



**Magister Juris
Dissertation**

**WTO Law and EU/EEA Law:
A Legal and Substantive Comparison**
With Emphasis on Free Movement of Goods

Unnur Elfa Hallsteinsdóttir

Pétur Dam Leifsson

June 2015



HÁSKÓLI ÍSLANDS
FÉLAGSVÍSINDASVIÐ

LAGAÐEILD

**Magister Juris
Dissertation**

**WTO Law and EU/EEA Law:
A Legal and Substantive Comparison**

With Emphasis on Free Movement of Goods

Unnur Elfa Hallsteinsdóttir

Pétur Dam Leifsson

June 2015



HÁSKÓLI ÍSLANDS
FÉLAGSVÍSINDASVIÐ

LAGAÐEILD

TABLE OF CONTENTS

1 Introduction	6
2 Trade in Goods	8
2.1 Conceptual Framework	8
2.2 Trade Theories.....	9
2.2.1 Trade Liberalization.....	9
2.2.2 Protectionism	10
2.2.3 Free Trade vs. Protectionism	10
2.3 Trade in Goods from an International Perspective.....	11
2.4 European Union as a Member of the WTO.....	12
2.4.1 EU as an International Organization.....	12
2.4.2 EU as a Trade Union.....	13
2.4.3 The Position of the EU in the WTO.....	14
3 Foundation of the World Trade Organization and Legal Framework.....	15
3.1 The GATT 1947	15
3.2 The Uruguay Round and WTO Agreement	16
3.3 Legal Framework of the WTO	17
3.3.1 Legal Sources.....	17
3.3.2 Institutional Framework.....	18
3.3.3 The Rule of Single Undertaking	19
4 WTO Main Principles Regarding Trade in Goods.....	19
4.1 Introduction	19
4.2 Principles on Non-Discrimination.....	19
4.2.1 Most Favoured Nation Principle.....	19
4.2.2 National Treatment Principle.....	22
4.2.2.1 Article III:1 General Principle.....	22
4.2.2.2 Article III:2 Internal Taxation	23
4.2.2.3 Article III:4 Internal Regulation.....	25
4.3 Rules on Market Access	27
4.3.1 Rules Regarding Tariff Barriers and Non-Tariff Barriers	27
4.3.2 Tariff Barriers	27
4.3.2.1 Custom Duties	27
4.3.2.2 Other Charges on Imports	29
4.3.3 Non-Tariffs Barriers.....	29
4.3.3.1 Quantitative Restrictions	29
4.3.3.2 The Line Between Article III:4 and Article XI of the GATT	31
4.3.3.3 Other Non-Tariff Barriers	32

4.3.4 Charges on Exports	32
4.4 Exceptions	32
4.4.1 General Exceptions	32
4.4.2 Exceptions Relating to Regional Trade Agreements	35
4.4.2.1 Regional Trade Agreements: Costs and Benefits	35
4.4.2.2 Applicability of Article XXIV of the GATT	36
5. European Union and the Internal Market	37
5.1 Foundation of the Internal Market	37
5.2 Legal Framework of the EU	38
5.2.1 Legal Sources	38
5.2.2 Institutional Framework	39
5.2.3 Position of International Law within the EU and the Doctrine of Direct Effect	39
5.2.4 The Principle of Conferral	41
5.2.5 Competence	42
5.2.5.1 Exclusive, Shared and Coordinated Competences	42
5.2.5.2 Express and Implied Competences	43
5.3 Substantive Trade Law of the EU	45
5.3.1 Four Freedoms: Free Movement of Goods	45
5.3.2 EU Customs Law	45
5.3.3 Internal Taxation Rules	47
5.3.4 Non-Fiscal Barriers to Trade	50
5.3.4.1 Quantitative Restrictions and Measures Having Equivalent Effect	50
5.3.4.2 External Non-Fiscal Barriers	54
5.3.5 Derogations from EUs Trade Law	54
6 The European Economic Area	56
6.1 Foundation of the EFTA and the European Economic Area	56
6.2 EEA Institutional Framework and Functionality	56
6.2.1 Structural Framework of the EEA Agreement	56
6.2.2 Objectives of the EEA Agreement: Opinion 1/91	57
6.2.3 Legal Effect of the EEA Agreement	58
6.3 EEA Rules Regarding Free Movement of Goods	60
6.3.1 The EEA as a Free Trade Union: Rules of Origin	60
6.3.2 EEA Rules on Customs Duties, Quantitative Restrictions and Derogations	62
6.3.3 EEA Rules on Internal Taxation	63
6.3.4 Other Relevant EEA Rules	65
6.4 Conclusion	66
7 Legal and Substantive Comparison	66

7.1 Legal Comparison	66
7.1.1 Institutional Structure and Membership.....	66
7.1.2 Scope and Function	68
7.1.2.1 Scope	68
7.1.2.2 Function and Decision-Making Process.....	69
7.1.3 Legal Perspective	70
7.1.3.1 Legal Status of WTO Law in the EU	70
7.1.3.2 The Doctrine of Direct Effect.....	71
7.1.3.3 Judicial Review	73
7.1.3.4 The Doctrine of Indirect Effect	75
7.1.3.5 Theory of Treaty Consistent Interpretation.....	76
7.2 Substantive Comparison.....	77
7.2.1 Integration Methods	77
7.2.2 Customs Duties	78
7.2.2.1 EU as a Customs Union.....	78
7.2.2.2 Rules on Classification of Goods	80
7.2.2.3 Customs Valuation	82
7.2.2.4 Rules of Origin	83
7.2.2.5 Conclusion.....	85
7.2.3 Quantitative Restrictions, Internal Regulations and Internal Taxation Rules.....	87
7.2.4 Principle of Non-Discrimination.....	87
7.2.5 Non-Discriminatory Restrictions.....	90
7.2.5.1 Fiscal Measures	90
7.2.5.2 Non-Fiscal Measures	90
7.2.5.3 Conclusion.....	94
7.2.6 Principle of Non-Discrimination in EU External Trade Relations	95
7.2.7 Rules Regarding Charges on Exports	99
7.2.8 Balancing Social Values with Trade Rules.....	100
7.2.8.1 A Comparison between Article 36 of the TFEU and Article XX of the GATT	100
7.2.8.2 Other Derogations	104
7.3 Does the WTO Influence EUs Trade Rules and Policy?.....	104
8 Iceland	105
9 Conclusion.....	108
BIBLIOGRAPHY	112
TABLE OF RULINGS.....	118

