation policies gives the possibility to develop trade without obstacles such as customs duties, import controls, or all other barriers that make the free movement of goods and services difficult[39].

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[35] An act of Public Law of the USA, 3 January 1975, Pub.l. 93-618, *to promote the development of an open, nondiscriminatory, and fair world economic system, to stimulate fair and free competition between the United Stated and foreign nations, to foster the economic growth of, and full employment in, the United States, and for the other purposes, hereinafter:* Trade Act of 1974. It provides duty-free treatments to goods of designated beneficiary countries.

[36] BAGWELL, STAIGER (1997).

[37] PAGE (2002).

[38] CRYSTAL (2003).

[39] NAKILAR, DAUTON, STERN (2014).

As it has been demonstrated, the regulatory framework of the trade regime is composed of an innumerable number of rules, which, although in different forms, contribute to limit the ability of Member States to control and consequently limit, the flows of goods and services. In this regime, in addition to rules that explicitly prohibit certain policies adopted by member states, i.e., negative integration, rules that require the adoption of various policies, i.e., positive integration, have gradually acquired centrality. It must be kept in mind that when the GATT was created, the only obstacle to free trade in goods was tariff barriers[40]. When, thanks to the implementation of the GATT, the incidence of this type of barrier exponentially decreased, member States realized that it was necessary to try to harmonize their policies in areas traditionally of domestic competence to avoid that they could produce distortive effects for the entire international trade.

From the institutional point of view, GATT is not born as a real international organization[41]but rather as a provisional agreement in anticipation of the constitution of the ITO. It is considered as a regime, which groups together a set of rules, norms, principles, and decision-making procedures around which all the expectations of the States converge. Nevertheless, it had assumed a structure very similar to that of a real institution and a very lean structure that consisted of three main organs:

a. The Assembly of Contracting Parties[42]
b. The Council, created in 1960
c. The Secretariat, led by the Secretary-General who in 1965 became Director-General

The Secretariat, based in Geneva, represented the administrative organ of the GATT and it was given the task of managing the ever-increasing transaction costs resulting from the inevitable increase in the number of member states and regulating their various interactions. It was assisted by several standing committees that were responsible for overseeing and supervising the implementation of the specific provisions of the agreements concluded in the various rounds.

The Assembly, on the other hand, met once a year, always in Geneva, and on these occasions, decisions were taken by all the contracting parties, each of which had one vote. The approval of the different resolutions could either require a simple majority or a qualified majority of 2/3 depending on the question at stake.

[40] IRWIN, MAVROIDIS, SYKES (2007).
[41] LAMY (2007:971).
[42] Not being an international organization, the term Member States was never used.

The Council, constituted by the permanent representatives of each country, had monthly meetings for the preparation of the various texts on the decisions to be submitted to the attention of the Assembly of the Contracting Parties.
As will be described in detail later on, with the creation of the World Trade Organization the original agreement with which the GATT was established in 1947 was expanded and amended, transforming it into the so-called "GATT 1994", it is accompanied by new agreements that contain rules on trade in services, intellectual property rights, and dispute resolution procedures.

Unfortunately, all the good hopes placed in the GATT at the beginning of its creation hid some fundamental shortcomings for its functioning. This led to its inevitable decline: as already pointed out, the General Agreement on Tariffs and Trade was nothing more than a mere provisional agreement, destined to give way to a real international organization. Lacking legal personality[43], the GATT found itself to be dependent almost entirely on the will of the Contracting Parties, thus restricting its capability to perform its functions[44]. It did not have the chance to impose its sovereignty over that of the single signatory states as it was not considered as an international legal body. It is only with to the birth of the World Trade Organization in 1995 that all the institutions that regulated the international trade regime finally managed to acquire the status of an international organization with their own legal personalities.

[43] SELLERS (2006).
[44] STILES (1996).

1.3 The GATT Negotiations

The history of international trade, as we know it today, which was born with the creation of the GATT, is the result of numerous rounds of negotiations that took place and reason to exist according to the different issues that had to be dealt with. The agreement embodies the highest testimony that in the reality of possible relations, pragmatism is certainly the winning way not only in the short term but especially in the long run[45]. Since it was not possible, in 1947, to liberalize all aspects of international trade, all exchanges on the topic of liberalization began with the establishment of general principles and rules, including those governing tariff regimes. Then it was necessary to attack and reduce slowly all those non-tariff barriers, always different and sometimes not very transparent. All this was always done exalting the principle of liberalization through negotiation, which, as already mentioned in the previous section, is one of the key principles of the agreement.

In its almost 50 years of honorable career, GATT has collected 8 rounds of negotiations, in which the first five have had as their sole and exclusive object the reduction of customs tariffs[46]. Since the Kennedy round in 1964, other topics such as non-tariff barriers, the service sector, and the agricultural sector have also begun to be dealt with, thus bringing GATT into its second phase, commonly known as the "competition phase". Members and agreement changed adjusting to different demands stemming from national governments, but it firmly remained single-minded in its pursuit of addressing trade barriers related issues in a multilateral fashion. Before ceasing to exist, leaving its place to the permanent World Trade Organization, GATT managed to incorporate customs, barrier reductions, and trade rules into the capitalist world economy[47].

1.2.1 First round: Geneva Round 1947

As tradition has it, this round started even before the official birth of the GATT. As the project for the creation of the ITO miserably failed, the General Agreement on Tariffs and Trade began to press for the process of trade liberalization to start as soon as possible, although not at a universal level. It is important to bear in mind that these events took place amid the advent of the Cold War. The United States wanted to push forward the recovery of western European countries *vis-à-vis* the expansion of Soviet-led communism in the old continent by promoting The European Recovery Act[48] as well as

[45] NAKILAR, DAUTON, STERN (2014).
[46] FERRO, REALI (1999).
[47] NAKILAR, DAUTON, STERN (2014).

regional initiative both in trade and in finance. To the US, European regionalism was a mean through which political stability in the Free World would be achieved. Their approach allowed for the implementation of discriminatory measures against the US-produced goods as a mean to boost the fast reconstruction of war-torn industries while assuring that countries remained liberal and continued to lean toward a pro-capitalist ideology.

As already mentioned above, from the 50 countries that had previously participated in the Preparatory Committee for the establishment of the ITO, 23 broke away from it by meeting in Geneva to give birth to what would later become the first of the round's series. Under Article 24, the GATT allowed for the creation of customs unions as well as free trade areas; the reason behind such decision is simple and straightforward: countries strongly believed that said trade arrangement would eventually lead to a further liberalization to be achieved at a multilateral level. In this way the United State managed to tie their concerns and fears over the advent of communism to GATT, encouraging Europe towards a greater integration by also maintaining a solid stance in the drive toward liberalism[49].

The Geneva Round spelled out the very primordial principles for the General Agreement on Tariffs and Trade. As mentioned above, Article 1, which is the most important as it called for the MFN principle; countries undertook the decision not to discriminate against one another to facilitate equal treatment among all Contracting Parties. The strategy created to achieve a fast establishment of the non-discrimination principle was surprisingly astonishing: countries would conclude bilateral agreements on products in which the reciprocal partner was the principal supplier, then as provided for in the most favored nation principle, such accord would be extended to all other GATT's members. The MNF did not come without exceptions, countries were given the possibility to discriminate against another nation be their national security at stake or be their balance of payment in need of reform. This way of reaching agreements through reciprocal talks changed the very way in which multilateral negotiations were being held; this partially reflected countries' pressures for protectionism, especially from the United States[50].

The final result of this first round of negotiations was not very much the acceptance of Contracting Parties of the GATT itself as a possible global trade

[48] An Act of Public Law of the USA, 3 April 1948, Pub.L. 80-472, *to promote world peace and the general welfare, national interest, and foreign policy of the United States through economic, financial, and other measures necessary to the maintenance of conditions abroad in which free institutions can survive and consistent with the maintenance of the strength and stability of the United States*, hereinafter: The Marshall Plan, officially the European Recovery Act, was an American Initiative passed in 1948 for foreign aid to Western Europe.
[49] *Supra note 39.*
[50] NAKILAR, DAUTON, STERN (2014).

institution but the completion of 123 trade negotiations that gave rise to 20 agreements on tariff reductions. By the end of the Geneva Round, the General Agreement on Tariffs and Trade did not manage to enter conclusively into force as all 23 nations firmly refused to subject their entire trade to the Accord. As spelled in the protocol comprised in Article XXVI of the GATT, the agreement would remain provisional up until negotiations managed to cover at least 85% of the world trade[51].

1.3.1 Second round: Annecy Round 1949

The second round took place in France and it was named after the town in High Savoy where the negotiations were concluded. By 1948 the GATT was officially in place, as the Geneva concessions came into full effect. The international scenario as well as the increasing concerns over the rapid advent of communism in Europe deeply influenced this round of negotiations. The number of signatory states increased by 10 and among them, there was also Italy. Once again, the United States proved to be the only superpower willing to bring forward a sharp cut to tariffs. Britain on its part was still facing some serious economic difficulties which caused the government to opt for rigid austerity measures to avoid the collapse of its economy. Contrary to the previous round of negotiations, the results achieved at Annecy were quite modest. All national governments hoped that the failure of the ITO would strengthen and enhance the cause for comprehensive multilateral trade liberalization, but that was the right time.

1.3.2 Third round: Torquay Round 1951

For the third round of negotiations, talks were moved to England in the town of Torquay. Also, on this occasion, the number of states participating in the conference raised to 38. Once again, the main topic of the negotiations were tariffs, a field in which countries were able to obtain enormous concessions, managing to reduce the average customs duties by about 25% compared to previous years. The United States again proposed a list of appealing concessions but according to the European countries they were not sufficient as they strongly believed the US had much more to offer. Washington decided to cut off conversations with London as the United Kingdom refused not to budge on their offer; therefore, the Torquay Round came to a flickering end raising several questions on the actual relevance of the GATT itself[52].

[51] FERRO, RAELI (1999).
[52] NAKILAR, DAUTON, STERN (2014).

1.3.3 Fourth Round: Geneva 1956

As by mid-1950s the reconstruction of Europe was well underway, GATT's countries decided to call for another round of negotiation to be held in Geneva. Despite US trade legislation severely limited the American offers brought to the table, twenty-six countries managed to achieve a net cut of over $2 billion worth in tariffs. Washington tried to push forward countless measures to boost trade liberalization as facing opposition by both the Congress and the Republican Party, which did not look favorably on international organizations as they represented a threat to their national sovereignty.

This round was specifically marked by the accession of both Japan and Western Germany into the GATT as their entrance indicated that the reconstruction of the world was about to be finally achieved. The UK did not welcome happily the annexation of Japan as war-related memories of their predatory economic practices were still vivid at the time. Its admission, however, was critical for President Eisenhower as he aimed to link free trade to security also in Asia. Officially a contracting party in 1955, Japan was heavily pushed by the US toward the process of economic liberalization[53].

1.3.4 Fifth Round: Dillon Round 1960-1961

The fifth round of negotiation takes its name from C. Douglas Dillon, Undersecretary of State in the Eisenhower Administration who during the course of the round became Minister of Treasury of the Kennedy Administration. These negotiations are of fundamental importance, as the European Economic Community ('EEC') appears for the first time on the international trade scene[54]. With the Dillon Round, the GATT officially ended its "recovery phase" paving the way for a new phase to begin. Due to the peculiarity of the subjects dealt with and the novelty of the interlocutors, the negotiation took place in two distinct phases and lasted about two years. The primary focus shifted on the position of the EEC[55] as the United States was highly concerned with the inevitable transformation in the balance of world economic power. As the newly created custom union clearly discriminated against non-adherent parties by favoring treatment of internal trade, US suspicions began to increase also due to their severe balance of payment deficit. It was well clear before the very end of the Dillon Round that a major reform of the GATT was to be pushed forward by Contracting Parties.

The accession of the EEC into the scenario brought the Americans to the realization that Europe had well recovered from the disaster of the war and it

[53] *Ibid.*
[54] RAINELLI (1996:54-56).
[55] Created in 1957, this round marked its official entry into GATT's Contracting Parties

was time for them to hold back on some of the concessions previously made in order to cover their trade deficit. GATT officially entered into a new era. Although tariffs still represented the most significant barrier to trade, a new obstacle came into the scene: agriculture. Growing protectionism on behalf of the US and the implementation of the EEC's agricultural policy will lead to an impasse which will partially be resolved twenty years later at the Uruguay Round. GATT's rules of procedure requested the Europe of Six to compensate countries that were faced with higher duties. Due to the complexity of the negotiations, the round was extended for an additional four months past its deadline; it eventually terminated in 1961 after a deal was signed which granted the US duty-free bindings on a list of goods[56].

The need for a major reform of the GATT system was further prompted by the emergence of Third World Countries. Freshly out of colonialism, many of these countries started to request aid through special trade accords from the United Nation and from elsewhere. Most of them sought to obtain preferential trade agreements that smacked squarely against GATT's non-discrimination clause. Having set their neutral agenda with regard to the Cold War, at the Bandung Conference of 1955[57] developing countries hoped to deviate from the standard regime provided in the agreement by asking more advanced economies to stop striving for the implementation of the principle of reciprocity in order for them to give a boost to newborn industries. Without surprise, they encountered the opposition of American-led GATT which offered little if not assistance. It is for this reason that less advanced countries sought to get their demands accepted in forums outside the GATT, that is why the United Nations Committee on Trade and Development ('UNCTAD') was created. The United Nations worked as the tool which paved the way toward prosperity for such countries. Drawing from the shreds of evidence it is possible to conclude that both GATT and the Americans were about to face challenges from all quarters.

1.3.5 Sixth round: Kennedy Round 1964-1967

From the strategic point of view, this was the negotiation that had considerable importance, even if it was a round accompanied by a long series of lights and shadows. Begun in 1964, it ended three years later with the signature of 47 countries, 48 with the EEC, which represented about 75% of world trade. It was dedicated to President J. F. Kennedy as a tribute to his memory after his brutal assassination in Dallas in 1963, but also because, in 1962, his administration had largely contributed to the approval of the "US

[56] NAKILAR, DAUTON, STERN (2014).
[57] The first large-scale Asian–African or Afro–Asian Conference aims were to promote Afro-Asian economic and cultural cooperation and to oppose colonialism or neocolonialism by any nation.

Trade Expansion Act"[58] which authorized the government to negotiate a 50% reduction in customs tariffs.

The focal point of the Kennedy round the long pursuit agreement the Europe of the Six and the United States and due to the difficulties related to the reach of such accord, the negotiations lasted for almost thirty-seven months. As it occurred during a period in which the world was undergoing some major transformations, leaders soon came to the realization that issues were not to be understood necessarily as politically critical. It was now time for nations to inevitably adjust to a changed economic order. European Community found itself ideologically aligned with the US: global security went hand in hand with trade and so it chose to help Americans to recover their deficits in the balance of payments. By being able to negotiate for six different nations as a single unit, the Community understood it had a certain degree of leverage, hence, the GATT negotiations witnessed their two major competitors discuss on the most equal ground since the war ended. As disparities among nations finally started to disappear European tariffs fell drastically following a sharp decrease in the American ones[59].

Compared to previous rounds, it marked a turning point for the negotiations, as for the first time, anti-dumping measures were introduced showing that countries were now willing to engage in discussions also on non-tariff barriers. Unfortunately, once again the CAP[60] proved to be the source of the long-lasting disappointment between the ECC and the United States as it proved that changes brought to the GATT negotiation process not necessarily translated into fast progress toward liberalization.

The sixth round was extremely important, especially for developing countries. In fact, with the addition of the fourth section to the general agreement in 1947, the possibility of not applying the principle of non-discrimination and reciprocity between developing and developed countries was recognized. In this way, developing countries were given the opportunity to receive preferential treatment and to be partially exempted from the liberalization obligations established at the multilateral level[61].Reforming the entire GATT system was still in the picture, but the timing was not quite right, the problems related to the agricultural sphere will constitute a major problem for the next decade to come. The Kennedy round still retains its fair share of importance as for the first time, non-tariff barriers have been addressed and because of the light shed on the right of the developing countries

[58] An Act of Public Law of the USA, 11 October 1996, Pub. L. 87-794, *to promote the general welfare, foreign policy, and security of the United States through international trade agreements and through adjustment assistance to domestic industry, agriculture, and labor, and for other purposes*, hereinafter: The Trade Expansion Act.
[59] NAKILAR, DAUTON, STERN (2014).
[60] Common Agricultural Policy.
[61] RAINELLI (1996).

1.3.7 Seventh round: Tokyo Round 1973-1979

The Tokyo Round was most certainly the more peculiar one, as it was the first to be started outside Europe. The inaugural session was celebrated in Tokyo in September 1973. Facing the threat of turning back to protectionist measures at home, Washington called for a new round of negotiation to begin[62]. As many as 102 countries, many of which were developing countries, took part in this seventh round of negotiations. North America, EEC[63] and Japan, brought to the negotiations the strength of about 60% of world trade, thus being the main protagonists of this conference. In 1974, the Congress approved the Trade Act, granting the President the powers to combat protectionism both at home and abroad through the abolition of unfair practices that discriminated against the US[64]. By doing so free traders had been appeased and the president was granted the right oh "fast-track" with regard to the conclusion of the GATT's accords.

The results achieved, if considered in a short-term vision, do not seem to be particularly exciting, but if analyzed in a long-term vision, the seeds and the basis for the subsequent evolution of the international trade regime are captured in the round. It is important to bear in mind that it had started in a very peculiar moment: Nixon was being removed from office and the Bretton Woods system collapsed under the pressure of the US Administration. Concerning the reduction of tariffs, the achievements were quite sizable. What was stunning was the establishment of a set of codes that officially transformed the GATT from a "simple" tariff reduction body to a proper forum for the management of trade. This enlargement of GATT's scope, through the implementation of codes that covered non-tariff barriers, paved the way for an ITO-type of organization that will eventually become the WTO fifteen years later.

Third world countries also received their fair share of concessions: after pleading for differential treatment, they were exempted from GATT's rules on non-discrimination and reciprocity. However, such privileges would cease to exist with progress and development, slowing assuming all the obligations of the regular Contraction Parties of the Agreement. Despite these great achievements, many developing countries felt that the GATT had failed many of them since their effective participation at the negotiation table was still very limited as they felt contracting parties of rich nations were keener to conclude accords among one another. On the other hand, the industrialized countries believed that all Third world countries managed to get a free ride to the Tokyo Round as they benefited from the new codes and rules without having to

[62] GRAHAM (1979).
[63] The ECC in 1961 was made up of six countries, while in 1972 it was the Europe of the Nine.
[64] United States Code: Trade Act of 1974, 19 U.S.C. §§ 2111-2462 (Suppl. 2 1976).

formally adhere to many of the obligations. Hence, GATT proved to be both a spectacular engine for the continuous growth of a multilateral trading system, but at the same time, it also turned into an unsatisfactory avenue towards prosperity and richness for poorer countries[65].

What resulted from the enlargement of the membership of the Tokyo Round was an exponential increase in issues stemming from different countries, but at the same time also the means to the resolutions of such issues incremented. The new codes themselves had transformed the GATT, in Winham words, "from a statement of broad principles to more detailed regulations relating to domestic and international procedure"[66]. Contracting parties came to the realization that changes needed to be pursued as times and demands were also changing, GATT had to keep up with the evolution of the world. The granting of fast-track authority to the US president was a clear example of this needed change: it proved to be extremely helpful in the subsequent Uruguay Round as it granted the President the right to preserve the agreements reached. A further advancement in this field was made when the 1979 law, under section 301[67], gave the US president the ultimate right to enforce the US' right also on a unilateral basis; the Americas were now granted the right to retort against discriminatory and unreasonable practices while also pushing for trade liberalization to continue. By the Uruguay Round, this dual position of the United States strengthened as the President was also granted the right to sign bilateral accords if the security of certain industries was at stake.

Lastly, the Tokyo Round was the formal launching pad for the creation of the World Trade Organization. Transitional is the word that best suits the seventh round of negotiations because although the proposed solutions to the issues were not perfect, they were most certainly groundbreaking as they brought forward the advancement of the forum toward a set of more solid solutions to be upheld in the future rounds. Multilateralism has, once again, prevailed[68].

[65] NAKILAR, DAUTON, STERN (2014).
[66] WINHAM (1986:17).
[67] Section 301 of the Trade Act of 1974 (19 U.S.C. §2411).
[68] NAKILAR, DAUTON, STERN (2014).

1.4 The Uruguay Round and the creation of the WTO

Launched at Punta del Este in 1986 and resolved at Marrakesh in 1994, The Uruguay round is undoubtedly the most significant and successful of the eight rounds of the General Agreement on Tariffs and Trade[69]. Despite the number of successes collected in this round, the creation of the WTO remains the most important. Although officially initiated in 1986, the agenda for the future round of negotiations began to take shape at the end of the Tokyo round that ended in 1979. The end of such round marks the beginning of a period of great discontent on the part of developing countries, strongly disappointed by the inability of states to agree on a more cohesive multilateral safeguard system, which allowed developed countries to impose provisional import limitations to avoid injury to their domestic industries. Another focal point, on which the contracting parties had decided to focus in this new round of negotiations was the strengthening of the dispute settlement system, which has always been considered fundamental for the proper functioning of the international trading system[70].

The plans for a new round, as it had happened in the past, came from the United States. An aggressive trade strategy was prepared by the new Reagan administration in 1981, leading to a new GATT round based on new issues: trade-distorting investment measures, trade in services but most importantly the upcoming transition of all developed countries to greater compliance with the obligation born by their adherence to GATT. Particular importance have had, the measures launched for agriculture, which have almost brought the round to a complete impasse, causing the failure to launch it at the November 1982 ministerial meeting in Geneva.

The turning point was reached when the United States called for a new round to be opened in 1985 in order to counterpart the growing protectionism in the US. Since their trade deficit was growing exponentially, they understood that the only way to fight protectionist movements was to press forward with the liberalization of trade rather than stand idle. US pressure led to an agreement in October to begin the systematic preparing of the agenda for a new round, to be implemented at a ministerial meeting in Punta del Este in September 1986[71]. Although the first phase of the negotiations was very controversial, mainly due to the European Union's proposal on the "balancing of benefits", several signs of progress were made in that year.

The meeting in Punta del Este was a milestone for the world trading economy, for the elimination of trade barriers, and for the broadening and

[69] *Ibid.*
[70] *Ibid.*
[71] PAARLBERG (1997).

expansion of the rule-based trading system[72]. However, the prospect of success was welcomed reluctantly from many countries but especially from the press as by the Financial Times: "Setting an agenda is one thing: repairing the worn fabric of the GATT by rewriting the rules and negotiating mutual concessions that would liberalize trade is another".

Notwithstanding the difficulties, by 1987 it was possible to establish fifteen different negotiation groups whose task was to tackle the specific issues brought about in the Punta del Este Declaration. In the spirit of goodwill, a mid-term ministerial conference held in Montreal in 1988 was also agreed upon by the Contracting Parties. The United States was certainly the country that most pushed for immediate results because, as stated before, it was urgent to counterbalance the growing wave of protectionism. Pressures emerged in the 1988 Omnibus Trade Competition Act[73], which granted President Reagan the "fast-track" power to vote easily, up or down Congressional vote, without modification of the final deal[74]. The emergence of several bilateral and regional agreements cast a shadow over the GATT multilateral negotiations. The spasmodic will of the European Union to create a single European market was considered by the other contracting states, especially the United States, as an attempt by the Union to create a sort of European fortress[75]. To this was added the development, by the Japanese Ministry of International Trade and Industry, of a New Asian Industrial Development Plan which clearly recalls some of the East Asia Co-Prosperity Sphere of the 1930s[76].

The position of more prosperous and rapidly export- competitive countries represented an additional obstacle for the good continuation of the negotiations. GATT part VI on Trade and Growth points out unique and unequal treatment for developing countries, including not expecting reciprocity for commitment during the GATT negotiations. However, the Punta del Este declaration reaffirmed the "enabling clause" of the previous Tokyo Round, which allowed for full participation in negotiations of developing countries as their economies progressively developed. From this moment on, more and more states will push for the strengthening of the principle of reciprocity, including the European Union and the United States

[72] CROOME (1998).
[73] Act passed by the United States of America Congress, 24 August 1998, Public Law 100-418, *Omnibus Foreign Trade and Competitiveness Act*.
[74] Previously, the American President had limited negotiating authority. The Kennedy Round of 1964-1967 final agreement included two provisions that required post-agreement Congressional approval. However, Congress did not approve them by simply not bringing them to a vote, hence the fast track was created in the 1974 Trade Act for the Tokyo Round Congressional approval.
[75] NAKILAR, DAUTON, STERN (2014).
[76] The Greater East Asia Co-Prosperity Sphere was a concept created and promulgated during the Shōwa era by the government and military of the Empire of Japan. It represented the desire to create a self-sufficient bloc of Asian nations led by the Japanese and free of Western Powers.

whose Secretary of the Treasury, Peter McPherson condemned the policies of some developing countries as being an *escamotage* for implementing protectionist measures which have nothing to do with the process of development.

On a more general term, the Montreal meeting managed to produce a series of mixed results: many of the barriers previously applied to tropical products were reduced to the benefit of developing countries but also strengthened GATT dispute procedures were implemented, for further development later in the negotiations. However, once again, agriculture constituted the central impasse at Montreal as the US was opposing EU positions. This caused GATT' Director-General Arthur Dunkel to suspend the mid-term review on the 9th of December 1988 until April of the following year. The decision for the suspension of the meeting was rather strategical, being both the US and the EU representatives lame ducks[77]. DG Dunker was well aware that President Reagan's new trade representatives would not take over until early in the year, as would EC Commission. As a result, an agreement was well reached by mid-April.

Although agriculture continued to remain a substantial problem, the year between 1989 and 1990 was crucial in terms of importance for the shaping of the final Uruguay Agreement, whose conclusion was scheduled at the Brussels' ministerial meeting in December[78]. In April, Canada moved forward with an ambitious proposal for the creation of a new World Trade Organization which was eventually received very coolly by the other Contraction Parties as they were deeply influenced by the dramatic developments which were happening in the rest of the world[79]. The collapse of the Berlin Wall and with it of the communist regimes of easter Europe brought to the formation of newly elected democratic governments which eventually influenced the Uruguay Round prospect leading up to the Brussel meeting. The same wave of democratization hit Asia as well: elected governments and economic reforms took place in Taiwan, South Korea but also throughout Latin America. GATT was witnessing an exponential increase in its already grown membership and its principles of liberal trade and market-oriented prices became the mainstream thinking for economic reforms almost everywhere in the world.

Unfortunately, however, it was still unclear what role the GATT was to play within the international trading system. Europe was increasingly focused on managing the economic reunification of the two Germanies and its inevitable consequences. On the other hand, the United States and Canada were consolidating their North American agreement which also included

[77] In politics, a lame duck or outgoing politician is an elected official whose successor has already been elected or will be soon.
[78] DAVENPORT, HEWITT (1991).
[79] NAKILAR, DAUTON, STERN (2014).

Mexico and in June of 1990 an "Enterprise for the Americans"[80] was proposed by President Bush. The same happened in the Asiatic hemisphere were the Asia-Pacific Economic Cooperation, APEC, had been established in 1989 which began the talks for the creation of a free trade area across the Pacific and in 1990 Mahathir Mohamad, Malaysian Prime Minister proposed an all-East Asian economic grouping which purposely excluded the United States from the accord.

Even though all these regional initiatives represented amazing goals for the States that had signed them, they took time and concentration away from the Uruguay Round negotiations not to mention the fact that these developments competed with their spirit, distracting the leaders from giving absolute priority to GATT. European heads of state were strongly focused on the economic and social developments that were affecting Europe at the time. The United States were called upon to take important and difficult decisions, the consequences of which put their long leadership of the Uruguay Round to the test. Although the premises were not the best, the initial optimism returned to the surface, and "World Trade: The Courage to Go Further" became the official motto of the Brussel meeting[81]. The primary objective of the summit was for world leaders to be able to find a solution to the remarkable issues, to reach a conclusion for the negotiations by early 1991 as US fast track authority expired on the last day of May. Unfortunately, despite the progress made, the agricultural sector continued to be a major obstacle to the conclusion of the negotiations, but the GATT Secretariat managed to make enormous progress with all the groups that had taken part in the meeting, working on a 391- page draft agreement. On this occasion, the European Community declared that it would be possible to be more flexible on the issue of agriculture if progress were made in all other fields as well. This news was misinterpreted by the press, which reported to the world that the EC had given in on concessions of farm support and that the United States decided to completely subvert their position in regard to services such as telecommunications, banking, and insurance. This confusion is rooted in a mistake made by the European bodies: the Commission was firmly convinced that it had large room for maneuver in the sphere of agriculture and communicated this to others, not thinking that the Member States had not yet consented to it. The following day, due to the ever-increasing confusion at the negotiating tables, the chairman took the strong decision to suspend them and Director-General Dunkel was called for the pursuit of an intensive round of consultation for the differences to be resolved as soon as possible[82].

It is in fact usually assessed that a basic agreement would have been reached at the Brussel conference in late 1990 had they overcome the *impasse*;

[80] The goal for President Bush was the creation of a comprehensive and free trade zone for the Americans.
[81] *Supra note 72.*
[82] NAKILAR, DAUTON, STERN (2014).

however, in that case, the result would not have had the comprehensive scope that it had in its final agreement signed in Marrakesh in April 1994. Those three, additional years of negotiations significantly widened the scope of the agreement, whose commitments were broadened and deepened on a wide range of issues. The very creation of the World Trade Organization would not have happened had the agreement been reached in Brussels. During the summer of 1991, negotiations under the guidance of Director General Dunkel were exponentially intensified and a reduction for non-agricultural tariffs was eventually agreed upon[83]. Notwithstanding criticalities and disagreements on Agriculture, the Director-General circulated a 436 pages long *Dunkel Draft* so as to orientate the negotiating process towards a general consensus; the draft was deemed "not acceptable" by the EC, and the US' acceptance came with reservations. The results produced were astonishing as by 1992 all Contracting Parties positions had moved toward consensus with the willingness to be able to reach a final agreement by December so that the US Congress could approve it exploiting the two years extension of its fast-track authority which was set to expire in April 1993. As French representatives became more obdurate, agriculture was once again placed at the center of the negotiations.

Thanks to one of the greatest diplomatic maneuvers performed by the United States, the impasse on agriculture was eventually broken. This goes to show that history is often made not through the dialectical forces in play but by individual initiative[84]. Despite having lost the presidential elections, President Bush' and his Trade Representative, Mrs. Carla Hills pushed for an ultimatum to the European Community. It is quietly known that the Uruguay Round agricultural package has long been connected to a bilateral issue of over $1 billion US oilseed export loss through the work of the European Community's agricultural policy on which GATT dispute panels had twice ruled in favor of the United States. Knowing that the new Clinton administration would be very reluctant to overturn its decision due to the conservative majority at the Congress, in November 1992 Mr. Hill announced a retaliatory oilseed tariff of 200 percent on $300 million several agricultural products as well as wite whine coming from the European Community. It is thanks to the "Blair House Accord"[85] of 1992 that the *impasse* on agriculture was finally overcome as it paved the way to the very last stage of the Uruguay Round of negotiations. Trade Representative, Mickey Kantor, worked diligently with the EC Trade Commissioner, Mr. Leon Brittan, as President Clinton managed to extend his negotiating authority for an additional year. Former Irish Prime Minister and newly elected GATT Director-General, Peter Sutherland, through a boost in political forcefulness in the process of negotiation, managed to seek the necessary compromises for the agreement to

[83] PATTERSON (1994).
[84] NAKILAR, DAUTON, STERN (2014).
[85] A Memorandum of Understanding on Oilseeds, *The Blair House Agreement*, was negotiated with the US during the GATT Uruguay Round negotiations in 1992.

be reached. In order to maintain the notification requirement under U.S. trade law, the agreement had to be reached by December 15, 1993, at the latest even though the very last few issues had remained unsolved until the 14th. As far the organizational reform is concerned the creation of the World Trade Organization was ultimately accepted at the very last minute when Director-General Southerland was finally able to proudly announce, live on CNN that the most far-reaching and historic accord had finally been achieved. Many were the issues to be solved and the changes to be made before the official signing of the final agreement at Marrakesh, but no main problems were encountered. The implementation of this agreement was left to the newborn WTO Committee and in fact, its operations have been lackluster. On the 14th of April, Moroccan King Hassan II, at the signing ceremony, welcomed the newly reached agreement and the creation of the WTO as milestones in the step toward an increasingly broader and more intensive international cooperation.

