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RĪGA STRADIŅŠ UNIVERSITY

Giga Abuseridze

The Role of the WTO in the Development of International Trade: History, Problems and Perspectives of International Trade Law

Doctoral Thesis for obtaining a doctoral degree (*Ph.D.*)

Sector – Legal Science
Sub-Sector – International Law

Riga, 2021

Giga Abuseridze

ORCID 0000-0003-2868-8719

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Supervisor of the Doctoral Thesis:

Dr. iur., Associate Professor **Jānis Grasis**,

Rīga Stradiņš University, Latvia

Rīga, 2021

Annotation

The subject of this doctoral thesis is the Role of the World Trade Organization (WTO) in the Development of International Trade: History, Problems and Perspectives of International Trade law. The purpose of the present thesis is to explore the role of the WTO in the development of international trade, to research the possibilities of resolving trade disputes within the framework of the WTO law, to identify strengths and weaknesses of Dispute Settlement Understanding (DSU), to determine the status of a developing country and elaborate recommendations for the improvement of WTO legislation in compliance with fair trade.

The present doctoral thesis consists of four chapters:

The first chapter reviews international trade and main aspects of WTO legislation, analyses rules for international trade, defines strategy for WTO trade policy and the principles of legal pluralism and inter-legality, establishes correlation of norms of international law examines trade tensions and elaborates proposals for their solution.

The second chapter, attempting to determine developing country status in the WTO, explores the categorization of a developing country by the World Bank, United Nations and International Monetary Fund (IMF). Experience of developing countries with enforcement of DSU rulings is analysed. Furthermore, application of more consultations and mediation at DSU is suggested as it would turn Dispute Settlement Body (DSB) into a more practical tool. This chapter also focuses on political stability and trade agreements as well as national security and cybersecurity which ensure the simplicity, stability and neutrality of trade agreements.

The third chapter examines the peculiarities of legal status and overviews WTO disputes involving subsidies in the renewable energy sector that follows the WTO agenda.

The fourth chapter reviews the trade policies and practices of Georgia as well as Georgia-WTO relationship in the historical context. The author retrospects trade relations between Georgia and Russia which, as the author qualifies, eventually developed into the “trade war” with a very clear political connotation and precedential character. This is the only and first attempt ever to analyse this case and to give it the qualification of “the trade war”.

The present thesis consists of 196 pages and includes introduction, four chapters, conclusions, suggestions and interviews.

Keywords: World Trade Organization, General Agreements on Tariffs and Trade, General Agreements on Trade in Services, European Union, The Agreement on Trade-Related Aspects of Intellectual Property Rights.

Anotācija

Šī promocijas darba tēma ir Pasaules Tirdzniecības organizācijas (PTO) loma starptautiskās tirdzniecības attīstībā: starptautiskās tirdzniecības tiesību vēsture, problēmas un perspektīvas.

Darba mērķis ir izpētīt PTO lomu starptautiskās tirdzniecības attīstībā, apskatīt tirdzniecības strīdu risināšanas iespējas PTO likumu ietvaros, identificēt strīdu izskatīšanas izpratnes (DSU) stiprās un vājās puses, noteikt jaunattīstības valstu statusu, kā arī izstrādāt rekomendācijas PTO likumdošanas uzlabošanai, ievērojot godīgas tirdzniecības principus.

Promocijas darbs sastāv no četrām nodaļām:

Pirmajā nodaļā aplūkota starptautiskā tirdzniecība un PTO likumdošanas galvenie aspekti, analizēti starptautiskās tirdzniecības noteikumi, definēta PTO tirdzniecības politikas stratēģija un tiesiskā plurālisma un savstarpējās likumības principi, izveidota starptautisko tiesību normu korelācija PTO likumdošanas ietvaros. Šajā nodaļā arī apskatīti tirdzniecības spriedzes piemēri, identificētas problēmas un izaicinājumi un izstrādāti priekšlikumi to risināšanai.

Otrajā nodaļā, mēģinot noteikt jaunattīstības valstu statusu PTO, tiek pētīta "jaunattīstības valstu" kategorija Pasaules Bankas, Apvienoto Nāciju Organizācijas un Starptautiskā Valūtas fonda (SVF) ietvaros. Tajā arī analizēta jaunattīstības valstu pieredze saistībā ar Vienošanās par strīdu noregulēšanu (DSU) lēmumu izpildi un ieteikts vairāk konsultēties un izmantot DSU mediāciju, lai piešķirtu Strīdu izšķiršanas struktūrai (DSB) praktiskāku nozīmi.

Trešajā nodaļā aplūkotas juridiskā statusa īpatnības un apskatīti PTO strīdi par subsīdijām atjaunojamās enerģijas nozarē, kas atbilst PTO darba kārtībai.

Ceturtajā nodaļā ir apskatīta Gruzijas tirdzniecības politika un prakse, kā arī Gruzijas un PTO attiecības, tostarp vēsturiskais konteksts, pamatojoties uz PTO sekretariāta ziņojumu un Gruzijas valdības ziņojumu. Autors koncentrējas uz Gruzijas un Krievijas tirdzniecības attiecību vēsturi, kas, pēc autora domām, laika gaitā pārtapa par "tirdzniecības karu" ar ļoti skaidru politisko pieskaņu un precedenciālu raksturu. Šis gadījums nekad nav plaši analizēts zinātniskās aprindās un ir pirmais mēģinājums.

Promocijas darbs sastāv no 196 lappusēm. Tajā ir ievads, četras nodaļas, secinājumi, ieteikumi, kā arī intervijas.

Atslēgvārdi: Pasaules Tirdzniecības organizācija, Vispārējā vienošanās par tarifiem un tirdzniecību, Vispārējais līgums par pakalpojumu tirdzniecību, Eiropas Savienība, Līgums par intelektuālā īpašuma tiesību aspektiem saistībā ar tirdzniecību.

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List of Abbreviations

AA	Association Agreement
ASCM	Agreement on Subsidies and Countervailing Measures
BSEC	Black Sea Economic Cooperation Organization
CLS	Core Labour Standards
CIS	Commonwealth of Independent States
CIDA	Canadian International Development Agency
DDA	Doha Development Agenda
DSB	Dispute Settlement Body
DSM	Dispute Settlement Mechanism
DSU	Dispute Settlement Understanding
DCFTA	Deep and Comprehensive Free Trade Area
EU	European Union
EDA	Entrepreneurship Development Agency
ECJ	European Court of Justice
EFTA	European Free Trade Association
EBRD	European Bank for Reconstruction and Development
FDI	Foreign Direct Investment
FIT	Feed-in Tariffs
FIZs	Free Industrial Zones
GSP	Generalized Scheme of Preference
GPA	Government Procurement Agreement
GDP	Growth Domestic Payment
GATT	General Agreements on Tariffs and Trade
GATS	General Agreements on Trade in Services
GUAM	Organization for Democracy and Economic Development
IP	Intellectual Property
ITO	International Trade Organization
IMF	International Monetary Found
ICC	International Chamber of Commerce
ILO	International Labour Organization
ILC	International Law Commission
ICJ	International Court of Justice
ILC	International Law Commission

ITTC	Institute for Training and Technical Cooperation
ICSID	International Centre for the Settlement of Investment Disputes
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
LCR	Local Content Requirement
LDC	Least Developed Countries
MNF	Most Favoured Nation
MEAs	Doha mandate on Multilateral Environmental Agreements
MERCOSUR	Mercado Común del Sur (Southern Common Market)
NT	National Treatment
NGO	Nongovernmental Organizations
NCTF	National Committee on the Trade Facilitation
NAFTA	North American Free Trade Agreements
OECD	Organization for Economic Co-operation and Development
PCIJ	Permanent Court of International Justice
RAM	Recently Acceded Member
SMEs	Medium-sized Enterprises
TFA	Trade Facilitation Agreement
TIFA	Trade and Investment Framework Agreement
TCSA	Technical and Construction Supervision Agency
TPRB	Trade Policy Review Body
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TRIMs	Agreement on Trade-Related Investment Measures
UN	United Nations
USTR	United States Trade representative
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization
WHO	The World Health Organization

General Description of the Doctoral Thesis

Topicality of the theme

In today's highly interlinked and globalised world, it is essential for each country to ensure trade, economic and political stability so that both, local communities and communities living in the neighbouring countries could feel safe. In the WTO, the political behaviour of well-organized societies impacts the whole region, which is why it is necessary for authoritative bodies, like the General Council, to impose certain rules and obligations in social, economic, political, legal and security spheres of each WTO or European country. Although political behaviour in European countries is primarily formed in response to the socio-economic and political issues particular to each given country, positive political behaviour in the whole European Union can be achieved only if the collective efforts of all national governments are applied. The recent financial and economic crisis affecting all WTO member states has proved that the issue of political stabilization as the key condition of WTO integration is very topical, with most WTO Member States showing readiness to compromise and implement more effective economic adjustment measures in their countries to provide for overall political stability in the region.

The paper examines, analyses and applies the scientific articles/papers of various scientists/experts and the methodological approaches of effective trade policy proposed by them as well as identifies the factors hindering/stimulating trade.

It is argued that international and free trade contributes to the democratization process and political stability. When we talk about democracy, we mean countries where the rate of democracy/political stability is high according to the principles established by international norms, i.e. where human rights, free trade, freedom of choice, fair elections etc. are observed. Almost all countries where these norms are applied have trade partnerships with each other rather than conflicts. For international trade to occur it is essential to have a competitive market system in a country since competition is the characteristic feature of international trade that can be safeguarded through observation of democratic principles and political stability. The development of free trade by the WTO depends precisely on the implementation of these fundamental principles. In view of the abovementioned factors the present paper quite legitimately analyses interconnection between trade and political stability.

On the other hand, trade stability is ensured not only by adequate policies and by reforms in the political or social sphere; equally important is the economic sphere with such factors as unemployment, fiscal policy, growth in incomes and inflation. The effective economic

development, trade and political stability as the main aims of the WTO can be achieved only if the WTO politicians thoroughly consider the factors hindering the development of each WTO member state in terms of legislation, security policy, welfare, economic situation.

Interrelation between trade and human rights is very important and topical since it implies human interaction, respect and understanding. Trade is controversial; around the world many people believe that trade agreements, even trade per se, undermine particular human rights such as labour rights or access to affordable medicine (the right to health). But trade and trade agreements can also advance human rights, directly or indirectly.[1] In fact, some countries use trade policies to advance specific human rights such as labour rights or property rights. But in almost every country policy-makers struggle to achieve both goals. Trade and human rights are out of balance. Although scholars, policymakers, and activists have long debated the relationship between them, in truth we know very little about it. The goal of my doctoral thesis is to provide society with greater insights into the relationship between human rights and trade.

The novelty of the research thesis

Scientific novelty of the research thesis is based on several findings:

1. The research argues that WTO does not act in "clinical isolation" from international law and shares universally recognized legal rules. The study exposes that WTO self-contained regime may violate human rights (directly or indirectly) and become a barrier to labour standards. In order to make the WTO legislation more flexible in terms of respect and protection of human rights the author proposes an **"Appendix Agreement to the GATT Concerning Annual Reports on Human Rights and Free Trade between the WTO and its Members"**. The research contributes to creating more awareness and specific knowledge about the issues, rules, norms, enforcement and problems of the WTO.
2. The study exposes the importance of the World Trade Organization in determining the place of developing countries in the world trade system and their status. Through systematic and fundamental analysis of trade disputes and WTO, the important factors contributing to trade stability, simplicity and neutrality have been identified. The study determines the meaning of "developing country" under the GATT as well as under the WTO through exploring the categorization of a 'developing country'

[1] Howse, R. and Teitel, R. 2007. Beyond the Divide: The Covenant on Economic, Social and Cultural Rights and The Worlds Trade Organization., Friedrich Ebert Stiftung, occasional Paper No. 30.

by the World Bank, United Nations and International Monetary Fund (IMF) and identifying clear principles for ranking countries as developing. The author suggests application of more consultations and mediation at DSU for developing countries as it would have rather positive practical significance at DSB. The study also provides insight into the interrelationship between political stability, economic conditions and social cohesion. The author analyses two important models of political stability and factors that contribute to trade stability, simplicity and neutrality.

3. Having evaluated the WTO panels and the Appellate Body, several presented disputes prove to conclude that in the event of a conflict, the specific law prevails over the general law.
4. The study reveals the importance of the World Trade Organization, main trade agreements and arrangements with Georgia as a developing country. Conclusions/recommendations on trade liberalization and stimulation are elaborated. The case of Russian-Georgian trade tension is analysed and given a "trade war" qualification. The present thesis is the first attempt in the field of trade law to discuss several aspects of the WTO trade relationship with Georgia, Russian-Georgian “trade war”, main trade agreements and arrangements, relationship between human rights and trade, the economic and political factors. The Russian-Georgian trade war has been selected due to its exclusiveness as a special case with political connotation and precedential character, that has not been widely explored in scientific circles.

Aim and Objectives of the Doctoral Thesis

The **aim** of the **Doctoral Thesis** is to explore the role of the WTO in the development of international trade, to research the possibilities of resolving trade disputes within the framework of the WTO law, to identify strengths and weaknesses of DSU, to determine the status of a developing country and elaborate recommendations for the improvement of WTO legislation in compliance with fair trade.

The **object** of the research is legal relationship between WTO and member states.

The **subject** of the research is the regulations/acts and practice of WTO arbitration (DSB).

Significance of the study

The findings of this research will add to the knowledge and understanding of the participation of developing countries and experience of different member countries in WTO dispute settlement proceedings and the ability of the WTO system to deal with them. The significance of this research is related to the importance of the subject matter covered and the context in which it is applied. This study will:

1. Allow the identification of the concept and framework of the WTO which provide facilitation of development of its WTO provisions and trade balance;
2. Provide useful knowledge on factors that might impact trade stability, simplicity and neutrality and contribute to the successful participation of developing countries in WTO dispute settlement proceedings;
3. Demonstrate that effective trade stabilization in the WTO can be achieved by the implementation of specific WTO's regulations on trade, economic, legal, labour, political and security spheres in all WTO Member States.
4. Support both the WTO and the developing countries to create a good system to settle disputes;
5. Identify, clarify, and discuss the problems faced by member countries that affect their participation in the WTO; and
6. Find solutions, by legal provisions or otherwise, for the problems that countries face in the WTO.

The research problem has been identified as follows: the level of trade stability (simplicity and neutrality) in the WTO member states differs largely, and the WTO's main task is to provide for more effective trade-political stabilization in all its members, including developing countries. This is achieved by the requirement to all WTO member states to comply with specific Union's regulations concerning different spheres of life.

Research questions

Having selected specific research objectives from the sizeable body of the WTO issues, this study pursues to answer the following ***questions****:*

1. Which conflicts of norms may arise between the WTO system and what should the WTO do?
2. How is the WTO currently performing? What are the main challenges of the WTO today and where can the WTO go in the future?

3. Which countries can be ranked as developing countries under the WTO in view of the theory proposed by the author?
4. The rule of law and political stability are fundamental factors in ensuring free trade. Therefore, it is important to define these factors. What role does political stability play for simplicity, stability and neutrality of trade and how secure is the WTO?
5. How to maintain the current benefits of the WTO and make sure that we realise any benefits to be negotiated in the future and can free trade deliver development gains?
6. What are the benefits of Georgia's WTO membership for the EU and Georgian businesses?

The methodological basis of the study

The methodology of the research is based on the existing literature, court practice, books, scientific journals and WTO official legal documentation and publications. Following knowledge is applied to real life cases to reveal how the rules are actually affecting the members of the WTO. The methodological basis of the study consists of general scientific methods:

1. **The analytical method** has been used to determine the regularities in legal problems; it serves as the basis for conclusions, evaluations and proposals.
2. **Comparative method** was used to study different and contradictory scientific views, countries' practices and enforcement of DSU rulings.
3. **Qualitative and quantitative methods** were applied in the form of interviews with experienced diplomats and trade law experts. Interviewing allowed the author of the paper to collect additional qualitative information about the role of the WTO in the process of trade stabilization. In particular, the interviews were conducted to find out how the trade and political experts view trade stability and instability in the WTO and what factors they found most important for the provision of trade stability in the WTO. The interviews were held in October 2020 with the following persons: Director of International Economic Relations, Ministry of Foreign Affairs of Georgia, Ambassador, Mr. Teimuraz Janjalia; Senior Fellow of Global Trade Experts, Mr. Emilio Molliner.
4. **Historical method** has been used to explore literature on GATT's development in the past and other important sources of law in the WTO.
5. **Induction and deduction** methods were used at all stages of scientific research. **Induction method** helped to produce general opinion about the role of the WTO in international trade on the basis of researched relevant literature, observations

and interaction with international researchers. Through **deduction method**, individual conclusions were made from generalisations and theoretical findings.

Methods of interpreting legal norms: for the interpretation of the Vienna Convention and WTO legislation in relation to the research question, the following legal interpretation methods were used: grammatical, historical, teleological and systemic. Grammatical method of interpretation has been used to clarify the verbal content of the legal provisions. The textualist, consensus-forming and formalistic approach was applied to interpret the meaning of Article 31(3) of the Vienna Convention. In turn, within the framework of the systemic method, the interconnections and interdependencies of legal norms in legal acts related to the trade area are understood. Historical method was used to explore sources of law in the WTO and their legal application. The meaning of the legal provisions was clarified by the teleological method of interpretation (meaning and purpose). In the light of the objectives of this paper, proposals are made to solve the problems identified.

The thesis structure is defined by the object and subject, with the targets and missions, consisting of four chapters, conclusions, appendices and bibliography for the sources as well as the interviews.

The legal basis for the study is international conventions, WTO agreements, Judgment of Court of Justice of the European Union, WTO Dispute Settlement cases, Georgian and foreign laws.

Theoretical framework of the study

Theoretical framework of the study is basically three-pronged. First, it explores the categorization of a 'developing country', trying to identify clear principles for ranking countries as developing. Second, it analyses legal Status and Overview of WTO disputes considering specific cases. Third, it examines how various factors affect international trade. In this context, author argues that rule of law, social and economic development provide for political stability, crucial for ensuring democracy and healthy economic processes in the WTO countries. On the other hand, dramatic political changes, like a *coup d'etat*, cause shock, slow down/reverse of economic growth and deteriorate welfare of the population. Political stability is achieved through the unique political arrangement of the WTO, the complex mechanism of power redistribution (*checks and balances*), the diversity of member states, and the constant struggle between supra-nationalism and intergovernmentalism in decision-making.

In the 21st century no one debates that international trade is a multidisciplinary field. Fundamental and systemic analyses clearly demonstrate that international trade regulates trade rules, but inherently bears both economic and political content. Any trade war, for example US-China trade war or Russian-Georgian trade war bear political connotation i.e. a political decision should regulate trade relations. And when damage is inflicted, then it is already a fact of economic value. Therefore, in international trade law economics and politics cohabitate. Proceeding from the above context the author considers the main *theorists's arguments about* political stability, affecting trade stability:

(i) Claude's definition of political behaviour that defines a person's political views, ideology and levels of political participation;

(ii) Helliwell's argument about the indirect effect of democracy on the economic growth, with an indirect effect of democracy on growth through the channel of political stability;

(iii) Taylor and Hudson's proposal of three varieties of instability, namely, "irregular government change", "major regular government change" and "minor regular government change", with regular and irregular government changes being recognized as having different impacts on economic growth and trade stability;

The theory of political stability by authors James C. Davies, V. Freng and Leon Hurwitz has been applied.

The Doctoral Thesis is based on the works of foreign researchers such as A. Sen, A. O. Sykes, Robert M. Stern, G. Zanini, B. Langille, M. Baliamoune-Lutz, T. Cottier, M. Oesch, M. Carlos, D. Holloway, D. Timson-Hunt, C. VanGrasstek, C. Blouin, N. Drager, Y. Radicals, C. McCrudden, C. Beverelli, S. Neumuller, D. Ben-David, H. Nordström, L. Alan-Winters, D. Dollar, G. De Búrca, David P. Fidler, E. Alben, I. Carr, I. Brownlie, John H. Jackson, W. Davey, M. Trebilock, M. Bronckers, R. Howse, Nikolas F. Diebold, Petros C. Mavroidis, and others.

Approbation and publication of the results of the Doctoral Thesis – the results of the study, presenting some problems and possible solutions, have been approbated at local and international scientific conferences in Latvia and abroad. The author of the study has published **14 scientific publications** on the topic of the research. Two publications are published in a scientific paper collection that is included in the **SCOPUS** database and five publications in **ERIH PLUS** database.

Some conclusions were approbated by the author in the framework of the following lecture courses and seminars delivered to the students at the Rīga Stradiņš University: "Development Problems in International Law and Globalization", academic year 2015/2016; "Problems in International Law-based Collaboration", academic year 2016/2017; "Implementation and Protection of Human Rights in the Digital Environment", academic year 2018/2019.

The author collaborates with the international trade experts and hence the information reflected in his published papers as well as the present thesis has practical application.

1 International Trade and the Law of the WTO

1.1 Introduction

The first chapter reviews international trade and main aspects of WTO legislation, analyses rules for international trade, defines a strategy for WTO trade policy and the principles of legal pluralism and inter-legality, establishes correlation of norms of international law within the framework of the WTO law. The present chapter also examines trade tensions (on the example of the USA-China trade war and other disputes), identifies problems and challenges and elaborates proposals for the solution of the problem.

Throughout the eighteenth and nineteenth centuries and into the twentieth, many countries limited the competitiveness of foreign goods in order to foster native industries by using the tariff. A tariff is a tax on imported goods that raises their price, thus making similar domestically produced goods more economically attractive. Tariffs were a significant source of income for many governments before they had revenue from income and sales taxes. However, the need for reduced tariffs was advocated by many countries, beginning in the nineteenth and throughout the twentieth centuries. Many countries opened up their national markets to foreign goods by reducing tariffs in return for similar liberalisation by others, because "the key to sustaining increased free trade is to maintain balanced benefits in this process, a concept called *reciprocity* – each government gives similar levels of concessions in order to balance the benefits from the agreements made".[2] The increase of international free trade has been encouraged principally with the goal of solidifying peace and distributing economic development across "national boundaries by means of multinational negotiations and agreements",[3] in short, "it deals with attempts to liberalize markets"[4] in the world.

This topic is divided into two main parts. The first part considers briefly some of the points of comparison and contrast between the EU and the WTO. In addition, the relevance of these similarities and differences for the interpretation and effect of the respective norms of these institutions will be examined. The second part discourses about the domestic impact of the WTO law. It is more than obvious, that the EC law, the WTO law and national law are in narrow contact every day and the relation between them has to be clear.

[2] Buterbaugh, K. and Fulton, R.2007. The WTO primer: Tracing Trade's Visible Hand through Case Studies. Palgrave Macmillan, New York. p. 15.
[3] *Ibid*. p. 15
[4] *Ibid*.

1.1.1 International Rules for International Trade

Globalization and international trade need to be properly managed if they are to be of benefit to all humankind. Former GATT and WTO director-general, Peter Sutherland, wrote in 1997: 'The greatest challenge facing the world is the need to create an international system that not only maximizes global growth but also achieves a greater measure of equity, a system that both integrates emerging powers and assists currently marginalized countries in their efforts to participate in worldwide economic expansion. The most important means available to secure peace and prosperity into the futures is to develop effective multilateral approaches and institutions.[5]

But what exactly is the role of legal rules and, in particular, international legal rules in international trade? How do international trade rules allow countries realize the gains of international trade? There are basically four related reasons why there is a need for international trade rules. First, countries must be restrained from adopting trade-restrictive measures both in their own interest and in that of the world economy. International trade rules restrain countries from taking trade-restrictive measures. National policy-makers may come under considerable pressure from influential interest groups to adopt trade-restrictive measures in order to protect domestic industries from import competition. Such measures may benefit the specific, short-term interests of the groups advocating them but they very seldom benefit the general economic interest of the country adopting them. 'Governments know very well, that by tying their hands to the mast, reciprocal international pre-commitments help them to resist the siren-like temptations from rent-seeking, interest groups at home'.[6] Countries also realise that, if they take trade-restrictive measures, other countries will do so too. This may lead to an escalation of trade-restrictive measures, a disastrous move for international trade and for global economic welfare. International trade rules help to avoid such escalation. Second and closely related reason why international trade rules are necessary is the need of traders and investors for a degree of security and predictability. International trade rules offer a degree of security and predictability. Traders and investors operating, or intending to operate in a country that is bound by such legal rules will be able to predict better how that country will act in the future on matters affecting their operations in that country. A third reason why international trade rules are necessary is that national governments alone simply cannot cope with the challenges presented by globalization. International trade rules serve to ensure that countries only maintain national regulatory measures that are necessary for the protection of the above key societal

[5] Sutherland, P. 1997. Beyond the Market, a Different Kind of Equity. International Herald Tribune.
[6] *Ibid.*

values.[7] Furthermore international trade rules may introduce a degree of harmonization of domestic regulatory measures and thus ensure an effective, international protection of these societal values. As fourth and final reason why international trade rules are necessary is the need to achieve a greater measure of equity in international economic relations. Without international trade rules, binding and enforceable on the rich as well as the poor, and rules recognizing the special needs of developing countries, many of these countries would not be able to integrate fully in the world trading system and derive an equitable share of the gains of international trade.

However, for international trade legal rules to play these multiple roles, such rules have, of course, to be observed. It is clear that international trade rules are not always adhered to. All countries and their people benefit from the existence of rules on international trade making the trading environment more predictable and stable. However, provided the rules consider their specific interest and needs, developing countries, with generally limited economic, political and military power, should benefit even more from the existence of rules on international trade. The weaker countries are likely to suffer most where the law of the jungle reigns. They are more likely to thrive in a rules-based, rather than a power-based, international trading system.

International trade law consists of, on the one hand, numerous bilateral or regional trade agreements and, on the other hand, multilateral trade agreements. Examples of bilateral and regional trade agreements are manifold.[8] The NAFTA and the Mercosur Agreement are typical examples of regional trade agreements. The Trade Agreements between the United States and Israel or the Agreement on Trade on Wine between the EU and Australia are example of bilateral trade agreements. The number of multilateral trade agreements is more limited.[9] This group includes, for example, the 1983 International Convention on the Harmonized Commodity and Coding System (The Brussels Convention) and the 1973 International Convention on the simplification and Harmonization of customs procedures, as revised in 2000 (the Kyoto Convention). The most important and broadest of all multilateral trade agreements is the Marrakesh Agreement Establishing the World Trade Organization, concluded on 15 April 1994. It is the law of this Agreement, the law of the WTO.

[7] Jackson, J. 1998. Global Economics and International Economic Law. Journal of International Economic Law, pp. 5–6.

[8] Bartels, L. and Ortino, F. 2006. Regional Trade Agreements and the WTO Legal System. Oxford Univ. Press, pp. 23–38.

[9] See,Agreement between the European Community and Australia on trade in wine https://eurlex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22009A0130(01)&from=HU [Accessed: August 10, 2020].

The author claims that the WTO by virtue of its competence, is undoubtedly one of the key organizations that regulates international trade and economic relations almost all over the world. It is also a crucial legislative body in modern international relations, which, despite widespread criticism, is an exemplary successful international organization.

The author poses a number of questions about the WTO: What is behind the success of the World Trade Organization, how did such a young organization manage to legitimize its leadership? What is the role of the WTO Basic Rules in the development of international trade? What is the status of developing countries in the organization? How important is the dispute resolution mechanism within the organization and what factors determine the stability of trade in the organization? Can we assume that the main reason for the success of the WTO lies in its regulation?

In order to answer these and many similar questions the author, in the chapters below, will analyse the historical, legal, economic framework of the WTO in which the states began to work together to create an international mechanism for promoting sustainable world trade/economy.

1.1.2 Basic Rules and Principles of WTO Law

The law of the WTO is complex and specialized. It deals with a broad spectrum of issues, ranging from tariffs, import quotas and customs formalities to intellectual property rights, food safety regulations and national security measures. However, six groups can be distinguished:

1. The principle of non-discrimination;
2. The rules on market access, including rules on transparency;
3. The rules on unfair trade;
4. The rules on conflicts between trade liberalizations and other societal values and interests;
5. The rules in special and differential treatment for developing countries; and
6. A number of key institutional and procedural rules relating to decision-making and dispute settlement.[10]

These basic rules and principles of WTO law make up what is commonly referred to as the multilateral trading system. Referring to this system, Peter Sutherland and others wrote in 2001: ‘The multilateral trading system, with the WTO at its centre, is the most important tool

[10] Van den Bossche, P. 2005. The Law and Policy of the World Trade Organization: text, cases and materials. 1st edn. Cambridge University Press, pp. 65–115.

of global economic management and development we process. The WTO has complex institutional structure which includes: (1) at the highest level, the Ministerial Conference, which is in session only for a few days every two years; (2) at a second level, the General Council, which exercises the powers of the Ministerial Conference in between its sessions; and the Dispute Settlement Body (DSB) and the Trade Policy Review Body (TPRB), which are both emanations of the General Council; and (3) at lower levels, specialized councils and manifold committees, working parties and working groups.

In this area *author considers the* WTO dispute settlement. One of the most remarkable and successful aspects of the WTO is its automatic and compulsory dispute settlement system. It is one thing for countries to agree to a treaty and quite another to enforce compliance with that treaty. The WTO agreements provided for many wide-ranging rules concerning international trade in goods, trade in service and trade-related aspects of intellectual property rights. In view of the importance of their impact, economic and otherwise, it is not surprising that WTO members do not always agree on the correct interpretation and application of these rules. Members frequently argue about whether or not a particular law or practice of a member constitutes a violation of a right or obligation provided for in a WTO agreement. The WTO disposes of a remarkable system to settle such disputes between WTO members concerning their rights and obligations under the WTO agreement. The WTO dispute settlement system has been operational for twenty-tree years now. In that period, it has arguably been the most prolific of all international dispute settlement systems. In almost a quarter of the disputes brought to the WTO system, the parties were able to reach an amicable solution through consultations, or the dispute was otherwise resolved without recourse to adjudication. In other disputes, parties have resorted to adjudication.

Under international law, states can only be brought before an international court or tribunal if they have consented to the jurisdiction of that court or tribunal. In many cases, this implies that breach of a treaty cannot be challenged in third-party adjudication, or that when a dispute arises it can be settled in a judicial fashion only with the explicit consent of both parties.

In the WTO the situation is dramatically different. Whenever a WTO member has a complaint against another WTO member for any matter falling under any WTO covered agreement (as defined in DSU Article 1),[11] it can invoke the WTO's dispute settlement system, without needing the approval of the defending party. This remains the case even if the matter

[11] Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 1, 14 April 1994. www.wto.org/english/tratop_e/dispu_e/dsu_e.htm [Accessed: August 10, 2019].

raised not only involves trade but also more sensitive questions such as health or environmental protection, public morals, or national security. As compared to most other international adjudication regimes, WTO dispute settlement has detailed procedural rules, an appellate process, and back-up arbitration mechanisms to deal with non-implementation and the calculation of trade sanctions in response to continued non-compliance. Most important, WTO members have frequently used the dispute settlement system (between 1995 and April 2011, 424 disputes have been filed)[12] and in the large majority of cases (with some notable exceptions) the system has managed to resolve the dispute. A better understanding of the WTO dispute settlement system not only allows one to formulate and guide complaints through the multiple stages of enforcing trade agreements at the WTO, be it in pursuit of government or private client interests, but it also offers a fascinating study of state-to-state adjudication and international law enforcement more broadly.

An effective dispute settlement system is critical to the operation of the WTO. It would make little sense to spend years negotiating detailed rules in international trade agreements if those rules could be ignored. Therefore, a system of rule enforcement is necessary. In the WTO that function is performed by the Understanding on Rules and Procedures Governing the Settlement of Disputes (usually called the "Dispute Settlement Understanding" or simply the "DSU"). As stated in Article 3.2 of the DSU, "the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system."[13] In the commercial world, such security and predictability are viewed as fundamental prerequisites to conducting business internationally. The DSU is effectively an interpretation and elaboration of GATT Articles XXII and XXIII, which were not modified in the Uruguay Round. As noted above, these articles were the basis for dispute settlement in the GATT system, and since all of the agreements annexed to the Marrakesh Agreement Establishing the World Trade Organization rely on GATT Articles XXII and XXIII or very similar provisions as a basis for dispute settlement, they are the basis for dispute in the WTO system as well. Article XXII provides that one WTO Member may request another Member to consult with respect to any matter affecting the operation of the agreement. Generally speaking, Article XXIII provides for consultations and dispute settlement procedures where one Member considers that another Member is failing to carry out its obligations under the agreement. There are essentially four phases in the WTO dispute settlement process: consultations, the panel process, the appellate

[12] See WTO Dispute Settlement: One-Page Case Summaries 1995–2011, edition 2012. https://www.wto.org/english/res_e/booksp_e/dispu_summary95_11_e.pdf [Accessed: August 10, 2020].

[13] Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 3.2, 14 April 1994. www.wto.org/english/res_e/booksp_e/analytic_index_e/dsu_01_e.htm [Accessed: August 10, 2020].

process and surveillance of implementation. After outlining some of the more important general provisions of the DSU, each of these four phases is discussed in turn.[14]

Discussing the principles of the WTO, the author pays special attention to the principle of trade without discrimination and in this context conducts a legal analysis of the main articles of the GATT (I, III, XX). In his opinion, the analysis of these articles is of particular importance, since on their basis the states submit applications to the dispute resolution body.

The purpose of Article I is that any advantage, privilege or immunity accorded by one contracting party to a product that is produced or owned by any other country shall immediately and unconditionally extend to similar products produced or attributed to it in other contracting state.[15] According to *the author, although* the article establishes such an approach, it is still not enough for the treaty to be properly enforced by states, as they always try to use various reasons for violating the norms and manipulate, even by such means as establishing product similarities and differences the criteria for which have not yet been established in accordance with WTO case law. Such attempts have been presented on many occasions. The author gives an illustrative example of this – *Japan Alchoholic Beverages II*, where the Dispute Resolution Body explicitly pointed out the absence of criteria for determining the similarity of products and the need to take into account all the circumstances of each case.[16] Moreover, according to the author, the importance of this principle is indicated by the fact that it is enshrined in the three main WTO treaties (GATT, GATS and TRIPS), and is also the fundamental concept of international trade or the global economy as a whole.

With regard to article III, it clearly sets out the main purpose that determines the relationship between international and domestic law. This article clearly demonstrates the will of the contracting states to respect each other's domestic law and at the same time to protect themselves against possible harassments from other States on the market.[17] Moreover, according to paragraph 4 of Article III of the GATT, the products of any contracting party imported into the territory of any other contracting party should not be subjected to less favourable treatment than the products of national origin. It should also be noted that the established principle provides for exceptions as well which are governed by the relevant articles of the GATT. These are, on the one hand, the exceptions set out in Article XX, as well

[14] Guzman, A. and Pauwelyn, J. H.B. 2012. International Trade Law. 2nd Edn. Walters Kluwer in New York, p. 130.

[15] General Agreement on Tariffs and Trade (GATT) 1994, Article I.

[16] Japan – Taxes on Alcoholic Beverages ("Japan – Alcoholic Beverages II"), WT/DS8/R, WT/DS10/R, WT/DS11/R, adopted 1 November 1996, para. 6.23, Modified by the AB Report, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, DSR 1996:I, 125, p. 16.

[17] See Article III of the GATT (1994).

as the principles set out in Article XXIV, which will be discussed below on the examples of specific disputes.

According to the author, the analysis of the above-mentioned Articles I and III of the GATT demonstrates, that despite the sovereign right of states to conduct internal affairs in accordance with their will, they are still subject to a number of conditions governed by international law, especially when the economic interests of states are concerned. If we take into account the fact that states are full-fledged subjects of international law, which create international treaties and commit themselves to comply with the norms of law established by them, then one circumstance becomes clear – no matter what convention is concluded and no matter which state is a party to it, whether developed or a developing country, still it remains subject to the principle of article 27 of the 1969 Vienna Convention on the Law of Treaties: " A party may not rely on the provisions of its domestic law to justify a breach of treaty."

Based on the above, *the author concludes* that international law does not care in what form this or that state recognizes it; the main thing is that if a country decides to become a party to the treaty, then it is obliged to fulfil all its obligations, regardless of whether or not its actions contradict its own domestic legislation.

1.2 The Institute of International Trade Law

In the given topic, the author will discuss international trade and legislation, as well as core legal pluralism and inter-legality, analysing WTO interface between legalities and finally principle of non-discrimination. International trade is conducted mainly under the rules of the World Trade Organization. Its non-discrimination rules are of fundamental importance. In essence, they require WTO members not to discriminate amongst products of other WTO members in trade matters (the most favoured- nation rule) and, subject to permitted market-access limitations, not to discriminate against products of other WTO members in favour of domestic products (the national treatment rule). The interpretation of these rules is quite difficult. Their reach is potentially so broad that it has been felt that they should be limited by a number of exceptions, some of which also present interpretative difficulties. Indeed, one of the principal riddles faced by WTO dispute settlement is how to strike the appropriate balance between the rules and exceptions.[18]

Non-discrimination is a key concept in WTO law and policy. There are two main principles of non-discrimination in WTO law: the most-favoured-nation (MFN) treatment

[18] Dezalay, Y. and Garth, B. 1996. Dealing In Virtue: International Commercial Arbitration and the Construction of a Transnational Order. University of Chicago Press. p. 36.

obligation and the national treatment obligation. In simple terms, the MFN treatment obligation prohibits a country from discriminating between countries; the national treatment obligation prohibits a country from discriminating against other countries. [19] So in this piece of research the author examines these two principles of non-discrimination as they apply to trade in goods and trade in services.

1.2.1 Legal pluralism and inter-legality

The first is the concept of legal pluralism, the idea that social fields are likely to incorporate a multiplicity and diversity of legality. We shall identify several varieties of legality briefly. Under conditions of globalization, such legal diversity often comes to be regarded as a difference. From the viewpoint of some traders, this difference gives rise to systems frictions. They would like to see such friction eliminated. But for others it represents alternative sources of expression and ordering that ought to be preserved and promoted. We shall be suggesting that the subsuming phenomenon is one of inter-legality.[20] Inter-legality is an uncommon term which Bonaventura da Sousa Santos derived from postmodernism's literary interests in intertextuality. Globalization can be expected to widen and deepen the phenomenon of inter-legality. Such inter-legality is spreading wider across the world as many more countries open up to the global flows of goods, persons, money, information and services. Inter-legality is also extending deeper down into the layers of each locality as foreign suppliers seek not only to ship finished goods but also to provide services and make investments. We shall see that the WTO agreements are still concerned with cross-border supply of personal services and intellectual resources. This supply taking on added dimensions is greatly enhanced by technological innovations. Additionally, the agreements are concerned with the inter-legalities involved in the establishment of a commercial presence or the presence of natural persons within the locality. In establishing this presence, the foreigner encounters a rich variety of legal arrangements which have been made for domestic production and provision, indeed for socially significant activities such as legal services, farming and communications media. These local legal arrangements involve not only legislative measures but also judicial and administrative norms and all manners of unofficial customs and practices.

[19] Van de Bossche, P. and Zdouc, W. 2013. The Law and Police of the World Trade Organization: text, cases and materials. 3rd edn. Cambridge University Press, pp. 41–369.

[20] De Sousa, Santos B. 1987. Law: A map of Misreading: Towards a Postmodern Conception of Law. Journal of Law and Societe, p. 279.

The author thinks that, the foreign legality need not be centred on one nation state or another. The studies of globalization find, that certain emerging legalities are much freer floating and self-referential. There is interest, for instance, in the re-emergence of a supra-national ***lex mercartoria*** in the business field.[21] Built on transnational contracts, model codes and private arbitration, it gives its own legal character to financial transactions, licensing agreements, strategic alliances and corporate mergers. Through the media of electronic commerce, these legal arrangements might assume even more ethereal and transitory manifestations. Likewise, the local legalities which the foreigner encounters need not be grounded in the official public laws of the nation states. We need not treat local legalities as entirely synonymous with national sovereignty. Local legalities might be said to embrace a host of private as well as public legalities. When the laws in the statute books converge, the foreigner only encounters further layers of normative ordering. Alternatively, it might be founded in the customary arrangements which indigenous peoples make to manage and share native resources. These private and unofficial legalities receive various degrees of recognition and support from the nation state.

No doubt globalization produces convergence or homogeneity in law. While, certainly that tendency is present within globalization, we should see through the studies why difference remains sustainable. For a variety of reasons, global suppliers find that they still have to negotiate the richness of local diversity. They need to call on the legal support, primarily of the nation state, to open a path for them and safeguard their passage. But, perversely, the same process of globalization has the effect of undermining the competence of the national jurisdictions to which they turn for support.

1.2.2 The WTO Interface between legitimacy

These features of globalization stimulate the efforts being made to formulate agreements such as WTO agreements. The author argues that, if we are to understand the agreements and their role in the globalization of law, we need to add the less familiar concept of an interface to our array of conceptual tools.[22] Like a software interface of computer technology, our interface operates to connect legalities, to make them work together, but it does not need to suggest a full integration of the legalities which are interacting or even an ordering of them in a strictly hierarchical fashion. We might also expect the WTO interface to favour global

[21] Dezalay, Y. and Garth, B. 1996. Dealing In Virtue: International Commercial Arbitration and the Construction of a Transnational Order. University of Chicago Press. p. 47.

[22] Jackson, J. H. 1989. The World Trading System: Law and Policy of International Economic Relations. Cambridge: MIT Press, p. 432.

legitimacy over local. We need to gauge the implications of looking certain traditional ways of dealing with these endeavours and services as barriers to trade. The onus is placed on national governments to refashion their regulations as trade-neutral measures or as legitimate exceptions to the norms of trade law. This means that, at the least, local legalities must be mindful of and receptive to the legalities which foreigners bring with them. They must become more cosmopolitan. However, we cannot expect all the legalities to survive in a harmonious coexistence. The WTO is pushing in a particular direction.

Put at its strongest, the WTO agreements can be linked to a neo-liberal agenda of regulatory reform. The objective is not just to ease conflicts between foreign and local legalities but to promote efficient regulation around the world. This agenda extends beyond free trade in the sense of breaking down barriers at the border. Its program for reform behind the border seeks to achieve two more ambitious goals. It aims to ensure that markets are accessible to foreign, commercial suppliers while at the same time they are secure for their investments. There are different ways of characterising this package of reforms. They can be seen as a blend between access and security, liberalisation and control, free and fair trade, or deregulation and re-regulation.[23]

Such a program requires a re-orientation, not just of lawfulness which were designed to protect local industries form foreign competition, but ultimately of a wide range of lawfulness with preoccupations other than trade, such as professional conduct, natural heritage and media diversity. One immediate target of the agreements is the kind of nationally based, industry-specific legislation which limits foreign participation guarantees space for local and less powerful producers, and insists on meeting public service obligations. We can expect the agreements to challenge these regulatory legalities and enlarge the scope for more generic bodies of business law, such as private property and contractual rights, to operate in their place. But the new agreements go further than this, as they begin to prescribe the content of that business law directly. Intellectual property and competition law provide two early tests of the prescriptive nature of that content.

However, we should appreciate that, in keeping with the nature of mediation, the agreements remain tentative in their approach to industry specific regulation. Similarly, their specifications of business law remain incomplete. Moreover, it is not their view to treat intellectual property or even competition law solely as business law. Therefore, we should not be to portray the agreements as single minded. In particular, we should see whether they lend

[23] Cass, R. A. and Knoll, M. S. 2003. International Trade Law. Aldershot, Hants, England; Burlington, VT: Ashgate/Dartmouth, p. 363.

support to independent and alternative producers, those producers, we might say, who cannot make use of the same powers of capital and technology as the largest operators in a laissez-faire global market.

1.2.3 Non-discrimination

Non-discrimination is a key concept in WTO law and policy. There are two main principles of non-discrimination in the WTO law: the most favoured nation (MFN) treatment obligation and the national treatment obligation. In simple terms, the MFN treatment obligation prohibits a country from discriminating between countries; the national treatment obligation prohibits a country from discriminating against other countries.[24] Discrimination between, as well as against, other countries was an important characteristic of the protectionist trade policies pursued by many countries during the economic crisis of the 1930s. Historians now regard these discriminatory policies as an important contributing cause of the economic and political crises that resulted in the Second World War. Discrimination in trade matters breeds resentment among the countries, manufacturers, traders and workers discriminated against. Such resentment poisons international relations and may lead to economic and political confrontation and conflict.[25] The importance of eliminating discrimination in the context of the WTO is highlighted in the Preamble of the WTO Agreement where the 'elimination of discriminatory treatment in international trade relations' is identified as one of two main means by which the objectives of the WTO may be attained.

These principles of non-discrimination apply, be it not in the same manner, with respect to trade in goods, as well as trade in services. The key provisions of the GATT 1994 that deal with non-discrimination in trade in goods are Article I, on the MFN treatment obligation, and Article III, on the national treatment obligation. The key provisions on non-discrimination in the GATS are Article II, on the MFN treatment obligation, and Article XVII, on the national treatment obligation.[26]

[24] Van de Bossche, P. 2008. The Law and Policy of the World Trade Organization: text, cases and materials. 2nd edn. Cambridge University Press, p. 320.
[25] Diebold, N. F. 2010. Non Discrimination in International Trade in Services: likeness in WTO/GATS. Cambridge University Press, p. 15.
[26] Martin, W. and Winters. L. A. 1996. The Uruguay Round and the Developing Countries. World Bank Discussion Paperers, p. 88.

The principal purpose of the MFN treatment obligation of Article I of the GATT 1994 is to ensure equality of opportunity to import from, or to export to, all WTO Members.[27] There are three questions which must be answered to determine whether or not there is a violation of the MFN treatment obligation of Article I:1, namely whether:

1. The measure at issue confers a trade 'advantage' of the kind covered by Article I:1;
2. The products concerned are 'like' products; and,
3. The advantage at issue is granted 'immediately and unconditionally' to all like products concerned.

As is the case with the MFN treatment obligation under the GATT 1994, the principal purpose of the MFN treatment obligation of Article II:1 of the GATS is to ensure equality of opportunity, in case, for services and service suppliers of all other WTO Members. There are three questions which must be answered to determine whether or not a measure violates the MFN treatment obligation of Article II:1, namely, whether:

1. The measure at issue affects trade in services;
2. The services or service suppliers concerned are 'like' services or service suppliers; and,
3. Less favourable treatment is accorded to the services or service suppliers of a Member. [28]

To answer these questions, we examine the norms and processes of the agreements. A particular interest here is how law is used to enhance the WTO's own capacity to mediate as well as to discipline the relationships between legalities. The agreements do not decide which national jurisdiction is to apply in the way that traditional conflict of laws doctrine does. We shall see that this kind of choice is becoming increasingly problematic. Instead, the agreements proceed from a principle of non-discrimination. This principle has two component norms, called most favoured nation treatment and national treatment. The essence of non-discrimination is that national legalities treat foreigners no less favourably, the point of comparison for most favoured nation treatment being the treatment of other foreigners, the point of comparison for national treatment being the treatment of locals. The liberal norms of non-discrimination may seem innocuous and unobjectionable to apply. It is said in particular that both most favoured nation treatment and national treatment do not prescribe the content of a host country's regulatory standards; they only need to apply the standards they choose to adopt equally among

[27] Correa, C. M. 2010. Research Handbook on the Interpretation and Enforcement of Intellectual Property Under WTO Rules. Edward Elgar Publishing, p. 133.