1 Introduction

The global trade regime has in recent decades changed significantly. Globalization and proliferation in production of goods and technology have led to rapid changes, resulting in increased trade across borders and economic growth.¹ These changes have simultaneously led to a growing need to effectively regulate and manage international trade in goods. The ultimate goal with such regulation has been to achieve free flow of international trade and gradually integrate national economies into one global market.²

The World Trade Organization (hereafter the WTO) is an intergovernmental organization that governs the modern trade regime and is in charge of managing and developing international trade principles. The WTO furthermore oversees the function of all the multilateral and plurilateral trade agreements annexed to the *Agreement Establishing the WTO* (hereafter the WTO Agreement). One of the most important agreements is the *General Agreement on Tariffs and Trade 1994* (hereafter the GATT) that incorporates by reference the older GATT, *GATT 1947* and entails all the main principles regarding trade in goods.

Despite considerable success of the WTO and its management of the global trade regime, states often seek to conclude their trade affairs on regional terms and on the grounds of regional trade agreements. Article XXIV of the GATT acknowledges such agreements as an exception to its main principles and therefore permits its members to conclude such agreements. The European Union (hereafter the EU) is the best example of a successful regional entity that falls under this exception and functions both at the regional and international level. It is a customs union that entails extensive trade law based on its internal market. However, externally it is also an active member of the WTO, representing all of its 28 member states.

National legislation regarding trade in goods can also influence the global trade regime in various ways. Iceland, as a sovereign state, has been a member of the WTO since its foundation. However, Iceland is currently not a member of the EU but is instead a member of the European Free Trade Association (hereafter EFTA), an organization that promotes free trade among Iceland, Lichtenstein, Norway and Switzerland. Additionally Iceland participates in the internal market and the four freedoms of the EU on the grounds of the *European Economic Agreement* (hereafter EEA Agreement). Iceland therefore enjoys free movement of goods within the EU and other EEA states.

¹ Paul A. Samuelsson and William D. Nordhaus: *Economics*, p. 673.

² Peter Van den Bossche and Werner Zdouc: *The Law and Policy of the World Trade Organization*, p. 5.

The main purpose of this thesis is to compare the WTO and the EU/EEA in relation to trade rules and to explore the different approaches of integrating trade regulation regarding *goods*. The essay will begin by examining the conceptual, theoretical and legal framework of the topic along with a short overview of EUs position in the WTO. In chapter 3 the history and foundation of the WTO will then be briefly accounted. Chapter 4 will then discuss the main principles of WTO law that relate directly to trade in goods, starting with rules on non-discrimination and moving on to principles regarding trade barriers, both in the form of tariffs and other measures. The chapter will then end by taking into account general exceptions and regional trade exceptions to these rules. The focus of the essay will then shift to a narrower view, as chapters 5 and 6 examine trade rules regarding goods within the EU and the EEA. The concept of the internal market and the free movement of goods will be examined in the context of EU law. The main emphasis of the essay is then placed in chapter 7 where these different trade regimes are thoroughly compared, both from a legal and substantive perspective. Finally, the perspective of Iceland will briefly be reviewed in chapter 8.

In short, this essay aims at answering the analytical question of how these legal regimes function together in relation to its trade legislation only focusing on trade in goods. This is pursued under the methodology of comparative law, a legal dogma that puts forth principles on how different legal systems should be examined and compared.³ The WTO and the EU essentially share the same purpose to promote trade and trade liberalization, and therefore share the same function.⁴ When a comparison is made between these two legal fields the principle of functionality in comparative law is therefore applied.⁵ This comparison will take into account all relevant legal sources such as general principles and provisions of various trade agreements. In addition, important rulings of the Court of Justice of the European Union (hereafter the CJEU), the Court of Justice of the European Free Trade Association States (hereafter the EFTA Court) and reports of the Panel and the Appellate Body (hereafter the AB) of the WTO will also be examined.⁶

³ Konrad Zweigert and Hein Kötz: *An introduction to Comparative Law*, p. 5.

⁴ Stanford E. Gaines, Birgitte Egelund Olsen, Karsten Engsig Sørensen: "Comparing Two Trade Liberalization Regimes", p. 7.

⁵ The principle entails that when comparing different legal regimes one must not restrain to its own legal system and be open minded when other legal regimes and sources are explored Konrad Zweigert and Hein Kötz: *An Introduction to Comparative Law*, p. 34-35.

⁶ Prior to the entry of force of the *Treaty of the Lisbon* in 2009 the Court was referred to as the *European Court of Justice* (ECJ). To simplify the rulings of the Court will in this essay be referred to as rulings of the CJEU.

