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THE EU IN SEARCH FOR STRONGER ENFORCEMENT RULES: ASSESSING THE PROPOSED AMENDMENTS TO TRADE ENFORCEMENT REGULATION 654/2014

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ABSTRACT

Considering the new focus of the European Union (EU) trade policy on strengthening the enforcement of trade rules, the article presents the proposed amendments to the EU Trade Enforcement Regulation 654/2014. It analyzes the EU Commission proposal and the amendments suggested by the European Parliament Committee on International Trade (INTA), in particular with regard to uncooperative third parties and the provision of immediate countermeasures. The amendments will be assessed in view of their legality under World Trade Organization (WTO), Free Trade Agreement (FTA), and general international law and in view of their political implications for the EU's multilateralist stance. Finally, the opportunity to amend Regulation 654/2014 to use it for the enforcement of FTA trade and sustainable development chapters will be explored. The analysis shows that the shift towards more effective enforcement should be pursued with due care for respecting existing international legal commitments and with more caution to multilateralism.

I. THE EU'S NEW TRADE POLICY FOCUS ON ENFORCEMENT

In recent years, trade policy has been refocused on the implementation and enforcement of trade rules and the benefits they bring to market access for the European Union (EU) industry, in order to strengthen the effectiveness of the EU's trade policy. For many years, the EU seemed reluctant to use the dispute settlement procedures established in its trade agreements (less so, of course, in respect to World Trade Organization (WTO) procedures), and enforcement was not a priority in EU trade policy for the Commission.[1] However, things are changing.

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1 Simon J, Evenett, 'Paper Tiger? EU Trade Enforcement as if Binding Pacts Mattered', (2016) New Direction The Foundation for European Reform, p.17–39; Marise Cremona, 'A Quiet Revolution: The Common Commercial Policy Six Years after the Treaty of Lisbon', (2017) Report No. 2, Swedish Institute for European Policy Studies, p. 56.

In 2014, the so-called Trade Enforcement Regulation 654/2014[2] was adopted, which regulated the exercise of EU rights for the enforcement of international trade rules under WTO law and bilateral trade agreements and provided for the 'appropriate instruments to ensure the effective exercise of the Union's rights under international trade agreements'.[3] In 2015, the European Commission's Communication 'Trade for All' announced that it will step up the enforcement and implementation of the EU trade rights and ensure that its partners live up to their promises, including for the benefit of small businesses, consumers, and workers.[4] In this Communication, effectiveness of trade policy was identified as one of its three key objectives, alongside transparency and value orientation,[5] and the Commission committed itself to producing annual Free Trade Agreement (FTA) implementation reports, three of which have already been published since 2016.[6] The policy shift also engendered changes at the institutional level: since 2018, the Commission made use of bilateral dispute settlement mechanisms on several occasions,[7] including for solving a labor dispute under the EU–Korea FTA, and the new office of a Chief Trade Enforcement Officer has recently been established. Strengthening the enforcement of trade rules features prominently in the debate on how to improve the implementation of trade and sustainable development (TSD) chapters in EU FTAs,[8] in the political guidelines of the von der Leyen Commission,[9] in the mandate for the Trade Commissioner,[10] and in the recently launched discussion and consultation on the new direction of trade policy under the motto of 'open strategic autonomy'; this motto implies that the EU should continue reaping the benefits of the international rules-based trade by focusing on implementation and enforcement issues, while having the right tools in place to protect itself from unfair, hostile, or uncompetitive practices.[11] Contemporary developments such as the proliferation of

2 Regulation (EU) 654/2014 of the European Parliament and of the Council of 15 May 2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules and amending Council Regulation (EC) No. 3286/94 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization, OJ EU 2014 L 189/50, 27 June 2014.

3 See Trade Enforcement Regulation, Preamble, and recital 2.

4 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Trade for all. Towards a More Responsible Trade and Investment Policy', COM(2015) 497 final, 14 October 2015, p. 15–17.

5 ibid, p. 10 ff.

6 FTA Implementation Report 2016, COM(2017) 654 final; FTA Implementation Report 2017, COM(2018) 728 final, FTA Implementation Report 2018, COM(2019) 455 final.

7 For more on these disputes, see European Commission, 'Disputes under Bilateral Trade Agreements' https://ec.europa.eu/trade/policy/accessing-markets/dispute-settlement/bilateral-disputes/.

8 FTA Implementation Report 2017, p. 39; Non-Paper of the Commission Services, Feedback and Way Forward on Improving the Implementation and Enforcement of Trade and Sustainable Development Chapters in EU Free Trade Agreements, 26.02.2018; FTA Implementation Report 2018, p. 26.

9 Political Guidelines for the Next European Commission 2019–2024, 'A Union that wants to achieve more', https://ec.europa.eu/info/sites/info/files/political-guidelines-next-commission_de.pdf.

10 See the Mission Letter, 1 December 2019, https://ec.europa.eu/commission/commissioners/sites/comm-cwt2019/files/commissioner_mission_letters/mission-letter-phil-hogan-2019_en.pdf.

11 European Commission, A renewed trade policy for a stronger Europe. Consultation Note, 16 June 2020, p. 3, 8.

protectionist measures in the trade conflicts with and between the USA and China,[12] and the paralysis of the Appellate Body (AB) since December 2019, rendering WTO dispute settlement unable to provide a reliable instrument for enforcement of trade rules, have contributed significantly to this reorientation.

This reorientation is also reflected in a current legislative project, the proposal for an amendment to the Trade Enforcement Regulation 654/2014 presented by the Commission at the end of 2019, which describes the effective enforcement of trade rules as a 'Union priority'[13] and aims at extending the regulation's material scope to allow for the use of sanctions in situations where trade partners block the resolution of trade conflicts, in conformity with the Political Guidelines of the von der Leyen Commission[14] and the Trade Commissioner's mandate that states that the Trade Enforcement Regulation should allow the EU to use sanctions when others adopt illegal measures and simultaneously block the WTO dispute settlement process.[15] While this project appears legitimate, the EU must take care that it does not undermine its commitment to a multilateral rules-based trade system, which the EU constantly professes.[16] 'Multilateralism is in Europe's DNA',[17] not only for political reasons but also for constitutional reasons. International law has to be respected by the EU in its international relations (see Article 3(5), Article 21 (2) Treaty on European Union (TEU)), especially with respect to the trade policy.[18] Accordingly, the EU will have to balance its need for autonomy and self-protection with that of support for multilateralism, a task that will likely be not an easy one.[19]

In the following sections, the article will briefly introduce the proposal for the amendment to Regulation 654/2014, the situations that it seeks to address and the

12 On this and the resulting challenges for the EU, see Bernard Hoekman, Laura Puccio, 'EU Trade Policy: Challenges and Opportunities', (2019) RSCAS Policy Papers 2019/06; Frank Hoffmeister, 'Do Ut Des oder Tit For Tat?—Die Europäische Handelspolitik angesichts neuer Herausforderungen aus den USA und China' in Christoph Herrmann (ed.), *Die Gemeinsame Handelspolitik im Europäischen Verfassungsverbund* (Nomos 2020), p. 77 ff; Wolfgang Weiß, in Wolfgang Weiß, Cornelia Furculita (eds.), *Global Politics and EU Trade Policy* (Springer 2020), p. 17 ff.

13 Proposal for 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 (Proposal for Amending Regulation 654/2014), COM(2019) 623 final, p. 4.

14 Political Guidelines (n. 9), p. 17–18.

15 Mission Letter (n. 10), p. 5.

16 See Intro Remarks by Commissioner Phil Hogan at Second G20 Extraordinary Trade and Investment Ministers Meeting on COVID-19, 14 May 2020, https://ec.europa.eu/commission/commissioners/2019-2024/hogan/announcements/intro-remarks-commissioner-phil-hogan-second-g20-extraordinary-trade-and-investment-ministers_en; Speech by Commissioner Phil Hogan at Launch of Public Consultation for EU Trade Policy Review—Hosted by EUI Florence, 16 June 2020, https://ec.europa.eu/commission/commissioners/2019-2024/hogan/announcements/speech-commissioner-phil-hogan-launch-public-consultation-eu-trade-policy-review-hosted-eui-florence_en.