[28] See, GATS, Article II https://www.wto.org/english/res_e/publications_e/ai17_e/gats_art2_jur.pdf [Accessed: August 11, 2020].

foreigners and locals. When the norms are applied in the fields of personnel, services and intellectual endeavours, being required to treat foreigners no less favourably tends to narrow the regulatory legalities or modalities which are available to national governments when they pursue their preferred policies. National treatment is significant because countries do wish to apply restrictions to foreigners. They wish for instance to protect local industries from foreign inroads or to assert regulatory competence over foreign operators. National treatment may say that formally identical treatment can actually constitute less favourable treatment, for example, if the foreigner finds it more onerous to meet the same requirement as the local. Such as standard means that foreigners cannot be treated simply according to local legalities. It requires the local legality to make concession to the foreigner's legality.

1.3 International Trade Strategy: from GATT to the WTO

Free Trade among nations is largely seen as the key to economic growth, peace and better standards of living, leading to a happier state of human existence at a global level.[29] The General Agreement on Tariffs and Trade (GATT) was formed in 1947 with a treaty signed by 23 countries, and signed into international law on January 1, 1948. The world witnessed in the 1930s and 1940s, enshrined the philosophy of free trade using the principles of non-discriminations (also known as Most Favoured Nation Obligation) and the elimination of quantitative restrictions. This Philosophy of free trade continues to this day in the form of GATT 1994.[30] The Philosophy of free Trade, however, has not gone unchallenged. Over time, the world has become more aware of the global effects of environmental degradation and the exploitation of the economically disadvantaged and the young by commercial enterprises. Social and ethical issues in the context of trade have taken on new meaning and non-governmental organization (WTO) and the philosophy of free trade as enshrined in GATT 1994, so much so that there is widespread agreement that trade needs to acquire a human face.[31] The first International trade agreement was signed by 23 of the original 50 UN member-countries and this formed the constitution for the International Trade Organization (ITO) which operated under the auspices of the UN.[32]

[29] Krugman, P. R. 1979. Increasing returns, monopolistic competition and international Trade. Journal of International Economics, 9 (4), p. 469.
[30] Annex 1 A to the World Trade Organization Agreement.
[31] Carr, I., Stone, P. 2010. International Trade Law. Routledge-Cavendish, p. 3.
[32] Murray, C., Holloway, D., Hunt, D. T., D'Arcy, L., Schmitthoff, C. M. 2007. Export Trade: The Law and Practice of International Trade. London: Thomson/Sweet & Maxwell, p. 881.

1.3.1 Bretton Woods and the Failure of International Trade Organization

The United States, which emerged from the Second World War as the leading political and economic power, took the lead in establishing a new post-Second World War international economic system. At 1944 Conference in Bretton Woods, New Hampshire, the idea of founding an international organization to develop and coordinate international trade was agreed, but the main emphasis was placed on creating the International Monetary Fund (IMF) and the World Bank, so the details were left for later. After the founding of United Nations (UN) in 1945, multilateral trade negotiations were conducted under the auspices of the UN Economic and Social Council, which in 1946 adopted a resolution in favour of forming an International Trade Organization and convened a conference on the matter.

Negotiations over the ITO and the post-war international trading system were held in several stages: in New York in 1947; in Geneva in 1947; and in Havana in 1948. The Geneva meetings, which were pivotal, had three objectives: (1) draft an ITO character, (2) prepare schedules of tariffs reductions, and (3) prepare a multilateral treaty containing general principles of trade, namely, the General Agreements on Tariffs and Trade (GATT). By the end of 1947, work had been completed on the tariff reductions and the GATT. The final work to complete a character for the ITO was put off until 1948.

The governments of the countries engaged in the negotiations were left with a problem: how to bring the tariff and GATT into force right away without waiting on the final round of negotiations to form the ITO. The solution was to adopt a Protocol of Provisional Application to apply the GATT provisionally on and after January 1, 1948.[33] In this way, the GATT and its tariff schedules could immediately enter into force, later the GATT could be revised to be consistent with the charter.

The countries participating in the Havana Conference of 1948 completed work on the ITO character, but it never entered into force. Because the support of the United States was critical, other countries that were ready to adopt the ITO charter waited to see its fate in the United States. President Truman submitted the ITO charter to congress, but the Republicans won control of Congress in the 1948 election. In 1950, the Truman administration announced that it would no longer seek congressional approval for the ITO. Hence, the ITO was dead.

[33] Protocol of Provisional Application to the General Agreements on tariffs and Trade, Oct. 30 1947, 55 U.N.T.S. 308.

1.3.2 The GATT as an International Organization

The failure to adopt the ITO meant the absence of the third pillar,[34] on which the Bretton Woods economic structure was to be built. In fact, The GATT, which was never intended to be an international organization, gradually filled this void. The contracting parties of the GATT (the GATT had no members) held meetings every years and new contracting parties were gradually added. The interim commission for the ITO became the GATT Secretariat. The GATT evolved into an international organization based in Geneva, taking as its charter the GATT, practice under the GATT, and additional understandings and agreements.

Nevertheless, the GATT always suffered from what Professor Jackson has termed birth defects, inherent weaknesses that handicapped its operation.[35] These birth defects included:

1. The lack of character granting the GATT legal personality and establishing it procedures and organizational structures;
2. The fact that GATT had only provisional applications;
3. The fact that Protocol of Provisional Application contained provisions enabling GATT contracting parties to maintain legislation that was in force on accession to the GATT and was inconsistent with GATT; and
4. Ambiguity and confusion about the GATT's authority, decision-making ability, and legal status. [36]

The Creation of the GATT as an International Organization in the 1940s may best be understood against the background of the history of international trade policy. The GATT was an extraordinary new departure built upon two new ideas: the desirability of (1) multilateralism and (2) institutionalism. The injection of these new ideas that made possible the GATT was the result of bitter experience and contemplation of history.

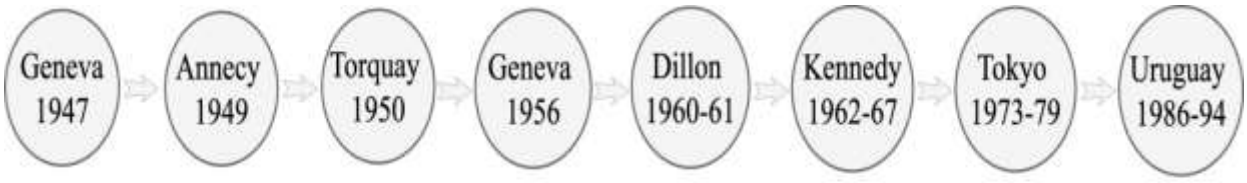
1.3.3 The GATT as a de facto International Organization for trade and Negotiating Rounds

In the absence of an international organization for trade, countries gradually turned, form the early 1950s onwards, to the only existing multilateral institution for trade, the GATT

[34] The two pillars that came into existence as agreed at the Bretton Woods Conference were the International Monetary Fund (IMF) and The World Bank.
[35] Jackson, J. H. 1998. Designing and Implementing Effective Dispute Settlement Procedures: WTO Dispute Settlement, Appraisal and Prospects, in the WTO as an International Organization, pp. 161–163.
[36] Jackson, J. H. 2007. The Jurispudence of GATT and WTO, Insights on Treaty Law and Economic Relations. Cambridge: Cambridge University Press, p. 87.

1947, to handle problems, concerning their trade relations. Although the GATT was conceived as a multilateral agreement for the reduction of tariffs, and not an international organization, it would successfully transform itself in a pragmatic and incremental manner – into a de facto international organization. The institutional provisions in the GATT 1947 were scant.[37] However, over the years, the GATT generated through experimentation and trial and error – some fairly elaborate procedures for conducting its business.

The above notwithstanding, the GATT served as the basis for eight rounds of multilateral trade negotiations. These rounds were held periodically to reduce tariffs and other barriers to international trade and were increasingly complex and ambitious. All were ultimately successful. A principal accomplishment of the GATT was its success in reducing tariffs and other trade barriers on a worldwide basis. The various negotiating rounds were named after the place in which the negotiations began or the person associated with initiating the round. The names and dates of the completed rounds are as follows: [38]



The objective of the early GATT negotiating rounds was primarily to reduce tariffs. Non-tariff barriers later emerged as a vital concern as well. The objective of the Tokyo and Uruguay Rounds was primarily to reduce non-tariff barriers. The Uruguay Round culminated in the creation of an immense new body of international law relating to trade. The basic texts of the WTO agreements exceeded 400 pages, and the final Act signed in Marrakesh, Morocco on 15 April 1994 was over 26,000 pages. The final Act of the Uruguay Round transformed the GATT into a new, fully fledged international organization called the World Trade Organization (WTO).

The author argues that GATT was a legal basis and not an organization. Systemic and fundamental analysis of the GATT legislation clearly reveals that its legislation did not cover many crucial areas and therefore was not complete. These shortcomings brought forth the necessity of forming the new organization.

[37] Article XXV of the GATT 1947. 15 April, 1994.
[38] See, GATT bilateral negotiating material by Round at: https://www.wto.org/english/docs_e/gattbilaterals_e/indexbyround_e.htm [Accessed: August 11, 2020].

1.3.4 The World Trade Organization

The establishment of the World Trade Organization at Uruguay Round was aimed at creating an integrated legal system in world trade relations. Today many critics of the WTO claim that the WTO is 'pathologically secretive, conspiratorial and unaccountable to sovereign states and their electorate'.[39] Developing-country members criticise the WTO and object to what they consider to be their marginalization within the WTO's negotiation and rule-making process. While for many years international trade law was not part of the mainstream of international law, WTO law is now the 'new frontier' of international law. Nobody questions that WTO law is an integral part of public international law. However, the relationship between WTO rules and other, conflicting rules of public international law, such as rules of MEAs, is controversial. A generally accepted view on this relationship is yet to emerge.

With regard to the relationship between WTO law and the national law of WTO members, it is noteworthy that, while some WTO scholars forcefully plead for the granting of direct effect to WTO law in the domestic legal order of WTO members, none of the major trading nations grants such effect WTO law. In most WTO members, a breach of WTO law obligations cannot be challenged or invoked in national courts.

As regards relationship between WTO and EU, the EU and the WTO share many obvious features, they are both organizations set up primarily to promote trade between states. Some authors consider EU and WTO even as constitutional entities with similar roots. Other authors see as main shared sign, that the members of the EU and WTO have tied their hands in matters of trade policy and have tried to cover domestic policies that may affect trade Concerning EU role, they exist many exceptions from the MNF and NT duties due to the article XXIV GATT of course. Each organization has own legal framework. It is very interesting, how in substantive and procedural terms the process of political and legal decision-making in the European Communities is affected by the fact, that EU are the member of the WTO. The biggest issues can be described as:

1. Question of the exact legal status and effect of WTO norms within the European legal order;
2. How particular EU policies are affected by the provisions of the relevant agreements of the WTO;

[39] De Jonquières, G. 1999. Prime Target for Protests: WTO Ministerial Conference. Financial Time.

3. The question of extent to which and the way in which the EU institutions and organs seek to integrate the substantive obligations contained in the various agreements into their political and legislative processes;
4. The general principles and due process norms being developed by the dispute settlement bodies.[40]

The author claims that the current legal framework of the WTO is based on mandatory changes, improvements and adaptations against the background of globalization. It makes trade relations more flexible, reduces trade tensions, thus proving its clear advantage over GATT legislation. According to the author, despite the critical assessment presented in the introduction, the WTO plays an important role for the intergovernmental community, given its substantial jurisdiction and the existence of an effective mechanism for multilateral international agreements concluded within its framework. Its importance in modern international relations is especially evident in view of the list of areas covered by this organization, including intellectual property, environmental protection, technical barriers to trade, investment mechanisms and other important aspects. Although the world trading system only established the mechanisms of trade in goods during the creation of the GATT, at a certain stage of its development it expanded and today it covers almost all spectra of interstate relations. One of the reasons for the success of the WTO, in author's opinion is the effective implementation mechanism of international agreements between the member states, the unimpeded functioning of which has been guaranteed by the Dispute Settlement Mechanism established at Uruguay Round. Its effectiveness is confirmed by interstate disputes in the WTO, the sentences of which are always distinguished by an effective enforcement mechanism. An exception is the recent escalation of trade tensions between the United States and China, of which the author is critical; see below the analysis of US-China trade tensions and the author's position. However, according to the author, the WTO maintains a balance of power since small member states can express their views on the development of world trade, using all the mechanisms to protect their interests. These facts allow us to conclude that the organization greatly contributes to the interpretation and development of international law.

[40] De Búrca, G. and Scott, J. 2003. The Impact of the WTO on EU Decision making in The EU and the WTO Legal and Constitutional Issues. Oxford: Hart Publishing, pp. 300–328.

1.4 Labour Standards, Human Rights and Public Health in the WTO

This topic reviews the effects of the interaction between labour standards and human rights that has become a key issue in the World Trade organization. Human rights and trade rules, including WTO rules, are based on the same values: individual freedom and responsibility, non-discrimination, rule of law, and welfare through peaceful cooperation among individuals. Policymakers gradually developed new rules to achieve both trade and human rights objectives. For example, in the early nineteenth century, England signed treaties with the U.S., Portugal, Denmark, and Sweden to ban trade in slaves. In the late nineteenth century, the US, England, Australia and Canada banned trade in goods made by conflict labour. These efforts stimulated international cooperation. In 1919, the signatories of the Treaty of Versailles created the International Labour Organization (ILO); its members agreed that state failure to protect labour rights could distort trade and undermine labour rights in other countries.[41]

The trade labour linkage has a long history.[42] It has become one of the most contentious contemporary issues in trade and labour policy circles and debates[43]. The idea of using international labour standards to protect workers from economic exploitation was first promoted by individual social reformers in Europe in the first half of the nineteenth century during the early stages of the industrial revolution. The work of these reformers was later taken over by various non-governmental organizations. Calls for international labour legislation increased dramatically during the second half of the nineteenth century and found expression in various international organizations that were formed (often international associations of trade unions).

Opponents of labour standards argue that international pressure on foreign countries is an unnecessary and counterproductive interference in the workings of the free market. In this view pressure for international labour standards represents either disguised protectionism or misplaced compassion. Proponents of labour standards argue that a set of minimal labour standards is necessary to promote fair competition and to facilitate efficient operation of the labour market. In industrialized countries there has also been a growing undercurrent of resentment toward trade with countries with low labour costs, which threatens the viability of international trade agreements. The core areas of labour standards typically include freedom

[41] Bidwell, P., W. 1939. The Invisible Tariff: A Study of the Control of Imports into the United States. NY: Council on Foreign Relations, pp. 11–115.

[42] See. Charnovitz, S. 1987. The influence of International Labour Standards on the World Trading System: An Historical Overview. International Labour Review, p. 565.

[43] For an excellent review of the surrounding debates, see Langille, B. 1997. Eight Ways to Think about International Labour Standards. Journal of World Trade, p. 27.

of association, collective bargaining, prohibition of forced labour, elimination of exploitative child labour, and non-discrimination. The International Labour Organization (ILO) has been the main institution concerned with international labour standards since its inception in 1919. The ILO establishes conventions that are binding only on the countries that ratify them. The ILO is not empowered to enforce compliance with ratified conventions; instead, it relies on international pressure, advice, and monitoring to encourage compliance. Additionally, several bilateral and multilateral trade agreements cover labour and environmental standards. For example, the labour side agreements were a critical element of the North American Free Trade Agreement (NAFTA).

The (ILO) formally entered the trade labour interface debate in 1994 at the time of discussion of a possible inclusion of a social clause in the WTO, the establishment of link between trade and labour in differing forms within NAFTA and the EU, and the conditioning of trade preferences and concessions by some developed countries on respect for labour standards. The ILO set up a working party on the social dimensions of the liberalization of international trade, but in 1995 the ILO's governing body concluded that the working party would not pursue the question of trade sanction and that further discussions of a link between international trade and social standards or a sanction-based social clause mechanism would be suspended.

With respect to trade and labour standards linkages in regional trading arrangements, within the EU the social dimension of European integration took concrete form in 1991 when 11 of the 12 Member States (excluding the UK) signed the community's Charter of Fundamental Social Rights. Another important step in the development of EU social policy was the adoption by the11 members (excluding the UK) of the protocol on Social Policy at Maastricht in 1991.[44]

Recently, the debate over trade and labour rights has been extended to human rights more generally an entirely logical development. However, in the case of other human rights, the debate is much less focused on 'linkage', including sanctions, and much more on the effects of trade obligations on the ability of states, especially developing countries, to fulfil economic, social and cultural rights, such as the right to health or to adequate food. Here, developing countries, although wary about sanctions have been generally supportive of efforts to evaluate and interpret trade agreements in human rights terms.[45]

[44] Trebilock, M., Howse, R. and Eliason, A. 2013. The Regulation of International Trade. 4th edn. European Journal of International Law, p. 718.

[45] See Alben, E. 2001.GATT and the Fair Wage: A Historical Perspective. 101 (6) Columbia Law Review, 101 (6), 1410–1447.

1.4.1 Core labour standards (CLS) as human rights

Various CLS have been characterized as human rights the UN Universal Declaration of Human Rights, the subsequent international Covenant on Civil and Political Rights, and International Covenant on Economics, social and Cultural rights. The ILO's 1998 Declaration of Fundamental Principles and Rights at Work enumerates a short list of core international labour standards that are defined more fully in eight background Covenants incorporated by reference, namely, freedom of association and collective bargaining, the elimination of forced labour, the elimination of child labour, and the elimination of discrimination in employment, which is also consistent with the characterization of certain core labour standards or rights as human rights, especially that guarantee basic freedom of choice in employment relations[46]. Labour standards have been used in the Generalized System of Preferences a preferential system to provide duty free access to exports of developing countries by (most notably) the European Union and the United States of America. Currently, there is a revision of the EU's GSP scheme, the potential implications of which may be considerable given that the new GSP plus scheme appears to target not only ratification of the fundamental Conventions, but also application of Conventions in line with comments from the ILO supervisory bodies. This has the potential to be very problematic for employers.

Anartya Sen argues in his book "Development as Freedom" that basic goals of development can be conceived of in universalistic terms where individual well-being can plausibly be viewed as entailing certain basic freedoms irrespective of cultural context:

1. Freedom to engage in political criticism and association;
2. Freedom to engage in market transactions;
3. Freedom from the ravages of preventable or curable disease;
4. Freedom from the disabling effects of illiteracy and lack of basic education;
5. Freedom from extreme material privation. [47]

According to Sen, these freedoms have both intrinsic and instrumental value. Importantly, in contrast to the unfair competition and race to the bottom rationales for linking international trade policy and international labour standards, the human rights perspective focuses primarily on the welfare of citizens in exporting, not importing countries. The assumption underlying this concern for basic or universal human rights is that failure to respect them in any country is either a reflection of the decision of unrepresentative or

[46] Trebilcock, M. J. and Howse, R. 2005. The Regulation of International Trade. 3rd edn. London, Routledge, p. 562.
[47] See Sen, A. 1999. Development as Freedom. New York: Oxford University Press, p. 132.

repressive governments rather than the will of the citizens or a sign of the majoritarian oppression of minorities, for example, children, women or racial religious minorities; alternatively, there may be paternalistic concerns that citizens in other countries have made uninformed or ill-advised choices to forgo these basic rights.

In author's view, the linkage of international trade policy, including trade or other economic sanctions, with CLS that reflect basic or universal human rights is a cogent one. When citizens in some countries observe gross or systematic abuses of human rights in other countries, the possible range of reactions open to them include diplomatic protests, withdrawal of ambassadors, cancellation of air landing rights, trade sanctions or more comprehensive economic boycotts, or at the limit, military intervention.

Arguing that doing nothing is always or often the most appropriate response is inconsistent with the very notion of universal human rights. In extreme cases, such as war crimes, apartheid, the threat of chemical warfare in the case of Iraq, genocide in the case of Serbia, or the Holocaust in the case of Nazi Germany, excluding a priori economic sanctions form the menu of possible options seems indefensible. Whether it is the most appropriate option may, of course, be context specific and depend both on the seriousness of the abuses and on the likely efficacy of the response choice of instrument. But it is sufficient for present purposes to restate the point that to the extent that CLS are appropriately characterized as basic or universal human rights, a linkage between trade policy and such labour standards is not only defensible but arguably imperative, in contrast to the other two rationales for such a linkage which, despite their much longer historical lineage, are largely spurious and inconsistent with the central predicates of a liberal trading system. However, CLS viewed as basic or universal human rights, by promoting human freedom of choice, are entirely consistent with a liberal trading regime that seeks to ensure other human freedoms, in particular the right of individuals to engage in market transactions with other individuals without discrimination on the basis of country of location.[48] Having said this scope and definition of the class human rights viewed as sufficiently universal as to warrant potentially the imposition of trade sanctions for their violation is problematic in various respects. Even CLS are not susceptible to uncontentious understandings of their scope. The scope of many economic, social and cultural rights is controversial.[49] These controversies do not obviate the normative force of the rights themselves, but do have implications for the choice of instrument and choice of institutional arrangement for addressing the trade policy-labour standards linkage, to which we now turn. As regards

[48] See Cleveland, S. H. 2002. Human Rights and International Trade: A theory of Compatibility. Journal of International Economic Law 5(1), 133–189.
[49] Ignatieff, M. 2001. Human Rights as Politics and Idolatry. Princeton University Press, p. 61.

developing country: From a developing country perspective, the conventional wisdom is that unlike the case with developed countries, increased integration with the world economy will be beneficial to less skilled workers. But this does not seem to be supported by the available empirical evidence, which suggests that many developing countries experienced rising wage inequality after opening to international trade. *A clear example of this are the leading WTO countries, including Georgia, which adheres to the WTO's compensation policy based on the principle of equal pay for work of equal value.*

It appears possible that there is a pervasive skill bias in globalization. It is also uncertain what prospects international trade offers in creating jobs in developing countries, particularly those located in Africa and Latin America.

1.4.2 Human rights beyond labour rights

Since the end of the Cold War, two main visions have guided the evolution of international law and institution, the visions of human rights and humanity and that of economic globalization. Both visions have offered challenges to traditional and understandings of sovereignty: they have given a new significance to non-state actors in the evolution and implementation of international law. Both have often given rise to demands and aspirations to global politics and constitutionalism as well as new relationship between local, national, regional, and global levels of governance. However, the legal, institutional and policy cultures of international human rights law and of international trade, financial and investment law have developed largely in isolation from one another.[50]

As a matter of international law, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the WTO are, in the first instance treaty regimes. A fundamental structural characteristic of the international legal system is that of decentralization without hierarchy. Treaty norms in the ICCPR and ICESCR and other human rights instruments have an equal legal status to those in the WTO (a few such norms, related to prohibitions on torture and slavery have a higher status as *ius cogens* or pre-emptory norms of International law, trumping treaty obligations to the extent of inconsistence).

A large majority of states are signatories to both the WTO Single Undertaking (the core WTI treaties) and the ICCPR and ICESCR. The principle of decentralization without hierarchy, along with that of giving full effect to international obligations, implies the need to interpret

[50] Howse, R. and Teitel, R. 2007. Beyond the Divide: The Covenant on Economic, Social and Cultural Rights and The Worlds Trade Organization., Friedrich Ebert Stiftung, occasional Paper No. 30.

and to develop these regimes in a complementary and consistent fashion to the extent possible. As the Report of the international Law Commission (ILC) on fragmentation of international law notes, 'In international law, there is a strong presumption against normative conflict'.[51]

The Declaration on Trade-related Intellectual Property Rights (TRIP) and Public Health and the Kimberly (Conflict Diamonds) waiver reflect an unacknowledged debt to human rights consciousness in the WTO. The former Director-General of the WTO, Pascal Lamy, has written about globalization with a human face, and his conception of the economic sphere, including the international economic sphere, is deeply rooted in the notion of humanity. More recently, a joint study by the ILO and the WTO Secretariat explicitly refers to freedom of association and the right to collective bargaining as 'universally recognized Human Rights', urges their respects as such and not just for instrumental reasons of social peace, ad refutes with empirical evidence the notion that respect for such rights harms competitiveness.[52]

Anartya Sen vigorously challenges the view that human rights are 'luxury goods' that poor countries cannot afford until they have achieved a certain level of prosperity; instead, the improvement of economic welfare depends upon respect for rights in many and complex ways. More recently, Alan Sykes has noted that, generally speaking, there is a positive correlation between a country's openness to trade and its tendency to respect human rights. This puts into question the idea that poor countries should or must sacrifice human rights or postpone their realization for the sake of openness to trade, and an outward-oriented development strategy.[53]

The author believes that trade and human rights should be coordinated and countries should exercise considerable flexibility under WTO rules to protect human rights at home or abroad. All these issues are related to how states tried decades long to allocate jurisdiction between legislative and judicial functions within each state, among states themselves, among state and international organizations and between international organizations.

WTO member states must fulfill their human rights and WTO obligations in good faith, so as to exclude conflict between these two sets of legislation. In light of the inherent flexibility of many of the WTO obligations, including Articles XX and XXI of GATT, WTO Members

[51] International Law Commission, 2006. Fragmentation of international Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study group of the International Law Commission, finalized by Martti Koskenniemi, para.37. UN Doc: A/CN.4/L.682.

[52] Cass, R. A. and Knoll, M. S. 2003. International Trade Law. Aldershot, Hants, England; Burlington, VT: Ashgate/Dartmouth.

[53] Sykes, A.O. 2003. International Trade and Human rights: An Economic Perspective. University of Chicago Law and Economics Olin Working paper No.188.

can simultaneously respect both their human rights and their WTO rights and obligations; however, the author believes that these articles are not flexible enough to allow it.

In authors view, Article XX and similar provisions in other WTO agreements, such as Art. XXIII GPA do not contain a human rights or social clause. Some human rights violations could however be covered by the existing specific exceptions. According to the respective paragraphs of Article XX, the legal bases for the implementation of social or human rights standards through trade measures could be the public morals exception (para. a), the protection of human, animal or plant life or health exception (para. b), the prison labour exception (para. e) or measures related to the conservation of exhaustible natural resources (para. g). Whereas paras. (a) and (e) have hardly been applied or mentioned in any reports of the Dispute Settlement institutions, paras. (b) and (g) have often been invoked to justify environmental or public health measures.

A clear example of the above argument are *US-Shrimp and Brazil-Retreaded* cases analysed by the author below. The author claims, that since the WTO adjudicating bodies and legislation do not determine whether human rights have been violated or respected, there is the need for legislative changes.

Hence, the author proposes his own draft agreement, which is of a recommendatory character:

Appendix Agreement Concerning Annual Reports on Human Rights and Free Trade between the WTO and its Members

WTO and ITS MEMBER COUNTRIES (hereinafter referred to as the "Parties"):

AFFIRMING the importance of respect for democracy and human rights;

NOTING the existing national bodies mandated to promote and protect human rights within the respective territories of the WTO member countries;

HAVE AGREED as follows:

Article 1

Annual Reports on Human Rights

1. Each member of the WTO shall provide a report on human rights to its respective national body every year, by June 1 in the framework of the Free Trade Agreement or Regional Trade Agreements (RTAs). These reports shall communicate on the effect of the measures taken under the Free Trade Agreement and Trade Relations within the WTO on Human Rights in the WTO Member States.
2. Each Party involved in trade relations shall make its own report public.

Article 2

Cooperation Mechanism

1. The Parties may consult with one another to review the implementation of this Agreement.
2. Each Party involved in trade relation shall notify the other Party (WTO Secretariat) in writing of the completion of the domestic procedures required for the entry into force of this Agreement.

Article 3

Amendments

The Parties shall agree in writing to amend this Agreement. Each Party shall notify the other Party in writing of the completion of its domestic procedures required for the entry into force of the Amendment. The Amendment shall enter into force in 30 days from the date of the notification.

The author believes that the approval of this draft Appendix Agreement would highly contribute to solving such fundamental legal issues in the trade arena as respect and protection of human rights. Furthermore, this initiative, through enhancing human rights, will inevitably promote more democracy in the member states.

1.4.3 Liberalization of trade and health policy perspective

International trade can also hurt the right to health directly or indirectly. In this case it should be mentioned that the Regional Committee for the Eastern Mediterranean of WHO discussed in its Forty-fifth Session the impact of the GATT Agreements on health and passed a resolution urging Member States to: A. Ensure that ministries of health are represented on national committees entrusted with the task of studying the negative impact of World Trade Organization agreements on the health sector; B. Conduct studies to coordinate response to World Trade Organization health-related agreements in cooperation with the Regional Office. WHO expressed its concerns in a statement at the Third WTO Ministerial Conference as follows – trade and public health should not be discussed in isolation from each other. Decisions made outside the health sector have tremendous influence on health outcomes, especially in poor societies. WHO supports the main purpose of promoting trade, that is, to improve living conditions and to raise real income. It strongly reaffirms that health is central to this development goal. The benefits to be derived from expanding trade should further

the goal of improving the health of the population, especially that of poor or marginalized groups who may find themselves excluded from the process of economic growth.[54]

TRIPS is the importance of interpreting WTO treaties from a health policy perspective. Health policy experts and organizations were able to promote the protection of the safeguards in TRIPS for parallel importing and compulsory licensing by stressing that the treaty text accorded WTO members these rights. In addition, health policy activism helped stimulate subsequent state practice in the form of the Doha Declaration on the TRIPS Agreement and Public Health which reinforced WTO members' rights to use TRIPS flexibilities and safeguards for public health purposes. Treaty interpretation from a health policy perspective remains important in other areas of TRIPS as well.

The question arises whether the provisions of GATS may also provide insufficient flexibility for health policy-makers, transferring the issue from the realm of treaty interpretation into treaty implementation or revision. Health concerns often seem to have insufficient weight in decisions many governments make in international forums, such as the WTO. GATS force WTO members to think about health in connection with the growing role of services in modern economies and the impact of globalization trends, particularly on the poor. In addition, GATS establish a process designed to progressively liberalize trade in services and health policy-makers must be prepared to participate in this process to ensure that such liberalization unfolds in a way sensitive to the needs of national governments in ensuring the provision and regulation of health-related services. GATS "institutional framework' and particularly dispute the dispute settlement mechanism, are also important parts of the GATS for health policy.[55]

Any liberalization under GATS should aim to produce better quality, affordable, and effective health-related services, leading to greater equity in health outcomes. Liberalization should also ensure the necessary policy and regulatory space governments require to promote and protect the health of their populations, particularly those in greatest need. GATS create health opportunities and challenges, especially for developing countries. GATS accord countries considerable choice, discretion, and flexibility so that proper management of the process of liberalization of trade in health-related services can adequately protect health. In key areas of GATS, governments face choices about the breadth and depth of liberalization of trade in health-related services and the impact of such liberalization on health policy. In fact,

[54] WHO (1999) Trade and public health. Statement of the World health Organization (WHO) at the Third WTO Ministerial Conference, 30 November to 3 December, Seattle, See link: https://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/presspack_english.pdf [Accessed: April 10, 2017].

[55] Mattoo, A., Stern, R. M. and Zanini, G. 2008. A Handbook of International Trade in Services. Ney York: Oxford University Press, p. 449.

countries are free to decide whether liberalization in the health sector should be pursued or not and to what extent. Countries are not obliged to liberalize health services if they do not wish to do so. These choices make it imperative that health officials understand the structure and substance of GATS, collaborate with other government agencies on GATS implementation and liberalization, and act to ensure that the GATS process does not adversely affect national health policy.[56]

As regards key provisions of GATS, it creates the multilateral legal framework for international trade in nearly every type of service. The Agreement's 29 articles establish the scope of its rules' coverage, impose general obligations, structure the making of specific commitments, construct a process for progressive liberalization of trade in services, and link the treaty to the WTO's dispute settlement mechanism. Although experts acknowledge that GATS has not, to date, significantly affected trade in health-related services, the potential for GATS to do so through the progressive liberalization process is tremendous. In the GATS 2000 negotiations, countries may be receiving requests from and may consider submitting offers to other WTO members for market access and national treatment commitments in many different health-related service sectors.

On the basis of the above-mentioned the author refers to WHO's work on GATS and policy. WHO's work on GATS has, to date, focused on collecting evidence on the potential and actual impact of GATS on the functioning of health systems. These efforts involve:

1. Collecting data on trade in health-related services;
2. Undertaking a wide range of country-based studies;
3. Conducting regional and national training programs;
4. Supporting a legal review of GATS from the perspective of health policy;
5. Developing a Handbook on Trade in Health-Related Services and GATS; and
6. Tracking and disseminating information on the GATS 2000 negotiations.[57]

Although the environment per se is not a WTO issue, several WTO Agreements and rules are relevant to environmental issues. There have been several environmental related WTO disputes often centring on the issue of “like product”. In deciding “likeness”, WTO rules permit health risks to be considered. In a recent case on asbestos, the Appellate Body found the objective pursued, i.e. the preservation of human life and health, to be “both vital and important

[56] Blouin, C., Drager, N., Smith, R. eds. 2006. International Trade in Health Services and the GATS: Current Issues and Debates. Washington, DC: World Bank, p. 145.

[57] Adlung, R. and Carzaniga, A. 2001. Health Services under the General Agreement on Trade in Services. Bulletin of the World Health Organization, 79(4), pp. 352–364.

in the highest degree", and concluded that an import ban on asbestos was a "necessary" measure to protect human health.[58]

Proceeding from the above mentioned the author claims, that in view of the risks to health equity and access, empirical studies on the impact of reducing trade barriers on health equity, efficiency, access, or quality are vitally important. Studies should be carried out under the auspices of the WTO or by order of the organization. Particular attention should be paid to the well-coordinated work of trade experts and medical professionals to minimise the risks to health equity from liberalisation of services trade, and ensure that any resulting economic gains in health-related service sectors generate tangible public health benefits. The author argues that such a strategy that prioritizes human development and public health goals would enable to achieve a more suitable trade balance.

1.5 Rules, Norms and enforcement in the WTO

As Aristotle said: 'Even when laws have been written down, they ought not always to remain unaltered. As in other sciences, so in politics, it is impossible that all things should be precisely set down in writing; for enactments must be universal, but actions are concerned with particulars'.[59]

The thought is the father to the deed, and the multilateral trading system could never have been built if it had not first been imagined. The World Trade Organization (WTO) is not the product of just one idea, however, or even one school of thought.[60] It instead represents the confluence of, and sometimes the conflict between, three distinct areas of theory and practice. Law, economics and politics have each inspired and constrained the capacity of countries to work together for the creation and maintenance of a rules-based regime in which members with widely different levels of economic development and asymmetrical political power work together to reduce barriers to trade. In this process, legislation of the WTO plays very important role to improve trade situation of the WTO countries.

Aristotle would likely approve of the way that the decision-making processes of the multilateral trading system allow for adaptation, innovation and an emphasis on unwritten norms over formal rules. A literal reading of GATT 1947 and the Agreement Establishing the World Trade Organization (WTO Agreement) gives one only an imperfect idea of how decisions are made, with the procedures that are actually followed having evolved over decades

[58] WTO Agreements and Public Health, published by the WTO Secretariat 2002, p. 15.
[59] Aristotle Politics Book II, Chapter 8 (350 BCE) Translated by Benjamin Jowett, published 1999.
[60] VanGrasstek, C. 2013. The history and future the World trade organization. WTO Edition, p. 3. p. 202.

of experience, improvisation and accommodation. That evolution was neither easy nor settled, however, and one bloc or another often proposes tweaks or major changes in how issues are deliberated, decisions are made and commitments are enforced.[61]

The WTO currently has a membership of 164 sovereign States and independent customs territories. Its agreements cover some 95% of international trade and regulate the trade of goods and services as well as the protection of intellectual property rights. Its membership comes close to that of a universal organisation, even more so if one considers that a significant proportion of the remaining non-Members are currently negotiating their accession to the WTO. The reason why the WTO is important and unique, however, is also that it has been and continues to be the forum in which trade negotiations take place at the worldwide level in subsequent rounds. These negotiations result in binding international agreements that can be enforced in a highly effective, compulsory and exclusive quasi-judiciary.

Together with other factors, the strong increase of international trade (significantly faster than the growth of world GDP) and of other aspects of economic interaction (e.g. investment) has resulted in an increased international economic interdependence. In view of this interdependence, nation-state governments cannot regulate effectively any more in many areas,[62] which is why effective international governance is needed in order to manage globalisation. At a time when global governance is more necessary than ever before,[63] the WTO is a forum in which the international community can achieve many important things, given its rule-making vocation, its broad membership and its effective enforcement mechanism.

1.5.1 The rules for decision-making in the WTO

The Vienna Convention on the Law of Treaties defines a "treaty" to be "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation" (Article 2.1(a)).[64] Somewhat less precisely, it defines an "international organization" simply to be "an intergovernmental organization" (Article 2.1(i)). One might more bluntly describe a treaty as an instrument by which countries agree to place voluntary limitations on the exercise of their sovereignty, and an international organization as

[61] *Ibid.*
[62] Jackson, J. H. 2001. The WTO "Constitution" and Proposed Reforms: Seven "Mantras" Revisited. Journal of International Economic Law, pp. 67–69.
[63] Lamy, P. 2000. Mondialisation: Pascal Lamy dénonce un déficit de gouvernance internationale, Interview in Les Echos, p. 1.
[64] See, Article 2 of the Vienna Convention at https://m.likumi.lv/doc.php?id=73444 [Accessed: August 11, 2020].

a body that states agree to create in order to facilitate the development and execution of these sovereignty-constraining instruments. Any treaty or international organization will necessarily involve some derogation of sovereignty in this sense, but states never renounce their sovereignty altogether, no matter what the terms of a treaty or the rules of an international organization may be.

What is at issue in the architecture of the WTO is just how far members wish to go in the apparent relaxation of their sovereignty in order to reach agreements efficiently, achieve an appropriate level of liberalization and enforce the rules with an optimal level of predictability. As desirable as those objectives may be, they must also be balanced against countries' interests in preserving and exercising their right to "policy space" and allowing for some degree of flexibility in the implementation and, when necessary, the revision or even the abrogation of these agreements. Table 1.1 elaborates on the balance between these objectives by showing the range of options for three of the architectural issues. The first issue is the way that agreements are packaged, which range from one option that leaves the greatest leeway to individual states (i.e. plurilateral agreements based on code reciprocity) to another that leaves them with the least (i.e. a strict single undertaking), with a compromise position in-between. There is a similar array of least-to-most derogations for the ways that decisions are reached in the WTO and how the decision-making bodies of the organization are structured.

Table 1.1

A taxonomy of options in the decision-making of the WTO
(developed by the author)

Least derogation of sovereignty		**Compromise position**	**Most derogation of sovereignty**
Packaging of agreements	Plurilateral agreements based on code reciprocity that states are free to accept or reject.	Plurilateral agreements based on MFN treatment that states are free to accept or reject.	A single undertaking under which all members must adopt all agreements concluded in a round.
Decision making procedures	Principle of consensus (i.e. approval requires that no member formally object to a decision).	Voting based on a qualified majority (e.g. two thirds, three quarters, etc.), whether or not weighted.	Voting based on a simple majority (50 per cent plus one), whether or not weighted.
Decision making bodies	All decisions are made in bodies in which all members have the right to be represented.	An executive board is established with limited membership that has only consultative authority.	An executive board is established with limited membership that has both negotiating and executive authority.

WTO members have collectively made very different choices in these three areas. They elected for their decision-making procedures and bodies to choose the option that involves the least derogation of sovereignty: the principle of consensus ensures that even the smallest member can block the adoption of any decision that it considers contrary to its interests, and all members are represented in all bodies. This stands in contrast to the decision made on the packaging of agreements, in which case members chose the single undertaking. The seeming mismatch between these choices is notable, as is the fact that there appears to be much more willingness on the part of countries to revisit the single undertaking plurilateral choice than to reopen the issue of voting versus consensus.

1.5.2 Enforcement of WTO Rulings

WTO is the global international institution which governs global trade between nations. It is hard to overestimate the importance of this body. One of the greatest achievements of the WTO is a decrease in tariffs for industrial products from 40% to an average of 6.3% to 3.8%.[65] This is a result of WTO trading rounds. Ministerial conference in Doha, Qatar opened the last trade round, with a very ambitious agenda in November 2001. However, due to various reasons including a great increase of members of the WTO, Doha trade round lead to a deadlock in trade negotiations. To the contrary, there is a sphere, where WTO remains immensely actual and vital dispute settlement mechanism. The WTO Dispute settlement system was introduced during Uruguay Round by the adoption of the DSU, which constitutes Annex 2 of the WTO Agreement. The rationale of this system is obvious, it provides an instrument to enforce trade concessions agreed upon by the members of the WTO. The WTO has one of the most active international dispute settlement mechanisms in the world. Since 1995, over 500 disputes have been brought to the WTO and over 350 rulings have been issued.[66]

The author considers the views of enforcement approach scholars that claim that the DSB's compliance success comes from "the enhanced ability of the …[WTO] to respond to and punish…" violators rather than its normative legitimacy because of the central role played by domestic special interests in shaping the liberalization of trade.[67] These assumptions

[65] WTO, Dispute settlement https://www.wto.org/english/res_e/booksp_e/dispu_settl_1995_2017_e.pdf [Accessed: August 5, 2020].

[66] WTO, Tariffs: more bindings and closer to zero https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm2_e.htm [Accessed: August 5, 2020].

[67] *See* Downs, G., W. Rocke, D. M. and Barsoom, P. N. 1996. Is the Good News About Compliance Good News About Cooperation? Journal of International Organization, vol. 50, issue 3, pp. 379–391. *see also* Goldstein J, and Martin, L. 2000. *Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note*. INT'L ORG. 603, 603–604, 619, 631–632.

are then used to justify game-theoretical and public choice models when describing WTO compliance.[68] Subsequently, several WTO scholars have utilized inferential statistics in studies to confirm this framework.

Political economists Tobias Hofmann and See Yeon Kim argue "the relative political importance of the domestic economic sectors at the centre of WTO disputes is key to understanding why opportunistic governments provide extended periods of non-compliance, or protection, to some of these sectors."[69] Deploying enforcement approach theory, their study used the "relative employment and GDP of the sector" affected by a WTO dispute as a proxy for the relative importance of the said sector.[70]

The trade scholar Stephanie Rickard argues that violations of GATT/WTO agreements are more common among governments elected through majoritarian electoral rules and/or single-member districts.[71] These electoral systems have been said to incentivize narrow targeted transfers to special interests as they are cantered on candidates, while proportional electoral rules and/or multi-member districts are more likely to be scrutinized by the broader constituency as they are cantered on parties.[72] Proportional representation (PR) in elected legislatures is said to encourage more examination from average constituent members, as members do not have to vote sophisticatedly[73] and parties must appeal to large segments of the population.[74] It has been widely documented that the general constituency in PR legislatures can better punish officials who capitulate to special interests, while majoritarian electoral rules and/or single-member districts create a protectionist bias due to election strategies that privilege decisions to garner a simple majority.[75]

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[68] *See, e.g.,* Abbott, K., W. 1985. *The Trading Nation's Dilemma: The Functions of the Law of International Trade*, Harvard International Law Journal, 501, 514–516, 528–532; Bagwell, K. W. and Mavroidis, P. C. 2011. Preferential Trade Agreements: A Law and Economics Analysis. Cambridge University Press, p. 1; Dai, X. 2005. *Why Comply? The Domestic Constituency Mechanism*. International Organization, 363, 364–365, 373–374, 384–385.

[69] *See* Hofmann, T. and Kim, S. Y. 2009. The Political Economy of Compliance in WTO Disputes. Unpublished manuscript, p. 6. available at http://wp. peio.me/wp-content/uploads/2014/04/Conf3_Hofmann-Kim-25.09.09.pdf. [Accessed: January 10, 2021].

[70] *See ibid.* at 14. [Accessed: January 10, 2021].

[71] *See* Rickard, S. 2010. Democratic Differences: Electoral Institutions and Compliance with GATT/WTO Agreements. European Journal of International Relations, 16 (4), 714–717.

[72] See Persson, T. and Tabellini, G. 2005. The Economic Effects of Constitutions. The MIT press Cambridge, pp. 3–5. See also Carey, J., M and Shugart, M., S. 1995. *Incentives to Cultivate a Personal Vote: A Rank Ordering of Electoral Formulas*. Electoral studies, pp. 417, 432–434.

[73] Sophisticated or tactical voting refers to the practice of pragmatically supporting candidates that are not a voter's first choice so as to prevent an even worse outcome.

[74] *See* Reinhardt, E. 1996. Posturing Parliaments: Ratification, Uncertainty, and International Bargaining. Ph.D. dissertation, Columbia University.

[75] *See* Carolyn L. Evans, C., A. 2009. *A Protectionist Bias in Majoritarian Politics: An Empirical Investigation*, Econ. And Pol. 278, 300–305.

WTO dispute settlement mechanism is not only the most frequently used but also one of the most effective international adjudication body. In general, it is considered that about half of the brought complaints never moved to an actual panel, and thus, were settled by means of consultations.[76] The problem, however, may arise if a party to a dispute is not willing to comply with a decision. The most vital element of implementation mechanism of DSB is prompt compliance with recommendations and rulings. Mr William J. Davey, the former Director of Legal Affair Division of WTO Secretariat, says that "while the dispute settlement system's record for dispute resolution is quite good, its performance in terms of promptness is not so impressive".[77]

One of the main objectives of the DSU is to provide security and predictability to the multilateral trading system.[78] Predictable legal framework increases the trust of economic operators in the system of international trade. WTO dispute settlement provides the mechanism which is equally available and binding for all fellow-members of the WTO. So that, every Member can be sure that there is a comprehensive mechanism to enforce its rights under WTO agreements. One of the features of the WTO agreements is that they are the result of multilateral trade negotiations, consequently, they are compromises, which are often drafted to be as general as possible to cover a bunch of feasible cases, this leading to another function of the DSB clarification of the WTO agreements through interpretation.[79]

A WTO dispute arises when one or several Members complain that regulations or policies of another Member do not comply with the WTO law. There are three types of complaints under the DSU: "violation" complaint, "non-violation" complaint and "situation" complaint. When the WTO member fails to carry out its obligation under WTO law, another member may file a "violation" complaint. This is the most common and widespread type of complaints so far.[80] To the contrary, "non-violation" complaint may be lodged even when the measure is still consistent with WTO agreements, however, it frustrates the benefit which complaining member legitimately expect. There were a few cases on the ground of "non-violation" complain. "Situation" complaint covers all situations, that does not fall within the two previous types. No "situation" complaint was lodged to the DSB so far. With regards to

[76] Taniguchi, Y., Bohanes, J. and Yanovich, A. 2007. The WTO in the twenty-first century: Dispute settlement, negotiations, and regionalism in Asia. Cambridge University Press p. 32.
[77] Davey, W. J. 2005. The WTO Dispute Settlement System: The First Ten years. Journal of International Economic Law, p. 49.
[78] The Dispute Settlement Understanding, Article 3.2. See link https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm [Accessed: August 5, 2020].
[79] *Ibid.*
[80] WTO, Legal basis for a dispute, https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c4s2p1_e.htm [Accessed: August 5, 2020].

participants of the dispute, it is crucial to stress that only governments which represent members of the WTO may become a party to a dispute or participate as a third party. Neither citizens, nor business enterprises may take part in the WTO dispute settlement. However, there is *amicus curiae* practice, which allows sending submissions to the DSB from non-state actors. Most panels and the Appellate Body decide that they cannot take into account information from such submissions for consideration of the case, though this issue remains at their discretion.