2 Trade in Goods

2.1 Conceptual Framework

According to the *Oxford Advanced Learners Dictionary* the formal definition of trade is the "activity of buying and selling or of exchanging goods or services between people or countries".⁷ In this essay the term will solely refer to international trade, a more extended version of the term that only applies when goods and services are exchanged or sold across borders.⁸

The GATT does not provide a formal definition of the term "goods" but it refers to the term "products", seemingly to emphasize that the GATT only applies to trade in goods and not to services, etc.⁹ In practice, the term is generally used to describe some type of product or merchandise that can be sold. The true meaning of the term goods is therefore seldom under dispute, as goods can often be categorized depending on their physical characteristic, tariff classification, etc.¹⁰ However, the question of its precise legal meaning has arisen on several occasions, especially within the EU regarding its policy on free movement of goods.¹¹ In the case C-7/68 *Commission v. Italy*, the CJEU first addressed the concept and gave it a broad meaning. The case established that "in relation to customs unions, goods are products, which can have monetary value and are capable of forming the subject of commercial transactions".¹² The Court has kept developing the definition of goods and in the case C-7/78 *Thompson* it was even concluded that coins that were no longer being used as currency were considered to be goods in the sense of the internal market.¹³ These previous cases demonstrate that trade in goods is a broad topic, constantly changing and developing as goods can take various forms.

Moreover, the line between trade in goods and services is often blurry and has occasionally been drawn through case law. For example, in the case C-15/73, *Giuseppi Sacchi*, a television signal was categorized as services and trade in "material, sound recordings, films, apparatus and other products used for the diffusion of the television signals" were considered goods.¹⁴ To simplify, the term trade in this essay will only apply to trade in goods that are able to cross borders, leaving out trade in services.

⁷ *Oxford Advanced learners Dictionary*, p. 1627.

⁸ Gilbert R. Winham: "The Evolution of the World Trading System - The Economic and policy Context", p. 6.

⁹ Tamara Perišin: *Free Movement of Goods and Limits of Regulatory Autonomy in the EU and the WTO*, p. 127.

¹⁰ Karsten Engsig Sørensen: "Trade in Goods", p. 120.

¹¹ Tamara Perišin *Free Movement of Goods and Limits of Regulatory Autonomy in the EU and the WTO*, p. 15.

¹² CJEU C-7/68, *Commission v. Italy*, 10 December 1968, p. 429.

¹³ CJEU C-7/78, *Thompson*, 23 November 1978, para. 31.

¹⁴ CJEU C-15/73, *Giuseppi Sacchi*, 30 April 1974, para 6-7.

2.2 Trade Theories

2.2.1 Trade Liberalization

Having established the conceptual framework of the topic it is necessary to briefly examine the main principles that apply to trade in goods. Modern international trade is built on the overarching principle that barriers to trade or governmental interventions regarding international trade should be removed or limited as much as possible. This principle is usually referred to as the *principle of trade liberalization* and is a fundamental part of the policy supporting free trade. In order to achieve these policies, national governments adhere to an international framework that encourages the reduction of such barriers.¹⁵ The ultimate goal is to create an international regime that supports trade liberalization and ensures free trade. But why is this the ultimate goal?

The theory of free trade is often contributed to the work of Adam Smith in 1776, a philosopher who put forth the idea of specialization and compared the market with normal family life, as families normally do not produce at home what is cheaper for them to buy elsewhere.¹⁶ He argued that nations benefited more from trading with each other and that specialization in production and labour were fundamental to boost economic growth.¹⁷ Smith firmly believed that world trade was beneficial and provided individuals the opportunity to develop their skills, eventually leading to an overall increased production and a better economic outcome.¹⁸ The economist David Ricardo, who put forth the theory of comparative advantage in his book *On the Principles of Political Economy and Taxation*, further developed this theory of specialization. On the grounds of its theory of comparative advantage, he encouraged nations to choose their main production based on their strength in resources, labours skills, etc. Furthermore, he encouraged nations to export the products they had considerable advantage in producing and to import the products they least had advantage in producing.¹⁹ This theory represents a great simplification of how the economy functions in reality as the model cannot predict all possible outcomes.²⁰ However, despite various drawbacks, these theories have managed to survive and are still applied by recent economist such as *Paul Samuelsson*, who described the benefits of free trade as such: "Free trade

¹⁵ Andreas F. Lowenfeld: *International Economic Law*, p. 3.

¹⁶ Adam Smith: *An Inquiry into the Nature and Causes of the Wealth of the Nations*, p. 424.

¹⁷ Adam Smith: *An Inquiry into the Nature and Causes of the Wealth of the Nations*, p. 431.

¹⁸ Douglas A. Irwin: *Free Trade Under Fire*, p. 22-23.

¹⁹ Douglas A. Irwin: *Free Trade Under Fire*, p. 24-25.

²⁰ Peter Van den Bossche and Werner Zdouc: *The Law and Policy of the World Trade Organization*, p. 18-19.

promotes mutually profitable division of labour, greatly exchanges the potential real national product for all nations and make possible for higher standards of living all over the globe".²¹

2.2.2 Protectionism

Despite great success of the theory supporting free trade, some theorists still support trade restrictive measures or trade protectionism, at least when such measures are considered necessary.²² Trade protectionism is an economic theory, that contravenes the theory of free trade and supports *trade barriers*, such as tariffs, domestic regulations and quantitative restrictions. According to the theory, governments are allowed to afford protection to its domestic markets or industries and to restrict importation. Today such restrictive trade measures are usually based on valid reasoning or important social values such as the need to nurture domestic industries, currency problems, language problems, etc.²³ Whatever the reasons might be, protectionist measures are also often enforced to provide the government with revenue or to secure national security.²⁴

2.2.3 Free Trade vs. Protectionism

On the debate on the theory of free trade versus protectionism, it can generally be concluded that the theory promoting trade liberalization has the upper hand and is now being pursued within reasonable limits in the international trade regime.²⁵ It is, therefore, no surprise that the current world trade system and its organizations are established with the clear goal of managing and promoting trade liberalization.²⁶ The reasons, for the firm support of free trade are many. First of all, no nation, regardless of its resources, has all the commodities that it needs to create the perfect state. Furthermore, economics have long researched the costs and losses of pursuing free trade, generally concluding that the benefits outweigh the costs.²⁷ Lastly, it is worth mentioning that the focus on this particular theory is also directly related to keeping world peace, in contrast to trade protectionism that is often seen as a reason for potential warfare, referring to the saying "If goods don't cross borders, soldiers will".²⁸

²¹ Paul A. Samuelsson and William D. Nordhaus: *Economics*, p. 673.

