

Number 3610617

May 2020

“QUO VADIS” WTO AFTER COVID-19?

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Abstract

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

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

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

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

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

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

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

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

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

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

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

Against this inward-looking involution, influential personalities, such as French President Emmanuel Macron, former US Treasury Secretary Henry Paulson and Bill Gates⁹, have raised their voices advocating for more multilateralism, concerted action and cooperation in order to tackle global problems such as health security and assistance to vulnerable developing countries, which require maintaining trade flows.¹⁰ The negative experience of unilateral beggar-your-neighbor protectionist responses of the 1930s to the 1929 crisis has been evoked as an example not to be followed. Organizations such as the WHO, WTO and IMF should see their roles enhanced rather than being sidelined. In fact, bodies as diverse as the EU, the G-7 and G-20 have expressed themselves, with different tones and determination, to be in favor of strengthening global cooperation.¹¹ The UN General Assembly on 2 April 2020 approved a resolution calling for “international cooperation” and “multilateralism” in the fight against Covid-19. The UN General Assembly issued on 2 April 2020 Resolution 74/270 on “Global solidarity to fight the coronavirus disease 2019 (COVID-19)”¹² Meeting global challenges such as those stemming from climate change (global warming), protecting the environment, meeting sustainable development goals, ensuring basic needs and respecting fundamental rights for all should not be relegated to second place. To the contrary, ensuring health and appropriate sanitary conditions worldwide has to be added to the list since viruses know no border.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

As a consequence of these tariff increases, of the additional tariffs on exports from the US introduced as a response by a number of target countries, and a creeping introduction of various restrictions by other countries, expansion of world trade stalled in 2018-2019.¹⁶ Uncertainty as to the opening of existing markets and the stability of the world trade regime has led to the disruption of inter-national value chains: offshoring and delocalization is being replaced by reshoring and decoupling.

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

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

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

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

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

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

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

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

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

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

What has not been resolved by these bilateral negotiations is the criticism of the US (and other WTO members) of China concerning its widespread use (or abuse) of subsidies to and through its state-owned enterprises (SOEs) which distort international competition and are not adequately dealt with by the special provisions of China's Access Protocol to the WTO (a criticism that China of course rejects).²³ Reform of substantive provisions of the WTO Agreement on Subsidies and Countervailing Measures (ASCM) had been advocated in a joint statement of the United States, the European Union and Japan in January 2020.²⁴ The proposals include broadening the concept of state-owned enterprises and sidelining the current AB restrictive interpretation of the term "public body" in the ASCM — another ground for complaint by the US against the AB.

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

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

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

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

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

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

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

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

At the beginning of 2020 the WTO appears thus to be on the verge of paralysis, risking irrelevance and of being sidestepped by bilateral agreements that are not compatible with the principles of multilateralism. The announced resignation of Mr. Azevêdo from his position as Director-General effective September 2020 will not help. Valuable proposals notwithstanding²⁵, for the time being it appears unlikely that the WTO will be able to soon regain its institutional role as a rule settler, permanent negotiation forum, implementation watchdog and effective adjudicator on a global scale. Temporary export restrictions introduced on the trade of personal protective devices, medical equipment and pharmaceuticals by a number of countries during the pandemic have added tensions, although their legitimacy may be justified in principle under the various public interest exceptions found in Article XI.2, XX (a) and (b) of GATT (no one having invoked the security exception of Art. XXI).²⁶ Unilateral import or export restrictions are however not a long term answer for resolving global problems.

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

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

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

²⁵ See Centre for International Governance, *Modernizing the WTO*, April 2020,

<https://www.cigionline.org/articles/modernizing-world-trade-organization>

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

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

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

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

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

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

An alternative interim solution has been proposed by the EU and accepted by other 19 WTO members in March 2020.³³ This “Multi-party Interim Appeal Arbitration Arrangement” (MPIA) envisages an alternative “appeal arbitration” between the participants within the DSS. The scheme is based on the option laid down in Article 25 of the Dispute Settlement Understanding (DSU), to opt for arbitration instead of the regular dispute settlement proceedings but still within the WTO DSS. According to the MPIA, arbitration for the appeal phase would be resorted to at the end of the panel stage in lieu of appeal to the AB by virtue of specific bilateral agreements between the signatories in dispute as long as the AB is inoperative.

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

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

²⁹ The criticism expressed by the US on various practices of the AB at almost all DSB meetings in 2018-2019 has been assembled in a lengthy report of USTR in February 2020, see

<https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf>

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

³¹ The proposal addresses as follows the issue raised by the US:

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

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

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

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

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

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

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

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

³⁴ The EU has announced that in such a case by an opposing party in a dispute with the EU, it would resort immediately to countermeasures, relying on general international law principles in the area of State responsibility, see “Commission reinforces tools to ensure Europe’s interests in international trade”, 12 December 2019, <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2091&title=Commission-reinforces-tools-to-ensure-Europes-interests-in-international-trade> (Proposal for a Regulation amending Regulation (EU) No 654/2014 of the European Parliament and of the Council concerning the exercise of the Union's rights for the application and enforcement of international trade rules)

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

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