The preferred function of the DSB is closely connected to its name solving disputes has a priority over delivering judgments. Mutually agreed solution reached by parties has a number of advantages. Firstly, there is no 'losing' party. Nothing will be imposed on a member of the WTO by the DSB so, there is no external intervention to the national governmental policy. Secondly, costs are much lower for the parties in comparison to the panel procedure. Thirdly, it is much faster than going through the panel procedure. Once a mutually agreed solution is reached, there are fewer problems with enforcement as responding member has already agreed to a particular outcome and, therefore, will not try to shirk enforcement. Time is always of crucial importance for a complaining member, especially when it comes to enforcement.[81]

So, the first step for a complaining party is always to request for consultations with a member which is considered to be in breach of its WTO obligations. The 'request for consultations' plays an extremely crucial role in the whole DSB procedure. Firstly, this step is mandatory, a party cannot ask for establishment of a panel until the term of 20 days after the date of receipt of the request terminates.[82] Secondly, the 'request for consultation' is a starting point for a countdown of the whole DSB procedure. Therefore, sending a 'request for consultations' secures the complaining party from being involved in lengthy negotiation with a member concerned without further opportunity to require the establishment of panel.

In any case, mutually agreed solutions may be reached during any stage of the WTO dispute settlement process. Sometimes a party is not willing to seriously consider settlement out of the DSB unless they hear all the arguments of the other party during the panel process. For instance, in the EC-Butter dispute, the parties reached mutually agreed solution after the panel submitted its final report.[83]

[81] The Dispute Settlement Understanding, Article 3.7. https://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm [Accessed: August 5, 2020].
[82] The Dispute Settlement Understanding, Article 4.7. https://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm [Accessed: August 5, 2020].
[83] Report of the Panel, *European Communities – Measures Affecting Butter Products* WT/DS72/R (24 November 1999) para 13 (*EC – Butter*).

Based on the above, the author analyses that DSU has both weaknesses and strengths. The weak side is the deadlines set for specific disputes because in most cases the time allotted for resolving disputes is not sufficient and additional time is required. Very often the complainant suffers significant economic losses due to the lack of time. It is also noteworthy that during the dispute resolution procedure there are no temporary measures provided for protection of economic and trade interests, which would prevent damage being inflicted to a particular party.

In author's opinion, effective conflict resolution system can be evaluated as a strength. The existing system is much more efficient in comparison with the GATT dispute settlement system of 1947. Moreover, its quasi-judicial and quasi-automatic character enables to handle more complex cases. At the same time, the enforcement mechanism of the WTO dispute settlement system is much more effective, which can also be assessed as a strength. The weaknesses of DSU are very vivid in trade wars, particularly, US-China trade war which will be analysed by the author further below.

1.5.3 WTO Dispute Settlement Panel and Appellate Procedures

The main priority of the WTO dispute settlement is achievement of mutually agreed solutions by means of consultations, disputes often pursued to the panel stage. The complaining member may ask a DSB to establish a panel to make compulsory recommendations for resolution of the dispute. Due to a negative consensus rule, the DSB authorises the establishment of a panel in almost all the cases. However, the request must be duly lodged. There is a set of requirements for the request stipulated in Article 2.6 of the DSU. Such requirements were sometimes used as a ground for 'procedural' defence of the respondent. According to the reports of the Appellate Body, the DSU requires only minimum reference to provisions of violated agreements in the request, without setting out detailed arguments.[84]

The panel consists of three individuals and is formed for each dispute. Well-qualified governmental and non-governmental individuals, taught or published on international trade law or policy may serve on a panel.[85] The WTO Secretariat proposes nominations to the parties to the dispute, but parties may oppose to these nominations if they have compelling reasons to do so.[86] The panel procedure is strictly confidential. Panel meetings are closed to the public and

[84] Report of the Appellate Body, *European Communities – Regime for the Importation, Sale and Distribution of Bananas* WT/DS27/AB/R (9 September1997), para 141 (AB Report *EC – Banana).*

[85] Dispute Settlement Understanding, Article 8.1. https://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm [Accessed: August 5, 2020].

[86] *Ibid.*

conducted exclusively with delegations of the parties. The panel proceedings start with written submissions from the parties, which contain a presentation of the facts and the legal argumentation relating to specific trade rules at issue. At the first meeting, the complainant presents the case and the respondent its defence. Sometimes expert opinion can be advised to clarify scientific or technical data. After the first meeting, the panel submits descriptive sections of its reports to the parties, stating how the panel understands the facts and argumentation, giving parties two weeks for a comment. Once the comments are received and revised, the interim report containing findings and conclusions is issued to the parties. Parties then have one week to request a review. The instrument of the interim report provides an outstanding cooperation between the panel and the parties which lead to minimization of uncertainties and misunderstanding. The final report is submitted to the parties and in three weeks becomes available for all members of the WTO. Starting from the date of composition of the panel the procedure shall not last more than 6 months until the final report is issued.[87] The panel report is adopted by the DSB within 60 days unless one of the parties appeals to it. Again, in most cases, the panel report will be adopted by the DSB thanks to the 'negative' consensus voting.

There is a possibility to appeal to the panel report in DSM of the WTO. This mechanism is quite innovative, as it has neither existed in the dispute settlement system under the GATT, nor it exists in the most of the international adjudicative bodies. An appeal is limited to assessment of issues of law and legal interpretation applied by the panel.[88] Both the 'winning' and the 'losing' party have a right to appeal. One can easily imagine grounds for appeal for 'losing', but there can also be several reasons for a 'winning' party to challenge the panel's report. For instance, not all of the claims of the 'winning' party were successful or it might be interested in challenging particular findings of the panel (e.g. legal interpretation was challenged by the US ('winning party').[89] Therefore it is possible that both of the claimant and respondent will become appellant and appellee at the same time, whereas the Appellate Body will deal with various appeals jointly.[90]

As regards Appellate Body, these is a standing body, which comprises seven persons. Its members are appointed by the DSB for a four-year term. Scholars, judges and officials with expertise in trade, law and economics are capable of becoming a member of the Appellate Body.

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[87] Dispute Settlement Understanding, Article 12.7.
[88] *Ibid.*
[89] Decision of the Arbitrators – *Japan – Taxes on Alcoholic Beverages – Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes* WT/DS10/20 (January 27, 1997) *page 4 para 2* (Decision of the Arbitrators, *Japan – Alcoholic Beverages*).
[90] Working Procedures for appellate review WT/AB/WP/W/6 (16 AUGUST 2010) Rules 23(4) and (5) (Working procedures).

Three out of seven members of the Appellate Body serve to resolve a case on the basis of rotation rule, and such body is called the 'division'. They elect a presiding member among themselves to chair the oral hearing and meetings and coordinate the drafting of the Appellate Body report.[91]

The appeal process starts once one of the parties to a dispute sends a notice of appeal to the DSB. A notice of appeal shall include a brief statement on the grounds of an appeal including the error of the panel in the application of the law or developed legal interpretation. The appellant shall file its written submissions not later than 10 days after a notice of appeal. This might seem as an incredibly short period which will not allow sufficient preparation of the appeal but, the appellant may already start preparation of his appeal after the interim report was issued by the panel. Within 25 days from the notice of an appeal, the appellee has to lodge its written submissions.

The first oral meeting with participants is held by the Appellate Body division within 30 to 45 days from the notice. The Appellate Body can uphold, modify or reverse the legal findings of the panel. The decision of the Appellate Body is final, there is no further appeal option. Overall, the appeal stage lasts from 60 to 90 days and DSB has to accept or reject it in 30 days. The rule of 'negative consensus' is again applied for rejection of the Appellate Body report.[92]

1.5.4 The Implementation of Recommendation and Rulings

If a Panel or the Appellate Body of the WTO found a measure inconsistent with the WTO agreements, it suggests to bring that measure into conformity with the WTO requirements. The most appropriate way to implement recommendations and rulings is to bring the WTO-inconsistent measure into conformity. This may be achieved through a withdrawal or modification of inconsistent measure. Within 30 days after adoption of the report, the responding member shall disclose the information on the way it is going to implement the decision. The implementation must be done promptly, hence, in *Australia-Salmon* the Appellate Body is stated: "In the absence of a mutually agreed solution, the first objective is usually the immediate withdrawal of the measure judged to be inconsistent with any of the covered agreements".[93]

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[91] Working procedures, Rule 7.2

[92] WTO, *Dispute Settlement: Appellate Body* https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm, accessed 30 April 2017.

[93] Award of the Arbitrator, Australia – Measures Affecting Importation of Salmon (*Australia – Salmon*), WT/DS18/9 (23 February 1999) para. 30.

However, immediate compliance rarely happens as the implementation of the recommendation and rulings frequently involves legislative amendments in a member state. Therefore, the reasonable period of time for implementation is frequently asked. The time for implementation depends on the measures at issue and degree of complexity of the legislative mechanism. It is important to stress that reasonable period of time is not invoked automatically, there is a burden of proof on a member concerned to pursue DSB in the necessity of such a period. The Arbitrator in Canada-Pharmaceutical mentions: "Further, and significantly, a "reasonable period of time" is not available unconditionally. Article 21.3 makes it clear that a reasonable period of time is available for implementation only "[i]f it is impracticable to comply immediately with the recommendations and rulings" of the DSB. The "reasonable period of time" to which Article 21.3 refers is, thus, a period of time in what is implicitly not the ordinary circumstance, but a circumstance in which "it is impracticable to comply immediately."[94]

There are three approaches to establish a reasonable period of time:

(i) A reasonable period of time proposed by the member concerned and approved by the DSB. The deadline for this option is within 30 days of adoption of the panel or Appellate Body report;

(ii) Parties to the dispute may agree among themselves on a reasonable period of time for implementation within 45 days of adoption of a report. In such case, the DSB approval is not needed.

(iii) If there is no agreement on the reasonable period of time, the parties may refer to a binding WTO arbitration.

In general, the DSU establishes that the reasonable period of time should not exceed 15 months from the date of adoption of the report. However, it is not a strict rule and the period may be extended or shorten, depending on the particular circumstances.

1.5.5 Direct Effect of WTO Law

The direct effect of the rulings is one of the modifications that first arises in mind in the view of enforcing compliance with WTO dispute settlement. The direct effect would mean that individuals could base their claims in the national court directly on the basis of the WTO ruling. The direct effect is an immensely politically sensitive issue, as it provides supremacy of the WTO and may cause some threats of loss of sovereignty.

[94] Award of the Arbitrator, *Canada – Patent Protection of Pharmaceutical Products* (*Canada – Pharmaceutical Patents*), WT/DS114/13 (18 August 2000), para. 45.

Let's first assess to which degree the rulings of the WTO are binding. WTO members are required to ensure compliance with its WTO obligations in national law under Article 16.4 of the Marrakesh Agreement. However, the legal status of the WTO agreements and dispute settlement rulings in national law is not specified. In the scientific field, there are several views regarding the binding force of the WTO rulings. Thus Bello concludes that the WTO rulings are not binding in the general meaning of international law, as they lack an enforcement body and need a political will to voluntary comply.[95] Jackson insisted that the rulings of the WTO are binding in the sense of traditional international law, as the losing party is under the obligation to implement the recommendation and rulings of the WTO by change or withdrawal of the inconsistent measure.[96] Indeed, the rulings are binding upon members and must be implemented as prompt as possible according to Article 21 of the DSU. Fei suggests that the approach of Bello is based on the mistaken argument that there is a need of a special enforcement body in order to impart binding force to the WTO rulings.[97] She then convincingly concludes that although WTO rulings differ from those of national courts in its binding degree, precedential effect and the form of enforcement, it does not mean that they are not binding, it just shows that they are different.[98] Petersman suggests that the WTO rulings have the nature of secondary obligations compared to the obligations of the members to comply with the WTO agreements.[99] It does not mean that they are less binding than the agreements, but it entails that they are binding only on the parties to the dispute, which in addition to their general WTO obligations, added obligations to comply with the rulings. Therefore, the overall conclusion is that rulings are binding upon parties to a WTO dispute.

The issue of the direct effect of the rulings was raised in the national courts of the WTO members and basically, it was denied by both the US and the EU. Fei concludes that the US explicitly deny the application of direct effect as "Section 102 of the domestic Uruguay Round Agreements Act provides that WTO rulings do not have binding effects under US law and individuals cannot challenge US law consistency with WTO law".[100] The EU courts attach lack of the direct effect of the WTO rulings to the absence of the direct effect of the WTO law.[101]

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[95] Bello, J. 1996. The WTO Dispute Settlement Understanding: Less Is More. American Journal of International Law, 90 (3), 416–417.

[96] *Jackson,* J. H. 1997. The WTO Dispute Settlement Understanding – Misunderstandings on the Nature of Legal Obligation. (91(1) American Journal of International Law, 91 (1), pp. 60–63.

[97] X. Fei, *Direct Effect of WTO Rulings: The Case for Conditional Recognition*. (13, US – China Law Review 2016), 494.

[98] *Ibid*, 495.

[99] *Ibid*, with reference to E. Petersman, *Implementation of WTO Rulings: The Role of Courts and Legislatures in the US and Other Jurisdictions (EC, China)* para. 4 (Columbia University Conference on the WTO at 10, New York, 2006).

[100] *Ibid*, 495.

[101] *Ibid*.

There are a lot of constraints that explain the reluctance of states to impart direct effect to the WTO rulings. The first being democratic legitimacy. Panels and Appellate Body divisions are not controlled by the members and they were not attributed to direct effect during the Uruguay round. Second is that the character of the panel and Appellate Body proceedings were not designed to be a kind of supreme instance of trade disputes towards member's national judicial system. Moreover, there is no check and balances towards WTO tribunals because of the negative consensus voting of the DSB. It is immensely hard, if not impossible, to block a particular panel or Appellate body decision. Based on this, one may understand why states do not accept the direct effect of the WTO rulings, however, it is not necessarily mean that there is no place for such modification.

Fei proposed a so-called 'conditional direct effect' of the WTO rulings. In her view, it is reasonable that private parties lodge a complaint to the national courts towards national authorities to if they are failed to comply within a reasonable period of time for implementation.[102] The 'conditional' element means that a national court would have a wide discretion in applying proportionality test to grant an immune to a national authority by weighting and balancing several factors: "such as the complainants' losses, causality between the losses and non-compliance with WTO rulings, public interests, allocation of the costs among economic actors, or the State's budget".[103] There are three subsequent features regarding the scope of such conditional direct effect: (i) it applies only to the parties to a dispute, regarding the ruling in that dispute; (ii) there is no obligations of the full compensation to private parties, national court may award partial compensation taking into account circumstances of the case; (iii) if the immunity was granted to a national authority by the court it does not waive an obligation of the member to comply with WTO ruling in international context.[104] This proposal increases the power of judicial branch to enforce the WTO decision, which seems appealing. Hence, there will be a system of double-checks of compliance and improvement of the balance of powers within a member of the WTO. It also provides a judicial remedy to private parties which are generally excepted from the whole WTO dispute settlement. This approach also solves the problem of differences in peculiarities of implementation procedure between members which might be far from understanding by the WTO tribunals.

[102] Fei, X. 2016. Direct Effect of WTO Rulings: The Case for Conditional Recognition. US – China Law Review, p. 509.
[103] *Ibid.*
[104] *Ibid.*

Lastly, a conditional direct effect of the WTO rulings appears to be an efficient tool to use the check-and-balance system of the different branches of powers inside the national system of the member concerned. The conditional direct effect also benefits private parties, who are generally not able to induce compliance of the government of the member concerned. However, a lot of constraints remain. For instance, such an approach might change the balance of powers within the WTO in benefit to adjudicatory bodies, which might be not the best consequence.[105] It is also argued that the direct effect might make the losing state more demanding towards the other parties which will lead to more aggressive negotiations in the context of the WTO. To conclude, the proposal of conditional direct effect seems appealing as it will definitely strengthen the enforcement stage while waving drawbacks of the full direct effect. National courts will provide a sufficient counterbalance to executive branch which is failed to comply, while there will be an opportunity to provide immune when it is justifiable.

1.6 Correlation of Norms of International Law within the Framework of the WTO law: Conflicts between Treaties

Before discussing the relationship between international and domestic law in accordance with the legislation of states, it should be determined how the relationship between the norms of international law is regulated and where the WTO stands; Is it an independent system or an integral part of a unified law?

It should be noted that, unlike domestic law, the norms of international law do not have a strictly defined hierarchy, which is obvious from the angle of the relationship between international treaties and customary law, namely: both of them are at the same level in the hierarchy of legal norms and neither is superior to the other. This is not surprising since the International Court of Justice has repeatedly stated that customary international law and treaty norms have similar legal force and, in many cases, customary norms fill in the gaps existing in international treaties. Standing of customary law and international treaties at the same hierarchical level is the will of both states.[106] The author claims that the exception in this case are the so-called norms of peremptory *jus cogens*, the revision of which is not allowed in any way, and they are the highest norms in terms of hierarchy, which have superior force over both the old and new norms.

[105] Bronckers, M. 2001. More Power to the WTO. Journal of International Economic Law, p. 41.
[106] Pauwelyn, J. 2001. The Role of Public International Law in the WTO: How Far Can We Go?', American Journal of International Law, Volume 95, Issue 3, p. 535.

As already mentioned, along with the relationship between international and domestic law, the relationship between different rules of international law is also important as any one area of international law, like any other law in general, is closely related to other areas. Very often the same issue is regulated by different legal norms with the same hierarchy. The problem is easily solved when one of the norms belongs to the so-called. "special norm" and the second to "general", since the principle of *lex specialis derogat lex generalis* is applied in law. However, the situation is complicated by the parallel existence of norms with equal legal force which leads to a conflict between contracts. Based on the above, the issue of collision norms will be discussed below with specific examples. This topic also reviews WTO jurisprudence on general international law concepts and principles concerning conflicts between treaties, which focus on the principle of lex specialis and Article 31(3) (c) of the Vienna Convention. The author thinks that these and other concepts and principles relating to treaty conflicts have been the subject of extensive commentary in the context of International trade law and WTO.

1.6.1 The Narrow Definition of and Presumption against Conflict in International law

In cases where question relating to potential treaty conflicts have arisen, WTO adjudicators have often proceeded by first determining whether there is any actual conflict which would trigger the application of any priority clauses, the *lex specialis* principle or Article 30 of the Vienna Convention. In that context, WTO adjudicators have developed and applied a fairly narrow definition of a conflict' and have found, in a number of cases, that overlapping obligations apply cumulatively. Panels and the Appellate Body have not lightly assumed the existence of conflicts among the WTO agreements, or between the WTO agreements and other international treaty obligations.

The first dispute in *Indonesia- Autos,*[107] Indonesia invoked the principle of *lex specialis* in support of its argument that the subsidy measures at issue were governed exclusively by Article XVI of the GATT and the SCM Agreement, and were not also subject to Article III of the GATT (or, for the same reason, the TRIMs Agreement). The Panel rejected Indonesia's argument on the grounds that there is no conflict between these sets of provisions:

In considering Indonesia's defence that there is a general conflict between the provisions of the SCM Agreement and those of Article III of GATT, and consequently that the SCM Agreement is the only applicable law, we recall first that in public international law there is

[107] Panel report Indonesia – Autos, para.14.28. See also Sir Ian Sinclair. 1984. The Vienna Convention on the Law of Treaties. 2nd edn. British Yearbook of International Law, Volume 56, Issue 1, p. 97. https://www.wto.org/english/tratop_e/dispu_e/54r00.pdf [Accessed: August 5, 2020].

a presumption against conflict. This presumption is especially relevant in the WTO context since all WTO agreements, including GATT 1994 which was modified by Understandings when judged necessary, were negotiated at the same time, by the same Members and in the same forum. In this context we recall the principle of effective interpretation pursuant to which all provisions of a treaty (and in the WTO system all agreements) must be given meaning, using the ordinary meaning of words.

In international Law for a conflict to exist between two treaties, three conditions have to be satisfied. First, the treaties must have the same parties. Second, the treaties must cover the same substantive subject-matter. Were it otherwise, there would be no possibility for conflict. Third, the provisions must conflict, in the sense that the provisions must impose mutually exclusive obligations. Technically speaking, there is a conflict when two (or more) treaty instruments contain obligations which cannot be complied with simultaneously. Not every such divergence constitutes a conflict, however. The *lex specialis derogat lex generali* principle which is inseparably linked with the question of conflict between two treaties or between two provisions (one arguably being more specific than the other), does not apply if the two treaties deal with the same subject from different points of view or applicable in different circumstances, or one provision is more far-reaching than but not inconsistent with those of the other. For in such a case it is possible for a state which is a signatory of both treaties to comply with both treaties at the same time. The presumption against conflict is especially reinforced in cases where separate agreements are concluded between the same parties, since it can be presumed that they are meant to be consistent with themselves, failing any evidence to the contrary.[108]

In another dispute, *Argentina – Hides and Leather*, Argentina argued that its challenged measure was necessary to meet its commitments pursuant to agreement between itself and the IMF. The Panel disagreed:

Lastly, we turn to Argentina's assertion that no changes to the current pre-payment mechanisms are possible, as this could preclude Argentina from meeting its deficit commitments to the IMF. In support of its assertion, Argentina has referred us to an Economic Policy Memorandum and a Technical Memorandum, which Argentina says are part of an agreement with the IMF. However, in neither Memorandum is there a statement to the effect that Argentina is under an obligation to impose a discriminatory tax burden on importers. Nor do we see a requirement in those Memoranda which would bar Argentina from compensating importers for the discrimination suffered. Furthermore, Argentina has in any event not

[108] *Ibid.*

presented argument and evidence sufficient for us to find that it would be impossible for Argentina to meet its deficit targets if it were to compensate importers for the additional interest lost or paid. It should also be recalled in this context that Argentina has not invoked Article XX (d) on the basis that RG 3431 and RG 3543 are necessary to secure compliance with IMF commitments, but on the basis that they are necessary to secure compliance with the IVA Law and IG Law. For these reasons, we do not consider that, in the present case, Argentina's commitments to the IMF provide a justification for not compensating importers. [109]

Last Dispute focuses In *Brazil – Retreaded Tyres,* the European Communities challenged the WTO consistency of an import ban on retreaded tyres that provided for an exemption from the ban for tyres imported from MERCOSUR countries. Brazil introduced the MERCOSUR exemption to comply with a ruling issued by a MERCOSUR arbitral tribunal, which had found Brazil's restrictions on the importation of remoulded tyres to be a violation of its obligations under MERCOSUR. Before the WTO Panel, Brazil argued that the MERCOSUR exemption was neither arbitrary' nor unjustifiable' discrimination within the meaning of the chapeau of Article XX of the GATT, because it was taken to implement the MERCOSUR tribunal ruling. The Panel agreed with Brazil. However, the Appellate reversed Panel's interpretation of Article XX, and concluded that the exemption from the import ban for MERCOSUR countries did indeed result in arbitrary or unjustifiable discrimination within the meaning of the chapeau of Article XX of the GATT. In the course of its analysis, the Appellate Body indicated that it saw no necessary conflict between Brazil's MERCOSUR and WTO obligations:

This being said, we observe, like the Panel, that, before the arbitral tribunal established under MERCOSUR, Brazil could have sought to justify the challenged Import Ban on the grounds of human, animal, and plant health under Article 50 (d) of the Treaty Montevideo. Brazil, however, decided not to do so. It is not appropriate for us to second-guess Brazil's decision not to invoke Article 50 (d), which serves a function similar to that of Article XX (b) of the GATT 1994. However, Article 50 (d) of the treaty of Montevideo, as well as the fact that Brazil might have raised this defence in the MERCOSUR arbitral proceedings, show in our view, that the discrimination associated with the MERCOSUR exemption does not necessarily result from a conflict between provisions under MERCOSUR and the GATT 1994.[110]

[109] Panel report Argentina – Hides and Leather para.14.328., brief summary is available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds155_e.htm [Accessed: August 5, 2020].

[110] Appellate Body Report *Brazil – Retreaded* Tyres, paras. 224–34, brief summary is available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm [Accessed: August 11, 2020].

Based on the analysis of the above panels, author argues that the narrow definition of conflict arguably prevailing in international law is legally inappropriate and leads to contradictions. By contrast, this article has argued that an adequate definition of conflict of norms (i) has to be a wide one that includes incompatibilities between permissions and obligations, permissions and prohibitions, and obligations and prohibitions; and (ii) has to rely on the 'test of violation', since the criterion of 'joint compliance', which is regularly employed in legal theory and domestic law and which has also been used in WTO panel practice, does not produce unequivocal results.

In the same context the author focuses on the clearest case of modern trade tension between the *US and China* that challenged the WTO putting its flexibility in question. Trade aspects have been key between these two countries since the establishment of diplomatic relations. The normalization of trade relations between them began in 2000 through the Clinton Act with China, and a year later, the US assisted China in joining the WTO. Since 2006, China has become the largest US trading partner after Canada.

Already in 2008, China became the largest creditor to the United States, and the economies of the two states became more and more interdependent, but some tensions also appeared.

The US, the EU and Japan filed metal export lawsuits against China, alleging that China was violating international trade rules and regulations, and forcing multinational companies to move to China. However, China considered this step to be unfair. It should also be noted that being the largest holder of US debt and foreign exchange reserves, China viewed the economic crisis of 2007-2009 as artificially caused by the US. The US sent raw materials to China due to the cheap labour and low manufacturing costs and subsequently getting the finished product back as imported, created growing shortage. The disbalance between the countries became a matter of discontent in the US. As a result, in 2017 trade deficit with China amounted to 375 bln.USD, the main cause being the artificial depreciation of Chinese currency.

Under the Trump administration, the US imposed tariffs on Chinese products, accusing China of stealing intellectual and technological property and forcing foreign companies to transfer technology to it, some Chinese investment in the country has also been limited.

The fact is that foreign companies in areas such as the automotive industry could not operate in China unless they merge with local companies, where local companies must have a large stake.

Thus, Chinese companies had full access to technology and patents, and subsequently the Chinese create their own products.

China was imposing retaliatory tariffs on a range of American goods; this caused outrage in the United States and around the world, sparking talk of a "trade war" that began in the summer of 2018 between the two strongest economic powers.

The trade war has negatively impacted both economies, leading to a higher prices for US consumers and contributing to a slowdown in China's economic growth. In total, the US currently applies tariffs exclusively to Chinese goods worth $362 billion, while China applied tariffs exclusively to US goods worth $185 billion. China brought this case to the WTO's DSU, which recently ruled that tariffs imposed by the US in 2018 that triggered the escalation in tensions between the two countries, were inconsistent with the international trade rules as the US failed to justify the alleged technology theft. The panel claims that the US did not provide evidence on how the Chinese goods and services affected by the tariffs received benefits from the so-called unfair practices. Therefore, the US could not prove that the tariffs were justified. The WTO stated that the ruling only applies to the original case brought by China, as China's retaliation has not been challenged by Washington.

In January 2020, Trump and the Chinese Prime Minister signed an agreement to end a two-year trade war. The agreement lowered tariffs on Chinese imports, but China must purchase 200 USD billion worth of American goods, including agricultural products and machinery, over two years.

China is also committed to protecting intellectual property. The trade war has had its consequences: China had to repeal a law obliging the auto-industry and shipbuilding companies to work with local companies.

In September 2020, the WTO circulated the dispute panel report in the case brought by China in "United States-Tariff Measures on Certain Goods from China". The Panel concludes that: conformity with the chapeau of measures that they have found not to be provisionally justified under various subparagraphs of Article XX od DSU. The parties have not reached a mutually satisfactory solution within the meaning of Article 12.7 of the DSU, or otherwise relinquished their rights to pursue WTO dispute settlement action on the measures at issue in this dispute. The document also states that the Panel is very much aware of the wider context in which the WTO system currently operates, which is one reflecting a range of unprecedented global trade tensions. Accordingly, recalling Article 3.7 of the DSU that highlights that the aim of the dispute settlement system is to achieve a positive solution to a dispute, the Panel expresses its ongoing encouragement to the parties. [111]

[111] WTO panel issues report regarding US tariffs on Chinese goods https://www.wto.org/english/tratop_e/dispu_e/543r_conc_e.pdf [Accessed: January 5, 2021].

Ultimately, it can be stated that the trade war affected not only the two countries, but also the global economic picture. Global trade was hit 2.5% by the game of tariff barriers between the US and China amid the trade war, according to a 2019 World Bank report. The main economic threat according to the report was the trade dispute between the United States and China. The author believes that countries should reconsider their economic policies and choose to protect their own market, rather than intervene in global trade processes.

The author attaches special importance to the role of the WTO in the process of trade stability. He argues that the role of the WTO as the umpire in trade disputes has been greatly threatened by the US-China trade war. With the burst of the US-China trade war, it is observed that there is an urgent need for DSU reform particularly through the incorporation of a retrospective monetary compensation. The author believes, that although this would increase the trust of the member states in dispute settlement system it may not be the only solution for preventing the trade wars. With the global tension brought about by the trade war between the US and China there is a perfect timing for reforms in the WTO to strengthen the multilateral trading system.

The Author concludes that the international system, which was characterized by unipolarity from the point of view of US leadership, today has changed and lost its unipolar appearance. Since China's rise to the pinnacle of power, the United States has become a rival state that threatens its hegemony and maintains spheres of influence. The world is no longer unipolar, heading to multipolarity. The author gives preference to fair trade in conformity with trade standards, and engagement of developing countries to promote their economic revival and welfare.

1.6.2 Article 31(3) (c) of the Vienna Convention

Article 31(3) (c) of the Vienna Convention provides that a treaty interpreter take account of any relevant rules of international law applicable in the relations between the parties. In several cases, panels and the Body have declined to take account of non-WTO instruments to interpret WTO provisions on the grounds that those instruments did not qualify as relevant rules of international law applicable in the relations between the parties; in some cases, panels and the Appellate Body have taken other international instruments and/or principles of customary international law into account, either on the basis that they did so qualify under Article 31 (3)(c), or without any express reference to Article 31 (c). In those cases, where WTO adjudicators have taken into account other treaties and/or international law concepts and principles pursuant to Article 31(3) (c), it has generally been to support an interpretation arrived

at on the basis of the text, context and purpose of the provision at issue. To date, there is no case in which a WTO adjudicator has justified its interpretation of a WTO provision expressly and primarily on the basis of Article 3 (3) (c).

Appellate Body Report in *US – Gasoline*, the Appellate Body, without mentioning Article 31 (3) (c) stated that Article 3.2 of the DSU, which provides that the WTO dispute settlement system serves to clarify the existing provisions of the covered agreements in accordance with customary rules of interpretation of public international law, reflects a measure of recognition that the General Agreement is to be read in clinical isolation from public international law.[112]

In *US – Shrimp*, the Appellate Body concluded that the meaning of the term exhaustible natural resources in Article XX (g) of the GATT is not confined to non-living (e.g. mineral) resources. The Appellate Body, without referring to Article 31 (3)(c) of the Vienna Convention, referred to several international conventions and international instruments as support for that view:

From the perspective embodied in the preamble of the WTO Agreement, we note that the generic term "natural resources' in Article XX (g) is not static in its content or reference but is rather by definition, evolutionary. It is, therefore pertinent to note that modern international conventions and declarations make frequent references to natural resources as embracing both living and non-living resources. For instance, the 1982 United Nations Convention on the Law of the Sea (UNCLOS), in defining the jurisdictional rights of coastal states in their exclusive economic zones. Article 56 provides rights, jurisdiction and duties of the coastal State in the exclusive economic zone. In the exclusive economic zone, the coastal State has:

(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living of the waters suprajacent to the sea-bed and of the sea bad its subsoil.

The UNCLOs also repeatedly refers in Articles 61 and 62 to living resources' in specifying rights and duties of states in their exclusive economic zones. The Convention on Biological Diversity uses the concept of biological resources. Agenda 21 speaks most broadly of natural resources and goes into detailed statements about marine living resources. In addition, the Resolution on Assistance to Developing Countries, adopted in conjunction with the Convention on the Conservation of Migratory Species of Wild Animals, recites: Conscious

[112] Appellate body Report *US – Gasoline*, p. 17., available at https://www.wto.org/english/ tratop_e/dispu_e/cases_e/ds2_e.htm# [Accessed: May 11, 2020].

that an important element of development lies in the conservation and management of living natural resources and that migratory species constitute a significant part of these resources.

Given the recent acknowledgment by the international community of the importance of concerted bilateral or multilateral action to protect living natural resources, and recalling the explicit recognition by WTO Members of the objective of sustainable development in the preamble of the WTO Agreement, I believe it is too late in the day to suppose that Article XX (g) of the GATT 1994 may be read as referring only to the conservation of exhaustible mineral or other non-living natural resources. Moreover, two adopted GATT 1947 panel reports previously found fish to be an exhaustible natural resource within the meaning of Article XX (g). I hold that, in line with the principle of effectiveness in treaty interpretation, measures to conserve exhaustible natural resources, whether living or non-living, may fall within Article XX (g).[113] Having analysed the Decisions of the Appellate Body in US-Shrimp and Brazil-Retreaded Tyres cases, the author concludes that the Article XX of the GATT is ambiguous causes and requires specification. To this end the author has suggested above draft agreement of recommendatory character.

In *Canada – Renewable Energy Feed-In Tariff Program*, (regarding this case author will offer a legal analysis in chapter III) the Appellate Body examined Article III:8 (a) of the GATT, which provides that the non-discrimination obligation in Article III does not apply to laws, regulations, or requirements governing the procurement by governmental agencies of products purchased for certain purposes. The Appellate Body stated:

"We note that the word governing links the words laws, regulations or requirements' to the word "procurement" and the remainder of the paragraph. In the context of Article III:8 (a), the word "governing", along with the word "procurement" and the other parts of the paragraph, define the subject matter of the laws, regulations or requirements. The word governing is defined as constituting a law or rule for. Article III:8 (a) thus requires an articulated connection between the laws, regulations, or requirements and the procurement, in the sense that the act of procurement is undertaken within a binding structure of laws, regulations, or requirement".[114]

[113] Appellate Body Report *US – Shrimp*, paras. 130–1., available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm [Accessed: May 17, 2020].
[114] Appellate Body Report *Canada – Renewable Energy Feed-In Tariff Program. See chapter III.*

1.6.3 The *lex specialis* principle

The Latin maxim *lex specialis derogat legi generali* stands for the proposition that, in the event of a conflict, the specific law prevails over the general law. WTO panels and the Appellate Body have referred to and applied this principle in several cases when dealing with the relationship between two or more provisions of the WTO agreements.

In *EEC – Apples (US)*, a GATT panel proceeding, Chile claimed that the measures at issue were inconsistent with the most favoured nation obligation in Article I of the GATT, and also with the non-discrimination obligations in Article XIII of the GATT. The Panel stated:
"The Panel considered it more appropriate to examine the consistency of the EEC measures with the most favoured nation principles of the General Agreement in the context of Article XIII. This provision deals with the non-discriminatory administration of quantitative restrictions and is thus the *lex specialis* in this particular case".[115]
The Panel in *US – 1916 Act (Japan) referred* to the *lex specialis* principle in the context of setting for its understanding of a prior Appellate Body statement, in *EC – Bananas III*,[116] regarding the correct order of applying two WTO agreements where one of them deals specifically, and in detail with the matter at issue. Referring to this statement, the Panel in *US – 1916 Act (Japan)* state that we view the Appellate Body statement as applying the general principle of international law *lex specialis derogat legi generali.* The Panel noted: "It is a general principle of international law that, when applying a body of norms to a given factual situation, one should consider that factual situation under the norm which most specifically addresses it". [117]

The Panel in *EU – Footwear (China)* addressed the relationship between Article 6.2 of the Anti-Dumping Agreement, which provides in general terms that an interested party be given a full opportunity' to defend its interests, and the more specific provisions of Article 6, including Article 6.4, which puts limits on the scope of an investigating authority's obligation to make information available to interested parties. The European Union argued that the limits established in Article 6.4 may not be by-passed' through an expansive interpretation of Article 6.2. In the European Union's view, such an interpretation would be contrary to the rule of interpretation which requires that meaning and effect must be given to all the terms of a treaty "and to the *lex specialis* principle which suggests that whenever two or more norms

[115] GATT Panel Report, EEC – Apples (US), para. 12.28., available at https://www.wto.org/english/tratop_e/dispu_e/gatt_e/88appleu.pdf [Accessed: April 17, 2020].
[116] Appellate Body Report EC Bananas III, para. 204, available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds27_e.htm [Accessed: April 10, 2020].
[117] Panel Report, *US – 1916 Act (Japan)* para. 6.269, available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds162_e.htm [Accessed: April 19, 2020].

deal with the same subject-matter, priority should be given to the norm that is more specific.[118] The Panel, without referring expressly to the *lex specialis* principle, agreed with the European Union's approach to the interpretation of these provisions:

While a full opportunity for the defence of a party's interests may well include, conceptually, the notion of access to information, in our view, the more specific provisions of Article 6, including Articles 6.1.2, 6.4, and 6.9, establish the obligations on investigating authorities in this regard. In our view, Article 6.2 does add anything specific to the obligations on investigating authorities with respect to interested parties' ability to see or receive information in the hands of the investigating authorities established in other provisions of Article 6. Thus, while a failure to comply with one of the more specific provisions of Article 6 concerning access to or disclosure of information may establish a violation of Article 6.2, we find it difficult to imagine a situation where the more specific provision is complied with, but Article 6.2 is nonetheless violated as result of investigating authority's actions in connection with access to or disclosure of information to interested parties. [119]

The Panel in *US – Countervailing and Anti-Dumping Measures (China)* (DS449) in the event of a conflict between the obligation the GATT, which prohibits certain types of retroactive measures, and Articles 20 and 10 of SCM and Anti-Dumping Agreements, which permit the permit retroactive levying of countervailing and anti-dumping duties in specified circumstances, the latter would function as *lex specialis*: These provisions would not be redundant if Article X:2 also applied in the situations covered by Articles 20.2 and 10.2. This is because even if Article X:2 applied in these situations, the SCM Agreement and the Anti-Dumping Agreement would be *leges speciales* in relation to Article X: 2. Consequently, it is the provisions of these agreements that would be applied rather than Article X:2.[120]

1.6.4 Place of the WTO in the international legal system

According to the author, the determination of the place of the World Trade Organization in the international legal system serves only one purpose – to identify the international legal framework under which international trade law develops as well as the volume of international obligations of states in view of specific jurisdictions.

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[118] Panel Report *EU – Footwear (China)* para. 7.598, available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds405_e.htm [Accessed: April 19, 2020].

[119] *Ibid.*

[120] Panel Report, US Countervailing and Anti-Dumping Measures (China) para. 7.114, available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds449_e.htm [Accessed: April 21, 2020].

According to the literature, international trade law is an integral/subordinate part of international law. This appears to be a special law in relation to general international law. If international law is the primary source of international norms and principles, then the constituent norms and principles of the WTO law itself derive from international law. International law is the primary framework through which gaps in WTO law are filled and decisions are made by the Dispute Resolution Body. The author bases this point of view on the second part of Article 3 of the DSU which states that the interpretation of treaties concluded under the WTO must consider the customary approach of international law. A clear example of this is the above considered classic US-Shrimp case, in which the Appellate Body stated that Article 31 of the Vienna Convention had acquired the status of a norm of customary law, in particular, this article of the Vienna Convention, as a rule of general interpretation of the treaty norm, was used by all parties to the dispute, including third parties. The rule acquired the status of a customary norm. Consequently, since this rule is considered part of customary international law, it must necessarily be applied by the Dispute Settlement Body when interpreting the agreement referred to in the WTO founding treaty as stated in Article 3 of the DSU. Hence, the author concludes that provision reaffirms the WTO's view that WTO agreements should not be viewed in "clinical isolation" from international public law. To further strengthen his position, the author cites the case of Japan – Alcoholic Beverages II; In the present case, the Appellate Body has confirmed that Article 32 of the Vienna Convention had acquired the status of a rule of customary international law, therefore Article 3.2 of the DSU obliges the Appellate Body to interpret the constituent instruments of the WTO in accordance with customary international law. This position further strengthens the author's position that international trade law is an integral part of international law.

Against the background of the information presented in this chapter and the analysis of specific cases, the author concludes that the WTO dispute settlement system, on the one hand, obeys the rules of the WTO itself, and on the other hand, considers the practice of international law when resolving disputes. This underlines the WTO's commitment to the international legal system.

1.7 Sources of Law in the WTO

This topic deals with the issue of sources of law in the WTO. The principal source of WTO law is the Marrakesh Agreement Establishing the WTO, concluded on April 15, 1995 and in force since January 1, 1995. The author presents various sources of WTO law, such as:

1. The Marrakesh Agreement Establishing the World Trade Organisation;
2. General Agreement on Tariffs and Trade 1994;
3. General Agreement on Trade in Services;
4. Agreement on Trade-Related Aspects of Intellectual Property Right;
5. Other Multilateral Agreements on Trade in Goods.

Modern discussion of the sources of international law usually begins with a reference to Article 38 (1)[121], of the statute of the International Court of Justice (ICJ), which provides: The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
(b) international customs as evidence of a general practice accepted as law;
(c) the general principles of law recognized by civilized nations;
(d) subject to the provisions of article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law;[122].

The WTO agreement is a "particular" international convention within the meaning of article 38 (1) (a), as are the agreements and legal instruments annexed thereto. The agreements annexed to the WTO agreement are known as the WTO agreements or the covered agreements. The Dispute Settlement Understanding (DSU) governs resolution of disputes concerning the substantive rights and obligations of the WTO members under the covered agreements. In the words of Article 38 (1) (a) the rules of the DSU "are expressly recognized by the contesting states" that are parties to WTO dispute settlement procedures.

The fundamental source of law in the WTO is, therefore, the texts of the relevant covered agreements themselves. All legal analysis begins there. In the words of the WTO Appellate Body, which was established by Article 17 of the DSU, "The proper interpretation of the Article is, first of all, a textual interpretation".[123]

The agreements, however, do not exhaust the sources of potentially relevant law. On the contrary, all of the subparagraphs of Article 38 (1) are potential sources of the law in the WTO dispute settlement. More specifically, prior practice under the WTO's predecessor, the General

[121] *Article 38(1) of* (ICJ), available at https://www.icj-cij.org/en/statute [Accessed: April 27, 2020]., see also Palmeter, N. D. and Mavroidis, P. C. 1998. The WTO Legal System: Sources of Law. American Journal of International Law, Vol. 92, p. 398.
[122] Brownlie, I. 2008. Principles of Public International Law. 7th edn. Oxford University Law, p. 4.
[123] Appellate Body report, Japan – Alcoholic beverages, at Part G, para. 1. available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds8_e.htm [Accessed: May 2, 2020].

Agreement on Tariffs and Trade (GATT) including reports of GATT dispute settlement panels; WTO practice, particularly report of dispute settlement panels and the WTO Appellate body; custom; the teachings of highly qualified publicists; general principles of law; and other international instruments all contribute to the rapidly growing and increasingly important body of law known as "WTO law".

While there is no explicit equivalent to Article 38 (1) in the Dispute Settlement Understanding or any other of the covered agreements, its terms are effectively brought into WTO dispute settlement by article 3.2 and 7 of the DSU. Article 3.2 specifies that the purpose of dispute settlement is to clarify the provisions of the WTO Agreements "in accordance with customary of interpretation of public international law". Article 7 specifies that the terms of reference for panels shall be "to examine, in the light of the relevant provisions in the covered agreements cited by the parties to the dispute, the matter referred to the DSB and to address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.[124]

The "DSB" is the dispute settlement body, established by the DSU, with "the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements".[125]

1.7.1 The Marrakesh Agreement Establishing the World Trade Organization

Marrakesh Agreement Establishing the World Trade Organization (The WTO Agreements) is the most ambitious and far-reaching international trade agreement ever concluded.[126] It consists of short basic agreement (of sixteen articles) and numerous other agreements included in the annexes to this basic agreement. On the relationship between the WTO Agreement and the agreements in the annexes as well as on the binding nature of the latter agreements, Article II of the WTO Agreement states:

[124] Article 7.1 and 7.2 of the DSU; April 1994. https://www.wto.org/ENGLISH/tratop_e/dispu_e/repertory_e/s7_e.htm#S.7.2 [Accessed: May 2, 2020].

[125] Dispute Settlement Id. Art. 2.1. https://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm [Accessed: May 2, 2020].

[126] The official version of WTO Agreements and its annexes is published by the WTO and Cambridge University Press as The Results of the Uruguay Round of Multilateral Trade Negotiations: The legal texts. The WTO Agreement and its Annexes are also available on the WTO website at www.wto.org/english/docs_e/legal_e/legal_e.htm.

1. The agreements and associated legal instruments included in Annexes 1,2 and 3 (hereinafter referred to as multilateral trade agreements) are integral parts of this agreement, binding on all member;
2. The agreements and associated legal instruments included in annex 4 (hereinafter referred to as 'Plurilateral Trade Agreements') are also part of this agreement for those members that have accepted them, and are binding on those members. The plurilateral trade agreements do not create either obligations or rights for members that have not accepted them.[127]

While the WTO agreement consists of many agreements, the Appellate Body in one of the first cases before it, Brazil-Desiccated Coconut (1997), stressed that the WTO agreement had been accepted by WTO members as a single undertaking.[128] The provisions of this agreements represent 'an inseparable package of rights and disciplines which have to be considered in conjunction'.[129] The WTO Agreements is thus a single treaty. However, it should be noted that the agreements making up the WTO agreement were negotiated in multiple separate committees, which operated quite independently and without much coordination. Only towards the end of the Uruguay Round were some efforts made at coordinating and harmonizing the texts of the various agreements. At that stage, however, the negotiators for fear of seeing disagreement re-emerge were often unwilling to change the agreed texts, and some 'inconsistencies' or 'tensions' between the texts remained. Note that Article XVI:3 of the WTO agreement provides: "In the event if conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict".[130]

Most of the substantive WTO law is found in the agreements contained in Annex 1. This annex consists of three parts. Annex 1A contains thirteen multilateral agreements on trade in goods; Annex 1B contains the General Agreements on Trade in Services (the 'GATS'); and Annex 1C the Agreement on Trade related Aspects of Intellectual Property Rights (The TRIPS Agreement). The most important of the thirteen multilateral agreements on trade in goods, contained in Annex 1A, is the General Agreement on Tariffs and Trade 1994 (the GATT 1994). The plurilateral agreements in Annex 4 also contain provisions of substantive law but they are

[127] Van de Bossche, P. and Zdouc, W. 2013. The Law and Police of the World Trade Organization: text, cases and materials. 3rd edn. Cambridge University Press, p. 41.
[128] Appellate Body Report, Brazil – Desiccated Coconut (1997), p. 177; available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds22_e.htm [Accessed: May 3, 2020].
[129] Appellate Body Report, Argentina – Footwear (EC) (2000), para.81. Available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds121_e.htm [Accessed: May 3, 2020].
[130] Article XVI:3 of the WTO; https://www.wto.org/english/docs_e/legal_e/04-wto.pdf [Accessed: May 3, 2020].

as set out in Article II:3 of the WTI Agreement, quoted above only binding upon those WTO members that are a party to these agreements. Annexes 2 and 3 cover, respectively, the Understanding on Rules and Procedures for the Settlement of Disputes (the DSU) and the Trade Policy Review Mechanism (The TPRM), and contain procedural provisions.

1.7.2 General Agreements on Tariffs and Trade 1994

The GATT 1994 sets out the basic rules for trade in goods. This agreement is, however, somewhat unusual in its appearance and structure. Paragraph 1 of the introductory text of the GATT 1994 states:

The General Agreements on Tariffs and Trade 1994 (GATT) shall consists of:

1. The provisions in the General Agreements on Tariffs and Trade, dated 30 October 1947;
2. The provisions of the legal instruments set forth below that have entered into force under the GATT 1947 before the date of entry into force of the WTO agreements;
3. The Marrakesh Protocol to GATT 1994;

The GATT 1994 would obviously have been a less confusing and more user-friendly legal instrument if the negotiators had drafted a new text reflecting the basic rules on trade in goods as agreed during the Uruguay Round. If the negotiators had opted for a new text reflecting the basic rules on trade in goods, it would not have been possible to keep a lid of the many contentious issues relating to the interpretation and application of GATT provision .[131] The current arrangement obliges one to consult: (1) the provisions of the GATT 1947; (2) the provisions of relevant GATT 1947 legal instruments; and (3) the understandings agreed upon during the Uruguay Round in order to know what the GATT 1994 rules on trade in goods are. The negotiators were obviously aware that this arrangement might lead to some confusion, especially with regard to the continued relevance of the GATT 1947. They therefore felt the need to state explicitly in Article II:4 of the WTO agreement that: The General Agreement on Tariffs and Trade 1944 as specified in Annex A1 (hereinafter referred to as GATT 1944) is legally distinct from the General Agreement on Tariffs and Trade, dated 30 October 1947 (hereinafter referred to as GATT 1947).