²² Douglas A. Irwin: *Free Trade Under Fire*, p. 62.

²³ Regine Adele Ngono Fouda: "Protectionism and Free Trade: A Country's Glory or Doom?", p. 351.

²⁴ Michael J. Trebilcock and Robert Howse: *The Regulation of International Trade*, p. 6-10.

²⁵ Douglas A. Irwin: *Free Trade Under Fire*, p. 21.

²⁶ Paul A. Samuelsson and William D. Nordhaus: *Economics*, p. 708.

²⁷ Regine Adele Ngono Fouda: "Protectionism and Free Trade: A Country's Glory or Doom?", p. 352.

²⁸ Peter Van Den Boosche: *The Law and Policy of the World Trade Organization*, p. 21. It is unknown who first uttered these words, but they are often attributed to the economist *Claude Frederic Bastiat*.

2.3 Trade in Goods from an International Perspective

The discussion on trade in goods cannot begin without putting the subject into an international perspective. The subject of this essay partly pertains to the sub-discipline of public international law called international economic law, a field of law that primarily deals with the economic aspect of international law and with economic relations and matters.²⁹ Pertained to this field of law is international trade law, a field of law that more narrowly covers international trade regulations, such as bilateral and regional trade agreements and the WTO legal framework.³⁰

As both these bodies of law fall under the scope of public international law, they share the same distinct features that public international law holds. Consequently, it is based on a *consensus* among states and its main legal sources are; treaties, customary law and principles that states have gradually agreed upon.³¹ Furthermore, the true effect of international trade law depends on the relationship sovereign states have with international law and what view states share towards the position international law holds in their domestic legal systems. In practice two main theories elaborate on how states incorporate international law into their municipal law: *Monism* and *Dualism*. Both theories support that international and national law simultaneously coexist and interact. However, they differ in how international law becomes a formal legal source in national law. Dualism supports that these bodies of law share different purposes, as international law only governs the behaviour of states and not individuals. Also, in order for international law to become binding in national law a formal incorporation of that rule has to take place. Monism argues that both these legal systems share the same purposes and are combined. Therefore, international law immediately becomes a binding rule in national law when a state decides to adhere to international law.³²

Altogether, the function of international trade law depends on the level of integration of international trade rules into domestic law and on how states structure their policies regarding international trade.³³ These different approaches towards international law are therefore important in trade and are to be kept in mind when international trade regulations are viewed and international trade issues resolved.

²⁹ John H. Jackson estimates that roughly 90% of international law work is directly or indirectly related to economic law, see John H. Jackson: "International Economic Law: Reflections on the "Boilerroom" of International Relations", p. 596.

³⁰ Peter Van den Bossche and Werner Zdouc: *The Law and Policy of the World Trade Organization*, p. 35.

³¹ *Statute of the International Court of Justice*, art. 38 (1) (a)-(d).

³² Ian Brownlie: *Principles of Public International Law*, p. 32-33.

³³ Jason Cuah: *Law of International Trade Law*, p. 15.

2.4 European Union as a Member of the WTO

2.4.1 EU as an International Organization

Regional trade agreements (hereafter RTAs) play a significant role in the development of international trade law and have been shown to be an unavoidable phenomenon of the multilateral trading system.³⁴ The position RTAs hold, both externally and internally, is directly related to intensity of *economic integration* and depends on the mutual benefits states are trying to achieve with the particular integration.³⁵ In this essay the term RTA will be used as an umbrella term for the different types of trade blocks that the WTO acknowledges on the grounds of article XXIV of the GATT, mainly referring to *Free Trade Areas or Agreements* (hereafter referred to as FTAs) and *Customs Unions* (hereafter referred to as CUs)

This essay covers the position the EU holds as an entity in the WTO. The EU is a unique RTA, often described as an international entity *sui generis*, but this special status of the EU in international law was first acknowledged in the case C-26/62 *Van Gend en Loos*. In that case the EU was considered to "constitute a *new legal order of international law* for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals."³⁶ The integration of the EU is therefore different than of any other traditional international entity in the world. The EU was originally established as a common market, constituting a customs union and promoting the four freedoms free movement of goods, person, services and capital. It then slowly developed into an economic and monetary union (EMU), now aiming to becoming a full economic and political union.³⁷

Today the EU is an international organization and a legal person that can, meeting the right conditions, act externally on behalf of its members.³⁸ The EU can either gain a membership of another international organization, given that the organization permits such membership, or enter through an observer status, both providing the EU with rights and duties accordingly.³⁹ Nevertheless, this power of the EU, directly relates to certain conditions that must be met, as the EU must possess competence to enter into an international obligation, as will be briefly reviewed in chapter 5.2.5.

³⁴ John H. Jackson: "Regional Trade Blocs and the GATT", p.122.

³⁵ Catherine Barnard: *The Substantive Law of the EU - The Four Freedoms*, p. 8.