17 Political Guidelines (n. 9), p. 17.

18 CJEU, Case C-386/08 *Brita* [2010] paras 41–42; Case C-104/16 P *Council v Front Polisario* [2016] paras. 89–124; C-266/16 *Western Sahara Campaign UK* [2018] para. 63; Theodore Konstadinides, 'Customary International Law as a Source of EU Law: A Two-Way Fertilization Route?' (2016) Yearbook of European Law 1 ff.

19 Luca Rubini, 'A Delphic oracle?' What does the recent EU Commission's trade policy review mean?', 24 June 2020, https://eulawlive.com/op-ed-a-delphic-oracle-what-does-the-recent-eu-commissions-trade-policy-review-mean-by-luca-rubini/.

changes suggested to it, especially by the European Parliament Committee on International Trade (INTA). Further, it will analyse some of the most controversial amendments and assess their legality and desirability, especially in light of the EU's declared political intention and legal commitment to support the international rules-based trade system. Finally, it will explore whether Regulation 654/2014 could be useful in strengthening the enforcement of the TSD chapters in EU FTAs, as has also been discussed in the wake of reforming the regulation.

II. THE PROPOSAL FOR AMENDING THE TRADE ENFORCEMENT REGULATION 654/2014

A. Trade Enforcement Regulation 654/2014

The Trade Enforcement Regulation 654/2014 governs the procedure for suspension or withdrawal of EU trade commitments in relation to other states in specific circumstances.[20] Currently, its scope covers the suspension of concessions or other obligations authorized under the respective agreements as a result of the successful adjudication of trade disputes under the WTO or bilateral dispute settlement rules,[21] of rebalancing measures under multilateral and bilateral safeguard rules, or in cases of modifications by a third country of its concessions under Article XXVIII of GATT 1994.[22] Therefore, the regulation addresses both the situations when the EU's interests are affected by the violations of international trade rules by third countries, as well as by permissible measures to which reaction is allowed under these rules.[23] The permissible counter-reactions under the regulation are the suspension of tariff concessions, customs duties, quantitative restrictions on imports or exports of goods, and the suspension of concessions regarding goods, services, or suppliers in the area of public procurement.[24] Accordingly, currently, the Commission has no powers to take countermeasures in the sector of intellectual property and services; it can only address the violations in these areas by implementing permitted actions with respect to trade in goods because of the possibility to cross-retaliate in a different sector.[25] Article 4 of the regulation contains the substantive conditions that the measures shall respect and the criteria based on which they shall be selected, thereby internalizing the requirements under international law for these measures under the WTO or bilateral agreements.[26] The regulation also sets out the rules on suspension, modification, and termination of

20 Wolfgang Weiß, in Horst Günter Krenzler, Christoph Herrmann, Marian Niestedt (eds.) Handelsverge ltungs-VO 112, Erwägungsgründe, mn 1.

21 Trade Enforcement Regulation 654/2014, Article 3(a), (b).

22 ibid, Article 3(c), (d).

23 ibid, Article 1.

24 ibid, Article 5.

25 Weiß (n. 20), Article 5 mn 2. Recital 11 of the regulation already provides for a review of the scope, functioning, and efficiency of this regulation, including possible measures in the sector of intellectual property rights and additional measures concerning services, no later than five years from its entry into force.

26 Weiß (n. 20) Article 4, mn 4. Without this codification, the international requirements at least under WTO law would not have been relevant for the EU internally, for lack of direct effect of WTO law; see Hélène Ruiz Fabri, 'Is There a Case—Legally and Politically—for Direct Effect of WTO Obligations?', (2014) 25(1) The European Journal of International Law 151 ff.

the measures adopted under the regulation, the applicable Comitology procedures for the adoption of implementing acts, and the procedural rules for public consultation.[27]

B. Commission's proposal for amending Regulation 654/2014

As already mentioned, the proposal for amending the regulation has the objective to protect the Union's rights under international trade agreements in situations where trading partners take illegal measures while blocking the dispute settlement procedures, either under WTO law or under bilateral agreements. Thus, the scope of the regulation is to be extended, so that in such cases, the EU may also suspend concessions granted to the partner or take protective measures (countermeasures). According to the Commission, the adoption of such amendment is promptly necessary,[28] considering that the AB is dysfunctional since December 2019, when the terms of two other remaining Members expired. Since then, the AB has only one Member and is unable to hear and decide new appeals, as a minimum of three Members would be required to form a division. The amendment to Regulation 654/2014 tabled by the Commission's proposal is, thus, designed as a reaction to the paralysis of the AB, which may lead to a situation where a WTO party can block a dispute settlement procedure by lodging an appeal against a panel report, which is detrimental to it, to the currently inactive AB. Under the WTO dispute settlement understanding (DSU), a panel report goes into limbo, as soon as a disputing party notifies about its decision to appeal, as the appealed report shall not be considered for adoption by the WTO dispute settlement body (DSB) until after the completion of the appeal.[29] Consequently, there is a risk that the WTO dispute settlement proceedings may remain pending, without being concluded until and if the AB crisis is solved. Appealed panel reports that are not adopted by the DSB have no binding character and cannot be enforced. In this way, the EU would then also be deprived of the possibility to apply countermeasures for the violation of its trade rights under WTO rules as they allow the imposition of countermeasures only after the adoption of the reports by and following an authorization of the DSB.[30] Also at the level of Union law, countermeasures would be illegal because, under the current version of Regulation 654/2014, their adoption presupposes the conclusion of dispute settlement.

Considering, that in the context of the current WTO crisis, any WTO Member can avoid being held accountable for WTO violations by lodging an appeal, there is only one way out of an appeal 'into the void': the disputing parties agreeing on alternatives. The EU is currently promoting the Multi-Party Interim Arbitration Arrangement (MPIA),[31] according to which in case of an appeal by a disputing party, the appellate stage should take place under Article 25 of the DSU that establishes arbitration

27 Trade Enforcement Regulation (n. 21), Articles 7–9.
28 Proposal for Amending Regulation (n. 13), Explanatory Memorandum, p. 1.
29 Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) (DSU), Article 16.4.
30 DSU, Articles 21(3) & (6), 22(8), 23.2(c).
31 Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU (MPIA), JOB/DSB/1/Add.12, 30 April 2020.

as an alternative dispute resolution method.[32] Appeal arbitrations can take place only between participating Members to the MPIA and subject to their agreement pursuant to Article 25.2 of the DSU. One of the advantages of the use of Article 25 of the DSU for the appellate stage is that the awards issued can be enforced in the same way as final panel and AB reports, because Articles 21 and 22 of the DSU on the implementation of reports and countermeasures apply *mutatis mutandis* to arbitration awards.[33] Therefore, the MPIA solves the issue of sending appealed panel reports into the void and the related enforcement concern. Hence, the proposed amendment to the Trade Enforcement Regulation 654/2014 extends the scope of the regulation in Article 3 by making it applicable to the situation in which WTO dispute settlement procedures cannot be completed due to the appeal into the void of a panel report in favor of the EU, where the other disputing party has not agreed to interim appeal arbitration under Article 25 of the DSU.

