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The WTO Dispute Settlement System as a New Actor in the EU-Russia Trade Relationship

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Introduction

In 2012, Russia became a Member of the World Trade Organization (WTO). By joining the WTO, a new institutional framework came into force in the trade relationship between Russia and the EU, who has been a member of the WTO since 1995 where the WTO entered into force. Until Russia's membership of the WTO, the trade relationship between Russia and the EU was based on bilateral agreements. With the WTO institutional framework follows the WTO Dispute Settlement Body (DSB) which settles disputes between Russia and the EU. Not only does it leave decisions to a third party institution but it promotes legal certainty that is essential for businesses involved in Russia-EU trade. That is a result of the rule of law developments by the WTO quasi-judicial bodies.

This paper addresses the WTO DSB and its role in settling disputes which is relevant in the Russia-EU trade relationship. By using the WTO DSB, a third party independent institution can solve trade disputes. However, it also implies that by using the WTO DSB, Russia and the EU must accept that the WTO DSB may include other aspects of general and specific international law in the decisions, and that by using the WTO DSB they accept the rule of law dimension in the trade relationship. The EU has made 4 complaints against Russia in all. One concerns violations of the national treatment principle of GATT 1994 and of the Agreement on Trade-Related Investment Measures.[1] One concerns violations of the SPS Agreement.[2] One concerns antidumping.[3] One concerns tariff treatment.[4] Russia's 4 complaints against the EU concerns antidumping in three of them,[5] and one concerns violations of the most favoured nations principle and national treatment principle in GATT 1994 and GATS respectively.[6]

The paper will first make a brief outline of the importance of rule of law and legal certainty for businesses. Next, the paper makes a brief outline of the WTO and its key principles. Thereafter, the paper addresses how the WTO quasi-judicial bodies have 1) clarified the legal value of their reports, and 2) handled the interface between trade law and environmental law as an example of the overlaps between trade and non-trade values.

Rule of Law and Legal Certainty for Businesses

According to Haggard and Tiede, economic literature on the rule of law divides it into 4 categories: 1) *Rule of law and security of persons*; personal insecurity in civil wars or in systems with high level of crimes have a negative economic impact. 2) *Rule of law and contract and property rights*; strong property rights protection and contract enforcement correlate with better long-run economic performance. 3) *Rule of law and institutional balance;* judicial independence is necessary to secure contract and property rights. There is correlation between institutional checks on governments and

[1] *Russia — Motor Vehicles*, WT/DS462, panel established but not composed
[2] *Russia — Pigs (EU),* WT/DS475/AB/R, adopted by the DSB on 21 March 2017.
[3] *Russia — Commercial Vehicles*, WT/DS479/AB/R, adopted by the DSB on 9 April 2018.
[4] *Russia — Tariff Treatment*, WT/DS485/R, adopted by the DSB on 26 September 2016.
[5] *EU — Cost Adjustment Methodologies (Russia)*, WT/DS474. Panel established but not composed; *EU — Cost Adjustment Methodologies II (Russia),* WT/DS494/R, pending appeal; and *EU — Cold-Rolled Steel (Russia),* WT/DS521, panel composed – case pending.
[6] *EU — Energy Package*, WT/DS476/R, pending appeal.

economic growth. 4) *Rule of law and corruption;* prices will rise as lack of confidence in courts raise the costs of dispute resolutions as the disputing parties must use alternative, private enforcement mechanisms. Furthermore, rent-seeking behavior by participants in corrupt societies raise costs for consumers and producers, and policy distortions cause barriers to long-run growth by protection or creation of monopolies.[7]

Access to justice with independent and neutral courts is necessary for the companies to protect their intellectual property rights. Not only as a matter of protecting the expected revenue from the investments, including the irreversible sunk costs, in the R&D etc., but also to protect the consumers from falsified medicines, which might be inferior or even dangerous compared to the products by the patent holder.[8] Furthermore, as companies are acting on worldwide markets, and will be on markets in areas with weak rule of law compliance, the risk is that competing companies can without any governmental interference copy products and force the patent holder to lower the prices – and thus raise the prices in markets with strong rule of law compliance. In addition, corruption can lead to anti-competitive behavior through price-fixing. Even in areas with high rule of law compliance, the industries cannot free of itself of participating in anti-competitive practices that will raise the prices of products.

Lack of compliance with the rule of law leads to *legal uncertainty*, which Katsoulacos and Ulph loosely have defined as "lack of ability to predict the outcome of a legal dispute".[9] They suggest that legal uncertainty may have a positive effect on welfare, as it can have a deterrent effect on companies' conduct if they cannot predict how enforcement authorities will assess their conduct. Even if that is the case, a weak rule of law might discourage companies from investing in R&D for new products if the companies cannot protect the investment from, for example, corrupt practices in the judicial or administrative system.[10] Craswell and Calfee suggest that the administration of the rules, rather than the rule itself, can lead to legal uncertainty. They suggest legal uncertainty may have a deterrent effect on the market agents and lead to over-compliance if the penalties are too severe.[11]

A weak rule of law is an economic risk as companies' investments have only limited legal protection. That increases the transaction costs, i.e. the costs of using the market,[12] and raises the price of the products. Companies on world markets might even raise the prices in well-functioning rule of law societies if they have losses on markets with a weak rule of law. Furthermore, those companies benefitting from societies with a weak rule of law, where corruption and anti-competitive behavior go hand-in-hand, can raise the price of the product. A strong rule of law should narrow down the