³⁶ CJEU C-26/62, *Van Gend en Loos*, 5 February 1963, p. 12. (Emphasis added).

³⁷ Catherine Barnard: *The Substantive Law of the EU - The Four Freedoms*, p. 13.

³⁸ Bart Van Vooren and Ramses Wessel: *EU External Relations Law*, p. 3.

³⁹ Bart Van Vooren and Ramses Wessel: *EU External Relations Law*, p. 247, 253.

2.4.2 EU as a Trade Union

This essay will focus on comparing the WTO with the EU and partly the EEA, in relation to its *trade in goods* policy. This is no coincidence, as the EU is currently one of the biggest traders worldwide, both as an exporter and importer and is also able to represent all its member states in international trade negotiations.⁴⁰ More importantly the EU is a firm supporter of trade liberalization, especially internally as it has regionally constructed a very ambitious legal framework regarding its trade policy that began with the establishment of the internal market. In addition, the EU also promotes trade policies that focus on active participation in trade outside the region.⁴¹ The EU is therefore systematically committed to improving its position in the global trade regime, by opening up its markets and investments.⁴² The EU's trade policy also encourages international cooperation, both by actively participating in the multilateral trade scheme as a powerful member of the WTO and by concluding various trade agreements with other regions and nations.⁴³

At the heart of the EU's trade policy is Common Commercial Policy (hereafter CCP), but the CCP remains according to Piet Eeckhout "the centrepiece of EU's external policies".⁴⁴ CCP is substantively built on the theme of the GATT and the internal market and represents EU's dedication to terminate or limit restrictions on external trade relations.⁴⁵ The CCP is further elaborated in article 207 (1) of the *Treaty of the Functioning of the EU*:

The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.

The rest of the article sets the legal framework for the function of the policy. The policy is therefore, in short, an external reflection of the EU's internal cooperation, regarding trade in goods. This policy is based on the *principle of uniformity*, that the same rules apply to exports

⁴⁰ *The European Union Explained: Trade*, p. 3.

⁴¹ It should be noted that the EU along with many other states, such as the United States, is hesitant to support further trade liberalization in regard to trade in agricultural products. This refers to the stranding of the Doha Round Negotiations, briefly discussed in chapter 8.

⁴² *The European Union Explained: Trade*, p.10.

⁴³ Tamar Perišin: *Free Movement of Goods and Limits of Regulatory Autonomy in the EU and the WTO*, p. 3.

⁴⁴ Piet Eeckhout: *EU External Relations Law*, P. 439.

⁴⁵ Bart Van Vooren and Ramses Wessel: *EU External Relations Law*, p. 278.

and imports within the Union.⁴⁶ Finally, the EU also takes into account various political considerations when developing its trade policy and the CCP.⁴⁷

Despite the rapid change of the EU foundational framework, its trade policy is still a dominant factor in the development of the future of the EU. The EU therefore seeks on the grounds of its CCP, along with the WTO, to promote trade liberalization in order to increase economic growth and to improve its international position.⁴⁸

2.4.3 The Position of the EU in the WTO

When the EU was established, all its founding parties were already members of the GATT 1947 and the EU, representing all its members, was therefore not a "contracting party" to the GATT.⁴⁹ However as the time passed, the EU gradually obtained more power to represent its members and eventually started acting like a contracting party while other GATT members silently accepted.⁵⁰ Thus, when the WTO was founded it was decided that the EU itself, along with other former parties to the GATT 1947, would become a formal member of the WTO.⁵¹ The EU therefore became a founding member of the WTO on April 15 1994 when the President of the Council and the member of the Commission responsible for external relations signed the WTO Agreement on behalf of the EU.⁵² On December 22 1994, the Council of European Union adopted the Agreement and all the agreements annexed to it with *Decision no. 94/800, Adhering to the Agreement and its Legal Framework*.

Today, the EU is a member of the WTO along with all its 28 member states individually.⁵³ This might seem confusing at first, but as will be properly explained the EU can possess the competence to become a member of an international organization and holds exclusive competence in some trade related areas. According to article XII:1 of the WTO Agreement, the WTO specifically allows for the membership of states and customs territories and therefore permits the EU to enter as a member. When the EU acceded to the WTO there was some speculation regarding *when* the EU had the competence to act on behalf of its members and when member states held that power. The CJEU issued a formal opinion on the matter.

⁴⁶ Piet Eeckhout: *EU External Relations Law*, p. 441.

⁴⁷ Tamar Perisin: *Free Movement of Goods and Limits of Regulatory Autonomy in the EU and the WTO*, p. 4.

⁴⁸ *The European Union Explained: Trade*, p. 1.

⁴⁹ The difference between the GATT 1947 and GATT 1994 will be further discussed in chapter 4.

⁵⁰ Eva Steinberger: "The WTO Treaty as Mixed Agreement: Problems with the ECs and the EC Member States Memberships of the WTO", p. 856.

⁵¹ *Agreement Establishing the World Trade Organization*, art. XI:1.

⁵² Referring to the *Agreement Establishing the World Trade Organization*, discussed in chapter 4.

⁵³ "The European Union and the WTO", https://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm.

According to *Opinion 1/94* of the CJEU, the Court addressed the question of what subjects of the WTO Agreement belonged to the exclusive competence of the EU and what subjects fell outside it.⁵⁴ The Court concluded that trade rules regarding *goods* pertained to the EU's CCP and therefore fell under the exclusive competence of the EU. It furthermore concluded that trade rules regarding services (the GATS Agreement) and Intellectual Property (the TRIPS Agreement) did not fall under the CCP and therefore not under the exclusive competence of the EU. Instead these subjects fell under *shared competence*, partly under the EU and partly under the Member States.⁵⁵ The opinion therefore paved the way for rules regarding trade in goods. It established once and for all that all trade in goods related matter fell under the exclusive competence of the EU. Since then, the EU has also gradually gained more exclusive competence in various trade related subjects as will be explained later in this thesis.