The proposal, furthermore, addresses the same problem occurring in dispute settlement mechanisms under other international, regional, or bilateral trade agreements, insofar dispute settlement could come to a halt or be delayed by an uncooperative third party, already at the stage of panel formation. Whereas the WTO DSU provides no possibility for a disputing party to unilaterally block the composition of a panel, this is not always the case when it comes to the dispute settlement rules of EU FTAs, especially the older ones. The more recent EU FTAs provide that in case the arbitrators are not selected by agreement, they shall be selected by lot from a pre-established list of candidates.[34] However, even EU–Korea FTA and EU–Singapore FTA do not permit the selection by lot to be performed by the representative of only one party, making possible for an uncooperative party to obstruct the panel composition.[35] Furthermore, if there are no pre-established lists, EU–Korea FTA provides with no further rules, meaning the dispute settlement procedures under this agreement could be brought to a complete halt even for decades, as it happened in case of The North American Free Trade Agreement (NAFTA).[36] Moreover, the more developed agreements, such as EU–Canada Comprehensive Economic and Trade Agreement (CETA) and EU–Vietnam FTA, provide opportunity for delays in panel formation in case the lists of arbitrators are absent or incomplete, due to some vague and uncertain rules.[37] For this reason, the proposal for amending Regulation 654/2014 intends to amend Article 3 to allow the imposition of countermeasures if adjudication is not possible because a third country is not taking the necessary steps for a dispute settlement procedure to function.[38] The countermeasures to be imposed as a reaction to the blockage of the dispute

32 MPIA (n. 31), Annex 1, para. 4 and 5.
33 DSU, Article 25.4.
34 EU–Korea FTA, Article 14.5(2)-(3); CETA, Article 29.7(2)-(4); EU–Japan EPA, Article 21.8(2)-(4); EU–Singapore FTA, Article 14.5(2)-(4); EU–Vietnam FTA, Article 15.7(2)-(4).
35 For more see Cornelia Furculita, 'Ensuring that State to State Dispute Settlement Procedures under the EU FTAs Do Not End When They Have Just Begun', (2020) EUTIP Policy Brief 1, p. 3–4.
36 See David A. Gantz, 'The United States and NAFTA Dispute Settlement: Ambivalence, Frustration and Occasional Defiance', (2009) 06–16 Arizona Legal Studies Discussion Paper, p. 387.
37 See Furculita (n. 35), p. 4.
38 Proposal Amending Regulation (n. 13), p. 9.

settlement procedures shall commensurate to the nullification or impairment of the Union's commercial interests.[39]

C. Suggested changes to the Commission proposal

Whereas the Council's agreed position was close to that of the Commission, except that it proposed a review clause that would require the Commission to assess the functioning of the new rules and to consider within maximum three years from the adoption of the regulation, the potential need of extending the scope to services and intellectual property rights,[40] the INTA's position for a draft European Parliament resolution suggested, with the support of the large majority,[41] several amendments to the Commission's proposal.[42]

While the Commission's proposal suggested the review of the scope of the regulation to take place by March 2025, including with the aim to envisage additional measures in the area of services,[43] INTA voted in favor of extending the areas in which measures can be taken to cover services and intellectual property rights,[44] a proposal that was accepted by the Commission. Furthermore, one of the requested changes is a review clause that would require the Commission at the earliest possible opportunity, but no later than two years after the entry into force of the amendments to review the scope of the Regulation 654/2014, a review that shall include proposals on strengthening the enforcement of sustainable development commitments.[45] Some voices in the Parliament had postulated that the Trade Enforcement Regulation should be used also for the enforcement of the FTA TSD chapters, which the Commission had rejected.[46] This issue will resurface again, the latest at the requested review of the scope of the Regulation 654/2014, as proposed by the INTA Report.

Lastly, although the Commission now promised to introduce new anti-coercion legislation that would allow the EU to respond to immediate unilateral measures of other states, as proposed by INTA, INTA wanted such a possibility to be included into the Trade Enforcement Regulation. Accordingly, the INTA report requested a change providing that in the event of a 'clear breach' of international law or a 'clear violation' of trade obligations by another state, which threatens or impairs the Union's commercial interests or its strategic autonomy, the Commission should be able to take measures addressing them, provided that the allegedly illegal measures have been challenged in

39 ibid.

40 European Council, 'EU trade: Council agrees its position on revamped enforcement regulation', 8 April 2020, https://www.consilium.europa.eu/en/press/press-releases/2020/04/08/eu-trade-council-agrees-its-position-on-revamped-enforcement-regulation/.

41 See Iana Dreyer, 'Marie-Pierre Vedrenne: Defending your Trade Interests is Not Protectionism', Borderlex, 08.07.2020, https://borderlex.eu/2020/07/08/vedrenne-defending-your-trade-interests-is-not-protectionis/.

42 Report on the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No. 654/2014 of the European Parliament and of the Council concerning the Exercise of the Union's Rights for the Application and Enforcement of International Trade Rules (INTA Report), 6 July 2020, A9-0133/2020.

43 Proposal Amending Regulation (n. 13), p. 10.

44 INTA Report (n. 42), p. 8, 10, 14, 19.

45 ibid, p. 16.

46 Marco Bronckers, Giovanni Gruni, 'Taking the Enforcement of Labour Standards in The EU's Free Trade Agreements Seriously', (2019) 56 CML Rev, p. 1615–16.

front of the relevant dispute settlement body.[47] The Commission should become able to impose countermeasures even before a panel report is issued (be it at the multilateral or bilateral level), so that the EU 'will be spared the immediate consequences of illegal measures, including waiting several months for a decision to be handed down under the dispute settlement process before being able to react'.[48]

While the Commission intended to use the amendment of Regulation 654/2014 to specifically address current dispute settlement blockages, particularly in the WTO context, changes similar to those tabled by the INTA Committee, which will serve as a basis for Commission's anti-coercion legislation, are likely to open the pandora box of very fundamental debates about the political and legal implications of the proposals by INTA, but also by the Commission's draft might have. In particular, the legality of the envisaged enlarged scope of application of countermeasures under WTO rules is subject to considerable doubt, as will be explored in the next section.

III. ASSESSING THE COMMISSION'S PROPOSAL AND THE SUGGESTED INTA AMENDMENTS

A. Commission's proposal on countermeasures against third parties not acting in good faith

First, we assess the proposal to expand the scope of Regulation 654/2014 to cover the situations in which dispute settlement proceedings are blocked by a disputing party, especially because of an appeal into the void by a WTO Member that does not participate in the MPIA. It is doubtful whether the intended extension of the scope of the regulation, allowing the imposition of countermeasures in case of, technically, ongoing proceedings, is in conformity with international law. In assessing the legal situation, a distinction has to be drawn between the application of the proposed amendment within the framework of the WTO dispute settlement and that of bilateral, i.e. FTA dispute settlement mechanisms.

As far as WTO law is concerned, it could be argued that recourse to the general public international legal concept of countermeasures is precluded, as Article 23.1 of the DSU stipulates that disputes arising from WTO law may only be settled according to the disciplines of the DSU. The panels in *US—Shrimp* and *Canada—Aircraft Credits and Guarantees* established that this article stresses the primacy of the multilateral system, to the exclusion of unilateralism.[49] It has also been confirmed by doctrinal writings that the *raison d'être* of Article 23.1 of the DSU is to prevent Members from adopting unilateral measures without making use of the WTO dispute settlement mechanism.[50] The proposed amendments to Regulation 654/2014 do promote unilateralism, contrary to the DSU. While the first paragraph of Article 23 of the DSU states the general obligation, '[s]ubparagraphs (a), (b) and (c) of Article 23.2 articulate specific and

47 INTA Report (n. 42), p. 8 ff (Amendments 8 and 14).
48 ibid, Explanatory Statement, p. 19.
49 Panel Report, *US—Shrimp*, WT/DS58/R, 15 May 1998, para. 7.43; Panel Report, *Canada—Aircraft Credits and Guarantees*, WT/DS222/R, 28 January 2002, para. 7.170.
50 Erich Vranes, 'Jurisdiction and Applicable Law in WTO Dispute Settlement', (2005) 48 German Yearbook of International Law, p. 287; Makane Moïse Mbengue, 'The Settlement of Trade Disputes: Is There a Monopoly for the WTO?', (2016) 15 The Law and Practice of International Courts and Tribunals, p. 223.