[7] Stephan Haggard and Lydia Tiede, 'The Rule of Law and Economic Growth: Where are We?', *World Development* 39 (5) (2011) 673 at 674-675 (2011).
[8] O. B. K. Dingake, 'The Rule of Law as a Social Determinant of Health' *Health and Human Rights Journal* 19 (2) (2017) 295 (2017).
[9] Yannis Katsoulacos and David Ulph, *Legal uncertainty, competition law enforcement procedures and optimal penalties*, 41 Eur J Law Econ 255, 266 (2016)
[10] The theory proposed by Katsoulacos and Ulph does not concern systems with a weak rule of law but it concerns the uncertainties associated with high discretion by authorities in cases about competition law.
[11] Richard Craswell and John E. Calfee, *Deterrence and Uncertain Legal Standards*, 2 Journal of Law, Economics, & Organization 279, 298-299 (1986).
[12] See for a nuanced discussion of the concept of transaction costs; Carl J. Dahlman, *The Problem of Externality*, 22 (1) The Journal of Law And Economics 141 (1979).

scope of legal uncertainty and reduce transaction costs. To strengthening the rule of law in societies with a weak rule of law, it is necessary to work towards stronger rule of law on international level.

WTO Law and Its Main Principles

The WTO has mainly economic aims, although it also aims at protection of the environment and sustainable development.[13] It covers three areas; trade in goods, trade in services, and intellectual property right.

The WTO's core principles are:

- *Non-discrimination*, which is reflected in two separate principles; *most favoured nations (MFN),* i.e. a WTO Member must not discriminate between its trading partners; and *national treatment (NT),* i.e. products which have passed the custom zone must be granted equal treatment to *like products* from domestic producers.
- *Market access*. It has both an import and export dimension and is reflected throughout all the WTO treaties with reduction of tariffs and elimination of quantitative restrictions and non-tariff barriers.
- *Transparency*, which are legal requirements to make the administrative and public laws and practices transparent for importers/exporters.
- *Fair trade* concerns WTO Members' rights to impose antidumping duties on goods with dumped prices, and the use of countervailing duties on subsidised products.

These principles are reflected in the WTO treaties, like the General Agreement on Tariffs and Trade (GATT) 1994. None of the WTO treaties concern human rights, working conditions, or environment directly. If national measures are in violation of the provisions of GATT 1994, they can be exempted if they qualify under the legitimate policy objectives in Art. XX of GATT 1994. These policy objectives are *inter alia*;

- Measures necessary to protect public morals (para. a)
- Measures necessary to protect human, animal or plant life or health (para. b)
- Measures relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption (para. g).

It follows from the *chapeau* of Art. XX of GATT 1994 that measures that can be justified under one of the policy objectives must *"not [be] applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."*

There have been numerous cases in the WTO Dispute Settlement System concerning the balance between, on the one side, the rules reflecting the free trade principles, and on the other side, states'

[13] Preamble of the WTO Agreement.

unilateral approaches to protect national interests with basis in the legitimate policy objectives of Art. XX of GATT 1994.

The WTO DSB and its Specific Institutions: The Role of the de facto WTO Judicial Institutions and the Progressive Dimension

Compared to the old GATT regime, the WTO has brought a more judicialized framework to the world trading order by introducing the DSB. In contrast to GATT, the WTO Members have no veto to reject a recommendation. A panel recommendation can only be rejected by the WTO Members if there is full consensus by all the WTO Members. If one or all the disputing parties find the panel reasoning or conclusion unsatisfactory, they can appeal to the AB. The AB can review the legal aspects of the panel recommendation and it has authority to overrule the panel recommendation. The recommendation from the AB is final and will be adopted by the DSB unless there is full consensus by all the WTO members to reject it. However, under Art. IX.2 of the WTO Agreement, the Ministerial Conference and the General Council, which represent the WTO Members, have the mandate to make *final interpretations* of the respective WTO treaties. Art. IX.2 has only been applied in a few occasions. The AB has interpreted Art. IX.2 of the WTO Agreement to mean that adopted panel and AB recommendations do not constitute definitive interpretations.[14] Panel and AB recommendations – if adopted by the DSB – are only binding between the disputing parties.

The authority of the AB is further clarified in the Dispute Settlement Understanding (DSU). Art. 3.2 provides:

> *The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.*

It is clear that the AB is bound by the rule of law requirement of predictability in the WTO system. That predictability must have its outset in the WTO treaties. Hence, the AB is not authorized to create law but it is not confined to apply a specific catalogue of sources as long as it does not add to or diminish the right and obligations under the WTO treaties. The WTO treaties must be clarified "in accordance with customary rules of interpretation of public international law" which, according to the AB, are expressed in Art. 31 and Art. 32 of the VCLT. The interpretative space leaves room for the AB to step outside the WTO framework and include other instruments of international law as context. Occasionally, the AB looks at other treaties outside the WTO and other international courts, tribunals etc. in its methodology. For example it has referred to the ICJ in support of its legal arguments.[15] It should be noted that the WTO Agreement is registered to the UN Secretariat in accordance with Art. 102 of the UN Charter. In case of conflict with the UN Charter, the UN Charter

[14] *Japan — Alcoholic Beverages II*, WT/DS8, 10 and 11/AB/R, adopted on 1 November 1996

[15] See for example *EC – Tariff Preferences*, WT/DS246/AB/R, adopted on 20 April 2004, footnote 220; *US – Stainless Steel (Mexico)*, WT/DS344/AB/R, adopted on 20 May 2008, footnote 308; *China – Publications and Audiovisual Products*, WT/DS363/AB/R, adopted on 19 January 2010, footnote 705.

prevails although the extent of that hierarchy is unclear.[16] Certain purposes of the UN Charter cannot be ignored by the AB, like the maintenance of international peace and security, principles of equality and friendship between states, and the achievements of;

> international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language.[17]

The AB has in certain areas taken some progressive approaches to clarify the challenging balance between trade and non-trade values, and by establishing its own role as judicial by elaborating on the legal value of the reports made by panels and in particular the AB. The paper will first elaborate on the manner in which in particular the AB has clarified the legal value of its reports. Next, the paper shows how the panels and the AB have stressed the importance of environment both through the use of exceptions and through externality arguments, and thereby created the space and balance between trade and environment.