These competence issues have also raised some questions in relation to the voting procedures within the WTO, such as when the EU votes on behalf of its members and when the member states vote individually. In practice, only the EU can vote or its members states but according to WTO law the EU receives the same amount of votes as its total number of members when it votes on behalf of its members. Whereas most decisions in the WTO are reached with consensus these voting issues are of little relevance.⁵⁶

3 Foundation of the World Trade Organization and Legal Framework

3.1 The GATT 1947

The World Trade Organization supervises and manages the modern international trade regime. The WTO came into force on 1 January 1995 as a result of the trade negotiations at the *Uruguay Round* in 1986-1994, discussed in further detail below. However, the WTO was not established overnight and its foundation can be traced back to 1945, as around that time states had their mind on settling for peace after the ending of World War II. The idea therefore emerged that one way to secure peace would be to start negotiating trade agreements and to focus on reducing tariffs and other trade barriers.⁵⁷

At the Bretton Woods conference in 1944 the need for a more effective trade regime was discussed and a suggestion for creating a multilateral trade organization was first put to the table. This discussion then continued via the work of a preparatory committee that eventually

⁵⁴ CJEU, *Opinion 1/94*, 15 November 1994, para.1.

⁵⁵ CJEU, *Opinion 1/94*, 15 November 1994, para 34, 53, 71.

⁵⁶ Bart Van Vooren and Ramses Wessel: *EU External Relations Law*, p. 264-265.

⁵⁷ Andreas F. Lowenfeld: *International Economic Law*, p. 23.

led to the drafting of the *GATT 1947* that was concluded at the *Havana Conference on the Trade and Employment* on 21 November 1947 and to the drafting of a *Charter for the Establishment of an International Trade Organization* (hereafter ITO charter) that was concluded with the *Final Act of the Havana Conference* signed on 24 March 1948.⁵⁸ The purpose of the GATT and the ITO was to establish a trade regime that would focus on reducing tariffs and other trade barriers via negotiations. However, due to political reasons, the United States (hereafter US) never ratified the ITO charter as the US congress refused to approve it. This caused a domino effect resolving in other states also refusing to approve the charter. Thus the ITO never came into being. Instead the GATT, that originally was seen to be a supplementary agreement with the ITO charter, became the main instrument regulating and developing trade in the 20th century, even though it was never formally adopted.⁵⁹ Instead the GATT 1947 was applied through the *Protocol of Provisional Application of the General Agreement on Tariffs and Trade* (hereafter the PPA). Through the legal basis of the PPA the GATT 1947 had the function of a *de-facto* institution regulating trade rules. This application of the agreement caused various problems, often referred to, as the GATT "birth defects" as there were no institutional organs supervising the agreement and all negotiations had to be agreed upon by all the *contracting parties*.⁶⁰ All of this led to poor decision-making and difficulties in amending the agreement.

3.2 The Uruguay Round and WTO Agreement

Despite various institutional flaws, the GATT originating from 1947 did manage to function and to keep on reducing tariffs on trade in goods. From 1947 until the establishment of the WTO, the substantive law of the GATT 1947 developed on the basis of negotiation rounds, each adding to the ultimate goal of reducing tariffs or eliminating other duties or trade barriers.⁶¹ These rounds under GATT were eight in total but the negotiations leading up to the Uruguay Round in 1986 mostly related to barriers relating to trade with *goods*.⁶²

⁵⁸ Andreas F. Lowenfeld: *International Economic Law*, p. 28.

⁵⁹ John H. Jackson: *The World Trading System*, p. 38-40.

⁶⁰ Gilbert R. Winham: "The Evolution of the World Trading System - The Economic and policy Context", p.14.

⁶¹ Andreas F. Lowenfeld: *International Economic Law*, p. 49.

⁶² However after the Tokyo Round in 1979 it became clear that other sectors of trade also needed attention such as trading in services, investment and etc. See Andreas F. Lowenfeld: *International Economic Law*, p. 64-65.

The Uruguay Round, starting in 1986 was to be the most ambitious negotiating round yet, covering 15 main trade-related topics and dividing the negotiations into groups depending on topics. In turn the results from the negotiations differed depending on the groups and topics.⁶³ Therefore some groups, dealing with delegated issues, struggled getting results and such struggle almost terminated the round. Nonetheless, in 1991 the Director General of the round pushed the negotiations forward and issued a *Comprehensive Draft Final Act* manifesting most of the proposals resulting from the negotiations.⁶⁴ This final draft finally lead to the conclusion of the round and the final act of the Uruguay Round was concluded at the Ministerial Meeting in Marrakesh Morocco on 15 April 1994. Thereby the World Trade Organization was formally established with the conclusion of the *WTO Agreement Establishing the World Trade Organization*.

3.3 Legal Framework of the WTO

3.3.1 Legal Sources

The WTO Agreement and the agreements annexed to it are the most important sources in WTO law. The main text of the WTO Agreement sets out framework of the organization and describes the scope, function and the decision-making of the organization. The preamble of the agreement also manifests the ambition for creating a new successful multilateral trading system built on the old principles and objectives of the GATT originating from 1947. However, although the WTO is mainly built on the old GATT, as well as its former decisions, procedures, negotiations, etc. the WTO did not just incorporate the GATT 1947. Instead it is based on the GATT 1994 that is legally distinct document from the GATT originating from 1947. According to article II:4 of the WTO Agreement, the GATT 1994 found in annex 1 (A) of the WTO Agreement, refers substantially to the GATT 1947, adding necessary changes and adjustments. The GATT agreements are therefore almost identical agreements that are two different legal instruments.⁶⁵ In addition, to the GATT other substantive multilateral and plurilateral agreements annexed to the WTO Agreement are also very important sources in WTO and take their part in shaping substantive international trade law.