clearly-defined forms of prohibited unilateral action'.[51] According to Article 23.2(a), Members shall 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 under the DSU and shall make any such determination consistent with the findings contained in the panel or AB report adopted by the DSB or an arbitration award issued under the DSU. By imposing countermeasures when a panel report has been appealed and, therefore, not adopted by the DSB, the EU would act against Article 23.2(a) of the DSU. Furthermore, Article 23.2(c) of the DSU expressly establishes that suspending concessions or other obligations require previous DSB authorization. The panel in *US—Certain EC Products* expressly stated that 'Article 23.2(c) prohibits *any* suspensions of concessions or other obligations [...], prior to a relevant DSB authorization'[52] (emphasis added). Therefore, the EU would be acting, clearly, in breach of Article 23.2(c) of the DSU, by taking countermeasures without DSB authorization. The appeal of a panel reports blocks the DSB from authorizing countermeasures, arg. ex. Article 16.4 of the DSU.

The Commission, however, opines that its proposal was compatible with international law. It argues that under customary rules of international law, as codified by the International Law Commission's Draft Articles on State responsibility (ILC Articles), the EU is allowed under conditions, such as proportionality and prior notice, to take countermeasures to curb the breach of its rights and to obtain reparation.[53] While the ILC Articles are not binding by virtue of being a treaty, they codify customary rules and general principles of interpretation that have been referred to by many international courts and tribunals,[54] and also by WTO panels and the AB, considering them as reflecting customary international law or general principles of international law.[55] The Commission claims that while under Article 50(2)(a) of the ILC Articles, a party is not relieved from fulfilling its obligations under any pertinent dispute settlement procedure, the rules on dispute settlement, according to Article 55 of the ILC Articles, constitute *lex specialis* in relation to the general international law on countermeasures.[56] Thus, the possibility to take countermeasures according to general rules allegedly revive when the 'the responsible State fails to implement the dispute settlement procedures in good faith', as provided by Article 52(4) of the ILC Articles.[57]

51 Appellate Body Report, *US—Certain EC Products*, WT/DS165/AB/R, 11 December 2000, para. 111.
52 Panel Report, *US—Certain EC Products*, WT/DS165/R, 17 July 2000, para. 6.37.
53 Proposal Amending Regulation (n. 13), p. 4.
54 James Crawford, 'State Responsibility', (2006) in Max Planck Encyclopedias of International Law, para. 65; Alejandro Sánchez, 'What Trade Lawyers Should Know about the ILC Articles on State Responsibility', (2012) 7(6) Global Trade and Customs Journal, 293 ff.; Lori Fisler Damrosch, 'The Legitimacy of Economic Sanctions as Countermeasures for Wrongful Acts', (2019) 46 Ecology Law Quarterly 105, 37 Berkeley Journal of International Law p. 259.
55 Panel Report, *Canada—Dairy*, WT/DS103/R, WT/DS113/R, 17 May 1999, para. 7.77; Appellate Body Report, *US—Line Pipe*, WT/DS202/AB/R, 15 February 2002, para. 259; Panel Report, *US—Gambling*, WT/DS285/R, 10 November 2004, para. 6.128; Appellate Body Report, *Canada—Continued Suspension*, WT/DS321/AB/R, 16 October 2008, para. 382; Appellate Body Report, *US—Anti-Dumping and Countervailing Duties*, WT/DS379/AB/R, 11 March 2011, para. 309–11.
56 ibid, p. 4.
57 ibid, p. 4.

By virtue of Article 55 of the ILC Articles, these Articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or its legal consequences are determined by special rules of international law.[58] Thus, the ILC Articles apply in a residual way, and it depends on the special rules the extent to which the relevant general rules are displaced.[59] According to the Commentaries to the ILC Articles, some aspects may be modified, while others remain applicable, an example of such a case being the DSU rules.[60] While Article 23 of the DSU prohibits unilateral determinations that a violation occurred and the imposition of countermeasures without the DSB authorization, as mentioned above, it is silent on the situation in which one of the parties acting in bad faith fails to implement the pertinent dispute settlement rules regulated by Article 52(4) of the ILC Articles. Consequently, the Commission's argument is based on this silence as to the consequences of bad faith, and adopts a reading of the DSU that in this case, the residual general public international law rules as enshrined in the ILC Articles are applicable again, with the effect of making way for countermeasures even in the wake of a pending WTO appeal. The 'fall-back' doctrine, according to which the general rules of international law, including on countermeasures, becomes applicable once the more special system fails and which was invoked before by the USA in GATT 1947 procedures (when the dispute settlement proceedings were blocked by another disputing party due to the rule of positive consensus)[61] is not helpful here. The WTO dispute settlement system has not failed yet, since unappealed panel reports and potential arbitral appeal awards issued under the MPIA can be enforced. Moreover, there seemed to be no consensus between states and academics regarding the 'fall-back' doctrine and the exact conditions in which it applies,[62] thus making its status as a customary international law source questionable. In contrast, the ILC Articles provide a clear basis (also for the EU Commission) recognized as customary law, under which general rules on countermeasures may revive, and establish the limits to such revival.[63]

The legal approach presented by the Commission raises at least two questions: first, is this reading of the relationship between DSU rules and the ILC Articles compatible with the WTO judiciary's approach on countermeasures? Second, can one blame any WTO Member that appeals a panel report under current circumstances to act in bad faith? Only if one can answer both questions in the affirmative, the argumentation by the Commission might stand.

As to the first issue: one may infer from Articles 50(2) and 52(3) of the ILC Articles a choice for an international entity between taking countermeasures or initiating

58 ILC Articles with Commentaries, Article 55, Commentary, para. 2.
59 ibid, para. 2, 3; Gabrielle Marceau, Julian Wyatt, 'Dispute Settlement Regimes Intermingled: Regional Trade Agreements and the WTO', (2010) 1(1) Journal of International Dispute Settlement, p. 76.
60 ILC Articles with Commentaries, Article 55, Commentary, para. 3; Petros C. Mavroidis, 'Remedies in the WTO Legal System: Between a Rock and a Hard Place', (2000) 11(4) EJIL, p. 765.
61 Javier Fernández Pons, 'Self-Help and the World Trade Organization' in Paolo Mengozzi (ed.). *International Trade Law on the 50th Anniversary of the Multilateral Trade System* (Giuffrè 1999), p. 66.
62 ibid, fn. 25, 42, 80.
63 Pons (n. 61), p. 88, mentions that even under the 'fall-back' doctrine, the ILC Articles impose limits on the countermeasures.

dispute settlement procedures. But these general rules do not apply in case of DSU rules as they are *leges speciales* (see above). As WTO practice shows, it is highly doubtful whether the WTO judiciary would accept the ILC Articles as a defense in a dispute on the legality of EU countermeasures taken without DSB authorization. While the WTO panels and the AB used in many instances the ILC Articles for the purpose of interpretation and determination of the meaning of WTO rules, including on countermeasures,[64] they have not applied them, or any other general rules about state responsibility, directly within a dispute as the WTO judiciary avoids the question of their applicability.[65] The WTO panels and the AB are, generally, known for their reticence to apply non-WTO law as a substantive defense for an alleged violation of WTO rules.[66] Therefore, it is likely that the invocation of the ILC Articles within WTO dispute settlement proceedings as a defense by the EU in case it imposes unilateral measures when a third country does not cooperate will be unsuccessful. Furthermore, as mentioned above, the WTO judiciary is hostile to unilateral countermeasures adopted outside the legal framework of the DSU.