To conclude this historical account, it is of vital importance to reserve a more detailed presentation of the creation of the WTO and its implications. As already pointed out in this elaborate, the failure of the national government to ratify the constituent instrument of the International Trade Organization in 1947 and their decision to only adhere to the provisional framework of the GATT, has caused the international trading system to undergo forty years of endless proposals and discussion before a final accord on a permanent trade organization was finally agreed[86]. Many were the options brought to the negotiating table: many states advocated for an UN-style global membership while others, following the dramatic failure of the Brussel meeting of 1982 pushed for a more restricted membership, a union of like-minded countries working together to achieve greatness. In 1989, American economist Gary Hufbauer went as far as proposing the creation of an OECD[87] Free Trade and Investment Area. Notwithstanding the creation of a new trade organization was not included in the 1986 Uruguay Round mandate, discussions sparked over the need for an institutional reform, including the creation of a more efficient dispute settlement mechanism. Serious talk over the creation of a permanent trade organization began with the Quad[88]framework in 1989 upon Canadian initiative with the full support of the EC. Highly concerned with Congressional approval over the inevitable loss of sovereignty, the United States did not welcome with enthusiasm the proposals put forward by its fellow Quad members as they fear it would shift the negotiations away from their primordial objective, trade liberalization.

Canada formally called for the creation of the World Trade Organization in April 1990 basing its proposal on the works of John Jacks, an American

[86] REICH (2017).
[87] The Organization for Economic Co-operation and Development.
[88] US, EU, Japan, and Canada

legal scholar who worked as an advisor for the Canadian delegation at the Uruguay Round. Despite little, if non-signs of progress were made during the Brussels meeting of December 1990, the conversations intensified considerably between 1991 and 1993 both in the Quad and in the Geneva negotiation group. The issues at stake became central to the outcome:

- *Single undertaking principle:* there were numerous uncertainties as to how the newly established agreement would have reconciled with the already existing obligations for trade in goods. The WTO sought to overcome such an issue by grouping together all provisions agreed upon at The Uruguay Round and the previous GATT's obligation into a single undertaking that would be subject to the overall WTO managing structure. Moreover, differently from the old GATT membership, where many developing countries restrained from signing the final agreement, membership of the new organization called for the reaching of an agreement on all provisions of the single undertaking[89];
- *Strengthened dispute settlement procedure:* undoubtedly this has been the most important objective of negotiations throughout the whole duration of the Round. The new dispute settlement mechanism emerged strengthened and more disciplined, the WTO dropped the old veto power of its long-gone GATT's days and replaced it with the creation of dispute panes together with the establishment of the appellate review procedure, right granted also to the accused party in the dispute. The final agreement also allowed for the so-called "cross-retaliation" among the signatory states[90];
- *Decision-making process:* within this field, the United States called and pressed for a continuation of the GATT's consensus mechanism for the decision-making process which also entailed the recourse to the qualified majority over specific issues. On the other hand, the majority of the Member States were in favor of the UN-style model of one vote for one nation. However, the final result was for decisions to be taken through the mechanism of negative consensus or, should it fail for whatever reason, through either simple or qualified majority on a one nation one vote basis. Amendment to certain articles of the Agreement required unanimity among the Member States[91].

The ultimate result stemming from these three institutional issues represents the long searched political trade-off between the developed countries which continuously pushed for an agreement to the full range of Uruguay Round by developing countries as the price for membership and

[89] NAKILAR, DAUTON, STERN (2014).
[90] *Ibid.*
[91] *Ibid.*

developing countries which requested a stronger multilateral trade organization in which to exert an objective influence.

As per tradition, the United States continued to maintain a semi-hostile attitude towards the agreement for the creation of the WTO. While they were not totally sure of the Congress' approval, they tried to use their indecision as leverage to get as many concessions as they could to later proceed and sign the final agreement on the very last available date of the negotiations. Congress did give President Clinton a hard time as he had to make many concessions, including the creation of a panel composed of retired US judges, whose duty was to monitor the findings of the dispute panels of the WTO which was later followed by a Congressional vote on the possibility to withdraw from the WTO had the judges disagreed with the panels three times over the course of five years. The Uruguay Round Agreement was approved with a large majority both in the House and in the Senate[92].

[92] STILES (1996).

1.5 The WTO: The World Trade Organization

The World Trade Organization, established following the Marrakesh Agreement of 1994, officially started its activities on the 1st of January 1995[93]. Up until these days, it is considered to be one of the greatest achievements in terms of multilateral cooperation as states have been historically reluctant to give up part of their sovereignty especially in trade-related fields. The WTO represents the official forum for the discussion and negotiations of multilateral trade accords and where controversies are solved through an innovative system of rules. Its activities do not revolve around the sole reduction of non-tariff or tariff barriers, but bear also on the freedom to provide services, on the tutelage of intellectual property, on the advancement of development, and the protection of the environment[94]. Thanks to its institutional structure, conferred to it by its founding agreement, it is possible to place the WTO on the same level as the financial and monetary organizations of the United Nations system derived from the previous Bretton Woods agreements such as the World Bank Group and the International Monetary Fund. It is precisely thanks to a healthy and close collaboration between the institutions mentioned that the much sought-after restructuring of economic and financial relations between the member states could finally be achieved. But how does the World Trade Organization differ from the old GATT?

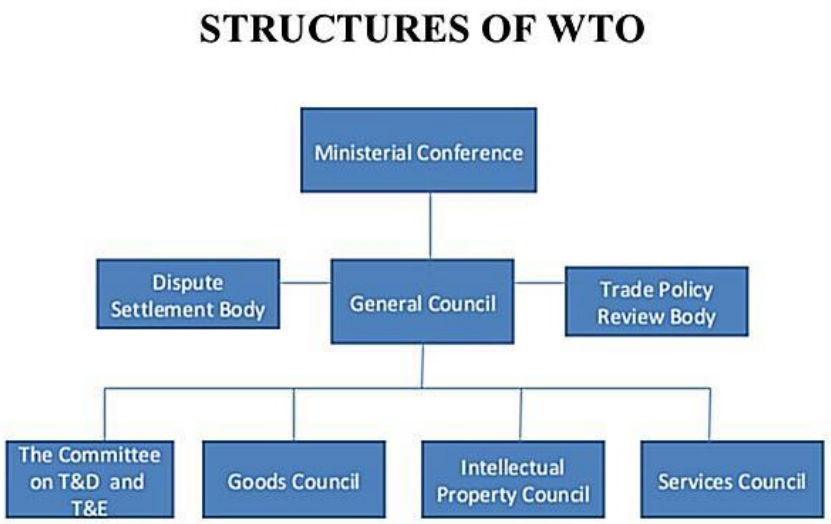
First and foremost, due to its organized and distinctive legal structure, the WTO no longer represents a provisional General Agreement between contracting parties but rather a proper International Organization that enjoys its own legal personality. Notwithstanding a considerable number of debates have emerged on whether International Economic Law should be treated as a new autonomous branch of International Law, the newborn WTO had been created as a completely new organization with its own legal order which fully complies with the basic principles of the discipline: international cooperation among state and non-state actors, the respect of the sovereignty equality of states and the inalienable duty to recourse to peaceful means for the resolution of disputes. The agreement establishing the WTO consists of three sub-agreements that are classified according to the main areas of intervention: goods, governed by the General Agreement on Tariffs and Trade, services that are regulated by the General Agreement on Trade in Services and lastly, intellectual property governed by The Agreement on Trade Related Aspects of Intellectual Property.

Within this context, it is crucial to bear in mind that all the achievements which resulted in over fifty years of functioning of the General Agreement on

[93] Registered by the Director-General of the World Trade Organization, acting on behalf of the Parties, on 1 June 1995, N. 31874, *Marrakesh Agreement establishing The World Trade Organization (with final acts, annexes, and protocol)*

[94] NAKILAR, DAUTON, STERN (2014).

Tariffs and Trade did not go wasted. Most of the rules, precedents, and principles of the GATT have been incorporated in the new legal body of the World Trade Organization[95]. Crucial, for the management of the World Trade Organization are the principle of coherence and association as every taken decision is later integrated into a single undertaking as mentioned in the section above. All multilateral trade accords which are negotiated under the legal agenda of the WTO constitute an inherent part of the Marrakesh Agreement and hence have to be considered binding upon the Member States as "nothing is approved until everything is approved"[96]. The Organization's bodies do have the capacity of adopting successful decisions directed at the effective settlement of complex problems despite not really having the power to impose binding resolutions. If countries disrespect and do not comply with the decisions taken, such actions can be prosecuted within the guidelines of the Dispute Settlement Body[97]. The chart below shows the organizational structure of the WTO as provided by the legal framework through which it has been created[98].



[95] DILLON (1995).
[96] GALLAGHER, STOLER (2009).
[97] CHARNOVITZ (2019).
[98] Structure and Functions of the WTO (2018).

Although like all other International Organizations, the WTO is composed of Member States, the organization retains a peculiarity, considered by many as one of its greatest strengths: while remaining the main forum for negotiations between states, in order to foster cooperation at the international level the World Trade Organizations allowed also for the participation of NGOs and Communities in the negotiation talks[99]. This choice is the direct result of a long series of reasoning held in the principles of transparency: in order to strengthen and enhance it, it is of crucial importance also to include non-state actors as well as representatives from the civil society to have a more complete understanding of the different interests at stake for the whole international community[100]. Being able to address current issues more cooperatively is fundamental as the world becomes exponentially interconnected and interests intertwined; the WTO can take pride in it, as its work represents the enormous progress which has been done toward that direction. The groundbreaking progress that has been achieved in the economic field, especially after the collapse of the communist regime, has caused States to create relations of growing interdependence among themselves, leading them to assume an attitude of cooperation; should the interests of a single member state prevail over those of the whole community, the entire system might be at stake.

To better comprehend the true spirit of the World Trade Organization is central to specify that its main objective it is not that of reaching a status of equity among its member states; it rather seeks to produce a certain degree of legality through the absolute respect of the fundamental principle of equality of state sovereignty mentioned above[101]. Despite countries might differ in terms of power and size, the Organization ensures the full respect of the standard which calls for one vote for one government. While the principle of equity refers to the fair and reasonable administration of justice[102], the principle of equality of state sovereignty represents the:

> "necessary corollary of the principle of sovereignty which provides that states have supreme authority within their territory, it sustains the plenitude of internal 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"[103]

As it is shown in the chart above, the bodies which form the apparatus of the World Trade Organization are quite numerous, what is striking is that the Member States do have an active and participant role in all of them; not only in the Ministerial Conference which is the principal organ but also in the different committees and in Dispute Settlement Body which will be later

[99] NARKILAR (2005).
[100] DARAHAN (2020).
[101] LAMY (2007).
[102] FRANCIONI (2013).
[103] BESSON (2009).

described. As already mentioned, the very intrinsic peculiarity of the WTO is its capability of being both a forum for the negotiations on the enhancement of cooperation but also a proper international organization with its own dispute settlement mechanism[104]. To ensure that states are treated as equals, the principles of reciprocity and non-discrimination intervene[105]. The first finds its greatest importance and expression in the words of the Secretary-General before the General Assembly of the United Nations, through which he affirms that at the international level all states have the right and need for a framework of fair rules which each can be confident that others will obey[106]. The centrality of the second principle is in the famous Most Favorite Nation Clause, considered to be of timeless importance as it also constitutes the very first article of the GATT. However, as stated at the Uruguay Round, an exception to such principle exist through the implementation of the Enabling Clause; it is of crucial importance for the WTO to ensure that developing countries can be facilitated up until their economies can catch up with the ones of the other Member States.

The last pillar worth mentioning is the obligation of WTO to resort to peaceful means for the resolution of the disputes that might arise in the international trading system. The resolution of disputes is considered to be one of the most prominent activities of the Organization; usually, controversies arise when a given Member States believes that another government is breaching an agreement or a given commitment made within the framework of the WTO. Up to this day, the World Trade Organization has one of the most prolific and active dispute settlement mechanism in the entire world[107]. Since the character of its jurisdiction is compulsory, Member State cannot counter the commencement of a Dispute Settlement procedure[108]. The dispute resolution mechanism is closely linked to the decision-making procedure and encourages members to overcome any differences through consultation in the first place. According to Director-General Renato Ruggiero, the first to be invested with such a role, it represents one of the major contributions of the WTO, as such a system, through its countless rules, guarantees a more solid world economy and a more stable international trading system.

1.5.1 Mission, objectives, and basic structure

The pivotal role for which the World Trade Organization has been created is that of ensuring the implementation of a comprehensive ad cohesive framework for the regulation of international trade aimed at removing barriers

[104] LAMY (2007).
[105] WTO, *What is the World Trade Organization?*
[106] *Communique by the Council of Presidents of General Assembly of the 19th of November 2004*, United Nation Department of Public Information.
[107] *Supra note 98.*
[108] HENCKELS (2008).

which might impede the free circulation of goods and services and for the peaceful resolution of economic conflicts that might arise among the Member States[109]. The WTO exists to "facilitate the implementation, administration, and operations as well as to further the objectives of the WTO Agreements"[110]. Among the numerous objectives such as the progressive enlargement of the membership, the attainment of a condition of full employment, and the overall improvement of the standard of living, the functioning of the WTO revolves around four specific tasks. Firstly, it strives to provide a broad forum of negotiation for the Member States for both present issues and those which might come in the later future, second, it administers the revolutionary system of dispute settlement, third it also oversees the correct functioning of the Trade Policy Review Mechanism[111] and lastly, where needed, it cooperates with the World Bank and the International Monetary Fund.

The preamble of the WTO agreement specifies the essential importance of preserving both the environment and the various needs of developing countries, which, as pointed out above, within the organization's framework enjoy certain benefits. As in the GATT, also in the WTO, fundamental importance is given to the Most Favored Nation principle that establishes the immediate extension of the benefits negotiated bilaterally between two states to all the others. This principle is also included in other WTO agreements such as the WTO: TRIPS and GATS as if to reiterate its importance, although the principle may be handled slightly differently. Also, concerning the principle of national treatment, the WTO is aligned with its predecessor agreement. Domestic products, as well as imported goods, must receive the same treatment; the same principle applies for the provision of foreign and domestic services, but also for copyright, trademarks, and all patents. Of great importance in the context of the WTO is the principle of transparency; it is based on the commitment made by each individual country of the organization to keep the promise not to increase or reduce barriers to free trade in goods, products, and services[112]. The World Trade Organization, in addition to actively contributing to the full economic development of its Member States, recognizes that certain flexibility must be reserved for all developing countries in order to ensure that their economies can be put on a par with the others in the best possible way and in the shortest possible time. it is precisely for these reasons that the organization is firmly committed to maintaining all the measures taken in this regard by the GATT. The WTO is often described as an institution devoted to free trade, but this is not entirely true; it is important to keep in mind that the system allows states to introduce tariffs or other forms of protection as long as they do not exceed the limits. More precisely it has to

[109] NAKILAR, DAUTON, STERN (2014).
[110] WTO Agreement Art III:1.
[111] It is the main transparency instrument of the World Trade Organization, affording opportunities for a process of a collective evaluation of the trade policies and practices of individual members.
[112] KARIM (2014).

be considered a system that works and strives for the achievement of a status of fair and undistorted competition among countries[113].

The Ministerial Conference is the highest authority that governs the whole structure of the World Trade Organization and it is composed of representatives of the Member States[114]. According to the statute of the Organization, the Conference has the obligation to meet at least once every two years to discuss but specially to take decisions upon issues which fall under the framework of multilateral trade agreements. The other governing body is the General Council, its main duty is to carry out the day-by-day operations of the WTO. As in the Ministerial Conference, also the General Council is composed of representatives of Member States, and it is considered the chief decision making and policy body which act as a bridge between the different meetings of the Conference as it is obliged to report everything to it. As well as conducting its regular work on behalf of the Ministerial Conference, the General Council also discharges the responsibility of two of the main subsidiary bodies of the WTO namely: the Dispute Settlement Body and the Trade Policy Review Body. Contrary to the Conference which is obliged to schedule a meeting, the General Council meets when it is deemed appropriate. Hence, these three bodies represent the administrative apparatus of the World Trade Organization. The General Council also delegates responsibilities to specialized councils and committees which report directly to it; those are the Trade in Services Council, the Councils for trade in Goods, and for Trade Related Aspects of Intellectual Property. These three bodies also have the authority to call for the creation of specific committees depending on the subject matter and the interests at stake. Over the years numerous committees have been created such as the Committee on Balance of Payment which is the primary responsible for the communications between the Member States and those countries which engage in trade-restrictive measures[115], a committee on Budget, Finance and Administration as well as a committee on Trade and Development whose primary concern covers all those issues related to developing countries, more specifically to those least developed among them. In order to deal with the multitude of matters brought on by the governments, the WTO generally creates *ad hoc* working parties comprising representatives of the Organization members who participate on a voluntary yet official basis.

The Secretariat of the World Trade Organization is located in Geneva and it is presided over by a Director-General and four deputy directors generals appointed by the Ministerial Conference. In turn, the Director-General has the power to appoint all the staff and provide for the guidelines for the well-functioning of the entire body. The primary duties of the Secretariat include

[113] NAKILAR, DAUTON, STERN (2014).
[114] ANAND (2018).
[115] Articles XII and XVIII of GATT.

providing resources to WTO Members with regard to negotiations and the overall implementation of the agreements. It has a special obligation to provide technical assistance to developing countries and in particular to the least developed ones. WTO analysts and statisticians provide trade performance and trade policy research while their legal personnel aid in the settlement of trade issues, including the application and interpretation of WTO laws and legal precedents. Indeed, much of the work associated with the Secretariat deals with the negotiations for the accession for new members for which it provides governments advice regarding their possible upcoming membership.

1.5.2 Membership to the World Trade Organization

As of today, the WTO counts 164 Members, the majority of which are sovereign States. It is important to emphasize that the Organization allows access and participation also to all independent customs territories, i.e., all those areas of the world that enjoy a certain degree of independence in the trade sector but do not enjoy complete political sovereignty as Hong Kong and Taiwan. Most WTO Members are previously GATT Members who have signed the Final Act of the Uruguay Round and concluded their market access negotiations on goods and services by the Marrakesh meeting in 1994. A few countries which joined the GATT later in 1994, signed the Final Act, and concluded negotiations on their goods and services schedules, also became early WTO Members. Other countries that had participated in the Uruguay Round negotiations concluded their domestic ratification procedures only during the course of 1995 and became members thereafter. This transition from the 23 original states to the current 164 took place mainly during the GATT, by virtue of a provision contained in the agreement itself that gave all countries that were about to achieve independence the possibility to access the agreement automatically[116]. It is important to remember that since the seventies, the almost majority of the members were developing countries; this majority in forty years has grown exponentially until today to represent three-quarters of the general membership of the World Trade Organization[117].

Usually, members are distinguished between the "original members" and "members by accession". The first group includes all those states that since January 1, 1995, have been members of GATT 1947, i.e., all those who have accepted the Constitutive Agreement of the WTO and the related multilateral trade agreements. All programs on goods and services must therefore be concluded by the GATT 1947 countries through bilateral and plurilateral negotiations, in order to start the respective procedures at the national level to be able to proceed with the reception of the agreements. The second grouping

[116] NAKILAR, DAUTON, STERN (2014).
[117] ALEM (2020).

is made up of all those governments or customs territories mentioned above that enjoy full autonomy in the commercial sector, which spontaneously decide to be part of the World Trade Organization. To the 164 full members must be added all those States that have made a formal request for access and that until the formalization of such, enjoy the status of observer sSates[118]. These countries have the right to participate in all general meetings, formal and informal, but without having the right to vote extended to other Members. Some of the most important international economic organizations enjoy observer status, but unlike other international organizations, the WTO does not grant such status to non-governmental organizations.

The accession process in order to become a full member of the WTO is very difficult and time-consuming. In this context, the access processes of China and the Russian Federation have been peculiar. With regard to the first one, the fundamental prerequisite for its accession was the obligation for the negotiation of bilateral market access packages with the relevant WTO members, namely the United States and the European Community[119]. Only after the completion of these rounds of bilateral negotiations, the discussion on the annexes of a Protocol of Accession was brought to the table. The whole process was concluded with the proclamation of China as a full member of the WTO at the Ministerial Conference in 2001, after fourteen years of negotiations. As far as the Russian Federation is concerned, it is important to emphasize that its access has been a very important goal for the entire organization. The whole process has lasted about eighteen years, but with its conclusion, it has reached a balanced membership within the WTO. Nowadays all the states that are part of the G20 are also members of the World Trade Organization. The accession of Russia was also remarkable because with the collapse of the Soviet Union that the largest number of accessions to the organization was registered during the Uruguay Round. The collapse of the Soviet bloc and the process of modernization of some of the most prominent Asian economies have determined the long-sought, economic rapprochement by Eastern Europe Countries and Indochina as well. The status of the European Union is extremely peculiar; in fact, it has never formally applied to join the WTO but was automatically added over time thanks to its member States by virtue of the principle of Conferral[120] upon which the Member States have transferred to the Union many of their competences in the field of trade.

As previously mentioned, the accession process is very long and complex. The finalization of admission to the WTO implies the acceptance by governments of the whole set of rules in their entirety without exception, with

[118] Handbook on the accession to the WTO.
[119] In the context of the World Trade Organization the European Union is still referred to as the European Community.
[120] Articles IV and V of TEU.

the consequent considerable legislative effort for the updating of the entire national apparatus, whose task is to apply these rules within the country. First, the country wishing to apply for access must produce a formal document in which it accurately describes all aspects of its trade and economic policies that could have an impact on existing WTO agreements. A working party will then be set up within the organization, whose task is to examine all applications for membership. Once the formal request has been exhaustively examined, the process of bilateral talks will start between the requesting country and each Member State of the WTO. This process, among other things, determines the specific benefits for WTO members in permitting the applicant to accede. Once these bilateral talks have been concluded, the working parties proceed with the production of an accurate report, which contains all the terms and conditions of access, and also draws up the accession protocol together with a list of all the commitments made by the Member States. The final package, which consists of the report, the protocol, and the list of commitments is then submitted to the General Council of the World Trade Organization or to the Ministerial Conference. Should a two-thirds majority of votes in favor be reached, the requesting country can then proceed with the official signature of the accession protocol and become a full member of the organization. In most cases, the national legislator or the Parliament of the country has the obligation to ratify the agreement before accession is formally concluded[121].

1.5.3 WTO Decision-Making procedure

With regard to the entire decision-making process, the agreement establishing the WTO, recalls the same practice used in the previous forty years of the GATT regime. Decisions must therefore be taken through the complete and absolute consensus of all Member States and where it is not possible to reach such consensus then it is possible to recourse to the exercise of voting. In this case, decisions may be taken by a simple or qualified majority depending on the subject matter in question. With the exception of the European Union, which has as many votes as its member states, according to the agreement, each state is entitled to only one vote regardless of the political or economic weight of the country. Despite the full freedom given to the States to make decisions by recourse to the vote, nor in the GATT regime before and in the WTO after, has it ever come to the use of the formal voting procedure practice; this depends on the repeatedly reiterated willingness of states to make decisions through the achievement of consensus, preferring, therefore, to extend the duration of negotiations rather than risking the uncertainties inevitably linked to a secret vote. Substantial, however, is the difference in consensus as understood by the GATT compared to that of the

[121] NAKILAR, DAUTON, STERN (2014).

WTO. In the World Trade Organization regime, the consensus is reached when no Member State opposes the decision taken.

The consent, therefore, does not appear as a formal approval by the contracting countries, but rather their non-opposition to the decision[122]. While it is true that on the one hand, that the use of this decision-making formula guarantees the right to all states to be able to block a decision considered disadvantageous for their individual interests, on the other hand, it also constitutes a huge disadvantage for all those states that do not have a permanent representation in Geneva. Achieving consensus implies a considerable lengthening of the time frame for negotiations, thus disadvantaging all those countries that do not have the necessary resources to cope with the long time required by the process[123]. However, there are specific and informal mechanisms within the WTO that aim to reach consensus. Among these, it is important to highlight the so-called "green rooms", meetings that are chaired by the Director-General and attended by no more than forty members between developed and developing countries that have the greatest interest in the issue at stake. In conclusion, it is important to emphasize that other types of negotiations are developed and concluded through simple bilateral meetings or informal meetings.

[122] FOOTER (1997).
[123] NAKILAR, DAUTON, STERN (2014).

2 Chapter 2: Dispute Settlement Mechanism and The Appellate Body

2.1 Why Dispute Settlement?

Why do international trade agreements need a set of dispute settlement provisions? Ever since the 1980s, several International Relations scholars have started looking for an answer to such a question. It has been argued that the lack of trust among States and the deficiency in transparency constitute one of the major obstacles to the well-functioning of international cooperation[124]. Liberal Institutionalist have placed at the heart of their theory the model of the prisoner's dilemma, which in this context represents the starting point for the illustration of various difficulties cooperation might encounter. Providing countries with a proper system for the resolution of controversies which hence enhances also the overall trust and information might constitute an important way to address incentives for both retract commitments or free-riding. Although the World Trade Organization Dispute Settlement is not usually associated with a centralized structure of enforcement, it managed to establish a wide system of reciprocity, creating several normative references that translate to a significant burden posed to the unilateral exercise of power. Liberal institutional International Relations theory thus views the WTO as an organization that ultimately enables and enhances multilateral trade liberalization by exerting legal pressure on the Member States that do not comply with their commitments through a judicial process, hence discouraging non-compliance with its rules.

Contrary to liberal institutionalist, realist theories of International Relations tend to undervalue the necessity and importance of a system for the peaceful resolution of disputes in multilateral accords as long as an obligation for states remain weak[125]. Within their tradition, only hegemonic power politics has the capability of imposing some sort of discipline in the international community. This inevitably implies that strong commitment to international obligations that can be achieved only when such commitments are relatively weak in the eyes of States and thus reflect what they would do anyway. In this context some of the main features of international institutions as the dispute settlement are considered as being part of the general scenario in which power politics plays out without having any type of significant or relevant results of their own. Undoubtedly, the dispute settlement of the World Trade Organization creates numerous challenges for both streams of thought. From a liberal institutional point of view, the establishment of a powerful dispute settlement mechanism still remains a puzzle due to the position adopted by GATT's Contracting Parties at the onset of the Uruguay Round.

[124] KEOHANE (1984).
[125] DOWNS, ROCKE, BARSOOM (1996).

Going beyond the general debates that have emerged in the International Relations research, many of the approaches which are embedded both in law and economics literature have motivated and pushed forward the analysis of the Dispute Settlement Mechanism of the WTO. Liberal institutionalist perspective is widely enriched by the new elements brought about by the legal and economic point of view of the dispute settlement itself. One of the most important notions is most certainly that of "incomplete contracts[126]". There are, however, differences in terms of completeness when WTO agreements are compared. In many cases, the negotiators have explicitly stated what contractors are allowed to do while in some other issue areas major gaps in the original contracts exist. The recourse to the dispute settlement mechanism is more likely to occur when a country starts questioning the fulfillment of the contractual obligation by another contracting party. This inevitably leads to an exponential delegation of interpretative power to the adjudication body which is called upon to adjudicate whether alleged *ex-post* nonperformance constitute a legal breach or a violation of the contract[127]. The very need to enforce obligation stemming from a certain WTO agreement it is not the primary driver of the overall demand for dispute settlement; it is rather the existence of ambiguous wording in the provisions of the agreement or contractual silence on a great number of issues that creates different expectations on the interpretation of the contract. Within this context, the dispute settlement mechanism by addressing the conflict might also fill the contractual gaps previously created. If looked from the perspective of the one who is called upon to judge, the only question that arises concerns the type of interpretation deemed more adequate to address incomplete contracts.

In the International Relations research arena, a substantial debate has emerged among scholars who rely on delegation theories as they are deemed capable of assisting in the conceptualization of the functions and the politics of the dispute settlement. Within the supporters of delegation theories, there are different views and currents of thought regarding the conceptualization of the two main agents[128] of the dispute settlement of the WTO namely the Appellate Body and the panels. Without a shadow of a doubt, the primary function of the dispute resolution mechanism, at least from a purely functional point of view, is to ensure the credibility of the commitments agreed upon between member states. Yet, the abrupt change in the delegation from member states to panels creates a substantial difference in expectations about the

[126] Mainstream IR literature has long focused on how to explain opt-outs assuming that incomplete contracts represent endogenous decisions.
[127] A breach of contract is a violation of any of the agreed-upon terms and conditions of a binding contract. The breach could be anything from a late payment to a more serious violation such as the failure to deliver a promised asset. A contract is binding and will hold weight if taken to court. To successfully claim a breach of contract it is imperative to demonstrate that the breach has occurred.
[128] Art.6 of the DARIO.

proper functioning of the DSM. While there is a tacit agreement that panelists have significantly less autonomy and work as agents of arbitrariness, there is widespread recognition of a level of both individual and group discretion for Appellate Body ('AB') members. The extent of autonomy AB's members enjoy with respect to their own governments it is still the subject of various debate among scholars. For many experts, the Appellate Body constitutes a trustee operating outside the full control of the World Trade Organization[129]. This view of the AB as an almost autonomous organ is supported by the fact that it is not possible to either contract or impose sanctions on member states given the high majority thresholds required for adoption [130]. According to other experts, on the other hand, the Appellate Body represents a group of agents with limited autonomy that are highly influenced by their principal through a series of *ex-ante* control tools[131]. It is possible therefore to state that delegation theories help to better grasp the situations and conditions according to which principals manage to successfully exert control tools capable of affecting the behavior of those called upon to adjudicate disputes.

Finally, many have been the legal scholars who have described the Dispute Settlement Mechanism ('DSM') as a great stabilizing factor that by impartially identifying breaches, manages to promote peaceful relations between countries and not only as an enforcement devise that renders defection more costly to the Member States. The Dispute Settlement Mechanism succeeds in putting a gap to the compulsive retaliation policy undergone by countries in the past, by offering a great deal of legal clarification to private trades[132] while at the same time it fulfills its domestic constitutional function of protecting trade from government abuse[133]. The gradual shift from a diplomatic or "power-based" approach to one focused heavily on rules, was widely appreciated and applauded within the legal arena. It is important to note, however, that many were those who insisted that the full legalization of dispute resolution mechanism is a process that cannot be dissociated from politics, but undoubtedly requires considerable effort to balance law and politics for the better functioning of the system as a whole.

[129] ALTER (2008).
[130] In order not to accept a panel or Appellate Body ruling, WTO members must reject it by consensus, or indirectly they could attempt to engage in "authoritative interpretation", for which a three-quarters majority is necessary.
[131] The principal-agent relationship is an arrangement in which one entity legally appoints another to act on its behalf. In a principal-agent relationship, the agent acts on behalf of the principal and should not have a conflict of interest in carrying out the act.
[132] JACKSON (1997).
[133] PETERSMANN (1986).

2.2 Means of peaceful dispute resolution

The International Community is constituted of entities, mainly States, each of which is the maximum ruler in its territory according to the principle of *superiorem non recognoscents*[134]; the coexistence between such entities is guaranteed and regulated by a series of legal norms which in turn constitute International Law. The primary purpose of the international legal system is to protect and safeguard total harmony between States to ensure global peace[135]. The implementation of this commitment is made possible only through the regulation of relations between the various members, but especially through the establishment of mechanisms for the peaceful resolution of disputes. As mentioned in the previous chapter, it was only after the horrors of World War II and the adoption of the United Nations Charter that the world order witnessed a major shift in its understanding of dispute settlement[136]. States are therefore under the legal obligation to settle their controversies peacefully without having to recure to the use of force as stated in Art. 2 par. 3 of the Charter of the United Nations[137]. In 1970 through a resolution, the General Assembly declared that "States shall accordingly seek early and just settlement of their disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice"[138].