The Zeroing Saga and the Legal Value of AB Reports

Law creation must from a rule of law perspective follow open and clear rules. In a territorially confined constitutional system there will often be a mandate to specific institutions, like a parliament, to create law, or it might be given in constitutional principles, like the common law in the United Kingdom, that certain institutions can have a law creating function. International law is often seen as a result of sovereign states' choice to enter into agreement with other states.[18] International courts do not have authority to create law or to develop case law unless it is positively provided for in treaty. For example, the mandate of the International Court of Justice (ICJ) is established in the Charter of the United Nations and the Statute of the ICJ,[19] and the ICJ does not have authority to provide binding decisions beyond the actual dispute,[20] which is also indirectly implied from the catalogue of the sources; treaty, customary law, principles, which are available to the ICJ.[21] The scope of sources might be broader for the International Tribunal for the Law of the Sea (ITLOS), which has its jurisdiction defined in the Statute for ITLOS,[22] as long as the sources are not incompatible with UNCLOS.[23] For the International Criminal Court (ICC), there is also a catalogue of applicable law available to it. It has a wider scope of sources compared to the ICJ as the Rome Statute of the ICC

[16] Art. 103 of the UN Charter.
[17] Art. 1(3) of the UN Charter.
[18] The concept of 'sovereignty' is a contested concept with different degrees of absoluteness. See for example Krasner, *Sovereignty: Organised Hypocrisy*, (Princeton University Press 1999) at 3, and Andrew Coleman and Jackson Nyamuya Maogoto, '"Westphalian" Meets "Eastphalian" Sovereignty: China in a Globalized World' (2013) 3 Asian Journal of International Law 237 at 241-245.
[19] See Art. 92-96 of the UN Charter.
[20] Art. 59 of the Statute of the ICJ.
[21] Art. 38 of the Statute of the ICJ.
[22] Art. 21. In the recent dispute between the Philippines and China concerning the South China Sea, China rejected the jurisdiction of ITLOS as it according to China acted beyond the scope of United Nations Convention on the Law of the Sea (UNCLOS). See more in; The Republic of the Philippines v The People's Republic of China (*South China Sea Arbitration*), PCA Case Nº 2013-19, Award by the Arbitral Tribunal on 12 July 2016, and see for a discussion concerning the jurisdiction of ITLOS in Shicun Wu (ed) and Keyuan Zou (ed), *Arbitration Concerning the South China Sea: Philippines Versus China*, (Abingdon: Routledge, 2016).
[23] Art. 23 of the Statute of ITLOS and Art. 293 of UNCLOS. However, Art. 293 refers to 'rules of international law' and it can be discussed whether case law developed through ITLOS can be considered as 'international law'.

provides that it may "apply principles and rules of law as interpreted in its previous decisions."[24] However, it is clear that the ICJ refers to previous cases as part of its legal methodology which must be seen in light of its aim of providing consistency and predictability in law.[25] For panels and the AB there is not provided a catalogue of sources available to them in the WTO treaties. Instead of a positive definition of sources, it can negatively be claimed that other sources of law, like customary law and principles of law, are available as long as they do not create obligations and/or rights in violation of the WTO treaties. The methodological position is clear though; the WTO treaties are the starting point. In a few cases, other international treaties have been applied as interpretative tools.[26] Furthermore, the AB has also referred to other courts and to the International Law Commission (ILC) in support of its findings and as interpretative context,[27] and in antidumping cases, there has been reference to – although the legal value is limited – the Group of Experts, which was a group of economic and trade experts discussing antidumping issues under GATT in 1958.[28] The question with the zeroing cases concerned the legal value of AB reports. The AB statement in *US – Stainless Steel (Mexico)* was the third step of entrenching the legal value of the AB reports. The first step came early in WTO jurisprudence in *Japan – Alcoholic Beverages II* where the AB stated that previous decisions create "legitimate expectations" and must be taken into account of they are relevant to the dispute.[29] The second step came in *US – Oil Country Tubular Goods Sunset Reviews*, where the AB stated that it was expected that panels would follow previous decisions in particular if the issues were the same.[30] In *US – Stainless Steel (Mexico),* the AB added:

> "Ensuring "security and predictability" in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case."[31]

The AB must here balance between on the one hand the WTO treaty rule that final interpretations can only be made by the WTO Mnisterial Conference and WTO General Council,[32] which are represented by the states, and which seem to support the claim that AB reports cannot bind in future cases – which

[24] Art. 21 of the Rome Statute of the International Criminal Court.
[25] See for example the Inaugural Hilding Eek Memorial Lecture by H. E. Judge Peter Tomka, Former President of the ICJ, 'The Rule of Law and the Role of the International Court of Justice in World Affairs' (Stockholm Centre for International Law and Justice 2013) at 7.
[26] See for example AB in *EC – Asbestos*, WT/DS135/AB/R, adopted 5 April 2001 concerning facts, and *US – Shrimps*, WT/DS58/AB/R, adopted 6 November 1998 concerning interpretation.
[27] See in respect of the ICJ; *Japan – Alcoholic Beverages II*, WT/DS8, 10 and 11/AB/R, adopted on 1 November 1996, footnotes 17-20; *EC – Tariff Preferences*, WT/DS246/AB/R, adopted on 20 April 2004, footnote 220; *China – Publications and Audiovisual Product*s, WT/DS363/AB/R, adopted on 19 January 2010, footnote 705. See in respect of the ILC and customary law; *US – Countervailing and Anti-Dumping Measures (China),* WT/DS379/AB/R, adopted 25 March 2011, para. 308.
[28] See the AB in *US – Softwood Lumber (Article 21.5 – Canada), WT/DS264/AB/RW*, report of the AB of 15 August 2006, para. 121.
[29] *Japan – Alcoholic Beverages II*, WT/DS8, 10 and 11/AB/R, adopted on 1 November 1996, pp. 14-15. See also concerning AB reports, *US – Shrimp (Article 21.5 – Malaysia), WT/DS58/AB/R*, adopted on 21 November 2001, para. 109.
[30] *US – Oil Country Tubular Goods Sunset Reviews*, WT/DS268/AB/R, adopted on 17 December 2004, para. 188.
[31] *US – Stainless Steel (Mexico),* WT/DS344/AB/R, adopted on 20 May 2008, para. 160.
[32] Art. IX.2 of the WTO Agreement.