Furthermore, the reports of the panels and the Appellate Body (hereafter the AB), can provide a valuable insight into WTO law even though the doctrine of precedence does not

⁶³ Andreas F. Lowenfeld: *International Economic Law*, p. 67.

⁶⁴ *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, 22 December 1991.

⁶⁵ From now on, to simplify, the thesis will refer to the GATT as both the substantive rules of the GATT 1947 and of the GATT 1994 as these agreements are substantially the same.

apply in WTO law as the reports only apply on a case-by-case basis⁶⁶ Nonetheless, such reports hold legal interpretations that must not be disregarded. The AB described the meaning of adopted panel reports in *Japan-Alcoholic Beverages II* (4 October 1996), where it concluded:

adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute.⁶⁷

In addition, various other sources can be of great relevance such as customary international law, provisions of other trade agreements and general principles of law.⁶⁸

3.3.2 Institutional Framework

The institutional foundation and legal status of the WTO is described in the WTO Agreement. According to article IV of the WTO Agreement, the Ministerial Conference is the body responsible for carrying out most of the function of the organization, but the Conference only meets every two years. Therefore, in between the meetings of the Ministerial Conferences, the function of the organization is in the hands of the General Council. To oversee the general administration of WTO Agreement, the Ministerial Conference appoints a Director General that then is in charge of the WTO secretariat. Finally various specified councils, committees and working bodies help carry out functions for the organization.

In addition, according to article IV:3 of the WTO Agreement, the General Council also represent other important institutions *the Dispute Settlement Body* (hereafter the DSB). The DSB administers the *Dispute Settlement Understanding* (hereafter the DSU) that provides the framework and procedures for settling disputes within the WTO. On the grounds of article 2.1 of the DSU, disputes can be solved informally via meditation, consultation, etc. and formally, through the establishment of panels or by the review of the Appellate Body (hereafter AB). The reports of these bodies play a significant role in shaping WTO law and are binding in nature for WTO members, as is stated in article 23.1 of the DSU:

When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

⁶⁶ Appellate Body Report, *US - Stainless Steel*, 30 April 2008, para. 162-168.

⁶⁷ Appellate Body Report, *Japan - Alcoholic Beverages II*, 4 October 1996, p. 14.

⁶⁸ Peter Van den Bossche and Werner Zdouc: *The Law and Policy of the World Trade Organization*, p. 55-59.

3.3.3 The Rule of Single Undertaking

When the WTO Agreement opened up for signature it was presented as a *package of agreements*, referring to all the agreements annexed to it. This means that all current members and future members of the WTO automatically become bound by its agreements upon signature. This refers both to WTOs institutional framework and to all its substantive trade regulations annexed to the WTO Agreement.⁶⁹ However, this only applies to the multilateral agreements, found in annex one to three of the WTO Agreement. The plurilateral agreements, found in annex 4, only become binding when parties sign them.⁷⁰

4 WTO Main Principles Regarding Trade in Goods

4.1 Introduction

WTO law is complex and addresses various aspects of international trade law.⁷¹ According to Peter Van den Bossche and Werner Zdouc, the substantive law of the WTO can roughly be divided into five categories; rules prohibiting discriminative measures, rules regarding market access, rules regarding unfair trade, rules regulating the balance between trade liberalization and other important goals, and rules relating to the WTO as an institution.⁷² Most of these rules are codified in the GATT and in other relevant sources of WTO law.

This chapter will provide a short overview over the main principles regarding trade in *goods* found in the GATT, starting with principles on non-discrimination and then moving on to rules regarding trade barriers, both in the form of tariffs and other non-tariff measures. The chapter will end by examining relevant exceptions.

4.2 Principles on Non-Discrimination

4.2.1 Most Favoured Nation Principle

The GATT entails two very important principles that prohibit discrimination and are set to level the playing field between imported products and domestic products in national markets: the most-favoured-nation treatment obligation (hereafter MFN principle) and the national treatment obligation (hereafter NT principle).⁷³

⁶⁹ Peter Van den Bossche and Werner Zdouc: *The Law and Policy of the World Trade Organization*, p. 41.

⁷⁰ Peter Van den Bossche and Werner Zdouc: *The Law and Policy of the World Trade Organization*, p. 49.

⁷¹ Most of the rules regard trade in goods but some address other related topics such as intellectual property rights, e.g. *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS Agreement).

⁷² Peter Van den Bossche and Werner Zdouc: *The Law and Policy of the World Trade Organization*, p. 35.

⁷³ Thomas Cottier and Matthias Oesch: "Direct and Indirect Discrimination in WTO Law and EU Law", p. 153.