[131] Together with the provisions of the GATT 1947, the provisions of the legal instruments that have entered into force under the GATT 1947, referred to in paragraph 1(b) of the introductory text of the GATT 1994, are incorporated into the GATT 1994.

It should be stressed that the GATT 1947 is, in fact, no longer in force. It was terminated in 1996. However, as explained, its provisions have been incorporated by reference in the GATT 1994.

1.7.3 General Agreement on Trade in Services

The General Agreement on Trade in Services (The GATS) is the first ever multilateral agreement on trade in services. It entered into force in January 1995 as a result of the Uruguay Round negotiations to provide for the extension of the multilateral trading system to services. All Members of the World Trade Organization are signatories to the GATS and have to assume the resulting obligations.[132] By the same token, they are committed, pursuant to Article XIX of the GATS, to entering into subsequent rounds of trade liberalizing negotiations. The first such Round started in January 2000 and was integrated later into the wider context of the Doha Development Agenda (DDA). The GATS establishes a regulatory framework within which WTO members can undertake and implement commitments for the liberalization on trade in services. The GATS covers measures of Members affecting trade in services. Trade in services is defined in Article I:2 of the GATS as the supply of a service: (1) from the territory of one member into the territory of any other member (cross-border supply); (2) in the territory of one member to a service consumer of any other member (consumption abroad); (3) by a service supplier of one member, through a commercial presence in the territory of any other member (supply through a commercial presence); and (4) by a service supplier of one member, through the presence of natural persons of a member in the territory of any other member (supply through the presence of natural persons).[133]

1.7.4 Agreement on Trade-Related Aspects of Intellectual Property Rights

The WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), negotiated in the 1986-94 Uruguay Round, introduced intellectual property rules into the multilateral trading system for the first time.[134] One of the main objectives of the World Trade Organization (WTO) is to facilitate the world's trade and production. It enforces legally binding multilateral agreements on trade in goods, services, and trade-related aspects of intellectual property rights to manage global trade efficiently. At the end of the Uruguay

[132] General Agreement on Trade in Services published Geneva, July 1986 p. 41; See link https://www.wto.org/English/docs_e/legal_e/gatt47_e.pdf [Accessed: May 3, 2020].
[133] GATT legislation – Article I:2(a)–(d), https://www.wto.org/english/res_e/booksp_e/analytic_index_e/gats_01_e.htm#article1 [Accessed: May 3, 2020].
[134] Understanding the WTO, third edition, published by the World Trade Organization 2003, third edition, p. 42.

Round of the General Agreement on Tariffs and Trade (GATT) in 1994, the Trade Related Intellectual Property Rights (TRIPS) agreement was implemented to regulate standards of Intellectual Property (IP) regulations in WTO member countries. Economic theory suggests that intellectual property rights could either enhance or limit economic growth. However, evidence is emerging that stronger and more certain IPRs could increase economic growth and foster beneficial technical change, thereby improving development prospects.[135] Nevertheless, the significance of these growth effects would be dependent on the circumstances in each country.

However, with the appropriate complementary policies and transparent regulation, IPRs could play an important and positive role in promoting economic growth. There are two central economic objectives of intellectual property protection. Firstly, to promote investments in knowledge creation and business innovation by establishing exclusive rights to use and sell newly developed technologies, goods, and services. Secondly, to promote widespread dissemination of new knowledge by encouraging (or requiring) rights holders to place their inventions and ideas on the market.[136] When there is a lack of intellectual property protection or weak intellectual property rights, firms are not willing to incur costs in research and commercialization activities. In economic terms, weak IPRs create a negative dynamic externality (Fink and Maskus, 2005), and fail to overcome the problems of uncertainty in R&D and risks in competitive appropriation that are inherent in private markets for information.[137]

In an economic context, it is socially efficient to provide wide access to new technologies and products, when they are developed at marginal production costs. IPR rules are important in terms of encouraging creativity and innovation; to transfer technology on commercial terms to business enterprises in developing countries; to protect consumers by controlling the trade of counterfeit goods; and to improve international trade activities.[138] By strengthening IPR regimes, either unilaterally or through adherence to TRIPS agreement, developing countries attempt to attract greater inflow of technology. There are three interdependent channels through which technology is transferred across borders. These channels are international trade in goods, foreign direct investment (FDI) within multinational enterprises, and contractual licensing of technologies and trademarks to unaffiliated firms,

[135] Maskus, K. E. 2000. Intellectual Property Rights and Economic Development. Case Western Reserve Journal of International Law, Vo. 32, p. 472.
[136] Van de Bossche, P. and Zdouc, W. 2013. The Law and Police of the World Trade Organization: text, cases and materials. 3rd edn. Cambridge University Press, p. 50
[137] Fink, C. and E. Maskus. 2005. Why we study intellectual property rights and what we have learned. Oxford University Press, p. 1–3.
[138] Hirimuthugodage, D. 2011. Trade Related Intellectual Property Rights (TRIPS). Asia-Pacific Research and Training Network on Trade Working Paper Series, No. 92, p. 9.

subsidiaries, and joint ventures. Economic theory observes that technology transfers through each channel partly depend on local protection of IPRs, albeit in complex and subtle ways. Furthermore, countries with weak IPRs could be isolated from modern technologies and would be forced to develop technological knowledge from their own resources.

1.7.5 Other Multilateral Agreements on Trade in Goods

In addition to the GATT 1994, Annex 1A to the WTO agreement contains a number of other multilateral agreements on trade in goods. These agreements include: (1) the Agreement on Agriculture, which requires the use of tariffs instead of quotas or other quantitative restrictions, imposes minimum market access requirements and provides for specific rules on domestic support and export subsidies in the agricultural sector; (2) The Agreement on the Application on the Sanitary and Phytosanitary Measures (The SPS Agreement), which regulates the use be WTO members of measures adopted to ensure food safety and protect the life and health of humans, animals and plants from pests and diseases. (3) the Agreement on Textiles and Clothing, which provided for the gradual elimination by 1 January 2005 of quotas on textiles and clothing (and is no longer in force); (4) the Agreement on Technical Barriers to Trade (the TBT agreement) which regulates the use by WTO Members of technical regulations and standards and procedures to test conformity with these regulations and standards; (5) the Agreement on Trade-Related Investment Measures (the TRIMs agreement), which provides that WTO members regulations dealing with foreign investments must respect the obligations in Article III (national treatment obligation) and Article XI (prohibition on quantitative restrictions) of the GATT 1994; (6) the Agreement of Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Anti-Dumping Agreement), which provides for detailed rules on the use of anti-dumping measures; (7) the Agreement of Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (the Customs Valuation Agreement), which sets out in detail the rules to be used by national customs authorities for valuing good for customs purposes; (8) the Agreement on Preshipment Inspection, which regulates activities relating to the verification of the quality, the quantity, the price and the customs classification of goods to be exported; (9) the Agreement on Rules of Origin, which provides for negotiations aimed at the harmonization of non-preferential rules of origin, sets out disciplines to govern the application of these rules of origin, both during and after the negotiation on harmonization, and sets out disciplines applicable to preferential rules of origin; (10) the Agreement on Import Licensing Procedures, which sets out rules on the use of import licensing procedure;

(11) the Agreement on Subsidies and Countervailing Measures (the ASCM agreement), which provides for detailed rules on subsidies and the use of countervailing measures; and last one (12) the Agreement on Safeguards, which provides for detailed rules on the use of safeguard measures and prohibits the use of voluntary export restraints.

Most of these multilateral agreements on trade in goods provide for rules that are more detailed than, and sometimes possible in conflict with, the rules contained in the GATT 1994. The interpretative note to annex 1A addresses the relationship between the GATT 1994 and the other multilateral agreements on trade in goods.

In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and provision on another agreement in annex 1A to the Agreement Establishing the World Trade Organization (referred to in the agreement in Annex 1A as the WTO agreement), the provision of the other agreements shall prevail to the extent of the conflict.[139]

However, it is only where a provision of the GATT and a provision of another multilateral agreement on trade in goods are in conflict that the provision of the latter will prevail. Provisions are in conflict where adherence to the one provision will necessarily lead to a violation of the other provision and the provisions cannot, therefore, be read as complementing each other. While it is undisputed that a conflict exists when one provision requires what another provision prohibits, international lawyers tend to disagree on whether such a conflict may exist where one provision expressly permits what another provision prohibits.

1.8 International Trade: Role of the National Law in International Law

This part of the paper addresses the relationship between international and national law by reference to theoretical debate known as the dualist-monist controversy. The paper also addresses the position and legal impact of WTO law in domestic law and Principle of Good Governance.

It is customary practice to commence any discussions about the relationship between international and national law by reference to theoretical debate known as the dualist-monist controversy. While there are a number of different aspects of both doctrines, they derive their appellations-Dualism and monism, from their respective viewpoint on the question as to whether international law and national law belong to two separate legal orders or the same legal order. Dualist doctrine points to differences between national and international law, such as:

[139] Uruguay round agreement Multilateral Agreements on Trade in Goods, dated October 30 1994. https://www.wto.org/english/docs_e/legal_e/05-anx1a_e.htm [Accessed: May 4, 2020].

the subjects of the former are individuals while the subjects of the latter are states;[140] or, while the sources of the former is the will of a particular state, that of the latter is the common will of states; or the fundamental principle that underpins the national system of law is that legislation is to be obeyed, while that of international law is the principle of *pacta sunt servanda.*

By contrast, monist doctrine regards all law, national or international as part of one single legal structure. This doctrine is put forward either on formalistic logical grounds or from an ethical perspective to assert the supremacy of international law as the best way to project human rights. From the former perspective it is argued that the same definition of law as norms that lay down patterns of behaviour that ought to be followed is applicable to both national and international law, and accordingly they cannot but be part of a unified legal structure.[141] The other monist strand proceeds from distrust for "sovereign" states as vehicles for guaranteeing human rights. International law is believed to be the best guarantor of human rights; and as such it is concerned, like national law, with the conduct and welfare of individuals. Furthermore, the supremacy of international law is asserted even within the municipal sphere, such that the entire monistic legal architecture is imbued with a moral purpose founded upon respect for human rights.

Much of the dualist-monist controversy turns on whether and if so, on what basis one system of law can be said to be superior to or supreme over the other. For dualist the rules of national and international systems of law are so fundamentally different that it is not possible for the rules of one system to have an effect on, or overrule the rules of the other. When national law provides for the application of international law within the national jurisdiction, rules of international law are adopted or transformed as rules of national law: thus rather than being a detraction, it is an example of the supreme authority of national law within the national jurisdiction. Monist, on the other hand, often tend to argue, either on the basis of abstract logic or because of the importance of international guarantees for the protection of human rights, that international law is superior to municipal law.

Fitzmaurice has critiqued the entire dualist-monist controversy, including the debate about supremacy, as being "unreal, artificial and strictly beside the point".[142] He points out that both doctrines assume that there is a common field in which the international and municipal

[140] *Starke*, J. G. 1936. Monism and *Dualism* in the Theory of International Law. British Yearbook of International Law, vol.17, p. 70–74;

[141] Kelsen, H. 2009. General Theory of Law and State. Union NJ: Lawbook Exchange, P. 348.

[142] Fitzmaurice, G. 1957. The general principles of international law considered from the standpoint of the rule of law. Recueil des cours. vol. 92, p. 71.

legal orders operate simultaneously in respect of the same set of relations and transactions. Because in reality there is no such common field, the entire controversy is as sterile as a controversy as to whether English law is superior to French law or vice versa. Just a French law is supreme in France and English law in England, international law is supreme in the international field and national law in the national field. And in neither case does the supremacy result from the content or any inherent character of the law, but rather from the respective fields of operation. While Fitzmaurice emphasizes that his vies is neither dualist nor monist, it can certainly be regarded as a modified dualist position, because on the one hand it rests, like the traditional dualist doctrine, upon the distinctness of the two legal orders, and on the other hand it avoids, unlike the traditional dualist doctrine, the question of supremacy of one system of law over the other.

But in any case, the points raised by Fitzmaurice have much practical significance. Despite their intellectual or ideological appeal, theories indeed are not terribly helpful in understanding the actual process of interaction between national and international law. The tremendous growth in international law during the second half of the twentieth century has increasingly made the relationship between national and international law less clear and more complex than it was during the nineteenth and the first half of the twentieth century, when both the dualist and the monist doctrines were put forward.

The gradual emergence of individuals as subjects of international law in such areas as human rights, investment, international administrative law, or international criminal law has thwarted one of the basic premises of the dualist doctrine. International law has also made considerable inroads into national legal systems in various ways, for instance by stipulation in treaties for states to take effective legislative, administrative or other measures to implement treaty provisions. The WTO treaty contains an entire range of obligations that has far-reaching systemic or constitutional repercussions for the member's domestic legal systems. There have also come into being ever more effective and "powerful" international adjudicative bodies with competence to review whether national legislative, administrative or judicial acts are in complete accord with international obligations. The EU legal order, which in many respects partakes the characteristics of a domestic federal constitutional structure but yet remains an international treaty-based system, provides another instance where the traditional dividing lines between national and international law seem entirely inapt.[143]

Do this and other similar developments mean that the distinction between national and international law has become so vague that the contemporary international legal order is to be

[143] Weiler, J.H.H. 1991. The Transformation of Europ. Yale Law Journal, 100/8, 2403–2483, p. 2419.

described as monist? The answer, of course, must be in the negative. Various reasons can be given for still treating the two legal orders as distinct: the methods of creation of rules of national and international law remains, as underscored in the traditional dualist doctrine, meaningfully different. And it is still difficult to imagine that rules of international law can have effect within the national legal order without the sufferance of the latter.

However, if so included, one can take issue with these generalizations. For instance, the political organs of the European Union have authority to make laws that in some respect can be compared to the law-making power of national institutions. Equally notable are the twin principles of direct effect and supremacy of EU law. According to the former, EU law – both treaty provisions and laws made by the EU organs – become part of the national legal systems of member states without any interventions by national governments or legislatures to adopt of transform those provision or laws as rules of national law. And according to the letter, EU law takes precedence over both prior and subsequent national law. But, again, with respect to the legislative power of the EU organs, it is of course the case that such power is delegated to those organs by the EU member states themselves. The principles of direct effect and supremacy mean that treaty provisions may be used to make claims before domestic courts and override domestic law. Probably the best-known examples are Case 26/62, Van Gend en Loos v. Nederlandse Admnistratie der Belastingen and Case 6/64, Costa v. ENEL ECR 585.[144]

The important sources of national law arranged in the order of their juridical binding force are:

1. Statutes;
2. Judicial precedents;
3. Opinions of experts;
4. Customs;
5. Ideas of justice, reason, or expediency.[145]

The last three of these sources are in themselves indefinite, and courts will generally apply international law, in appropriate cases, where resort must be made to such source. In all states international law is deemed to be incorporated in such sources of law. The opinions of experts include the opinions of text-writers on international law. International law, itself founded on custom, is the law applied when custom is resorted to in determining a case

[144] Case 26/62, Van Gend en Loos v. Nederlandse Admnistratie der Belastingen [1963] ECR 1; and Case 6/64, Costa v. ENEL [1964] ECR 585 (these are the two seminal cases or direct effect and supremacy, respectively). The judgments of the ECJ in both of these cases, as well as other leading cases on the subject, are reproduced in Oppenheimer 1994.

[145] Weatherill, S. and Beaumont, P. 1999. EU Law. 3rd edn. Penguin UK chs. 2–5.

involving international elements. So also, rather than appeal to unaided reason, judges will seldom refuse to lean on the authority of a rule of international law, if such exists, applicable to the case in hand. In Civil Law countries judicial precedents have little more weight than expert opinions and will seldom in themselves stand in the way of a judicial application of international law.[146]

The author argues, that the WTO efficiency and legitimacy depends on the relations it has with the norms of other legal systems and on the nature and quality of its relationships with other international organizations. The WTO's treaty provisions and their interpretation confirms the absence of any hierarchy between WTO norms and the norms developed in other forums i.e. WTO norms do not supersede other international norms. In reality, the WTO with its content recognizes that trade is not the only policy consideration that Members can favour. The WTO implies other exceptional provisions, which besides trade, serve other objectives too, under the umbrella of other organizations.

The WTO is in cohabitation with other norms of international law and with absent protectionism, WTO restrictions based on non-WTO norms will trump WTO norms on market access, thus expanding coherence between systems of norms or legal order. Moreover, author believes that in leaving Members with the necessary policy space to favour non-WTO concerns, the WTO also recognizes the specialization, expertise and importance of other international organizations.

Finally, the author concludes that, despite the grouping of states into dualist and monist states and the fact that domestic law largely determines the entire process of formation and functioning of international law, WTO practice shows that the norms of international treaties are observed and the legal order is not subject to significant changes. However, given the current globalization, this requires a proper legal analysis.

1.8.1 National Law in WTO law and International Obligations

We may observe this issue firstly, from the point of view of international law, which shapes the prerogative of WTO law. And secondly, as the domestic point of view in the EU law. The relationship of WTO law and domestic law (including EU law) is in full line with the principles of general public international law.[147] There are two aspects of the relationship between WTO law and national law that need to be examined; first, the place of national law in

[146] Gray, J. C. 1909. Nature and Sources of the Law. New York: Columbia University Press, p. 110.
[147] WTO Law, Article XVI:4, April 1994, http://www.wto.org/english/tratop_e/dispu_e/repertory_e/w4_e.htm [Accessed: May 4, 2020].

WTO law; and secondly, the place of WTO law in the domestic legal order. With regard to the place of national law in WTO law, Article XVI:4 of the WTO Agreement states: 'Each member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements'.[148] It is a generally rule of international law, reflected in Article 27 of the Vienna Convention, that: 'A party may not invoke the provisions of its internal law as justification for its failure to perform treaty'.[149] With respect to the role of WTO law in national legal order, it should first be observed that, where a provision of national law allows different interpretations, this provision should, whenever possible, be interpreted in a manner that avoids any conflict with WTO law. In the US, the EU and elsewhere, national courts have adopted this doctrine of treaty-consistent interpretation. The ECJ stated in 1996 in Commission v. Germany (international Dairy Arrangement) with regard to the GATT 1947: 'When the wording of secondary EU legislation is open to more than one interpretation, preference should be given as far as possible to the interpretation which renders the provision consistent with the treaty. Similarly, the primacy of international agreements concluded by the Community over the provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner consistent with those agreements'.[150]

The ECJ confirmed the doctrine of treaty-consistent interpretation of national EU law with regard to the WTO Agreement in its judgments in Hermes, (1998) and Schieving-Nijstad (2001).[151] In many cases, however, it will not be possible to avoid a conflict between a provision of national law and a WTO law provision through treaty-consistent interpretation. First of all, it is the general public law, which interferes with the relationship of WTO law and domestic, eventually EU law. The principle of *pacta sunt servanda* is applied and noncompliance actions of any state shall be invoked. From the point of view of international law, the relationship is an easy one: the international legal order necessarily prevails over domestic law. This is well established, in all accounts. Primacy is a matter of logic as international law can only assume

[148] Vienna convention article 27 www.oas.org/legal/english/docs/Vienna%20Convention%20Treaties.htm entry into force 27 January 1980. [Accessed: May 4, 2020].

[149] Judgment of the court of 10 September 1996, Commission of the European Communities v. Federal republic of Germany (International Dairy Arrangement), Case C-61/94, [1996] ECR I-3989, para.52.

[150] Judgment of the court 10 September 2001., Schieving-Nijstad vof and others v. Robert Groenoveld, case C-89/99, [2001] ECR I-5851; and Judgment of the Court of 15 June 1998, Hermes International and FHT Marketing Choice, Case 53/96, [1998] ECR I-360

[151] Cottier T., Oesch, M. 2005. International Trade Regulation: Law and Policy in the WTO, the European Union and Switzerland: Cases, Materials and Comments. *Bern: Staempfli Publisher Ltd.* p. 197.

its role of stabilizing a global order if it supersedes particular and logical rules.[152] There are no doubts that from WTO law perspective with regard to WTO Agreement,[153] WTO legal system shall prevail over domestic law. From the perspective of EU law, the EU Treaty is essential. Article 300 (7) says that Agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States. According to the practice of ECJ, to the extent that international agreements have been concluded by the Community in its own competence, they became an integral part of EU law.[154] The WTO agreements are so called mixed agreements and they do not belong exclusively into the competence of the EU, but they belong into the competence both of the Community and also into competence of member state. Therefore, also the member state is involved in the implementation of such agreements and WTO law shall be concerned as an international agreement within each member state's legal order. WTO law is an integral part of international law and when its relationship with national law is examined, two things need to be asked: the place of national law in WTO law and the place of WTO law in the domestic legal order.[155] A position of WTO law in hierarchy of EU law is between primary and secondary law, when induced by the Union in its own competence. Therefore, WTO law shall be taken in account by Union authorities in the creation and interpretation of secondary law, as it is consequently endowed with the power to derogate national law. At last both EU and its member states are bound in their own rights, from the point of view of international law.

From the point of view of international obligations, international regulation of this matter has a number of different dimensions: first, it is a well-established rule, supported by a range of judicial and arbitral decisions so that in order to justify violations of international obligations, a state cannot refer to provision in its construction or its laws. With respect to treaties, these rules are also provided for in Article 27 of the Vienna Convention on the Law of Treaties (VCLT), which lays down that provision of national law may not be invoked as justification for failure to perform obligations imposed by a treaty.[156] Thus, a state that has

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[152] Cottier, T. 2002. "A Theory of Direct Effect in Global Law", in Von Bogdany, Petros C. Mavroidis and Yves Meny, eds. European Integration and International Coordination, Studies in Transnational Economic Law. The Hague, London, New York: Kluwer Law International, p. 102.

[153] Article XVI, par 4 requires unequivocally that each member stall ensure the conformity of its laws, regulations and administrative procedures with its obligations under the WTO agreements

[154] Judgement C-181/73, R. & V. Haegeman v. Belgian State, 1974. Available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61973CJ0181 [Accessed: May 5, 2020].

[155] Van den Bossche, P. 2005. The Law and Policy of the World Trade Organization: text, cases and materials. 1st edn. Cambridge University Press, pp. 65–115.

[156] Convention de Vienne sur le droit des traités (avec annexe). Conclue à Vienne le 23 mai 1969, entry into force 27 January 1980 https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf [Accessed: May 5, 2020].

breached the obligation of international law cannot plead that it acted lawfully under its domestic law or that its domestic law required the breach or that it was prevented from acting consistently with the international obligation because of the lack of or deficiencies in its own legislative provision. The rationale for this rule is self-evident: it prevents evasion of international obligation by means of domestic legislations and as such, it is a *sine qua non* for the effectiveness of international law.

However, the negative import of this rule is readily apparent. That is to say, it simply forbids something, i.e. opposing national law as a legal bar to the fulfilment of international obligation, and does not require a state to take any positive steps to implement international obligations in national laws. Unlike the issue of non-opposability of national laws, with respect to the issue of implementation there is no unequivocal international practice, and publicists also seem to hold divergent views. While many contemporary international treaties contain express provisions in this regard, the perplexing question is: what are the requirements for implementation in the absence of express provisions and as a matter of general (customary) international law? As regards treaty obligations, article 26 and 27 the VCLT[157] can be seen as the codification of the general international law requirements. In my opinion, these two articles hardly speak of any positive implementation measures that states are obliged to take.

As regards the means of implementation, it is clear that general international law gives each state complete freedom: that is to say, it does not regulate the manner in which a state may choose to put itself domestically in the position to meet its international obligations. Thus, each state can determine in accordance with its own constitutional practice whether to give direct domestic law effect to international rules or whether to transform, adopt or incorporate those rules into domestic law by statutes or by some other (e.ge judicial or administrative) means. There is a related issue of whether a state must have laws that are compatible with international obligations, or conversely, must not have laws that are not so compatible, and with respect to this issue, the situation is far from clear. In the exchange of Greek and Turkish population case, the Permanent Court of International Justice stated that a state which has contracted valid international obligations is bound to make in its legislation such modification as may be necessary to ensure the fulfilment of the obligations undertaken. First, although it is eighty years old, the dictum has hardly been judicially reiterated. Second, on this issue publicists seem to hold widely divergent views. Some have argued apparently on the basis of the dictum of the PCIJ that states have a general duty to bring national laws into conformity with international obligations. The view that, there is no such general duty seems more plausible for

[157] Vienna Convention on the Law on Treaties, Article 26, article 27, entry into force 27 January 1980.

a number of reasons. Many international treaties explicitly require the contraction states to adopt legislative measures to implement specified treaty obligations.

The fact, that with respect to some obligations, the members of the international community take care to provide expressly for a duty to enact implementing legislation lends support to the point of view that a general duty to this effect may not exist.

1.8.2 Principle of Good Governance

Principle of good governance needs to be understood from a number a different perspective. The author assumes, that first a key object of different systemic obligations to which references have been made earlier is to promote good governance within national legal systems. In this context it is worth recalling once again that such obligations include those requiring transparency and fairness in the adaptation, implementation and administration of domestic law and regulations or those obligating members to make available domestic legal procedures for the review, modification and reversal of actions of domestic administrative authorities and for the enforcement of private rights by individuals.[158]

Second, various substantive obligations also promote good governance in important ways. To note but a few examples, the non-discrimination principles of most-favoured nation (MFN) and national treatment (this is principle which lie at the heart of the substantive WTO obligations) promote good governance by:

1. guaranteeing some protection for the commercial interest of foreign states, who have little or no representation in the political life of a state enacting or implementing a trade or trade related law or measure;
2. Ensuring that national trade policy is not unjustifiable biased in favour of one domestic constituency at the expense of another domestic constituency.

The requirements under different WTO agreements that health protection, environmental, sanitary and phytosanitary, and technical laws and measures should not be arbitrary, discriminatory or more trade-restrictive than necessary promote good governance by outlawing arbitrariness, unjustifiable discrimination and disproportionality. [159]

The agreement on government procurement is an instance of a "good governance-spirited" text that seeks to increase accountability and prevent corruption in public procurement

[158] Bhuiyan, S. 2007. National law in WTO law: Effectiveness and Good Governance in the World Trade Organization. Cambridge University Press, Chapter 3, sections 4–6.
[159] GATT Legislation 1994, Article XX, Article XIV.

through its elaborate provisions on non-discrimination, bidding procedures, transparency, etc.[160]

Finally, WTO dispute settlement, which often operates as a further layer of judicial review of national laws and administrative measures, has important good governance ramifications. Genuine access to fair and impartial judicial review is widely considered to be an important element in ensuring good governance, because it acts as a check on legislative and administrative bodies. WTO dispute settlement organs review of the legality, i.e. WTO-compatibility, of national laws and administrative measures also acts as a check on national legislation and executives.

[160] McCrudden, C. and Gross, S. G. 2006. WTO Government Procurement Rules and the Local Dynamics of Procurement Policies: A Malaysian Case Study. European Journal of International Law 17(1), p. 16.

2 Developing Country Status in WTO

2.1 Introduction

The following chapter examines developing country status in WTO. Author tries to determine the meaning of "developing country" under the GATT as well as under the WTO. It explores the categorization of a 'developing country' by the World Bank, United Nations and International Monetary Fund (IMF) trying to identify clear principles for ranking countries as developing. *The author suggests application of more consultations and mediation at DSU for developing countries as it would have rather positive practical significance at DSB.* This Chapter also includes a number of the WTO articles that create participating role in WTO proceedings possibly leading to accession under the WTO. The presented chapter also focuses on the relationship between political stability and trade agreements, analyses the empirical model of political stabilization in WTO member states that affects international trade. The author considers three approaches to domestic political economy of trade agreements. Special focus is set on national security, which safeguards simplicity, stability and neutrality of trade agreements.

There are various concessions granted to developing countries under the GATT/WTO, particularly in their dispute settlement systems. Therefore, the meaning of 'developing country' has to be formulated clearly by the GATT/WTO body so that the status as a developing country is given to those countries that qualify for it, but not to the countries that seek the status only for benefiting from it. Therefore, it is utterly significant to classify, demarcate and identify the meaning of a 'developing country' in theory by considering the opinions of scholars of law, politics and economics and in practice by considering the operation of organizations such as GATT or/and WTO.

The majority of WTO members are developing countries. They are grouped as "developing countries" and "least developing country".[161] In this part, the term "developing country" will be used in the legal sense as it is used in the WTO Agreement. However, in the WTO, there is no exact definition of term "developing country".[162] Defining a country as developing depends on the country declaring itself to be so. Therefore, it is the WTO members that can announce themselves either as "developed" or "developing" countries.[163] Nevertheless, other members can challenge the decision of a member to be a "developing"

[161] See, WTO Website available at https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm [Accessed: July 6, 2020].
[162] *Ibid.*
[163] Henrik, H. 1999. Remedies in the WTO Dispute Settlement Understanding and Developing Country Interests. Institute for International Economic Studies, Stockholm University, p. 20.

country and can also challenge such a member for using provisions available to developing countries.

Developing countries are about two thirds of the 164 WTO members.[164] Due to their number, these countries play an important and increasingly active role in the WTO, and they increasingly view trade as a vital and significant tool in their development efforts. [165] Consequently, they have varied increasingly and significantly in terms of the size of their economies.[166] In addition, they are rising as a significant trade in the global economy, and "they are becoming more important in the global economy".[167] This grants the developing countries an important position in the WTO. The participation of the developing countries in the trading system witnessed clear evolution under WTO compared to the GATT system. In 1995, when the Uruguay Round was completed, "developing countries had assumed a much higher level of commitments within the system than ever before".[168] This trend can be attributed to the fact that some of the developing countries had rapid growth and succeeded in varying their economies.[169] This made them better equipped to be more participative in the WTO trading system and enhanced their interests in the WTO negotiations.

Due to the fact that the majority of WTO members are developing countries, the major focus of the WTO is to make sure that these developing countries are able to benefit from joining in international trade and from the multilateral trading system. Therefore, the Agreement establishing the WTO recognized that "there is need for positive efforts designed to ensure that developing countries, and especially least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development".[170] Accordingly, the WTO deals with the special needs of developing countries in the DSU.[171] The DSU contains several provisions that seek to improve the possibilities for developing countries to take advantage of the WTO system.[172] Thus, under

[164] *See*, WTO Website available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/dev1_e.htm [Accessed: June 17, 2020].
[165] *Ibid.*
[166] Peters, M. and Kumar, M. 2014. Introspect "special and differential treatment" given to developing countries under the WTO dispute settlement system. *International Arbitration Law Review*, p. 2.
[167] *See*, WTO Website available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/dev1_e.htm [Accessed: June 21, 2020].
[168] Peters, M. and Kumar, M. 2014. Introspect "special and differential treatment" given to developing countries under the WTO dispute settlement system. *International Arbitration Law Review*, p. 6.
[169] Particularly in Asia and Latin America.
[170] *See*, WTO Website available at https://www.wto.org/english/thewto_e/coher_e/mdg_e/development_e.htm [Accessed: July 7, 2020].
[171] *See*, WTO Website available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/dev1_e.htm [Accessed: July 7, 2020].
[172] Peters, M. and Kumar, M. 2014. Introspect "special and differential treatment" given to developing countries under the WTO dispute settlement system. *International Arbitration Law Review*, p. 2.

the current DSU rules, there are some special provisions which developing countries can benefit from.

Since the WTO has no definition of a 'developing country', the standing of 'developing-country member' was selected by the countries themselves. Therefore, a member has to state whether it is a 'developing' or a 'developed' country. As a WTO member, all developing-countries can receive WTO technical assistance and they can also benefit from special and differential treatment under some of the WTO agreements. [173]

Developing countries are playing a significant role in the WTO, not only because of their WTO membership but also due to the fact that they have rising importance in the global economy.[174] In addition, they have been significantly increasing the size of their economies and they often "act as spokespersons for other developing countries".[175] For example, China, Brazil and India without doubt are powerful, active and significant members in the WTO.[176]

The least-developed WTO members are designated as least-developed by the United Nations. On 7 July 2020, it was observed that there were 36 least-developed members among the developing-country members.[177]

According to the author, clarifying this issue is essential for the purposes of the present study. Below the author presents the categorization of developing countries under the GATT.

2.2 Categorization of Developing Countries

2.2.1 Categorization of developing countries under the GATT

The GATT 1994 was not trying to classify or explain the meaning of 'developing country' whereas the GATT 1947 did provide an explanation of 'developing country'.[178] Article XVIII of GATT 1947 grants certain privileges to least developed and developing countries. Developing countries were referred to in the statement:

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[173] Any member can challenge the decision of a member to use 'special and differential treatment provisions' which are available to developing countries. Note also that in the context of the national generalized systems of preferences (GSP), adopted under the enabling clause of the GATT 1994, it is the preference-giving member that decides which countries qualify for the preferential tariff treatment.

[174] Matsushita, M., Schoenbaum, T. and Mavroidis, P. 2003. The World Trade Organization: Law, Practice and Policy. 3rd edn. Oxford University Press, Oxford, p. 763.

[175] *Ibid.*

[176] *Ibid.*

[177] *See*, WTO Website available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm [Accessed: July 7, 2020].

[178] Matsushita *et al*. 2003; *see also* Jiang, M. 2002. Developing Countries and the GATT/WTO Dispute Settlement Mechanism: Case Study of China. LLM dissertation, University of Essex.

The contracting parties recognize that the attainment of the objectives of this Agreement will be facilitated by the progressive development of their economies, particularly of those contracting parties the economies of which can only support low standards of living and are in the early stages of development.[179]

Whereas the statement is written in indistinct terms, an attempt was created to further illuminate its meaning in an interpretative note to the provision. It states that:

1. When they consider whether the economy of a contracting party 'can only support low standards of living', the Contracting Parties shall take into consideration the normal position of that economy and shall not base their determination on exceptional circumstances such as those which may result from the temporary existence of exceptionally favourable conditions for the staple export product or products of such contracting party.
2. The phrase 'in the early stages of development' is not meant to apply only to contracting parties which have just started their economic development, but also to contracting parties the economies of which are undergoing a process of industrialization to correct an excessive dependence on primary production.[180]

In addition, the meaning of the term 'developing country' was explained in the GATT Agreement on Subsidies and Countervailing Measures as "a country whose GNP per capita has reached $1,000 per annum based on the most recent data from the World Bank on GNP per capita".[181]

The author clarifies that the GATT was trying to solve the issue of identifying 'developing countries' under the 'self-declare' method, but that was not enough. The term required a simpler and clearer definition and an identifiable set of criteria based on a country's involvement in the world trade context. The integration of developing countries into the GATT or in the multilateral trading system is most significant for their economic development and for global trade expansion. Therefore, the next part will discuss the categorization of developing countries under the WTO.

[179] *See*, GATT Agreement 1947, Article XVIII:1.
[180] Jiang 2002. *See also*, the GATT Agreement 1947, Article XVIII: 1 and 4.
[181] Gross National Product (GNP); Matsushita *et al*. 2003; *see also* Jiang 2002.

2.2.2 Categorization of Developing Countries Under the WTO

Developing countries make up the majority of the WTO membership. Under the WTO, they are known as 'developing countries' and 'least developed countries'. Today, the WTO does not state specific definitions of the terms 'developing countries' and 'least developed countries'. The author thinks that the organization should formulate on this issue.

The WTO states that "[t]here are no WTO definitions of 'developed' and 'developing' countries".[182] Members announce for themselves whether they are 'developed' or 'developing' countries. However, other "members can challenge the decision of a member to make use of provisions available to developing countries".[183] It may be supposed that the WTO has not created any criteria because the members could not agree on a definition and the organization does not want to be criticized by scholars of law, economic or even politics. Also, the WTO might be far away from making distinctions between developing and developed countries, because the rigid definition of "developing country" might deter some states joining the WTO as well as create disadvantage for some countries that want to benefit from the WTO provisions.

In November 1999, the Ministerial Conference of the WTO in Seattle, Washington, created a step forward in the identification process for developing countries via the Advisory Centre on WTO Law.[184] In general, member countries are classified as developed countries, economies in transition, or least developed countries.[185] The Advisory Centre classifies developing countries by their share of world trade and per capita income for the last three years based on the data of World Bank statistics. Therefore, developing countries are divided into three categories: "(1) Category A: more than 1.5 per cent of world trade or High Income; (2) Category B: more than 0.15 per cent but less than 1.5 per cent of world trade; and (3) Category C: less than 0.15 per cent of world trade".[186] While there is no classification for least developed countries, it may be assumed that they might have just a little or none of the world's trade. The Advisory Centre's criteria might be considered best suited for identifying developing countries. This may be because the Advisory Centre is detached from the WTO and has its own legal personality.[187]

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[182] *See*, World Trade Organization 2020, *WTO Development. Who are the developing countries in the WTO?* Available from: https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm [viewed, July 17, 2020].
[183] *Ibid.*
[184] Matsushita *et al*. 2003; *see also* Jiang 2002.
[185] *Ibid.*
[186] Jiang 2002.
[187] Matsushita *et al*. 2003; *see also* Jiang 2002.

As the draft agreement that established the World Trade Organization states, there is a need for positive efforts designed to ensure that developing countries especially the least developed among them, secure a share in the growth of international trade commensurate with the needs of their economic development.[188]

In addition, there are many provisions in the WTO agreement granting developing countries 'special and differential treatment'; it is also significant for them to achieve the goal of securing special and differential treatment.[189] The term 'developing countries' is not clearly defined under the WTO agreements nor the GATT regime; the classification is given on "an *ad hoc* basis and primarily through self-selection".[190] 'Least-developed' countries were not mentioned by the WTO Agreement but their definition has been based on how the United Nations identified them.[191]

Indeed, one might demand an answer to the question 'what countries are developing countries?' particularly under the GATT/WTO.[192] The vagueness of the notion of 'developing countries' was argued in the WTO in negotiations about the accession of China, which is considered a developing country.[193] It was suggested that the term 'developing countries' required clear criteria to describe and identify the status.[194] It is thought that the reasons for vagueness of the term 'developing countries' might be because the term is used for different aims in many international contexts and there is a lack of international consensus on the term.[195]

Since the existing model can no longer meet the challenges, the author recommends that the WTO provide its definition through objective criteria. *According to the author* these objective criteria should be based on the classification proposed by the World Bank, United Nations and International Monetary Fund. The criteria may also include indicators of economic performance, business development, rule of law, and political stability, as important factors in terms of ease of trade, stability and neutrality. With such an approach the developing countries would benefit more from the Special and Differential treatment provisions when dealing with the WTO and its Members, specifically in the DSU.

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[188] Jiang 2002.
[189] Matsushita *et al*. 2003; *see also* Jiang 2002.
[190] Matsushita *et al*. 2003.
[191] The UN Committee for Development Planning periodically makes this determination by reference to four criteria: per capita income, population size, quality-of-life index, and economic diversification. *See*, UN (1994) *Report on the Twenty-Ninth Session, 12–14 January 1994*, Committee for Development Planning, Economic and Social Council Official Records, 1994, Supplement No.2, New York: United Nations Publications, E/1994/22. (1994) at 64, 67.
[192] Jiang 2002; *see also* Kipel, A. A., 1996. 'Special and Differential Treatment for Developing Countries' in Terence P. Stewart (ed.).
[193] Jiang 2002.
[194] *Ibid.*
[195] *Ibid.*

2.3. Analysis of the Concept of Developing Countries

The IMF[196] classified all nations of the former Soviet Union (USSR) in Central Asia (Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan) and Mongolia as well as all nations of Eastern Europe including Central European countries which still belong to the UN institutional 'Eastern Europe Group' as countries not classified as either developed or developing regions. They were classified as 'countries in transition'. The IMF has developed a flexible system for classifying nations. The system divides the world into advanced economies and emerging markets. Under the classification, the developing nation economies are defined based on "(1) per capita income level, (2) export diversification, and (3) degree of integration into the global financial system".[197]

Moreover, any nation with a low or medium standard of living may be considered a developing country.[198] Also, any nation may be considered, or categorized, as a developing country or a newly industrialized country[199] if it has not obtained an important degree of industrialization relative to its population, define as a country in development and, if it creates an economy that is more advanced than other developing countries but it has not yet demonstrated fully the signs of a developed country.[200] In general, the concept of development may be based on the measure of a nation's statistical indexes, for example, gross domestic product per capita, rate of literacy, life expectancy, etc.

It thought that the term 'developing countries' may be used when discussing the intent of those who utilize these terms. In fact, some international organisations have started to use the term 'less economically developed country' (LEDCs) for developing countries as well as

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[196] The HDI has been developed by the UN to determine the level of human development for any countries when the data is available and correct. The Human Development index is a measure of economic development and economic welfare. The Human Development Index examines three important criteria of economic development (life expectancy, education and income levels). *See*, Human Development Index (HDI) website, available at http://hdr.undp. org/en/content/human-development-index-hdi [viewed 11 July 2020]; The IMF describes itself as an organization of 189 countries, working to foster global monetary cooperation, secure financial stability, facilitate international trade, promote high employment and sustainable economic growth, and reduce poverty around the world.

[197] International Monetary Fund, 2020, *World Economic Outlook-Frequently Asked Questions*. *Available from*: http://www.imf.org/external/pubs/ft/weo/faq.htm [viewed May 11, 2020].

[198] There is a strong correlation between low income and high population growth. *See* United Nations, 2020, *United Nations Statistics Division-Standard Country and Area Codes Classifications (M49)*. *Available from:* http://unstats.un.org/unsd/methods/m49/m49regin.htm [viewed July 14, 2020].

[199] See Investopedia (2019), Definition of Newly Industrialized Country. *Available from*: http://www.investopedia.com/terms/n/newly-industrialized-country.asp#axzz2BBxvXFgo [viewed July 16, 2020].

[200] Also, the developing countries may be considered to be nations that allow all of their population to enjoy a free and healthy life in a safe environment. It has been suggested that gross national happiness, measuring the actual satisfaction of a population, is more important than how money oriented a country is for classification purposes. *See* United Nations, 2013, *United Nations Statistics Division-Standard Country and Area Codes Classifications (M49)*. *Available from:* http://unstats.un.org/unsd/methods/m49/m49regin.htm [viewed July 17, 2020].

for the poorest subset of developing countries in order to moderate the euphemistic aspect of the term 'developing'. There are some other terms used for developing countries such as 'underdeveloped nations', 'non-industrialized nations', 'less developed countries' (LDCs), and 'Third World nations', while higher level countries may be called 'developed countries', 'industrialized nations', 'most economically developed countries' (MEDCs), and 'First World nations'.[201]

In general, there are some criticisms of the term 'developing countries'.[202] In author's opinion, the term may mean the inferiority of a 'developing country', which might be adverse to the nation when contrasted to a 'developed country'. The developed countries have higher-class economies and expect the 'developing country' to follow them, as a 'model economy', in order to become a 'developed country'. Normally, the term may be considered as a term suggesting the mobility of the economy, while it sometimes appears as a method that does not show increasing economic development of any countries. In this case, the term may be considered as a euphemism. However, it may stand for homogeneity among countries that have similar economies. In contrast, the term 'developed country' will not be the correct term because it implies a lack of continuing economic development and/or growth in developed countries, which is not correct at all.

A country with an economy in transition and deep, extensive poverty may be considered a developing country. Such countries are importers rather than developers of innovations in technology and science. The GATT has adopted an enabling clause and established the policy of special and preferential treatment for developing countries.[203] The Uruguay Round has continued this policy of special and preferential treatment for developing countries. In the WTO, there are many agreements that include special provisions or exceptions, such as longer phase-in periods, for developing countries. For example, the agreements on textiles and agriculture apply policies long sought by developing countries.

2.3.1 Special and Differential Treatment Provisions for the Developing Countries

The DSU included some provisions concerned with developing countries' special needs. These provisions are referred to as Special and Differential Treatment (S&D) provisions and are recognised as the "integral point of WTO agreements".[204]

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[201] *See*, Jiang 2002; *see also* Investopedia, Definition of Newly Industrialized Country.
[202] *Ibid.*
[203] *See* GATT Agreement 1947, at Article XVIII, *Available* https://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm [viewed Jyly 20, 2020].
[204] Peters, M. and Kumar, M. 2014. Introspect "special and differential treatment" given to developing countries under the WTO dispute settlement system. International Arbitration Law Review, p. 9.

They give developing countries special rights in all stages of the DSB process.[205]

The Uruguay Round emphasised the basic conceptual premises related to Special and Differential Treatment which are:

1. Developing countries are intrinsically disadvantaged in their participation in International Trade.
2. Any Multilateral Agreement must take this into account when specifying a developing country's rights and obligations.
3. Trade policies that maximise sustainable development in one country may not necessarily do so in another.
4. It is in the interest of developed countries to assist developing countries in integration into the multilateral trading system.[206]

Therefore, the conclusion of the Uruguay Round can be divided into two main focus areas.[207] The first area focuses on the developed countries' need to take positive action to enhance their participation in the WTO that falls into the following three categories:

(i) safeguarding the interests of developing countries;

(ii) increasing trade opportunities; and

(iii) providing technical assistance to developing countries.[208]

The second area focuses on giving developing countries additional flexibility in their schedule of commitment to WTO obligations that fall into the following three categories:

(a) flexibility commitments;

(b) transitional time periods and;

(c) differential and more favourable treatment of the least-developed countries (LDCs).[209]

Therefore, DSU contains the substantive rules governing special and differential treatment for developing and least-developed country members. It recognizes the special situation of developing and least-developed country members by dedicating additional privileged procedures and legal assistance to them.[210] Moreover, it encourages WTO members

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[205] See WTO Website available at https://www.wto.org/english/tratop_e/devel_e/dev_special_ differential_provisions_e.htm [Accessed: July, 2020].

[206] *Ibid*. p. 9. *See also*, Ezeani, E. C., (2010). *'The WTO and Its Development Obligation: Prospects for Global Trade'.* (Anthem Press: *Wimbledon Publishing Company*, London).

[207] Novel, A. S. and Paugam, J. M. 2006. Why and how differentiate developing countries in the WTO? Theoretical options and negotiating solutions. Reviving the Special and Differential Treatment of Developing Countries in International Trade. Paris: IFRI, 151–180.

[208] *Ibid*.

[209] *Ibid.*

[210] Yerxa R. and Wilson, B. 2005. Key Issues in WTO Dispute Settlement: The First Ten Years. Cambridge University Press. pp. 32–45.

to give special consideration to the situation of developing and least-developed country Members.

Whereas some of these provisions are applied very often, others have not yet had much practical relevance. Furthermore, a number of these rules are not very specific or definite.[211] Regarding the consultation stage of the DSB, Article 4.10 of the DSU provides that during consultations, "Members should give special attention to developing country members' particular problems and interests". Indeed, the consultation stage of the DSB is mandatory and it supposed to grant the disputing parties an opportunity to discuss their views, giving this chance particularly to the defending party that needs to explain its measure subjected to the dispute. However, the DSU does not indicate as to how this provision is implemented.[212]
In this part of the study, the role of developed countries in the DSB has a recommendatory nature, therefore, the author below analyses the developing country experience with enforcement of DSU rulings and presents a proposal.