The onset of a dispute is an inevitable and very specific moment in a given relationship; it assumes an international character when there are two or more states in clear opposition to each other. A dispute is nothing more than a substantial disagreement, or opposition of legal theses or interests between two parties[139]. It is also often defined as a specific disagreement in which the assertation of one party is met with either denial or counter-claim by another[140]. As stated above, States are entitled to a wide range of peaceful means for the resolution of disputes, but within this context it is of vital

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[134] "*Who does not recognize another superior"* The expression is used in constitutional law to indicate the supreme organs of the State which, placed in a position of independence and equality among themselves, are not subject to any superior power. This characteristic does not exclude their being subject to the control of other organs, to achieve coordination between the various powers of the State, and to prevent an organ from carrying out acts other than those proper to it.

[135] ROLING (2009).

[136] Initially, international disputes could be resolved through armed conflict if alternative political or diplomatic solutions could not be found.

[137] Art. 2.3 of the UN Charter states that: "All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered".

[138] Resolution of the General Assembly, 24 October 1970, 2625 (XXV*), Declaration on Principles on International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations*.

[139] Judgement of the Permantent Court of International Justice, 30 August 1924, 1924 P.C.I.J. (ser. B) No. 3, *Mavrommatis Palestine Concessions Concessions (Greece v. U.K.),*

[140] MERILLIS (2005).

importance to underline that although they are under the legal obligation to renounce the use of force, the choice of such instruments made available to them, requires the consent of the contracting parties before any type of procedure can be imposed on them. Having to agree to certain limitations on their sovereignty is, however, a double-edged sword for states, as they often find themselves in disagreement or contrast with the decisions taken[141]. Although not exhaustive, Art. 33 of the United Nations Charter contains a list of all the peaceful procedures available to states to achieve a peaceful resolution of disputes. This norm does not impose the use of a tool rather than another, so states are given full freedom to choose the one they deem most appropriate according to the type of dispute or interest at stake[142]. Without a shadow of a doubt, the instruments for the peaceful resolution of international controversies[143] that are still most used today are those of a diplomatic nature; in fact, they tend to facilitate an agreement between the different parties without necessarily having a binding effect upon them[144].

First and foremost, in this category are negotiations[145]; these are considered to be the simplest and most effective method of resolving disputes in a diplomatic manner, which inevitably makes them the one most often resorted to[146]. The reason why negotiations are often used is that they are not called upon to identify a "winner" and a "loser" within the dispute; their primary purpose is to reach a compromise between the different claims that can promote the good continuation of relations between states. Negotiations are carried out exclusively by the parties involved, excluding third parties, whose intervention is not required. The two parties to the dispute are therefore committed to finding common ground through direct confrontation with each other. There is no general obligation under international law for states to resort to other methods of resolution only if negotiations fail. However, many are the international treaties in which the obligation to go through negotiations is prescribed, as an essential condition for resorting to other methods of resolution[147]. The same holds true also for the Dispute Settlement Mechanism of the WTO, in which the Member States are called upon to undergo consultation and negotiation before proceeding with the arbitration process[148].

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141 PERJU (2018:49-75).
142 Art. 33 of the UN Charter states: "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or other means of their own choice".
143 COLLIER, VAUGHAN LOWE (1999).
144 PETERS (2003:1-34).
145 LACHS (1985).
146 CASSESE (1986:202).
147 Art. 41Vienna Convention on the Succession of States in respect of Treaties states: "If a dispute regarding the interpretation or application of the present Convention arises between two or more parties to the Convention, they shall, upon the request of any of them, seek to resolve it by a process of consultation and negotiation."
148 WTO, *Understanding the WTO: Settling Disputes, A unique contribution*.

It is possible, therefore, to assert that the negotiation can end either with the resolution of the dispute itself, should the states succeed in finding a compromise, or through the drafting of an agreement on the determination of the means of dispute resolution to be adopted[149].

One negotiating technique that States frequently resort to in order to avoid a dispute is consultation. If governments sense that a certain action or procedure they are about to undergo might cause damage to a third party, they engage in a constructive discussion with said party in order to avoid the insurgence of a dispute. This method might avoid a long process of litigation enabling the parties to find a compromise before a dispute arise. Although a technique used primarily at the bilateral level, the benefits of consultations are particularly evident in matters affecting a larger number of states.

Mediation and good offices, on the other hand, are customary dispute resolution instruments that were subsequently codified in both Hague Conventions, in 1889 and 1907[150]. The role of the mediator is conferred upon another member state or an international organization. Being the difference between the two methods very thin, it is quite difficult to assert if a certain type of intervention ought to be classified as mediation or good offices. The mediator's role is to be considered extremely important, and his task is to bring the parties involved in the dispute closest to each other in order to facilitate negotiations and the reach of a compromise[151]. The fact that good offices might not result in genuine settlement agreements, leads to consider this approach as an indirect method of resolution. Good offices, as of today, are carried out mostly by international organizations through their principal organs. On the other hand, the role of the third party in the processes of mediation acquires significant importance as it takes part also in the negotiations, favoring the peaceful resolution of the controversies[152]. It is important to point out that the solutions proposed by mediators do not have any kind of binding effect, therefore the parties are free to reject it if they are convinced that such a solution is not advantageous for their interests. The purpose of mediation, therefore, is to create the necessary conditions for states to reach a peaceful agreement before the dispute turns into a conflict.

[149] LLAMZON (2007).
[150] The Hague Convention on the Pacific Settlement of International Disputes, 1898, 1907.
[151] BUSH (1990).
[152] KLEIBOER (1996).

Of outstanding importance, within the tools for the peaceful resolutions of disputes is conciliation[153]. Here the third party involved acquires a central role as it examines every aspect of the dispute with the ultimate aim of bringing the parties together to reach an agreement by pointing out specific terms of settlement. As an institutionalized process, it is often compared to arbitration because of the strong procedural similarities between the two; what distinguishes them is the lack of binding effect of the proposed solutions. Often the conciliatory functions are exercised by Commissions, either permanently or created *ad hoc* whose competencies are regulated by an accord agreed by the states involved in the litigation[154].

The last step is represented by the arbitration[155], which is recurrently resorted to when state need or want to find a binding solution to their dispute; therefore, it constitutes a judicial and not a diplomatic instrument for resolving controversies[156]. Arbitrations are therefore characterized by the binding nature of the proposed solutions, resulting from the intervention of the third party[157]. Since states are the undisputed protagonists, their consent is the fundamental condition for having recourse to an arbitrator. Such consent can be expressed either in a general or specific agreement which could have also been concluded before any dispute arose. By including an arbitration clause in each contract, two or more state agree that their disputes will be resolved through means of arbitration and that such proceeding will be ruled by specific set of rules. Over the course of the years, arbitration has become an institutionalized process, officially formalized in the Hague Conventions on the Pacific Settlement of International Disputes of 1889 and 1907. Such conventions define arbitration as the most preferable tool for the resolution of controversies

[153] Art. 1 of the Regulation of the *Institut de Droit International* , 11 September 1961, on *the Procedure of International Conciliation* defines conciliation as "a method for the settlement of international disputes of any nature according to which a commission set up by the parties, either permanently or on an *ad hoc* basis to deal with a dispute, proceeds to the impartial examination of the dispute and attempts to define the terms of a settlement susceptible of being accepted by them, or of affording the parties, with a view to its settlement, such aid as they may have requested".

[154] MANI, PONZIO (2013).

[155] Art. 33 of the UN Charter identifies arbitration as a means for the pacific settlement of interstate disputes. More specifically, arbitration represents a consensual procedure for the final settlement of disputes between states based on the law by adjudicators of their choosing. By focusing on the elements of this definition, one may illuminate the nature of arbitration and distinguish it from the other techniques for the peaceful settlement of disputes listed in Art. 33 UN Charter.

[156] Despite the predominance of diplomatic settlement in international relations, States occasionally prefer a legal settlement of disputes, meaning one in which the disputing parties submit their differences to a third party who renders a binding decision based exclusively on the application of legal principles. Arbitration and judicial settlement fall into this category. The exclusive application of legal principles distinguishes these processes from negotiation, mediation, and inquiry.

[157] CASSESE (1986).

among states through the appointment of delegates or special agents[158]. As mentioned above, consensus represents the primary condition for the process to be set in motion; it finds its legal basis in the common will of the parties to submit the dispute to a third party whose intervention is aimed at the issuance of a decisive act. When dealing with cases of arbitration, collegial bodies are usually preferred as they are composed of a varying number of members who are given the power to decide the case by majority vote. What substantially differentiates arbitration from international tribunals, which in turn justifies the more frequent recourse to them, is the greater freedom of procedural forms. In the case of arbitration, states are allowed to personally choose the arbitrators to whom they will entrust the resolution of the dispute, but also the rules that will be observed when issuing the final agreement, thus giving the parties full power of control over the entire procedure.

[158] Art. 37 of The Hague Convention on the Pacific Resolution of International Disputes states that: "The parties have the right to appoint delegates or special agents to attend the Tribunal, for the purpose of serving as intermediaries between them and the Tribunal. They are further authorized to retain, for the defense of their rights and interests before the Tribunal, counsel or advocates appointed by them for this purpose".

2.3 Dispute Settlement in the GATT's Five Decades

As mentioned in the previous chapter of this work, with the failure of the ITO, the General Agreement on Tariffs and Trade became, for over fifty years the only multilateral juridical tool in the trade sector. This has inevitably brought to an exponential enlargement of its functions and its institutional structure. Notwithstanding the provisionary nature of the agreement, Contracting Parties[159] never doubted its compulsoriness even though it inevitably constituted a limit to the operation of the system as a whole leading to an exponential decrease in the effectiveness of the regulatory provisions spelled in the Agreement. It is important to point out that in the international law framework, under Art. 26 of the VCLT for an international agreement to produce legal obligations on signatory states, it must first come into force[160]. Over the years, states have witnessed a considerable increase in the use of provisional agreements which, however, have not always met with unanimous approval. They have been defined by some legal scholars as simple agreements between states, therefore without legal character. According to others, however, these are agreements drawn up in a simplified manner and therefore having a binding effect, in which the signatory States undertake to respect the norms laid down, until the exchange of ratifications for the definitive treaty[161]. For what concerns the GATT, contracting parties have continued to fulfill their obligation despite the provisional nature of the agreement. This does not imply, however, that the GATT regime was in any way perfect; in fact, it was strongly limited in its legal nature due to the inclusion in the text of the famous *grandfather clause*[162] which gave States the possibility to derogate the application of Part II of the Agreement despite being inconsistent with existing legislation. Therefore, in the event of a clear conflict between national and GATT rules, domestic legislation would prevail over the latter[163]. This procedure was justified precisely based on the provisional nature of the agreement. The great urgency to ensure the immediate entry into force of the agreement, especially of those parts that did not require notification by the states, found its solution in a compromise that proved necessary to allow the immediate application of the GATT. Unfortunately, however, when the failure of the agreement began to be realized, the nature of this clause became permanent, thus giving States the

[159] During the GATT regimes, participatory States were referred to as Contracting Parties. The term Member States will be later introduced with the establishment of the permanent World Trade Organization.
[160] Art. 26 of The Vienna Convention on the Law of the Treaties of 1969 states that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."
[161] REITZ (1996).
[162] A provision in the GATT and other trade agreements permitting signatories to retain domestic legislation that was in effect before the agreement was signed, even though it may be inconsistent with certain provisions of the agreement. Only charter members of GATT may take advantage of its grandfather clause; they are, however, expected to bring their legislation into conformity with GATT provisions as soon as possible.
[163] DEVEZA (1991).

possibility to evade the rules of the agreement by invoking domestic law, thus being able to maintain, without committing any type of violation, practices intrinsically contrary to the accord. This regulatory elasticity has greatly contributed to negatively impacting the effectiveness of the system but also its legal rigor.

The deep conviction on the part of the States that the GATT would have an almost short life also explains its poor development from the institutional point of view. It is important to remember that in addition to not having a legal personality, the GATT lacked economic independence; in fact, it was financed by the Interim Commission of the International Trade Organization[164]. Notwithstanding the failure of the implementation of the Havana Charter, this *ad hoc* commission remained well alive for over fifty years, becoming the Secretariat of the GATT retaining little if no powers. As previously stated, the only organ vested with actual powers were the Contracting Parties, made up of representatives of signatory States. In 1960, Member States decided to establish a new organ, namely the Council which ended up taking over the main function of the system comprising also that of dispute settlement, strongly influenced by the weakness of the system as a whole[165].

In any multilateral agreement, the peaceful settlement of disputes is an essential prerequisite for the functioning of the accord, as the purpose of the rules is to ensure that conflicts between states are conducted in full compliance with the rules of conduct set out in the agreement itself[166]. While analyzing the GATT's dispute settlement it is possible to notice how States have long preferred to recur to informal tools for the resolution of their controversies; this practice is perfectly coherent with the provisional nature of the Agreement. The system has recurrently been described as power-oriented by many legal scholars due to the prevailing recourse by States to procedures of a diplomatic nature; in stark contrast to those described as rule-oriented which have arbitration at the center[167]. In general, when a dispute arises between countries that are members to an organization of an economic nature, it can inevitably take on a multilateral character; in fact, it can also affect or have enormous repercussions on the interests of the other signatory States. It is precisely for this reason, therefore, that the parties turn to a third body, where all States are represented, to reach a peaceful conclusion to the dispute. This is done based on the thought that a third, yet internal body, therefore the bearer of the interests of all States, can be much more appropriate than an external third party such as an arbitrator or a court. The reason behind the constant recourse to diplomatic instruments finds its foundation in the need to find

[164] An organ of the United Nations Conference on trade and employment was created ad hoc in 1947 for the establishment of the International Trade Organization (ITO).
[165] NAKILAR, DAUTON, STERN (2014).
[166] REICH (2017).
[167] JACKSON (1979)

solutions that can represent a fair compromise between the needs and interests of the various States[168].

The General Agreement on Tariffs and Trade contained only a limited number of provisions concerning the peaceful resolution of controversies among states; Art XXII and XXIII[169] address the proper conduct of consultations and the provision for the possibility of submitting to the parties concerned the question regarding events which have not been satisfactorily resolved through the consultations. According to Art XXIII, the use of this procedure is limited to the case in which one of the contracting parties considers that "any benefit accruing to it directly or indirectly under the Agreement is being nullified or impaired"[170]. It can be seen, therefore, that a mixture is inevitably created between the litigation function and the normal administrative procedures of the Organization; the states, in fact, in addition to being the only body provided for by the GATT and called upon to carry out the basic activities for the proper functioning of the system, are also required to play an important, if not fundamental role in the resolution of disputes. This overlapping of contrasting function is the direct consequence of the inability of states to adopt the Havana Charter for the establishment of the International Trade Organization[171].

To get a better understanding of the dispute settlement as it was envisioned in the GATT's regime the analysis must start from the first paragraph of the before mentioned Art XIII: it provides for the compulsoriness for the contracting parties to undergo through a phase of bilateral consultation any time that a given dispute among them arises to avoid it to become a proper conflict which could have major repercussion on the entire system. Consultations, used as a method of dispute resolution, thus take on an indispensable character for reaching a common ground between the counterparts[172]. The precise functioning of the consultation was left out of the provision conferring upon States a great degree of discretion while reaching for a solution to the controversy. Should such an agreement fail to be reached, paragraph 2 of the same article provides for the possibility for the countries

[168] DARNTON (2019).

[169] Decision of the Contracting Parties of the GATT, 28 November 1979, (L/4907), "*Understanding regarding notification, consultation, dispute settlement and surveillance".* It officially formalized the procedures for the resolution of controversies which have developed through the costmary practice of GATT.

[170] Art. XXIII of the General Agreement on Tariffs and Trade.

[171] NAKILAR, DAUTON, STERN (2014).

[172] Paragraph 8 of the Understanding regarding notification, consultation, dispute settlement and surveillance of 1979 states that "if a dispute is not resolved through consultations the contracting parties concerned may request an appropriate body or individual to use their good offices with a view to the conciliation of the outstanding differences between the parties. If the unresolved dispute is one in which a less-developed contracting party has brought a complaint against a developed contracting party, the less developed contracting party may request the good offices of the Director-General who, in carrying out his task, may consult with the Chairman of Contracting Parties and the Chairman of the Council".

involved in the disputes, to bring consultations before the Contracting Parties stating that "The Contracting Parties may, at the request of a contracting party consult with any contracting party or parties in respect on any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1". Within this context, the primary organ of the GATT performs functions that are proper of a mediator, being it called upon to bring the parties closer in the search for a peaceful solution.

However, it is not yet possible to talk about "mediation", being the Contracting Parties an internal organ and not an impartial third party to the dispute[173] which will inevitably try to propose a solution eventually accommodating the different claims and requests of the States; it will try to balance the interests of the contracting parties and the well-functioning of the organization itself[174]. If a State considered that an advantage, either directly or indirectly deriving from participation in the Agreement had been nullified or compromised, it could activate the procedure contained in paragraph one of Article XIII of the Agreement[175]. It consisted of a two-phase procedure, the first being bilateral and the second multilateral in nature. As it has been previously stated in this section, bilateral consultations constitute a fundamental condition for the dispute to be brought before the contracting parties; however bilateral consultations as provided for under Art XXII seem to be more official in character as they require the States in the dispute to produce written complaints and solutions proposals. The Contracting Parties' intervention became central in the multilateral phase of the resolution of the dispute as they were required to start an investigation, should the countries fail to find a suitable solution. The scarce provision regulating the discipline and the role of the organ makes it almost impossible to somehow limit the power conferred to it; in fact, contrary to what is spelled under Art. XXII the function the main body was to be exercising was a purely judicial competence, the decisions of which had a binding effect.

If States failed to agree or implement decisions and recommendations issued by the Contracting Parties, the latter could authorize the suspension of the commercial concessions deemed necessary, should the circumstances be "serious enough". Within this context, it is necessary to point out, that the

[173] JACKSON, HUDEC, DEVIS (2000).
[174] NAKILAR, DAUTON, STERN (2014).
[175] Paragraph 1 states that "If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of (a) the failure of another contracting party to carry out its obligations under this Agreement, or (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or (c) the existence of any other situation, the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which is considered to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it".

possibility for a member State to recur to retaliatory measures has prevented several countries to put in motion the dispute settlement procedure during the regime of the GATT[176]. In fact, less powerful States firmly refused to enter into a dispute with strong economies as the risk of retaliation from the latter was deemed too high to bear. Placed in a context of progressive division of powers, it became customary to delegate the conduction of the inquiry to *ad hoc* commissions which could take the form of either working parties or panels of experts as provided for in par. 2 of Art. XXIII. Contrary to the working parties which were made up of States' representatives, the panels were run by independent individuals, whose impartiality was considered necessary for the resolution to the dispute to be more effective[177]. The role of the panel was to examine what had been done before the case was brought before them and to find a suitable solution for the dispute to get to an end. Should the conciliatory procedure fail, the panel was called upon to draft a report stating the motivations for the failure of conciliation. Contracting Parties had, then, to formulate recommendations based on the panels' report or issue a decision[178]. It became quite customary for States not to detach from what had been proposed by the panels by directly adopting their decisions without changing it.

Before GATT '94, the Understanding Regarding Notification, Consultation, Dispute Settlement, and Surveillance of 1979 constituted the most prominent codification of the dispute resolution rules of procedures. However, in 1982 the Contracting Parties signed a Ministerial Declaration on Dispute Settlement Procedure, which mainly addressed the delays in panels' procedures; two years later in 1984 a disposition had been adopted which introduced the possibility of forming working groups for the resolution of the dispute to be achieved in less time[179]. Complaints concerning the lengthy delays of procedures are still vocal also in today's World Trade Organization. The annex of the 1979's Understanding states that "at the Review Session of 1955 the proposal to institutionalize the procedures of panels was not adopted by Contracting Parties mainly because they preferred to preserve the existing situation and not to establish judicial procedures which might put excessive strain on the GATT"[180] demonstrating that contracting parties had no intention of institutionalizing the procedure before the panels. Accordingly, also in the very first phases of the Uruguay Round, the GATT's dispute settlement procedure remained mainly diplomatic in nature; the parties have indeed the possibility to decide whether to accept or refuse the proposed solution, as for

[176] ZANGL (2008).
[177] JACKSON, HUDEC, DEVIS (2000).
[178] KANTCHEVSKI (2007).
[179] Ministerial Declaration on Dispute Settlement Procedures, 29 November 1982, GATT BISD 29th Supp. 9, 13 (1983) and Dispute Settlement Procedure, 30 November 1984, GATT BISD 31st Supp. 9 (1985)
[180] Annex on the Customary Practice 1979 of the General Agreement on Tariffs and Trade.

its adoption presumes a positive consensus[181] on behalf of the Council. For over fifty years, a single objection to the solution proposed could prevent it from being adopted. Although par. 4 of Article XXV stated that "except as otherwise provided for in this Agreement, decisions of the Contracting Parties shall be taken by a majority of the votes cast", for over five decades, consensus continued to be the traditional method of resolving disputes[182]. During the Ministerial Conference of 1982, the governments tried to look for a solution to the problem stemming from the fact that also the parties in the dispute had the right to vote for the acceptance or refusal of the panel. Notwithstanding the introduction of the "consensus minus two" rule[183], this did not solve the problems, as countries, although deprived of their voting rights, could always convince a friendly government to take their part and vote in their favor. This led to the adoption of the 1979 Understanding and its Annex on the Customary Practice. These documents recognize the possibility of any contracting party with a substantial interest in the matter, even if not directly involved in the dispute, to be heard by the panel during the conciliatory phase.

However, this, unfortunately, did not lead to a strengthening of the system, in fact, if the States were unable to reach an agreement, the chances of resolving the dispute decreased considerably. All important decisions concerning disputes had to be adopted by the Council through positive consensus, so without the approval of the contracting parties, any decision was lacking any legal and binding value[184]. This, therefore, allowed the disputing parties to obstruct not only the adoption of the report but the entire panel formation and the eventual adoption of sanctions. This practice thus conferred veto powers on States. It is precisely for this reason that the reform of the dispute settlement mechanism was at the forefront of the Uruguay Round. In 1989, with the adoption of the Decision on Improvements to the GATT Dispute Settlement Rules and Procedure[185], contracting parties tried to solve the problem related to the practice of positive consensus. This document constituted the basic juridical text for the Understanding on Rules and Procedures Governing the Settlement of Disputes, known also as the Dispute Settlement Understanding which entered into force in 1995 with the creation of the World Trade Organization[186]. This decision brought monumental transformations to the system as it tried to overcome the issues related to the

[181] Practice that existed during the GATT's years. Positive consensus meant that there had to be no objection from any contracting party to the decision. Importantly, the parties to the dispute were not excluded from participation in this decision-making process. In other words, the respondent could block the establishment of a panel. Moreover, the adoption of the panel report also required a positive consensus, and so did the authorization of countermeasures against a non-implementing respondent. Such actions could also be blocked by the respondent.
[182] FOOTER (1997).
[183] *Ibid.*
[184] JACKSON, HUDEC, DEVIS (2000).
[185] Decision of the Contracting Parties of the GATT, 12 April 1989, (BISD36S/61) *on Improvements to the GATT Dispute Settlement rules and Procedures.*
[186] HIPPLER BELLO (2017).

institution of a panel and the lengthiness of their procedures. However, there was still a lack of procedure governing the adoption of panel reports and the ability to appeal to them, which was later introduced with the DSU.

Contrary to what one might think, however, States were not so prone to the practice of obstructionism, in fact, it has been repeatedly stated that the system of dispute resolutions devised by the GATT has led to more than satisfactory solutions despite its structural weakness[187]. However, this only holds true for the limited numbers of disputes which have been actually solved through the dispute settlement mechanism; most certainly a great number of cases have never been denounced by the contracting parties as they feared veto players.

Considering this, it seems quite reasonable that States would decide to act directly and unilaterally with the other party to be able to find a solution and to be able to assert their rights rather than trigger the dispute settlement mechanism of the GATT[188]. As the report becomes part of the law of GATT only after its adoption by the council, the parties to the dispute are not required in any way to comply with the conditions contained therein. As consequence, the Commission will not publish the report and it will not acquire any legal value. Despite its countless procedural flaws, the dispute settlement system established by the General Agreement has undoubtedly constituted an excellent innovation in the field of international trade. Often this system has been defined as "hybrid" if on the one hand legal scholars tend to consider it as a conciliatory procedure, on the other hand, it is impossible to deny the strong presence of elements that instead bring it closer to other methods of resolution. Different from the previous regime, the Dispute Settlement Mechanism envisioned by the WTO is firmly based on law, rather than customary practices and vague provisions regulating its functioning.

[187] REITZ (1996).
[188] WTO Secretariat (2004).

2.4 Dispute Settlement in the World Trade Organization

Regulatory flexibility, due to the merely provisional nature of the GATT, constituted one of its greatest weaknesses, which inevitably reflected on the proper functioning and effectiveness of the system in general. In fact, it gave a wide margin for exceptions and justifications for deviant behavior, especially concerning the adoption of protectionist measures by States to protect their national markets. At the end of the eight rounds of negotiations, which purpose was to integrate the basic discipline of the agreement, the Uruguay Round led to the creation of a true International Organization: The World Trade Organization. In contrast to the GATT, the WTO had provided for a complex system for the settlement of disputes which is extensively described in the Dispute Settlement Understanding[189]. This is undoubtedly the most peculiar feature of the entire system, which guarantees its effectiveness, an element that was certainly lacking in the years of the General Agreement. Many have been the legal scholars who have stated that the dispute settlement of the WTO should serve as an example for other international organizations[190].

The WTO dispute settlement has been conceived as an arbitration system whose main body is represented by the Dispute Settlement Body. All member states shall recourse to this body should they suffer adverse consequences resulting from the violation of the treaty by another Member State of the organization. As mentioned in the previous section, the GATT framework provided only two articles concerning dispute settlement procedures, Article XXII and Article XIII; while maintaining some of the most important characteristics of the old regime, the main purpose of the WTO was to overcome the structural limitations of the past to make the system more institutionalized and effective. Therefore, all the vague provisions were abandoned in favor of specific and cohesive rules. However, what made the GATT extremely weak was the limited binding effect of the decisions taken by the panels. The customary recourse to the positive consensus deliberative mechanism had inevitably negative repercussions on the entire system as for the adoption of a certain solution the consent of all contracting parties was required, including that of the countries involved in the dispute itself. This not only entailed a great deal of uncertainty on the part of the States as to the successful acceptance of what was indicated by the panels, but the solution could end up being a compromise between the States in which the eventual adoption of the decision was conditional on the acceptance of all the States including those negatively involved[191].

[189] Provided for in the Marrakech agreement which entered into force the 1st of January 1995.
[190] PETERSMANN (1997).
[191] NAKILAR, DAUTON, STERN (2014).

Quite different is what is provided for by the DSU, which places at the center of its work an arbitration panel, thus relieving the contracting parties, who have become the Member States, of operating as a reference body in the dispute resolution mechanism. The formal request for the establishment of a panel will have to be submitted to a designated body, the Dispute Settlement Body that through the practice of "reverse consensus"[192] will either accept or refuse the establishment of the panel[193]. Of fundamental importance is Art. 23 which states that:

> "when Member States seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedure of this understanding*",*

thus, sanctioning the principle of exclusivity of the dispute settlement mechanism provided for in the DSU for all controversies arising in the interpretation or application of WTO's agreements among Member States.

Undoubtedly, the greatest novelty introduced by the World Trade Organization in the dispute resolution mechanism is represented by the institution of a second level of judgment, thanks to the creation of the Appellate Body, established by the Dispute Settlement Body in 1995[194]. Its work is limited to reviewing the findings, i.e., only the conclusions produced by the panels. Its task is to ascertain the correct interpretation and implementation of the treaty without having to examine the causes that led the parties to a dispute. In turn, the Appellate Body is also called upon to issue a report indicating to the Member States the modalities and times required for the fulfillment of their obligations[195]. Once this report has been produced, it too will be subjected to the reverse consensus procedure, to sanction its adoption, and its non-compliance by the losing state will then justify the adoption of possible retaliatory measures, such as the suspension of certain commercial concessions. The WTO has often been spoken of as a quasi-judicial system in that on the one hand panels perform a function very similar to that carried out by conciliation commissions, and on the other hand with the introduction of the degree of appeal, the Appellate Body represents a proper permanent jurisdictional organ which brings the whole system closer to an actual judiciary procedure[196]. Despite the great innovations brought about by the institution of the WTO and, above all, of the Appellate Body,

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[192] TIJIMES (2009:417-437).
[193] Art. 6.1 of the Dispute Settlement Understanding states that "If the complaining party so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda unless at that meeting the DSB decides by consensus not to establish a panel".
[194] VIDIGAL (2019).
[195] NAKILAR, DAUTON, STERN (2014).
[196] *Ibidem.*

there have been numerous criticisms, above all about latter, which have led to an almost complete impasse of the entire system, which will be dealt with in detail below.

2.4.1 The Dispute Settlement Understanding and the process of Dispute Settlement

The regulatory framework for the resolution of disputes in the World Trade Organization is spelled in the Understanding on Rules and Procedures Governing the Settlement of Disputes, also known as the Dispute Settlement Understanding[197] ('DSU'). The document constitutes Annex 2 of the WTO constitutive agreement and although the mechanism of dispute settlement envisioned by it represents the progressive evolution of the rules and procedure, most of them have been drawn from the past GATT's regime[198]. The entire functioning of the mechanism has been entrusted to a specific body, the Dispute Settlement Body, which constitutes the central element of the jurisdictional process of the system. It is the organ entrusted by the General Council for the discharging of its responsibilities as it is stated in Art. IV:3 of the WTO Agreement[199]. It is composed of representatives of the governments of the Member States who do follow the guidelines given to them from their countries, thus the DSB is indeed a political body. As provided for in Art.23 of the DSU, Member States of the WTO must avail themselves of and comply with the rules and procedures as they are governed by the agreement, if they intend, at the end of the dispute, to receive compensation for damages caused by another state's failure to comply with the rules, or the cancellation or reduction of benefits arising directly from the agreements[200]. The same article prohibits the Member States of the Organization from resorting to any kind of unilateral action to resolve the dispute in question. This means that the existence of a discrepancy between a commercial norm and the obligations deriving from WTO membership can only be determined by resorting to the procedure provided for by the DSU. Contrary to what happened under the

[197] Art. 1 of the Dispute Settlement Understanding states that: "The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the "covered agreements"). The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (referred to in this Understanding as the "WTO Agreement") and of this Understanding taken in isolation or in combination with any other covered agreement".

[198] NAKILAR, DAUTON, STERN (2014).

[199] Art. IV:3 of the WTO 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 fulfillment of those responsibilities".

[200] Art. 23 of the Dispute Settlement Understanding.

GATT regime, with the WTO the absolute legal priority is given to the dispute resolution mechanism over any other type of resolution tool. The Dispute Settlement Body has the power to set up committees, enact panels and appeals reports, track the execution of decisions and guidelines, and allow the waiver of commitments under the agreements covered[201]. The entire proceeding brought before the panels is strongly influenced by the mandatory nature of the DSB's jurisdiction. The will and intention of the parties to the case are essential elements in the entire process because the primary purpose of the whole mechanism is to find a "positive solution to a dispute" hence, a solution that is mutually accepted by both parties involved. Therefore, the process, like in the GATT's years always starts with bilateral consultations[202]; the parties are here given the possibility to discuss the matter to find a satisfactory solution before requesting the adjudication by a panel as provided for in Art. 4.7 of the DSU. However, the dispute settlement mechanism highly encourages member states to engage in reaching a compromise through consultation at any given phase of the process before the panels[203]. Most of the disputes that have arisen ever since the creation of the WTO have been resolved through consultations, proving that other instruments of adjudication and law enforcement are not always deemed necessary. Art. 25 of the Dispute Settlement Understanding provides for an alternative means for the resolution of a dispute: arbitration. Should Member States fail to reach an agreement through consultation and should they mutually agree with the procedure, a formal request for arbitration can be notified to the Dispute Settlement Body[204].