the AB also suggests[33] – and on the other hand rule of law and legal certainty which should come with a decision by a court, and where the various actors, both private and public, will develop legal expectations for future situations. In *US – Stainless Steel (Mexico),* the AB substantiated its argument for the strong legal value of AB reports with reference to H. Lauterpacht, who pointed out that the function of law is to provide security and stability and that legal decisions should be followed;[34] the International Criminal Tribunal for the Former Yugoslavia, which stated that in order to have a fair trial, decisions from the Appeal Chamber should not be ignored by the Trial Chamber;[35] and the Arbitration Tribunal of the International Centre for Settlement of Investment Disputes (ICSID) which in *Saipem S.p.A. v. The People's Republic of Bangladesh* stated:

> "[I]t has a duty to adopt solutions established in a series of consistent cases (…) subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law"[36]

Even though the AB in *US – Stainless Steel (Mexico)* held that panels should follow AB reports unless there are cogent reasons for departing from them, the panel in *US – Zeroing (Korea)* stated as response to the EU's reference to the AB report in *US – Stainless Steel (Mexico)*:

> "In our view, there is not a system of precedent within the WTO dispute settlement system and panels are not bound by Appellate Body reasoning. However, we agree with Korea that adopted reports create legitimate expectations among WTO Members and that "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same".[37]

It is interesting to note that the panel only referred to those AB reports which are first step and second step but did not refer to the AB's statement from *US – Stainless Steel (Mexico)*. However, in *US — Washing Machines*, the panel seemed to rely on findings by the AB in *US – Stainless Steel (Mexico)* and stated that zeroing in administrative reviews are inconsistent with WTO law.[38] In *US – Shrimp II (Viet Nam),* the panel made explicit reference to the statement by the AB in *US – Stainless Steel (Mexico)* when it found that the USDOC violated WTO law by its zeroing methodology in

[33] *Japan – Alcoholic Beverages II*, WT/DS8, 10 and 11/AB/R, adopted on 1 November 1996, p. 13; *US — Wool Shirts and Blouses,* WT/DS33/AB/R. pp. 19-20.
[34] H. Lauterpacht, "The so-called Anglo-American and Continental Schools of Thought in International Law" (1931) *12 British Yearbook of International Law* 53, mentioned in footnote 313.
[35] Decision of the International Criminal Tribunal for the Former Yugoslavia, Case No. IT-95-14/1-A, *Prosecutor v. Aleksovski*, Judgement of 24 March 2000, para. 113, mentioned in footnote 313.
[36] Decision of 21 March 2007 of the ICSID (International Centre for Settlement of Investment Disputes) Arbitration Tribunal, Case No. ARB/05/07, *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID IIC 280 (2007), p. 20, para. 67.
[37] *US – Zeroing (Korea),* WT/DS402/R, adopted on 24 February 2011, para. 7.31.
[38] *US – Washing Machines*, WT/DS464/R, para. 7.208. The panel report is not adopted yet as it is currently under appeal.

administrative reviews.[39] Furthermore, in *US – Orange Juice (Brazil),* after a lengthy discussion with reference to the AB in *US – Stainless Steel (Mexico)* and the function of law, the panel stated:

> "Given the objective lack of clarity in the current definition of "dumping" that is set forth in the AD Agreement (a conclusion which we believe is inescapable after almost a decade of unprecedented, and often conflicting, panel and Appellate Body opinions on the matter), we firmly believe that all Members have a strong systemic interest in seeing that a lasting resolution to the "zeroing" controversy is found sooner rather than later (Footnote omitted). With all these considerations in mind, and despite sometimes diverse positions existing even amongst ourselves as to different aspects of this debate, we believe that, on balance, our function under Article 11 of the DSU, and the integrity and effectiveness of the WTO dispute settlement system, are best served in the present instance by following the Appellate Body."[40]

It should also be noted that outside the antidumping field, panels have referred to the third step statement by the AB. For example, in *China – Rare Earths*, the panel stated that "the expression "cogent reasons" may be understood as referring generally to a high threshold."[41]

Where the line pursued by panels concerning the legal value of AB reports is not entirely clear, the AB seems to develop a consistent line. The challenge is that international law is based on assumptions of state sovereignty where states should be equal and supreme in respect of making international law. It leads to a question of how wide the mandate of the WTO judiciaries is; which leads to another question; which institutions or states can clearly formulate the mandate? It can by itself be subject to interpretation. From a rule of law perspective, it is important that courts develop a methodology which is clear and open as their decisions otherwise could risk being regarded as arbitrary. This is not to suggest that different courts should follow the same methodology, but in a hierarchical court structure within a specific regime, like the WTO, it must be expected that a lower court will comply with a higher court's decisions unless it can provide new and compelling arguments in subsequent cases. However, regardless of state sovereignty, states must assume that every time they choose to be part of an international organization with a dispute settlement system, such system will develop a legal methodology which will substantiate over the course of time through the handling of legal questions. It has in WTO jurisprudence been clear that previous cases have served as interpretative tool. Not only do panels and AB refer to previous cases, but states, both the disputing states and the third party states, do that as well. If the states do not accept a consistent line of interpretation by the AB, it must try to change law through treaty amendments. If the US wants more scope for zeroing in antidumping law, it can be written into an amended ADA.