2.4 Developing Country Experience with Enforcement of DSU Rulings

There has been no occasion in which developed countries considered retaliation or cross- retaliation against the developing countries, because developing countries always implement the rulings and recommendations of the DSB.[213] Moral pressure was considered to be a greater factor in getting governments to implement rulings and recommendations, rather than coercive legal action.[214]

On the other hand, it has been considered that the major factor for securing implementation of DSB rulings and recommendations in dispute is recourse to retaliation in the DSU.[215] It has been observed that developing countries have had success in implementing DSB rulings and recommendation without recourse to retaliation.[216] However, they had authorisation to retaliate in five cases: Ecuador in *EC – Bananas III*; Brazil, Chile, India, Indonesia, Korea and Thailand in *US – Offset Act (DS 217)*; Brazil in *US – Upland Cotton (DS 267)*; Brazil in *Canada – Aircraft Credits and Guarantees (DS 222)*; and Mexico in *US – Offset Act (DS 234)*.

[211] *Ibid.*
[212] Babu, R. R. 2003. Special and Differential Treatment under WTO Agreements: A Study. *Asian-African Legal Consultative Organization*, p. 70. available at https://papers.ssrn.com/sol3/papers.cfm?abstract_ id=887860, [Accessed: July 20, 2020].
[213] Hoda, A.2012. Dispute Settlement in the WTO, Developing Countries and India. ICRIER Policy Series, N. 15. p. 13.
[214] *Ibid*. The retaliation and cross-retaliation are considered to be good tools for developing countries, but Members were reluctant to use it.
[215] Hoda, A. 2012. Dispute Settlement in the WTO, Developing Countries and India. ICRIER Policy Series, N.15. pp. 13–14.
[216] *Ibid*.

In *Bananas III*, Ecuador had not gone ahead with retaliation.[217] In *US Offset Act (DS217)*, Brazil, Chile, India, Indonesia and Korea did not benefit from the authorisation whereas "three developed countries that were co-complainants viz., the EC, Japan and Australia did".[218] In *US – Upland Cotton* and *Canada – Aircraft Credits and Guarantees* cases, Brazil did not use its authorisation to retaliate.[219] In *US – Offset Act (DS 234),* Mexico and Canada (Canada was a co-complainant) applied the authorised measure.[220]

In other cases, developing countries took the step for being authorised to retaliate but they did not follow up.[221] In *US – Oil Country Tubular Goods Sunset Reviews* (DS 268), Argentina requested authorisation but did not continue, and as a result of that "the US announced withdrawal of the WTO inconsistent measure, bringing itself into full compliance with the recommendations of the DSB".[222] In *US – Gambling,* Antigua and Barbuda received the recommendation of the arbitrators for retaliation, but did not go to the next step of applying for the DSB to authorise the retaliation.

It has been argued that the biggest factor for implementation of rulings and recommendations is the moral pressure placed on governments to be seen as abiding by their international obligations, rather than coercive legal action[516]. However, it has been observed that in the *EC – Bananas* and *US – Offset Act* cases the developed country co-complainants have caused pain by the retaliation.[223]

In particular, Ecuador and Antigua, in the *EC – Bananas III* case *(Ecuador)* and In the *US – Gambling* case *(Antigua)*, were not able to cause any economic or political pain by retaliation against the US and the EC to secure compliance.[224] However, in the large developing countries, such as Brazil, the position could be different. Therefore, Brazil's position can cause pain to the US and Canada.[225] In the two cases, Brazil obtained authorisation to go ahead with the retaliation. However, Brazil has baulked at proceeding against Canada.[226]Also, Brazil signed an interim 'Framework Agreement' with the US and "the latter has promised to provide annual payments of US 147.3 million for the establishment of a technical fund for Brazilian farmers"[227] and "payments are to continue until the US reforms its subsidy programme under

[217] *Ibid*.
[218] *Ibid*.
[219] *Ibid*.
[220] *Ibid*.
[221] *Ibid*.
[222] *Ibid*.
[223] *Ibid.*
[224] *Ibid.*
[225] *Ibid.*
[226] *Ibid.*
[227] *Ibid.*

the 2012 farm bill".[228] The threat of retaliation by a large developing country such as Brazil can work. However, moral pressure does not always work for developing countries: see the *EC – Bananas III* case, for example.

It would be better to ensure compliance to the DSB rulings by means of retaliation. A DSB legal ruling with more using retaliation rules can be an effective tool for a developing country seeking to reverse a legal violation by a larger country.[229]

Developing countries often are weak and lack economic and political tools to pursue the implementation of DSU rulings in their favour, particularly if the rulings are against a major economic power such as the EU or the US (Political stability plays a very important role in terms of trade stability, especially in developing countries. The author discusses political stability and its factors below.

This problem still remains and is considered as the biggest concern for developing countries in the DSU. In the *US – Upland Cotton* dispute, involving Brazil and the US, this concern has obviously appeared. Hagstrom states that Brazil is itself unlikely to be able to force US compliance[230] when the US refused to comply with the DSB's decision. Therefore, Brazil applied for DSB authorisation for countermeasures under Article 22.2 of the Dispute Settlement Understanding (DSU).[231]

By suspending obligations under the TRIPs and GATS, it had cross-retaliated against US pharmaceutical patents. However, it is believed that the consequence of cross-retaliation would be "so dire for the US-based pharmaceutical companies that the US is unlikely to tolerate it".[232] On 26 August 2008, Brazil requested for the recommencement of arbitration in the matter of countermeasures.

The DSB approved cross-retaliation by means of suspending TRIPs and GATS obligations in the *EC – Bananas* case,[233] where Ecuador was authorised[234] to suspend such obligations as regards the EC. Ecuador tried to settle the dispute with the EC while it had

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[228] *Ibid.*

[229] *Ibid. See, also* Hudec, R., (2002), 'The Adequacy of WTO Dispute Settlement Remedies: A Developing Country Perspective. Washington D.C: World Bank, 81–91.

[230] Altaer, A. 2010. The WTO and developing countries: the missing link of international distributive justice. University of Portsmouth PhD thesis. *See, also*, Hagstrom, J. 2007. Cotton council picks fight with WTO over March meeting. *Congress Daily*, p. 6.

[231] Annex 2 of the WTO Agreement, Understanding on Rules and Procedures Governing the Settlement of Disputes.

[232] Hoda, A.2012. Dispute Settlement in the WTO, Developing Countries and India. ICRIER Policy Series, N. 15. pp. 13–15.

[233] European Communities-Regime for the Importation, Sale and Distribution of Bananas, (Panel) WT/DS27/RW/USA, 12 April 1999.

[234]Decision by the Arbitrators, European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, WT/DS27/ARB/ECU, 24 March 2000, (herein EC – Bananas III (Ecuador) (Article 22.6 – EC).

the authority for suspension and "despite having filed for the establishment of a second panel in February 2007 to seek redress against EC non-compliance".[235] In the *US – Gambling* case,[236] Antigua was also authorised[237] to suspend TRIPS obligations as regards the US, but "Antigua as yet has no domestic legislation in place to indicate how it means to use the DSB authority to retaliate".[238]

The DSB authorized 'cross-retaliation before for two small countries, but the DSU only provides for cross-retaliation where suspending concessions with respect to the sector at issue (here, all goods) is not 'practicable or effective'. Given the size of Brazil's economy, it will be more difficult for it to demonstrate that suspending concessions on imports of goods from the United States is not 'practicable or effective'.[239]

On 19 November 2009, Brazil was authorised by the DSB to "suspend the application to the United States of concessions or other obligations".[240] On March 2010, Brazil informed the DSB that "it would 'suspend the application to the United States of concessions or other obligations' under the GATT 1994 in the form of increased import duties', and under the TRIPS Agreement and/or the GATS, the form of the latter to be notified before implementation".[241]

Article 22.3 of the DSU indicates that retaliation occurs when the DSU rulings have not been complied by a WTO Member. However, in the *US – Upland Cotton* case, the DSU decided against authorising Brazil's cross-retaliation that would have "given the clear impression that the non-compliance option is freely available to WTO member countries with strong economies bolstered by the power of large MNEs".[242] Also "it will not allow the DSU's cross-retaliation provision to be activated against such a member".[243]

The author considers, that Article 22.3 of the DSU as well as the dispute resolution system is not effective as it has not developed adequately to the existing challenges and globalization. Even though cross-retaliation may not be the best option, there is no other viable alternative which can offer anything better in this regard. If that is the last resort and the only

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[235] Decision by the Arbitrators, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS27/80, 26 February 2007.
[236] Decision by the Arbitrators, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, 7 April 2005.
[237] Decision by the Arbitrators, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/ARB, 21 December 2007.
[238] Hoda, A.2012. Dispute Settlement in the WTO, Developing Countries and India. ICRIER Policy Series, N. 15
[239] Cross, K. H. 2008. WTO Appellate Body Upholds Compliance Panel's Findings in Cotton Subsidies Dispute. American Society of International Law, Volume 12.
[240] Hoda, A. 2012. Dispute Settlement in the WTO, Developing Countries and India. ICRIER Policy Series, N. 15.
[241] *Ibid.*
[242] *Ibid.* A huge multinational enterprise (MNE).
[243] Hoda, A. 2012. Dispute Settlement in the WTO, Developing Countries and India.

alternative that is available under the current dispute settlement mechanism, suspending obligations under the TRIPS Agreement could considerably be the better choice than doing it in other agreements such as the GATS. The examples of *EC – bananas*, *US – Cotton* clearly demonstrate this reality. To eliminate this issue, it is important to start a new round of negotiations and improve dispute settlement procedures.

In the submitted dissertation, *the author* proposes more consultations and mediation at DSU. WTO practice shows that DSU makes less use of its mediation role although as observed that there is not any record of discouraging mediation by developed countries. The author believes that using mediation, on the one hand, eliminates the problem of deadlines for resolving disputes, which in many cases is not enough for the parties and therefore they suffer considerable economic damage; and on the other hand, mediation may be a good method for developing countries as it "offers the opportunity to be less legalistic and more equitable". Hence, it would save time and costs as well as help the parties to the dispute maintain good relationships. Moreover, it is in line with the goals of the DSU, in particular, Article 3.7 of the DSU which states that "the aim of the dispute settlement mechanism is to secure a positive solution to a dispute. The author claims that settlement of disputes through mediation will require less time and costs than by the adjudicatory procedures.

Proceeding from the above mentioned, *the author concludes* that using more consultations and mediation would be far more beneficial for developing countries as they would help them to find effective ways for discussing and solving disputes. These methods would give developing countries extra chance to explore and search for the solutions. Therefore, consultations and mediation might be considered as a good method for resolving many obstacles that limit developing countries' participation in WTO dispute settlement proceedings. The author recommends that this proposal should be used in actual practice in the DSB.

2.5 Political Stability and Trade Agreements

Today, all members of the WTO, like many other multilateral institutions, are confronted by multiple challenges, ranging from the threat of protectionism and unilateralism, the risks of a trade war and political instability, to the inability to forge consensus on core issues, some of which have underpinned the world trading system for decades since the end of the World War II.[244] What about the role that the government plays in maintaining a stable

[244] Abuseridze, G. 2020. Political Stability and Trade Agreements. Bulletin of the Georgian National Academy of Sciences, Bull. Georg. Natl. Acad. Sci., Vol. 14, No. 4, pp. 140–144.

political climate? To begin with the explanation of political behaviour, it is notable that theories of political behaviour attempt to quantify and explain the influences that define a person's political views, ideology, and levels of political participation. Political behaviour can be met everywhere. For example, members of society behave politically while they are obeying or disobeying the laws of society, and supporting or undermining the power stratification system.[245]

Political behaviour takes place in organized society. People in interaction behave in the context of shared expectations about what can be done in any given situation, according to the law. For these people, the variability of behaviour patterns is limited. So this behaviour can be predicted to some extent. The above allows for the following conclusion: to say that people are in interaction as opposed to random contact is to say that they act out roles to some degree.[246]

Political stability can be defined as the regularity of the flow of political exchanges. Political behaviour or act or exchange is regular if it does not violate the system (or pattern) of political exchanges, whereas it irregularity is expressed through the violation of that pattern.[247] The network of political roles in a given society forms the society's political structure. If one thinks of political roles in terms of their function in controlling the flow of transactions and communications among political actors, one may refer to political structure as the system of political exchanges.

If political stability is understood as the regularity of the flow of political exchanges, then it must be accepted that the more regular the flow of political exchanges, the more stable they should be. It is necessary to point out that regular exchanges do not violate the laws of the society, while irregular exchanges do. It should not be assumed that it is always clear whether or not a form of behaviour violates the law. Such an assumption is unnecessary. Rather, it may be considered necessary to regard a possible violation of the law as an issue if it is resolved by appeal at the court or at an institution which the society uses for compulsory arbitration. The main reason for using law and custom as the arbiters of role expectations is that the two constitute the system of sanctions which gives political structure its particular character. [248]

There are several perspectives on political stability, and they will be discussed below in the doctoral thesis. For instance, according to Helliwell's argument about the indirect effect of democracy on the economic growth, there is an indirect effect of democracy on growth

[245] Claude, A. 1975. A Definition of Political Stability. Comparative Politics, Vol. 7, No. 2, p. 271.
[246] *Ibid*, p. 272.
[247] Op. cit p271
[248] Claude, A. 1975. A Definition of Political Stability. Comparative Politics, Vol. 7, No. 2, p. 273.

through the channel of political stability. Taylor and Hudson proposed the three varieties of instability mentioned earlier, namely, "irregular government change", "major regular government change" and "minor regular government change".[249] Meanwhile, regular and irregular government changes are also supposed to have different impacts on economic growth and trade stability.

Political stability as a result of social processes and economic developments, showing how closely related these aspects are in providing political stability in the WTO. That all these perspectives on political stability are very important for the sustenance of democracy and healthy economic development in the WTO because irregular political changes, such as coups d'état, instill great amounts of uncertainty into the market-place, tend to slow down and even reverse economic growth in a given region and this often deteriorates the well-being of society, which in turn may increase political instability in the region.

2.5.1 Empirical Model of Political Stabilization for Fair Trade

Political stabilization is a long-term commitment to the specific region (every country in EU) both in terms of political effort, financial and human resources. The centrepiece of the stabilization process is the conclusion of the agreement which represents a far-reaching contractual relationship between the politicians and society. Such "agreement" can have high political value since it is based on the gradual implementation of reforms designed to achieve the aim of moving closer to the high social standards. Importantly, political stabilization focuses on respect for key democratic principles and the core elements at the heart of the political society. The political stability encourages the active development of regional co-operation and good neighbourly relations in the WTO.

The tools of political stabilization are the means necessary to encourage these countries to adopt real reforms towards the immediate objectives. The mechanisms of stabilization themselves will allow the WTO countries to prioritize reforms, shape them according to WTO models, solve problems and monitor their implementation. Below is a practical model of political stabilization, created by the author. The model identifies the main factors that ensure, and contribute to, the political stabilization (Figure 2.1).

[249] Alesina, A., Özler, S., Roubini, N. and Swagel, P. 1992. Political Instability and Economic Growth. Working Paper 4173, National Bureau of Economic Research, p. 7.

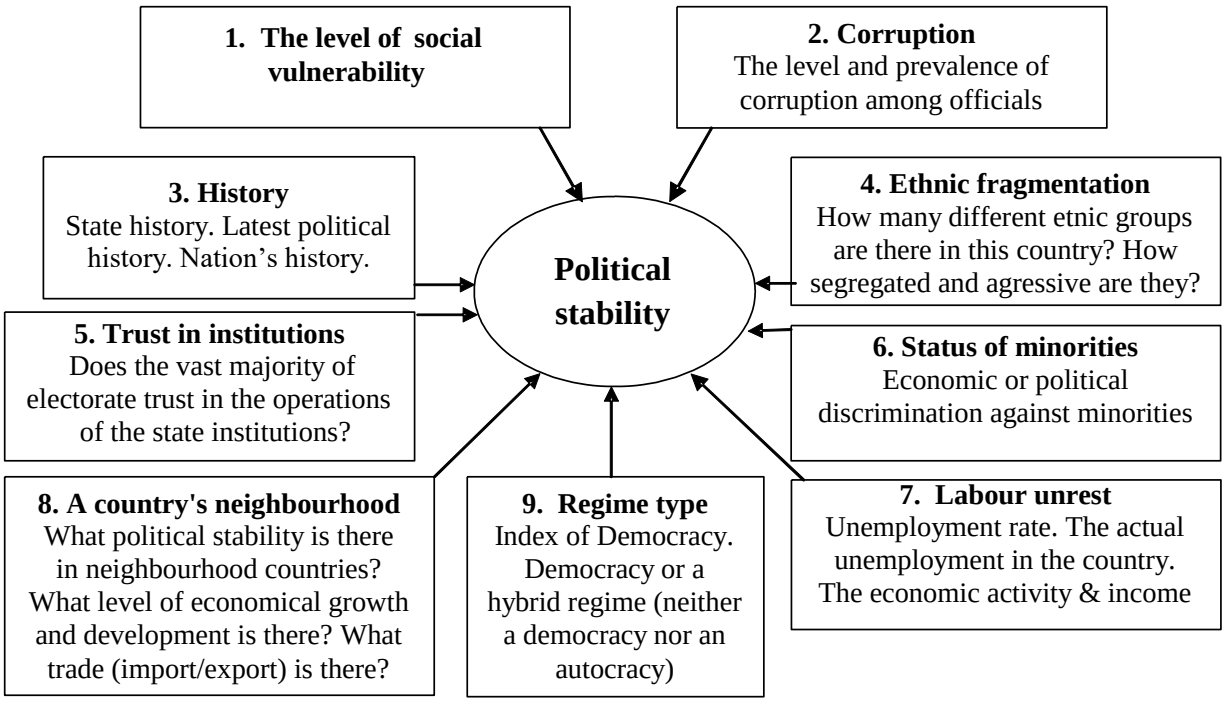

Figure 2.1. **Factors affecting political stability** (developed by the author)

2.5.2 Indicators of Political Instability

It is well known that democracy is alleged both to promote and to inhibit economic development. Yet, some scholars consider democracy and growth to be unrelated. Speaking about political instability it is sometimes identified both as a cause of poor economic growth and as its consequence. Overall, three types of political instability can be distinguished:[250]

1. "irregular" government change (i.e. regime-level change);
2. "major regular" government change (i.e. within-regime change); and
3. "minor regular" government change (i.e. within-regime change).

The above theoretical model has been tested against data covering ninety-six countries for the period 1960-1980, with statistical tests estimating the long-run interrelationships between growth, stability and democracy. However, there has not been any analysis of the short-run dynamics that might be involved in those interrelationships.

Democracy provides a stable political environment which reduces unconstitutional government change. Nevertheless, the author believes that democracy, along with regime stability, offers flexibility and the opportunity for major government change within the political

[250] Alesina, A., Özler, S., Roubini, N. and Swagel, P. 1992. Political Instability and Economic Growth. Working Paper 4173, National Bureau of Economic Research, p. 1.

system. Thus, it can be concluded that this combination of macro political certainty and micro political adjustability is conducive to sustained economic growth and expansion.

With regard to the political economy of growth which is the relationship between democracy and growth as well as between political stability and growth, three schools of thought have worked on this issue.[251] The "conflict school" argues that democracy hinders economic growth, particularly in less developed countries (LDCs).[252] For example, Sirowy and Inkles propose three hypotheses in support of this claim:

The "dysfunctional consequences" of "premature" democracy slow growth. Democratic regimes are unable to implement the policies necessary for rapid growth. Democracy is incapable of pervasive state involvement in the development process in the present world-historical context.[253]

Nation's rapid growth requires autocratic control and reduced freedom. And the fact that the developing countries, in particular, cannot achieve rapid economic growth without a strong centralized government only proves this statement. *A good example is Georgia's rapid economic growing under government of Georgia between 2004-2011 in the conditions of young/fragile democracy with strong centralized government in the conditions of the Presidential Republic, which even survived the Russian aggression in 2008.* Meanwhile, democratic processes as well as the existence and exercise of fundamental civil liberties and political rights are maintained to generate the social conditions most conducive to economic development. Political and economic freedom enhances property rights and market competition, thus promoting economic growth.[254] Nevertheless, from the "sceptical" perspective, there is no systematic relationship between democracy and economic development.[255]

Meanwhile, Sanders identifies two major dimensions of political instability:

1. Regime change (changes in regime norms, changes in types of party system, changes in military-civilian status); and
2. Government change (changes in the effective executive or cabinet). [256]

[251] Sirowy, L. and Inkeles, A. 1990. The Effects of Democracy on Economic Growth and Inequality: A Review. Studies in Comparative International Development, 25(1), p. 126.
[252] Cohen, Y. 1994. Radicals, Reformers and Reactionaries: The Prisoner's Dilemma and the Collapse of Democracy in Latin America. The University of Chicago Press, p. 23.
[253] Sirowy, L. and Inkeles, A. 1990. The Effects of Democracy on Economic Growth and Inequality: A Review. Studies in Comparative International Development, 25(1), p. 126.
[254] Riker, W. and W., D. 1993. The Economic and Political Liberalization of Socialism: The Fundamental Problem of Property Rights. Social Philosophy and Policy, 10(2), p. 84.
[255] McKinlay, R. and Cohan, A., 1975. A Comparative Analysis of the Political and Economic Performance of Military and Civilian Regimes: A Cross-National Aggregate Study. Comparative Politics, 8(1), p. 5.
[256] Dinan, D. 2006. Origins and Evolution of the European Union. 2nd edn. Oxford University Press, p. 11.

As a result of investigation by the author, these factors have been observed to impact the *trade* stability in different rates (%) in the EU/WTO countries.

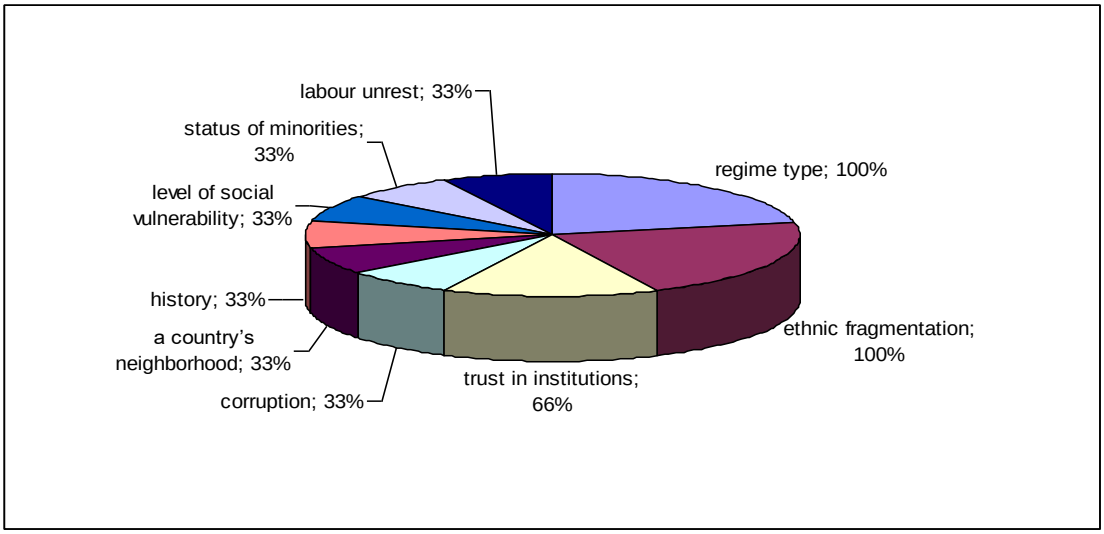

Figure 2.2. **Rate of factors affecting trade stability in the EU/WTO countries**
(developed by the author)

The research has shown that the *political stability plays a key role for stability, simplicity and neutrality of trade*. Firstly, the concept of trade stability simplicity and neutrality should be acknowledged as a multi-faceted phenomenon. The research has demonstrated that different theorists view trade stability simplicity and neutrality from different angles, and all these perspectives on trade stability are equally important. For instance, Helliwell argues that it is through the channel of stability that democracy indirectly impacts on the economic growth, thereby linking an actual state of trade stability in a country with the country's economy. Taylor and Hudson, in turn, distinguish three varieties of instability, such as "irregular government change", "major regular government change" and "minor regular government change", emphasizing that it is exactly regular and irregular government changes that are likely to have a serious impact on a country's economic growth. *Secondly*, realizing the interrelationship of political stability, economic conditions and social cohesion, the author of the present research has developed two models of trade stability. The minor model puts forward the most significant economic factors that contribute to trade stability, namely, unemployment, the level of tax, growth in incomes and inflation. Meanwhile, the major model of trade stability, proposed by the author of this paper, illustrates how factors, such as the level of social vulnerability, corruption, history, ethnic fragmentation, trust in institutions, status of minorities, labour unrest, a country's neighbourhood and regime type, impact on the overall level of trade stability in a country.

2.5.3 Three approaches to domestic political economy of trade

Free trade increases wealth and reduces poverty, and, thus, it may contribute to social stability through the economics of comparative advantage.[257] Both the World Trade Organization (WTO) and World Bank suggest that trade liberalization is a positive contributor to social stability.[258]

Trade growth and political stability are deeply interconnected. On the one hand, the uncertainty associated with an unstable political environment may reduce investment and the pace of economic development. On the other hand, poor trade and economic performance may lead to government collapse and political unrest.[259] However, political stability can be achieved through oppression or through having a political party in place that does not have to compete to be re-elected. In these cases, political stability is a double-edged sword. While the peaceful environment that political stability may offer is a desideratum, it could easily become a breeding ground for cronyism with impunity. Such is the dilemma that many countries with a fragile political order have to face.[260]

Democracy and political stability provide conditions for promoting free trade, which in its turn may increase wealth and reduce poverty, and, thus, it may contribute to social stability through the economics of comparative advantage.

It is important to note that the domestic politics shape countries' strategic decisions to negotiate regional trade agreements (RTAs), and are even more important in determining at the tactical level what kinds of commitments countries seek or grant in these agreements.

To simplify, the political scientists who look to domestic political factors in order to explain countries' choices between openness and closure tend to fall into three general camps. The oldest and perhaps largest school of thought depicts this choice as the outcome of struggles between competing economic interests. Openness represents the triumph of pro-trade interests such as exporters, retailers, and consumers over import-competing industries, labour unions, or others that are typically trade-sceptical. A second category of explanations shifts the locus of conflict from civil society to government, and sees openness as the triumph of pro-trade institutions (e.g. the executive branch in general, the foreign ministry, etc.) over their trade-

[257] Bagwell, K. W. and Mavroidis, P. C. 2011. Preferential Trade Agreements: A Law and Economics Analysis. Cambridge University Press, p. 1.
[258] Dan, B. D., Nordström, H., & L. Alan Winters, L. A. 1999. Trade, Income Disparity and Poverty. WTO Publication. Leibniz Information Centre for Economics, pp. 5. 23–37
[259] Dollar, D., Kraay, A. 2002. Growth Is Good for the Poor. Journal of Economic Growth, 7 (3), 195–225.
[260] De Ville, F. and Siles-Brügge, G. 2015. The Transatlantic Trade and Investment Partnership and the Role of Computable General Equilibrium Modeling: An Exercise in 'Managing Fictional Expectations'. New Political Economy, 20(5), 653–678.

sceptical rivals (e.g. legislatures or client-oriented ministries). Yet a third approach pays more attention to ideas than to interests. Analysts in this school argue that openness represents the victory of liberal ideology over protectionist doctrines. While the debates among the proponents of these three schools of thought are sometimes conducted as if the explanations were mutually exclusive, it is possible that each one captures some part of the truth. In any given country the decision to open the market may be influenced by a mixture of sectoral, institutional, and ideological factors.

2.6 National security in the WTO

National security plays an important role for simplicity, stability and neutrality of trade. Governments have used national security to uphold important national security interests, as well as to adopt trade restrictive measures for reasons of supposed national security, defined as self-sufficiency.[261] Rarely do such attempts hold up to careful scrutiny, but the temptation is always present.[262]

When originally established, the General Agreement on Tariffs and Trade (GATT) was intended to deal with a technical matter – the regulation of transnational trade. Other Bretton Woods institutions, notably the United Nations, were to deal with issues of national or international security and peace.[263] Accordingly, most of GATT's exceptions deal primarily with "technical" problems caused by imports or exports of goods.[264] However, the exceptions in Articles XX and XXI deal with a different kind of situation.[265] Compared to the broad exceptions of Article XX,[266] Article XXI provides extensive discretion, the precise limits of which remain largely unexplored in GATT/WTO jurisprudence. Thus, WTO members, otherwise bound by technical rules,[267] have been viewed traditionally in matters of national security as being largely freed of any legal bonds imposed on them.[268]

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[261] Jackson, J., Davey .W. and Sykes, A. 2002. Legal Problems of International Economic Relations: Cases, Materials and Text. 4th edition, West Group, pp. 20–21.

[262] *Ibid.*

[263] Jackson, J. 1969. World Trade and the Law of GATT, Indianapolis: Bobbs Merrill, pp. 60–97.

[264] *Ibid*.

[265] Though Article XXI of GATT is the primary source of discussion about national security in the WTO, there are similar provisions in the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The provision in GATS is Article XIVbis, which is virtually identical to GATT Article XXI other than the focus upon services in Article XIVbis(b)(i). The provision in the TRIPS Agreement is Article 73, again virtually identical to GATT Article XXI.

[266] Dam, K.W. 1970. The GATT: Law and International Economic Organization, The University of Chicago Press.

[267] Jackson, J., supra note 3, at 30.

[268] John Jackson, Founder and Faculty Director, Institute of International Economic Law, Georgetown Law, USA and leading GATT legal authority, has noted that the exceptions found in Article XXI "provide a dangerous loophole to the obligations" contained in the agreement. Jackson, J., supra note 3, at 748. While

Many GATT members stated the belief that Article XXI(b) was self-defining. The GATT contracting parties adopted a ministerial declaration stating that "… the contracting parties undertake, individually and jointly: … to abstain from taking restrictive trade measures, for reasons of a non-economic character, not consistent with the General Agreement."[269]

The notion of self-definition came under renewed scrutiny with the launch of the WTO and its dispute settlement system that no longer allows a member to block formation of panels, thus no longer limiting the ability of another member to question the legitimacy of a measure defended on the basis of national security.[270]

In the US – Helms-Burton panel proceedings[271] – the only case on Article XXI to date under the WTO regime[272] – the US informed the WTO that it would not participate in panel proceedings since it viewed the Act as outside the scope of WTO law and thus not in the panel's jurisdiction.[273] The US stated that the disputed embargo was about diplomatic and security issues, and "was not fundamentally a trade matter".[274]However, "few Members shared this opinion", as noted by Peter Van den Bossche, Member, Appellate Body of the World Trade Organization, Geneva and Professor of International Economic Law, Maastricht University, Netherlands.[275]

Thus, there has been no WTO proceeding to determine these issues. The most recent invocation of Article XXI in a possible WTO challenge appears to be the issue of US, Canadian and European Union (EU) sanctions against Russia over Crimea and other issues related to Ukraine.[276] A Russian official involved in the matter opined that Russia would not expect

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recognizing that Article XXI has a legitimate role to play, Jackson expressed concern regarding its potential for abuse and the possibility for the "arbitrary exercise of economic power". Id. at 752. He went on to note that "[i]n addition to possible abuse for international political reasons, Article XXI may also shelter some measures that, although ostensibly imposed for security reasons, may actually be protectionist-oriented". Id. at 752.

[269] L/5424, adopted on 29 November 1982, 29S/9, 11. This situation also resulted in an unusual decision by the GATT membership which recognized "… that recourse to Article XXI could constitute, in certain circumstances, an element of disruption and uncertainty for international trade and affect benefits accruing to contracting parties under the General Agreement …", L/5426, 29S/23.

[270] Van de Bossche, P. 2008. The Law and Policy of the World Trade Organization: text, cases and materials. 2nd edn. Cambridge University Press, p. 320.

[271] Request for Consultations, US – Cuban Liberty and Democratic Solidarity Act (Helms-Burton Act), WT/DS38/1, 13 May 1996.

[272] The national security issue could have been raised by the United States in the later dispute with the European Union over Cuba – related issues in the "Havana Club" rum case, United States – Section 211 Omnibus Appropriations Act of 1998 (WT/DS176/AB/R), which in the context of the US boycott of Cuba found that the United States violated the national treatment and MFN provisions of the TRIPS Agreement. However, the United States did not raise Article 73 of TRIPS as a national security defence.

[273] Van den Bossche, P., supra note 9 at 667.

[274] WT/DSB/M/24, of 16 October 1996, 7.

[275] Van den Bossche, P. supra note 9 at 668, citing WT/DSB/M/24, at 8–9.

[276] "Russian PM Says Moscow To Challenge U.S. Sanctions At WTO", World Trade Online at Inside U.S. Trade, 27 June 2014, http://insidetrade.com/node/142496

the national security exception would be available to the US in the same sweeping, self-defining way that some legal experts have asserted.[277]

In this context, the author argues that Russia had been spared of sanctions after the disproportional aggression against Georgia in 2008, which was a wakeup call for Europe 6 years earlier than Russian Aggression against Ukraine. Moreover, the author also reminds how at all Russia became the WTO member 2011. Georgia had been a member of the WTO since July 14, 2000. It took 18 years for the Russia Federation to become a member. According to the WTO rules, accession of a new country requires the approval of all member states. In this context the author claims that Georgia was one of the final obstacles for Russia to join the WTO. The disagreement between Georgia and Russian Federation was clearly political as Russia has occupied 20% of the territories of Georgia and recognized the disputed territories as independent states.

The compromise agreement partly meets Georgia's long-standing demand for monitoring the traffic of goods between the Russian Federation and the two breakaway regions. The agreement does not mention any geographic name, only geographic coordinates. The agreement establishes three trade corridors: Adler – Zugdidi; the village of Nar (North Ossetia) – Gori; and Zemo Larsi – Kazbegi. All goods entering and exiting these corridors would be subjected to monitoring by the neutral private company.

When the Agreement was signed between Russia and Georgia in 2011, it was presented as a huge political victory, as by signing the agreement Russia was supposedly indirectly recognizing the territorial integrity of Georgia. It was also assumed that Georgia managed to achieve this because it used the existing situation and forced Russia to sign an agreement which was beneficial to us. However, this is not the reality. Georgia did it only through international coercion and giving in to the *Obama* Administration's pressure as making Russia the member of World Trade Organization was a part of the Reset Policy. Hence, if we look at it objectively, the Government of Georgia found itself trapped at some point. Hence, an agreement needed to be signed and in the conditions, when Georgia was at a disadvantage with already much more powerful Russia.

The *Agreement between the Government of Georgia and the Government of the Russian Federation on the Basic Principles for a Mechanism of Customs Administration and Monitoring of Trade in Goods* was signed on November 9, 2011and entered into force on August 22, 2012. As was stipulated by the agreement, the Swiss Confederation selected

[277] "Russia's WTO Claims Against U.S. Sanctions Unlikely To Prevail: Experts", World Trade Online at Inside U.S. Trade, 2 May 2014.

the neutral company SGS Societe Generale de Surveillance SA for oversight functions. Georgia and Russian had to enter separately into contract with the company (for more detailed information, see below chapter 4).

In January – February 2016 Georgia finalized the contract with SGS; however, the Russian side still has issues to clarify. Consultations continue. It is obvious that the negotiations are dragging on. The mechanism of monitoring is still not in effect, and the parties continue to debate technical and legal details. On 6 February 2019, the first meeting of the joint committee for overseeing the implementation of the Russo-Georgian agreement on monitoring of freight passing through Abkhazia and South Ossetia took place.

2.6.1 Cybersecurity

Many cybersecurity issues are also raised in this unclear legal setting. As yet, the WTO's membership does not know whether any measures whatsoever taken by one member on grounds of national security are completely immune to WTO scrutiny, or whether there is a level of WTO review available.[278]

Thus, in the overall realm of cybersecurity, it has proven difficult for one WTO member to argue against measures taken by another WTO member on grounds of national security. Some of the decisions are arguably also outside the remit of the WTO, e.g. certain decisions on cross-border investments, but the potential for mingling of high and low politics is equally strong.

For example, in 2010 a group of US senators called for the blockage of private sales of telecommunications equipment from a Chinese company to Sprint, a major US carrier, on grounds that the carrier was also a supplier to the military.[279] In a 2012 report, the US House Permanent Select Committee on Intelligence recommended that US telecommunications operators should not do business with China's top network equipment suppliers, and that the

[278] According to Van den Bossche: "[I]t is imperative that a certain degree of 'judicial review' be maintained; otherwise the provision would be prone to abuse without redress. At a minimum, panels and the Appellate Body should conduct an examination as to whether the explanation provided by the member concerned is reasonable or whether the measure constitutes an apparent abuse." Van den Bossche, P., supra note 9 at 666, citing GATT Panel state in US – Trade Measures Affecting Nicaragua, in GATT Activities 1986, 58–59, and citing Cann Jr, W., "Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance between Sovereignty and Multilateralism", Yale Journal of International Law, 2001, 426.

[279] "China Update", World Trade Online at Inside U.S. Trade, 27 August 2010, http://insidetrade.com/inside-us-trade/china-update-87.

government should block takeovers of US companies by the two largest Chinese telecommunications equipment manufacturers because of an alleged threat to cybersecurity.[280]

Those dynamics, enabling the US to take the "high road" on cyberespionage, changed dramatically in June 2013 when Edward Snowden, former US National Security Agency (NSA) subcontractor, revealed that the NSA had been engaged in massive global espionage.[281] The irony became even more apparent when it was revealed that the NSA had been spying for years on the same Chinese companies which the US had targeted for commercial bans owing to fears of espionage.[282]

Fast forward to 2014–2015: the US and other countries are concerned that China is using cybersecurity criteria in some of its legal and policy proposals, most notably in banking.[283] The US complains that China's legislative proposals are not consistent with its WTO obligations.[284] To date, the US has raised issues about local content requirements in those rules.[285] The Chinese government has been standing by its regulatory proposals, explaining that it is "necessary for all governments to strengthen security to protect public interests".[286] Others in China and elsewhere believe forced localization would interfere with free competition and innovation.[287]

A separate issue in the overall cybersecurity topic is cybertheft. One type is the stealing of trade secrets and intellectual property (IP) rights. At least one government has decided to include the use of trade-law tools in its responses to cybertheft and cyberespionage,[288] with the US arguing that China is violating its commitments to the WTO Agreement on Trade-

[280] "U.S. lawmakers seek to block China Huawei, ZTE U.S. inroads", Reuters, 8 October 2012, http://www.reuters. com/article/2012/10/08/us-usa-china-huawei-zte-idUSBRE8960NH20121008. Earlier, the Committee on Foreign Investment in the United States (CFIUS) had pressured Huawei in 2011 to drop its bid for the US company 3Leaf, which made computer servers for cloud computing. In 2010, CFIUS helped derail Huawei investments in Motorola and 2Wire, and in 2008, CFIUS reportedly also scuttled Huawei's attempts to purchase computer-network equipment maker 3Com. Id.

[281] See, for example, the news archives from The Guardian, one of two news sources to which Snowden first released his materials: Macaskill, E. and G. Dance, "The NSA Files: Decoded", The Guardian, 1 November 2013, http://www. theguardian.com/us-news/the-nsa-files.

[282] Sanger, D. and Perlroth, N. 2014. N.S.A. Breached Chinese Servers Seen as Security Threat. The New York Times.

[283] "Holleyman: U.S. Working With EU, Japan To Press China On Cyber Regs", World Trade Online at Inside U.S. Trade, 19 March 2015, http://insidetrade.com/inside-us-trade/holleyman-us-working-eu-japan-press-china-cyber-regs. [Accessed: July 5, 2020].

[284] "Treasury Secretary warns China on trade issues," MLex, 31 March 2015, http://www.mlex.com/ Corporate/DetailView. aspx?cid=662418&siteid=171.

[285] G/TRIMS/W/150, 26 March 2015, cited at: http://insidetrade.com/sites/insidetrade.com/files/documents/ mar2015/ wto2015_0983a.pdf.

[286] WTO News, report on WTO TBT Committee meeting on 18–19 March 2015, World Trade Online at Inside U.S. Trade, http://insidetrade.com/sites/insidetrade.com/files/documents/mar2015/wto2015_1012a.pdf. [Accessed: July 5, 2020].

[287] Shih, G., 2015. "Exclusive: Huawei CEO says Chinese cybersecurity rules could backfire", Reuters.

[288] Executive Office of the President of the United States, Administration Strategy on Mitigating the Theft of U.S. Trade Secrets, 2013.

Related Aspects of Intellectual Property Rights by failing to protect trade secrets.[289] The issues are not unique to these countries, and cybertheft issues are a double-edged security concern, with legal debate over whether a national security exception is available in this type of case.[290]

Yet while the US accuses China of cyberespionage, there was also disclosure that the NSA itself had penetrated a major Chinese company and its equipment worldwide.[291] This type of economic espionage by a WTO member might be argued as being in US national security interests, but the inconsistencies and double standards in such arguments are clear.[292] One US legal writer has observed: "The NSA's company-specific intrusion into the network and equipment of China's leading telecom company does dilute the strength of US claims against China's targeting specific firms for their commercial secrets."[293]

In short, recent issues concerning cybersecurity show that while some WTO members take a high view of national security when it pertains to activity within their borders or when they view sanctions appropriate elsewhere, they are against the same measure of flexibility when exercised by other countries. Therefore, National security, Cybersecurity are equally important simplicity, stability and neutrality of trade.

Answering research question 4

The rule of law and political stability are fundamental factors in ensuring free trade. Therefore, it is important to define these factors. What role does political stability play for simplicity, stability and neutrality of trade and how secure is the WTO?

The WTO is a universal international organization distinguished by solid political/trade simplicity, stability and neutrality, which appears in a number of states as guarantor of trade stability. The WTO's relative political stability is achieved through the unique political arrangement the Organization constitutes, the complex power-sharing mechanisms in place (checks and balance), the great variety of its Member States, and the constant struggle between supra-nationalism and inter-governmentalism which characterizes most decisions deemed

[289] "US Ambassador Baucus Says China Hacking Threatens National Security," Reuters in International Business Times, 25 June 2014, http://www.ibtimes.com/us-ambassador-baucus-says-china-hacking-threatens-nationalsecurity-1611080.

[290] Skinner, C. 2014. An International Law Response to Economic Cyber Espionage. Connecticut Law Review, vol. 46, no. 4. Fidler, D. 2013. Why the WTO is not an Appropriate Venue for Addressing Economic Cyber Espionage. Arms Control Law. https://armscontrollaw.com [Accessed: February 7, 2019]; Fidler, D. 2013. Economic Cyber Espionage and International Law: Controversies Involving Government Acquisition of Trade Secrets through Cyber Technologies. American Society of International Law Insights, vol. 17, no. 10.

[291] Sanger, D. and Perlroth, N. 2014. N.S.A. Breached Chinese Servers Seen as Security Threat," The New York Times.

[292] Sanger, D. 2014. Fine Line Seen in U.S. Spying on Companies. The New York Times.

[293] Malawer, S., 2014. Confronting Chinese Economic Cyber Espionage with WTO Litigation. New York Law Journal, pp. 1–5.

crucial to the national interests of its Member States. The WTO recommendations regarding the issues are clear example of trade and political simplicity, stability and neutrality.

It is necessary to note, that the WTO's role in political and trade stabilization among its Member States is exactly the setting of specific requirements with which all those countries willing to integrate in the organization have to comply. Specifically, these requirements concern country's internal democracy, electoral environment or economic situation. And those countries that meet all the requirements are integrated into the WTO and continue living together with member countries, with unified system of values and common identities.

However, existing challenges have shown that the role of the WTO as the umpire in trade disputes has been greatly threatened by the US-China trade war. He argues that with the burst of the US-China trade war, it is observed that there is an urgent need for DSU reform particularly through the incorporation of a retrospective monetary compensation. The author believes, that although this would increase the trust of the member states in dispute settlement system it may not be the only solution for preventing the trade wars. With the global tension brought about by the trade war between the US and China there is a perfect timing for reforms in the WTO to strengthen the multilateral trading system.

Many factors have been considered as important for the provision of political stability within the trade, with existence of a legitimate constitutional regime, regime type, ethnic fragmentation and trust in institutions being named as the most significant political factors and with economic employment and adequate level of taxes being named as the most important economic factors. In addition, author argues that insurance against political violence, such as revolution, insurrection, civil unrest, terrorism or war, insurance against governmental expropriation or confiscation of assets as well as insurance against inconvertibility of foreign currency or the inability to repatriate funds have been regarded as the most important measures of political risk insurance in the WTO.

3 Legal Status of Classical Canada Renewable Energy Dispute

3.1 Introduction

The following chapter examines the peculiarities of legal status and WTO disputes. The author focuses on the dispute involving Canada renewable energy. Over the past few years, renewable energy subsidies have become one of the main sources of trade disputes at the WTO. Sustainable development that protects and preserves the environment has been recognized as one of the primary goals of the WTO. This goal is to be achieved through enhanced economic growth and development fostered by non-discriminatory, predictable and rule-based multilateral trading system backed up by strong dispute settlement mechanism. This issue follows the WTO agenda and in view of its topicality has become the subject of this chapter.

So far, the Dispute Settlement Body (DSB) of the WTO has been presented with a few disputes regarding renewable energy, while none has been presented in relation to measure supporting fossil fuels and especially oil. On the other hand, several disputes concerned export and local content subsidies. The finding and conclusion reached by the WTO panel and Appellate Body in these cases can surely help clarify the WTO approach towards such types of governmental support. What can be concluded from the analyses below is that both the panel and Appellate Body have interpreted the rules quite narrowly, so as to not leave much space to state's policies in favour of renewable. This, despite the inarguable evolution of the WTO case law toward its deep and final objectives represented by the WTO preamble when it comes to assessing the relationship between trade and non-trade concerns, and especially the environment.[294]

The first two disputes related to the Canadian renewable energy generation sector: *Canada Feed In Tariff Program* and *Canada Renewable Energy*.[295]In both disputes, the Canadian measures challenged, respectively, by the European Union (EU) and Japan, as well as the WTO provisions, whose violations is complained of, are the same. Both the EU and Japan challenged the FIT program established by Canadian province of Ontario in 2009 providing for guaranteed, long-term pricing for the output of renewable energy generation facilities that contained a defined percentage of domestic content. The complainants deemed

[294] Vicente, D. M. 2016. Towards A Universal Justice? Putting International Courts and Jurisdictions into perspective. Brill Nijhoff; Lam edition, p. 334–345.

[295] Panel report *Canada Measures Relating to the Feed In Tariff Program* (Canada Feed In Tariff Program), WT/DS$_{426}$/R(Dec. 19, 2012) and appellate body report, WT/DS$_{426}$/AB/R (May.6, 2013); Panel report, Canada – Certain Measures Affecting the Renewable Energy Generation Sector (Canada – Renewable Energy), WT/DS$_{412}$/R (Sep. a3, 2010) and Appellate body Report, WT/DS$_{412}$/AB/R (Dec.19, 2012).

this program to be inconsistent with among other Article 3.1 (b)[296] and 3.2[297] of the Agreement on Subsidies and Countervailing Measures (ASCM)[298] because of the local content requirement present in the feed in tariff system.[299] The panels circulated their Reports on 19 December 2012, rejecting the complaints claim that the challenged measures were to be considered subsidies according to the ASCM.