Moving on to the actual analysis of the Dispute Settlement mechanism, we can immediately see that, unlike the one provided by GATT, that is much more precise and detailed[205]. As previously mentioned, during the 50 years of the General Agreement regime, panels were established directly by the

[201] Art.2.1 of the DSU states that: "The Dispute Settlement Body is hereby established to administer these rules and procedures and, except as otherwise provided in a covered agreement, the consultation and dispute settlement provisions of the covered agreements. Accordingly, the DSB shall have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements. With respect to disputes arising under a covered agreement which is a Plurilateral Trade Agreement, the term "Member" as used herein shall refer only to those Members that are parties to the relevant Plurilateral Trade Agreement. Where the DSB administers the dispute settlement provisions of a Plurilateral Trade Agreement, only those Members that are parties to that Agreement may participate in decisions or actions taken by the DSB with respect to that dispute".

[202] Art.4 of the Dispute Settlement Understanding.

[203] JACKSON, HUDEC, DEVIS (2000).

[204] Art.25 of the DSU states that: "Except as otherwise provided in this Understanding, resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed. Agreements to resort to arbitration shall be notified to all Members sufficiently in advance of the actual commencement of the arbitration process".

[205] NAKILAR, DAUTON, STERN (2014).

General Council through the practice of positive consensus. With the establishment of the WTO, such function has been given to the Dispute Settlement Body. It is considered a particular organ as it only deals with the resolution of controversies, it has its own procedure and it has a proper President, which acts autonomously from the Member States besides being a highly politicized body.

As mentioned above, should States fail to find a mutually agreed solution through consultation, the parties involved in the dispute may present a formal request to the DSB for the establishment of the panels. They represent quasi-judicial bodies; whose task is that of supporting and assist the DSB in the process of resolution of a dispute by issuing a recommendation on the eventual solution to the disagreement[206]. Panels are usually made up of three members, which might increase up to five members on special occasions; they are not permanent bodies, as different panels are formed for each dispute brought before the DSB. The establishment of a panel in the new WTO system is undoubtedly faster and more effective as it is voted on through the practice of reverse consensus; consequently, unless the plaintiff also contributes to the consensus, it will always be possible for the DSB to set up a panel. The Secretariat retains a list of names, from which to choose the different panelists however, as provided for in Articles 8.1 and 8.2[207] of the DSU, anyone who is well qualified and independent can be chosen by the DSB to be part of the composition of the panel entrusted to a specific dispute. The panel composed for a particular dispute shall evaluate the substantive and legal aspects of the litigation and send a report to the DSB outlining its observations as to whether the complainant's arguments are well-founded and whether the steps or acts being questioned are WTO-inconsistent. When requesting for the formation of a panel, Member States are called upon to inform the DSB's president of whether consultations have or have not been held and to provide a written document spelling the measures at issues together with a brief summary of the juridical basis for their complaints[208]. As provided for in Art. XXIII of GATT '94 only three typologies of complaints are deemed admissible: violation complaint, non-violation complaint, and situation complaint. The first case presupposes the non-fulfillment of obligations by another member State thus resulting in the impairment or nullification of a treaty benefit. The second type, on the other hand, refers to the existence of a measure adopted by a State which, although not in contrast with the provisions of the agreements,

[206] PAUWELYN (2015).
[207] Art. 8.1 of the DSU states that: "Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member". Art. 8.2 of the DSU states that: "Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience".
[208] NAKILAR, DAUTON, STERN (2014).

produces the same result. As far as the last case is concerned, it refers to any situation which could lead to the compromise or annulment of a benefit or which could hinder in some way the pursuit of an objective envisaged by the agreement.

If the panel considers that the allegations are indeed well-founded and that a member of the WTO's responsibilities have been breached, it shall issue a recommendation for compliance by the respondent[209]. In light of Art.15 of the DSU, the report of the panel of a certain dispute appears to be the result of a solution extensively discussed between the parties according to the principle of adversarial debate to ensure greater participation by member states aimed at resolving the dispute in question[210]. The adoption of the written report by the panel must occur no later than 60 days from the date it was submitted to the DSB unless one of the parties decides to submit it to the Appellate Body for the revision[211]. Should the DSB adopt the report, through the practice of reverse consensus, the document will acquire legal value, thus it will become binding among the countries involved in the dispute. In Art. 3.7 of the DSU it is stated that should the parties fail to agree to a mutually accepted solution to the dispute, the very first objective is that of withdrawing the measure which has been found incompatible and in contrast with the WTO Agreement. If the resolution of a given dispute is successful, the panel will then call the Member States to conform their action with the provisions of the Organization[212]. As both suspensions of concessions and compensation are considered to be only temporary solutions to the dispute, the only permanent remedy is the full compliance by the Member States to the laws of the organization as provided for in Art. 19 of the DSU. Within this context it is important to underline, that neither the reports of the panels or of the Appellate Body can or should add or diminish any type of obligation provided for in the Agreements, thus they are only entitled to use laws which have already been spelled in the agreement, without creating new ones. This particular aspect will be the object of the primary criticism moved by the United States with regard the function of the Appellate Body. DSU makes it clear that a Participant who fails to put the WTO-inconsistent measure into line with the WTO Agreement faces consequences: either it must compensate with the agreement of the claimant

[209] Articles 11 and 19 of the Dispute Settlement Understanding.
[210] Art.15 of the DSU states that: "Following the consideration of rebuttal submissions and oral arguments, the panel shall issue the descriptive (factual and argument) sections of its draft report to the parties to the dispute. Within a period of time set by the panel, the parties shall submit their comments in writing".
[211] Under Art. 16.4 of the DSU, an appellant must require its decision to appeal a panel report within 60 days after the date of its circulation to the Member States or it will be considered for adoption by the Dispute Settlement Body.
[212] Art. 19.1 of the DSU states that: "Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned to bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations".

or has to face retaliatory countermeasures. As mentioned earlier, should States request it, the report may be submitted for review to the Appellate Body, which is undoubtedly one of the greatest and most criticized innovations brought to the Dispute Settlement mechanism with the creation of the World Trade Organization.

2.5 The Jewel of the Crown: The Appellate Body

Up to these days, the Appellate Body is considered to be one of the most peculiar institutions in the entire world. The intentions of the Uruguay Round negotiators were not that of creating a court as if they intended to do that, they would have negotiated for a type of institution highly resembling the International Court of Justice. Instead, the Dispute Settlement Understanding only dedicate a single sparse provision concerning the Appellate Body[213]. This is because negotiators envisioned the possibility that the panel might produce a bad report which may need to be revised; the very idea of creating an appeal mechanism in the dispute settlement resolution was considered as a *quid pro quo* for the parties which had lost their power to block the adoption of a panel report through the introduction of the reverse consensus practice. The Appellate Body has been created as an independent organ, separated from the World Trade Organization's Secretariat that served the panels[214]. It is composed of seven members, three of whom have the duty of hearing each case. They are appointed through a process of rotation which is determined in the Working Procedure of the Appellate Review "while taking into account the principles of random selection, unpredictability and opportunity for all Members to serve regardless of their national origin"[215]. The terms of the members together with their qualifications and the jurisdiction of the Appellate Body are all spelled out in Article 17[216] of the Dispute Settlement Understanding. Any member is appointed for a four years term which can be renewed only once, thus members can serve for a maximum of eight years. As it will be later described in the next chapter of this elaborate, many have been the criticisms raised with regard the term and reappointment of Appellate Body's members. Although appointed members should be representative of the whole membership of the WTO, they are under the legal obligation to work independently from their governments. Under Art. 17.9 the institution is endowed with the right of establishing its Working Parties, created through a

[213] Art. 17.1 of the DSU states that: "A standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body".

[214] Recommendations by the Preparatory Committee for the WTO approved by the Dispute Settlement Body on 10th of February 1995, (WT/DSB/1) , *Establishment of the Appellate Body.*

[215] Working Procedures, para. 6(2).

[216] Art. 17.3 of the DSU states that: "The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. The Appellate Body membership shall be broadly representative of membership in the WTO. All persons serving on the Appellate Body shall be available at all times and on short notice and shall stay abreast of dispute settlement activities and other relevant activities of the WTO. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest".

process of consultation with both the Director-General and the Chair of the Dispute Settlement Body.

Although the AB has managed to establish itself as one of the most prominent and important tribunals, its functioning still remains tied and under the strict supervision of the DSB as its role is that of determining the claims which are brought under the dispute settlement provision, but its status remains subsidiary[217]. If compared with that of the International Court of Justice, the jurisdiction of the AB is very limited in nature. It is established by the Dispute Settlement Understanding which states in Art. 17.6 that it "is limited to issues of law covered in the panel report and legal interpretations developed by the panel"[218]. Hence, its jurisdiction only covers a particular appeal, once it has been brought before the DSB, once a given dispute is solved, its jurisdiction ceases to exist. Stemming from what we have described so far, it is possible to notice how the WTO lacks a pure division of powers between its institutions; indeed, the Dispute Settlement Body which is the most politicized organ within the Organization governs the entire mechanism of dispute settlement. It is the organ called upon to decide whether or not to create panels, to adopt their reports, and also the reports stemming from the Appellate Body ("AB"). All AB members work part-time and this is the direct reflection of its limited jurisdiction. For the sake of coherence, the Appellate Body has developed over the course of the years, the principle of collegiality and it still is a core aspect of their joint decision-making[219]. The Working Procedures require all seven representatives to come to Geneva for an interchange of views with any appeal, to promote continuity and coherence of decisions. This practice has performed exceptionally well and has been very critical in the achievement of crucial legal and realistic decisions that have underpinned the WTO dispute resolution system.

Despite all the criticisms made to the Appellate Body, which we will deal with in the next chapter, it has always stressed the fundamental importance of the principle of due process ever since its creation, together with the principles of transparency and fairness. In drawing up its Working Protocols, the Appellate Body agreed to take an inclusive, straightforward approach to third parties because it wished to hear the opinions of other concerned WTO Members on matters of legal understanding of the terms of the WTO Agreement. Article 17.4[220] of the DSU specifies that third parties may not have the ability to appeal a panel report, but third parties who have informed the DSB of their involvement in the matter may request written submissions and

[217] BARTELS (2004).
[218] Art. 17.6 of the Dispute Settlement Understanding.
[219] STEGER (2015).
[220] Art. 17.4 of the DSU states that: "Only parties to the dispute, not third parties, may appeal a panel report. Third parties which have notified the DSB of a substantial interest in the matter pursuant to paragraph 2 of Article 10 may make written submissions to, and be given an opportunity to be heard by, the Appellate Body".

are granted the opportunity to be heard by the AB. In the following section, the entire procedure of the appellate review will be analyzed in an exhaustive manner

2.5.1 The Appellate Review Procedure

As it has already been mentioned above, should Member State request it the report produced by the panels in a given dispute may be brought to the attention of the Appellate Body, the organ in charge of its revision. The introduction of a degree of appeal in the WTO dispute settlement system is a direct consequence of the change from positive to negative consensus[221]. The Uruguay Round negotiators thought it appropriate to give states the possibility of reviewing the reports before they were adopted by the DSB. At the same time, however, it had to be ensured that this practice did not lengthen the entire procedure excessively. The hope was that states would make a limited number of appeals to the Appellate Body, a hope that has proved futile over the years as States have chosen to appeal panel reports especially in the early years of the World Trade Organization. As we have seen, the Appellate Body is the only institution of the WTO to be invested with the power to resolve a dispute; this is amply demonstrated by its intrinsic characteristics that allow placing it on the level of an international tribunal that is broadly representative of the organization's membership.

The Appellate Review procedure officially starts with the formal request forwarded to the DSB for the revision of a panel report from one of the parties involved in the dispute referred to as the appellant[222]. The review procedure is open only to parties who have previously participated in the appeals process. However, the participation of third parties is permitted, as described above, if they have also participated in the previous process. The entire procedure begins with the oral hearing by the States involved, which takes place 35 to 40 days before the official start of the appeal. At this preliminary stage, the parties are called upon to make oral statements at the request of the specific division handling the case, which will then proceed to question the parties and any third parties involved in the dispute[223]. At the end of this initial phase, the three selected members of the division are required to consult with the other four members of the Appellate Body. The seven, acting under the principle of collegiality, must produce a written report within 60 days of the states' submission of the request for review unless there are impediments that must be notified to the DSB in advance. Within this context it is important to underline that the Appellate Body is not called upon to participate in the

[221] JACKSON, HUDEC, DEVIS (2000).
[222] Decision of the Appellate Body, 15 February, WT/AB/WP/6, *Working Procedures for Appellate Review.*
[223] NAKILAR, DAUTON, STERN (2014).

decisional procedure, the only organ entrusted to decide to either adopt or reject the report is the Dispute Settlement Body.

The role of the Appellate Body is merely limited to reviewing purely legal issues and thus does not have jurisdiction to enter into the merits of the dispute[224]. They must limit themselves to judging only the legal reasoning implemented by the panels when drafting the report, to assess whether they have correctly and consistently interpreted and applied the laws of the WTO[225]. The confinement of its activities to the mere review of legal procedures has caused the AB several procedural difficulties over the years; very often, in fact, a careful examination of the correct interpretation of the treaties leads members to include and review the factual issues concerning the dispute as well. In the appellate reviews concerning only breaches of procedural rules, the AB will be called upon merely to ascertain that the panel has not acted in a way that infringes in any way the parties' treaty rights under the DSU. The appellate court is characterized by its ability to restore the balance between the parties which had been disturbed by a panel ruling which was clearly in favor of one rather than the other party involved. Broadly speaking it is also possible to compare the working of the Appellate Body to that of a Court of Cassation[226] as it acts as the guarantor of the legitimacy of the report produced by the panel and of the conformity of the interpretation of the rules in force under the WTO regime.

Once the Appellate Body has produced its report, it must be submitted to the DSB which must adopt it within 30 days of its circulation; however, its implementation is subject to acceptance by all Member States unless, through the practice of reverse consent, it is decided otherwise. This process of adoption is without exception to the right of Representatives to share their views on the report of the Appellate Body[227]. For what concerns the process of adoption of a report and its automaticity, it is the same required for the adoption of a panel report, the only practical difference lies in the time required for the adoption to be finalized as there is no possibility of appeal to a report of the Appellate Body the deadline is reduced to only 30 days instead of 60 as described above. Should the report of the Appellate Body conclude that the actions taken by one of the parties to the dispute are not in accordance with the provisions of the Organization's regulations, member states will be

[224] ADINOLFI (2019).
[225] Art. 17.6 of the DSU states that: "An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel".
[226] A Court of Cassation is a high-instance court that exists in some judicial systems. Courts of cassation do not re-examine the facts of a case, they only interpret the relevant law. In this, they are appellate courts of the highest instance.
[227] Art. 17.14 states that: "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report".

required to ratify such action to bring it into compliance with the laws according to Article 20 of the DSU. It is important, however, to stress once again that neither the panels' reports nor the Appellate Body's reports can either add or diminish the rights or obligations of Member States.

Should States fail to implement the reports produced by both the panels and the Appellate Body, the "winning" State may formally apply to the DSB for authorization to offset or suspend concessions against the defaulting state. These procedures are provided for in Article 21 of the DSU and are now generally identified as the typical sanctions applied by the World Trade Organization. To ensure greater effectiveness and effective execution of the decisions taken by the bodies responsible for dispute resolution, the same article comprehensively lists the precise mechanism of compliance with the rules, which will take place under the full supervision of the main body, the DSB. The execution of directives[228] must be either prompt or immediate although the third paragraph of the same article allows for an exception stating that:

> "At a DSB meeting held within 30 days after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so."

The very definition of "a reasonable period" of time is governed by the article itself, providing three ways different in which it can be established. In fact, it can be defined by a proposal from the State itself, subject to acceptance by the DSB. In this context, however, the mode of deliberation by the body changes, as it will no longer act according to the practice of negative consensus but rather through positive consensus; it is, therefore, possible that this proposal will be blocked by the other State involved. In the event of non-decision, the states are given the opportunity to find a solution by agreement; should such an agreement not be reached, the deadline will be set by mandatory arbitration which will then become binding[229]. At this point in the proceedings, the losing State will be called upon to put an end to the claimant's violation of the rule in question.

It possible, however that the parties are not in accordance with the adopted measure aimed at ensuring compliance to the norms; should that occur the recurring party may call for a composition of a further panel, preferably the original one as provided for in Art.21.5 of the DSU[230]. The panel will be then

[228] Art. 21.3 of the DSU.
[229] *Ibid.*

called upon to reexamine if the adopted measures are deemed to be coherent with what was provided for in the agreements and with what has been written by panelists' reports. Within this phase, it is crucial to highlight the surveillance role performed by the Dispute Settlement Body to ensure full compliance with the decision taken[231]. As it has already been mentioned above, Member States are under the obligation to notify within 30 days the DSB their intentions regarding their willingness con comply with decisions. Once this has been done, the body must include on its agenda the question of the State's compliance with the report no later than 6 months after the date on which the parties were granted the reasonable period of time. Should the losing State fail to meet its obligations arising from the DSB decision, the aggrieved party may apply to the same body for authorization to proceed with the implementation of countermeasures against the failing state. These measures are defined as a suspension of concession or other obligations. Once again, the role of the authorization granted by the DSB must not be undervalued as it demonstrates how the DSU firmly outlaws any type of unilateral measure for the resolution of a controversy.

However, the right of Member States to engage in counter o retaliatory measures does not come without exceptions; in fact, Art.22.4 of the DSU clearly states the level of either concession or suspension must be proportionate to the level of impairment or nullification suffered[232]. Additionally, Art .22.3 allows for the recourse to cross-retaliation, should countermeasure be not applicable within the same sectors of the violation[233]. The possibility of cross-retaliation has been highly criticized over the course of the years, as in international organizations all actions undertaken do not affect only the parties who act but also all the other Member States[234]. What is, in fact, most criticized about this mechanism is the possibility that it may penalize, even if indirectly, parties other than those to whom the measures are directed. The DSB is therefore responsible for ensuring that the principle of proportionality between violation and countermeasure is always respected.

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[230] Art. 21.5 of the DSU states that: "Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within 90 days after the date of referral of the matter to it. When the panel considers that it cannot provide its report within this time frame, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report".

[231] REICH (2017).

[232] Art. 22.4 of the DSU states that: "The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment".

[233] Art. 22.3 of the DSU.

[234] ABBOTT (2009).

Another emblematic aspect is undoubtedly that linked to the termination of the suspension of concessions. Unfortunately, the Dispute Settlement Understanding does not contain any explicit rule to regulate this procedure; however, it provides that the duration of such countermeasures ceases with the cessation of the erroneous behavior of the defaulting State[235].The authorization to the cessation of suspension can only be granted after the expiration of the reasonable period of time should the party not comply with the decision of the DSB. In this case, the injured party is allowed to agree on possible compensation with the defaulting party. In fact, before the reasonable period of time expires, it can formally request the start of negotiations to reach an agreement and thus be able to offset the loss suffered as a result of the deviant behavior on the part of the other state involved in the dispute[236]. Although obliged to take part in the negotiations according to the principle of good faith, the losing party is in no way obliged to accept the request for compensation made by the winning State. Since this procedure has been strongly criticized, due to the enormous delays it could bring to the dispute settlement procedure, a term of 20 days has been fixed within which the two parties must agree on the compensation, otherwise the negotiations will have to be declared null and void. It is important to underline that, should the State reach an agreement concerning the compensation, such agreement must be in full compliance with WTO's laws. Although not many states have recurred to the practice of compensation during the years, it has certainly represented a turning point in the whole dispute settlement system as it shows once again the willingness of the Organization of resolving controversies in an amicable manner[237].

All these different procedures described above prevent States from recurring to unilateral measures for the resolution of disputes that might arise, thus risking compromising the well-functioning of the whole system while also ensuring that the Member States do not engage in unjustified measures. Hence, it possible to conclude that the overall functioning of the Dispute Settlement mechanism on the WTO should be considered a success despite countless criticisms of it[238]. Since its creation, a great number of States have

[235] In this regard, the most emblematic case is represented by the Appellate Body Report, 13 February 1996, WT/DS26/AB/R, *European Communities Measures Concerning Meat and Meat Products, (EC-Hormones* 1996). The European Community continued to firmly maintain that it had complied with the recommendations made by the DSB. As opposed to it, Canada and the United States strongly believed that the measures were not sufficient and therefore both refused to cease the suspension of cessations against the Community. In 2005, the Community submitted a formal request for the establishment of a panel to rule on whether or not the suspension of concessions by Canada and the United States complied with the relevant provisions, thus marking the beginning of a new dispute settlement procedure.

[236] Art. 22.2 of the DSU.

[237] Art 3.7 of DSU states that: "[…] The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred […]".

[238] Reich (2017).

made use of the DSB, both developed and developing, and the percentage of compliance with the decisions taken is extremely remarkable if we bear in mind that this is an international system. As it will be deeply analyzed in the next chapter, the system is far from perfect, because if on the one hand, it is true that the States have shown themselves to be inclined to comply with the decision, on the other hand, the timeframe that leads to such a result is often long and exhausting. However, it is important to bear in mind that any consideration of whether or not the system envisaged by the WTO is working properly must also take into account the major limitations that this type of judicial process may encounter along the way. It is in fact a process that is activated by States that seek to find a solution through a process, to an issue that they have not been able to resolve diplomatically through the use of negotiations. The fact that the entire dispute settlement procedure has to deal with sovereign States leads to the question of whether the judicial processes activated within the WTO regime are capable of resolving highly complex disputes arising between them.

3 Chapter 3: The Dispute Settlement Crisis

3.1 From Jewel of the Crown to Survival Crisis

Ever since its establishment in 1995, the World Trade Organization has been a source of pride for political leaders, negotiators, and scholars, as it had finally succeeded at creating a robust and efficient dispute resolution system as promised. As we have already noted in the previous section of this work, the system is very sophisticated but not necessarily complicated. Although the DSU contains 27 detailed articles that regulate the dispute resolution procedure, the core elements of the overall mechanism are extremely clear and straightforward.[239]. Clearly, the system places great emphasis on rules, but it does not stop there. There are certain features related to the rule-based aspects of the system in the DSU, as the need to interpret all agreements reached under the WTO framework in light of International Law's customary practice.[240] as it is spelled in Art.3.2[241] of the Dispute Settlement Understanding, together with the obligation not to add or diminish any Member State's rights and obligation as provided for in Art. 19.2[242]. Simultaneously, the DSU describes many aspects that are not rule-based, such as the need for the parties to have to go through the consultation stage when the dispute settlement mechanism is triggered. This is required in order for the Member States to fully comprehend the reciprocal standing concerning the dispute so that they may increase the chances to come to a solution that is deemed optimal for both. The system also provides for alternative mechanisms such as good offices, mediation, and conciliation to be used by the parties to facilitate the process of settlement. We could then assert that this mix of rule-based and non-rule-based aspects of the DSU gives it a perfect design.

It is most certainly true that all WTO Members had great expectations for this almost perfect dispute settlement system they had designed. Thanks to 10 consecutive years of flawless work and extremely efficient performances, the Dispute Settlement System has earned the name of "Jewel of the Crown". This jewel's focal point is undoubtedly the Appellate Body, which owes its praise

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[239] LO, NAKAGAWA, CHEN (2019).

[240] i.e., Vienna Convention on the Law of Treaties.

[241] Art. 3.2 of the DSU states that: "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 and to clarify the existing provisions of those agreements following customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements".

[242] Art. 19.2 of the DSU states that: "In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements".

to its top-quality work and the authoritative and professional interpretations it has delivered concerning the WTO Agreements that it has been called upon to adjudicate. Unfortunately, though, like all great legends, after 20 years of glory, the Appellate Body's perception has drastically changed. Among its most prominent critics are undoubtedly the United States, which already in 2011, during the Obama administration, began to express their dissent towards the organ, going so far as to veto Professor Jennifer Hillman's reappointment.[243] and the blocking of the reappointment of Professor Seung Wha Chang[244], preventing them from continuing to serve the Appellate Body. This decision not to vote in favor of the reappointment was also carried forward by the subsequent Trump administration, which on several occasions expressed its disagreement with certain aspects of the dispute settlement, claiming it has treated their nation unfairly.[245] Robert Lighthizer, United States Trade Representative, has openly reminisced about the Member States' veto power during the five decades of the GATT's regime.[246]

The situation reached its maximum point of crisis on the 19th of December, 2019, when due to the decisions of the U.S. government, the Appellate Body found itself with less than three members, the minimum quorum necessary to carry out the appeals process as provided for in Article 17.1[247] of the DSU. This has led then to a complete disruption of the functioning of the Appellate Body, which as a consequence has led to an overall impasse of the overall dispute settlement mechanism. Should the parties by mutual agreement decide not to appeal, the panel report would be automatically adopted by the Dispute Settlement Body, and hence the case is considered concluded. The scenario changes drastically if one of the two parties disagrees with what is written in the panel and then decides to appeal, in this case, lacking the minimum number of panelists necessary to carry out the procedure, the case would be pending forever. This impasse on the part of the Appellate Body could lead to a complete breakdown of the entire system envisioned by the WTO negotiators. Stemming from the evidence, it would be correct to assert that the ultimate goal of the United States would be to dismantle the dispute settlement system in its entirety and perhaps even the rules-based trading system itself.

Although the situation does not seem to portend a bright future for the smooth functioning of the dispute resolution mechanism, it is not exactly clear

[243] The term of Professor Jennifer Hillman with the Appellate Body was from 2007 to 2011.
[244] The term of Professor Seung Wha Chang with the Appellate Body was from 2012 to 2016.
[245] TRUMP (2018).
[246] LIGHTHIZER (2017).
[247] Art. 17.1 of the DSU states that: "A standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body".

whether the U.S. administration intends to pursue such an extreme and irreversible curse or if it would even have both the legal and political authority to do so[248]. Despite the various criticisms, it remains clear that with its binding and compulsory dispute settlement system, the WTO is too crucial for the USA in order for it to be completely undone. Indeed, it should be pointed out that the current Trump Administration has openly expressed its full support for the WTO[249] even though it tries to seek both substantive and institutional reforms. In the absence of an actual statement of intent aimed at dismantling the dispute resolution system, US rhetoric could be interpreted as a means used to increase or even generate leverage over the other Member States to achieve its reform objectives.

While the United States has been the biggest supporter and proponent of a more robust and more effective dispute settlement mechanism compared to the system in operation during the GATT years, many have been the concerns raised immediately after the entry into force of the WTO Agreement[250]. The essence of the US proposal is to strike a different balance between the autonomy of the WTO adjudicators and the control by sovereign governments over the meaning of their WTO obligations, especially those intentionally left imprecise[251]. Within this context, it is essential to highlight that many other concerns have been raised in relation to both the work and the roles of the Appellate Body. Some of them clearly refer to some broader problems as, for example, whether or not the initial member-driven idea has been deviated or if there exists an objectionable practice of judicial activism on behalf of the Appellate Body. Many concerns were also raised with regard to some technical issues such as if an outgoing Appellate Body Member should be allowed to complete or end the proceedings in which he/she served until his/her term expired or issues related to the proper way to deal with the failure of Appellate Body to meet the requirement not to exceed the 90 days to submit a report as spelled in Art. 17.5 of the DSU[252].

[248] TRACHTMAN (2017).
[249] USTR Lighthizer at the 2017 Ministerial Conference, referred to the World Trade Organization as "obviously an important institution".
[250] Deputy Director-General Alan Wolff in his "Testimony before Senate Financial Committee on proposed WTO Dispute Settlement Review Commission Act", 1995.
[251] MCDOUGALL (2018).
[252] Art. 17.5 of the DSU states that: "As a general rule, the proceedings shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. In fixing its timetable, the Appellate Body shall take into account the provisions of paragraph 9 of Article 4, if relevant. When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days".

3.2 Member-Driven Governance and Judicialization: main dilemmas in the World Trading System

In order to be considered commonly accepted by society, law and governance require a high degree of justification *vis-à-vis* their citizens. Ever since the ancient time, people have resorted to their "social contracts" in order to challenge any perceived abuse of power on behalf of their States by invoking the famous principles of justice envisioned by both Confucian and Aristotelian theories of justice, together with democratic constitutionalism and republican constitutionalism[253]. It is commonly known that with the end of WWII, the United Nations have agreed to multilateral treaties and to several additional legal instruments that recognize the principles of democracy, the importance of the rule of law, and the inalienability of human rights. This almost mutually accepted post-war constitutionalism is based on constitutionally agreed rules and rights, which stem from a higher legal rank, which inevitably pose limits on post-constitutional law-making by the executive, legislative and judicial powers while providing for extensive judicial remedies aimed at protecting the rule of law. Contrary to the very state-centered model of the UN with regards its Member State sovereignty equality, the establishing agreement of the World Trade Organization also provided for the participation of supranational Member and sub-national Members as well[254]. The compulsory authority of the multilevel WTO dispute resolution mechanism for the legislative and judicial enforcement of the transnational rule of law at international and domestic levels of trade governance represents the historic and remarkable accomplishment of legal civilization[255].

Historically and as well juridically, agreements covering trade and investments have been created in order for States to limit governance failures in State regulation and to correct market failures in private self-regulation. It is thanks to ancient Greek and Roman philosopher who first developed the rule of law theories that transnational republicanism has emerged throughout the years together with the increase of multilevel judicial protection of commercial law. It is undeniable that it is only thanks to the recognition of the importance and necessity of human rights together with the democratic right that also international trade law has been founded on the principle of republican constitutionalism whose aim is to protect the traders and investments against any abuse of power[256]. The eternal struggle for justice has inevitably led to continuous judicial and constitutional reforms both in investment law and in international trade, such as the principle of bounded

[253] PETERSMANN (2017).
[254] I.e., Taiwan, Macau, Hong Kong, and the European Communities.
[255] PETERSMANN (1997:233)
[256] BESSON (2009).

rationality[257] which has posed limitations to intergovernmental power politics, especially under the GATT of 1947, which, as it has been stated multiple times had been applied only provisionally. Substantially different is the World Trade Organization founding agreement of 1994, approved by national governments, which has introduced judicial reforms and rules aimed at protecting citizens and their inherent rights. The aforementioned principles of justice have come to profoundly influence the design of all judicial remedies as well as the international trade court's jurisprudence. The convergence that has occurred between the jurisprudence related to international trade and the multilateral treaty commitments with regard to the transnational rule of law reflects the advent of constitutional restraints on the power-oriented conception of member-driven governance of both trade and investments[258].

Under the umbrella of WTO law, investment agreements and regulatory powers not only have they become subject to several democratic and judicial restraints, but this separation of powers, together with the multilevel judicial and legal protection of the rule of law, have become entrenched in the domestic institutional and constitutionals systems of "checks and balances"[259] with the ultimate aim of protecting citizens against any kind of abuse from foreign policy powers. The primary mandate of the division of legislative, administrative, and judicial powers and the security of the rule of law in the WTO framework, as democratically accepted by parliaments and understood and applied not only by States but also by national and international courts, is under pressure from intergovernmental power politics.

[257] The principle that governments cannot either rule effectively or legitimately unless all their powers are restricted by several constitutional rules of a higher legal rank.
[258] LO, NAKAGAWA, CHEN (2019:17).
[259] The principle of "checks and balances" is a principle of government under which separate branches are empowered to prevent actions by other branches and are induced to share power. Checks and balances are applied primarily in constitutional governments. They are of fundamental importance in tripartite governments, such as that of the United States, which separate powers among legislative, executive, and judicial branches.

3.2.1 Constitutional limits of Member-Driven WTO Governance

Article IX of the DSU clearly and effectively describes the different voting procedures on authoritative interpretations, waivers from obligation stemming from the WTO Agreement and all the decisions taken under the plurilateral trade agreements[260]. Throughout the course of the Uruguay Round, the process of decision-making had been based on three fundamental principles namely single undertaking, consensus, and member-driven governance. It is clear that the States and more precisely the governments have been at the very heart of the negotiations and consequentially also of the law-making process, delegating only very little powers the Director-General of the GATT[261]. In order to protect the supreme sovereignty of each State the recurse to majority voting had been avoided; government opted instead for the principle of single undertaking[262] in order to prevent any type of legal fragmentation. It is undoubtedly thanks to the inclusion of these three principles that the Uruguay Round negotiations ended in a positive way for all the States that participated. Nevertheless, it is also true that these principles have been extensively criticized for preventing the fruitful conclusion of the Doha Round and the reach of an agreement needed in order to solve the crisis of the Appellate Body due to several abuses of powers enacted by some powerful Member States.