As to the second issue: the Commission's argument presupposes that an appeal to a dysfunctional AB has to be classified as being contrary to good faith, as prescribed by Article 52(4) of the ILC Articles. The principle of good faith, considered both a general and customary principle of international law, is an abstract and vague one,[67] being more difficult to define it rather than illustrating it in examples.[68] According to the ILC commentary, under Article 52(4), the remedy of countermeasures revives if a party is not acting in good faith, such a situation occurring when, for example, a party does not appear in the process, does not comply with a provisional measures order, refuses to accept a final decision of the court or tribunal, or a party fails to cooperate in the establishment of the relevant tribunal.[69] To our view, the argument that any WTO Member appealing a panel report would not be acting in good faith because of the blockage of the appointment of AB Members is not convincing. Under Article 16.4 of the DSU, the parties to the dispute have the right to appeal the panel report, without indicating any

64 See, for example, Decision by the Arbitrators, *Brazil—Aircraft (Article 22.6—Brazil)*, WT/DS46/ARB, 28 August 2000, para. 3.42–3.44; Appellate Body Report, *US—Cotton Yarn,* WT/DS192/AB/R, 8 October 2001, para. 120; Appellate Body Report, *US—Line Pipe*, paras. 251 – 260; Decision by Arbitrator, *US—FSC (*Article *22.6—US)*, WT/DS108/ARB, 30 August 2002, para. 5.26, fn. 52; Appellate Body Report, *Canada—Continued Suspension*, para. 382.

65 See for example how the AB avoided this question in Appellate Body Report, *Peru—Agricultural Products*, WT/DS457/AB/R, 20 July 2015, paras. 5.21–5.28.

66 For this debate see Joost Pauwelyn, 'How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law? Questions of Jurisdiction and Merits', (2003) 37(6) Journal of World Trade, p. 997 ff.; Lorand Bartels, 'Jurisdiction and Applicable Law in the WTO', (2016) SIEL Working Paper No. 2016/18, p. 1 ff; Wolfgang Weiß, *WTO Law and Domestic Regulation* (2020), p. 412–419.

67 Robert Kolb, 'Principles as Sources of International Law: (with Special Reference to Good Faith)', (2006) 53(1) Netherlands International Law Review, p. 13; Andrew D. Mitchell, 'Good Faith in WTO Dispute Settlement', (2006) 7 Melbourne Journal of International Law, p. 340 ff.; Andreas R Ziegler, Jorun Baumgartner, 'Good Faith as a General Principle of (International) Law' in Andrew D. Mitchell, M Sornarajah, and Tania Voon (eds.) *Good Faith and International Economic Law* (Oxford University Press 2015), p. 9–11.

68 Mitchell (n 67) citing Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1987), p. 105.

69 ILC Articles with Commentaries, Article 52, Commentary, para. 9.

limitation.[70] While the USA could be held responsible for blocking the appointment and reappointment of the AB Members (for more on this see below), the rest of the WTO Members should not be charged for this. The AB as an institution is still existing, and any appeal can be heard again as soon as the positions are filled. Neither can one argue that WTO Members that appeal a panel report are abusing their right to appeal. Admittedly, no right is a priori absolute and the recognition of its recourse could be refused in certain circumstances on the grounds that it has been abused.[71] An allegation of the breach of good faith could not only be considered under Article 52(4) of the ILC Articles, but it could also be invoked under Articles 3.7 and 3.10 of the DSU as these rules are manifestations of the good faith principle.[72] However, WTO panels and the AB, as well as the International Court of Justice (ICJ) and other international courts and tribunals, have showed caution and restraint in finding an abuse of rights or process.[73] There is a presumption of good faith,[74] which in order to be rebutted and an abuse to be found is necessary to show convincing evidence of the use of a norm in a manner other than the one in which it was intended and with an unreasonable, arbitrary, malicious, frivolous purpose or for causing harm or obtaining an illegitimate advantage.[75] It appears difficult, if not almost impossible to show that a WTO Member used its right to appeal with a different purpose than to obtain the modification or reversal of legal findings of a panel in its favor, which is expressly permitted under the DSU and is the reason d'etre of the appeal mechanism in the DSU. A WTO Member can always argue that it appealed the panel report with the sincere hope that the appeal will be heard once the AB crisis is solved. Furthermore, the EU may be in a bad position to blame others for acting in bad faith as the EU itself recently appealed the panel report in *EU—Cost Adjustment Methodologies II (Russia)*. Admittedly, it argued that since there is no functional AB, it is ready to move to appeal arbitral proceedings under the MPIA.[76] But WTO Members are not obliged to follow this invitation.

There is no reason to consider that it is contrary to good faith if a WTO Member refuses to participate in the MPIA. Article 25 of the DSU creates the possibility to make use of arbitration and not an obligation. The voluntary nature of arbitration is reflected in the language 'mutual agreement' and 'agree' used in Article 25.2 of the DSU. Deciding not to exercise this possibility is not a breach of law or a breach of trust.[77] Otherwise, WTO law would provide an obligation to cooperate under Article 25 DSU.

70 Appellate Body Report, *EU—Fatty Alcohols (Indonesia)*, WT/DS442/AB/R, 5 September 2017, para. 5.175.
71 Hersch Lauterpacht, *The Development of International Law by the International Court* (Stevens & Sons 1958), p. 164; Ziegler, Baumgartner (n 67), p. 30.
72 Appellate Body Report, *EC—Export Subsidies on Sugar*, WT/DS265/AB/R, 28 April 2005, para. 312; Appellate Body Report, *Peru—Agricultural Products*, para. 5.18–5.19.
73 Mitchell (n. 67), p. 371; Ziegler, Baumgartner (n 67), p. 33; Freya Baetens, 'Abuse of Process and Abuse of Rights Before the ICJ: Ever More Popular, Ever Less Successful?', (2019) https://www.ejiltalk.org/abuse-of-process-and-abuse-of-rights-before-the-icj-ever-more-popular-ever-less-successful/.
74 Appellate Body Report, *Mexico—Corn Syrup (Article 21.5—US)*, WT/DS132/AB/RW, 22 October 2001, para. 74; Mitchell (n 67), p. 344.
75 Mitchell (n 67), p. 350; Ziegler, Baumgartner (n 67), p. 32; Steven Reinhold, 'Good Faith in International Law', (2013) Bonn Research Papers on Public International Law Paper No. 2/2013, p. 12; Baetens (n 73).
76 Notification of an Appeal, *European Union—Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia (Second Complaint)*, WT/DS494/7, 1 September 2020, p. 11.
77 Caroline Glöckle, 'Die ungewisse Zukunft des WTO Appellate Body', (2020) 9 EuZW, p. 364.

The Commission's proposal amending Regulation 654/2014 also does not take into account a conceivable situation in which the EU's counterparty would agree to subject the same dispute to a bilateral mechanism, where possible, instead of the WTO DSU, which would enable the imposition of countermeasures according to the relevant bilateral rules.

But things may be different for the USA. The argument that there is bad faith because of the blockage of the appointment of the AB Members might be true with respect to the USA, which displayed an uncooperative attitude leading to the paralysis of the AB. The USA still sees itself as entitled to appeal panel reports and the USA is still available for negotiations of mutually agreed solutions for its disputes, which is 'clearly to be preferred' under Article 3.7 of the DSU. For example, in *US—Carbon Steel (India) (Article 21.5—India)*, the USA notified the DSB of its decision to appeal the report, but did not file a notice of appeal or an appellant submission, and then the parties communicated that they will continue to engage in good faith discussions to seek a positive solution to this dispute.[78] Since the USA forces other parties to go back to the negotiating table by lodging appeals, its position could amount to taking advantage of the paralysis that it has generated. This could also be seen as a violation of good faith on the part of the USA, because it could be argued that it pursued the blockage with the malevolent purpose of replacing the judicial settlement of disputes with diplomatic negotiations. This contradicts the fundamental idea of the DSU. A negotiated solution under the pressure exercised by a big economic power in this situation is different than the peaceful agreement that is always permitted in the DSU in the shadow of a pending dispute settlement procedure. Therefore, the USA uses DSU rules in a manner in which they were not intended to be exercised, which could qualify as bad faith.[79] Proving bad faith is usually a difficult task. Yet, in this case, the US actions clearly fall under one of the examples of bad faith given by the Commentaries to the ICL articles.[80]

In sum, we must conclude that it is highly likely that the Commission's proposal for amending Regulation 654/2014 will not stand the test of WTO legality if invoked with respect to disputes with other WTO Members than the USA.