In 2010, another dispute was initiated, this time by an investigation carried out by the United States Trade representative (USTR) on 15 October 2010, which covered a broad variety of Chinese policies and practices affecting trade and investment in the wind power technology sector.[300] As a follow-up to this investigation, the United States held WTO consultations with China on 16 February 2011.[301] However, such consultations did not cover all the issue raised in the investigation but rather focused on subsidies. The US made clear the view that the subsidies provided to Chinese wind turbine manufactures under the Special Found Program thought which Chinese manufacturers of wind turbines and of components of wind turbines can receive multiple grants were prohibited because they were conditioned upon the use of domestic over imported goods (and therefore prohibited according to Article 3 of the ASCM Agreement). Following those consultations, Chine acted formally revoking legal measure that had created the Special Fund program.

Two new requests for consultation have been presented in 2012 and 2013: *European Union and Certain Member States – Certain Measures Affecting the Renewable Energy Generation Sector*[302] and *India – Certain Measures Relating to Solar Cells and Solar Modules.*[303] In the first case, Chine requested consultations with the EU, Greece and Italy

[296] ASCM Article 3.1 (b) reads: "Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited 9b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over important goods."

[297] According to ASCM Article 3.2, "The member shall neither grant nor maintain subsidies referred to in paragraph 1."

[298] Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869, U.N.T.S. 14.

[299] The other claims regarded the alleged violation of Article 2.1 of the Agreement on Trade Related Investment Measures (TRIMs) and GATT Article III;4.

[300] The USTR investigation was based on a petition filed on September 9, 2010 by the USW. C. Moyer, J. Wanging and T.P. Stewart, on behalf of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union.

[301] China – Measures Concerning Wind Power Equipment, Supra note 66.

[302] Request for consultation by Chine, European Union and Certain Member States – certain Measures Affecting the Renewable Energy Generation Sector, WT/DS$_{452/1}$(Nov.5, 2012).

[303] Request for consultation by United States, India certain Measures Relating Solar Cells and Solar modules, WT/DS456/1 (Feb.6, 2013).

regarding certain feed in tariff program implemented by a number of EU member states in the renewable energy sector, while in the second, the US challenged Indian measures relating to domestic content requirement under the Jawaharlal Nehru National Solar Mission (NSM) for solar cells and solar modules.

3.2 The Disputes involving Canada and Renewable Energy: Is there Room for Change?

All the disputes briefly described above involve subsidies according to renewable energy enterprises, considered prohibited according to Article 3 of the ASCM because of the local content requirement they prescribe.[304] While in the Chine – wind dispute, the official position of the panel is unknown because China removed the measure at stake after consultations with the US, and the last two disputes are still at a request for consultations stage, the panel and Appellate Body Reports on Canada Feed in Tariff Program and Canada Renewable Energy, offer interesting insights on the problems of subsidies in the renewable energy sector. In order to decide whether subsidies generally prohibited might be permitted because of their "green" nature, we will answer two questions: are measures supporting renewable energy to be considered as "subsidies" according to the ASCM? And secondly, if they are, can they still be justified?

Regarding the first part of question: The ASCM provides definition of "subsidies" in Article 1: a Subsidy exists whenever a financial contribution is made by a government or any public body within the territory of a member, which confers a benefit. Moreover, according to Article 1.2, only a measure that is a "specific subsidy" as defined in Part I of the ASCM is subject to the WTO's subsidies discipline. In order to verify whether measures adopted to support trade in renewable energy fall within the scope on the ASCM, two requirements need to be analysed: (a) the existence of a financial contribution of public nature; and (b) the existence of a benefit.

Regarding the second question, "Are Subsidies on Renewable Energy Justified?*"*, this is another key point. The complainants in the Canada – Renewable Energy and Canada Feed in Tariff Program disputes were not able to prove the existence of a benefit for the recipient of the government measure, and therefore there was no violation of the ASCM by the Government of Ontario. It might be nevertheless interesting to conduct a purely theoretical reasoning over the possibility to justify measures supporting renewable energy if they were

[304] ASCM Article 3,1 (b) identifies the following subsidies as prohibited: "Subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported good." 15 April, 1994.

to be found to be "prohibited subsidies" according to ACSM Article 1 and 3. In particular, I would like to address an issues which has proved to be extremely controversial: the possibility to apply the general exceptions set out in GATT Article XX to the ACSM, since the latter lacks its own exceptional clause.

Can we apply GATT Article XX to a subsidy, which goes beyond the scope of the Agreement? Om other words, can GATT Article XX integrate the provisions of the SCM Agreement? Various arguments can be made against such applicability. First of all, one might stress the fact that in order for GATT Article XX to apply, the ASCM should explicitly recall it, as it happens in the Agreement on Sanitary and Phytosanitary measures (SPS Agreement), which makes express reference to GATT Article XX(b) in Articles 1 and 2.4.[305] Furthermore, not only does the ASCM not mention such provision but, in Article 3.1, on prohibited subsidies, its specifically excludes from the scope of the provisions what is provided in the Agreement of Agriculture. Finally, the Agreement on subsidies used to have its own exception, enshrined in Article 8, now no longer in force. The existence of a provision similar to Article XX but designed exclusively for the SCM Agreement could be seen as a sign of the inadequacy and eventually inapplicability of GATT Article XX.[306]

On the other hand, a few arguments have been proposed in favour of the applicability of GATT Article XX to the ASCM: the first one relates to a general principle of international law, the second one is the result of a purely logical reasoning, and the last one is based on the WTO case law. First, we need to consider the hierarchy of the different agreements belonging to the WTO legal framework. As a matter of fact, the principle of *lex specialis derogat legi generali*, widely applied by international courts and tribunals, is a broadly accepted customary international law principle of treaty interpretation.[307] The GATT applies as soon as trade in goods is a affected, and can be therefore classified as *lex generalis*, while the SCM Agreement as well as other agreements such as the SPS, the TBT and so on has a specific scope of application and therefore qualifies as *lex specialis.* This means that, while the provisions of the ASCM as *lex specialis* take precedence over those of the GATT *lex generalis* in case conflict, the GATT remains always applicable to fill in possible gaps, where the ASCM does not specifically contemplate otherwise. The second argument is purely logical. It stems

[305] According to SPS Article 1, members desire, to elaborate rules for the application of the provisions of GATT 1994 which relate to the use of sanitary pr phytosanitary measures, in particular the provisions of Article XX(b).

[306] Rubini, L. 2011. The Subsidization of Renewable Energy in the WTO: Issues and Perspectives. NCCR Trade Working Paper, supra note 24, at 34.

[307] Pauwelyn, J. 2003. Conflicts on Norms in Public International Law: How WTO Related to Other Rules of International Law published. Cambridge, New York Cambridge University Press, p. 385.

from the analysis of the different measures covered by the two agreements (GATT and ASCM) and from the consideration that denying the applicability of the exceptions set out in GATT Article XX to subsidies would create irreversible and unjustified policy inconsistencies. As matter of fact, the GATT covers measures such as total bans and quotas which are widely known as more restrictive and trade distorting than subsidies. Needless to say, that such a approach would and up allowing more distorting measures and banning less distorting ones.[308] Finally, the last argument is based on the WTO case law. In the *China Publications and Audiovisual products*[309] dispute, the Appellate Body agreed that Article XX of the GATT could apply to China's Protocol of Accession (in particular to Article 5.1),[310] and for the first time it showed a positive attitude towards the idea that such provision might be applicable beyond the scope of the agreement. There is still a crucial difference between China's Accession Protocol and the SCM Agreement: the latter like the other WTO agreement does not include a general "without prejudice clause" as written in China's Accession Protocol. Whether this obstacle could be overcome or not based on the legal relationship between the ASCM and GATT provision, is still debated.

It follows that the WTO treaty structure is complex and the relationship between the provisions of the WTO Agreements is not at all clear. On the one hand, the WTO panel and Appellate Body ate not likely to agree to the application of Article XX to the ASCM provisions. Since, in the interpretation of WTO agreements, they have often adopted a quite narrow approach that appears to apply the rules of the Vienna Convention on the Law of Treaties (VCLT) rather mechanically. On the other, the recent ruling in the aforementioned China Publications and Audiovisual Products case represents a "welcome development in WTO jurisprudence".[311] Undoubtedly, however, allowing GATT Article XX to be used to justify any WTO violation even beyond the list of objectives mentioned therein would confer considerable power to the panel and the Appellate Body, increasing the discretion they already exercise in the weighting and balancing activity required under Article XX.

[308] Howse, R. 2010. Climate Change Mitigation Subsidies and WTO Legal framework: A Policy Analysis. International Institute for Sustainable Development, p. 13.

[309] Appellate Body Report, China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China Publications and Audiovisual Products), WT/DS$_{363}$/AB/R, (Dec. 21, 2009)

[310] Id., 205–233.

[311] Qin, J., Q. 2011. Pushing the Limits of Global Governance: Trading Rights, Censorship and WTO Jurisprudence. Chinese Journal of International law, supra note 94, at 293.

3.3 Legal Analysis of the Renewable Energy Decision

The *Canada-Renewable Energy* case is about two markets: (1) the market for renewable energy equipment production and investment, and (2) the market for electricity. The renewable energy equipment market is a global market, and Canada has allowed its province Ontario to erect discriminatory barriers against importation of those products (barriers that can only make renewable energy costlier in Canada). By contrast, the electricity market has traditionally been local, with cross-border electricity trade limited by geography and grid connection infrastructure. While the economic impact of a FIT may primarily be to incentivize investment in new renewable energy capacity and equipment installation, the policy is implemented with payments based on electricity generation.

In its decision, the Appellate Body addresses mainly the market for electricity, as that is where the subsidy would be legally defined. However, the decision makes a distinction between electricity from certain renewable sources and other generation. Indeed, the Appellate Body seems to split the market between those two sources. This is an important development, because electrical current from the two sources is physically identical and interchangeable in use.

In this section, the author first examines the substantive law on domestic market discrimination, then the substantive law of subsidy, and finally scrutinizes the lack of openness by the panel to non-state participation.

3.3.1 TRIMs Agreement and GATT Article III

Canada-Renewable Energy marked the first Appellate Body decision under the Agreement on Trade-Related Investment Measures (TRIMs) agreement, thereby laying precedents for future jurisprudence on the application of the TRIMs non-discrimination disciplines. The Appellate Body reversed the panel so as to reduce the scope of the derogation for government procurement in GATT Article III. This holding has implications for TRIMs because that agreement and GATT Article III are so closely interconnected.[312]

The panel began its evaluation under the TRIMs Agreement by considering whether the FIT program was in fact an investment program and, if so, whether it was trade-related. (Canada did not contest that the measure fit within the scope of the TRIMs Agreement). A previous panel, Indonesia – Autos in 1998, took the same approach, but the Autos panel decided that the contested measure was an investment measure based on its announced purpose

[312] It is important to note Canada did not offer an Article XX defense to the GATT or TRIMs causes of action.

and legislative text.[313] By contrast, the Renewable Energy panel decided that the FIT was an investment measure not only based on the legislative record, but also considering the evidence that Ontario's scheme had in fact attracted investment in equipment manufacturing. Like the Autos panel, the Renewable Energy panel found that the investment measure was trade-related based on its minimum local content requirement. These findings were not reviewed by the Appellate Body.

The TRIMs Agreement lacks any substantive disciplines independent of the GATT; therefore, evidencing a violation of GATT Article III or XI is necessary to show a violation of TRIMs Article 2. Ontario's measure was not a quantitative restriction, so if there was a violation of GATT, it had to be a violation of Article III:4 (national treatment). The key question before the panel was how to apply the language in Article III:8(a), which carves out from the disciplines Article III certain activity related to government procurement; 22 the Appellate Body refers to Article III:8(a) as a 'derogation'.[314]

Canada's defence to the cause of action under TRIMs was based solely on Article III:8(a); namely, that due to the nature of the program being a market created by and for the government and its entities, it was not subject to Article III's obligations. The EU offered an expansive reading of TRIMs Article 2.2 and the TRIMs Illustrative List that suggested a discriminatory measure on the Illustrative List could be found to be a violation of GATT Article III:4 irrespective of the Article III:8 procurement derogation. In its decision, the panel rejected that argument, and its analysis was upheld by the Appellate Body.[315] In doing so, the Appellate Body suggested it was a providing a 'harmonious' interpretation of TRIMs Articles 2.1 and 2.2 together.[316] Moreover, the Appellate Body held that the TRIMs Illustrative List is not a closed list and that GATT Article III:8(a) provides 'rights' to WTO Members.[317]

Thus, the availability of Article III's procurement derogation was the central feature of the TRIMs and GATT analysis. This question was nearly a tabula rasa for the WTO dispute system, as no previous WTO jurisprudence on GATT Article III:8(a) had occurred. As a result, both the panel and the Appellate Body devoted considerable attention to the interpretation of Article III:8(a). Although the Appellate Body upheld the panel's conclusion that the challenged measure did not fit within the terms of the Article III:8(a) derogation, it declared that the panel had erred on a key analytical point.

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[313] Panel Report, *Indonesia – Autos*, DS64, para. 14.80.
[314] Appellate Body Reports, Canada – Renewable Energy / Canada – Feed-In Tariff Program, para. 5.56.
[315] Panel Reports, *Canada – Renewable Energy* / *Canada – Feed-In Tariff Program*, para. 7.120; Appellate Body Reports, para. 5.33.
[316] Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-In Tariff Program*, para. 5.26.
[317] Ibid., paras. 5.22, 5.32.

In determining the applicability of GATT Article III, the panel divided the analysis into three prongs: first, whether the measure is a law, regulation, or requirement governing procurement; second, whether the measure involves procurement by governmental agencies; and third, whether the procurement is undertaken for governmental purposes and not with a view to commercial resale. On the first prong, the panel found that the domestic content requirement for renewable energy equipment is a requirement governing the procurement of electricity because there is a 'very clearly a close relationship' between the electricity allegedly being procured and the domestic content requirement on energy generation equipment.[318] On the second prong, the panel found that the measure constitutes procurement by government agencies. On the third prong, the panel reasoned that if the purchase had been done with a view to commercial resale, then such a purchase cannot be for governmental purposes.[319] Focusing on the issue of commercial resale, the panel considered and rejected several arguments by Canada that the nature of the market undermined the commercialese of the sale. Consequently, the panel ruled that the resale of electricity produced through the FIT program is 'commercial' and that the government indeed earns a profit.[320] Thus, the Canadian Article III:8(a) defence was found to have failed on the third prong, and the panel did not rule on the existence of 'governmental purposes'.

The applicability of the Article III:8(a) defence was appealed by all three parties. Explaining that Article III:8(a) was a derogation rather than a justification, the Appellate Body provided what it called a 'holistic' interpretation of the key terms in Article III:8(a).[321] The Appellate Body's dicta will surely guide future panels.[322] The most important conclusion

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[318] In the preliminary part of its report, the panel noted that no party had contested that electricity is a good. The panel's report assumes that electricity is a good, even noting its intangible nature. Panel Reports, para. 7.11, n. 46, para. 7.127.

[319] *Ibid*., para. 7.145.

[320] *Ibid.*, para. 7.151.

[321] Appellate Body Reports, Canada – Renewable Energy / Canada – Feed-In Tariff Program, paras. 5.56, 5.82.

[322] Dicta is used here in the sense that the Appellate Body extensively interpreted Article III:8(a), even though these findings were unnecessary in its conclusion to reverse the panel on the first prong. See Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-In Tariff Program*, para. 5.84. Among the key points were that procurement should not be equated with purchase; that the definition of a government agency is determined by the competences conferred and on whether the entity acts for or on behalf of the government; that what constitutes a competitive relationship between products may require consideration of inputs and processes of production used to produce the product; that there has to be a 'rational relationship' between the product purchased and the governmental function being discharged; and that where products are consumed for government use, the consumption does not have to be immediate or ultimate. The Appellate Body also provided an essentially economic analysis on the meaning of commercial resale, noting that any profit orientation needs to be examined from the perspective of both the seller and the buyer, and introduced without any textual basis the concept of an arms-length sale. Ibid., paras. 5.71, 5.74. The Appellate Body also disagreed with the panel's view of the third prong as disjunctive, maintaining that the two requirements in the third prong are cumulative. Ibid., para. 5.69. On the issue of the meaning of the term 'government agency' in Article III:8(a), the Appellate Body posited that 'GATT 1994 recognizes

reached by the appellators was that since both the obligations in Article III and the derogation in III:8(a) refer to discriminatory treatment of products, the same discriminatory treatment must exist with both rules.[323] Put another way, the product of foreign origin being discriminated against must be in a competitive relationship with the product purchased by the government.[324]

Applying its interpretation to the facts, the Appellate Body noted that the discriminatory treatment (in the form of minimum content) applies to renewable energy equipment, while the government procurement concerns electricity. Since electricity is not the same as or a competitive product to the electricity generating equipment that is being treated less favourably, the Appellate Body reversed the panel on the first prong, holding that the discriminatory measures were not covered by the Article III:(8)(a) derogation. The Appellate Body also reversed as 'moot' all of the other legal interpretations by the panel of Article III:8(a).[325]

The remainder of the panel's finding with regard to TRIMs Article 2.1 and Article III:4 was not challenged by Canada on appeal, and the Appellate Body made clear that this part of the panel's analysis 'stands'.[326] Specifically, based on its conclusion that Article III:8(a) did not apply, the panel had analysed the Ontario measure under Article III:4. The panel found that mere participation in the FIT program was an 'advantage' under the chapeau of Article 1(a) of the TRIMs Illustrative List and that compliance with the domestic content requirements was necessary in order to obtain this advantage.[327]Therefore, the panel concluded that the domestic content requirement of the FIT was inconsistent with Article III:4 and thereby also inconsistent with TRIMs Article 2.1.[328] These findings were upheld.

3.3.2 ASCM Articles 1 and 3

The cause of action against the feed-in tariffs (FIT) contracts was that they violate ASCM Article 3.1(b), which forbids providing a subsidy contingent on local content. In adjudicating this claim, neither the panel nor the Appellate Body reached this central issue, because neither was able to validate the existence of a subsidy. The SCM Agreement defines a subsidy in Article 1 as generally requiring the two prongs of a financial contribution

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that there is a public realm and a private realm, and that government entities may act in one, the other, or both'. Ibid., para. 5.61.

[323] *Appellate Body Reports, Canada – Renewable Energy / Canada – Feed-In Tariff Program*, para. 5.63. The Appellate Body's restatement of Article III:8(a) is summarized in ibid., para. 5.74.

[324] *Ibid*., para. 5.79.

[325] *Ibid*., paras. 5.82, 6.1(b)(ii).

[326] *Ibid*., para. 5.85.

[327] Panel Reports, Canada–Renewable Energy / Canada–Feed-In Tariff Program, para. 7.165

[328] *Ibid*., para. 7.117

from the government and a benefit to a recipient. Alternatively, a subsidy can also be shown if, instead of a financial contribution, there is 'any form of income or price support in the sense of' GATT Article XVI (notification of subsidies).[329] If found to be a subsidy, then in view of the embedded LCR, the Ontario FIT would automatically be prohibited under the SCM Agreement. (A separate question, not addressed in the adjudication, would ask whether a FIT without an LCR would be specific and actionable under the SCM Agreement with regard to trade in electricity.)

A key issue in this case was how, if at all, Ontario's FIT contracts come within the statutory definition of financial contribution'. The SCM definitional provisions are as follows: [A]subsidy shall be deemed to exist if:

(a) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as 'government'), i.e. where:

(i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);

(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits),

(iii) a government provides goods or services other than general infrastructure, or purchases goods; (iv)a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to

(iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments.[330]

All three litigants agreed that the contracts were financial contributions, but the three governments offered different views as to the proper legal characterization between (i) and (iii) above.

The Appellate Body (as well as the panel) concluded that the contracts manifested a government purchase of goods, and therefore, a financial contribution exists.[331] In reaching

[329] The condition 'in the sense of' presumably refers to the language of GATT Article XVI:1 which references a subsidy '…including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory'.

[330] SCM Article 1.1(a)(1) (internal footnote omitted).

[331] Japan, one of the plaintiffs, appealed the panel's finding that Ontario's electricity contracts were purchases of a good, but the Appellate Body upheld the panel. Appellate Body Reports, Canada – Renewable Energy / Canada – Feed-In Tariff Program, para. 5.128.

that outcome, the panel scrutinized the design, operation, and principal characteristics of the contracts and concluded that the Ontario Power Authority pays for delivered electricity and that Ontario's Hydro One takes possession of the electricity. The panel also noted that for electricity, the purchase of electricity means the transfer of the entitlement to the electricity.[332]

Both the panel and the Appellate Body also grappled with the question of whether a measure could be a financial contribution in more than one way under the SCM definition. Japan had argued that the measures constituted a 'direct transfer of funds' or a 'potential direct transfer of funds', but the panel reasoned that a purchase of goods could not simultaneously be a 'transfer of funds', as that logic would render all purchases of goods to duplicative be direct transfers of funds.[333] This legal holding of mutual exclusivity was declared 'moot and of no legal effect' by the Appellate Body, as being inconsistent with a previous Appellate Body ruling that the definition of financial contribution does not expressly exclude that a transaction could be covered by more than one subparagraph of the definition.[334] Nevertheless, the Appellate Body refused to agree with Japan that the measure should also be characterized as a direct transfer or a potential direct transfer of funds.[335]

Japan (backed to some extent by the EU) argued before the panel that the FIT contracts constitute 'income or price support' of electricity.[336] Only one previous WTO case before Renewable Energy had considered this 'income or price support' provision, and the Renewable Energy panel dodged the issue by exercising judicial economy. Japan appealed this non-finding, but the Appellate Body rejected the claim of false judicial economy. In exercising judicial economy, the panel peeked ahead to the next section of its report and noted that since the panel majority 'rejects the entirety' of the conclusion that a benefit exists from the financial contribution, there was no need to determine whether a benefit exists from the income or price

[332] Panel Reports, Canada – Renewable Energy / Canada – Feed-In Tariff Program, para. 7.229. See at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds412_e.htm [Accessed: August 10, 2020].

[333] Ibid., paras. 7.245–7.246. The panel noted that the Appellate Body had previously stated that SCM Article 1.1 did not expressly preclude that a transaction could be covered by more than one subparagraph. Ibid., 7.247. Nevertheless, the panel seemed to adopt an interpretation that denied that a transaction could be covered by two subparagraphs. The Appellate Body was quick to point out the inconsistency with its prior jurisprudence and responded by erasing the legal effect of the panel's finding. Appellate Body Reports, Canada – Renewable Energy / Canada – Feed-In Tariff Program, para. 5.121.

[334] Appellate Body Reports, Canada – Renewable Energy / Canada – Feed-In Tariff Program, para. 5.121.

[335] This portion of the Appellate Body decision is murky. The Appellate Body seems to be suggesting that the proper legal characterization depends on the order in which the judge considers the prongs as defining a financial contribution. Ibid., para. 5.131. Such a conclusion seems illogical to us, particularly in light of the Appellate Body holding that the prongs are not mutually exclusive. Moreover, if the same characteristics of a measure cannot do double duty in qualifying a measure as a financial contribution under more than one of the Article 1.1(a)(1) prongs, the Appellate Body does not explain its reason for considering the prongs out of order rather than seriatim.

[336] Panel Reports, Canada – Renewable Energy / Canada – Feed-In Tariff Program, para. 7.172.

support.[337] In upholding the panel, the Appellate Body noted that Japan had not explained how the benefit analysis could have come out differently if the panel had characterized the FIT as an income or price support.[338] Thus, the Appellate Body's conclusion might have been different if Japan had been more comprehensive in its pleadings.

The second part of the definition of a subsidy requires that the financial contribution confer a benefit to a recipient. The Appellate Body agreed with the panel that the appropriate legal standard for a benefit is whether the FIT recipient has received the financial contribution on terms more favourable than those available to the recipient in the market.[339] In this case, the generators of electricity who are party to the FIT contracts are the recipients. So, the question is whether the terms of the contract provide more than 'adequate remuneration'. Even though their governments also provide generous FITs, both the EU and Japan argued on appeal that in the absence of the FIT contracts, the solar and wind power electricity generators would not have been able to operate financially.[340] Thus, from that perspective, the lucrative payments made by the Ontario government to the generators clearly provide a benefit.

Nevertheless, this straightforward conclusion was rejected by the Appellate Body, which refused to adopt such a 'but for' test in favour of a more government-centric market analysis. Although the panel had not ascertained the existence of a benefit, the Appellate Body reversed the panel's conclusion as having been based on an erroneous analytical application of the proper legal standard. In particular, according to the Appellate Body, the panel had erred in considering the wholesale market for all electricity from any source as the relevant market. Instead, the Appellate Body ruled that the relevant market was electricity produced from wind and solar generators. Its ruling was based on the assertion that both the government and some consumers view these products as being different from conventional generation. The Appellate Body indicated that the panel had not sufficiently considered such supply- and demand-side factors specific to the provincial market.[341]

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[337] *Ibid*., para. 7.249. The panel averred that the case arguments for the existence of benefit were 'essentially parallel' as between the two provisions.

[338] Appellate Body Reports, Canada – Renewable Energy / Canada – Feed-In Tariff Program, para 5.137.

[339] The ASCM Article 1 standard is whether there is a benefit to the recipient. Whether such a benefit is congruent with economic rent has not been addressed in the jurisprudence.

[340] Appellate Body Reports, Canada – Renewable Energy / Canada – Feed-In Tariff Program, para. 5.194–5.196.

[341] Appellate Body Reports, Canada – Renewable Energy / Canada – Feed-In Tariff Program, para. 5.214. The key supplyside factor is that electricity from renewable energy cannot compete with other electricity from conventional sources. The key demand-side factor is the government as market participant. The Appellate Body criticized the panel for focusing too much on the preferences of final consumers while ignoring the government's preferences. Oddly, the Appellate Body also says that the government's purchase decisions may reflect the fact that consumers are ready to purchase more expensive electricity from renewable sources. *Ibid*., para. 5.177.

The market for renewably sourced electricity, according to the Appellate Body, can come into existence only as a matter of government regulation, particularly the government's choice of the appropriate supply mix of electricity generation technologies.[342] The Appellate Body declared that a government may choose its supply mix by setting administered prices or by requiring private distributors or the government itself to buy part of their electricity from certain generation technologies. Without offering any reasons, the Appellate Body further emphasized that a regulation defining the government's desired supply mix 'cannot in and of itself be considered as conferring a benefit' under the SCM Agreement'. Indeed, the Appellate Body made this point three times, each without offering any justification.

To summarize the Appellate Body's conclusion, the judge should start with the 'policy imperatives' such as 'reducing reliance on fossil fuels', and then consider how the government defines the energy supply mix. That constructivist definition denotes a 'market' for electricity from certain renewable energy, and that market is then used to determine the existence of a benefit. Acknowledging the difference between its analytical approach and an approach based on observing an actual market, the Appellate Body admitted that while introducing legitimate policy considerations into the determination of 'benefit' could not be reconciled with the SCM Article 1 text, its self-described market-based approach to benefit benchmarks did not exclude considering situations where governments intervene to create markets that would not otherwise exist.[343]

Thus, to determine whether the FIT contracts confer a benefit, the Appellate Body explained that the benchmarks for comparison should be the terms and conditions that would emerge from market-based conditions for each of these technologies, taking the government-determined supply mix as a given. In other words, the relevant question is whether wind and solar electricity suppliers would have entered the renewable electricity market given those targets but absent the FIT program, not whether they would have entered the blended electricity wholesale market without the subventions.

After laying out its desired analytical approach, the Appellate Body found error in the panel's overreliance on the arguments of the complainants and in its failure to undertake

[342] *Ibid*., para. 5.175.

[343] *Ibid*., para. 5.185. In that regard, the Appellate Body drew a distinction between 'government interventions to create markets that would otherwise not exist and, on the other hand, other types of government interventions in support of certain players in markets that already exist or to correct distortions therein'. Ibid., para. 5.188. In a previous case, in discussing SCM benefit, the Appellate Body had called for using 'the market standard – according to which rational investors act'. Appellate Body Report, Japan – Countervailing Duties on Dynamic Random Access Memories from Korea, WT/DS336/AB/R and Corr.1, adopted 17 December 2007, para. 172. Perhaps in the FIT case, the Appellate Body was suggesting that rational actors would pay a higher price for electricity that is sourced from renewable energy.

its own analysis of the proper market. In dicta, the panel had recognized that a competitive wholesale electricity market could not be the appropriate focus for a benefit analysis, because such a market would not attract sufficient investment in clean energy.[344] Yet, although the complainants had invited it to conduct its own analysis, the panel had demurred on the grounds that a panel is not entitled to make a prima facie case for a complainant.[345] Nevertheless, the panel did offer its own 'observations' on the issue of benefit.[346] It was such dicta that provided the hook for the Appellate Body to reverse the panel for not having pursued its own line of reasoning to a conclusion.

While the Appellate Body did not appear to disagree with the panel that the complainants had failed to establish the existence of benefit, it nevertheless reversed the panel's holding of a failure to demonstrate the benefit.[347] This puzzling outcome can be explained only if the Appellate Body had been saying that the complainants had actually put forward a prima facie case despite using the wrong benchmark and that the panel had an obligation to seek whatever information was needed to conduct the analysis with a correct benchmark.[348] Moreover, the Appellate Body seems to have been saying that despite the complainants' obligation to identify the suitable benchmark, that obligation could be fulfilled by presenting arguments that in some way touch on a benchmark that was not offered by the complainants.[349]

After reversing the panel's conclusion that the complainants had failed to establish that the FIT conferred a benefit, the Appellate Body considered whether it had sufficient factual findings on the record to complete the analysis. The Appellate Body concluded that it did not have such facts, but it nevertheless offered dicta on how a judge might make such a determination. The Appellate Body explained that first one should look for what a market benchmark would yield for wind – and solar generated electricity in Ontario. If needed, one could look for an appropriate benchmark outside of Ontario. The Appellate Body further observed that the fact that the government sets prices does not in itself establish the existence of a benefit. Rather, the complainant must show that the prices do not reflect the adequate remuneration that would result in the market, and a complainant might do so with an analysis

[344] Panel Reports, Canada – Renewable Energy / Canada – Feed-In Tariff Program, paras. 7.320, 7.312, 7.313(c).
[345] *Ibid*., para. 7.321.
[346] For example, the panel suggested comparing the FIT contracts to the conditions that commercial distributors of electricity might have paid if there were a government obligation to purchase renewable energy. Ibid., para. 7.322. The panel also suggested comparing the rate of return on FIT investments to the average cost of capital for projects in Canada with a comparable risk profile in order to see whether FIT generators were being overcompensated. *Ibid.*, para. 7.323.
[347] Appellate Body Reports, Canada – Renewable Energy / Canada – Feed-In Tariff Program, para. 5.219.
[348] *Ibid*., paras. 5.215, 5.219.
[349] *Ibid*., paras. 5.215, 5.216.

of the methodology that was used to establish the administered prices. Where there is not sufficient information, the next step could be to construct a s within the country or in another country, provided that the proxy is determined based on a price-setting mechanism. The Appellate Body pointed to price discovery mechanisms such as competitive bidding or negotiated prices to ensure that the price paid by the government is the lowest possible price offered by a willing supply contractor. In addition, the Appellate Body hinted that for wind-based electricity, there was evidence that FIT contracts confer a benefit in comparison to Ontario's wind-power generation contracts awarded by the government with competitive bidding.

The author summarized the Appellate Body's roadmap for how a panel should conduct the benefit analysis in future FIT cases in Table 3.1.

Table 3.1

Appellate Body's suggested hierarchy for selecting the comparator for benefit analysis developed by the author

Source of benchmark	Options for determining relevant market price
1. In-country benchmark	a. Market prices b. Administered prices determined based on price setting mechanism c. Administered prices set through price discovery mechanism such as competitive bidding or negotiated prices
2. Out-of country benchmark when government intervention is distortive	Same options, adjusted to prevailing conditions in the market of the of the defendant country
3. Proxy construction	Appellate Body does not elaborate but presumably an analysis based on costs plus profit

The Appellate Body did not analyse or rebut the noteworthy dissenting opinion in the panel report, which emphasized previous Appellate Body jurisprudence regarding the marketplace. The dissenting judge had found that the FIT contracts do confer a benefit, because they bring high-cost and less efficient energy producers into the wholesale electricity market when they would not otherwise be present.[350] In addition, that anonymous jurist pointed out that although a competitive market might not achieve all of the objectives that the government may have for the goods or services that are traded, that situation should not shield the related financial contributions from the benefit analysis required by the SCM Agreement.

[350] Panel Reports, Canada – Renewable Energy / Canada – Feed-In Tariff Program, para. 9.23.

3.4 Procedural issues

Apart from these developments in substantive trade law, four procedural aspects of the case deserve attention. First, the Appellate Body abandoned its past practice of using a paragraph numbering system distinct from that regularly used by panels. The clever decimal-based numbering system had started with the EC-Bananas case in 1997 and saved trade law practitioners countless hours by clearly delineating panel versus Appellate Body rulings. The Appellate Body provided no explanation for why it adopted such a significant change that certainly does not serve the cause of clarity in WTO jurisprudence. This episode provides yet another example of why the Appellate Body should adopt a notice and comment process before making changes in its rules and practices.

Second, at the Dispute Settlement Body (DSB) meeting considering the reports, Canada complained that the Appellate Body's interpretation of GATT Article III: 8 was not based on the submissions of the parties and that no questions about the incipient interpretation were put to the parties.[351] If true, this claim does raise significant due process concerns. On the other hand, in a common law system, a court is not limited to the legal arguments offered by the litigants.

A third procedural point involves amicus briefs. Given the importance of the dispute to the global environment, the panel received two sets of amicus curiae briefs from nongovernmental organizations (NGOs): one from a coalition of labour groups and one from a coalition of environmental groups. Consistent with past practice of panels, the panel identified the NGOs but did not append the briefs or summarize their content. In addition, the panel delegated to the governments the question of whether it should take the briefs into account. When no government signified that the panel should take the briefs into account by appending the nongovernmental briefs to the government submission, the panel reported in its decision that it 'did not find it necessary to take the briefs into account'.[352]

The Appellate Body noted that it received two amicus briefs: one from an energy company and one from an academic.[353] The Appellate Body did not identify the sources of these briefs and did not discuss their content. According to the report, the division gave the participant and third participant governments an opportunity to express their views on these briefs at the oral hearing, but the report does not discuss the extent to which the participants did so.

[351] DSB Meeting Held on 24 May 2013, WT/DSB/M/332, para. 8.4.
[352] Panel Reports, Canada – Renewable Energy / Canada – Feed-In Tariff Program, para. 1.13.
[353] DSB Meeting Held on 24 May 2013, WT/DSB/M/332, para. 8.4.

We take note of the panel's sense of self-assurance in juxtaposition to how its adjudication was dispatched by the reviewing court. The Appellate Body reversed the panel twice, declared moot its findings once, and criticized it several times. The panel was composed of distinguished individuals, but one wonders whether the Canada – Renewable Energy panellists would have done a better job for the parties and the WTO if they had exercised their prerogative to take the amicus briefs into account.[354] In our view, panels should regularly take advantage of the legal insights offered in amicus briefs from NGOs, academics, or others.

Fourth, this case provides yet another example showing the need for a remand procedure in the DSU. As noted above, the Appellate Body concluded that there were not sufficient factual findings by the panel and uncontested evidence on the panel record to allow the Appellate Body to determine whether the FIT confers a benefit. As a result, the DSB's work in this case remained undone. Although we favor the establishment of a remand procedure, we note that in instances where the Appellate Body is unable to complete the analysis, the complainants are always free to file a new case. The fact that complainants regularly do not do so may suggest the need for a procedure triggered by a motion of the complainant rather than giving the Appellate Body full discretion to institute a remand.

To sum up, Canada – Renewable Energy presented a challenging case in which preferential payments for electricity generation were being used to incentivize capacity investment in renewable energy, seeking to modify the generation mix in a historically regulated market. At the same time, a local content requirement was used to earmark the preferential treatment toward installing locally manufactured equipment. The panel and Appellate Body were rightly in agreement that the LCR constitutes a WTO violation but demurred as to whether a FIT constitutes a subsidy. The greater, unspoken question is whether WTO law poses obstacles for socially merited environmental policies, and the dispute process largely avoided this confrontation.

However, by avoiding the determination of whether an environmentally minded program confers a benefit under the SCM, the Appellate Body may have opened the door for any number of well or poorly intentioned interventions. Coby and Mavroidis make this point forcefully, noting the incongruity of the Appellate Body's 'acrobatic' analysis in trying to avoid finding the FIT a subsidy (2014: 32 n. 24). The irony is that this broadening of benefit analysis, and all the machinations regarding the relevant benchmarks in the electricity market, comes from a dispute that was fundamentally not about electricity trade, as the complainants have no

[354] See Rubini (2014: 11–12) for similar criticism of the panel's and Appellate Body's disposition against use of the amicus briefs.

electricity trade with Canada. Rather, the dispute was about eliminating non-tariff barriers to imported renewable energy generation equipment.

In fact, were the FIT found to be an electricity subsidy, it would be difficult to find a partner in electricity trade harmed by it and willing to challenge it. Meanwhile, one can also think of other policy designs that would have economically equivalent effects for the generation portfolio namely, subsidies for renewable energy equipment and installation – and these would not trigger such an analysis of the electricity market, as the relevant market would be that of the manufactured equipment. Furthermore, in this situation, the subsidy would be viewed as a consumption subsidy, if also available to imports, rather than a production subsidy, and again a finding of harm would be challenging to identify.

Thus, had the Appellate Body found that the FIT were a subsidy, it is far from clear that this would have caused irreparable damage to renewable energy policy-making. Still, that judgment might have led to a useful conversation about aligning the SCM with internationally agreed-upon sustainable development goals. In author's view the Appellate Body, like the panel tried to shield the WTO from broad criticisms from the environmental community.

4 Georgia and the WTO: from Frailty to Sustainability in Trade

4.1 Main trade agreements and arrangements

4.1.1 Introduction

The following chapter reviews the trade policies and practices of Georgia as well as Georgia-WTO relationship including historical context based on the report by the WTO Secretariat and the report by the Government of Georgia. The author focuses on the history of trade relations between Georgia and Russia which in author's view eventually developed into the "trade war". Why Georgia? Georgia, is a part of the WTO's post-Soviet orbit, which managed to establish Western-style governance and values despite regional threats and globalization challenges, escaped a trade war Russia that later escalated into military intervention. Despite huge difficulties, the country has implemented fundamental reforms and harmonized trade regulations. Georgia was one of the first post-Soviet countries that began negotiations for WTO membership. At the same time, Georgia, as a small WTO state, was able to successfully deal with the Russian embargo and diversified its trade markets. However, the Russian embargo, which practically collapsed the country's economy and halted its development, was not evaluated as a trade war in due time probably because soon it was overshadowed by military intervention. Based on the above, this chapter reviews the Russian – Georgian trade war, gives the evidence and creates legal framework to evaluate it as a trade war. It is the first trade tension with a very clear political connotation and a precedential character which has never been widely analysed in scientific circles.

Trade liberalization is one of the key objectives on Georgia's economic policy agenda. After Georgia's integration in the WTO, country undertook a large number of reform initiatives targeted at streamlining, liberalization and simplification of trade regulations and their implementation. Following the Rose Revolution in 2003, the Georgian government increased efforts to reduce corruption in public and private sector and sought to meet international standards. These efforts resulted in significant improvements in Georgia's ranking in the World Bank's Doing Business Survey. Between 2006 and 2019, Georgia jumped from 112th place in the overall rankings for ease of doing business to 6th. [355]

[355] See Doing Business 2019: A Year of Record Reforms, Rising Influence https://www.worldbank.org/en/news/immersive-story/2018/10/31/doing-business-2019-a-year-of-record-reforms-rising-influence

4.1.2 Investment Incentives

One of the strategic initiatives is to develop Georgia's trade-transit function. The framework has been established that is intended to allow investors to conduct processing activities in Georgia in connection with the transit of goods without being subject to Georgian taxes.

A central feature of this strategy is the development of Free Industrial Zones (FIZs). A FIZ may be established on a piece of land exceeding 10 hectares, upon the initiative of the Georgian government or the request of a resident or non-resident person for land that they own or lease. FIZs have so far been established at Poti Port, Kutaisi and Tbilisi.

One limiting feature of a FIZ is that it is unclear whether output from a FIZ may be sold into the Georgian market. The Law on FIZ suggests such sales are permitted, but the tax code says otherwise. Another concern is that there are constraints on the goods and services that enterprises operating in a FIZ may obtain from Georgian suppliers.[356]

As *regards main trade agreements and arrangements* – after gaining independence in 1991, Georgia's economy collapsed and it is the only country in the South Caucasus and Central Asia that has not reached its pre-independence real GDP level; as of 2013, Georgia's GDP was estimated to be 80% of its 1990 levels.[357] Georgia's trade policy review in 2009 showed how since the Rose Revolution in 2003, the Government established a structural reform programme that aimed, inter alia, to liberalize trade, improve infrastructure, upgrade the business environment, strengthen public finances and combat corruption. As a result, growth accelerated to an average rate of 9.4% during 2004–2007. This acceleration was halted by the twin shocks in 2008: the conflict with the Russian Federation (two years before Russian intervention Georgia feel victim to Russian trade war, see below) and the global financial crisis. The impact of the crises was relatively short-lived and the economy rebounded in 2010–2013, with growth averaging 5.8%. Over the past decade or so, GDP per capita increased from US$920 in 2003 to US$3,680.8 in 2014, although Georgia's overall impressive growth performance was not matched by commensurate declines in unemployment and poverty. At the start of the review period (2009 to 2020), average annual real GDP growth rebounded from −3.7% in 2009 to an average of 5.8% in 2010–2013. GDP per capita increased by over half to reach US$3,681 in 2014, although Georgia's overall impressive growth performance was not matched by commensurate declines in unemployment and poverty. While the current account

[356] Georgian National Investment Agency http://www.investingeorgia.org/?84/tax_system/dated 16.04.2015.
[357] World Bank (2014a), p. 3.

deficit has narrowed from a peak of 22% of GDP in 2008, it has remained significant at 10–13% of GDP during 2010–2012. Real GDP growth slowed significantly to 3.3% in 2013 from 6.4% in 2012, reflecting slower global growth, weak domestic demand and economic deceleration related to the political transition that prompted investor caution. Growth for 2014 recovered to 4.8% (just below the Government's 5% target) but the depressed economies of Georgia's major trading partners are expected to halve growth to around 2% in 2015.[358] The positive dynamics of growth continued for the next 5 years (2015-2020) but due to the COVID-19 pandemic Georgia's GDP Declined by 5.8% in first half of 2020.

The key event of this review period occurred in June 2014, when Georgia signed the Association Agreement (AA) with the European Union. The AA includes a Deep and Comprehensive Free Trade Area (DCFTA), which plans to enhance Georgia's trade prospects and boost economic growth by bringing its legislation closer to that of the EU. It also removes the existing barriers on the trade of goods and services with the EU. Georgian products have to meet certain EU requirements not only for export, but also when consumed within the country.

The *author* explains that this study does not aim to explore the hierarchy of legal norms proceeding on the relations between the WTO and EU or their interdependence; rather it focuses on the entries in the Association Agreement between Georgia and the European Union which refer to Georgia's compliance with the WTO obligations and their superior power. In accordance with Article 1 of the Association Agreement, the goal is to achieve gradual economic integration of Georgia into the EU internal market that will ensure reliable market access based on sustainable and comprehensive regulatory convergence of rights and obligations arising from WTO membership. The signing of the Association Agreement with the EU sends a very positive message to the markets, and helps to promote exports to the area from 2014–2019 (Trade/economic structure and trends see below Figure 4.1) onwards, which creates a practical framework for achieving EU-Georgia political association and trade integration. Moreover, the author believes that the tools such as the DCFTA offer the EU an opportunity to spread its sphere of influence to its east, including the Caucasus region. This remains a sensitive area for Europe as it presently depends on Russia to meet its energy needs. Deeply cognizant of this, Russia uses its energy resources as a political bargaining chip. Indeed, as the South Caucasus region belongs to the energy-rich Caspian region, it is advantageous in the long-term for Europe to diversify its energy resources and energy partners. The author argues, that this perspective adds extra stimulus to the development of Georgia into a trade transit corridor.

[358] See Georgia's long-term growth strategy, https://www.mof.ge/images/File/Georgia-The%20Outlook_ENG_Jan-2018.pdf; See also http://geostat.ge/index.php?action=page&p_id=119&lang=eng

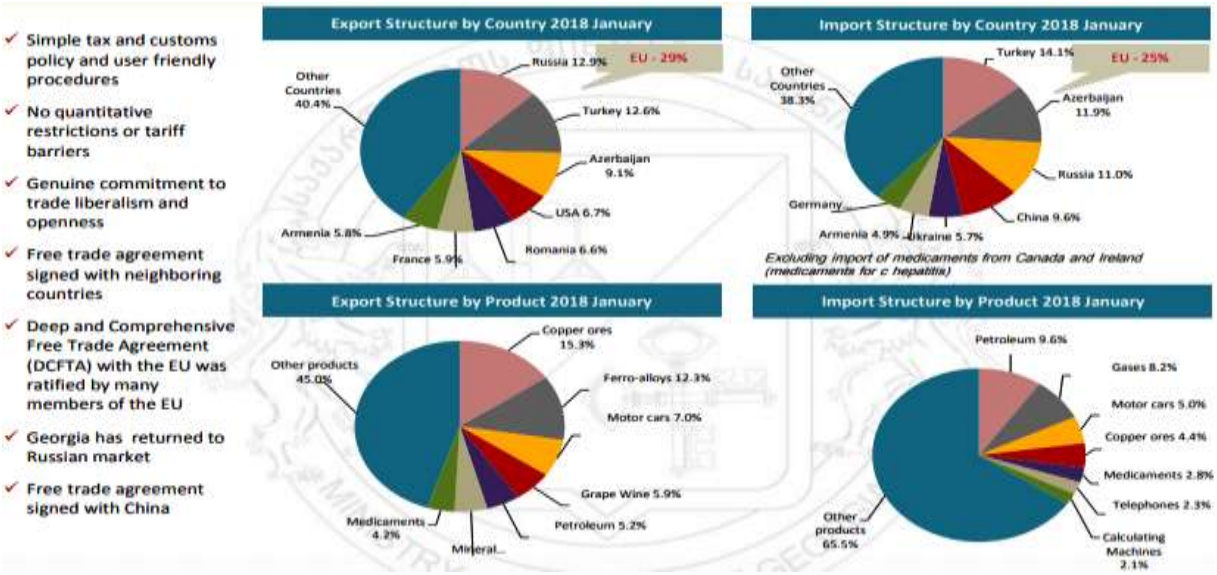

Figure 4.1. **Trade/Economic Structure and Trends***

* Liberalized trade, diverse partners, significant and growing network of free trade agreements.
Source: National Statistics Office of Georgia online information; IMF, International Financial Statistics online information.[359]

As a member of the WTO since 2000, Georgia grants MFN treatment to all WTO Members. Georgia is an observer to the Government Procurement Agreement. Georgia has GSP arrangements with the United States (temporarily terminated), Japan, Canada, Switzerland and Norway. In 2009, Georgia terminated its membership of the CIS organization but has maintained bilateral FTAs with eight CIS countries and also has an FTA with Turkey, a Trade and Investment Framework Agreement with the United States and is due to commence FTA negotiations with the EFTA states in September 2015. Georgia and China are completing a joint feasibility study on a possible Georgia-China Free Trade Agreement and have also signed a memorandum of understanding on strengthening cooperation for the Silk Road Economic Belt initiative. The Ministry of Economy and Sustainable Development is the executive authority which determines, implements and coordinates state policy in the field of trade. In the ministry, the Department for Foreign Trade and International Economic Relations is exclusively involved in the formulation of foreign trade policy. As part of its daily functions, the department closely cooperates with several trade-related bodies under the ministry and collaborates with other relevant entities, including in the private sector. The Department implements the mandatory notification submission procedures to the WTO. The main

[359] Georgia the Outlook, dated January 2018; https://www.mof.ge/images/File/Georgia-The%20Outlook_ENG_Jan-2018.pdf [Accessed: May 1, 2020].

instrument regulating foreign trade in Georgia is the revised 2011 Tax Code of Georgia, which defines objects subject to import taxation, customs regimes and procedures as well the exemption of certain goods from import duties. Legislative amendments have taken place in several trade-related areas. Georgia has continued to develop its national quality infrastructure in accordance with international and EU practices. Its TBT strategy stipulates that Georgia refrain from adopting national standards in the areas where relevant international standards exist. About 98% of all standards adopted in Georgia are international or European standards.[360]

4.2 Trade and Investment Regime

Georgia has made sweeping economic reforms during the last ten years, developing from a near-failed state in 2003 to a relatively well-functioning market economy in 2019. Georgia has achieved significant results in terms of curbing low-level corruption, streamlining an inefficient administration, eliminating unnecessary licensing requirements, improving the State's tax collection capabilities, liberalizing its trade regime and generally improving Georgia's attractiveness based on ease of doing business. However, progress has been coupled with shortcomings, particularly in the aftermath of the 2008 financial crisis and the war with the Russian Federation.