When in 1994 the Signatory States approved the WTO Agreement and consequently adopted the necessary legislation aimed at ensuring their conformity to the new laws, administrative procedures and regulations, most parliaments also limited the powers of their respective executives in the field of trade policy to enforce and modernize WTO laws without giving executive powers to destroy the WTO legal, conflict resolution, and trading structure[263]. To make this concept clearer we will take the Lisbon Treaty on European Union as an example; under Art.3 it clearly requires all EU's external policies to contribute to the strict observance and development of international law, similarly, Art.21 of the TEU calls for the complete support of democratic principles, human rights, the rule of law and all the principles of international law without conferring upon the European Institutions powers which could be

[260] Art. IX:1 of the DSU states that: "The WTO shall continue the practice of decision-making by consensus followed under GATT 1947. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. At meetings of the Ministerial Conference and the General Council, each Member of the WTO shall have one vote. Where the European Communities exercise their right to vote, they shall have a number of votes equal to the number of their member States which are Members of the WTO. Decisions of the Ministerial Conference and the General Council shall be taken by a majority of the votes cast, unless otherwise provided in this Agreement or in the relevant Multilateral Trade Agreements".

[261] The Director-General of the GATT chaired the Trade Negotiations Committee.

[262] Virtually every item of the negotiation is part of a whole and indivisible package and cannot be agreed separately. "*Nothing is agreed until everything is agreed*".

[263] PETERSMANN (2017).

used to violates agreements undertaken by Member States. Accordingly, the US Trade Act signed in 1974[264] provides for Congress and private sector committees to consult on issues concerning non-tariff measures and other procedural matters so that parliamentarians and civil society can discuss trade negotiation issues from the outset of trade negotiations rather than only during the very process or when draft agreements have already been reached[265]. Due to the fact that WTO agreement have been formally incorporated into the US domestic law and to the very limited trade policy powers in the hand of the executive branch of the government, the Congress has not conceded to the President any executive power that could be used to unilaterally withdraw from the WTO or to demolish it dispute settlement mechanism[266]. Although the principles of separation and delegation of powers are outlined in the Constitution of the United States, this has undoubtedly not stopped their WTO diplomats from engaging in an illegal abuse of power politics since 2017, which is undermining the well-functioning of the Appellate Body, clearly violating the principle enshrined in the Dispute Settlement Understanding.

[264] An act of Public Law of the USA, 3 January 1975, Pub.l. 93-618, *to promote the development of an open, nondiscriminatory, and fair world economic system, to stimulate fair and free competition between the United Stated and foreign nations, to foster the economic growth of, and full employment in, the United States, and for the other purposes, hereinafter:* Trade Act of 1974. It provides duty-free treatments to goods of designated beneficiary countries. Later extended in 1979 and amended in 1984,1988, 2002, and in 2005.

[265] VANGRASSTEK (2019).

[266] TRACHTMAN (2017).

3.3 Illegal US Blocking of the Filling of Appellate Body Vacancies in violation of the Dispute Settlement Understanding

Former President Donald Trump has reiterated on several occasion throughout the course of his now concluded presidency his wish to withdraw from the WTO agreement, which he personally described as "terrible"[267]. His claims are based on the misbelief that his country has repeatedly lost the majority of the disputes brought to the DSB notwithstanding the fact that in reality the United States have won almost 75% of them, being the most successful countries in the WTO[268]. United States Trade Representative Mr. Lighthizer together with other representatives of the US government as Security adviser Bolton declared their strong opposition to restricting the use of hegemonic power of the United States by the international courts[269]. Many US diplomats serving in the WTO have explained and justified their refusal to appoint new members for the Appellate Body in a rather controversial and ambiguous way; the reappointment of Ms. Janow and of Ms. Hillman was strongly opposed by the USTR because their ruling in the Appellate Body panel were considered as highly unpatriotic towards United States[270]. Although many other proposed law professors had thought in United States' universities, their appointment were vetoed by the USTR almost immediately without any exhaustive explanation on their behalf.

The reappointment of Korean member Chang Seung Wan was opposed in 2016 on the ground of his alleged practice of judicial overreach in the panel's decisions. Early on in 2017 the US has blocked the consensus in the DSB for the appointment of new members in the AB justifying their action on reasons related to the shift in the Administration of the country. Subsequently the replacement of three members in the same year, Ramirez, van den Bossche and Kim, was vetoed due to USTR' concerns about Rule 15[271] of the Appellate Body Working Procedures developed by the AB in conformity with Art. 17.9 of the Dispute Settlement Understanding. According to the United States, the latest decision by the Appellate Body to, in its words, "authorize" a person who is no longer a member of the Appellate Body to continue hearing appeals creates a number of very serious concerns[272]. Based purely on what has emerged, we note that the refusal of the US to reappoint the members needed

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[268] SHAFFER, ELSIG, POLLACK (2017)
[269] BACCHUS (2018)
[270] SHAFFER, ELSIG, POLLACK (2017)
[271] Rule 15 of the Appellate Body Working Procedure states that: "A person who ceases to be a Member of the Appellate Body may, with the authorization of the Appellate Body and upon notification to the DSB, complete the disposition of any appeal to which that person was assigned while a Member, and that person shall, for that purpose only, be deemed to continue to be a Member of the Appellate Body".
[272] KANTH (2018).

to serve on the appellate body panel is based on reasons not related to their personal qualifications; this represents a clear and manifest violation of Article 3.4[273] and 23 of the DSU, which requires Member States to comply with WTO rules in good faith and of Art. 17 of the DSU which oblige the Member State to protect the Appellate Body[274]. Although the US have not yet revealed their final objective regarding their vetoing strategy, many US policies observers have interpreted such blocking of the filling of AB vacancies as being aimed at terminating the very function of the Appellate Body hence, the related perceived restraint on the famous US trade protectionism.

The United States has repeatedly stated at many DSB meetings held in 2019 that it is not in favor of beginning a selection process to appoint new Appellate Body Members. According to the US government, the DSB has quite other priorities in fact, it should first decide how to act on concerns raised about the reports which have been issued by people who no longer serve as active Members of the Appellate Body. Despite the fact that in 1996 the Working Procedures were adopted in full compliance with the provisions of Article 17 of the DSU, and despite the fact that Rule 15 has been used for more than 20 years now, the US firmly believes that this rule should be revised and such revision should be at the top of the priorities of the DSB.

Additionally, many have been the US concerns relating to the very functioning of the Appellate Body as it is, one of the most prominent examples is the question related to the reappointment of Mr. Wan; according to the US diplomats, the Korean AB Member had raised issues that were not deemed to be necessary for the resolution of the dispute. All the above-mentioned claims regarding the overall malfunctioning of the Dispute Settlement System and described as a clear sign of "*Judicial Activism"*[275] have been included and summarized in the 2019 Trade Policy Agenda and majorly focused on the following issues which will later be extensively analyzed:

[273] Art 3.4 of the DSU states that: "It is understood that requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute. It is also understood that complaints and counter-complaints in regard to distinct matters should not be linked".

[274] The text of Art. 17.2 together with many other Dispute Settlement Procedures and the requirement of interpreting treaty right and obligations in good faith stemming from customary law, make clear that all of the obligation addressed to the Dispute Settlement Body entail such legal obligation of good faith for all of the Members. In the US-Shrimp Appellate Body Report of 1998, the AB has stated that: "an abusive exercise by a Member of its own treaty right may result in the breach of treaty rights of other Members, and as well, a violation of the treaty obligation of the Member so acting".

[275] Judicial Activism is the term commonly used to summarize the key American concerns about the Dispute Settlement Understanding.

- *"Persons Serving on the Appellate Body Have Repeatedly Violated Article 17.5 by Disregarding the Mandatory 90-Day Deadline for Issuing a Report"*: the US has severely criticized the Appellate Body for failing to respect the expected deadline, hence failing to comply with Art. 17.5 of the DSU.

- *"The Appellate Body Has Repeatedly Violated Article 17.2 of the DSU and Has Allowed Former Members to Decide Cases after Their Terms Have Ended":* notwithstanding the recurrent use of Rule 15, the US strongly affirmed that the Appellate Body does not have the legal authority to decide whether someone who is no longer an AB member can continue to serve as a standing member, as the only body entrusted with such authority is the Dispute Settlement Body.

- *The Appellate Body Has Violated Article 17.6 and Exceeded Its Limited Authority to Review Legal Issues by Reviewing Panel Findings of Fact, including Factual Findings Relating to the Meaning of WTO Members' Domestic Law":* according to US diplomats, the WTO has a recurrent tendency to produce finding also on matters which are deemed unnecessary for the resolution of the dispute as appeals are only limited to "issues of law covered in the panel report and legal interpretations that have been developed by the panel".

- *The Appellate Body Wrongly Claims that Its Reports Are Entitled to be Treated as Binding Precedents and Must Be Followed by Panels, Absent "Cogent Reasons":* the US administration has openly accused the Appellate Body of treating previous panel reports as binding precedents although such practice is not provided for in any of the provisions of the DSU.

3.3.1 Disregard of the 90 days deadline for appeals: violation of Art. 17.5

One of the very first claims raised by the United States against the working of the Appellate Body is the fact that it has repeatedly exceeded the required time limits for the determination of cases[276] and for the issuing of the panel

[276] REICH (2017).

reports. The text of Article 17.5[277] states very clearly that following the general rule, the AB must produce its report within 60 days and that in no case proceeding shall exceed the extended period of 90 days. Unfortunately, however, there have been numerous instances in which the Appellate Body has violated the timelines set forth in the DSU rule, leading the United States to assert that such a violation exponentially diminishes the rights of all other Member States, inevitably leading them to lose faith and esteem in the system they themselves envisioned when the Uruguay Round was concluded in 1994. Within this context, however, it is important to underline that from 1995 until 2011 the Appellate Body has almost always respected the rule enshrined in Art.17.5. According to the US there has been a radical change in the Appellate Body's procedures, which since 2011 has led it to repeatedly violate the rules on timing, without providing Member States with adequate explanations or justifications. Obviously, this violation has caused the timeframe for the resolution of the dispute to lengthen exponentially, causing other serious consequences for the entire dispute settlement system of the WTO.

It is clear that the immediate resolution of disputes is the focal point of the entire system, making it unique. Article 3.3 of the DSU clearly states that:

> "The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members"[278].

Such principle is also provided for in many other DSU provision such as the afore mentioned Art.17.5. It is clear, therefore, that it is the DSU itself that recognizes how, in extraordinary situations, it can be difficult and impossible to produce a report in 60 days, thus granting the Appellate Body an additional thirty days to fulfill its duties which however shall never exceed the 90 days. By holding to the text of the article, it is clear that the DSU does not confer any discretionary power on the Appellate Body to produce a report beyond the deadline. Within this context, what is spelled in Art. 17.5 stand in net contrast to Articles 12.8 and 12.9 both of which relate to the duration of the panel proceedings[279]. This sharp difference concerning the overall time requirement

[277] Art. 17.5 of the DSU states that: "As a general rule, the proceedings shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. In fixing its timetable the Appellate Body shall take into account the provisions of paragraph 9 of Article 4, if relevant. When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days".
[278] Article 3.3 of the Dispute Settlement Understanding.

has been recognized also by the Appellate Body itself in the early years of its functioning. A prime example of this recognition was in 1996 when, as soon as the Working Procedures were published, the AB explained to the DSB that as a direct result of Article 17.5, the timeframes for submission had to be short[280]. It is quite clear, US representatives assert, that already 25 years ago the Appellate Body understood that Art. 15.5 to mean exactly what it says stating that:

> "[…] It is our view that the timeframe we have established for the filing of submission and an oral hearing with the parties are reasonable within the constraints imposed by the DSU and afford due process to all partied concerned while at the same time providing the Appellate Body with the time it requires for careful study, deliberation decision-making, report writing by the division and subsequent translation of the Appellate Report"[281].

As previously mentioned, until 2011, the Appellate Body adhered to the timelines set forth in the DSU rules. Since the first appeal filed by the United States in 1996 namely *US - Gasoline*[282] up until *US - Tyre*[283] in 2011 hence covering a temporary span of 15 years, the Appellate Body has managed to egregiously meet the 90 days requirement; except on rare occasions when, after consultation, it has obtained permission from the parties to extend beyond the deadline to produce the final report. Among the most important appeals in which the AB has managed to respect the reasonable period of time for issuing of the report are counted cases such as the famous *EC – Bananas* of 1999, *US – Offset Act* of 2001 and *Japan – DRAMs* of 1998[284]. For the 14 appeals in which the Appellate Body requested an extension of time, it acted in accordance with the fundamental principle of transparency, the cornerstone of the entire Organization, by providing the relevant body, the DSB, with the reasons and processes for obtaining such an extension. In the 2005 case *EC –*

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[279] Art. 12.8 of the DSU states that: "In order to make the procedures more efficient, the period in which the panel shall conduct its examination, from the date that the composition and terms of reference of the panel have been agreed upon until the date the final report is issued to the parties to the dispute, shall, as a general rule, not exceed six months. In cases of urgency, including those relating to perishable goods, the panel shall aim to issue its report to the parties to the dispute within three months".
Art.12.9 of the DSU states that: "When the panel considers that it cannot issue its report within six months, or within three months in cases of urgency, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will issue its report. In no case should the period from the establishment of the panel to the circulation of the report to the Members exceed nine months".
[280] Decision of the Appellate Body, 15 February, WT/AB/WP/6, *Working Procedures for Appellate Review*, pp 2-3.
[281] *Supra note, 41.*
[282] Appellate Body Report, 20 May 1996, WT/DS2/AB/R , *United States — Standards for Reformulated and Conventional Gasoline.*
[283]Appellate Body Report, 5 October 2011, WT/DS399/AB/R, *United States — Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*
[284] WTO Dispute Settlement: One Page Case Summaries 1995-2009, pp 8, 34, 81.

Export Subsidies on Sugar[285], it is evident from the report produced by the Appellate Body that the parties to the case, after careful and extensive consultation with the Appellate Body Secretariat, agreed to a planned extension to the common 90 days, agreeing that it would be impossible for the panelists to produce a report in accordance with the timelines set out in Article 17.5 and that consequently they "would deem the Appellate Body Report in this proceeding, issued no later than the 28th of April 2005, to be an Appellate Body Report Circulated pursuant to Article 17.5 of the DSU"[286]. The procedure of the WTO Representatives sending so-called 'deeming letters', which was accompanied by at least ten appeals[287], acknowledged that the release of a paper beyond the 90-day period did not conform with Art. 17.5. of the DSU.

The commitment by the Appellate Body to comply with the 90-day rule lapsed beginning, as we said in 2011 with the case US – Tyre[288]. In this particular appeal, the AB, without providing any kind of explanation or justification, put an abrupt end to the usual practice of consultation in order to obtain the consent of the parties involved to obtain a waiver in the event that it did not deem it possible to produce the report in the 90 days provided[289]. Following the adoption of the report, the United States promptly made its disappointment known, communicating that it viewed the actions taken by the Appellate Body as inconsistent with its legal obligations under Article 17.5. On the 5th of October, 2011, in a statement made before the DSB, the US representative, they expressed their concerns that the AB had clearly violated Article 17.5 and that it had done so without first obtaining, as usual, the consent of the parties involved in the dispute[290]. Their concerns were also supported by other member states, who supported the American claim, including Guatemala, Chile, Argentina, Japan, and Australia[291].

In the subsequent years, the US has repeatedly pointed out that the Appellate Body has repeatedly violated the rules set out in Article 17.5, frequently complaining that many of the other Member States had simply chosen to ignore the issue, implicitly condoning this "illegal behavior"[292]. The

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[285] Appellate Body Report, 19 May 2005, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, *European Communities — Export Subsidies on Sugar.*
[286] *Ibid.*
[287] See e.g., Appellate Body Report, 20 2005, WT/DS295/AB/R, *Mexico – Anti-Dumping Measures on Rice* para.7; Joint Communication from the United States and Mexico, *US – Tuna II* (2012) pp. 1.
[288] Appellate Body Report, 5 October 2011, WT/DS399/AB/R, *United States — Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*.
[289] The overall duration of the appeal was of 104 days. The notice of appeal was submitted by China on the 24th of May 2011, and the report was circulated by the Appellate Body on the 5th of September 2011.
[290] Dispute Settlement Body, *Minutes of the Meeting Held on the 5th of October, 2011,* para. 4.
[291] *Supra note,* para. 4-7, 11-20.

major criticism of the US towards other countries was that they had refused to recognize the fundamental role that WTO Members play in the administration of DSU rules, claiming that they declined to help the parties to the conflict in addressing a severe procedural challenge and that such refusal has inevitably led the Appellate Body to feel free to disregard Art. 17.5.

Within this context it is important to underline that starting from 2014, not a single appeal submitted to the Appellate Body has been completed within the scheduled deadline. Another major criticism from the United States concerns the fact that in recent communications, the Appellate Body has merely communicated its inability to produce a report by the deadline, without providing a possible estimated date by which the report will be issued and hence circulated. According to the US representatives the AB fails to provide all WTO's Members solid explanation as to why it continuously fails to comply with the rules provided for in Art. 17.5 of the DSU, limiting itself to the mere communication of such impossibility[293].

No objective proof supports such claims and, even though such evidence existed, it is not in the Appellate Body's authority to ignore or modify the DSU. US diplomats strongly contend that the AB does not have the legal capacity to unilaterally decide when to amend or disregard the Dispute Settlement Understanding. Following their reasoning, it is clear that in the absence of a DSU amendment or any other alternative action taken by the DSU, the only rule the Appellate Body is required to adhere to is Art. 17.5.

The final issue raised by the United States is that by continuing to repeatedly violate Article 17.5, the Appellate Body has inevitably diminished the rights of other Member States, thereby undermining the trust that has been built up over the years between them and the organization. The lack of consultation between the AB and the Member States regarding the extension of deadlines or the lack of explanation regarding the impossibility of adhering to the deadline, according to the American view, do nothing but undermine the principle of transparency which, as we said earlier, is one of the cornerstones on which the entire WTO is based. Finally, the increase in the delay of appeals reduces the value of the dispute resolution procedure to the plaintiff and reduces the dissuasive impact on a Member who fails to comply with his obligations; a Member who is subject to an AB report released after the deadline for such a report has expired may credibly argue that he has no duty to comply with the judgment undermining the functioning of the entire Dispute Settlement System, the US sustain.

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[292] Dispute Settlement Body, *Minutes of the Meeting Held on the 5th of February, 2012* on the adoption of the report in *China – Raw Materials*, statements by Japan, Costa Rica, Guatemala, United States, Canada, Australia, and Norway; *Minutes of the DSB Meeting held on the 23rd of July, 2012* on the adoption of the report in *US – COOL*, statements by Turkey, Guatemala, Australia, Japan, Costa Rica, and United States.

[293] USTR (2020)

3.3.2 Continued Service by Persons Who Are No Longer Appellate Body Members: breach of Art. 17.2

The second major criticism moved from the United States Government relates to the practice pursued by persons who no longer serve as standing Members in the Appellate Body to still rule over the cases they have started before their 4 years term has expired[294]. In providing justification for such claim made, the US has reiterated that it is only WTO Members, jointly acting as the Dispute Settlement Body that have the ultimate authority to appoint and eventually reappoint members of the Appellate Body[295]. By adopting a rule, namely Rule 15, the AB has vested itself with the authority to allow former Members to continue to serve as standing panelist, clearly violating Article 17.2 of the Dispute Settlement Understanding[296]. Notwithstanding this clear and evident breach of the DSU, the US claim, persons who are no longer members have repeatedly continued to take part in appeals for approximately a year after their terms had expired.

As it is clear by reading the text of Article 17.2, the provision reflects the agreement reached by all WTO Member States on the appointment of people to serve as panelist in the Appellate Body. The said articles spells very clearly that it is only the DSB which has the authority to deliberate on such decision, not the Appellate Body itself. Despite this, the Appellate Body, according to the American perspective has manifestly exceeded its authority by going so far as to adopt a procedural rule, which gives it the power to act as if it were the DSB itself, thus deciding who is allowed to serve as a member and who is not, after the 4-year term has expired. That rule is the infamous and highly criticized Rule 15 which states: "A person who ceases to be a Member of the Appellate Body may, with the authorization of the Appellate Body and upon notification to the DSB, complete the disposition of any appeal to which that person was assigned while a Member, and that person shall, for that purpose only, be deemed to continue to be a Member of the Appellate Body"[297]. Relying on the text of that rule, which has not received the approval of the WTO Members, neither it has been promulgated by them, the AB considers itself as having the legal authority to unilaterally "appoint" persons who no

[294] LO, NAKAGAWA, CHEN (2017:113-117).
[295] BHALA (2018).
[296] Art. 17.2 of the DSU states that: "The DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once. However, the terms of three of the seven persons appointed immediately after the entry into force of the WTO Agreement shall expire at the end of two years, to be determined by lot. Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term".
[297] Rule 15 of Working Procedure for the Appellate Body, 1996.

longer serves as a standing panelist for the purpose of concluding an appeal beyond the expiration of his/her term the US accuse.

American representatives claim, that despite the clarity of the text of Art. 17.2 many have been the WTO Members who have proceeded in justifying such action perpetuated by the Appellate Body as a long-standing practice inherent to the very functioning of the AB itself. According to US administration it is unacceptable to allow a subordinate "employee" to refuse to comply to the rules and laws that have been promulgated by the "employer" simply by drafting a new rule in which he states it will not follow the law[298]. Similarly, it cannot be accepted that an illegal practice, even one that has been used repeatedly for years, can serve as justification for claims of illegality. For many years, the United States, together with other Member States of the Organization, have pointed out that this procedure is improper for an Organization that declares itself to be firmly rules-based. If it is true that the Dispute Settlement Understanding contains rules which have been previously agreed on by all the Member States it should be also true that such rules and laws can only be modified through an agreement of all WTO Members. Hence, it has to deem illegal for the Appellate Body to change rules through a practice which itself is in clear violation of the rules agreed on.

Within this context it is important to underline that throughout the years many Member States have defended the work of the Appellate Body by claiming that it does have the legal authority to establish its very own working procedure as it is stated in Art. 17.9 of the DSU[299]. Despite this USTR reiterate the fact that the text in no way gives permission to the AB to violate the rules provided for in the DSU. In the famous case *India – Patents* of 1998 the Appellate Body itself made a very straightforward point which stated that:

> "Although panels enjoy some discretion in establishing their working procedure, this discretion does not extend to modifying the substantive provision of the Dispute Settlement Understanding. To be sure, Article 12.1 of the DSU says: Panels shall follow the Working Procedure in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute"[300]

United States claim that following this note it is clear that the DSU does not provide the panels any authority to modify or unilaterally disregard other DSU provisions. The same reasoning should be applied to the working of the Appellate Body, it should not be allowed to disregard the rules of the Dispute Settlement Understanding pursuant to Rule 15. Similarly, even if the implementation of Rule 15 were to be viewed as simply expanding the tenure

[298] US Trade Representatives (2020)
[299] Art. 17.9 of the DSU states that: "Working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information".
[300] Appellate Body Report, 16 January 1998, WT/DS50/AB/R, *India – Patents Protection for Pharmaceutical and Agricultural Chemical Products*, para. 92.

of the existing Appellate Body Member, the action would be inconsistent with the four-year term laid down by the DSU and the DSB[301].

Among many another Members, China has stated that the system of rotation which is required for by the DSU provides the legal foundation for the application of Rule 15 of the Working Procedures. In a Dispute Settlement Body Meeting held on the 28th of February 2018 it has declared that: "[…] by allowing the Appellate Body Members, whose term has expired, to finish the cases to which they had previously been assigned, Rule 15 clearly guaranteed the rotation required by the DSU, and should, thus, form part of the Working Procedures for the Appellate Review"[302]. According to US diplomats reasoning this very statement clearly portrays a deep misunderstanding of the text of the DSU. Indeed, Article 17.1[303] does provide the Appellate Body with the legal authority to decides its working procedure for the rotation of serving members, without granting any right to extend their mandate.

The Appellate Body has however, managed to defend its own practice in several occasions. In response to the criticism put forward by the United States, on the 24th of November 2017, the Appellate Body has circulated among the WTO Members a Background Note on Rule 15[304], which however according to the American Administration has only increased the number of concerns rather than providing Members with actual answers. The said Background Note makes clear that the resort to Rule 15 has been providential for the well-functioning of the entire Appellate Body system for over twenty years whenever its composition changed in the midst of a pending appeal, claiming also that many other international adjudicators do apply procedural rules that are very similar to Rule 15, thus allowing outgoing adjudicators to complete the cases assigned to them before their term expired. The end of the note states that: "[…] in order to ensure the smooth functioning of the appellate stage when the Appellate Body's composition changes, and in particular when it has not been possible to fill vacancies in a timely fashion, AB Members have stayed on, with the authorization of the Appellate Body, to complete the disposition of pending appeals under Rule 15"[305]

With regard to this Background Note, the United States have pointed out four main criticisms. Firstly, such note does not provide nor does it address any kind of legal basis for the inclusion of Rule 15 in the Working Procedure;

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[301] LIGHTHIZER (2020).
[302] Dispute Settlement Body, *Minutes of the Meeting held on the 28th of February 2018,* para. 7.21.
[303] Art. 17.1 of the DSU states that: "A standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body."
[304] WTO, *Appellate Body Annual Report for 2017*, 2018, Annex II pp. 74.
[305] Background Note, 2018, para.5.

which otherwise concerns the review of appeals by the Appellate Body Members, not by officials who are not Appellate Body Members. Accordingly, the document fails to explain how the continuous service of a former member relates to the appointment authority of the DSB as it is provided for in Art. 17.2 of the DSU. In the American view The Appellate Body seems to be dependent on the political considerations of an effective functioning thus, disregarding the law. The second criticism relates to the fact that the use of words has been highly weighed and meticulously chosen, in order to avoid mentioning that many criticisms have been made against Rule 15. Indeed, the text states as follows: "[…] until recently, the application of Rule 15 has never been called into question by any participant in any appeal, nor has it been criticized by any Member in the DSB when an Appellate Body report signed by an AB Member completing an appeal pursuant Rule 15 was adopted by the DSB"[306]. According to the United States, the Appellate body fails to remember that already back in 1996, when the rule was included into the Working Procedures, India has raised its concerns on the fact that such rule might give rise to numerous systemic concerns by asserting that: "This was contrary to Article 17.1 of the DSU which, *inter alia*, provided that a standing Appellate Body shall be established by the DSB and that it shall be composed of seven persons". Rule 15 would lead to a situation where the Appellate Body could consist of more than seven members or an Appellate Body member continued after the expiry of his term without the approval of the DSB. While the practical need for the provision contained in Rule 15 was understandable, [the Member] would be seriously concerned if a member of the Appellate Body could continue without concurrence or approval by the DSB. This Rule provided for notification to the DSB and instead of approval and therefore was in violation pf Article 17.1 of the DSU[307]. Third, paragraph 6 of the Background note states clearly that Rule 15 was conceived to apply only to very short periods of time in which transitions were taking place. However, US claims that by no way an illegal action should be deemed possible simply because of its short duration. Additionally, in his 2020 report, USTR Lighthizer points out that there has been an exponential number of cases in which former AB members have continued to serve and have continued to take part into the decision long after their mandate had formally terminated. Even, he adds, there has been a particular case in which members of the Appellate Body have been appointed to serve into a division merely three days before the expiration of their term implicitly meaning that the entire appeal would have been solved after these people had formally ceased to be standing Members[308]. The last claim put forward by the United States concerns the reference made in the note to "other international adjudicatory bodies" namely international tribunals, pointing out that the procedural working rules of such institutions are provided for in their constitutive

[306] Background Note, 2018, para.6.
[307] Appellate Body, *Minutes of the Meeting Held on the 21st of February*, 1996, pp.12
[308] USTR Lighthizer is referring to the 2008 case *US – Continued Suspension*.

agreements. Taking as an example the International Court of Justice, US representatives make clear that the transition rules are clearly spelled in Art. 13.3 of its Statute which is also annexed to and forms an integral part of the Charter of the United Nations[309]. Contrary, Rule 15 has neither been approved by the Members of the WTO nor it is set out in the Dispute Settlement Understanding.

To conclude this section, we can therefore assert that for the United States, the continued and repeated violation of Article 17.2 has enormous implications that spill over into the entire Dispute Settlement System. Following their view this violation clearly exposes how the Appellate Body's sole purpose is to extend its legal authority far beyond that conferred upon it by Member States thus reducing their constitutional privileges, as former Appellate Body Members sign reports that contravene the balance of rights and responsibilities set out in the WTO Agreements.

3.3.3 Appellate Body Review of Facts and Review of a Member's Domestic law de novo: violation of Article 17.6

As it is commonly known the Members of the World Trade Organization have vested the panels with the authorization to make actual finding and legal conclusions, and they have granted the Appellate Body the power only to review the latter. According to the US representatives, in a clear violation of what is provided for by the Dispute Settlement Understanding the Appellate Body has repeatedly reviewed panels finding of fact, despite the rather explicit clear limitation of appeals to only legal issues[310]. The main claim is that by engaging is such wrongly behavior the Appellate Body seeks to expand its authority beyond the scope of review; additionally, it contributes to the lengthen of the overall duration on the appeals, making it impossible for a report to be circulated within the expect 90 days as provided for in the above-mentioned Article 17.5 of the DSU. What the United Stated and many other WTO Member States have pointed out is that in 1995 they all agreed to the creation of a dispute settlement system in which the panels, and the panels only would have the legal authority to render factual finding and consequently legal conclusion, granting the AB the authority to review, as stated before, only the latter. In a clear violation of the DSU, the US point out, the Appellate Body has impacted in a negative way the overall Dispute Settlement significantly.

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[309] Art. 13.3 of the Statute of the International Court of Justice states that: "The Members of the Court shall continue to discharge their duties until their places have been filled. Thought replaced, they shall finish any cases which they may have begun".
Art. 92 of the United Nation Charter states that: "The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter".

[310] HILLMAN (2018).

In order to legally justify their claims, USTR start from the text of Art. 11 of the DSU that in describing the inherent functions of a panel states as follow:

> "The function of a panel is to assist the DSB in discharging its responsibilities […] a panel should make an objective assessment of the matter before it, 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 DSB in making the recommendations or in giving the rulings provided for in the covered agreements […]"[311].

Stemming directly from the text it is quite clear that the matter in a litigation comprises only the actual facts and the legal claims, providing the panels the authority to make findings on both. On the other hand, the position envisioned by WTO members regarding the authority given to the Appellate Body is different: in the agreement reached in the DSU they expressly agreed to limit it to mere legal claims, leaving out the facts. According to the US government it is highly impossible to misinterpret the text of Art. 17.6 as it is very clear on the point in question stating that: "An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel"[312].

In fact, the Appellate Body itself, in a 1998 report, acknowledged the limits of the authority granted to it by Member States, stating that given the substantial difference existing between facts and legal interpretations, the former produced by a panel, are not subject to review by the Appellate Body[313]. Similarly, however, the US claims, the AB has attempted to circumvent the limits of its authority by declaring the existence of a standard review procedure that is also applicable to reports produced by panels in full compliance with the panel's ascertainment of facts under the relevant covered agreement[314]. According to a careful analysis of the U.S. administration, this approach appears to fail to answer a very important question: in light of the text of Article 17.6, how does the Appellate Body feel empowered to review a panel's ascertainment of facts? From the point of view of the US Diplomats, it is urgent to find an exhaustive and legally based answer to this raised doubt

[311] Art. 11 of the DSU.
[312] Art. 17.6 of the DSU
[313] Appellate Body Report, 13 February 1998, WT/DS26/AB/R; WT/DS48/AB/R, *EC – Measures Concerning Meat and Meat Products (Hormones)*, para.132.
[314] US Trade Representatives (2020

before being able to move on to a real analysis of the above-mentioned "standard procedure". Furthermore, they add, the review authority asserted by the Appellate Body poses some important concerns. It is clear that the DSU text makes no reference whatsoever to this standard procedure adopted by the Appellate Body without authorization or agreement reached by the other Member States. In the manifest absence of such agreement, the Appellate Body has used the text of Article 11 of the DSU to justify its adoption of this standard review procedure. In this manner, the Americans criticize, once again the Appellate Body has unilaterally decided to ignore what is provided for in the DSU, greatly expanding its authority and consequently its powers beyond what other Members had envisioned. The Appellate Body has erroneously interpreted the sentence "should make and objective assessment" written in Art. 11 to their favor, considering it as a manifest requirement for the panels to engage in such procedure. This should be deemed unacceptable as this interpretation is highly incorrect and does not comply with the very wording of the text itself. The choice by Member States to use the word "should" makes it very clear that the creation of such a legal obligation was not foreseen. Such conclusion is additionally reinforced by the very wording of Art. 17.6 itself, thus the Appellate Body once again fails to legally justify its illegal actions the American administration concludes.