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[39] *US – Shrimp II (Viet Nam),* WT/DS429/R, report adopted on 22 April 2015, para. 7.80. Vietnam appealed certain parts of the panel findings but the matter concerning the administrative reviews was not appealed by neither Vietnam or the US.

[40] *US – Orange Juice (Brazil),* WT/DS382/R, paras. 7.134-7.135.

[41] *China – Rare Earths*, WT/DS431, 432, and 433/R, adopted on 29 August 2014, para. 7.61. The panel referred to case law by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia, Case No. IT-95-14/1-A, *Prosecutor v. Aleksovski*, Judgement of 24 March 2000, para. 108, and the European Court of Human Rights, *Cossey* Judgement of 27 September 1990, Series A, vol. 184, para. 35

From a rule of law perspective, it is important that enterprises involved with cross-border trade can know in advance what to expect in respect of potential antidumping duties when they decide their domestic and export prices. After a long zeroing battle, it seems that panels to some extent have accepted the legal value of AB reports which provide some degree of predictability and legal certainty into WTO antidumping law. It should here be noted that even though the AB reports gain a precedent-like function, the Ministerial Conference and the General Council can at any time make a final interpretation of a WTO provision if they want to change the precedent-like character of the AB report.

Sustainable Development and Protection of the Environment in WTO Law

In the overlaps between trade and environment, the panels and the AB have had an important function in clarifying that balance. The preamble of the WTO Agreement provides *inter alia* that endeavor should be conducted with a view of;

> *"expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development".*

The strength of the principle of sustainable development as provided in the preamble of the WTO Agreement has been tested in WTO case law. In *US – Shrimp*, the AB relied *inter alia* on the principle of sustainable development of the preamble in the interpretation of "exhaustible natural resources" to conclude that exhaustible natural resources covers both living and non-living resources.[42] In *Brazil – Retreaded Tyres*, the panel stated:

> *"The Panel agrees with China that, in interpreting and applying Article XX(g) in relation to non-renewable resources, the treaty interpreter may take into account the international law principle of sovereignty over natural resources, to the extent relevant to the case at hand. The Panel also agrees that resource-endowed countries are entitled to manage the supply and use of those resources through conservation-related measures that foster the sustainable development of their domestic economies consistently with general international law and WTO law."*[43]

Thus, a WTO Member has its sovereign right over its resources to manage them in a manner that advances sustainable development in line with other parts of international law. However, the principle of sustainable development serves as interpretative context only. In *US — Tuna II (Mexico) – Second Recourse to Art. 21.5*,[44] Mexico claimed that the principle of sustainable development as provided in the preamble of the WTO Agreement should apply to the interpretation of the TBT Agreement. With reference to *US – Shrimps*, the AB stated:

> *"We consider that the preamble of the WTO Agreement may also inform interpretations of the covered agreements in appropriate circumstances. In this regard, the Appellate Body has found that the preamble of the WTO Agreement*

[42] *US – Shrimps*, WT/DS58/AB/R, adopted by the DSB on 6 November 1998, para. 131.
[43] *Brazil – Retreaded Tyres*, WT/DS332/R, adopted by the DSB on 17 December 2007, para. 7.404.
[44] *US — Tuna II (Mexico) – (Second) Recourse to Art. 21.5,* WT/DS381/AB/RW/USA and WT/DS381/AB/RW2, adopted by the DSB on adopted on 11 January 2019.

> *"add[s] colour, texture and shading" to the interpretation of the covered agreements. Thus, while the preamble of the WTO Agreement does not itself create substantive obligations, it can provide important context for the interpretation of the covered agreements, for example, by shedding light on the kinds of policy objectives a Member may pursue."*[45]

The panel—upheld by the AB—found that:

> *"The WTO Agreement does not obligate the United States or any other Member to regulate only for the objective of "sustainable development", and in our view a measure is not inconsistent with Article 2.1 of the TBT Agreement merely because it pursues some other objective."*[46]

Thus, the principle of sustainable development seems at this stage only to serve as interpretative context. A national measure that does not take account of sustainable development will not for that reason alone be considered inconsistent with WTO law. The principle as embodied in the preamble cannot stand alone. Nevertheless, the interpretative context is in particular relevant when the provisions of Art. XX of GATT 1994 are interpreted in cases concerning environment, and most likely also in cases about climate change.

Although there is explicit reference to sustainable development and environment, the body of WTO law does not contain a treaty explicitly concerned with the relationship between trade and climate. Instead, the WTO Members must in situations where their climate policies might conflict with WTO law resort to exceptions of Art. XX of GATT 1994. However, the WTO Members have to comply with their commitments under international climate change law. Thus, when the trade rules overlap—and potentially conflict—with climate change rules the WTO Members are faced with two sets of international commitments. The problem without a better integration between trade and climate change law is that the WTO panels and the AB must take a narrow view starting with the text of the trade rules only as they cannot add to or diminish the rights and obligations of the WTO members under the covered WTO treaties.[47] If it is not possible to reach a harmonious conclusion in the interface between the trade rules and the climate change rules, the WTO panels and the AB have to disregard the climate change rules. However, they have at times taken some progressive steps in order to include non-trade values in their efforts to reach a balance between trade values and non-trade values.