At the same time, it is notable that following parliamentary and presidential elections in 2012 and 2013 respectively, a peaceful transfer of power took place for the first time in Georgia's modern history. Since 2012, the Government has broadly continued the previous Government's low-regulation, low-tax free market policies while modestly increasing social spending. Also, the Russian Federation lifted its embargo on Georgian wine, mineral water and certain agricultural goods in 2013 that had been in place since 2006.

Integration with the EU remains the mainstay of Georgia's foreign economic and trade policy including a Deep and Comprehensive Free Trade Area (DCFTA). A wide range of trade regulations are also due to be implemented, as the DCFTA envisages approximation of Georgia's trade-related legislation with EU legislation. The EU estimates that in the longer run (5-10 years after implementation) Georgia's exports could increase by 12% and imports by 7.5% while GDP could be 4.3% higher. A more stable and predictable regulatory environment and free trade with the EU should also make Georgia more attractive for FDI.[361]

[360] Trade policy review, see link: https://www.wto.org/english/tratop_e/tpr_e/s328_e.pdf, dated November 10, 2015. p. 7–12.

[361] Georgia and EU dated August 2, 2018, see link https://eeas.europa.eu/headquarters/headquarters-homepage_en/49070/Georgia%20and%20the%20EU [Accessed: May 2, 2020].

Georgia's investment legislation, aiming to open the economy to increased international business activity and foreign investment, remains largely unchanged from the time of the previous review. However, the Government's medium-term development strategy aims to overhaul current legislation to better correspond to international norms and practices but without so far specifying what will be put in place of the current legislation.

The analysis of the process of Georgia's economic integration into the EU leads to the conclusion that in this respect Georgia has no enforcement problem ensuing from concomitant obligations for one reason: the text of Georgia's Association Agreement repeatedly stresses respect for the WTO principles and treaties and their preferential legal force in the case of collusive norms.

However, *the author argues*, that there is a gap in the text of the Association Agreement in regard of the WTO; in particular, the Organization is referred to rather inconsistently and it seems that there is no unified vision of the name of the organization. The author believes, that the state should decide how to mention such an important organization in the official documents, based on common practice of using terms of legal acts.

4.2.1 General Institutional Developments/Constitutional Framework

Under its 1995 Constitution, which separates government into executive, legislative and judicial branches, Georgia was defined as a presidential republic. However, recent constitutional amendments entered into force in 2013, distributing the presidential powers between the prime minister and parliament. The president remains head of state and commander-in-chief but can no longer initiate draft laws, suspend acts issued by the Government or convene emergency sessions of parliament. The amendments roll back the concentration of powers granted to the presidency in 2004 and increase the role of parliament regarding the direction and execution of foreign and domestic policies. The government led by the prime minister is the supreme body of the executive branch. During the current review period, Georgia successfully navigated a complex and unprecedented political transition with two landmark elections in which power changed hands peacefully, two changes of prime minister, a change of president, and a constitutional shift in the political system, while continuing to deliver on a detailed reform and approximation agenda in the framework of the Association Agreement with the EU.

Parliament is responsible for ratification of international treaties, while the executive is responsible for implementation. Ratification was required to complete the national procedures relating to Georgia's WTO accession. International agreements ratified by parliament, including

the WTO agreement, have precedence over domestic laws and other acts in Georgia apart from constitutional law. Georgia's laws provide for the right to appeal administrative rulings on matters subject to WTO provisions to an independent tribunal, in conformity with WTO obligations. Following the adoption of the 1995 constitution, a legal system was established with a constitutional court and a 3-level system of common courts: district or first instance courts; appellate courts where decisions of first instance courts can be appealed; and the Supreme Court which is the final instance court for administering justice. Despite far-reaching reform measures (including new rules for the appointment of judges by a non-political body of professionals and a significant increase in judges' salaries) the judiciary has failed to win a reputation for independence. The inefficiency of the judicial system and weak capacity of the courts are factors in the feeble protection of property rights and poor settlement of commercial disputes.[362] The Government recognizes this challenge and is taking steps to reinforce the independence of the judiciary through new rules that increase transparency and diminish the opportunity for political interference. In this regard, basic judiciary reform based on the Venice Commission recommendations is among the priorities of the current Government.[363]

4.3 WTO Trade relationship with Georgia

Table 4.1

Chronology of accession of Georgia to WTO (developed by the author)

1998–1999	Bilateral negotiations on market access with the WTO member countries (Japan, Slovakia, Czech Republic, Turkey, Australia, Canada, Mexico, European Union, Poland, India, Kyrgyz Republic, Bulgaria, Switzerland, USA);
October 6, 1999	Signing the protocol on Georgia’s accession to the World Trade Organization;
April 20, 2000	The Parliament of Georgia ratified the protocol on accession of Georgia to WTO;
June 14, 2000	Georgia became the 137th member of WTO.

The process of obtaining Membership of the WTO is complex and implies many challenges for the countries wanting to join and hence the long average duration. Once that goal is achieved, the practice shows that WTO membership creates significant new opportunities.

[362] Freedom House ranked Georgia low on judicial framework and independence in its study Nations in Transit 2013: Authoritarian Aggression and the Pressures of Austerity, online information viewed at: https://freedomhouse.org/report/nations-transit-2013/nations-transit-2013-authoritarian-aggression-andpressures-austerity.

[363] Bertelsmann Stiftung. 2014. Georgia Country Report, p. 12

This perhaps best explains why, since the WTO was created in 1995, a total of some 36 countries have taken the initiative to join the WTO and successfully completed the accession process nearly two dozen more are presently negotiating their accession.

Georgia was one of the countries that shortly after becoming an independent state launched the process of joining the WTO in July 1996. This decision was largely driven by the new trade opportunities that WTO membership offers and the decision taken to undertake the necessary reforms with a view of aligning domestic policies with international standards and requirements. Following 4 years negotiations, it obtained the green light from the WTO members, leading to the formal ratification by Georgia's Parliament in May 2000, thus freeing the way to become the WTO's 137th member on 14 June 2000. Georgia was the fourth former Soviet Republic joining the WTO after the Kyrgyz Republic, Latvia and Estonia.

The accession process required a fundamental rethinking of Georgia's economic and trade policies, the implementation of significant domestic structural reforms, the creation of new institutions designed to implement the policies and major trade capacity building efforts at the technical level in order to better understand the rights and obligations of WTO membership. The analysis offered below addresses the key challenges that Georgia faced in the accession process and is presently facing as a new WTO member and discusses the mechanisms that were and continue to be put in place to seize the new opportunities that this membership offered. In order to better appreciate the challenges that acceding countries face, explanations will first be provided on the requirements for WTO membership.

4.3.1 Key Elements of WTO Accession

A main objective of the WTO is to achieve the universal application of the rules of the multilateral trading system. One way of reaching that goal is by increasing the WTO's membership, thus ensuring that trading nations play by the same rules and thus creating a 'level-playing field'. The most recent examples of accession are Liberia and Afghanistan, who concluded their accession negotiations to the WTO in December 2015 (MC-X, Nairobi)[364] and officially joined in 2016, thus bringing the WTO membership to a count of 164 members.[365] The membership now represents 98% of world trade, thus making the system nearly universal.

[364] World Trade Organization, Nairobi Ministerial Declaration, adopted on 19 December 2015 (2015) WT/MIN(15)/DEC., para. 18.

[365] Liberia formally joined the WTO on 14 July 2016, as the WTOs 163rd Member, https://www.wto.org/english/news_e/news16_e/acc_lbr_20jun16_e.htm, followed by Afghanistan which formally joined the WTO on 29 July 2016 as WTO's 164th Member. https://www.wto.org/english/thewto_e/countries_e/afghanistan_e.htm

How is membership obtained and how does the WTO membership compare to that of the GATT?

There are two methods to acquire membership of the WTO.[366] The 'original membership' was available for a GATT Contracting Party that had accepted the WTO Agreement at its date of entry into force, 1 January 1995 under Article XI:1. This option was available for a limited period of time: up to the end of 1996.[367] The vast majority of the present WTO members joined the WTO as original members bringing the total WTO membership at its creation in 1995 to 128 members. This number increased to 130 before the 1996 deadline, two of which joined under the provisions of Article XII (Ecuador and Bulgaria). Members were obliged to have made concessions and commitments for goods and services: these were embodied in schedules and had been duly annexed to the GATT 1994 and the GATS 1995. These requirements, and in particular the fact that all original members had to accept the WTO Agreements without reservations, resulted in the all-embracing nature of the WTO and of the universal nature of rights and obligations for which it provides. While this requirement applies to all new members alike, there is an exception for LDCs, which are required to undertake commitments and concessions to the extent consistent with their individual development, financial or trade needs or their administrative and institutional capabilities.[368]

Another 36 members joined the WTO through the formal accession process, negotiations regulated by Article XII of the WTO Agreement. They are referred to as 'Article XII Members'. Time and experience have shown that obtaining WTO membership is a long, arduous and complex process.[369] According to the WTO's Director General's latest annual report it takes an average of 10 years and 2 months to complete.[370] The accession of LDCs on average takes 2 years and 4 months longer than the accession of the other, non-LDC countries.

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[366] According to WTO Agreement Article XI(1), membership is open to any state or separate customs territory possessing full autonomy in the conduct of its external commercial relations.

[367] By that time 130 had completed the domestic procedures and joined the WTO.

[368] Following the launch of the DDA, members adopted in December 2002 a set of Guidelines to ease and accelerate the accession of LDCs, as contained in WT/L/508. The guidelines were further strengthened in July 2012 following the adoption of a Decision by the General Council, to 'further strengthen, streamline, and operationalise the 2002 LDC accession guidelines' (World Trade Organization, Accessions of LDCs, 25 July 2012, WT/L/508/Add.1). The guidelines basically establish benchmarks on market access negotiations on goods and services.

[369] Dadush, U. and Osakwe, C. 2015. WTO Accessions and Multilateralism: Case Studies and Lessons from the WTO at Twenty. Cambridge University Press, p. 128.

[370] Annual Report by the Director-General. 2016. WTO Accessions. WT/ACC/28, Annex 4. The shortest negotiations lasted 2 years and 10 months (Kyrgyz Republic), whereas the accession of some of the largest nations took much longer, including 19 years and 2 months for the Russian Federation and 15 years and 5 months for China, which formally joined in December 2001 during the Ministerial Conference at Doha. The Russian Federation formally became a member on 22 August 2012, after it had ratified the WTO Agreements in July of the same year. The signing ceremony had taken place in Geneva during the 8th Ministerial Conference (MC-VIII), December 2011.

The adoption of the above mentioned LDC decision has reduced the length of this process by nearly 2 years. Georgia's accession process took exactly four years and thus is less than half the average duration for other accession negotiations. This testifies of the determination and commitment of the Georgian authorities to join the WTO and complete the transition process and moving to market-based principles.

There are many reasons that the average duration of the accession process is so lengthy. One is that the conditions for membership are not specifically set out in legal texts and are not defined, which complicates matters. The provisions simply indicate that membership can be obtained 'on terms to be agreed between it and the WTO' which is a rather open notion and can have a different meaning for different countries and situations.[371] There are no specific benchmarks and each accession is unique, reflecting the economic situation of the applicant and the commitments it is willing to make. This also explains why acceding countries are mostly required to assume higher levels of obligations than the original members, often referred to as 'WTO plus' provisions for the acceding countries. According to the WTO the newly acceded countries make considerably more concessions both in the area of goods and services, with nearly 100% of all tariff lines bound, mostly at lower levels and also covering far more services sub-sectors.[372] As will be shown, this also applies to Georgia, which has created one of the most liberal tariff regimes. Their commitments generally go beyond what most original members have committed to, thus pointing at a two-speed process. In addition, most acceding countries have an obligation to initiate the process of joining the Government Procurement Agreement (GPA) following their accession, thus expanding its membership and coverage. This also applies to Georgia, which is an observer to the GPA and committed to join.

What drove them to do so, as stated by Broadman was that 'the dismantling of the Soviet Bloc brought economic chaos and a collapse of trade flows, which compelled countries in Central and Eastern Europe to begin to reintegrate into the global economy'.[373] In the early years of the transition, many countries in the region started to adopt liberal import policies, in many cases largely driven by willingness and policy objectives to join the WTO. Georgia, as one of the three Caucasus countries, was no exception and determined to undertake the domestic reforms and adjustments to abide by the market-based principles. The objectives of trade liberalization, market opening and ensuring transparency were and still are at the heart of Georgia's reform policies.

[371] Article XII (1) of the Marrakesh Agreement.
[372] World Trade Organization, WTO at Twenty: Challenges and Achievements, WTO (2015), Table 5.
[373] Broadman, H., G. 2005. From Disintegration to Reintegration, Eastern Europe and the Former Soviet Union in International Trade. World Bank, p. 2.

Integrating transition economies into the multilateral trading system was a major challenge both economically and politically because of the way centrally planned systems operated. The economic systems of centrally planned economies were largely based on quota regimes, administered by central governments, as opposed to market based regimes, where markets determine prices based on offer and demand. Structural, institutional and economic reforms were required, largely accompanied by international organizations including the OECD, the IMF, World Bank and the European Bank for Reconstruction and Development (EBRD)[374] providing them with specific advice on how to conduct the reforms.[375] The WTO played a key role, as the WTO membership would anchor the transition to market-based regimes. The reform process was very challenging from the outset, as the inefficiencies of the domestic markets in the transition economies could lead to a surge in imports competing with domestic goods of sometimes lower quality and foreign direct investment with the risk of depressing the domestic economy at first. The longer-term perspective would be a more efficient economy, with a better integration into world markets, higher quality of goods at competitive prices and a larger consumer choice. However, this process takes time to materialize and requires a potentially significant price to be paid. Even today this adjustment process continues to be challenging in many countries, with difficulties in diversifying production and connect to global markets.[376] One of the questions at the time was whether the reforms should be undertaken rapidly, or if this should be a gradual process. Clearly some countries decided to move fast, in order to quickly introduce the market-based principles, even if this meant a loss in GDP in the early stages of the transition process. Others decided to opt for a gradual transition process, taking more time to introduce the new laws and regulations to conform to the market-based principles. Which process is better – remains an open question, but the facts and figures confirm that those countries that took the necessary actions managed to experience a steady growth of their economic activities. Here again Georgia is no exception with exports and imports of goods and services having grown manifold since the completion of the accession process.

The preparatory process prior to accession included many structural domestic legislative reform initiatives, adjusting laws and regulations, consultations at all levels and involving all stakeholders, including the private sector, interdepartmental coordination, interactions with

[374] European Bank for Reconstruction and Development (EBRD), created shortly after the end of the cold war to assist the formerly centrally planned economies in their reform process, based in London.
[375] Sometimes the financial support to accompany the reform was made conditional upon the reforms.
[376] This is evidenced Jallab, M. S. and Smeets, M. 2014. Connecting to Global Markets, case studies presented by WTO Chair-holders, pp. 25–34.

the Parliament, training and capacity building of the officials responsible for the implementation of the WTO agreements etc. Hundreds of legislative texts and changes to existing laws and regulations were introduced in anticipation of WTO's membership. Georgia doesn't stand alone in having gone through this very intense legislative process, as all acceding countries have to bite the bullet and undertake the reforms required for membership. By way of example of the importance of legislative changes required by acceding countries and according to the WTO, China introduced and/or modified over 2,300 legislative reforms, and the Russian Federation modified almost 1,200.[377]

The new WTO members need to prove that all domestic laws and regulations are in conformity with WTO law and ensure that all institutional arrangements are effectively in place to put its legal system into full operation. The laws and regulations are carefully scrutinized by the membership during working party meetings dedicated to each accession.[378] This is a particularly intensive duty and the difficulty often lies here, as domestic law makers need to be convinced of the advantages that WTO membership will bring. It is not always easy to demonstrate that the long-term balance will tip in the favour of the country joining the WTO and outweigh the short-term costs.[379] Parliamentarians often change during the (long) accession process. Many have little knowledge of the WTO system and rules and regulations, which may mean little to their local constituencies. It thus becomes a challenge to convince them of the longer-term advantages of membership and accept the short-term costs.[380] Indeed, the economic advantages of membership are not immediate.

Some accession processes have been interrupted at some point and become 'dormant' for a while as a result and there can be longer periods that pass without negotiations or any activity.[381] It has often been a challenge for the government to get the law makers on board

[377] WTO Secretariat. 2015. The WTO at Twenty: Challenges and Achievement. P. 236, Table 3. See link https://www.wto.org/english/res_e/booksp_e/wto_at_twenty_e.pdf [Accessed: August 3, 2021].

[378] Each accession is conducted through a working party, composed of members that have expressed an interest in following the debates and discussions on the terms of accession of the candidate country. Hence, the composition and number of countries in the working party varies from one accession to the other. The Chairman of the working party is appointed by the membership and in close consultation with the applicant country. It is also noted that in addition to the multilateral process, which is conducted through the working party, the applicant conducts bilateral negotiations to agree on the market access conditions, tariff schedules and services commitments with each of the members of the working party. Hence, in the accession process the distinction is made between the multilateral and the bilateral tracks, which are mostly conducted in parallel.

[379] It is not easy to measure and quantify in economic terms the benefits that WTO membership brings following the accession process, as many of the advantages are gradually obtained during the accession process, when the domestic reforms are conducted and laws are introduced. Contrary to a common belief, little immediate change occurs on the day following membership, as most conditions are already met on that day.

[380] Loss of competitiveness, jobs, support measures etc.

[381] This was the case with Vanuatu earlier, and more recently with several other countries, including Algeria, Ethiopia, Lebanon and Sudan, with the latter three recently actively having resumed their accession process after many years of inaction.

within the set time-frame to ratify the WTO Accession Protocol.[382] Georgia's authorities regularly briefed and sensitized the Parliament on the issues in order to get the timely buy-in and support. Parliamentarians need to be convinced of the longer term benefits that WTO membership brings. Fortunately, these are increasingly well documented.

According to the Article XII of the WTO Agreement states that accession to the WTO will be "on terms to be agreed" between the acceding government and the WTO. According to the Article XII members, especially those with large economies like China, have significantly lowered protection and expanded trade opportunities over the past 20 years.[383] Concerning goods trade, acceding members have made binding commitments on virtually all their agricultural and non-agricultural tariffs, significantly improving the certainty and predictability of their trade regimes. Also, according to the same report, the binding commitments are at substantially lower levels than those made by the original WTO members. As will be seen further, Georgia again is no exception to the rule and has one of the most liberal tariff regimes. The report goes on to observe that with the overall more liberal commitments, members have consistently had stronger trade growth performance than the original members. Since 1995, the average trade growth rate of members was 12.4%, almost double that of original members (7.4%), including after the financial crisis of 2008. China's average growth rate for the period 1995–2013 is 16.0%, which is exceptionally high and it largely outperforms the other countries. Economic growth in Georgia has also been above the average, as will be shown later. It is noted here that one should be cautious in attributing the substantially higher growth rates exclusively to the WTO accession, as there are not only numerous other macroeconomic factors that contribute to growth, but equally many developments in the world economy play an important role, often unrelated to WTO accession.

Finally, it is worth noting that the geo-political developments of previous decades not only explain the rapidly expanded membership of the WTO in recent years, but have considerably contributed to the diversity of the membership and the system, bringing together different economic systems under one umbrella organization, the WTO. This has had fundamental economic and policy implications, as it not only anchored the basis on which

[382] According to Article XII the applicant member has a period of 6 months to complete the domestic ratification process, following completion of the accession negotiations and the adoption of the Protocol of Accession by the membership. This has been particularly challenging in many countries and the WTO has often been called upon to speak to parliaments in acceding countries and hold bilateral meetings with lawmakers to explain the WTO, including the main elements of the WTO rules-based system and possible implications of membership. Based on personal experience, it is confirmed that these meetings often turned out to be decisive in getting the support of Parliament.

[383] WTO Secretariate. 2015. The WTO at Twenty: Challenges and Achievements. p. 26, Table 5. See link https://www.wto.org/english/res_e/booksp_e/wto_at_twenty_e.pdf [Accessed: August 3, 2021].

the multilateral trading system of the WTO is based (market-based principles) but it also extended the rules to a new family of countries that had based their economic systems on a fundamentally different economic and political philosophy. It triggered a process of further trade liberalization and a wider adherence to the rules-based trading system, which in itself are remarkable achievements that cannot be underestimated. In this respect the WTO differs fundamentally from the GATT system, as few centrally planned economies effectively participated in the multilateral trading system. This is more a specific feature of the WTO.

4.3.2 Georgia's Accession Process and the Implementation of its Commitment

The process of Georgia's accession was officially launched following the application for WTO membership in June 1996. At its meeting on 18 July 1996 and in accordance with the rules, the General Council established a working party to examine Georgia's accession application.[384] The working party met three times, including on 3 March 1998, chaired by H.E. Ms E.L. Herfkens (Netherlands) and, following the departure of the Netherlands Ambassador, on 13 October 1998 and 28 July 1999 under the chairmanship of H.E. Ms A. Anderson (Ireland).[385] Some 20 countries plus the EU and its member states took part in the deliberations. In addition to the discussions in the working party, bilateral market access negotiations were conducted with 12 members.

The negotiations included tariffs, Non-Tariff Barriers, Services and Intellectual property rights (IPRs) with a view of granting and extending the Most Favoured Nation treatment, national treatment, non-discrimination and transparency. The accession discussions and negotiations took place on the basis of a Memorandum on the Foreign Trade Regime of Georgia, which had been submitted in the early phases of accession and questions relating to it.[386] The outcome of the discussions and the negotiations are contained in the Report of the Working Party, as well as in the Annex to the report, which contain Georgia's tariff schedule with reference CXLV-Georgia, Part 1 – Goods (WT/ACC/GEO/31/Add.1) and Georgia's services commitments in Part II-Services (WT/ACC/GEO/31/Add.2).[387]

[384] 1 The terms of reference and the membership of the Working Party are contained in document WT/ACC/GEO/2/Rev.4

[385] Report of the Working Party on the Accession of Georgia to the World Trade Organization WT/ACC/GEO/31, 31 August 1999.

[386] Accession of Georgia to the WTO: Memorandum on the Foreign Trade Regime, 7 April 1997, WT/AA/GEO/3.

In terms of domestic set-up, it was quickly understood that cooperation between all Ministries and departments was of the essence in order to follow a coherent and coordinated approach, a responsibility assumed by the Ministry of Foreign Affairs. Hence and with a view of getting the necessary support in modifying existing and introducing new legislation, one of the first steps in Georgia included the setting up the institutional and legislative framework and the inter-ministerial coordination mechanisms to ensure coherent approaches. The national coordination and later the implementation of the WTO commitments were entrusted to the Ministry of Foreign Affairs, which established an inter-ministerial task force to that effect. In addition to preparing and adjusting laws, rules and regulations, the challenges included submitting all legal text in official WTO language, sharing information with private sector and get their feedback on concessions, identify priorities for give and take and establishing red lines, get full support from domestic constituency, including the Parliament, which needs to be briefed regularly, build technical knowledge and expertise on the WTO rules and rights and obligations. The practice shows that WTO Members will always ask for the maximum concessions from acceding countries, which need to be clear as to how far they can go with granting concessions. In other words, they need to establish their 'red lines'.

Once Georgia joined the WTO as a full Member, it became again apparent that for the implementation of the commitments and obligations taken required more coordination and a need of staying in close touch with the many different entities involved in the accession process required a systematic approach. Hence, in 2001 the President of Georgia issued a decree containing a detailed Action Plan, referred to as decree N113[388] and which established the various responsibilities between the relevant Ministries for implementation of Georgia's obligations and in accordance with its membership. The decree led to the establishment of an interagency commission which included all the relevant ministry and agencies of Georgia. The main function of the commission consisted of the preparing and adopting a strategy and action plan for the implementation of commitment, coordinate and monitor the implementation of general and specific commitments, ensure a proper implementation of the WTO provisions, maintain close working relations with WTO Secretariat and ensuring a full and active participation in to the WTO events. The commission was chaired by the Ministry of Foreign Affairs until 2005. The process of the implementation of the accession commitments was monitored by the head of the commission and the Members of negotiating team became members of intergovernmental commission. The members of accession team had built a solid

[388] Decree N113 of the President of Georgia of 26 March 2001 addresses the relations between Georgia and the WTO as a full member.

knowledge of the provisions of the WTO agreements and the process of implementation of obligations. This was the result of various capacity building efforts undertaken by the WTO and bilateral donors as will be explained further.

Since 2010 the department for Foreign Trade and International Economic Relations (which was subsequently re-named as the 'Department for Foreign Trade Policy') and which is housed in the Ministry of Economy and Sustainable Development of Georgia is the sole authority coordinating all Ministries and Agencies that have a responsibility with regard to WTO related issues. It also acts as an information centre which can provide any information on the WTO and Georgia's rights and obligations. The department actively cooperates with all the relevant ministries and institutional authorities on all WTO subjects. It is responsible for all the WTO notifications and ensures that they are submitted to the WTO Secretariat on time. The work is planned and organized in ways to ensure that all WTO obligations are met. In order to ensure a close coordination between the capital and the WTO Secretariat, a Permanent Mission of Georgia to the UN Office and other international organizations in Geneva was established, with dedicated staff following the day to day business and discussions of the WTO.

Since the WTO has a highly technical and complex set of trade rules and a rapidly increasing number of Agreements covering a broad spectrum of issues, trade capacity building through technical assistance and training was indispensable and an essential component in the learning process ensuring the full implementation of Georgia's obligations. In order to build such human and institutional capacity, support was provided both by the WTO Secretariat and bilateral donors.[389]

Between the years 1998–2003, i.e. during the accession of Georgia to the WTO and shortly after, the USA, EU, Canada, Switzerland, World Bank and WTO Secretariat assisted Georgia. Following its accession, the trade capacity building efforts were further intensified with direct support provided in Georgia as well as through activities whereby Georgian governmental officials were invited to participate. The activities included training courses, general and specialized technical seminars and courses to enhance their knowledge, awareness and understanding of the agreements and obligations. In addition, various WTO information centres were established in order to provide support to government and business society. Many important training events took place in-country (Tbilisi) for government officials, including general and specialized WTO training sessions.

[389] Smeets, M. 2013. Trade Capacity Building in the WTO: Main Achievements since Doha and Key Challenges. Journal of World Trade, 47 (5), p. 1047.

In line with the progressive learning Strategy of the WTO Institute for Training and Technical Cooperation (ITTC), staff of the Ministry of Economy and Sustainable Development of Georgia and who directly work on WTO subjects have undertaken ELearning courses on offer, attended the Regional Trade Policy Courses (RTPCs) and Advanced Trade Policy Courses (ATPCs), provided by the ITTC.[390] Government officials have participated in the Netherlands Trainee Program (NTP, funded by the Netherlands) and the WTO French Irish Mission Internship Program (FIMIP, funded by France and Ireland) and provided by ITTC. Altogether, since Georgia acceded to the WTO, a total of 460 trade capacity building activities have been organized to which Georgia was invited to nominate participants. A total of 369 Georgian officials participated in any of these events, thus gradually building and deepening the knowledge of Georgian's experts. Numbers have increased in the last few years with 216 officials having benefitted from WTO training in last three years on the basis of 287 activities that were on offer (see appendix Cf. Table 10), see in the appendixes. In addition, in the last four years Georgia has had one official under the NTP and two under the FIMIP. In many cases the officials that have benefited from one of the two internship programs upon return to capital assumed key functions in their domestic administration and often return as ambassador or as a delegate to Geneva representing their country at their permanent mission at the WTO. This certainly applies to Georgia, which is no exception to this rule.

The importance that the WTO attaches to engaging the Caucasus countries was testified early on through the organization of a WTO Ministerial Conference for Central Asia and South Caucasus countries, organized by WTO at the initiative of then Director-General, Mr Mike Moore. The Conference was held in Tbilisi (May, 2002) in recognition of the considerable reform efforts undertaken by Georgia and its speedy accession to the WTO. The Conference brought together a dozen Ministers from countries in the region to discuss issues of common interest and more specifically the challenges related to WTO accession and post accession reforms. A similar Conference was held the same year for countries in the Balkan, many of whom were negotiating their accession to the WTO following the breaking up of former Yugoslavia and the creation of new and independent countries. Several countries also had the objective to join the European Union, and for which WTO membership was a sine qua non, given the fact that the EU is a customs union.[391]

[390] *Ibid*.

[391] For the detail information please see link WTO Ministerial Trade Conference for Central Asian and Caucasus countries https://www.wto.org/english/news_e/spmm_e/spmm86_e.htm [Accessed: August 1, 2021].

The Director-General found that the efforts undertaken by countries in these two regions were of significant importance, precisely because of the scale of reforms required and, in many cases, already undertaken to conform to the WTO's market-based principles. In addition, as many countries face similar issues in the accession process, they could benefit from each other's experiences through information sharing. Both regions had the highest rate of countries committed to WTO accessions and the economic and policy challenges were considerable. The Director-General considered it of importance to provide a specific and dedicated support to countries in the accession process, reason for which they have often been prioritized in the trade capacity building programs. As a result, the WTO's trade capacity building efforts for all countries concerned were further strengthened and deepened.

Following Georgia's accession to the WTO and given the enormous tasks at hand, with the support of the Canadian International Development Agency (CIDA), the International Centre for Trade Policy and Law of Georgia was established with a view to helping Georgia fulfil its commitments. Activities were expanded to cover informational support for public and private sector concerning trade policy issues. Also, with the financial and technical support of the CIDA the experimental courses on “Trade policy and commercial diplomacy” were conducted in the Universities of Tbilisi. The courses mainly focused on the WTO issues. Representatives of the Department for Foreign Trade Policy conduct seminars and made presentations for public servants at the Training Centre of the Ministry of Foreign Affairs of Georgia about foreign trade policy of Georgia and WTO specifically. Separately, Georgian Universities decided to include lectures on the WTO in their curriculum of International Economy. One of the underlying ideas was to train students on WTO issues and get them interested in trade and trade policy, with the possibility to enrol in the Ministry at a subsequent stage.

Trade capacity building through training and education continues to be a priority for Georgia's policies. Through these training efforts, the knowledge and experience of the staff has significantly improved. The relevance and effectiveness of the trade capacity building efforts in building human and institutional capacity building is confirmed by an independent external evaluation that was conducted in 2016.[392] It underscores that …'Drawing on its different lines of evidence, the evaluation has been able to trace demonstrated results from the training of individuals (including interns) and groups through to strengthened contributions and rising levels of responsibility in their work, to more effective institutions in the field, and finally to collecting an unexpectedly large volume of plausibly-linked, concrete examples

[392] SAANA Consulting. 2016. WTO Trade-Related Technical Assistance External Evaluation.

of more effective participation in the system by countries concerned. This body of evidence meets and exceeds the conditions for a reasonable causal claim that the training interventions made substantial contributions to countries' more effective participation in the MTS.'[393]

The author believes that one of the reasons for the special success of the WTO is systemic exceptions for developed countries and states with special needs that contributes to the development of international trade through progressive liberalization and the comparative advantage of the states when carrying out trade. This is especially important for a country like Georgia.

According to the author, the example of Georgia shows very well that so far the country has not been able to actively apply all the advantages that can be used within the framework of international or regional organizations, at least for the simple reason that the country does not possess the appropriate infrastructure for bringing innovative products to foreign markets, and thus accumulate more economic wealth.

The author claims that it is necessary for the state to take responsibility for the relevant procedures and promote the production of services or products in the country, in which the country will take its niche in the international space.

4.3.3 Georgia's Post-accession Reforms

With trade being considered the main driver of economic growth, the main objectives of Georgia's trade policy are defined as follows:

1. Integration into the world economy, including the implementation of WTO membership obligations and obligations under other international agreements;
2. Trade policy liberalization, including simplification of export and import procedures and tariff and non-tariff regulation;
3. Diversification of trade relations by establishing preferential regimes with main trade and regional trade partners;
4. Enhancement of transparency in the policy-making.[394]

[393] *Ibid*, p. viii.
[394] Trade Policy Review, Report by Georgia, WT/TPR/G/328, 10 November 2015, p. 3 and Trade Policy Review, Report by the Secretariat, WT/TPR/S/328, 10 November 2015, p. 8.

In order to pursue these objectives and as a new and Recently Acceded Member (RAM) of the WTO, the main challenges for Georgia consisted of continuing the reform process initiated during the accession process.[395] It is considered to be the only way to take advantage of the benefits that WTO membership offers and to operate the system. The domestic reform process included a broad range of measures aimed at reducing transaction costs, easing business transactions, reviewing tax laws and regulations and enhancing transparency with a view of attracting foreign direct investment (FDI). Georgia's main reform initiatives target streamlining, liberalization and simplification of trade regulations and their implementation. All measures are geared towards enhancing competition, encouraging and facilitating trade, easing customs procedures, lowering import duties and reducing the incidence of non-tariff measures.

Fiscal and tax reforms: Some of the main reforms that were put into effect included the corporate income tax reform, enhancing easiness of tax compliance, enhancing stock exchange activities, the development of local capital market, a reform of the pension scheme, based on a private pension system, the introduction of transparent and efficient public-private partnership (PPP) framework,[396] the creation of a public investment management framework, which should lead to an improved efficiency of state projects, stimulating private savings, strengthening the public trust in the financial system, enhancing the transparency and financial accountability and strengthening the protection of shareholder rights.

More specifically with regard to tax and fiscal legislation, the Georgian tax system was simplified and tax rates were reduced. An easily administered, flat, and simple tax system was introduced. The number of different taxation schemes was reduced from 21 to only 6 types of taxes. These include corporate income tax, personal income tax, property tax and indirect taxes such as VAT, excise, and import duties. A new tax code entered into force on January 1, 2011, which incorporates both the tax and customs codes. Further improvements and innovations included the introduction of the status of micro, small business, the establishment of a Tax Ombudsmen, and the principle of good faith. All measures further strengthened the principles of transparency and accountability. Furthermore, the Georgian business licensing system was modernized and simplified and 'unnecessary' regulations, which often turned out

[395] The countries that are recognized as Recently Acceded Members (RAMs) are defined in the WTO negotiations and listed as such for the purpose of having a common understanding on which ones they are. Given their status as having recently acceded and having made considerable concessions in the process, special conditions are considered for them under the terms of the draft agreements under negotiation.

[396] Georgia is currently working on a new PPP framework legislation, which will enhance cooperation between state and private sectors, raise private funding (including foreign investment) and establish clear risks allocation mechanisms between the public sector and the private sector.

to be a source of corruption were abolished. The number of licenses and permits necessary for doing business was reduced by almost 85% and the "single window" and "Silence is Consent" principles were introduced. These two principles introduced by the Georgian Government essentially aim to minimize the bureaucratic red tape and facilitate services related procedures for the customers.

In particular: Single Window is a customer-oriented principle where public and private service is rendered in an integrated manner under one single window; Silence is Consent is a principle when in case of non-response on the inquiry of a citizen from a service provider within a defined period of time, the issue is considered upheld.

Georgia does not apply or recognize quantitative restrictions in foreign trade (licenses, quotas, prohibitions, and other) except when necessary for healthcare, security and safety, and environment protection purposes. Import licenses are mostly granted automatically in accordance with the relevant WTO provisions.

4.3.4 Ratification of the Trade Facilitation Agreement (TFA)

It is for the very same reason that Georgia, after a careful examination of all aspects of the Trade Facilitation Agreement (TFA) decided to fully support and ratify the Agreement, which happened on January 4th, 2016. It is recalled that the TFA was negotiated at the MC-IX (Bali) WTO and adopted by the members on 27 November 2014.[397] The TFA could only enter into force once two-thirds of members had completed their domestic ratification process. On 22nd February 2017, the required total of 111 members had ratified the agreement, thus freeing the way to its entering into force and implementation.[398] Several countries have indicated their intention to also ratify in the months ahead, thus further broadening its membership and spreading its benefits more widely. In ratifying the TFA, nearly two years after the TFA was negotiated, Georgia became the 64th WTO members to have formally adopted the TFA. Here again Georgia showed a strong political will and commitment to be bound by provisions of this Agreement. It is strongly motivated by the economic efficiency gains that can be derived from a full implementation of the TFA.

[397] Agreement on Trade Facilitation, 11 December 2013, WT/MIN (13)/36, WT/L/911.
[398] Cf. WTO 2017 News item, 22 February 2017: WTO's Trade facilitation Agreement enters into force

Indeed, there has been a large conversion of thought in the literature on the economic benefits that the implementation of the TFA can yield.[399] A recent study undertaken jointly by the WTO and the World Bank underscores the role of reducing transaction costs in developing countries in support of trade.[400] It observes that it is 'a common finding in the literature that trade facilitation can improve export performance and that the potential gains are larger for developing countries that developed countries'.[401] The WTO estimates that 'the full implementation of TFA could reduce global trade costs by an average of 14.3 per cent'.[402] According to the Peterson Institute, 'the implementation of the TFA could amount to over US$ 1 trillion in gains to the world GDP'.[403] There is wide recognition of the fact that while the implementation of the TFA will benefit all countries, it will mostly come to the benefit of developing countries, as both export and GDP growth will increase more than in developed countries. Beverelli et al. calculate that 'improved trade facilitation can lead to an increase in the number of products exported by destination of up to 16 per cent'.[404] Similar conclusions on the gains of the TFA are contained in a series of case studies presented by WTO Chairs, in which they analyse the cost and benefits of the implementation of the TFA for countries and regions and more specifically for Africa and Arab countries.[405] Calculations made by economists, international organizations and think tanks suggest that the trade costs in developing countries are on average the equivalent of 219 per cent import duties.[406]

The decision to ratify the TFA didn't come out of the blue and was the result of a careful examination of the potential benefits that Georgia could derive from the TFA and a full consultation with all interested parties. The text of the TFA was first translated into Georgian. On 3 November 2014 the Georgia Revenue Service established a national technical expert group composed of customs officials, legal and IT experts in order to determine what measures to submit into the classification of Section I of the TFA. The national technical expert group held 5 meetings and prepared a report assessing the compliance of the Georgian national

[399] Cf. WTO World Trade Report 2015: Speeding Up Trade: Benefits and Challenges of Implementing the WTO Trade Facilitation Agreement, p. 80, Table D, which includes a selection of studies that have estimated the effects of trade facilitation on trade flows.
[400] World Bank and WTO. 2016. The Role of Trade in Ending Poverty. World Trade Organization: Geneva, p. 46.
[401] *Ibid.*
[402] Cf WTO World Trade Report 2015, Chapter D, p. 73.
[403] Hufbauer, G. and Schott, J. 2013. Payoff from the World Trade Agenda 2013. Report to the ICC Research Foundation, Washington DC, p. 11.
[404] Beverelli, C., Neumuller, S. and Teh, R. 2015. Export Diversification Effects of the WTO Trade Facilitation Agreement. Working Paper No. 137, FIW Vienna, p. 20.
[405] Teh, R., Smeets, M., Sadni Jallab, M. and Chaudri, F. eds. 2016. Trade Costs and Inclusive Growth, Case studies presented by WTO chair-holders. WTO publication, p. 2.
[406] *Ibid*, Foreword by the Director General.

legislation with the TFA commitments. This assessment was carried out on the basis of the internationally agreed standards and tools of the World Customs Organization such as MERCATOR Programme and WCO Revised Kyoto Convention.[407]

There is a possibility that Georgia accede to the WCO Revised Kyoto Convention in the nearest future. Pursuant to the Report of the national technical expert group of the Revenue Service, Georgia (as a developing country) designated all of the provisions contained in Section I of the Agreement under Category A for implementation in full upon the entry into force of the Agreement, with the exception of a few provisions. The customs administration of Georgia in cooperation with the Ministry of Economy and Sustainable Development of Georgia coordinates the work on the formation of the National Committee on the Trade Facilitation (NCTF). It is expected that the NCTF with involvement of the private sector will be created in the nearest future and relevant procedures have been already begun for this purpose.

4.3.5 Georgia: RTAS and Preferential Trade Regime

While it is clearly evidenced that multilateral trade is the absolute priority for Georgia's future economic and trade policies, it also pursues trade liberalization at the regional level and through preferential trade agreements. It presently already benefits from free trade with the CIS countries and Turkey. Given the significance of the EU as both a market for exports and imports, and after several years of negotiations, in June 2014, Georgia signed an Association Agreement, including the Deep and Comprehensive Free Trade Agreement (DCFTA) with EU. It holds the potential of duty-free access to an economically very important market with over 700 Mln consumers. The DCFTA provisionally entered into force on 1 September 2014 and includes the liberalization of trade in goods and services. It is believed that the DCFTA can also help exploit largely an untapped potential of certain economic sectors and create the conditions

[407] The Mercator Programme was initiated by the World Customs Organization in June 2014 to support the uniform implementation of the Customs provisions of the TFA through the means of various WCO instruments and tools. The main components of the program center around the following: extensive donor funding through WCO Customs Co-operation Fund, maintaining a global network of Customs experts for in-country assistance activities, carrying out technical assistance activities, trainings, awareness raising campaigns, facilitating of stakeholder engagement in the National Trade Facilitation Committees. The Revised Kyoto Convention (RKC) is the main customs convention with the aim of ensuring trade facilitation. Developed by WCO and in force since 3 February 2006 it is an update and a revision of the International Convention on the Simplification and Harmonization of Customs Procedures (Kyoto Convention) adopted in 1973–1974. The RKC aims at facilitating trade by harmonizing and simplifying Customs procedures and practices. To this end the Convention provides standards and recommended practices for modern customs procedures and techniques. As such customs procedures included in the TFA build upon the corresponding parts of the Convention and thus become a technical tool for the implementation of the Agreement's provisions through the coordination of the Mercator Program and the Trade Facilitation Agreement Facility (TFAWG).

for technology and knowledge transfer as Georgian businesses integrate into global value chains. One of Georgia's major priorities is to make the best use of opportunities opened by |the DCFTA and bring the anticipated benefits to Georgian citizens. The effective implementation of the DCFTA is expected to boost the economy, increase Georgia's attractiveness as a viable investment destination, create a better environment for local as well as international businesses and facilitate the economic modernization of country.

Around the same time, in autumn 2014, Georgia has declared its interest to negotiate a free trade agreement with the EFTA, including Switzerland, Norway, Iceland and Liechtenstein. Here again the economic potential is important, as it would open a 14 million duty free consumer market. Georgia successfully completed negotiations on a free trade agreement with the EFTA countries earlier last year and the agreement was signed on 27 June 2016. Internal procedures for the ratification have already commenced and the entry into force of the instrument is expected in the course of 2017. Georgia's export potential to the EFTA countries is quite comprehensive with respect to agricultural as well as industrial products. Important potential export commodities are wine and other alcoholic and non-alcoholic beverages, mineral and sparkling waters, fruit cans and juices, confectionary, honey, also chemical products, ferroalloys and etc.[408]

Following the conduct of a feasibility study on a future Georgia – China free trade agreement in August 2015, Georgia and China initiated the negotiations in 2016. In October 2016, following three rounds of talks, the negotiations were successfully concluded. The agreement covers trade in goods and services as well as other sectors of economy such as SPS, TBT, competition, intellectual property and etc. With a view of making amendments to and further improvements in the Agreement on Free Trade between Georgia and the Republic of Turkey, negotiations were conducted under the aegis of the Georgian – Turkish Joint Committee. One of the objectives was to further liberalize tariffs on agriculture commodities and another one was to add a services component to the Agreement. On 27 October 2016 the Parties signed a decision laying down the amendments to the FTA between Georgia and the Republic of Turkey, which is expected to strengthen the triangular relations between the EU, Turkey and Georgia. Separately, negotiations between Georgia and Hong Kong, China on the formation of a free the agreement have been concluded. Two rounds of negotiations have already been held. This is an important opportunity for Georgia to gain access to a market of some 7.3 million consumers. In the longer run, Georgia intends to initiate

[408] Please see link about Georgia EFTA cooperation http://www.efta.int/free-trade/free-trade-agreements/georgia

negotiations in order to establish a free trade agreement with the United States and other priority countries.

4.4 Trade War: Georgia versus Russia

The negotiations between Georgia and Russia on joining the WTO have a long history. Georgia's position on Russia's accession to the WTO has always been determined by the political situation between the two countries. Russia had been negotiating membership in the organization almost for 18 years.[409]

Georgia, as a member of the WTO, quite legitimately refused to allow Russia to join the organization until Moscow would fulfil Tbilisi's claims. One of the demands of the Georgian side was directly related to the separatist conflicts in Abkhazia and South Ossetia, which further complicated the negotiations due to the destructive actions of Russia.

Negotiations on Russia's accession to the World Trade Organization began in 2002. The first piece of information on this issue is an interview with Russian President Vladimir Putin in June 2002, where he expressed his satisfaction that Russia's accession to the World Trade Organization would facilitate trade around the world. At the same time, on December 5, 2002, the Georgian parliament adopted a resolution in which the Georgian government vetoed Russia's accession to the World Trade Organization. After the Rose Revolution, in February 2004, when an attempt was made to mend relations with Russia, the Georgian parliament temporarily cancelled the veto. Nevertheless, the negotiations reached an impasse – the main task of the Georgian government was to place Georgian customs officers at the state border, but for 8 years the negotiations did not yield any results. Ultimately, as a result of the engagement of the US, Georgia's interest elaborated into the following position – if Georgia cannot control freight flows along the Georgian-Russian state border, then a foreign authoritative organization should assume this function.

4.4.1 Prerequisites for Concluding the Agreement

According to the WTO rules, accession of a new country requires the approval of all member states. Georgia was one of the final obstacles for Russia to join the WTO. Georgia and Russian Federation had disagreement on border checkpoints of Roki and Gantiadi on

[409] See the article at internationally distributed American daily middle-market newspaper – "Russia joins WTO after 18 years of negotiations", published August 22, 2012 Available athttp://usatoday30.usatoday.com/money/economy/trade/story/2012-08-22/russia-joins-world-trade-organization/57207664/1 [Accessed: July 30, 2020].

the occupied territories. Georgia demanded clarification of their legal status and the right of monitoring. On November 2011, in Geneva, with participation of Switzerland, Georgia and the Russian Federation agreed on having a neutral company monitor the movement of goods.[410] The Swiss Confederation was tasked with selecting a neutral private company in consultation with Georgia and the Russian Federation.