According to USTR's 2020 Report, the Appellate Body over the years has become significantly more aggressive in its approach to factual findings reviews, going so far as to use a variety of procedural standards. It has done so by using as a justification the fact that in order for an Article 11 appeal to be successful, litigants must show that the panel that produced the report made a mistake that called into question the panel's good faith. It should be noted, however, that in more recent time the Appellate Body has exponentially lowered such threshold. In the 2011 appeal of the case *EC – Large Civil Aircraft* it has exhaustively explained that in order to prevail in the argument under Article11, it must be confident that the panel has exceeded its jurisdiction as a trier of evidence[315]. Additionally, the AB has explained that it means that a panel has the inherent duty to provide both a reasoned and adequate elucidation for its findings and accordingly to provide the parties with a coherent reasoning. Hence, it is called to base its findings on a pure evidentiary base without engaging in the application of a double standard of proof. In the light of the above, it is clear that in the view of the US representatives, the Appellate Body has unilaterally granted itself the power and authority to review the panels' reasoning and, if deemed necessary, to replace it with its own. Their claim is that none of the WTO Member has ever agreed to grant such power to the AB, hence, rather that engaging in the development of its own standard of the review it should comply with what is provided for in the Dispute Settlement Understanding.

[315] Appellate Body Report, 1 June 2011, WT/DS316/AB/R, *European Communities and Certain Member States — Measures Affecting Trade in Large Civil Aircraft*, para.881.

An additional criticism moved by the USTR is that the Appellate Body has repeatedly declared to have the legal authority also to review findings of the panels concerning the meaning of Member State's domestic laws. While the compliance of domestic law with the provision of the WTO is a matter of law, the very meaning of such domestic law constitutes a matter of fact in the WTO system, hence it cannot be subjected to the review of the Appellate Body. The text of the DSU makes clear the distinction that exists between legal and factual issues. The fact that the determination of the meaning of domestic laws represents a problem of factual nature, is also recognized by the norms of international law in general. In fact, standard international treaties reiterate that domestic laws are merely facts expressing the ultimate will of states and constituting the nature of their activities[316]. In this regard, there have been numerous occasions in which WTO panels have reiterated this position in their reports. According to the analysis conducted by USTR there have been at least 10 cases over the years in which panels have expressed themselves contrary to the work of the Appellate Body, reminding the latter that domestic law is not subject to their review as it constitutes a factual problem and not a legal one within the WTO system. Within this context it is important to point out that together with the United States many other countries including: the EU and Canada have pointed out this erroneous and illegal practice perpetuated by the Appellate Body[317]. It is clear from what has transpired, the US assert, that the Appellate Body has repeatedly treated the meaning of domestic law as if it were an issue of WTO law, which must be decided *de novo* on the appeal pursued through Article 17.6 of the DSU. Exacerbating the situation, from an American perspective, is the fact that the Appellate Body has never provided adequate legal justification or demonstrated how their repeated practice is in line with the law. The only apparent justification that the Appellate Body has provided over the years refers to a 1998 report in the *India - Patents* case[318], in which it notes that in the past both WTO panels, and even earlier GATT's panels, had carefully examined the rules of domestic law in order to declare their conformity with the law of the Organization. According to the United States, what the Appellate Body does not seem to understand is that the panels have this authority because it was conferred upon them by agreement of the WTO member states, which was not granted to it. As for today, the Appellate Body still has provided no sound explanation as to how its examination of domestic law is in full compliance with what is provided for in Art. 17.6 of the Dispute

[316] KUMM (2004).
[317] For claims moved by Canada see Appellate Body Report, 12 January 2009, WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R *China – Measures Affecting Imports of Automobile Parts*. For claims moved by the European Union see DSU Arbitration, 2 October 2019, WT/DS316/ARB/Add.1, *European Communities and Certain Member States — Measures Affecting Trade in Large Civil Aircraft*, para.2.
[318] Appellate Body Report,16 January 1998 , WT/DS50/AB/R *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, para. 64

Settlement Understanding. The mere motivation such an examination is of pivotal importance in order for an appeal to be successful does not provide for the necessary legal base for the Appellate Body to grant itself with the authority to review factual issues.

To conclude this section the American Administration claims that by creating a brand-new category of "Article 11 appeals" the Appellate Body has exponentially increased its workload which, ironically enough, it has complained about on several occasions. The Appellate Body has made it known that as the number of Article 11 appeals has increased, so has the complexity of the appeals, requiring more time and inevitably leading to the impossibility of producing the report within the 90-days' time frame. The practice of the Appellate Body of conducting *de novo* review of the meaning of domestic laws is profoundly incompatible with the overall Dispute Settlement System. It inherently departs from the agreed division of duties and responsibilities by causing an exponential increase in the complexity of and the delay in the findings of the panels.

3.3.4 Appellate Body wrongly claims Reports are to be Treated as Binding Precedents

The text of Article 3.7 of the DSU clearly explained that the existence of an efficient Dispute Settlement mechanism exists in order to secure the Member of the Organization a positive resolution to disputes they engage in[319]. In compliance with such obligation the system may provide clarifications of the existence of provisions in the WTO Agreement that are in accordance with the customary laws of interpretation of public international law. However, as stated in Article IX:2 of the Agreement, only Member States have the ultimate and exclusive authority to adopt said interpretations. Accordingly, the Dispute Settlement Understanding together with the provision contained for the adoption of the reports of the Appellate Body is without prejudice to such exclusive authority[320]. It should be noted that the majority of the early Appellate Body reports fully complied with the provided division of responsibilities but then changed course as of 2008. Since then, the US notes, the AB has repeatedly stated how panels should understand the

[319] Art. 3.7 of the DSU states that: "Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements 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 […]".

[320] Art. 3.9 of the DSU states that: "The provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement".

interpretations in their reports as having binding force absent "*cogent reason"*[321] for departing from them. This position adopted over the past 12 years by the Appellate Body is in clear contrast to the provisions of the DSU, which, as cited, reserves such authority solely to member states. This practice of treating the reports issued as binding precedents has serious repercussions and implications for all WTO Members. In fact, it demonstrates once again, according to the US administration, how the Appellate Body unilaterally seeks to expand its authority and competencies by deciding not to respect the laws set forth in the DSU. Operating in this way, it inevitably deprives the signatory States of the opportunity to see their disputes solved through the decisions of the panels and the Appellate Body if necessary, purely on the basis of evidences and findings belonging to that particular case only. Lastly, such practice may engage into legal interpretations that deeply contradict the agreement of the WTO, profoundly affecting Member's right without their expressed approval[322].

As noted above, Article 3.2 of the DSU does not confer any authority on panels or the Appellate Body to treat reports previously adopted by the DSB as binding precedents, reserving interpretive authority only to the Ministerial Conference or the WTO General Council. The DSU clearly explains how both the panels and the Appellate Body are required to apply customary law for the interpretation of public international law with the ultimate aim of assisting the DSB in the determination of whether a measure adopted by a given Member state is consistent with the provisions of the WTO. In International Law, the rules governing the interpretation of laws do not give interpretations made in the context of dispute resolution any kind of binding precedent value. Within this realm it is important to underline that the Dispute Settlement mechanism of the WTO does not present any substantial change with regard the old system in place during the five decades of the GATT, detail that even the Appellate Body seemed to have understood during the early years of its work. Thus, a panel is not allowed to default or ignore what it is stated in the DSU by unilaterally proceeding to treat reports as precedent. Similarly, every time a panel decides to adopt the same reasoning used in a previous dispute, without producing new ones, it inevitably fails in its commitments and obligations enshrined in Art. 3.2, 11 and 7.1 of the DSU. By sticking to reasoning already used in previous cases, they might run the dangerous risk of creating new obligations that go far beyond what is stipulated in the agreements, thus violating both Art. 3.2 and Art. 19.2[323] of the DSU.

The USTRs also note in their analysis, how it was the Member States themselves that agreed on the different procedures aimed at adopting the

[321] A *cogent reason*, argument, or example is strong and convincing.
[322] NARKILAR, DAUTON, STERN (2014:526-527).
[323] Art. 19.2 of the DSU states that: "In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements".

interpretations. The signatory States unanimously established that they would act on the recommendations issued by the relevant Council. This modus operandi ensured that all States could learn about the problem, discuss it freely with fellow Members, and participate first in the relevant Council and then in the Ministerial Conference to proceed by consensus to adopt the interpretation. This process ensures that no rights or obligations of WTO Member States can be infringed or altered without their explicit consent[324]. This high level of transparency, consent and participation by all Member States in the process concerning the adoption of an authoritative interpretation is not equally reflected in the process of adoption of reports envisioned in the Dispute Settlement Understanding. The main difference concerns the overall level of participation on Member States, as for the adoption of an authoritative interpretation it is required the involvement of all WTO Members, the adoption of a specific report by the DSB might reflect different degrees of participations of Member States. The concern raised by the United States seems to find an apparent justification in the text of Article 3.9 in that it makes it clear that the adoption by negative consensus of a panel or Appellate Body report containing an interpretation of a WTO agreement does not give such an interpretation an authoritative value, as an interpretation only takes on such character once it is officially adopted by the Ministerial Conference. Asserting this is in no way meant to diminish the enormous value that interpretations provided by previous panels or the appellate body have. E.g., a panel or the Appellate Body may find the reasoning contained in previous reports to be highly persuasive, and may therefore refer to them to increase the persuasiveness of the reasoning they are following within their own reports. It is important, however, to emphasize that taking into account what is written in a previous report is quite different from treating that report as a binding precedent.

US diplomats in backing their claims make it clear that the Appellate Body's own reports do not actually support this new approach of "cogent reason". In asserting this they refer to the report produced in 1996 for the *Japan - Alcoholic Beverages II*[325] case in which the Appellate Body itself described in a clear and exhaustive manner the value attributed by the DSU to reports previously adopted in other disputes. Unfortunately, this approach has undergone a radical change since 2008, without any modification to the DSU or to the WTO agreement as it is evident in the *US – Stainless Steel* report of the Appellate Body. In the first mentioned case, the Appellate Body, straightforwardly stated that the adoption of reports under the agreement of the World Trade Organization does not constitute any kind of precedents for subsequent reports because and thus it does not assign any particular status to the interpretations reached in the reports; as it is provided for in the DSU, such

[324] US TRADE REPRESENTATIVES (2020:56-57).
[325] Appellate Body Report, 1 November 1996, WT/DS8/AB/R WT/DS10/AB/R WT/DS11/AB/R, *Japan - Taxes on Alcoholic Beverages II*.

right is reserved to Member States only. In the case *Japan - Alcoholic Beverages II*, reference is also made to the status that panel reports enjoyed during the years of the GATT regime. Starting its analysis from the GATT 1947, the Appellate Body stated that the Contracting Parties[326], by deciding to adopt a report produced by a panel, did not intend to give that report the nature of binding precedent for all future interpretations on the same issue. It is therefore clear that it was the Appellate Body itself, the USTR claim, that stated that the adoption of a report by negative consensus in no way replaces the exclusive authority of the General Counsel or of the Ministerial Conference to adopt an authoritative interpretation as established in both Art. IX:2 of the WTO and Art. 3.9 of the Dispute Settlement Understanding. Quite different is the position the Appellate Body has adopted in the 2008 case *US – Stainless Steel* that introduced for the first time the notion of cogent reason within the dispute settlement realm. The entire case revolves around the application of Article 3.2 of the DSU, describing precisely its cogent reason approach. In paragraph 160 of the report the Appellate Body states that: "ensuring security and predictability in the dispute settlement system as contemplated in Art.3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case[327]". Among many other Members, the United States have promptly expressed their concerns with regard such report issued by the Appellate Body. As matter of fact, USTR notice, the AB discussion on the cogent reason is to be considered *obiter dicta*[328] despite being flawed for many other reasons that include[329]: it makes an erroneous and inappropriate parallel to other international for a for adjudication, it misinterprets the text of Art. 3.2 of the Dispute Settlement Understanding and it fails to really appreciate the inherent functions of both the panels and the Appellate Body.

To conclude, the US claim that the functions of the WTO adjudicators is different under the DSU. Its role is to release only the findings required to settle the conflict and, in particular, the findings that will enable the DSB to make a recommendation to bring the measure into compliance with the WTO Agreement. These conclusions are to be focused on the content of the deals affected, not on the text of the previous notices of appeal. By setting a precedent, the Appellate Body tried to extend its own jurisdiction and stripped from WTO members the right to assess the scope of the WTO Agreements. With increasing frequency, the panels merely applied the decision of the Appellate Body on cogent grounds. This trend raises important questions

[326] It must be remembered that during the GATT's years, signatory States were referred to as "Contracting Parties"

[327] Appellate Body Report, 20 May 2008, WT/DS344/AB/R *United States — Final Anti-Dumping Measures on Stainless Steel from Mexico*, para. 160.

[328] Meaning "that which is said in passing," an incidental statement. Specifically, in law, it refers to a passage in a judicial opinion which is not necessary for the decision of the case before the court. Such statements lack the force of precedent but may nevertheless be significant.

[329] LO, NAKAGAWA, CHEN (2017:81).

regarding the conflict resolution mechanism, as it indicates that serious, systematic failures are frequently happening without any consideration of the original text decided by WTO participants. Such mistakes occur over time, and where, in a subsequent appeal, the Appellate Body bases its interpretation on an erroneous interpretation, the interpretations and the resultant conclusions are gradually excluded from what was accepted by WTO members. In seeking the power to give definitive opinions through its "cogent reasons" approach, the Appellate Body upsets the delicate balancing of rights and responsibilities that remains within the context of the WTO Agreements. This is yet another example for the United States of the inability of the Appellate Body to conform with the laws decided by WTO members, weakening support for a rules-based trading structure.

3.3.5 Final Considerations

All the above-mentioned concerns raised by the United States relate to the long-standing judicial practices and legal interpretations of the Appellate Body that have been exhaustively justified on the basis of: the quasi-constitutional mandated granted to by the DSU to the panels, the AB and all WTO adjudicators and of the customary laws regarding the interpretation of treaties. Albeit being deeply criticized by the Government of the United States such said practices have been accepted as inherent legal practices of the Appellate Body[330]. Although the talks for a possible reform of the DSU began as early as 1998, it should be pointed out that all reports adopted by the Appellate Body since 1996 have been approved by the DSB without any changes being made to the case law, as would have been possible through the use of authoritative interpretation as provided by Art IX:2, through amendments as provided by Art X or by the simple overruling the findings of the dispute settlement through the DSB decisions[331]. All the justification provided by the American administration for its blocking of the Appellate Body vacancies are primarily based on interpretative claims that completely disregard the rules of treaty interpretation and that fail to recognize the judicial function of which the Appellate Body is vested. Additionally, such claims are to be deemed in clear violation of Article 23 of the DSU which requires

> "not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding"[332].

[330] PETERSMANN (2017).
[331] LO, NAKAGAWA, CHEN (2017:23-25).
[332] Art. 23 of the Dispute Settlement Understanding.

Moreover, it should be noted that a considerable number of legal problems that the US continuously complain about have been caused by the US itself: starting from the imposition of such an unreasonable short period of time for the issue of the Appellate Body reports in order to prevent adjusting the corresponding time limits for regulatory remedies under US trade law, to the disregard of the requirement provided for in the DSU to provide the Appellate Body with both administrative and legal support[333]. To this must be added the enormous contribution to the increase in the complexity of making appeals, which makes compliance with the 90-day deadline almost impossible to achieve without having to resort to new procedures. To date, the US Administration has not provided any evidence to justify the fact, that in their view the Appellate Body acted illegally by continuously engaging in the practice of "persistent overreach" thus violating both the mandate of all the WTO dispute settlement system's bodies or the customary laws for the interpretation of treaties.

The continued insistence by the United States on its own hegemonic interpretation[334] of the laws of the WTO system is a clear reflection of what many WTO members criticized during the Uruguay Round negotiations as "bad lawyering" by the representatives of the US[335] whose attempt was that of imposing American interpretative methods albeit their profound inconsistency with the customary methods for the interpretations of treaties[336]. This attitude is also interpreted as further evidence of the US Government's willingness to make the WTO Appellate Body completely dysfunctional; the point of no return has been reached in December 2019 when the said body found itself with less than three members, the quorum needed in order to hear appeals as provided for in Art. 17.1 of the DSU[337]. This extremely power oriented approach used by the United States, further reflects the insistence of US trade diplomats on the contractual existence of WTO obligations, their rejection of the "constitutional dimension" of WTO law, their disregard for the complex development of the multilateral treaty structure by "argumentative" and "judicial practices" that have gradually explained and evolved WTO rules and principles since 1995; together with the continuous reluctance of the US to recognize other, worldwide and international jurisdictions that are mandatory such as the International Court of Justice, the International Criminal Court,

[333] Art. 17.7 of the DSU states that: "The Appellate Body shall be provided with appropriate administrative and legal support as it requires".
[334] Disregard of the customary law of treaty interpretation provided for in Art. XI:2 of the DSU and the quasi-judicial interpretation as described in Articles 3 and 23 of the DSU.
[335] KUIJIPER (2018:6-7).
[336] *E.g* Art. 17.6 (ii) of the Antidumping Agreement.
[337] Art. 17.1 of the DSU states that: "A standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body".

the Inter-American Court of Human Rights and the International Tribunal for the Law of the Sea[338].

Despite the normal disagreements between parties in a given dispute, there have been numerous international lawyers both inside and outside of the Organization who have hailed WTO jurisprudence to the point of defining it as the "Jewel of the Crown" of the international trading system. This title has been reserved for it thanks to its promptness in resolving the several disputes that have arisen over the years, but above all because it is the guarantor and ensures security and total predictability to the entire system through impartial adjudications, providing an exhaustive clarification on the provision of the WTO in accordance with the principles of interpretation of international law[339]. The customary rules of interpretation of the Treaties also include the implementation of the basic rules and standards of international law "applicable in relations between the parties" including also the due process of law, the judicial administration of justice and the compliance in good faith by all Members of the WTO with the rulings of the DSB as provided for in Art. 3.10 of the DSU[340]. Although the World Trade Organization does not describe the panels or the Appellate Body as "court of justice" the rules of the DSU[341], the WTO panel and AB operating processes and the WTO rules of ethics stipulating the impartiality and equality of WTO panelists, AB representatives and arbitrators have been persistently viewed by WTO adjudicators and WTO members as evidence of a quasi-judicial mandate[342]The US allegations of "judicial over-reach" are often criticized as opportunistic: in numerous WTO disputes, the US itself has proposed and welcomed "creative interpretations" of the WTO's unlimited procedural rules e.g. the admissibility of *amicus curiae* briefs thus, opening both panels and AB meeting to the public. As US trade diplomats have made no attempt to show that the jurisprudence of the AB has violated its quasi-judicial mandate to "prompt settlement" of WTO conflicts by clarifying the contested significance of WTO clauses by the use of customary treaty interpretation laws, no other DSB member has so far sponsored the politically driven US boycott of filling AB vacancies. Experts on trade legislation in the United States, such as former US Congressman and WTO AB Chairman Bacchus, interprets the blocking of the WTO AB by US President Trump and the discriminatory import tariffs levied by the Trump administration in 2018 as in evident breach of WTO legislation.

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[338] ROMANO (2009).

[339] Art 31.3(c) of the VCLT is widely recognized as codifying customary rules of international treaty interpretation, and the specification of applicable, universally recognized principles of justice in the of the Vienna Convention on the Law of Treaties.

[340] Art. 3.10 of the DSU states that: "It is understood that requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute. It is also understood that complaints and counter-complaints in regard to distinct matters should not be linked".

[341] BACCHUS (2018b).

[342] World Trade Organization (2004).

Although member driven Dispute Settlement reforms proposals ever since 1998 have fail to gather the necessary consensus on specific amendments to be pursued, politically agreed reforms of the DSU remain certainly desirable, and it is exactly for this reasons that many Member States have engaged in a great number of talks and discussions aimed at finding a solution for the impasse of the Appellate Body.

3.4 Saving the Right of Appeal: from the proposed amendment of Article 17 to the Multi Party Interim Appeal Arrangement

As extensively explained in the previous section of this elaborate, starting from 2016, under the administration of former President Barack Obama, the United States have repeatedly vetoed the process of selection for the reappointment of new members for the Appellate Body of the World Trade Organization; such decision has been justified on a series of legal and procedural concerns on the activity of the AB[343]. As a direct consequence of said choice, at midnight of the 19th of December 2019, the Appellate Body ceased to be operational, failing to meet the quorum of three standing members, required to hear a case of appeal as provided for in Art. 17.1 of the DSU[344]as only the Chinese judge, Ms. Zhao Hone remained in office[345]. Unfortunately, also the latter member of the AB had been vested with several criticisms from the US administration, in fact, Ambassador Shea, in a meeting before the Dispute Settlement Body held in March 2020, claimed that as Ms. Zhao is a paid officer of the People's Republic of China, she does not constitute a valid member to serve in the Appellate Body.

In light of such an unprecedented institutional crisis[346], the European Union has decided to step in and choose to be a pivotal player in the process of the reform of the Appellate Review mechanism of the WTO. Going beyond the presented proposal for the amendment of Art.17 of the DSU, that have never been welcomed positively by the United States, despite their claim being largely taken into consideration in the draft decision presented by Facilitator Ambassador Walker in late 2019, the European Union has launched an attractive provisional solution in order to preserve the right of appeal of states which have triggered the mechanism of dispute settlement: the Multi Party Interim Appeal Arbitration Arrangement ('MPIA'). The MPIA is entirely based on an autonomous alternative dispute settlement mechanism in full compliance with Article 25 of the DSU provided for arbitration as an alternative mean for the resolution of disputes[347]. The subsequent sections of this elaborate will analyze how the project came into being and how it progressively gained the great support of the other Member States of the

[343] LO, NAKAGAWA, CHEN (2020), LEHNE (2019).

[344] Art. 17.1 of the DSU states that: "A standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body".

[345] DI DONFRANCESCO (2019).

[346] ADINOLFI (2019:33), CHARNOVITZ (2018:1).

[347] Art. 25 of the DSU states that: "Expeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties".

World Trade Organization while also providing an answer to the criticism raised by the United States.

3.4.1 Proposed Amendment of Art. 17 of the Dispute Settlement Understanding

On the 12th December of 2018, the European Union together with China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore, and Mexico has presented a list of proposed reforms aimed at overcoming the impasse of the dispute settlement triggered by the decision of the United States to veto the reappointment of the member of the Appellate Body. EU Commissioner for Trade, Ms. Cecilia Malmström has declared:

> "the Appellate Body function of the WTO dispute settlement system is moving towards a cliff's edge. Without this core function of the WTO, the world would lose a system that has ensured global trade stability for decades. Now, together with a broad coalition of WTO members, we are presenting our most concrete proposals yet for WTO reform. I hope that this will contribute to breaking the current deadlock, and that all WTO members will take responsibility equally, engaging in good faith in the reform process"[348].

As it has been reiterated several times in this paper, the dispute settlement system established at the end of the Uruguay Round negotiations was fundamental in conferring both security and predictability to the entire multilateral trade system, elements undoubtedly lacking during the 50-year regency of the GATT. The changes that have been presented are the result of countless discussions among the Member States that have done the most to find a permanent solution to the criticisms made by the United States, which then pushed the administration to veto the appointments. The proposed reforms to the amendments in Article 17 are more aimed at addressing the concerns expressed about the operation of the Appellate Body and its procedures, which have undoubtedly been the most criticized.

With respect to the first concern expressed by the US relating to the practice of outgoing members of still serving on cases after their mandate has expired the EU and the other Member States have proposed the adoption of a transitional rule which will govern and regulate such situation. Said rules should be adopted by all Members of the WTO through an amendment of the text of the Dispute Settlement Understanding. Doing so will give outgoing members the opportunity to complete all appeals they were assigned before their 4-year term expired[349]. However, the outgoing member shall serve no longer than for a period of two years after the expiration of the mandate.

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[348] MALMSTRÖM (2018).

Addressing the issue relating to the failure to respect the 90 days' time requirement, the countries proposed an amendment of Art. 17.5. The amended Article will give the parties involved in the dispute the opportunity to extend the time limit beyond 90 days by agreement between them. If such an agreement cannot be reached, the Appellate Body will have to comply with the DSU time limit but may seek to streamline its work by advising the parties which aspects of the panel report to appeal and which aspects not to, and may take appropriate measures to reduce the time limit and meet the deadline[350].

The proposed reform also addressed the concern raised by the US according to which the Appellate Body has provided interpretation also of domestic law, thus acting *ultra vires* clarifying that questions of law that are subject to appeal before the appellate body do not include the interpretation of domestic legislation. This will be done so by the insert of a footnote to the Article which will state that: "For greater certainty, the issues of law covered in the panel report and legal interpretations developed by the panel do not include the panel findings with regard to their legal characterization under the covered agreement"[351].

In order to tackle the last claim of the USTR relating to the alleged practice of the AB of treating previous panel reports as binding precedents, the EU and the fellow Members who participated in the draft proposal advanced the possibility of holding annual meetings between the WTO Members and the Appellate Body in order to create an additional channel of communication; in this meeting, the dispute settlement organ, together with the Membership of the Organization would discuss and express their personal views in relation to the adoption of particular reports[352].

In addition to proposing targeted solutions to all of the criticisms made by the united states, other proposed amendments were included in the text presented to the General Council in December 2018. In fact, the idea of extending the term of office of the members of the appellate body (6-8 years) and eliminating the possibility of being appointed for a second term was hypothesized. The objective of the proposed extension is to promote the independence of the Appellate Body and its members. Furthermore, in order to strengthen the efficiency of the Appellate Body, it has been proposed to increase the number of members from 7 to 9. This will also provide the Organ with the needed geographical balance, a requisite deemed highly important due to the large membership of the WTO.

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[349] Communication from the European Union China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore, and Mexico to the General Council, 12-13 December 2018, Annex *Amendment of Certain Provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, para. 1.
[350] *Supra note,* para. 2.
[351] *Supra note,* para. 3.
[352] *Supra note,* para. 5.

Roughly a year later, on the 15th of October 2019, all these listed proposals were presented again before the General Council by the Facilitator David Walker through his report "Informal Process on Matters Related to the Functioning of the Appellate Body". Unfortunately, however, these proposals failed to gain the consensus needed to be implemented.

3.4.2 Article 25 of the DSU as an alternative mean for dispute settlement

The text of Art. 25 of the DSU presents arbitration as an alternative means for the resolution of disputes to which Members may have recourse, so as to facilitate the achievement of an optimal solution for both parties. This undoubtedly reflects and confirms the choice made in the Montreal Package of 1989[353], that finally realized the proposal which had been presented, but never accomplished, in the old Havana Charter of 1947 that would allow the Members involved in a given dispute to resort to arbitration. Arbitration under Art. 25 represents, together with mediation, conciliation and good offices, one of the alternative means at the disposal of Member States to enhance and promote the achievement of the goal of the multilateral conflict resolution process which consists in obtaining a rapid and positive solution to a dispute that fully preserves and respects the rights and obligations of the WTO, while also providing predictability and security to the whole multilateral trading system.

In fact, the arbitration proceedings provided for in Art. 25, despite being independent and autonomous from the principal DSU path of conciliation and two-level adjudication, they are completely integrated within the Geneva system under three main aspects. First, the disputants must notify the Membership the WTO directly of the accord in which they agree to resort to arbitration; this must be done in sufficient advance of the actual commencement of the arbitration process[354]. In this way it will be possible for other States to comment and determine what steps will be taken with respect to the announced dispute. Second, once the arbitration award has been secured, the parties to the dispute are called upon to notify it "to the DSB and the Council of Committee of any relevant agreement where any Member may raise any point relating thereto"[355]. The litigants, in fact, are called up to agree to abide by the arbitration award, that will then become mandatory without the approval of the DSB. In any case since the arbitral awards, guaranteed thanks to the recourse to art 25, have the power to interpret the laws of the WTO, they automatically become part of the very jurisprudence of the system and consequently must be in full consistency with the WTO agreements and

[353] With the expressions, Montreal Rules or Montreal Package are indicated the set of the new rules that have been developed at the Ministerial Meeting held in Montreal for the multilateral dispute settlement mechanism.
[354] Art. 25.2 of the DSU.
[355] Art. 25.3 of the DSU.

must be made known to the entire membership of the WTO. This obligation to transparency is intended to allow States to introduce any kind of clarification on any aspect of the arbitration award and to wholly and promptly assess it. Finally, the DSB is fully involved in the entire process of implementing arbitration awards, since it is precisely Article 25.4 of the DSU which states that "Articles 21 and 22 of this Understanding shall apply *mutatis mutandis*" thus granting to the DSB the same role it had with respect to the implementation of both panels and Appellate Body reports[356]. At the time of this writing, the member states of the Organization have resorted to arbitration through the use of Article 25 only once and only for the determination of the level of nullification and impediment of benefits in a circumstance in which a breach of certain TRIPs obligations had already been ascertained by the panels and in the subsequent report of the Appellate Body. In the 2000 *United States – Section 110(5) of the US Copyright Act*[357] case, the parties involved in the dispute requested to the arbitrators to ascertain the damaged suffered by the European Union as a consequence of a breach by the United States of copyrights of European performers. In this particular Art. 25 arbitration, the adjudicators promptly authoritatively applied the *kompetez-kompetenz*[358] principle, by making a clear reference to the AB finding in the 2000 *Us – 1916 Act* according to which "it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative"[359]. In the subsequent arbitration award, it was reiterated that in the clear absence of a multilateral control over the recourse to Article 25, it is the responsibility of adjudicators to ensure that the application of such provision is in full compliance with the rules and procedure established by the system of the WTO. The duties of adjudicators also include the full respect of the obligation stemming from Art. 3.5 according to which "All solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements"[360].

[356] MALKAWI (2007:173), WOLDFRUM, STOLL, KAISER (2006:566), LO (2011:879)
[357] Panel Report, 27th of July 2000, WT/DS160/R, *United States – Section 110(5) of the US Copyright Act.*
[358] Firstly, developed in the Federal Constitutional Court of Germany, it is a jurisprudential doctrine whereby a legal body, such as a court or arbitral tribunal, may have competence, or jurisdiction, to rule as to the extent of its own competence on an issue before it.
[359] Appellate Body Report, 26 September 2000, WT/DS136/AB/R, WT/DS162/AB/R *United States – Anti-Dumping Act of 1919*
[360] Art. 3.5 of the Dispute Settlement Understanding.

3.4.3 Setting up the scene for the Joint Declaration of EU and Canada

Undoubtedly, over the course of the years the European Union's approach to the WTO dispute settlement mechanism has been largely characterized by a deep belief in the ruled-based multilateral trading system, in which controversies among Member States could find solution thanks to the two-step adjudicatory process put in place in the Uruguay Round in 1995. A process which entails the enforcement of rules, after having previously benefitted from the given interpretation of a standing appeal instance aimed at ensuring and guaranteeing both quality and independence of judgements[361]. Coming to the conclusion that the continued hostility of the United States and its continued use of the veto for the appointment of members of the Appellate Body would inevitably lead to the erosion of the right of Member States to appeal, the European Union has firmly decided to pursue two parallel paths in search of a temporary solution to this impasse. First, it acknowledged the concerns expressed by Washington about the operation of the Appellate Body and worked to develop a solution that would work for everyone, while preserving the fundamental features of the entire Dispute Settlement and especially those of the AB[362]. As the European Union showed to be extremely determined in preserving the inherent function of the Appellate Body, it has carefully considered, on the basis of proposals made by numerous legal scholars, the creation of an alternative means of dispute resolution, through an instrument already available to the States, namely Article 25 of the DSU; this solution is obviously to be considered as provisional, until a final reform of the entire system is achieved[363]. Subsequently the EU has diligently explored the possibilities of creating an interim solution stemming directly from the text of Art. 25.