Art. XX of GATT 1994 is in particular relevant in establishing a balance between trade and climate. In that regard it must be noted that although Art. XX of GATT 1994 are exceptions to the trade rules, the interpretation follows the customary rules of interpretation of public international law. The implication is that the interpretation is made in good faith as expressed in Art. 31(1) of the VCLT:

> *"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."*[48]

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[45] Para. 6.23.
[46] Para. 7.131.
[47] Art. 3.2 of the DSU
[48] See from WTO case law; *US – Gasoline*, WT/DS2/AB/R, adopted by the DSB on 20 May 1996, p. 17.

The WTO AB and panel have made a continuation of the line of precedents that started to take shape in the late GATT days. With the establishment of the WTO, the environment gained an even stronger legal basis by the reference to it in the preamble of the WTO Agreement. Already in the second case that was notified to the DSB, *US – Gasoline,*[49] the relation between trade and environment was the main issue. Although the trade argument prevailed over the environmental argument in the case, it was important for the AB to highlight what the conclusion was not about;

> *"It is of some importance that the Appellate Body point out what this does not mean. It does not mean, or imply, that the ability of any WTO Member to take measures to control air pollution or, more generally, to protect the environment, is at issue. That would be to ignore the fact that Article XX of the General Agreement contains provisions designed to permit important state interests including the protection of human health, as well as the conservation of exhaustible natural resources - to find expression. The provisions of Article XX were not changed as a result of the Uruguay Round of Multilateral Trade Negotiations. Indeed, in the preamble to the WTO Agreement and in the Decision on Trade and Environment, there is specific acknowledgement to be found about the importance of coordinating policies on trade and the environment. WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the General Agreement and the other covered agreements."*

In its obiter dictum, the AB stresses the autonomy of the WTO Members to choose their own level of environmental protection as long as it complies with the WTO treaties. The AB cannot determine that balance between trade and environment: it is left to the states to coordinate their environmental protection in the WTO through the WTO political organs. That leads to a question—which the AB did not refer to—about the relationship between non-WTO treaties, other international law, and WTO law. As the AB clearly states that the Members must coordinate their efforts, it also reflects the fact that the WTO does not contain a treaty about the environment. Thus, there is not in the wider context of WTO law any clear guidance for the AB to establish a balance between the climate and trade. However, the AB has in its own case law developed answers to that question. In *US – Shrimps*, the panel and the AB had to determine the concept of "natural exhaustible resources" which are protected in Art. XX (g) of GATT 1994. The US had imposed barriers on shrimps from Malaysia as the harvesting methods caused damage to turtles. In its interpretation of Art. XX(g) of GATT 1994, the AB included the wider context of international environmental treaty law which also is consistent with customary rules of interpretation of public international law as reflected in Art. 31.3(c) of the VCLT.

However, what *US – Shrimps* also concerned was the specific harvesting methods by Malaysia, which is outside the US territorial sea. Although the AB did not clearly decide on questions about jurisdiction, it nevertheless stated that:

[49] *US – Gasoline*, WT/DS2/AB/R, adopted by the DSB on 20 May 1996

> *"We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g)."*[50]

Thus, by establishing that a nexus exists between the migratory turtles—that can migrate into US territory—and the US policies, it does not become a question of extra-territorial jurisdiction in the context of Art. XX (g) of GATT 1994. The AB has kept away from directly handle issues of extra-territorial character. Rather, it is a question of finding a nexus between the specific object being protected and the policies of the responding state. The question is whether such a nexus can be established in regard to protection of the climate.

Art. XX provides several avenues that can be taken in addressing protection against climate change—and where the question of nexus may arise. The main questions are whether the specific policy objective of the respective sub-paragraphs of Art. XX of GATT 1994 can encompass measures taken against climate change.

- Art. XX(b) of GATT 1994 concerns measures that are necessary to protect human, animal, and plant life and health. The challenge in this respect is how strong evidence is required to demonstrate that a state's production methods cause harm to the climate to such an extent that it harms human, animal, and plant life and health. In *US – Gasoline*, the panel—and later the AB—found that air pollution is covered by Art. XX(b). Pollution has a direct impact on human, animal, and plant life and health in that particular country. However, can the argument be taken further to also include the impact that production processes have on the climate? The harm caused on human, animal, and plant life and health in the importing state by climate change is more difficult to connect directly to the actions/inactions in one particular exporting state. Furthermore, the importing state must pass the test to demonstrate that the measures are necessary to meet the specific policies justifying the ban. In that respect, the importing state must assess whether there are less trade restrictive measures available. However, as the AB stated in *Colombia – Textiles*: "The more vital or important the interests or values that are reflected in the objective of the measure, the easier it would be to accept a measure as 'necessary."[51] Universal ratification of climate change law treaties should indicate the importance of protecting the planet, and all human, animal, and plant life and health against the harm resulting from human activities causing climate change. The panels and the AB have stated that an objective to preserve human life and health is vital and important to the highest degree and protection of animal and plant life and health is highly important.[52]
- Art. XX(g) protects natural exhaustible resources. It has similar questions as Art. XX(b). A link must be made between the exporting states' CO2 emission, that causes harm to the climate, which then causes harm to, for example, the ocean and thereby to the natural exhaustible resources of the ocean. It requires furthermore a nexus between the importing state and the natural exhaustible resources of the ocean. There is no necessity test in Art.

[50] Paragraph 133.
[51] *Columbia – Textiles*, WT/DS461/AB/R, adopted by the DSB on 22 June 2016, para. 5.71.
[52] AB report *EC – Asbestos*, WT/DS135/AB/R adopted by the DSB on 5 April 2001, para. 172, and panel report *Brazil – Retreaded Tyres*, WT/DS332/R, adopted by the DSB on 17 December 2007, para. 7.111.