The Agreement does not mention any geographic name, only geographic coordinates. The Agreement establishes three trade corridors: Adler – Zugdidi; the village of Nar (North Ossetia) – Gori; and Zemo Larsi – Kazbegi.[411] All goods entering and exiting these corridors would be subjected to monitoring by the neutral private company. The parties agreed on creating a mechanism of customs administration and monitoring of trade in goods. The mechanism's functions included gathering and sharing of information, ensuring transparency, transferring data, preventing crime and smuggling, and examining suspicious cargo. Georgia and the Russian Federation decided that the mechanism would entail both Electronic Data Exchange System (EDES) and International Monitoring System (IMS).[412]

The Agreement between the Government of Georgia and the Government of the Russian Federation on the Basic Principles for a Mechanism of Customs Administration and Monitoring of Trade in Goods was signed on November 9, 2011. Based on Georgia's consent, the Russian Federation acceded to WTO and the Agreement entered into force on 22 August 2012. As stipulated by the Agreement, the Swiss Confederation selected the neutral company SGS Societe Generale de Surveillance SA for oversight functions. Georgia and Russia had to enter separately into the contract with the company.[413]

The process of elaborating the contract took place in 2013–2014 with involvement of Switzerland. Representatives of SGS visited Georgia several times and after holding meetings, the initial version of the contract was elaborated. In 2015 a trilateral meeting of the Russian Federation, Georgia, and Switzerland with the participation of SGS representatives was held for the final review of the contract.

[410] See the article at Leading EU affairs newspaper – New Europe "Russia and Georgia sign WTO agreement", published November 13, 2011. Available at https://www.neweurope.eu/article/russia-and-georgia-sign-wto-agreement/ [Accessed: July 30, 2020].

[411] See the article at Georgian Newspaper – Civil Georgia "Georgia – Russia WTO Deal in Details", published November 18, 2011. Available at https://old.civil.ge/eng/article.php?id=24158 [Accessed: July 30, 2020].

[412] See Legislative at Herald of Georgia "The Agreement between the Government of Georgia and the Government of the Russian Federation on the Basic Principles for a Mechanism of Customs Administration and Monitoring of Trade in Goods", 09/11/2011. Available at https://www.matsne.gov.ge/ka/document/view/1512898?publication=0 [Accessed: July 30, 2020].

[413] See Georgian Public Information Database at http://www.opendata.ge/ka/preview/52734 [Accessed: July 30, 2020].

Apart from the contract, the parties reviewed two additional documents: Rules and Procedures (regulations) of a Joint Committee (body set up by the Agreement for discussing ongoing issues and settling disputes with involvement of a neutral party) and a Trust Fund document which established the rules for opening the bank account and transferring the reimbursement to SGS.

At the same time, Russia began bilateral relations with the Abkhaz and Ossetian sides, concluding agreements with them that were incompatible with Georgian legislation. Confronted with such behaviour of Russia, Georgia was forced to scrutinize the steps taken by Russia in order to identify additional threats. In December 2017, the Contract was signed between the Georgian side and the Swiss company SGS.[414] In response, Russia signed the Contract with the Swiss company in May 2018 and transferred the mandatory fee in June. Georgia transferred the fee in November. This ended the legal period of this dramatic story.

Negotiations between Georgia, Switzerland and Russia were held in February 2019, and the monitoring process was due to start in March 2020. However, the negotiation process was constantly dragged out. Georgia has the only option left, to force Russia to subject its cargo to monitoring.

4.4.2 Russian "Lessons" instead of Trade Neutrality

In 2005, the Russian Federation launched a full-scale trade/economic blockade on Georgia. The Kremlin targeted the trading sector, which was most dependent on the Russian market at the time. [415]

In December 2005, the Russian Federal Department of Veterinary and Phytosanitary banned the import of live plant products from Georgia to Russia with the pretence of violating the standards of microbiological composition. One month after this decision – on January 22, 2006, Georgia found itself in an energy blockade. The main gas pipeline exploded in the North Caucasus, all power plants were shut down, the electricity system could not withstand the load and as a result the whole of Georgia was dark for several days. After the energy blockade, Georgia took a decision to give up dependence on Russian natural gas, and as a result, Russia practically lost this leverage of influence.

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[414] See Article at Georgian English language newspaper Georgia Today "Tbilisi Signs Contract with Swiss Company SGS over Georgia – Russia Cargo Deal", published 20 December 2017. Available at: http://georgiatoday.ge/news/8580/Tbilisi-Signs-Contract-with-Swiss-Company-SGS-over-Georgia-Russia-Cargo-Monitoring-Deal%20 [Accessed: July 30, 2020].

[415] See the article at United States government-funded organization – Radio Free Europe/Radio Liberty – "Georgia: Russia Threatens to Ban Wine Imports", March 30, 2006. https://www.rferl.org/a/1067256.html [Accessed: July 30, 2020].

Soon after the pipeline exploded, Russia expanded its embargo and banned the export of wine from Georgia. For this period, 20% of total exports or $ 153 million came on Russia. As a result of the blockade, exports halved in the first year. The embargo became a signal for Georgian entrepreneurs, and as a result of hard work, Russia's share in Georgian exports fell to 2%.

After the revelation of Russian spies in Georgia, on October 6, 2006, a cargo plane landed at Tbilisi International Airport with hundreds of Georgian citizens expelled from Russia. A total of 4,634 citizens were deported then. On this fact, 13 years later, the European Court of Human Rights ordered Russia to pay multimillion-dollar compensation to the victims.

On October 2, 2006, the Russian Federation terminated postal, road, air, sea and rail connections with Georgia having violated the Convention on International Civil Aviation, as well as a number of bilateral and multilateral agreements with Georgia. The seven-year embargo ended in 2013, with exports to Russia quadrupling in 2013 and reaching $ 396 million in 2018.

The Russian embargo made it clear that modern challenges in Georgia's trade relations required greater diversification in order to avoid and prevent potential threats in the future. Following the signing of the Deep and Comprehensive Free Trade Agreement (DCFTA) with the European Union, the export of Georgian products and their competitiveness in the world market became particularly important.

From 2014 to 2020, the volume of Georgia's trade with the EU shows that Georgia's trade relations with the EU are steadily growing and exceed the Georgian-Russian trade relations several times. [416]

The action taken by the Russian Federation in 2005, from today's perspective, can be unequivocally interpreted as a trade war declared by Russia against Georgia, the main goal of which was to bring down the Georgian economy. In this case, too, Russia's main goal was to punish Georgia, which was motivated by political objectives. Three years after the start of the trade war, in 2008 Georgia fell victim to Russian intervention.

It should also be taken into consideration, that Russia officially applied to the GATT in 1993 with to join it. Negotiations for membership began in 1995, long before Georgia became a member of the World Trade Organization. Then Russia's accession to the organization was hampered by other factors. In addition to Georgia, Russia had been clarifying relations with

[416] See EU – Georgia: Trade in goods at https://ec.europa.eu/trade/policy/countries-and-regions/countries/georgia/ [Accessed: August 1, 2020].

the United States and EU countries. In 2009 in Davos, the Russian prime minister voiced its suspicion that Russia's membership in the organization was obstructed due to politically motives. The analysts attributed the delay to the authoritarian form of government in the Russian Federation as well as international statistics showing high levels of corruption, high annual bribery rate, shadow economy and government-controlled business. Nevertheless, the United States and the European Union could not deny and escape the fact that Russia's membership in the World Trade Organization would be in their favour.

After joining the WTO, Russia became obliged to comply with international norms, while revoking a pre-existing specific import license or additional requirements that did not comply with the requirements of the trade organization. Also, after Russia's accession to the WTO, importers to Russia would no longer need a license for products such as alcohol, wood and pharmaceuticals, and Russia could no longer impose additional requirements on them.

The topic discussed by the author in Chapter 2, which is of a recommendatory nature and aims to establish the term "developed" and "developing" countries in relation to the WTO, positions Georgia as a developed country in the trade war while Russia stands out as a "developing" country" (in view of its authoritarian form of government, shadow economy and discriminatory trade approaches).

4.4.3 Russian-Georgian Agreement: future threat or successful step?!

One of the advantages of the Russian-Georgian Agreement is that Georgia has proved to the world that it is part of the civilized world and did not intend to create world problems to prevent Russia from joining the WTO for the sake of its own private interests. This document is both a trade/economic and a political project for Georgia. It is the only document signed with Russia that implies Abkhazia and South Ossetia within Georgia, although they are not mentioned and are involved in the implementation of the Agreement. With this very Agreement, Russia indirectly confirms the territorial integrity of Georgia.

The Agreement establishes one important institution – a Joint Committee, which should discuss all possible problems. The Committee includes Georgia, Russia and Switzerland. And, of course, the Abkhazia and Ossetia are not presented separately. In author's view, this Committee can become an additional resource in the process of resolving the Russian-Georgian conflict. In general, the factor of Switzerland as a mediating state is extremely important. It is one of the leading countries in Europe although neither a member of the European Union nor

of NATO due to its neutral status. Consequently, its involvement in the Georgian-Russian context brings new opportunities. [417]

The Agreement establishes three trade corridors in the directions of Abkhazia and South Ossetia and on Lars, where cargo is currently being transported. The terminals of the Swiss company will be located on the Russian side in the cities of Adler, Vladikavkaz and Lars, on the Russian-Georgian state border, which in itself has great political significance. The cargo will be transported only between Russia and Georgia, though the cargo may be destined to different countries such as Turkey, Armenia, Iran, etc.

Why did the third checkpoint Lars, which already exists, find itself in the Agreement? The author believes, this leaves Georgia in a politically advantageous situation, as it proves that the Agreement goes beyond the Russian-Georgian conflict and embraces broader perspectives. The document regulates trade between the two countries and the agreement also includes the current checkpoint, which, along with the other two terminals, fully covers Russian-Georgian road freight traffic.

As for its negative sides, this Agreement contains one major drawback. In particular, only road freight is monitored under the Agreement between the parties. In addition to roads in Abkhazia, a significant amount of cargo flows through ships and railways, including equipment and weapons of Russian military bases. Cargo transported by sea and rail will not be subject to the monitoring provided for in the Agreement. As for the Tskhinvali corridor, there is only a road in this direction and in this case the cargo will be better inspected. The author thinks that in the future Georgia should take serious steps to eliminate this shortcoming.

Another issue that can be assessed in a negative context is that the Swiss company does not have the so-called "Barrier right", i.e. it cannot check all the cargo. The company can inspect and fix only the cargo whose owner is interested in undergoing international monitoring. It should be important for the Georgian side to know what cargo remains on the territory of Abkhazia and South Ossetia. This is a task that must be fully implemented under this Agreement.

There is an important point that Russia can use to strengthen its positions: The Agreement confirms the parties to fight illegal trade. Georgia believes that Russia is trading illegally with the Abkhazian and Ossetian sides, and if the agreement obliges it to eliminate illegal trade, then Georgia may be required to legally recognize many of the actions it deemed

[417] In author's view, the 2011 Agreement can be evaluated both in positive and negative contexts. He considers, that if Georgia opens the trade corridors, it should do so only proceeding from in its own interests.

illegal prior to the entry into force of the Agreement. Otherwise, Russia can argue with Georgia in both the Joint Committee and the Arbitration. Russia will say, that it provides information to the parties on what it is doing whereas Georgia considers it illegal trade. Russia may say that it signed this Agreement because it made the relations transparent and legitimate, and if Georgia considers everything illegal, it means that it only needs the document to reveal illegal cargo. If such a position is also agreed by the third neutral party – Switzerland, then the remark provided from Switzerland will be accountable. Georgia should weigh up well when to evaluate this or that event as standing outside the law.

The third and very important factor is that the world attitude towards Russia has changed significantly since 2011 due to the events in Crimea, Syria or Venezuela. Under the new circumstances, Russia may try to use this Agreement to legitimize the de facto authorities of Abkhazia and South Ossetia, or to promote the work of their so-called Customs or border guards. In author's view this means that due to Russia's unfavourable role in the world, the conclusion of this Agreement may provoke additional risks. The WTO, the EU, the UN and the OSCE should take care to make the implementation of this Agreement more effective.[418]

[418] Abuseridze, G. 2020. Trade War: Georgia versus Russia. ollection of electronic scientific articles of the faculty of law of RSU SOCRATES, No. 2020, 3 (18). pp. 147–154.

Conclusions and Recommendations

Summarizing the results of the research, the following conclusions are presented:

1 *For the potential of international trade* to be realized between the WTO and member countries as well as between the WTO and intergovernmental organizations there must be:

1.1 Good governance at the national level;

1.2 A further reduction of trade barriers;

1.3 More development aid;

1.4 Better international cooperation and global governance of economic globalization and international trade (such as statistics, research, standards development, technical assistance and training).

Without the national or international action required in these areas, international trade will not bring prosperity to all; on the contrary, it is likely to result in more income inequality, social injustice, environmental degradation and cultural homogenization.

Recommendation regarding the cooperation between the WTO with member countries and intergovernmental organizations:

(1) To amend Part 1 of Article 5 of the WTO to read as follows:

"The General Council shall make appropriate arrangements for results-oriented cooperation with member countries and with intergovernmental organizations that have responsibilities related to those of the WTO. Relations with countries should be based on the fundamental norms of international law, further reduction of trade barriers, more development aid and the principles of good governance."

2 *The TRIPS Agreement* is a highly innovative document that breaks new ground in covering a field tangentially related to international trade that is not covered in the GATT. Overall, the TRIPS Agreement has worked well, and the WTO has established a working relationship with WIPO to upgrade significantly intellectual property rights protection around the world. In the coming years, WTO members must continue to implement the wide-ranging provisions of the TRIPS Agreement. Significant public policy questions have arisen with regard to the TRIPS Agreement that must be addressed in the future. The Ministerial Declaration adopted at Doha, Qatar in 2001 has signalled that the TRIPS may be significantly modified.

Despite the effectiveness of TRIPS Agreement, the author believes that this law is unequal in relation to developing countries. In his opinion, the part of Dispute Settlement should contain certain exceptions for the developing countries, like use of mediation, as well as longer deadlines to resolve the problem.

> **Recommendation** regarding the Dispute Settlement of the TRIPS Agreement:
>
> (1) To amend Part 1 of Article 64 of the TRIPS Agreement to read as follows:
>
> "Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement except as otherwise specifically provided herein. Herewith, in exceptional cases, developing countries shall enjoy two additional months to resolve the problem through mediation."

3 *WTO adjective bodies* need to determine its content or meaning. This involves proof and interpretation of national law. Proof is the process whereby the necessary evidence such as text of legislation, evidence on pertinent legislative history, judicial decision, etc. – on the relevant national law issue is gathered. Interpretation is the process of construing the evidential materials to determine what is it that the national law provides on the particular issues that are at stake. Finally, it is necessary to say a few words about the "national law as a fact". It is well-established principle of international law that national laws are facts before international courts and tribunals. This principle has a number of different dimensions. Firstly, it means that judicial notice does not apply to matters of national law, which must be proved by introducing necessary evidence, and different evidentiary rules including those on burden of proof for the establishment of facts are fully applicable in this regard. Secondly, it also means that rules of national law constitute evidence of conduct by states that can be utilized by an international court in establishing the factual record so as to determine compliance or non-compliance with international obligations.

> **Recommendation** regarding the Dispute Settlement of the TRIPS Agreement:
>
> (1) To amend Part 4 of Article XVI of the WTO Agreement to read as follows:
>
> "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements. Rules of national law constitute evidence of conduct by states that can be utilized by a DSU in establishing the factual record so as to determine compliance or non-compliance with obligations."

4 *The WTO (legislation of WTO, rules, norms and enforcement)* is portrayed as a self-contained regime, and if not, as a system that should be supreme to all other international rules. To prove the point, it is important to quote from the report:

4.1 WTO legal system is part of the international legal system but it is the *lex specialis*, and this *lex specialis qua lex specialis* cannot be changed from the outside by other international organizations, except on a case by case basis derived from the right of panels to seek information.

On dispute settlement:

4.2 The dispute settlement body of WTO, due to its special characteristics, and being self-contained in its jurisdiction responsibilities, offers no legal space for cooperation with other international organizations, except on a case by case basis derived from the right of panels to seek information.

The author sees it as an inward-looking perspective on the problem of coordination and coherence, which, after all, is not so much favouring coordination and coherence, but rather looking at the WTO as something that stands above other organizations.

4.3 What is needed is a comprehensive system of collective security, one that tackles both new and old threats, and addresses the security concerns of all states – rich and poor, weak and strong. Today's security threats are all interconnected. Problems such as terrorism or civil wars or extreme poverty no longer occur in isolation (and this is a sentence particularly relevant for the WTO). Today's strategies must be comprehensive while the institutions must overcome their narrow preoccupations, and learn to work across the whole range of issues in a concerted manner.

The author's point is that the law and politics framework may be a better way to look at the evolution of the system because firstly, a lot of politics, especially consensus decision-making, is what enables a strong dispute settlement mechanism (more politics enables more law); secondly, stronger politics is required to back up a forceful dispute settlement mechanism (more law needs more politics). Following this paradigm, the imbalance that a lot of people see between the judicial branch and the political branch of the WTO (automaticity in the dispute process versus consensus in the political process) is, in the end quite logical and easy to explain: if there is a strong dispute system, that is, if there is a lot of law, then there is lot of politics. So, consensus is required. The WTO needs more politics, more contestation and more openness.

Equally, on the law side the author considers that it is necessary to be careful not to be too strict, that is, to keep certain exit options in place. Again, a multiple-speed WTO would be a way of providing exit options. Other exit options or ways to limit legalization to the degree of politics available would be to allow exit through other international organizations, and finally to realize that, for example, legalizing the system too much may be dangerous. Providing remedies that are too strong or giving direct effect to WTO law may be reducing exit to too great an extent.

Proceeding from the above noted the author answers the research question 1: Which conflicts of norms may arise between the WTO system and what should the WTO do?

In the framework of the conflicts between treaties the author paid special attention to the principle of *lex specialis*. A good illustration of the problems ensuing from a strict definition of conflict is furnished by two WTO panel reports. In the first panel report, *Indonesia – Automobiles*, a claim was brought against Indonesia *inter alia* under the national treatment provision of the GATT, Article III. A second case in point is the panel report on *Brazil – Retreaded Tyres.* There are two ways in which law takes account of the relationship of a particular rule to general rule (often termed a principle or a standard). A particular rule may be considered an application of the general rule in a given circumstance. That is to say, it may give instructions on what a general rule requires in the case at hand. Alternatively, a particular rule may be conceived as an exception to the general rule. In both cases that is, either as an application of or an exception to the general law – the point of the *lex specialis* rule is to indicate which rule should be applied. In both cases, the special, as it were, steps in to replace the general. The author also wants to stress the importance of the Vienna Convention. Classical treaty law, as embodied in the 1969 Vienna Convention on the Law of Treaties, has developed detailed rules on the so-called lex posterior principle. Although not found in the Vienna Convention, it is now fairly generally accepted that lex specialis also is a principle that can be applied in cases of (seeming) conflict between agreements. The Vienna Convention also encourages contextual interpretation of treaty provisions, not only within the same agreement, but also by considering the other rules of international law in force between the parties which may be rules of general international law, principally customary international law, as well as other treaty provisions in force between the parties. What should WTO do? The solution is simple: conflicts of norms can be prevented at the "legislative" level by writing explicit clauses into the relevant international agreements, which clearly lay down which agreement will prevail: the older one, the newer one, or the more specialized one; these are useful places to informally discuss problems such as the identity of cases and the flexibilities that might be

possible in order to take account of the substantive identity of issues, rather than always rely on the classical criteria: same parties, same cause of action, same legal questions. However, such consultation practices can only work among standing courts and many of the structures of dispute settlement in the broader trade world are based on non-permanent structures. It may thus be necessary to have recourse to treaty-based solutions on such issues.

Recommendation regarding the conflicts between the agreements:

(1) To amend Part 3 of Article XVI of the WTO Agreement to read as follows: "In the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict. In trade relations, to prevent conflicts between treaties, preference shall be given to the old, specialized or a new agreement."

5 On *the issue of trade and human rights*, the author thinks that all members of the WTO should adhere to certain principles as they make trade policy. They must automatically extend the best trade conditions granted to every other nation that belongs to the WTO. Policymakers cannot discriminate between products originating in different countries nor between imported or domestically produced goods. If member states don't adhere to the rules, they may find their trade policies subject to trade disputes at the WTO. The author argues, that within these structures, countries do not have considerable flexibility under WTO rules to protect human rights at home or abroad. Member states can use trade waivers and exceptions to promote human rights abroad or at home according to the Article XX. They occasionally bring up human rights during accessions and trade policy review. Furthermore, human rights concerns have seeped in into WTO and GATT negotiations, although many WTO members still see human rights concerns as "non-trade" issues. The author proposes as follow:

5.1 Make a policy determination that trade and human rights should be coordinated (Respond to public concerns, make strategies to address globalization more coherent);

5.2 Reform national trade policymaking process (for example: develop a channel for human rights concerns to enter the policymaking process. Set up an advisory system);

5.3 Task advisors to weigh human rights concerns (ask the rights questions when making public policy decision);

5.4 Create coalition of the willing at the WTO (member states should jointly request the WTO to study the relationship between WTO rules and human rights rules);

5.5 Clarify relationship (member states should request that WTO staff examine how social labelling and procurement policies can be designed so they do not distort trade);

5.6 Explore human rights impact assessments (governments and foundations should fund research and testing of human rights assessments).

The author claims, that since the WTO adjudicating bodies and legislation do not determine whether human rights have been violated or respected, there is the need for legislative changes.

Recommendation regarding legislative changes to the GATT:

(1) To introduce an appendix agreement to the GATT to read as follows:

"Appendix Agreement to the GATT Concerning Annual Reports on Human Rights and Free Trade between the WTO and its Members

WTO and ITS MEMBER COUNTRIES (hereinafter referred to as the "Parties"):

AFFIRMING the importance of respect for democracy and human rights;

NOTING the existing national bodies mandated to promote and protect human rights within the respective territories of the WTO member countries;

HAVE AGREED as follows:

Article 1

Annual Reports on Human Rights

1 Each member of the WTO shall provide a report on human rights to its respective national body every year, by June 1 in the framework of the Free Trade Agreement or Regional Trade Agreements (RTAs). These reports shall communicate on the effect of the measures taken under the Free Trade Agreement and Trade Relations within the WTO on Human Rights in the WTO Member States.

2 Each Party involved in trade relations shall make its own report public.

Article 2

Cooperation Mechanism

1 The Parties may consult with one another to review the implementation of this Agreement.

2 Each Party involved in trade relation shall notify the other Party (WTO Secretariat) in writing of the completion of the domestic procedures required for the entry into force of this Agreement.

Article 3

Amendments

1 The Parties shall agree in writing to amend this Agreement. Each Party shall notify the other Party in writing of the completion of its domestic procedures required for the entry into force of the Amendment. The Amendment shall enter into force in 30 days from the date of the notification."

The author believes that the approval of this draft Appendix Agreement would highly contribute to solving such fundamental legal issues in the trade arena as respect and protection of human rights. Furthermore, this initiative, through enhancing human rights, will inevitably promote more democracy in the member states.

Thereby, the author is able to answer the following question 2: How is the WTO currently performing? What are the main challenges of the WTO today and where can the WTO go in the future?

It is performing well and contributing to economic growth, job creation, and co-operation among Members. The most evident challenge is the Doha Development Round the current round of multilateral trade negotiations to further liberalize trade and reform the WTO. After a decade of talks, the discussions remain at a standstill. The Doha Round is focused on reducing critical trade barriers in areas such as agriculture, industrial goods, and services. This would urge businesses around the world to specialize in the production of goods and services, achieve greater economic status, and increase their efficiency and productivity, all of which would permit them to deliver higher quality and cheaper products to international consumers. With the various challenges that lie ahead, new thinking is needed in the WTO. The approaches of twenty years ago are no longer adequate to today's global obstacles. The WTO Secretariat needs to begin a process that will revitalize the organization and equip it to deal with the changing international economic environment. As regards Future of WTO, in the future WTO has a great opportunity to improve sovereignty, democracy and the market. All three ideas have nonetheless come down to the present time as foundations of modern international society, and to which all members of that society are at least rhetorically devoted. Two of these three concepts are indispensable to the multilateral trading system: there could be no WTO without sovereignty and international law, and it would have no purpose without market economics. WTO should be oriented in the future on democracy between members: leadership and burden-sharing, the future of the multilateral trading system depends in part on the ability of negotiators and political leaders to demonstrate the value of trade liberalization to legislators and representatives of civil society. The author argues that the WTO should be

focuses on Institutional reforms. At issue are the changes the members might make in the WTO as an institution, how they might make better use of the information that the system generates, and what new ideas may develop for the trading system.

According to the author, the future of the organization is determined through identifying existing problems and assessing the challenges in the context of globalization. However, the latest trade tension has put the WTO's Dispute Settlement function, long referred to as the "jewel" of the WTO under question. Therefore, in order to ensure the credibility of the WTO and its effective work, the author takes the initiative to start procedural actions to eliminate this vicious problem. Author claims that despite some successes in the first 25 years in terms of negotiated improvements, the WTO's set of agreements are largely reflective of the world in the 1980s. Advances in technology, manufacturing make-up and importance of certain service sectors (e.g., e-commerce, human rights) are not covered by the existing agreements. Therefore, this issue should be considered when talking about the future of the organization.

Recommendation regarding the status of the WTO:

(1) To amend Part 2 of Article VIII of the WTO agreement to read as follows:

"The WTO shall be accorded by each of its Member such privileges and immunities as are necessary for the exercise of its functions. Countries shall exercise considerable flexibility under WTO rules to protect human rights at home or abroad."

6 *The WTO has demonstrated interest in developing countries* in many ways. Clearly it shows respect for developing countries in a number of the WTO articles that favour developing countries and are key factors for the countries entering into the WTO. However, the term 'developing countries' may not be well enough defined under the WTO agreements while the 'developing country' classification is on 'an *ad hoc* basis and primarily through self-selection'. Countries can announce for themselves whether they are 'developed' or 'developing' countries, while other members can challenge the decision of a member to make use of provisions available to developing countries. The author thinks that the WTO now faces two problems. The first, and the biggest, is agriculture: the WTO has got to do something about agricultural subsidies and tariffs. The second biggest problem is integrating developing countries, particularly the poorest developing countries, into the world economy. The third thing to be done for developing countries, and it can't be done entirely from the outside, is to encourage their own trade liberalization. Hence, developed countries need adequate agricultural policies and the WTO should do its utmost to encourage the developing countries towards liberalization. Many developing countries would throw up their hands

in horror at this suggestion, but there is plenty of evidence that the benefits from preferences have been very limited; and that the system of preferences discourages liberalization in developing countries because it defuses exporter support for liberalization, which is the main engine for trade liberalization even in developed countries. The authors personal suggestion is that the WTO should help with supporting adjustment assistance in developed countries, at least if the money can be found. Obviously, trade liberalization always has losers, both in developed and developing countries. Even some developed countries need to have better adjustment assistance, or more generally better social safety nets, and this would help greatly with the WTO's public relations problems. So, with regard to adjustment assistance for developing countries, as a way to make liberalization easier, it sounds good.

In view of the proposed theory, the author answers the research question 3: Which countries can be ranked as developing countries under the WTO?

While there is no clear definition of the term 'developing countries' in the WTO, the second chapter analyses the status of 'developing countries'. The author believes that the WTO can benefit from such definition for its own purposes. Since the WTO deals with developing countries not only in the DSU but also in all WTO regulations and agreements, such a definition is necessary for the WTO and its members to understand what a developing country and its circumstances are. Moreover, a clear definition of 'developing countries' is needed for the WTO to provide more assistance for the developing countries to better benefit from the special and differential treatment provisions, specifically in the DSU. The author concludes that since the existing model can no longer meet the challenges, the WTO should provide its definition through objective criteria. According to the author these objective criteria should be based on the classification proposed by the World Bank, United Nations and International Monetary Fund. The criteria may also include indicators of economic performance, business development, rule of law, and political stability, as important factors in terms of ease of trade, stability and neutrality.

After the above adequate definition of the status of developing countries the author offers amendment to the Article 5 of the WTO Agreement, which defines relationship with non-governmental organizations.

Recommendation regarding the status of developing countries:

(1) To amend Part 2 of Article V of the WTO agreement to read as follows:

"The General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations and developing countries concerned with matters related to the WTO."

7 As regards the *Legal Status and Overview of WTO Disputes*, the author has discovered that:

7.1 There are currently several problems in both areas and there are several possible solutions. In author's view, it would be advisable, in addition to using political standards to achieve the objectives that each system pursues, to carry out an economic and trade analysis of the measures in question more frequently. The regulation of subsidies in the WTO will undergo further improvements whenever the necessary consensus among WTO members can be reached. This has been the case since the GATT 1947. However, dramatic changes in the system cannot be expected in the short term in light of the current mechanism in accordance with which WTO negotiations are conducted. Thus, in the near future, only cosmetic amendments may be foreseen.

7.2 These tensions include, first, the insufficiency of current interpretive tools. Second, the non-inclusive energy or renewable energy in any WTO agreement makes it hard for WTO rules to fully acknowledge and value the specific obstacles faced by renewable energy producers and consumers. It is necessary to weight the positive externalities of renewable energy use against the negative ones created by fossil fuels when evaluating national policies, and the WTO still lacks a suitable mechanism to achieve this goal. Third, the need to condemn local content requirement should be balanced for developing countries and emerging economies, to develop or improve their own domestic renewable energy industry, and a subsidy program completely void of a local content requirement would hardly help the country develop its own domestic production and market. One possible solution could be to include a period of transition, provided for in the Protocol of Accession, where the local content requirements are accepted by the WTO until a certain level of development is reached. All these tensions show the fundamental inadequacy of existing WTO rules in this area. It is now indisputable that climate change is one of the most relevant problems to face contemporary world and it has to be addressed with new instruments, which, in the framework of the WTO, would require a change

of course: leaving the current judicial status-quo behind with the adoption of a more flexible interpretation of the WTO.

Thus, the author is competent to answer the research question 5: How to maintain the current benefits of the WTO and make sure that we realise any benefits to be negotiated in the future and can free trade deliver development gains?

The WTO dispute settlement system has proven attractive to members in securing existing rights. The DSU Review offers an opportunity to make the system even more effective and valuable to the public. The extent to which free trade can deliver development gains depends on the development of the country in question and its trading partners. While this thesis has not contended that free trade cannot deliver economic growth, the author argues that free trade is not the problem-free catalyst of economic growth for Development countries, it was thought to be. For countries facing significant supply-side constraints, such as development countries, free trade as an underlying goal of trade policy, cannot successfully build the capacity and capabilities needed to integrate in global value chains. The acknowledgment that global trade is characterized by highly imperfect conditions leads me to contend that industrial policy focused on emulation and innovation-based rent seeking is better suited to overcome the current lack of productive capabilities in development countries.

In author's opinion, in the long-term perspective free trade and the WTO can highly contribute to the development of fair trade. However, all depends on how soon and how successfully will the WTO deal with the existential crisis, especially in view of the lately developed trade tensions that has made the DSU reform urgent. It is also crucial that the WTO reforms the subsidy regime, not limiting itself with "sustainable development" of the WTO Preamble.

Organization should act urgently to broaden its reform agenda and to bring it closer to what is suggested in the Preamble. The author also believes that it is necessary to at least define the perspective. The alternative is either having an effective organization that makes sense for all members, which is not the case today, or a paralyzed institution which has lost the trust of member states.

Nevertheless, the author's forecast is optimistic; in his opinion, the WTO will be able to overcome all the challenges in the face of globalization.

The author considers, that Article 22.3 of the DSU as well as the dispute resolution system is not effective as it has not developed adequately to the existing challenges and globalization.

Recommendation regarding Understanding on Rules and Procedures Governing the Settlement of Disputes:

(1) To amend Part 3(c) of Article 22 of the WTO agreement to read as follows:

"If that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement. The panel or Appellate Body shall offer to each party at each stage of litigation good offices, conciliation or mediation in order to assist parties to settle a dispute."

Proceeding from the above mentioned, the author concludes that using more consultations and mediation would be far more beneficial for developing countries as they would facilitate finding effective ways for discussing and solving disputes.

8 The author explains, that Georgian government often has tensions between executive institutions and legislative institutions. These tensions are part of a process of checks and balances. This process is often very messy, but arguably it leads to a more satisfactory governing structure, meeting some of the problems. Legislatures tend to look after specific constituents. Executive bodies tend to look at matters more nationally oriented, but sometimes have their own particular "public choice", goals, and sometimes become more remote from constituents while developing affinity to certain elites. These tensions are a real dilemma for constitution making. They are observed in Georgia, as well as in other WTO countries. This is a tension that we face in the new World Trading System, as well as in national governments. This work of course, does not take the view that good governance is something that can be imposed in a truly effective and wholesome manner form the above. Efforts to ensure good governance in trade policy making and implementation must in the first place come from nation-states themselves who are WTO members. However, the WTO process, including its dispute settlement, can make a useful contribution in that direction. *Finally*, and to conclude, this case study evidences and confirms that while the accession process to the WTO is challenging *per se,* it is part of a process of domestic reforms that triggers growth and economic benefits. WTO's membership doesn't automatically lead to economic gains, which can only be obtained through hard work, a strong and continued commitment to undertake domestic reforms and put the right policy conditions in place to trade and attract FDI. It requires a vision, a strategy and a clear understanding of the country's potential and the political will and determination to put all the elements and conditions in place to create synergies.

Hence, the author can answer the research question 6: What are the benefits of Georgia's WTO membership for the EU and Georgian businesses?

Accession of WTO contributed powerfully to stabilising Georgia's trade legislation and reinforcing domestic economic reform and therefore increasing the stability and predictability for EU businessmen exporting to, or investing in, Georgia. It is believed that Georgia's medium-term growth prospects depend on a number of factors, including its ability to take advantage of the free trade agreement with the EU. Georgia has conducted major structural reforms in order to achieve all its key objectives, i.e. the integration into the world economy, including the implementation of WTO membership obligations and obligations under other international agreements, trade policy liberalization, including simplification of export and import procedures and tariff and nontariff regulation, diversification of trade relations by establishing preferential regimes with main trade and regional trade partners and finally enhancing of transparency in the policy-making. These objectives for the major part continue to have the attention of the government and in many ways are considered as work in progress. Through its active participation in international trade, Georgia aims to diversify exports and benefit from MFN treatment granted by WTO members. Today Georgia is an active Member in the WTO, and has made substantive inputs in the negotiations of the DDA, including with specific text and negotiating proposals on technically complex issues with a view of directly serving its economic and trade interests at the multilateral level. It will actively continue doing so in pursuit of its economic development policy objectives. The WTO is described foremost as a trade-economic partnership-type institution with 164 member states. This is also advantage for Georgian exporters who will be better able to ensure their rights in doing business world-wide.

However, *the author argues*, that there is a gap in the text of the Association Agreement in regard of the WTO; in particular, the Organization is referred to rather inconsistently and it seems that there is no unified vision on the name of the organization. The author believes, that the state should decide how to denominate such an important organization in the official documents, based on common practice of using terms of legal acts.

The Agreement also does not define the conflict between norms when selecting Law. Therefore, the author offers changes in the Georgian-EU Association Agreement.

Recommendation regarding Georgian-EU Association Agreement:

(1) To amend Part 2 (h) of Article 1 of the WTO agreement to read as follows:

"The aims of this association are:

To achieve Georgia's gradual economic integration into the EU Internal Market, as stipulated in this Agreement, in particular through establishing a Deep and Comprehensive Free Trade Area which will provide for far-reaching market access on the basis of sustained and comprehensive regulatory approximation in compliance with the rights and obligations arising from its WTO membership; In case of conflict of norms the WTO legal acts and regulations shall prevail."

9 *The lifting of the embargo on Georgia by Russia*, in author's opinion, was conditioned by the Agreement between the Government of Georgia and the Government of the Russian Federation on the Basic Principles of the Customs Administration and Trade Monitoring Mechanism signed in 2011 on the basis of which Georgia agreed to Russia's accession to the WTO. Membership in the WTO put Russia into a civilized framework and automatically subjected to the WTO rules, which obliges the country to adhere to the principles of the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO). The membership was the very precondition for Russia to lift the unfair embargo on Georgia on the basis of common regulations.

Incidentally the pretext for the embargo was the poor quality of the products while the World Trade Organization refers to the export of quality products to the market. The author concludes that now that Russia is a full member of the WTO, Georgia will be able to apply multilateral international agreements within the WTO against the Russian Federation in the event of a new wave of trade tensions and through them restore its violated rights.

Recommendation regarding the Agreement between the Government of Georgia and the Government of the Russian Federation on the Basic Principles of the Customs Administration and Trade Monitoring Mechanism:

(1) To append to this Agreement the clause as follows:

"At a new round of negotiations between Russia and Georgia or at the obligatory negotiations to be held due to the newly discovered circumstances, Georgia shall participate only together with its allies."

The author concludes this paper with a personal note saying that, coming from Georgia, a small country that has suffered decades of self-isolation, he is optimistic about this recent multilateral initiative. He believes in open markets, free competition and free trade as the drivers

of economic development in the long run. Notwithstanding past/present conflicts, the WTO and its members share more common values than distinct features that will enable to embark in this journey together.

Publications and Reports on the Topic of Doctoral Thesis

Presentations in the international scientific conferences and seminars:

1. Abuseridze, G. "International Business Information Management Conference (35th IBIMA)" 1–2.04.2020, Seville, Spain.
2. Abuseridze, G. *International scientific-practical conference "Tiesiskās problēmas Latvijas simtgadē: retrospektīva un perspektīva*". *25 April, 2019. Riga, Latvia.*
3. Abuseridze, G. VII International Scientific and Practical Conference "Transformation Process of Law, Regional Economy and Economic Policies: Topical Economic, Political and Legal Issues". 7 December, 2018, Riga, Latvia.
4. Abuseridze, G. *International scientific-practical conference "Tiesiskās problēmas Latvijas simtgadē: retrospektīva un perspektīva*". 25 April, 2018. Riga, Latvia.
5. Abuseridze, G. VI International Scientific Conference "Transformation Process in Law, Regional Economics and Economic Policies: Topical Economic, Political and Legal Issues". 8 December 2017. Riga, Latvia.
6. Abuseridze, G. International Conference "Society, Person, Security – 2017". 28–29th April 2017. Riga, Latvia.
7. Abuseridze, G. Annual International and Practical Conference "Science, Law, Stability. The Modern Trends of Modernization of Private Law". 27 April, 2017. Riga, Latvia.
8. Abuseridze, G. International Scientific and Practical Conference "Tiesiskās sistēmas modernizācijas virzieni; reālais stāvoklis un nākotnes perspektīvas". 26 April 2017. Riga, Latvia.
9. Abuseridze, G. V International Scientific Conference "Transformation Process in Law, Regional Economics and Economic Policies: Topical Economic, Political and Legal Issues". 9 December 2015. Riga, Latvia.
10. Abuseridze, G. IV International Scientific Conference "Science, Law, Stability". April 21, 2016. Riga, Latvia.
11. Abuseridze, G. International Scientific and Practical Conference "New Challenges of Today's Society in Strengthening Security: State of Play and Future Perspectives". 20 April 2016. Riga, Latvia.
12. Abuseridze, G. IV International Scientific Conference "Transformation Process of Law, Regional Economy and Economic Policies: Topical Economic, Political and Legal Issues". 11 December 2015. Riga, Latvia.
13. Abuseridze, G. International Scientific Conference" Topical Problems of Security Reinforcement: Political, Social, Legal Aspects". April 23, 2015, Riga, Latvia.
14. Abuseridze, G. International Scientific Conference "*Privāttiesību modernizācijas mūsdienu tendences*" April 24, 2014. Riga, Latvia.
15. Abuseridze, G. III International Scientific and Practical Conference. "Transformation Process of Law, Regional Economy and Economic Policies: Topical Economic, Political and Legal Issues". 12 December 2014. Riga, Latvia.
16. Abuseridze, G. 5th International Interdisciplinary Conference "Society Health Welfare, Family Well-Being and Human Capital Improvement in Changing Society: Strategy and Practice". 26–28th November 2014. Riga, Latvia.
17. Abuseridze, G. 2nd International Scientific and Practical Conference "Transformation Process of Law, Regional Economy and Economic Policies: Topical Economic, Political and Legal Issues". 10 December 2013. Riga, Latvia.

18. Abuseridze, G. Intensive seminar "EU Capacity in the Current Crisis" and Study visit to NATO and the EU institutions in Brussels and Luxembourg. 21th–25th November 2011.

International scientific publications:

1. Abuseridze, G. International Trade in the Context of COVID-19 Pandemic. Impact of Infodemic on Organizational Performance. Published in the United State of America by IGI Global. May 2021. Available at: https://www.igi-global.com/chapter/international-trade-in-the-context-of-the-covid-19-pandemic/278934
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Interviews

Interview 1

Dear Interviewee,

1. Trade rules stabilize the world economy by discouraging sharp backward steps in economic policy and by making trade policy more predictable. In your opinion, how stable is the WTO in terms of trade?

   The WTO is quite stable in terms of trade rules as well as is in other aspects. The major share of the world trade accounts for the WTO member countries. For example, in 2019 the share of merchandize trade of WTO member countries in total world trade amounted to 98.2%. In order to get integrated into the WTO, the countries have to meet specific trade and economic requirements; in particular, they should be a market economy, have transparent trade system, undertake specific market access commitments in services sectors, and other policies in goods and services while tariff rates should be bound against increase. When the countries meet these requirements and successfully finalize negotiations for accession, they are accepted into the WTO. They coexist with other member countries which share the unified system of values. Sharing of the common values by the member countries, transparent trade rules and dispute settlement mechanism adds to the organization's stability.

2. What recent instances of political and trade instability in the WTO member states can you name? How dangerous do you think they are for WTO stability and economics in the long run?

   One of the clear examples of trade instability is caused by the Covid-19 pandemic. In the early stage of pandemic, the countries shut down their borders and introduced export restrictions on medical equipment and supplies. Restriction of export which is against the WTO rules, occurs only in exceptional circumstances and for limited time. Under the current pandemic demand on some goods and essential supplies increased dramatically, causing supply distortions. Lockdowns and disruption in transportation caused economic decline as well. Some countries started to apply protective measures and widely use stimulus packages and subsidies. All these measures are trade distortive measures and create vulnerability for WTO system. In the present circumstances it is crucial to return to normality soon to avoid additional difficulties and further damage of multilateral trading system.

The biggest threat to the global trade is trade wars that would do serious damage to the global economy as protectionist actions escalate. Countries imposing tariffs and countries subject to tariffs would experience losses in economic welfare, while countries on the side-lines would experience collateral damage. In order to avoid this kind of scenarios, WTO has dispute settlement mechanism and countries have opportunity to apply it for resolution of their disputes (recently even this mechanism was challenged, thus hindering trade dispute settlements in fair manner). According to the author, every year growing number of countries are applying for dispute settlement.

3. By what means are trade, economic and political stability in the WTO mostly achieved, in your opinion? (Please mark all factors that apply.)

   ☐ absence of violence

   ☐ governmental longevity/duration

   ☒ **existence of a legitimate legislative base/framework**

   ☐ absence of structural change

   ☐ a multifaceted societal attribute.

4. Does the WTO have responsibility for development?

   The WTO is not a developmental organization by implication but as the body which facilitates multilateral trade rules, it has an important role to play in engineering growth and development. It plays central role for achieving Sustainable Development and Sustainable Development Goals such as poverty reduction, improvement of health, education and environment. Trade itself is the integral part of development, but it cannot be the only engine of growth. Many other pieces have to fall into place if the developmental objectives are to be achieved.

5. Which of the following economic factors tend to influence political stability in the WTO member countries most?

   ☒ **unemployment**

   ☒ **the level of tax (i.e. fiscal policy)**

   ☐ growth of incomes

   ☐ inflation

   ☐ other (please, specify _____)

6. What role does negotiation play in the organization (from the Uruguay Round to the present day)?

   Negotiations are inevitably a reflection of varied interests of different countries and country groups. On the majority of issues decisions are taken by consensus in the WTO, which means that countries should find necessary balance between different interests. The world at the time of the Uruguay Round was different from today's. This is clearly shown by the duration of negotiation rounds in the WTO. The last round of negotiations – "Doha round" was launch in Doha in 2001 and it is still ongoing. Developing countries at this time have much more clout on the negotiating agenda as the negotiations themselves demonstrate. Also, the WTO system allows them to defend their trading interests. The TRIPS has been agreed by developing countries and it also protects them.

   In the modern circumstances, the negotiations are based on the principles established by international norms, i.e. where free trade, specific market access commitments etc. are observed. The talks can be highly complicated. In some cases, the negotiations are almost as large as entire round of multilateral trade negotiations. For example, when negotiations are underway for membership in the organization the new member's commitments are to apply equally to all WTO members under normal non-discrimination rules, even though they are negotiated bilaterally.

Teimuraz Janjalia

Ambassador, Director of International Economic Relations Department, Ministry of Foreign Affairs of Georgia.

Interview 2

Dear Interviewee

1. How important is political stability for the economy of the WTO member countries?

   Political stability for the national economy of WTO member countries is one of the most important and determining factors. Because political stability leads to economic stability, to free and secure economic investment zone. This in itself implies the existence of more financial institutions and more trade segments.

2. Could you please rate the following factors that contribute to trade stability, simplicity and neutrality in the order of importance (where 1 = the most important factor, while 9 = the least important factor)?

- **level of social vulnerability**
- corruption
- history
- ethnic fragmentation <
- trust in institutions
- status of minorities
- labour unrest
- a country’s neighbourhood
- regime type <

3. To what extent is it true that WTO accession imposes a greater burden on developing countries than it imposes on developed countries?

   There is a greater burden on developing countries because many of them have legal systems that are unlike the systems of the developed countries, and the WTO legal regime is far more similar to that of the latter than of the former. That burden, however, is not equal across the ‘developed countries’ spectrum. India and Brazil, for instance, given their parliamentary democracy styles of law, are at far less disadvantage than those countries where there is no parliamentary democracy.

4. In your opinion, what role does the WTO play in the trade stabilization in the old WTO Member States, like Germany and France, and in the least-development states?

   The old WTO member states Germany and France are spine of WTO together with other old member countries, which define to a large extent the WTO trade policy, as well trade stability. In this respect, Germany and France are the leading WTO member states that have a significant role and mission.

   As for the least developed states such as Senegal and Bangladesh, their role in the above-mentioned process is quite low. These states with their economic or social problems are still at the stage of development and therefore their role in maintaining trade stability process is quite modest.

5. Which of the following measures of political risk insurance in the WTO states do you consider to be most essential? (Please mark all measures that apply.)

   - **insurance against political violence, such as revolution, insurrection, civil unrest, terrorism or war**
   - insurance against governmental expropriation or confiscation of assets
   - insurance against governmental frustration or repudiation of contracts

- insurance against wrongful calling of letters of credit or similar on-demand guarantees
- insurance against business interruption
- insurance against inconvertibility of foreign currency or the inability to repatriate funds.

6. What do you consider as successes and failures of the World Trade Organization?

   One of the successes is a legal framework for world trade which must be followed by 164 member states (membership growing), as well as successful negotiation of the Trade Facilitation Agreement (TFA). The WTO is the world's only international organization that supervises 95% of the world's global trade, which can be considered a successful side.

   On the negative side, the failure of the Doha Round since 2001, as well as of the labour rights. The WTO must provide, that human rights, environmental, labour and other multilaterally agreed public interest standards already enshrined in various international treaties, can serve as a floor of conduct for corporations seeking the benefits of global trade rules.

Emilio Molliner

Senior Fellow of Global Trade Experts.

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