Particularly, the European Commission has closely worked with all Member which had expressed their interest, in drafting an arrangement for a temporary appeal procedure with the aiming of both preserving as safeguarding: the complete independence of adjudicators, the two-step process of adjudication and most importantly the binding nature of the dispute settlement of the WTO[364]. These three cornerstones established by the European institutions are clearly reflected in the proposed interim mechanism which consists of a political declaration by all members adhering to the project to which is added an annex containing the procedural rules granted in accordance with Article 25 of the DSU. This proposal was met with great political support at the European level, to the point of being endorsed by both

[361] EU Representative in WTO (2020).
[362] Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore, Mexico, Costa Rica and Montenegro to the General Council, 11th December 2018, WT/GC/W/752/Rev.2
[363] HILLEBRAND POHL (2019:139)
[364] PAUWELYN (2019:297-321).

the European Parliament and the European Council[365]. Particularly in a 2019 resolution, the European Parliament declared its full support for such initiative aimed at concluding a temporary arrangement for the provisional solution of disputes, to be achieved together with Europe's major trading partner in order to protect and preserve the right of Member State to have access and resort to the two level-adjudication processed provided for in the WTO[366]. Due to the common support for a multilateral trading system, Canada was the first partner chosen by the European Union to develop this new appeal procedure based on the text of Art 25 of the DSU. This choice seems inevitable, as both powers have repeatedly stressed the fundamental importance of the WTO in safeguarding and facilitating international trade[367]. As a direct consequence on the 17th Bilateral EU-Canada Summit held in Montreal in 2019, the two powers publicly announced that they were ultimately finalizing the interim appeal arbitration procedure based on already existing WTO rules and that said provisionary solution could be applied up until the Appellate Body is ready to hear appeals again. Thus, ten days later the European Commission officially presented in Geneva the "Interim Appeal Arbitration Pursual to Article 25 of the DSU" together with an Annex enlisting all of the agreed procedure as a joint statement with Canada, with the subsequent notification to the Secretariat of the WTO on the 25th of July 2019[368].

Due to the provisional nature of this agreement, and the growing fear of States for the complete demise of the World Trade Court, the proposal put forward by the European Union and Canada found wide support among the other parties. More and more WTO members have increasingly acknowledged and appreciated the soundness of the constructive and well-founded European approach, indicating their ability to share the EU's temporary structure. For this specific reason the September of the same year, the European Commission entrusted the Commissioner in charge for trade with the full power to "adopt, on behalf of the Commission and under its responsibility, certain measures concerning the interim appeal arbitration at the World Trade Organization"[369] a specific delegation that would allow the European institution to promptly

[365] Communication from the General Council Secretariat to the Permanent Representatives Committee/Council, 5 July 2019, 10905/19, *WTO Appellate Body – Interim Arrangement – Endorsement*.
[366] Resolution of the European Parliament, 28 November 2019, 2019/2918(RSP), *on the crisis of the WTO Appellate Body*, para. 5.
[367] *Canada – EU Summit Joint Declaration* of the 17th -18th of July 2019, para. 12.
[368] Communication Circulated at the request of the Delegations of Canada and the European Union,25 July 2019, JOB/DSB/1/Add.11, *Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes – Interim Appeal Arbitration Pursuant to Article 25 of the DSU*
[369] European Commission, *Minutes of the 2306th meeting of the Commission held in Brussels*, on the 4th of September 2019.

answer to any possible request put forward by other States to join their interim solution[370].

In December of 2019, as before mentioned, Ambassador David Walker presented to the General Council a series of proposals aimed at overcoming of the impasse of the Appellate Body triggered by the United States, which ultimately failed to reach the needed consensus. Among many Members, the US who never collaborated to the draft of any proposal presented in Geneva, strongly opposed such proposals and persisted in vetoing the appointment of new members for the Appellate Body, leaving it with a single standing member. This has caused the complete paralysis of the system put in place for the appeal procedure of the WTO with no reform proposal really taken into consideration by the overall Membership of the World Trade Organization.

Inevitably the impasse of the Appellate Body attracted the attention of many Member States on the proposal elaborated by Brussels for an alternative dispute settlement mechanism to be put in place up until a permanent reform of the DSU in agreed on by the Ministerial Conference. This immediately prompted the European Union to further enhance its efforts to ultimately preserve the rule of law in the international trade realm and thus the right to an appeal review as provided for in the WTO system.

Rather than pursuing the strategy of bilateral agreements, the EU has decided to multilaterize the nature of its proposal so that it can protect and preserve the right of all member states to have access to the appeals process. This multilateral dimension had already been mentioned by Argentina when in December 2019, it provided its commentary on the Joint Declaration made by Canada and The European Union. In mid-December, the European Union organized an informal meeting in Geneva, in which all those who had expressed their support for the initiative based on Art. 25 gathered, targeting especially the world economies that had often resorted to the Appellate Body along with developing countries[371]. The latter in particular considered the WTO dispute settlement mechanism fundamental, as it represented an essential part of their bargain power when they decided to join the Organization. Within this context the proposal put forward by the European Union and Canada found complete support and political backing also from China together with several other WTO Countries such as Australia, Argentina, Brazil, Chile, India, Japan, Norway and Turkey[372]. During the course if this informal meeting held in Geneva, the EU prompted all the invited Member to define together an arrangement for the multi-party interim appeal, whose job it would be to provide a viable alternative to the momentary

[370] Decision of the Commission, 4 September 2019, C (2019) 6380, *Granting an Empowerment Relating to Interim Appeal Arbitration Procedures in the World Trade Organization.*
[371] KANTH (2019).
[372] MILES (2019).

lack of members necessary for the Appellate Body to function properly. This solution would apply only to interested States and would preserve both the right of States to have access to a binding adjudication of controversies and the ultimately the right to appellate review.

Roughly a month later, following the World Economic Forum, the Ministers of Australia, Brazil, Canada, China, Chile, Colombia, Costa Rica, European Union, Guatemala, Republic of Korea, Mexico, New Zealand, Norway, Panama, Singapore, Switzerland and Uruguay jointly released a statement on which they all reiterated their full commitment to work with the WTO Membership in order to find a proper and permanent solution to the current situation of the Appellate Body[373]. On March 2020 a further statement was issued declaring that also Hong Kong was now supporting the MPIA.

Obviously, in light of what has repeatedly emerged in this paper, the proposal put forward by the European Union has come up against strong opposition from the United States; in fact, there are numerous rumors indicating that during the meeting held in Davos, the United States put political pressure on some of the states not to take part in this initiative[374]. Countries such as Argentina, India, Indonesia and Japan, which have often used the dispute resolution mechanism, have not yet joined the MPIA, nor has Russia due to growing friction with the European Union, although Moscow has frequently criticized the United States' continued attacks on the Appellate Body[375].

What immediately stands out is the adhesion of Pacific countries and famously allied to the United States, Australia, Singapore and New Zealand, or Latin American countries politically and commercially dependent on them, such as Guatemala, Costa Rica and Colombia. Hence, it is possible to assert that the MPIA can be considered an important symbolic victory or in the words of the Chair of the Committee on International Trade of the European Parliament, Mr. Bernd Lange, "a big success". Quickly, the initiative secured the full support of other WTO members, a few weeks after the Joint Statement was declared, other countries joined the initiative including Pakistan, Island

[373] Joint Statement by Ministers made in Davos the 24th of January 2020.

[374] DREYER (2020).

[375] At the General Meeting held on the 9th-10th December of 2019, the representative of the Russian Federation stated that: "The existence of the Appellate Body ensured predictability and consistency in the application of WTO provisions. Its non-existence, de jure or the facto, was clearly in contradiction with the DSU and impeded the attainment of the objectives of not only the Understanding itself but of the WTO Agreement in general. The disruption of the Appellate Body's work or even its non-functioning was not a solution to any of the concerns the United States had deigned to vocalize to date unless the Appellate Body's mere existence, as enshrined under Article 17 as it had been agreed and as in had been included in the DSU, was the real concern of the United States".

Ukraine Nicaragua and Ecuador[376]. At the same time the European Commissioner for trade, Mr. Phil Hogan, forwarded a letter of invitation to the trade ministries of over 100 Member of the World Trade Organization, prompting them to join the Interim Appeal Arbitration Arrangement[377].

3.4.4 Structure and Principles of the MPIA

Once all the adherent parties had completed their necessary internal adoption procedure[378], on the 30th of April 2020, the MPIA had been officially notified to the WTO constituting the starting point for the application of the interim solution to disputes that may arise among the participants[379]. This new solution has greatly improved the old model based on bilateral agreements; in fact, it benefits from the providential contributions made by all participating states during the consultations. Moreover, the MPIA anticipates many of the initiatives contained in the proposals presented by Walker that aimed at revising Article 17 of the DSU[380].

The structure of the MPIA includes three differentiated and separated parts: the first is named "Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU" which is the communication to the Dispute Settlement Body and that contains the principle of such alternative mechanism, the second part is entitled "Agreed Procedures for Arbitration under Article 25 of the DSU in Dispute DS X" that entails the pattern for the arbitration to be used by the litigants, and the third element contains the rules that concern the composition of the pool of arbitrators, presented as the Annex 2 of the said document. The choice of words in the first element is not accidental, in fact it is meant to express the soft law character of the communication, which is to be understood by all participants as a political statement in which they express their intention to have recourse to the arbitration procedure through Article 25.This new procedure stands out for its flexibility, timeliness and above all for its functionality in developing ideas aimed at overcoming the crisis that afflicts the Appellate Body, which, as repeatedly stated, is the absolute priority for all participating States. The commitment to find a solution to the impasse of the Dispute Settlement is additionally reiterated in paragraph 15 of the MPIA that states: "The

[376] Communication Circulated at the request of the Delegations of Canada and the European Union,19 May 2020, *Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes, Addendum, Multi-Party – Interim Appeal Arbitration Pursuant to Article 25 of the DSU.*

[377] European Commission, 13 May 2020, *EU Puts forward its Candidate for the Pool of Arbitrators in the Multi-Party Interim Appeal Arbitration Arrangement and Encourages more WTO Members to Join.*

[378] Decision of the European Commission, 6 April 2020, C (2020)2163/1, *Commission Decision on the Multi-Party Interim Arrangements.*

[379] European Commission, 30 April 2020, *Interim Appeal Arrangement for WTO Disputes Becomes Effective.*

[380] HESTERMEYER (2020), STOYANOV, BOURGEOIS (2020).

participating Members remain committed to resolving the impasse of the Appellate Body appointments as a matter of priority and envisage that the MPIA will remain in effect only until the Appellate Body is again fully functional. However, any appeal arbitration agreement entered into under paragraph 10 will remain in effect, unless the parties agree otherwise"[381], while also pledging to closely work with the Membership of the WTO to reach a lasting solution to the problem.

It can therefore be said that the primary mission of the MPIA is to strengthen and support the multilateral trading system, of which the jurisdictional pillar is an integral and essential part[382]. Being the purpose of the MPIA that of preserving the essential features of the Dispute Settlement of the WTO including its binding character, it is clear that such appeal arrangement may only be applied in the extraordinary circumstances, due to the momentary inoperability of the Appellate Body[383]. As it plays a pivotal role, at the very heart of the multilateral trading system, the interim solution has been conceived as mirroring the WTO appellate procedure. This new mechanism will therefore be based on procedural aspects of the classic appellate review provided by Art 17 of the DSU, which also contains its related Working Procedures for Appellate Review and its Rules of Conduct; the aim of such is to preserve its core functions including also its impartiality and independence[384]. Undoubtedly the application of the principles of the Appellate Body to the new provisional appeal procedure will require a proper readaptation of the sources of the WTO, especially those that discipline the relation and connection between the panels and the arbitrators of the MPIA. With this regard, the participant States have stated several times that the new provisional arbitration shall be governed, *mutatis mutandis*, by all the provisions of the Dispute Settlement Understanding which apply to the Appellate Review Procedure[385]. Additionally, the MPIA provides for different possibilities concerning the notification of appeals, the communication of panel records together with the implementation and enforcement of the proceedings, similarly to what is provided for in Article 25.4 of the DSU. It is clear, then, that extreme cooperation between all parties involved: arbitrators, panels and litigants is of paramount importance to the smooth functioning of the MPIA. All of these actors will in fact be called upon to assume a

[381] Communication circulated at the request of the Delegations of Australia, Brazil, Canada, China, Chile, Colombia, Costa Rica, the European Union, Guatemala, Hong Kong, China, Iceland, Mexico, New Zealand, Norway, Pakistan, Singapore, Switzerland, Ukraine and Uruguay, 30 April 2020, JOB/DSB/1/Add.12, *Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedure in the Conduct of Disputes*2020, para. 15, pp.3.
[382] *Supra note 135*, pp.1.
[383] *Ibid.*
[384] *Supra note 135*, para. 3.
[385] *Supra note 135*, para. 11, pp.5.

collaborative attitude whenever a dispute arises between the states participating in the initiative.

Furthermore, it is important to draw the attention to an exceptional feature of this new process: time. In fact, the MPIA was negotiated in record time if compared to the standard timeframe of the WTO, only 4 were needed for the member states to agree on such a solution. This was made possible mainly thanks to the great political will of the members to find a valid and effective solution, which could temporarily replace the work of the Appellate Body. This is the best premise for forecasting that they can continue to collaborate and encourage cooperation with the MPIA constructive tool as a temporary bridge to the achievement of a multilateral long-term solution to the AB crisis.

3.4.5 Innovations brought about by the MPIA

When drafting the MPIA, the European Union, has largely analyzed and taken into account all the discussed proposal previously put forward by other Member States when trying to address the concerns expressed by the United States. The very aim of this provisional appeal mechanism is in fact that of enhancing the overall efficiency of the already existing appeal procedure of the Appellate Body[386]. In doing so the MPIA has decided to enlarge the number of adjudicators in the pool of arbitrators, recalling to the proposal advanced by many Member States in 2018: Article 25 appeals will in fact by heard no longer by three or seven members, but by ten law experts. Upon the agreement of all participants States, the composition of the pool of arbitrators could increase even further as provided for in the text of the MPIA[387]. Therefore, it is possible to notice the willingness of the European Union to give to this provisional procedure a highly dynamic nature: should the States realize that an involvement of further members could be necessary for the resolution of the case, the number of members can be increased. This decision represents a thinly veiled implementation of what the EU has already proposed in 2018, i.e. the increase in the number of members of the body from the appeals, with the aim of ensuring member states a good quality of the reports produced and the respect of the timeframe foreseen by the DSU.

A second major improvement foreseen by the MPIA is certainly brought about by the existence of several rules concerning the 90 days required in order for a an MPIA award to be issued. This is the exact time requirement also provided for the Appellate Body under Article 17.5 of the DSU, although

[386] Communication circulated at the request of the Delegations of Australia, Brazil, Canada, China, Chile, Colombia, Costa Rica, the European Union, Guatemala, Hong Kong, China, Iceland, Mexico, New Zealand, Norway, Pakistan, Singapore, Switzerland, Ukraine and Uruguay, 30 April 2020, JOB/DSB/1/Add.12, *Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedure in the Conduct of Disputes*, para. 3, pp.2.
[387] *Suprea note*, para. 5, pp.7.

often, as the United States has criticized, this time limit has not been respected, precisely because of the low number of judges within the AB, which have automatically made it less efficient and less able to perform to the best of its ability. The solutions proposed by Mr. Walkers, and the 2018 proposal are at the very heart of the provisional appellate review envisioned in the by the MPIA. With the aim of complying with the given time requirement, the arbitrators have been provided with a series of practical devices which can ultimately be divided into two main categories: first are the organizational measures on which the adjudicators have the ultimate authority to decide and second they have been conferred with substantive measures, those the arbitrators can only recommend; again, all such measures will be subject to an agreement by the parties that decide to pursue an appeal through Article 25. To simplify the procedures, the adjudicators have been vested with the power to decide on a series of organizational measures as for example the maximum number of pages of a report, the length of a given hearing and the required hearing in order for the case to be concluded, together with some procedural limitation that clearly recall the famous "Jara Process", whose aim was that of enhancing the panel process whilst reducing its overall costs[388].

As an example of a substantial measure that might be adopted or suggested by the arbitrators the MPIA indicates the removal of arguments on the grounds of the supposed lack of an impartial evaluation of the evidence of Art. 11 of the DSU. As previously described in this elaborate, Article 11 claims, requiring the WTO appellate adjudicators to participate extensively and substantially in the determination of the evidence and disciplines of the panel, are continuously at the edges of the statute and the facts and typically require a significant amount of work throughout the analysis of the appeal[389]. It is in fact true, that initially the recourse to Article 11 claims were severely restricted to cases entailing egregious errors, but as parties ultimately expressed their willingness to relitigate the case in front of the Appellate Body, the grounds for such review has considerably been extended. Within this context it is important to highlight the position taken by the AB itself, that in the 2014 case *China – Rare Earths* it "encouraged the appellants to consider carefully when and to what extent to challenge a panel's assessment of matter pursuant to Article 11, bearing in mind that an allegation of violation of Article 11 is a very serious allegation. This is keeping with the objective of the prompt settlement of disputes, and the requirement in Article 3.7 of the DSU that Members exercise judgments in deciding whether action under the WTO dispute settlement procedures would be fruitful"[390]. This was later reiterated in the latest Appellate Body report circulated in 2020 on the Australia - Tobacco Plain Packaging case where litigants were reprimanded for the

[388] GARCIA BERCERO, GARZOTTI (2005:847).
[389] SALUZZO (2020:125).
[390] Appellate Body Report, 29 August 2014, WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum.*

excessive volume of claims submitted AB through Article 11. In this regard, the Appellate Body steadfastly refused to submit to review what was found and signed by the panels, because this would inevitably jeopardize the role played by the panels[391].

In this context, the MPIA addresses the problem related to Art. 11 claims by giving the possibility to the arbitrators to urge the parties to withdraw all allegations not considered adequate in order to avoid going beyond the ultimate purpose of the review, which also for the provisional procedure, replicates that provided by the DSU through Article 17.6; in fact, it has been repeatedly stated that this new procedure is limited only to problems concerning the laws and their interpretation by the panels. In this way, the MPIA also addresses the thorny issue of the substantial difference between legal and factual issues, reiterating and recognizing the limitation of review only to those of a legal nature, leaving aside those of a factual nature. The reduction of Article 11 claims is a clear manifestation also of the principle of judicial economy[392]. It if in fact true that the mechanism envisioned by the MPIA requires the adjudicators to only deal with issues deemed strictly necessary in order to solve the dispute; this requirement also aims at overcoming the present strict obligation to consider each of the problems posed by the appellants as provided for in Article 17.12 of the DSU[393]. Additionally, the ultimate aim of such innovation is also that of addressing and solving the problem related to the alleged practice of advisory opinion, a matter on which the US administration as continuously complained.

In spite of this, the United States, in a letter sent from Washington directly to the former Director General of the WTO, Mr. Azevêdo, noted that in reality this procedure introduced by the European Union weakens the legal obligation to respect the 90 days deadline because, despite having, once again, an indicative and non-binding nature. Paragraph 14 introduces into the MPIA process an important aspect which has the potential to enhance legitimacy: it stresses the preference of the parties to the possibility of extending the reporting period and, thereby, forbids arbitrators from evaluating it on their own initiative.

One of the greatest novelties brought about by the MPIA is undoubtedly the pool of arbitrators. In clear resemblance of the Appellate Body, it will be composed of qualified individuals who have demonstrated their expertise in international law, international trade along with full knowledge of WTO agreements. They will have to be independent members, therefore not affiliated with their governments and will not have to participate in disputes

[391] Appellate Body Report, 9 June 2020, WT/DS435/AB/R, WT/DS441/AB/R, *Australia – Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirement applicable to Tobacco Products and Packaging.*
[392] PALOMBINO (2010:909).
[393] BUSH, PELC (2010:257).

that could in any way create conflicts of interest. Particularly interesting is the decision to extend the possibility of appointment to former Members of the Appellate Body. According to Annex 2, each participating State will have the opportunity within 30 days from the date of notification of the MPIA notice to appoint its own member. Once each State nominates an individual, that decision must be made known to all other States to begin the member pre-selection process[394] which clearly resembles the one used for the appointment of Appellate Body Members. This process will be overseen by a special committee consisting of General Director of the WTO, the Chairperson of the Dispute Settlement Body together with General Council. Once the members who will make up the pool of arbitrators are chosen, this decision must be submitted to all the participating States who, through the exercise of consensus, must approve or reject the choice made[395]. Three will be the members selected from the pool of arbitrators, to form each arbitral appellate tribunal. The selection will be done in a completely randomized manner in full compliance with the methods and principles that are applied for the formation of the different divisions of the Appellate Body[396]. Once the division of the MPIA is formed, the General Council will have the duty to notify the parties to the dispute.

In the same way, the principle of collegiality of the Appellate Body will be applied and respected, in fact, according to what is foreseen by the MPIA text, the pool of arbitrators will have the obligation to "stay abreast of WTO dispute settlement activities and will receive all documents relating to appeal arbitration proceedings under the MPIA. In order to promote consistency and coherence in decision-making, the members of the pool of arbitrators will discuss amongst themselves matters of interpretation, practice and procedure, to the extent practicable"[397]. In full compliance with the text of Article 25 of the Dispute Settlement Understanding, all MPIA arbitration award will be binding and will thus form part of the WTO case law as well as to be notified to the DSB and to all the main bodies of the WTO, such as the General Council and the Ministerial Conference. Once this notification has been made, the parties involved will be able to put this award on the DSB agenda so that it can be discussed by all WTO Member States. In full compliance with the text of Articles 3.2 and 3.5 of the DSU, the arbitrations pursuit through the MPIA

[394] VAN DEN BOSSCHE (2017)
[395] Communication circulated at the request of the Delegations of Australia, Brazil, Canada, China, Chile, Colombia, Costa Rica, the European Union, Guatemala, Hong Kong, China, Iceland, Mexico, New Zealand, Norway, Pakistan, Singapore, Switzerland, Ukraine and Uruguay, 30 April 2020, JOB/DSB/1/Add.12, *Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedure in the Conduct of Disputes*, para. 3, pp.7.
[396] VANGRASSTEK (2013:241).
[397] Communication circulated at the request of the Delegations of Australia, Brazil, Canada, China, Chile, Colombia, Costa Rica, the European Union, Guatemala, Hong Kong, China, Iceland, Mexico, New Zealand, Norway, Pakistan, Singapore, Switzerland, Ukraine and Uruguay, 30 April 2020, JOB/DSB/1/Add.12, *Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedure in the Conduct of Disputes*, para. 5.

should neither add or diminish the rights and obligation[398] of any Member State and that all solution to a give WTO dispute will have to "[…] be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements".

Since the MPIA awards are the expression of an appeal review which, on a temporary basis, must substitute the authority of the Appellate Body and lead to the development of the requisite political conditions for the reform of its functioning, the criteria for arbitrators, the selection procedure and the working methods of the pool have been developed with a view to ensuring high standards for such decision. Being based on the provisions of Article 25, the MPIA case law, is in fact part of the WTO law that must be implemented in good faith by the states and must be subsequently integrated within the WTO. It is therefore clear that this procedure does not in any way give rise to a parallel jurisprudence that largely ignores the multilateral character of the reports produced for dispute resolution. Without much surprise, the US administration in a 2020 letter sent to former Director General has expressed disappointment by arguing that in fact the procedure under the MPIA implicitly promotes the use of reports as precedents by considering "consistency" as a pivotal principle when delivering decisions over a dispute[399]. The US recalls, that the principle of consistency is nowhere to be found in the wording of the provisions of the DSU notwithstanding the fact that the proposal made by the European Union, makes it one of the main goals to be achieved. In this way, according to the American view, arbitrators are explicitly encouraged to create a parallel channel of jurisprudence rather than assisting the parties in resolving the dispute as they should.

Holding true, what the United States has stated, that in the DSU there is no reference to the principle of consistency, it is also true that this principle is integrated in the WTO dispute settlement mechanism. in fact, rule number 4 of the Working Procedures for the Appellate Review, adopted in 1996 states that "to ensure consistency and coherence in decision-making, and to draw on the individual and collective expertise of the Members, the Members shall convene on a regular basis to discuss matters of policy, practice and procedure"[400]. The ultimate purpose of this principle of collegiality foreseen for the Appellate Body as well as for the MPIA arbitrators, is not to consider

[398] Article 3.2 of the DSU states that: "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, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements".

[399] Letter sent by US Ambassador Shea to the WTO Director General Azevêdo on the 5th of June 2020, p.2.

[400] Rule 4 of the Working Procedure for Appellate Review.

old reports as binding precedents: it is in fact commonly recognized by all WTO member states, that the principle of *stare decisis* is not part of WTO, as well as it is universally recognized that this principle does not exist even in international law.Consistency, which is targeted by MPIA collegiality, actually reformulates what is at the core of the multilateral dispute resolution mechanisms i.e. that of conferring security and predictability to the entire system as foreseen by Art 3.2 of the DSU. In this context, there is no question that each case must be discussed and evaluated on its own merits, and consistently, the MPIA emphasizes the total autonomy and freedom of each arbitration division with respect to the case they are called upon to adjudicate. It is for this reason that the principle of consistency is reaffirmed in the MPIA's procedure, in order to provide certainty and predictability to the entire mechanism as set forth in the DSU.

It is therefore safe to assert that the goal of the MPIA procedure is not that of creating a different body of law within the context of the dispute settlement mechanism nor that of using previous panel reports as binding documents for the resolution of any given appeal. The MPIA aims at delivering high quality disputes resolutions by creating an expert pool of arbitrators in order to avoid persistent conflicts or worse, inconsistent interpretations of WTO laws. The fact that the principle of stare decisis is not applied in the WTO system, does not necessarily exclude that the previous reports have de facto value, they can in fact serve as a guideline of reasoning for similar cases and can direct the arbitral divisions towards a precise conclusion.

In order to take advantage of the process created through the MPIA, participating States will first need to make limited adjustments to their panel procedures so that they can best administer the arbitration process[401]. States will then be required to disclose and notify their intent to enter into the appeal, no later than 60 days after the panel is created. By means of a unified notice, the parties to the dispute will have to formally request the suspension of the panel proceedings for a period of up to 12 months, as provided for in Art. 12.12 of the DSU[402]. The decision by the MPIA drafters to submit the request for suspension of panel proceedings through a joint statement serves to bypass what is written in the text of Article 12.12 that only "the complaining party" can make such a request, thus extending it to the responding party as well. According to paragraph 4 of the MPIA text, the appellant will have a substantially shorter period of time to put forward such a request: "Following the issuance of the final panel report to the parties, but no later than 10 days

[401] MARCEAU (2005:29).

[402] Art. 12.12 of the DSU states that: "The panel may suspend its work at any time at the request of the complaining party for a period not to exceed 12 months. In the event of such a suspension, the time-frames set out in paragraphs 8 and 9 of this Article, paragraph 1 of Article 20, and paragraph 4 of Article 21 shall be extended by the amount of time that the work was suspended. If the work of the panel has been suspended for more than 12 months, the authority for establishment of the panel shall lapse".

prior to the anticipated date of circulation of the final panel report to the rest of the Membership, any party may request that the panel suspend the panel proceedings with a view to initiating the arbitration under these agreed procedures"[403]. This choice has been made in order for panel to have sufficient time to proceed with the translation of the reports into the other official languages[404] of the World Trade Organization, a process which according to the rules provided for in the DSU[405] has to be completed in three weeks after the circulation of the reports to the litigants. In fact, the notice of appeal, which must be communicated no later than 29 days after the suspension of the panel proceedings to the WTO Secretariat, must necessarily include the final panel translated into all three languages of the Organization. This will have a twofold purpose: firstly, it will allow a wider audience to have access to the panel in order to discuss and comment on it, and secondly, it is included in the notice of appeal because the parts which have not been decided to be appealed shall be considered an integral part of the arbitral award as provided for in paragraph 9 of the MPIA[406]. Finally, the decision to transmit the report in all official languages will facilitate its adoption by the DSB in the event that the parties decide not to proceed with the MPIA within 20 days of the suspension of the panel proceedings; should this occur, the MPIA will consider that the parties have implicitly resurrected the panel proceedings and in this case the report will be adopted by negative consensus as provided for in Article 16.4 of the DSU. As mentioned above, the suspension of panel proceedings shall not exceed 12 months, after which such authority shall lapse, as provided for in the DSU. In the exceptional case that the withdrawal of the appeal should occur after the lapse of the maximum time limit, the MPIA provides that, in order to avoid nullifying the first level of WTO adjudication, "the arbitrators shall issue an award that incorporates the findings and conclusions of the panel in their entirety"[407].

As might be expected, these revisions and adjustments to panel proceedings, to which must be added the requirement that the report 45 be circulated prior to that date, have been severely criticized by the U.S. government. According to their diplomats, this bilateral contingency has a long list of legal flaws, first and foremost the publication of a panel report that is not really a report since to be formally considered as such, it must be circulated among the WTO States. Taking into consideration what the US Administration has asserted, it is important to emphasize, however, that the

[403] Communication circulated at the request of the Delegations of Australia, Brazil, Canada, China, Chile, Colombia, Costa Rica, the European Union, Guatemala, Hong Kong, China, Iceland, Mexico, New Zealand, Norway, Pakistan, Singapore, Switzerland, Ukraine and Uruguay, 30 April 2020, JOB/DSB/1/Add.12, *Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedure in the Conduct of Disputes*, para. 4, pp. 2.
[404] The official languages of the World Trade Organization, since 1983 are English, French and Spanish.
[405] Art. 12, Appendix 3, para. 12 (k) of the DSU.
[406] Supra note 407, para. 9, p. 5 ff.
[407] *Supra note* 407, p 6 ff.

MPIA itself, in order to overcome this, agrees that the parties' joint request that the panel lift the confidentiality with respect to the final report[408]. Analyzing what has been written in this section, it is clear that the procedure foreseen by the MPIA, requires a great degree of collaboration between the participating states and the WTO itself in order to ensure the proper functioning of this provisional solution to the impasse in which the dispute settlement verges. The panels that will be called to hear the appeal cases through the MPIA, will undoubtedly have to make the best use of their discretionary powers conferred by the DSU itself, and in the same way the parties will have to approach them as soon as possible, so as to ensure an effective functioning of the whole system. The *Canada - Sale of Wine*[409] case, in which Australia accused the North American country of adopting a wine distribution system which discriminates against foreign products, could be the stage to see such collaboration between parties in action. Following the notification by the two litigants to proceed through the MPIA, the panel has already communicated the date in which the report will be produced, well in advance of the 45 days required. The last novelty brought by the MPIA concerns the role of third parties in the resolution mechanism. It states that third parties who have notified the DSB of their interests in the case through Art 10.2 of the DSU will be able to produce written submissions and will be given the opportunity to be heard by the arbitrators applying mutatis mutandis the provisions of Rule 24 of the Working Procedures for the Appellate Review. In doing so, this alternative mechanism overcomes the only real problematic aspect of Art. 25.3, which establishes the right of the parties to decide on the participation of other States in their dispute. In so doing, the MPIA respects the institutional characteristic of the third-party role that strongly characterizes the activities of both panels and the Appellate Body.

3.4.6 Conclusive Considerations

As it has been shown in the last section of this dissertation, the text of the MPIA exhaustively provides clear provision that may clarify and solve the issues which have been pointed out by the United States since 2016. It should be also pointed out that many of the provisions spelled in the text of this interim appellate arrangement do have the capacity to trigger some exponential changes in the adjudicatory system of the WTO. As a direct consequence some of this modification may also renovate the interest of the Unite State to revive the functioning of the Appellate Body or even to join the MPIA itself; though, given the temporary nature of such arrangement this possibility is deemed to be very rare in the upcoming future. Similarly, it is expected that much of the criticism that have led to the collapse of the Appellate Body may also apply to the very functioning of the MPIA as well.

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[408] BARONCINI (2020:29).