XX(g) but the state must demonstrate that the measures are related to the conservation of natural exhaustible resources.

- Art. XX(a) seems to come around the problem. It protects a state's measures necessary to protect its public moral. It follows from case law that the WTO Members have a wide degree of discretion to determine their respective public morals. Thus, there is no need to demonstrate an actual impact on living being caused by climate change. If climate change protection can demonstrably be part of the importing state's public morals and requires 'green products', the importing state has a legitimate basis for adopting trade restrictive measures to protect the public morals concerning climate change. Furthermore, in respect of the nexus between the subject and the importing state's policies, *EC – Seal Products* provides some guidance as the AB and the disputing parties accepted that seals, without any concerns of whether they migrate into EU territory, had nexus with EU's policies on seal protection. If climate protection is a state's public moral, it may be possible to impose a higher standard of climate protection requirements on the exporting state. Art. XX(a) also has a necessity test which, as mentioned above, is easier to meet if the objective is vital and important, like protection of life. As the Panel stated in respect of the necessity test of Art. XX(a) in *EC – Seal Products*: "The European Union submits that the 'moral concern with regard to the protection of animals' is regarded as a value of high importance in the European Union. We consider, and the parties do not dispute, that the protection of such public moral concerns is indeed an important value or interest."[53]
- Art. XX(d) concerns the measures that are necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of GATT 1994. International climate change law must generally be assumed to be in conformity with WTO law and that the panels and the AB must establish a balance between the states' commitments under WTO law with their other international commitments. Some international climate change treaties have universal applications. Nevertheless, international climate change law is not enough to apply Art. XX(d). The importing state must demonstrate that international climate change law has a certain degree of direct effect in the national system. In *India – Solar Cells*, India imposed requirements on solar cell producers that some of the components should be of Indian origin. India claimed that the requirement was necessary to ensure that the product complied with India's international obligations, including those under the UNFCCC. India claimed that it was easier to monitor domestic producers' compliance with the climate change commitments than to monitor foreign producer. The AB rejected India's claim as they did not form an integral part of domestic law. The AB provided a non-exhausting list of factors that may determine whether an international rule of law qualifies as "laws of regulations" under Art. XX(d) of GATT 1994. The AB held:

  "in determining whether a responding party has identified a rule that falls within the scope of "laws or regulations" under Article XX(d) of the GATT 1994, a panel should evaluate and give due consideration to all the characteristics of the relevant instrument(s) and should avoid focusing exclusively or unduly on any single characteristic. In particular, it may be relevant for a panel to consider, among others: (i) the degree of normativity of the instrument and the extent to which the

[53] *EC – Seal Products*, WT/DS400/R and WT/DS401/R, adopted by the DSB with modifications by the AB on 16 June 2014, para. 7.632.

instrument operates to set out a rule of conduct or course of action that is to be observed within the domestic legal system of a Member; (ii) the degree of specificity of the relevant rule; (iii) whether the rule is legally enforceable, including, e.g. before a court of law; (iv) whether the rule has been adopted or recognized by a competent authority possessing the necessary powers under the domestic legal system of a Member; (v) the form and title given to any instrument or instruments containing the rule under the domestic legal system of a Member; and (vi) the penalties or sanctions that may accompany the relevant rule."[54]

Thus, a range of factors can be used to determine whether an international instrument qualify as "laws or regulations" under Art. XX(d) of GATT 1994. However, there must be a strong connecting element between the international instrument and the domestic legal system. "Laws or regulations" are thus supposed first of all to concern the legal instruments that are applicable in a domestic system that may not be confined to national courts, but assumingly also enforceable in the national administrative systems.[55] If there is a sufficient strong connection from the international climate change commitments to the domestic system, and these commitments meet the criterion of specificity and enforceability, the international climate change law will meet the "laws and regulations" requirement of Art. XX(d) of GATT 1994, and from there a WTO Member may adopt measures that are not consistent with the general trade rules in order tom comply with the international climate change commitments.

Although the panel and the AB have not directly been involved with questions about the scope of protection of the climate in trade relations, apart from the *India – Solar Cells* case, which did not directly address that balance, the AB has nevertheless referred to climate change in its case law. In *Brazil – Retreaded Tyres*, Brazil had introduced measures against the import of retreaded tyres. One of the arguments for the import ban was that retreaded tyres could endanger human life and health as mosquitos nest in retreaded tyres and could potentially cause diseases. Therefore, Brazil referred to Art. XX(b) of GATT 1994 as legal basis for justification of the import ban. One question concerned whether the measures were necessary to reach the aim of protecting human life and health if the effect of the measure was not immediate. The AB stated:

"This does not mean that an import ban, or another trade-restrictive measure, the contribution of which is not immediately observable, cannot be justified under Article XX(b). We recognize that certain complex public health or environmental problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures. In the short-term, it may prove difficult to isolate the contribution to public health or environmental objectives of one specific measure from those attributable to the other measures that are part of the same comprehensive policy. Moreover, the results obtained from certain actions—for instance, measures adopted in order to attenuate global warming and climate change, or certain preventive actions to reduce the incidence of diseases that may

[54] Para.5.113.

[55] Henrik Andersen, 'India – Solar Cells and Mexico – Taxes on Soft Drinks: Multilevel Rule of Law Challenges in the Interpretation of Art. XX (d) of GATT 1994 in WTO Case Law', *Indian Journal of International Economic Law* 10 (2019), 58 at 92.