Beyond the mere legal issues, extending the scope of Regulation 654/2014 to allow retaliation in case of WTO Members appealing into the void and not-participating in the MPIA would have broader political implications. First of all, this approach to multilateral dispute settlement is likely to invite also others to use unilateral retaliation in such situations. The weaker states would be the most disadvantaged ones, as they would not be able to credibly threat more powerful players to ensure compliance and would have to give in to the pressure exercised by others. While big players like the EU could use the mere threat of retaliation to push the weaker states into participating to the MPIA or accepting panel reports instead of appealing into the void,[81] the same

78 Joint Communication from India and the United States, *US—Carbon Steel (India) (Article 21.5—India)*, WT/DS436/22, 16 January 2020.

79 Mitchell (n. 67), p. 350.

80 See above (n. 69).

81 Terence P. Stewart, 'European Union Moves to Authorize Retaliation Where There is No Alternative to the Appellate Body Pursued' https://currentthoughtsontrade.com/2019/12/19/european-union-moves-to-authorize-retaliation-in-disputes-where-there-is-no-alternative-to-the-appellate-body-pursued/.

might not be true in case of disputes between equally powerful states.[82] Thus, there is a risk that powerful states will retaliate and counter-retaliate, the conflicts escalating to trade wars.[83] Moreover, one of the main benefits of the DSU is that retaliation would be capped in compliance proceedings under Article 22 of the DSU,[84] avoiding the imposition of excessive measures. If other Members also engage in establishing unilaterally the extent of the suspension of concessions, the EU industry might also support significant costs. Furthermore, the EU risks to be accused of undermining the WTO dispute settlement mechanism with its unilateral measures, making its claim of being a convinced multilateralist contradictory to its actions. By adopting the Commission's proposals, the EU would come closer to such states that only commit to multilateralism if it is in their own interest. Last, the EU could be accused of hypocrisy as it also appeals panel reports into the void.[85]

Despite these potential negative implications, given the context, it is hard to accuse the EU Commission of bad faith for tabling the amendment proposal.[86] It could argue that it made a choice in favor of the lesser evil, since it plans to use unilateral measures for the sole purpose of upholding the binding multilateral dispute settlement mechanism that results in final panel reports or appeal arbitration awards.[87]

In contrast to the situation under WTO law, the legal assessment of the Commission's proposal with regard to regional or bilateral dispute settlement mechanisms in EU FTAs is more beneficial for the EU. The EU's invocation of Article 52(4) of the ILC articles when a party blocks the panel formation under bilateral trade agreements appears in conformity with international law if these agreements do not express the exclusivity of dispute settlement as does the DSU, at least by far not to the same extent. The FTA with Viet Nam and the CETA, e.g., contain a rather weak clause according to which the dispute settlement provisions of these agreements apply to any dispute concerning their interpretation or application, without stating the exclusivity of these rules.[88] There is no such clause as Article 23 of the DSU. To the contrary, both agreements provide a choice of forum clause according to which recourse to the dispute settlement mechanism is without prejudice to recourse to dispute settlement under the WTO or any other instruments.[89] Since there is no exclusivity, the additional application of general rules of international law such as the ILC articles seems justifiable.[90] Consequently, as mentioned, under the ILC Articles, the EU has the right to choose between taking countermeasures or initiating FTA dispute

82 Joost Pauwelyn, 'WTO Dispute Settlement Post 2019: What to Expect?', (2019) 22 JIEL p. 308.
83 ibid.
84 ibid, p. 307.
85 See above (n. 76).
86 Weihuan Zhou, 'WTO Dispute Settlement Mechanism Without the Appellate Body: Some Observations on the US-China Trade Deal', (2020) 20(4) UNSW Law Research Paper, p. 5.
87 Nicolas Lamp, 'Making WTO Dispute Settlement Work without the Appellate Body: How the Threat of Unilateral Retaliation Could Be Used to Incentivize the Adoption of Panel Reports', (2019) IELP Blog https://ielp.worldtradelaw.net/2019/12/making-wto-dispute-settlement-work-without-the-appellate-body-how-the-threat-of-unilateral-retaliati.html.
88 CETA, Article 29.2; EU–Vietnam, FTA Article 15.2.
89 CETA, Article 29.3; EU–Vietnam, FTA Article 15.24.
90 With one exception: for the specific provisions on dispute settlement in TSD chapters, see below IV.

settlement procedures. Compared to this, the Commission's proposal is more restrictive as it implicitly requires the previous initiation of dispute settlement procedures before allowing countermeasures.[91] And the obligation to stop such countermeasures when the conditions of Article 52(3) ILC Articles are met does not apply if the other party acts in bad faith (Article 52(4)). The question of whether the party acts in bad faith when frustrating the bilateral procedures is easier to answer in the affirmative as the parties to a bilateral treaty are much more clearly bound by their duty of loyalty. As a frustration of a bilateral procedure would emanate directly from them, the allegation of breach of good faith is much easier to substantiate. The failure to cooperate in the establishment of the relevant tribunal is an explicit example of bad faith mentioned in the ILC articles.[92]

B. INTA amendment on countermeasures in case of a 'clear violation' of international trade obligations

As mentioned above, the INTA report proposed to amend the scope of Regulation 654/2014, so that retaliation becomes available in the event of a clear violation of international trade obligations, provided that the Union has appropriately challenged these measures at the WTO or in front of the relevant bilateral dispute settlement body.[93] Thus, it is suggested to allow immediate unilateral response to illegal measures of a third party, without waiting for a panel report or an appeal arbitration under the MPIA. While the EU Commission's proposal to react to uncooperative behavior was, at least, based on the argument that it would be legal under international law, the INTA's proposal, which is likely to be embodied in the EU Commission's proposal for a new anti-coercion legislation, does not even try to argue that it would be in conformity with the EU's international obligations, even though compliance with international law is demanded by Article 3(5) TEU.

The INTA's proposal without any doubt is illegal under WTO rules, specifically Article 23 of the DSU, which is *lex specialis* to general rules on countermeasures, as explained above. In *US—Section 301*, the panel clearly established that a legislation giving discretion to and reserving the right of a national authority to make a determination of inconsistency when the DSU proceedings have not been exhausted would be a violation of Article 23 of the DSU, unless there would be other acts or statements that would provide guarantees that the relevant authority would be precluded from breaching Article 23[94] which is not the case of the amendment proposed by INTA.