[409] Request for the establishment of a panel by Australia, 16 August 2018, WT/DS537/8 *Canada – Measures Governing the Sale of Wine.*

It is in fact true that many Member States of the WTO which have adhered to this interim arrangement are not particularly satisfied with many of the approaches previously undertaken by the Appellate Body. As Mr. McDougall has repeatedly pointed out in many occasions, the biggest disagreement that exists between the USA and many other Member lies in the different interpretation and understanding of the nature of the Dispute Settlement of the WTO namely the "mere" resolution of disputes arising among members and that of providing States with an authoritative interpretation of the WTO law[410]. Within this context, the European Union and the participatory States of the MPIA have long aspired for the creation of an independent adjudicatory system with an enhanced judicial role. Indeed, it must be pointed out that the model of "European governance" has long influenced the approach followed in the WTO dispute settlement mechanism.

Despite the institutional crisis triggered by the action of the United States over the Appellate Body, the European Union has managed to create and develop a valid strategy to overcome the long-lasting impasse of the appellate procedure. In this realm, the MPIA initiative is to be largely appreciated as it does not try to create a parallel branch of judicialization, but because it exhaustively makes the best of provisions already existing and well-functioning in the WTO legal framework. By recurring to Article 25 of the DSU and by using the Working Procedure for the Appellate Review, the interim mechanism overcomes the issue of having to indicate which procedural rules to apply while pursuing appellate review through this new mechanism[411]. The EU has managed to develop a temporary instrument in the hand of Member States which appear to be capable of preserving the mechanism of dispute settlement envisioned by the WTO while giving Member States the necessary time to engage in talks and negotiations with the aim of reaching a permanent solution through the needed reforms of the Dispute Settlement Understanding[412]. By projecting the MPIA at imagine and likeliness of the WTO dispute settlement procedure, the European Union has managed to overcome an exponential number of political difficulties and legal reservations while also providing the United States with feasible solutions to the claims raised by them.

The dynamic and open nature of this particular ambitious project is attracting an increasing number of Members of the WTO as the interim procedure is opened to all of those States wishing to join by simply notifying to the DSB their willingness to take part to the procedure to the DSB; similarly, should the participatory States decide not to resort to the MPIA procedure, they will only have to notify their decision. Additionally, it must be highlighted that this new procedure has exhaustively adopted many of the

[410] MCDOUGALL (2018).
[411] HAZARIKA, VAN VAERENBERGH (2019:595).
[412] KUKIPER (2018:10-11).

innovation which had been previously discussed in 2018 within the WTO realm; this has been done so in order to further enhance the overall efficiency of the appellate review procedure. Thus, we can characterize the implementation of MPIA as a true test of States' previously proposed reforms beginning in 2018; this could also result in a renewed interest by the membership to work and cooperate even more to be able to achieve an optimal solution for all. One further aspect worth mentioning is that this new procedure deeply takes into consideration also the perspective of developing countries. For such Countries the increase in complexity of the complaints brought before the Appellate Body, has come to constitute a serious burden as complex cases call for a more significant number of human resources to be involved in the resolution of the controversies, and said resources might not be at the disposal of developing countries. By requiring the arbitrators to take into consideration only the issues which are deemed to be necessary for the resolution of a given dispute, the MPIA may potentially decrease the complexity and the overall size of the case, thus not posing a burden upon developing countries. This aspect will hence, be beneficial to all participating States. The overall mechanism envisioned by the European Union will spark a series of discussions about the very nature of the MPIA, keeping the focus on the WTO and the reforms needed to bring the dispute settlement back into full operation.

Ursula von der Leyen, president of the European Commission, has decided to put the reform of the World Trade Organization at the top of the list of the priorities of her mandate. The attainment of such a goal is more urgent than ever, mostly due to the relentless hostile attitude of the United States, which may not change under the newly elected Biden administration, but primarily because of the enormous impact on trade caused by the Covid-19 pandemic. This contribution concludes that, while the procedural developments found in the MPIA may not exhaustively resolve these issues, some of them, combined with a good-faith approach by MPIA members and adjudicators, could contribute to a meaningful shift in WTO adjudication procedures, thus ensuring a more substantial role for the WTO in the future of international trade law.

The extraordinary work of the European Union, aimed at preserving one of the core functions of the dispute settlement mechanism, the appellate procedure, has to be considered the first step toward the strengthening of the rule of law in the international trade realm and toward the promotion of multilateral innovation of the overall World Trade Organization system.

4 Conclusions

The efficiency of the World Trade Organization and its Dispute Settlement Mechanism have long been the subject of much debate in the world of the multilateral trading system. In fact, the WTO has often been defined as dysfunctional and in need of major structural reforms, despite the great achievements in international trade and cooperation between states. In order to provide the reader with the necessary tools to fully and exhaustively understand the reasons that led to the current impasse of the dispute resolution system caused by the refusal of the American administration to start a new selection process for the members of the Appellate Body, it was necessary to retrace the historical evolution that brought to the creation of the World Trade Organization itself. As described, the ancestor par excellence of today's WTO is in fact the GATT, which came into force in 1947 after the failed project of the ITO. The agreement was signed in virtue of the will of the States, deeply affected by the Second World War, to engage multilateral relations with the aim of enhancing cooperation among them. As described, however, the peculiarities of this agreement resided in the prominent position held by the States and the absence of a legal personality. The aura of positivity and growth that surrounded the Contracting Parties during those years overshadowed the enormous structural shortcomings of the agreement that would later lead to the creation of a true international organization. In the GATT, the cardinal principles of equality and fairness were absent, and it was in these circumstances, where the decisions taken reflected only the economic power of the States, that the World Trade Organization was established: it was 1994 and the Marrakesh agreement made official this step forward towards an even more cohesive, interdependent, and cooperating system. The spearhead of the WTO, as described, is the Dispute Settlement Mechanism regulated by the Dispute Settlement Understanding, which undoubtedly represents the most peculiar aspect of the system and which guarantees its extreme effectiveness. In this realm of particular importance is Art. 3.2 of the DSU in which it is stated the importance of the resolution system provided by the World Trade Organization in ensuring security and predictability to the multilateral system of trade whose rights and fundamental principles have been accepted by the Member States at the time of ratification of the document itself.

The focal point of this dissertation is the institution of the greatest novelty created with the signing of the Marrakesh Agreement, that is, the Appellate Body and the criticisms that have been made of it up to the present day in which, due to the lack of the minimum quorum required, it is in a state of total stalemate, unable to fulfill its functions. As exhaustively described the Appellate Body is the direct response to the many frustrations of Member States with the previous dispute settlement mechanism envisioned by the GATT. After several years of honorable and impeccable work, the WTO Dispute Settlement Mechanism came to be escribed by legal scholars as well as international lawyers as the "Jewel of the Crown" as it was deemed to be

the most successful experiment in the international dispute settlement mechanism realm. The Dispute Settlement Understanding itself represents the cornerstone of the willingness of States to solve disputes in a more efficient manner, moving forward from the inefficient and highly diplomatic system envisioned by the GATT. As described, many were the procedural as well as functional problems related to the old dispute settlement regime. First among them was the fact that the parties involved in the dispute were able to block both the establishment of the panels and the very adoption of the reports they drafted. This lack of effectiveness has therefore led over the years to enormous consequences such as numerous threats of unilateral commercial sanctions. The DSU has solved this issue related to the panel process through the creation of a permanent and functional Appellate Body. In fact, it performs a function of support to the work of the Dispute Settlement Body, through the elaboration of reports containing the analysis of the grounds for the accusations and the consequent conclusions concerning the regulation of the substance of the dispute itself.

However, in spite of the enormous prestige accorded to it at the international level, the Appellate Body today finds itself in a situation of total impasse which has been caused by the refusal of the American Administration to start a new process for the selection of new members. The situation reached its maximum point of crisis on the 19th of December 2019, when due to the decisions of the U.S. government, the Appellate Body found itself with less than three members, the minimum quorum necessary to carry out the appeals process as provided for in Article 17.1[413] of the DSU. American criticism is based on what they refer to as "*Judicial Activism"*[414] on behalf of the Appellate Body. First, the US has severely criticized the AB for failing to respect the expected 90 days deadline, hence failing to comply with Art. 17.5 of the DSU. Second, according to USTR, the Appellate Body has Repeatedly violated Article 17.2 of the DSU allowing members to continue to serve on cases after their term had expired. Additionally, according to US diplomats, the WTO has a recurrent tendency to produce finding also on matters which are deemed unnecessary for the resolution of the dispute as appeals are only limited to "issues of law covered in the panel report and legal interpretations that have been developed by the panel" and lastly, the US administration has openly accused the Appellate Body of treating previous panel reports as binding precedents although such practice is not provided for in any of the provisions of the DSU.

[413] Art. 17.1 of the DSU states that: "A standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body".

[414] Judicial Activism is the term commonly used to summarize the key American concerns about the Dispute Settlement Understanding.

As extensively analyzed, considering such an unprecedented institutional crisis[415], the European Union has decided to step in, and it has chosen to be a pivotal player in the process of the reform of the Appellate Review mechanism of the WTO. Going beyond the presented proposal for the amendment of Art.17 of the DSU, that have never been welcomed positively by the United States, although their claim have been largely taken into consideration in the draft decision presented by Facilitator Ambassador Walker in late 2019, the European Union has launched an attractive provisional solution in order to preserve the right of appeal of States which have triggered the mechanism of dispute settlement: the Multi Party Interim Appeal Arbitration Arrangement. The solution proposed by the European Union relies entirely on Art. 25 of the DSU and it tries to replicate as closely as possible the functional as well as procedural aspect provided for in the Appellate Review. This provisional arrangement aims at filling the gap created by the impasse of the Appellate Body until it becomes fully functional again.

The text of the MPIA contains several provisions that have the potential to bring about a great deal of impact in the functioning of the appellate procedure of the WTO. The most prominent provision that tackles two of the main criticisms moved by the USTR is paragraph 13 of the Annex which deals with the problem related to the observance of the 90 days deadline provided for in Article 17.5 of the DSU and the concerns over the allegedly *de novo* review of fact and domestic laws carried out by the Appellate Body. By granting the possibility not to take into account, hence excluding from the appellate procedure, claims which are deemed to be outside the scope of the appeal itself, paragraph 13 might also mitigate the possible perception that finding not necessary for the resolution of the disputes are being review in the arbitral award granted under Art. 25 of the DSU. Drawing from the analysis conducted over the provisional mechanism, many are the provision that might trigger a process of innovation of the Dispute Settlement itself. The very aim of the MPIA is in fact that of enhancing the overall efficiency of the already existing appeal procedure of the Appellate Body[416]. In doing so it provides for an enlargement of the number of adjudicators in the pool of arbitrators, recalling to the proposal advanced by many Member States in 2018: Article 25 appeals will in fact by heard no longer by three or seven members, but by ten law experts selected and approved by the General Council. Accordingly, the principle of collegiality of the Appellate Body will be applied and respected, in fact, according to what is foreseen by the MPIA text, the pool of arbitrators will have the obligation to "stay abreast of WTO dispute settlement activities and will receive all documents relating to appeal arbitration

[415] ADINOLFI (2019:33), CHARNOVITZ (2018:1).

[416] Communication circulated at the request of the Delegations of Australia, Brazil, Canada, China, Chile, Colombia, Costa Rica, the European Union, Guatemala, Hong Kong, China, Iceland, Mexico, New Zealand, Norway, Pakistan, Singapore, Switzerland, Ukraine and Uruguay, 30 April 2020, JOB/DSB/1/Add.12, *Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedure in the Conduct of Disputes*, para. 3, pp.2.

proceedings under the MPIA. In full compliance with the text of Article 25 of the Dispute Settlement Understanding, all MPIA arbitration award will be binding and will thus form part of the WTO case law as well as to be notified to the DSB and to all the main bodies of the WTO, such as the General Council and the Ministerial Conference. Being based on the provisions of Article 25, the MPIA case law, is in fact part of the WTO law that must be implemented in good faith by the states and must be subsequently integrated within the WTO. It is therefore clear that this procedure does not in any way give rise to a parallel jurisprudence that largely ignores the multilateral character of the reports produced for the resolution of disputes. The MPIA aims at delivering high quality disputes resolutions by creating an expert pool of arbitrators in order to avoid persistent conflicts or worse, inconsistent interpretations of WTO laws.

Analyzing what has been written in the last section of this dissertation, it is clear that the procedure foreseen by the MPIA, requires a great degree of collaboration between the participant States and the WTO itself in order to ensure the proper functioning of this provisional solution to the impasse in which the dispute settlement verges. The panels that will be called to hear the appeal cases through the MPIA, will undoubtedly have to make the best use of their discretionary powers conferred by the DSU itself, and in the same way the parties will have to approach them as soon as possible, so as to ensure an effective functioning of the whole system. In this realm, the MPIA initiative is to be largely appreciated as it does not try to create a parallel branch of judicialization, but because it exhaustively makes the best of provisions already existing and well-functioning in the WTO legal framework. The EU has managed to develop a temporary instrument in the hand of Member States which appear to be capable of preserving the mechanism of dispute settlement envisioned by the WTO while giving Member States the necessary time to engage in talks and negotiations with the aim of reaching a permanent solution through the needed reforms of the Dispute Settlement Understanding[417].

Since newly elected President Biden holds a very peculiar view to that of former President Trump, a lift of the blockage to the appointment of new members appears highly unlikely in the foreseen future. In this context the provisional solution advanced by the European Union seems to be more necessary than ever as it represent a functional and effective bridge capable of ensuring the continuity of the entire Dispute Settlement Mechanism of the WTO. As for the Appellate Body's long-term solutions, they must be part of a broader project to reform the entire system of multilateral trade governance. The resolution of the stalemate in which the state of international trade law finds itself, in addition to preventing the increasing protectionist tendencies on the part of states, would re-establish the principles of fairness and trust, cardinal points of the WTO. A totally paralyzed dispute settlement mechanism

[417] KUKIPER (2018:10-11).

constitutes a step closer to the law of the jungle, which will be profitable only for a few in one of the most difficult and delicate moments for the world economy.

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The Hague Convention on the Pacific Settlement of International Disputes, 1898, 1907.

6 Executive Summary

In the aftermath of the Second World War, international trade became the ultimate protagonist of a long and difficult process of liberalization and integration; a phenomenon which has encountered many obstacles along the way and that currently has not yet ended. Ever since its creation in 1995, the World Trade Organization ('WTO') has been the subject of vocal and sometimes violent, international protest especially concerning the Dispute Settlement Mechanism it has put in place at the end of the Uruguay Round of negotiations. The greatest object of numerous criticisms is undoubtedly the Appellate Body, which soon after the birth of the WTO, has occupied a central and essential position in the governance of international trade to the point of being described by many legal scholars and international jurists as the "Jewel of the Crown". With its prominent position at the top of the entire WTO dispute settlement mechanism, its jurisprudence on values other than economic ones, and its emphasis on the importance of and the need for open and more transparent processes, the Appellate Body has greatly contributed to the improvement of the legitimacy of the World Trade Organization and more specifically to the overall Dispute Settlement Mechanism. Unfortunately, after more than twenty years of honorable work, the "central pillar of the multilateral trading system" as described by the first WTO Director General, Mr. Renato Ruggiero, the AB is facing a survival crisis triggered by the refusal of the American Administration to start a new process of selection for the appointment of new Appellate Body Members. In fact, at the midnight of the 10th of December 2019, the Appellate Body of the WTO has lost its minimum quorum required due to the expiration of the four years term of two of the three last standing members, remaining with a single component. The current impasse over the reappointment for the filling of vacancies of the Appellate Body runs the risk of relegating the enormous success achieved over more than twenty years to a historical footnote. The aim of this dissertation is to analyze from a historical and legal point of view, the development of the system of regulation of disputes, starting from the creation of the GATT, through the birth of the WTO and its innovative Dispute Settlement Mechanism, and arriving to the crisis in which it verges today, in order to provide the reader with a detailed analysis of possible solutions to overcome this impasse.

The ancestor par excellence of today's WTO is in fact the GATT, which came into force in 1947 after the failed project of the ITO. The agreement was signed in virtue of the will of the States, deeply affected by the Second World War, to engage multilateral relations with the aim of enhancing cooperation among them. However, the peculiarities of this agreement resided in the prominent position held by the States and the absence of a legal personality. The aura of positivity and growth that surrounded the Contracting Parties during those years overshadowed the enormous structural shortcomings of the

agreement that would later lead to the creation of a true international organization. In the GATT, the cardinal principles of equality and fairness were absent, and it was in these circumstances, where the decisions taken reflected only the economic power of the States, that the World Trade Organization was established: it was 1994 and the Marrakesh agreement made official this step forward towards an even more cohesive, interdependent, and cooperating system. The spearhead of the WTO, as described, is the Dispute Settlement Mechanism regulated by the Dispute Settlement Understanding, which undoubtedly represents the most peculiar aspect of the system and which guarantees its extreme effectiveness. In this realm of particular importance is Art. 3.2 of the DSU in which it is stated the importance of the resolution system provided by the World Trade Organization in ensuring security and predictability to the multilateral system of trade whose rights and fundamental principles have been accepted by the Member States at the time of ratification of the document itself. The focal point of this dissertation is the institution of the greatest novelty created with the signing of the Marrakesh Agreement, that is, the Appellate Body and the criticisms that have been made of it up to the present day in which, due to the lack of the minimum quorum required, it is in a state of total stalemate, unable to fulfill its functions.

The Dispute Settlement Understanding itself represents the cornerstone of the willingness of States to solve disputes in a more efficient manner, moving forward from the inefficient and highly diplomatic system envisioned by the GATT. Many were the procedural as well as functional problems related to the old dispute settlement regime. First among them was the fact that the parties involved in the dispute were able to block both the establishment of the panels and the very adoption of the reports they drafted. This lack of effectiveness has therefore led over the years to enormous consequences such as numerous threats of unilateral commercial sanctions. The DSU has solved this issue related to the panel process through the creation of a permanent and functional Appellate Body. In fact, it performs a function of support to the work of the Dispute Settlement Body, through the elaboration of reports containing the analysis of the grounds for the accusations and the consequent conclusions concerning the regulation of the substance of the dispute itself.

However, in spite of the enormous prestige accorded to it at the international level, the Appellate Body today finds itself in a situation of total impasse which has been caused by the refusal of the American Administration to start a new process for the selection of new members. The situation reached its maximum point of crisis on the 19th of December 2019, when due to the decisions of the U.S. government, the Appellate Body found itself with less than three members, the minimum quorum necessary to carry out the appeals process as provided for in Article 17.1 of the DSU. American criticism is based on what they refer to as "*Judicial Activism*" on behalf of the Appellate Body, pointing out a substantial number of both procedural and substantial issues related to the core functioning of the AB. The most vocal claim moved

by the US administration relates to the alleged possibility that the Appellate Body, by performing its functions, may have given rise to a system of judicial global governance, an authority which has never been conferred upon it, the US sustain. First, the US has severely criticized the AB for failing to respect the expected 90 days deadline required for the circulation of its reports, hence failing to comply with Art. 17.5 of the DSU. Second, according to USTR, the Appellate Body has Repeatedly violated Article 17.2 of the DSU allowing members to continue to serve on cases after their term had expired. Additionally, according to US diplomats, the WTO has a recurrent tendency to produce finding also on matters which are deemed unnecessary for the resolution of the dispute as appeals are only limited to "issues of law covered in the panel report and legal interpretations that have been developed by the panel" and lastly, the US administration has openly accused the Appellate Body of treating previous panel reports as binding precedents although such practice is not provided for in any of the provisions of the DSU.

Former President Donald Trump and US Trade Representative Mr. Lighthizer have consistently pointed out the issue relating to the lack of compliance of the Appellate Body procedures with Art. 17.5 of the DSU. The text of Article 17.5 states very clearly that following the general rule, the AB must produce its report within 60 days and that in no case proceeding shall exceed the extended period of 90 days. Unfortunately, however, there have been numerous instances in which the Appellate Body has violated the timelines set forth in the DSU rule, leading the United States to assert that such a violation exponentially diminishes the rights of all other Member States, inevitably leading them to lose faith and esteem in the system they themselves envisioned when the Uruguay Round was concluded in 1994. Within this context, however, it is important to underline that from 1995 until 2011 the Appellate Body has almost always respected the rule enshrined in Art.17.5. According to the US, there has been a radical change in the Appellate Body's procedures, which since 2011 has led it to repeatedly violate the rules on timing, without providing Member States with adequate explanations or justifications. Obviously, this violation has caused the timeframe for the resolution of the dispute to lengthen exponentially, causing other serious consequences for the entire dispute settlement system of the WTO. In still more complicated situations, the current decline in the number of Appellate Body Members with blocked reappointments has occurred. In order to preserve the legality of the functioning of the WTO, change in this regard is imperative, taking into consideration the latest functional innovations and the requirement for an expanded timeline required for the issuing of high-quality papers.

The second major criticism moved from the United States Government relates to the practice pursued by persons who no longer serve as standing Members in the Appellate Body to still rule over the cases they have started before their 4 years term has expired. In providing justification for such claim

made, the US has reiterated that it is only WTO Members, jointly acting as the Dispute Settlement Body that have the ultimate authority to appoint and eventually reappoint members of the Appellate Body. By adopting a rule, namely Rule 15, the AB has vested itself with the authority to allow former Members to continue to serve as standing panelist, clearly violating Article 17.2 of the Dispute Settlement Understanding. Notwithstanding this clear and evident breach of the DSU, the US claim, persons who are no longer members have repeatedly continued to take part in appeals for approximately a year after their terms had expired. As it is clear by reading the text of Article 17.2, the provision reflects the agreement reached by all WTO Member States on the appointment of people to serve as panelist in the Appellate Body. The said articles spells very clearly that it is only the DSB which has the authority to deliberate on such decision, not the Appellate Body itself. Despite this, the Appellate Body, according to the American perspective has manifestly exceeded its authority by going so far as to adopt a procedural rule, which gives it the power to act as if it were the DSB itself, thus deciding who is allowed to serve as a member and who is not, after the 4-year term has expired. For many years, the United States, together with other Member States of the organization, have pointed out that this procedure is improper for an Organization that declares itself to be firmly rules-based. If it is true that the Dispute Settlement Understanding contains rules which have been previously agreed on by all the Member States it should be also true that such rules and laws can only be modified through an agreement of all WTO Members. Hence, it has to deem illegal for the Appellate Body to change rules through a practice which itself is in clear violation of the rules agreed on, US Administration points out.

As it is commonly known the Members of the World Trade Organization have vested the panels with the authorization to make actual finding and legal conclusions, and they have granted the Appellate Body the power only to review the latter. According to the US representatives, in a clear violation of what is provided for the Dispute Settlement Understanding, the Appellate Body has repeatedly reviewed panels finding of facts, despite the clear rather explicit limitation of appeals to only legal issues. The main claim is that by engaging is such wrongly behavior the Appellate Body seeks to expand its authority beyond the scope of review; additionally, it contributes to the lengthen of the overall duration on the appeals, making it impossible for a report to be circulated within the expect 90 days as provided for in the above-mentioned Article 17.5 of the DSU. What the United Stated and many other WTO Member States have pointed out is that in 1995 they all agreed to the creation of a dispute settlement system in which the panels, and the panels only would have the legal authority to render factual finding and consequently legal conclusion, granting the AB the authority to review, as stated before, only the latter. In a clear violation of the DSU, the US point out, the Appellate Body has impacted in a negative way the overall Dispute Settlement significantly. In order to legally justify their claims, USTR start from the text

of Art. 11 of the DSU that in describing the inherent functions of a panel states as follow:

> "The function of a panel is to assist the DSB in discharging its responsibilities […] a panel should make an objective assessment of the matter before it, 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 DSB in making the recommendations or in giving the rulings provided for in the covered agreements […]".

The Appellate Body itself, in a 1998 report, acknowledged the limits of the authority granted to it by Member States, stating that given the substantial difference existing between facts and legal interpretations, the former produced by a panel, are not subject to review by the Appellate Body. Similarly, however, the US claims, the AB has attempted to circumvent the limits of its authority by declaring the existence of a standard review procedure that is also applicable to reports produced by panels in full compliance with the panel's ascertainment of facts under the relevant covered agreement. An additional criticism moved by the USTR is that the Appellate Body has repeatedly declared to have the legal authority also to review findings of the panels concerning the meaning of Member State's domestic laws. While the compliance of domestic law with the provision of the WTO is a matter of law, the very meaning of such domestic law constitutes a matter of fact in the WTO system, hence it cannot be subjected to the review of the Appellate Body. The text of the DSU makes clear the distinction that exists between legal and factual issues. The fact that the determination of the meaning of domestic laws represents a problem of factual nature, is also recognized by the norms of international law in general. In fact, standard international treaties reiterate that domestic laws are merely facts expressing the ultimate will of States and constituting the nature of their activities.

The text of Article 3.7 of the DSU clearly explained that the existence of an efficient Dispute Settlement mechanism exists in order to secure the Member of the Organization a positive resolution to disputes they engage in. In compliance with such obligation the system may provide clarifications of the existence of provisions in the WTO Agreement that are in accordance with the customary laws of interpretation of public international law. However, as stated in Article IX:2 of the Agreement, only Member States have the ultimate and exclusive authority to adopt said interpretations. Accordingly, the Dispute Settlement Understanding together with the provision contained for the adoption of the reports of the Appellate Body is without prejudice to such exclusive authority. It should be noted that the majority of the early Appellate Body reports fully complied with the provided division of responsibilities but then changed course as of 2008. Since then, the US notes, the AB has repeatedly stated how panels should understand the interpretations in their reports as having binding force absent "*cogent reason"* for departing from them. This practice of treating the reports issued as binding precedents has

serious repercussions and implications for all WTO Members. In fact, it demonstrates once again, according to the US administration, how the Appellate Body unilaterally seeks to expand its authority and competencies by deciding not to respect the laws set forth in the DSU. Operating in this way, it inevitably deprives the signatory States of the opportunity to see their disputes solved through the decisions of the panels and the Appellate Body if necessary, purely on the basis of evidences and findings belonging to that particular case only. Lastly, such practice may engage into legal interpretations that deeply contradict the agreement of the WTO, profoundly affecting Member's right without their expressed approval. The US claim that the functions of the WTO adjudicators is different under the DSU. Its role is to release only the findings required to settle the conflict and, in particular, the findings that will enable the DSB to make a recommendation to bring the measure into compliance with the WTO Agreement. These conclusions are to be focused on the content of the deals affected, not on the text of the previous notices of appeal. By setting a precedent, the Appellate Body tried to extend its own jurisdiction and stripped from WTO members the right to assess the scope of the WTO Agreements. With increasing frequency, the panels merely applied the decision of the Appellate Body on cogent grounds. This trend raises important questions regarding the conflict resolution mechanism, as it indicates that serious, systematic failures are frequently happening without any consideration of the original text decided by WTO participants. Issues posed by the United States have varying degrees of difficulty that need multiple solutions. Fixing issues with the Appellate Body would obviously entail finding consensus on larger changes to the WTO framework. The amendments should resolve a variety of legal and political concerns pertaining to the DSU and the Appellate Body, including, among others, the general balancing of legislative-judicial power.

All the above-mentioned concerns raised by the United States relate to the long-standing judicial practices and legal interpretations of the Appellate Body that have been exhaustively justified on the basis of: the quasi-constitutional mandated granted to by the DSU to the panels, the AB and all WTO adjudicators and of the customary laws regarding the interpretation of treaties. Albeit being deeply criticized by the Government of the United States such said practices have been accepted as inherent legal practices of the Appellate Body. Although the talks for a possible reform of the DSU began as early as 1998, it should be pointed out that all reports adopted by the Appellate Body since 1996 have been approved by the DSB without any changes being made to the case law, as would have been possible through the use of authoritative interpretation as provided by Art IX:2, through amendments as provided by Art X or by the simple overruling the findings of the dispute settlement through the DSB decisions.

In light of such an unprecedented institutional crisis, the European Union has decided to step in and choose to be a pivotal player in the process of the

reform of the Appellate Review mechanism of the WTO. Going beyond the presented proposal for the amendment of Art.17 of the DSU, that have never been welcomed positively by the United States, despite their claim being largely taken into consideration in the draft decision presented by Facilitator Ambassador Walker in late 2019, the European Union has launched an attractive provisional solution in order to preserve the right of appeal of states which have triggered the mechanism of dispute settlement: the Multi Party Interim Appeal Arbitration Arrangement. The MPIA is entirely based on an autonomous alternative dispute settlement mechanism in full compliance with Article 25 of the DSU provided for arbitration as an alternative mean for the resolution of disputes.

The text of the MPIA contains several provisions that have the potential to bring about a great deal of impact in the functioning of the appellate procedure of the WTO. The most prominent provision that tackles two of the main criticisms moved by the USTR is paragraph 13 of the Annex which deals with the problem related to the observance of the 90 days deadline provided for in Article 17.5 of the DSU and the concerns over the allegedly *de novo* review of fact and domestic laws carried out by the Appellate Body. By granting the possibility not to take into account, hence excluding from the appellate procedure, claims which are deemed to be outside the scope of the appeal itself, paragraph 13 might also mitigate the possible perception that finding not necessary for the resolution of the disputes are being review in the arbitral award granted under Art. 25 of the DSU. Drawing from the analysis conducted over the provisional mechanism, many are the provision that might trigger a process of innovation of the Dispute Settlement itself. The very aim of the MPIA is in fact that of enhancing the overall efficiency of the already existing appeal procedure of the Appellate Body. In doing so it provides for an enlargement of the number of adjudicators in the pool of arbitrators, recalling to the proposal advanced by many Member States in 2018: Article 25 appeals will in fact be heard no longer by three or seven members, but by ten law experts selected and approved by the General Council. Accordingly, the principle of collegiality of the Appellate Body will be applied and respected, in fact, according to what is foreseen by the MPIA text, the pool of arbitrators will have the obligation to "stay abreast of WTO dispute settlement activities and will receive all documents relating to appeal arbitration proceedings under the MPIA". In full compliance with the text of Article 25 of the Dispute Settlement Understanding, all MPIA arbitration awards will be binding and will thus form part of the WTO case law as well as to be notified to the DSB and to all the main bodies of the WTO, such as the General Council and the Ministerial Conference.

Being based on the provisions of Article 25, the MPIA case law, is in fact part of the WTO law that must be implemented in good faith by the States and must be subsequently integrated within the WTO. It is therefore clear that this procedure does not in any way give rise to a parallel jurisprudence that largely

ignores the multilateral character of the reports produced for the resolution of disputes. The MPIA aims at delivering high quality disputes resolutions by creating an expert pool of arbitrators in order to avoid persistent conflicts or worse, inconsistent interpretations of WTO laws. It is clear that the procedure foreseen by the MPIA, requires a great degree of collaboration between the participant States and the WTO itself in order to ensure the proper functioning of this provisional solution to the impasse in which the dispute settlement verges. The panels that will be called to hear the appeal cases through the MPIA, will undoubtedly have to make the best use of their discretionary powers conferred by the DSU itself, and in the same way the parties will have to approach them as soon as possible, so as to ensure an effective functioning of the whole system. In this realm, the MPIA initiative is to be largely appreciated as it does not try to create a parallel branch of judicialization, but because it exhaustively makes the best of provisions already existing and well-functioning in the WTO legal framework. The EU has managed to develop a temporary instrument in the hand of Member States which appear to be capable of preserving the mechanism of dispute settlement envisioned by the WTO, while giving Member States the necessary time to engage in talks and negotiations with the aim of reaching a permanent solution through the needed reforms of the Dispute Settlement Understanding.

Since newly elected President Biden holds a very peculiar view to that of former President Trump, a lift of the blockage to the appointment of new members appears highly unlikely in the foreseen future. In this context the provisional solution advanced by the European Union seems to be more necessary than ever as it represent a functional and effective bridge capable of ensuring the continuity of the entire Dispute Settlement Mechanism of the WTO. As for the Appellate Body's long-term solutions, they must be part of a broader project to reform the entire system of multilateral trade governance. The resolution of the stalemate in which the state of international trade law finds itself, in addition to preventing the increasing protectionist tendencies on the part of states, would re-establish the principles of fairness and trust, cardinal points of the WTO. A totally paralyzed dispute settlement mechanism constitutes a step closer to the law of the jungle, which will be profitable only for a few in one of the most difficult and delicate moments for the world economy.