> *manifest themselves only after a certain period of time—can only be evaluated with the benefit of time. In order to justify an import ban under Article XX(b), a panel must be satisfied that it brings about a material contribution to the achievement of its objective. Such a demonstration can of course be made by resorting to evidence or data, pertaining to the past or the present, that establish that the import ban at issue makes a material contribution to the protection of public health or environmental objectives pursued. This is not, however, the only type of demonstration that could establish such a contribution. Thus, a panel might conclude that an import ban is necessary on the basis of a demonstration that the import ban at issue is apt to produce a material contribution to the achievement of its objective. This demonstration could consist of quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence."*[56]

From a climate perspective, the statement by the AB is important as:

- the AB indirectly suggests that Art. XX(b) can justify trade barriers that are meant to protect the climate
- the AB directly accepts that measures may not have an immediate effect that can be measured. They may nevertheless pass the necessity test of Art. XX(b)
- the AB/panels "must be satisfied that it brings about a material contribution to the achievement of its objective". The evidence in that respect can be actual data from past experiences, but also quantitative projections in the future and qualitative reasoning based on some hypothesis that find support in sufficient evidence.
- However, what is not entirely clear from this statement: how does Art. XX(b) apply in the context of the precautionary principle? In *EC – Hormones*, the AB stated that although the precautionary principle is not a general principle of international law, it is nevertheless a principle of international environmental law.[57] Thus, it may serve as relevant context for the interpretation of Art. XX(b) under the interpretative principle reflected in Art. 31(3)(c) of the VCLT.

The Externality Approach in Case Law

Where Art. XX of GATT 1994 can serve as a legitimate basis for introducing measures to protect the environment and climate, it is also worth exploring other areas where the jurisprudence of the AB has demonstrated a willingness to protect measures that concern climate protection but where there has not been applied exceptions for promoting the environmental values. *Canada – Renewable Energy* and *Canada – Feed-In Tariff Program* concerned the feed-in tariff (FIT) programme in Canada which allegedly was a subsidy in violation of the Agreement on Subsidies and Countervailing Measures (SCM Agreement).[58] The FIT programme guaranteed suppliers of electricity a fixed price by the

[56] Para. 151
[57] *EC – Hormones*, WT/DS26/AB/R and WT/DS48/AB/R, adopted by the DSB on 13 February 1998, para. 123.
[58] *Canada – Renewable Energy* and *Canada – Feed-In Tariff Program,* WT/DS412/AB/R and WT/DS426/AB/R, adopted by the DSB on 24 May 2013.

Government if the supply of electricity was based on renewable energy. The SCM Agreement does not contain a list of non-trade policy objectives which can justify a subsidy.

In the cases, the AB had rejected the panels' jusitification for these measures. More specifically, the question was whether Canada conferred a "benefit" by its support to electricity producers that based their production on renewable energy. The panel had defined the market as the general electricity market. However, it then stated:

> *"competitive wholesale electricity markets, although a theoretical possibility, will only rarely operate in a way that remunerates the mix of generators needed to secure a reliable electricity system with enough revenue to cover their all-in costs, let alone a system that pursues human health and environmental objectives through the inclusion of facilities using solar PV and wind technologies into the supply-mix."*[59]

The AB disagreed with the panel as the SCM Agreement does not contain any mention of "human health and environment". Furthermore, the AB stated that the panel had in its market analysis ignored the different supply sides for electricity producers; those based on fossil energy, and those based on renewable energy.

Although the SCM Agreement does not contain any exceptions concerning human health and environment, the AB stated that a government may intervene by creating a new market. That could be a market with higher prices due to the higher cost of using renewable energy. The AB stated that lower-priced electricity based on;

> *"lower prices for non-renewable electricity generation have certain negative externalities, such as the adverse impact on human health and the environment of fossil fuel energy emissions and nuclear waste disposal."*

These externalities must be taken into the legal analysis of the term "benefit", and justify the creation of a new market, which differs from the old market by the supply side with renewable energy instead of fossil based energy.

Thus, an externality argument can be applied in situations where a market must be defined in WTO law. The question is how far the argument can be taken. Can the argument also apply in other areas of WTO law, for example, in the "like product" analysis in Art. I and Art. III? Regardless of the specific factors the AB refers to in the "like product" assessment, it is at the end of the day a question of like products on a market.

The Move from Power-Oriented Approaches to Rule of Law Approaches in the Russia-EU Trade Relationship

The WTO has moved the trade relationship between Russia and the EU into a rule of law based system instead of a power oriented system. The dispute settlement institutions of the WTO have taken a key role in protecting the rule of law in their handling of difficult cases, where they have emphasized

[59] Para 7.309 in the panel report

the legal value of their own reports for the sake of legal predictability, and they have worked to balance trade law with other sectors of law in particular environmental law.

These efforts by the WTO panels and the AB help them to maneuver in a complex set of international law that is both fragmented and overlapping, and with only few guidelines as to coping with these overlaps. However, it also comes at a price where the power oriented approaches indeed blocks for the rule of law developments in the WTO. The AB is currently not functioning as there are not enough AB Members left in the AB. Normally, there are seven members, and there must be three members to handle a case. An AB Member can sit for a 4 year term, with the possibility of renewal for one additional term, and then must be replaced. However, due to US trade policies, and US dissatisfaction with the judicial function that the AB has taken, the US has for years blocked for all nominations of new AB Members. It is from a legal perspective highly problematic when international politics overtake the function of the rule of law of an otherwise well-functioning dispute settlement.

Furthermore, even though the use of the WTO dispute settlement system moves the EU and Russia into a rule of law based system, it does not imply that power orientation is entirely left. Firstly, it is a political choice whether a state wants to apply the WTO DSB. The result is that several businesses may be left without a judicial review of state conduct that otherwise may infringe WTO law and violate the legal expectations of the businesses. Second, states may use the WTO DSB as a playing field for other issues under their international relationship and file complaints due to these other problems.