Also from a trade policy perspective, the INTA proposal to allow countermeasures without even waiting for a panel report is likely to have severe negative effects. In the

91 See Proposal for Amending Regulation (n. 13), p. 11, lit. (bb).
92 See above (n. 69).
93 INTA Report (n. 42), p. 8 ff.
94 Panel Report, *US—Section 301*, WT/DS152/R, 22 December 1999, paras. 7.32–7.131. The USA acted according to its guarantees until the Trump Administration started using Section 301 to impose unilateral countermeasures. (see Congressional Research Service, 'Section 301 of the Trade Act of 1974', 20 April 2020, https://crsreports.congress.gov/product/pdf/IF/IF11346).

current AB crisis, WTO Members should continue to have recourse to WTO mechanism when disputes materialize and to advance the process at least as far as possible before imposing countermeasures.[95] The proposal invites other Members to also resort to unilateral measures in various cases, by simply claiming that other WTO Members, including the EU, clearly violated the WTO rules.[96] Therefore, international trade might be ruled by the law of might, with smaller and less powerful states having no power to resist the interpretations advanced by others.[97] When asked about the possible abusive manner of using the proposed amendment, Marie-Pierre Vedrenne, INTA's rapporteur on the file, said that the EU Commission 'is perfectly capable of using the instrument "intelligently"'.[98] Nevertheless, the Commission would be granted too much discretion and even if the EU Commission would use this instrument only to react to manifest illegalities, it cannot be sure that others would not follow the same approach. Not only small economies would be affected, but also private economic operators that rely on a stable and predictable trade environment. If the EU goes down this path also in a new anti-coercion legislation, its declared support for multilateralism will not be credible. When responding to illegal unilateralism by adopting illegal unilateral measures, the EU could be accused of hypocrisy, as China was accused by the USA in a similar situation.[99] The departure from multilateral rules by multiple states without waiting to see, at least, if a panel report is adopted would seriously erode the authority of the WTO dispute settlement mechanism, making it more difficult to recover. Therefore, proposals similar to that of INTA to allow the Commission to retaliate in case of clear violations established by itself must be rejected insofar as they apply to WTO disputes. The only positive outcome of escalating conflicts between WTO Members, to which a proposal similar to INTA's could lead, would be a renewed attractiveness of a functioning and respected binding WTO dispute settlement, as happened in the GATT days.[100]

The assessment of the INTA proposal to allow immediate countermeasures with regard to FTA dispute settlement mechanisms, however, proves more beneficial for the EU. The adoption of countermeasures even before the issuance of an FTA panel report appears justified under the FTA rules and general rules on state responsibility. As the EU FTAs do not contain a provision similar to Article 23 of the DSU that would lead to the inapplicability of general rules on countermeasures,[101] the EU has not committed to only initiate FTA proceedings with respect to FTA disputes. While

95 Tsuyoshi Kawase et. al. 'Reforming the WTO AB: Short-term and Mid-term Options for DSU Reform, and Alternative Approaches in a Worst Case Scenario', (2019) Trade, Investment And Globalization https://www.g20-insights.org/wp-content/uploads/2019/05/t20-japan-tf8-3-reforming-the-wto-ab.pdf.

96 Rachel Brewster, 'Can International Trade Law Recover? WTO Dispute Settlement: Can We Go Back Again?', (2019) 113 AJIL Unbound, p. 65.

97 ibid, p. 66.

98 Iana Dreyer, 'Marie-Pierre Vedrenne: Defending your Trade Interests Is Not Protectionism', Borderlex, 08 July 2020, https://borderlex.eu/2020/07/08/vedrenne-defending-your-trade-interests-is-not-protectionis/.

99 First Written Submission of the United States of America, *United States—Tariff Measures on Certain Goods from China*, DS543, 27 August 2019, paras. 4–6.

100 Pauwelyn (n. 82), p. 317.

101 See above (n. 88).

Article 50(2) of the ILC Articles does not relieve a state from fulfilling its dispute settlement obligations, nowhere in the Articles can one find an obligation to initiate or even conclude dispute settlement proceedings *before* imposing countermeasures. As mentioned, the ILC Articles imply a choice between countermeasures or dispute settlement procedures. The choice is limited by Article 52(3) of the ILC Articles, under which countermeasures shall not be taken or if taken shall be suspended if the international wrongful act has ceased *and* the dispute is pending. Thus, Article 52(3) of the ILC Articles establishes two cumulative conditions.[102] Even though INTA's proposal requires the EU to challenge appropriately the alleged illegal measures in front of the relevant dispute settlement body before adopting countermeasures, the EU still has the choice to adopt countermeasures as long as the other condition of Article 52(3) (cessation of the wrongful act) has not been met, even once the FTA panel has been actually constituted.[103] Thus, immediate countermeasures under FTA rules would be legal under international law, until the other party ceases its wrongful act.

IV. USING REGULATION 654/2014 FOR ENFORCING FTA TSD CHAPTERS?

In light of the discussions to use Regulation 654/2014 for the enforcement of the FTA TSD chapters, this section will assess the opportunity of such possibility. Under the Trade Enforcement Regulation, the imposition of countermeasures is possible for a breach of an FTA violation following the adjudication of the dispute under the relevant dispute settlement rules and when the Union has the right to retaliate under those agreements.[104] The new-generation EU FTAs exclude the TSD chapters from the coverage of the general dispute settlement rules under which retaliation is possible. Instead, they provide with special mechanisms for solving disputes, which do not foresee the possibility to suspend concessions or obligations in case a breach is found by the panels of experts dealing with sustainability disputes.[105] Once these panels issue their reports, according to EU–Korea FTA, for example (under which a labor dispute is currently dealt with), the parties shall make their best efforts to accommodate the advice or recommendations contained in the report.[106] Similarly, under CETA and EU–Japan EPA, once the panels of experts issue their reports, the parties shall engage in discussions and shall endeavor to identify appropriate measures or to solve the matter, taking into account the panels' reports.[107] Since the FTAs themselves do not provide, but even exclude the possibility to take countermeasures under the FTA dispute settlement rules in case of violation of a TSD norm, countermeasures can neither be based on general

102 See the ILC Articles' Commentaries on Article 52, para. 7: 'Once the *conditions* in paragraph 3 are met, the injured State may not take countermeasures' (emphasis added).

103 According to the ILC Articles' Commentaries on Article 52, para. 8, 'a dispute is not pending before an *ad hoc* tribunal established pursuant to a treaty until the tribunal is actually constituted'.

104 Trade enforcement Regulation 654/2014, Article 3(b).

105 Lorand Bartels, 'Human Rights and Sustainable Development Obligations in EU Free Trade Agreements', (2013) 40(4) LIEI, p. 310; Bronckers, Gruni (n 46), p. 1610; Gracia Marín Durán, 'Sustainable Development Chapters in EU Free Trade Agreements: Emerging Compliance Issues', (2020) 57 CML Rev, p. 1041 ff: 'self-contained system of dispute settlement'.

106 EU–Korea FTA, Article 13.15(2).

107 CETA, Article 23.10(12), 24.15(11); EU–Japan EPA, Article 16.18(6).

international rules. The TSD chapters insofar must be seen as *leges speciales* in the sense of Article 55 of the ILC Articles. Consequently, unless the FTAs are redesigned, there is no room for countermeasures, neither under international law nor merely under Regulation 654/2014 which in the current version requires FTA rules to give the EU a right to retaliate. Amending only the scope of Regulation 654/2014 to allow the imposition of such measures under a different legal basis would breach the pertinent provisions of the FTAs. Whereas the political question on desirability of the use of countermeasures for the enforcement of the FTA TSD chapters is outside the scope of this article,[108] from a legal point of view one has to recall that countermeasures, even if they were allowed by an (amended) Regulation 654/2014, should be adopted only if in compliance with EU's international commitments (see Article 3(5) TEU, Article 207(1) s. 2 Treaty on the Functioning of the European Union in conjunction with Article 21(2) TEU).

The CJEU found in Opinion 2/15 that a breach of the sustainability obligations under EU trade agreements entitled the EU to terminate or suspend the agreements under Article 60(1) of the Vienna Convention on the Law of Treaties (VCLT).[109] Yet, the court's statement is not to be taken for granted. The EU FTAs regularly prohibit recourse to other procedures than the special dispute settlement procedures contained in the TSD chapters.[110] Therefore, according to the principle of *lex specialis,* the FTAs contain special rules derogating from and having primacy over the general rules contained in the VCLT or the ILC Articles on state responsibility.[111] AG Sharpston also argued in her opinion that the EU cannot unilaterally impose countermeasures under the EU–Singapore FTA rules.[112] Moreover, despite the CJEU Opinion 2/15, the Commission has stated on numerous occasions that currently the option of imposing sanctions for the enforcement of the FTA TSD chapters is not available.[113] Therefore, it is doubtful whether recourse to general public international law rules could be made in order to impose countermeasures in case of a breach of a TSD norm.[114] Even if recourse to Article 60 of the VCLT was available, it would be allowed only in case of the existence of a 'material breach', which according to its paragraph 3(b) requires the violation of an essential provision of the treaty. Although the CJEU advanced that in case of the EU–Singapore FTA the chapter on sustainability plays an 'essential role', it did not justify this.[115] The FTA agreements, themselves, fail to expressly state that sustainability

108 For more on this subject see Bronckers, Gruni (n. 46), p. 1616; Marín Durán (n. 105), p. 1058 ff.
109 CJEU, Opinion 2/15, 16 May 2017, para. 161.
110 EU–Korea FTA, Article 13.16; CETA, Article 23.11(1), 24.16(1); EU–Singapore FTA, Art, 12.16(1); EU–Vietnam FTA, Article 13.16(1).
111 Marín Durán (n. 105), p. 1047.
112 AG Opinion in Opinion 2/15, 21 December 2016, paras. 490–91.
113 Bronckers, Gruni (n. 46), p. 1615 ff.; Jin Woo Kim, 'Shedding Light on the Role of the EU's Chief Trade Enforcement Officer: Dispute Over Labor Commitments Under EU–Korea FTA and EU Enforcement Regulation', 2 March 2020, https://europeanlawblog.eu/2020/03/02/shedding-light-on-the-role-of-the-eus-chief-trade-enforcement-officer-dispute-over-labor-commitments-under-eu-korea-fta-and-eu-enforcement-regulation/.
114 One might, however, consider that if a party frustrates the special dispute settlement mechanisms under the TSD Chapters, such exercise of bad faith could be sufficient for allowing unilateral adoption of EU countermeasures. See the arguments made above III. A, *mutatis mutandis*.
115 CJEU, Opinion 2/15, para. 162.

commitments are essential provisions. One might, however, consider to expand the obligation to protect human rights to cover also the TSD chapters, at least part of their labor rights-related provisions. Such argument, however, is difficult to hold, as will be shown now.

Article 1.1 of the EU–Korea Framework Agreement and Article 1.1 of the EU–Singapore Partnership and Cooperation Agreement establish that respect for human rights constitutes an essential element of the agreements and allow countermeasures or even the termination of the agreement in case of breaches of these rights.[116] The EU–Canada Strategic Partnership Agreement, on the other hand, expressly allows the termination of CETA for serious and substantial violations of human rights obligations, which requires situations of an exceptional sort such as a coup d'état or grave crimes that threaten the peace, security, and well-being of the international community.[117] Thus, the EU made a shift in its treaty practice insofar as it excluded the possibility to suspend an FTA because of violations of human rights per se.[118] But even where the usual human rights conditionality applies, which allows the suspension of concessions in response to human rights breaches, the issue arises which and if labor commitments contained in the TSD chapters could be deemed to reflect human rights.[119] As the minimum-level, mandatory labor commitments usually refer to International Labour Organization Conventions on core labor standards which protect, inter alia, freedom of association or the right to collective bargaining,[120] these are the only provisions which might be feasible to be subsumed under the notion of human rights.[121] AG Sharpston, however, clearly distinguished the TSD obligations from the essential elements conditionality of FTAs.[122] Also the EU Commission is very reluctant since in the labor dispute under the EU–Korea FTA, for example, it made no reference to the human rights clause from the Framework Agreement, neither has the EU Commission used labor rights violations as a case for invoking conditionality rules and suspending trade concessions.[123] In sum, only very few of the TSD provisions might be suitable to be lawfully invoked under the FTA conditionality clauses. Consequently, Regulation 654/2014 should not be amended to allow the imposition of countermeasures in case of labor violations contended as human rights breaches, considering that the success

116 EU–Korea FTA, Article 15.14(2) in conjunction with EU–Korea Framework Agreement, Article 45(3), (4) applying to situations of 'special urgency', which according to the Joint Interpretative Declaration Concerning Articles 45 and 46 could consist of a particularly serious and substantial violation of an essential element of the Agreement. EU–Singapore FTA, Article 16.18 in conjunction with EU–Singapore Partnership and Cooperation Agreement, Articles 44(2), (3), (4) (b).

117 Lorand Bartels, 'Human Rights, Labour Standards and Environmental Standards in CETA', (2017) University of Cambridge Faculty of Law Legal Studies, Paper No. 13/2017, p. 11.

118 Bronckers, Gruni (n. 46), p. 1614.

119 Jin Woo Kim, Ann-Evelyn Luyten, 'Op-Ed: Could the EU's Chief Trade Enforcement Officer Enforce Sustainable Development Commitments under EU Trade Agreements Against Non-Compliant Third Countries', 13 May 2020, https://eulawlive.com/op-ed-could-the-eus-chief-trade-enforcement-officer-enforce-sustainable-development-commitments-under-eu-trade-agreements-against-non-compliant-third-countries-by-ann-evel/.

120 Marin Durán (n. 105), p. 1036 f.

121 Bronckers, Gruni (n. 46), p. 1613; Bartels (n. 105), p. 312.

122 AG Opinion in Opinion 2/15, paras. 490–91.

123 Bronckers, Gruni (n. 46), p. 1614.

of this line of reasoning is highly remote. Such amendment would either have a very narrow scope of application, or promise too much, as adoption of countermeasures will in most cases be in violation of EU's international trade commitments under TSD chapters as they currently stand.

V. CONCLUSION

The EU trade policy sees a shift in focus towards more effective enforcement. This shift occurs in response to recent developments on the international trade arena, which pushed the EU to reevaluate its priorities. Thus, the EU is considering amendments to its Trade Enforcement Regulation 654/2014 in order to ensure effective enforcement against the new developments. This new focus has to be balanced with its declared support for multilateralism, the international rules-based trade system, and the respect for international law as stipulated by Article 3(5) TEU.

The Commission's proposal for amending Regulation 654/2014 by extending its scope to cover the situation in which third parties do not act in good faith might not pass the WTO legality test. While the USA could be, indeed, found to act in bad faith, an allegation of bad faith of other WTO Members than the USA with regard to the WTO dispute settlement mechanism (as opposed to bilateral or regional dispute settlement mechanisms) might be difficult and even impossible to be successfully advanced if contested before the WTO judiciary. The Commission's proposal also has other serious negative implications than the WTO illegality, yet it could be contended that the EU chose the lesser evil in the current exceptional context of recent developments. The EU Commission could defend the EU's self-declared status of a convinced multilateralist by arguing that the proposal is, in fact, upholding the multilateral dispute settlement system. In contrast, the INTA's proposal to extend further the scope of Regulation 654/2014 to allow immediate retaliation in cases of clear breaches of trade rules, without even waiting for a panel report, is a clear violation of WTO rules, with potential severe negative effects that would also seriously affect the credibility of the EU as a multilateralist and the chances of the WTO to recover. Therefore, INTA's proposal with respect to immediate unilateral actions within the WTO context or other legislation comprising it must be rejected. In contrast, the proposal appears legal under general international rules within the FTA context. Finally, using an amended version of Regulation 654/2014 for the enforcement of TSD chapters is not possible under current FTA rules. Also, the use of the human rights conditionality rules for enforcing TSD chapters by suspending trade concessions is very unlikely to be successfully based on public international law rules and is, consequently, undesirable. To conclude, while the EU's shift towards more effective enforcement is appreciated, it should be pursued with more care for respecting the existing international legal commitments of the EU and with more caution to its multilateralist stance.