The MFN principle is a legal principle that prevents trade discriminatory measures from being enforced without reason. The principle involves that whenever a WTO member decides to grant a certain treatment to any other member it is compelled to apply the same treatment to all other members of the WTO.⁷⁴ The principle is codified in article I:1 of the GATT and is undoubtedly considered to be an essential principle of the WTO system.⁷⁵ The substantive obligation of the principle is occasionally disputed before the DSB and its content is constantly being interpreted and developed by the DSB. It has now for example been established that the principle prohibits both *de jure* and *de facto* discrimination, meaning that it is irrelevant whether a certain measure seems to be non-discriminative on the surface, as long as it does discriminate in practice. Thus, in order to apply the principle it will suffice to prove that a member is treating a product from one WTO member differently than from another.⁷⁶

Judging by the wording of article, four main requirements must be met in order for a particular trade measure to breach the article.⁷⁷ First of all, a measure must fall under the scope of the article but this requirement is seldom under dispute as the article is rather precise and entails both internal measures and external measures.⁷⁸ Given that a certain measure falls under the scope of the MFN principle it must secondly be discriminative in the sense that it promotes some kind of *advantage*. This has also received a broad interpretation, but the DSB has played its role in further defining the concept *advantage* such as in the case *Canada-Autos* (31 May 2000). The case concerned a Canadian legislation that allowed duty free treatment on the import of certain types of vehicles from certain countries and manufactures, given that the criteria of domestic law were fulfilled.⁷⁹ The AB examined whether these measures could be considered as an advantage and concluded:

We note next that Article I:1 requires that "any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other Members." (emphasis added) The words of Article I:1 refer not to some

⁷⁴ Mitsuo Matsushita, Thomas J. Schoenbaum and Petros C. Mavrodoidis: *The World Trade Organization, Law Practice and Policy*, p. 143.

⁷⁵ Appellate Body Report, *EC - Tariff Preferences*, 7 April 2004, para 101: "The rule of MFN in article 1:1 of the GATT 1994 is the cornerstone of the GATT and one of the pillars of the WTO trading system."

⁷⁶ Peter Van den Bossche and Werner Zdouc: *The Law and Policy of the World Trade Organization*, p. 319.

⁷⁷ Peter Van den Bossche and Werner Zdouc: *The Law and Policy of the World Trade Organization*, p. 320.

⁷⁸ According to Peter Van den Bossche and Werner Zdouc: *The Law and Policy of the World Trade Organization*, p. 321: "Border measures cover customs duties, various charges on import and exports, quotas, tariffs, import licenses and etc. while internal measures can include internal taxes and regulations that can in practice affect the use, sale and distribution of such products".

⁷⁹ Appellate Body Report, *Canada - Autos*, 31 May 2000, para. 7-9.

advantages granted "with respect to" the subjects that fall within the defined scope of the Article, but to "any advantage"; not to some products, but to "any product "; and not to like products from some other Members, but to like products originating in or destined for "all other" Members.⁸⁰

The exemption granted by Canada was therefore shown to be in practice only available to certain manufactures of certain countries and discriminative *de-facto* even though they claimed that the exemption was origin neutral. This consequently provided some countries with an advantage and entailed a breach of article I:1.⁸¹

The third criteria relates to whether or not the products are "like" in nature. This is essential requirement for a measure to become discriminative according to the article because when products are not considered alike it will be, according to the WTO, permitted to treat them differently. The DSB has kept on developing the criteria relating to likeness and established that the products do need to share some physical characteristics but moreover other factors can also matter such as consumer taste, tariff classification and the products end use.⁸² At the end of the day the test of likeness must always be evaluated on a case-by-case basis, and also takes into account other non-legal factors.⁸³

The fourth and final criteria entails that the advantage is accorded *immediately* and *unconditionally*. The concept immediately has not been under much debate meanwhile the interpretation of the word unconditionally has raised more questions. The panel addressed the concept of unconditionally in its report on *Canada-Autos* (11 February 2000). As noted before, the case regarded a Canadian duty exemption that was conditional and only granted if a certain criteria found in the Canadian legislation was fulfilled. Claimants argued that the criteria contravened the MFN principles whereas the requirements were unrelated to the imported products. This meant that the duty exemption was not provided unconditionally to like products of all WTO members.⁸⁴ The panel disagreed and concluded that when examining the concept unconditionally it is not only relevant whether a measure is discriminative between like products. The Panel kept on and stated:

The word "unconditionally" in Article I:1 does not pertain to the granting of an advantage per se, but to the obligation to accord to the like products of all Members an advantage which has been granted to any product originating in any country. The purpose of Article I:1 is to ensure unconditional MFN treatment. In this context, we consider that the obligation to accord

⁸⁰ Appellate Body Report, *Canada - Autos*, 31 May 2000, para. 79.

⁸¹ Appellate Body Report, *Canada - Autos*, 31 May 2000, para. 78-81.

⁸² Report of the Working Party, *Border Tax Adjustments*, 2 December 1970, para. 18.

⁸³ Appellate Body Report, *Japan - Taxes on Alcoholic Beverages II*, 4 October 1996, p. 20.

⁸⁴ Panel Report, *Canada - Autos*, 11 February 2000, para. 10.18.

"unconditionally" to third countries which are WTO Members an advantage which has been granted to any other country means that the extension of that advantage may not be made subject to conditions with respect to the situation or conduct of those countries. This means that an advantage granted to the product of any country must be accorded to the like product of all WTO Members without discrimination as to origin.⁸⁵

This was also addressed in a more recent case that regarded an EU regulation on trade in seal products, *EC - Seal Products* (22 May 2014).⁸⁶ The EU had enforced an importation restriction on seal products with various exceptions such as regarding products hunted by Intuits or indigenous communities.⁸⁷ The panel found that these measures *de facto* breached article I:1, as the *exceptions* mostly applied to products from Greenland and not to products from other WTO members.⁸⁸ The AB confirmed the panels ruling and concluded:

Thus, the Panel found that, "in terms of its design, structure, and expected operation", the measure at issue detrimentally affects the conditions of competition for Canadian and Norwegian seal products as compared to seal products originating in Greenland. Based on these findings, the Panel considered, correctly in our view, that the measure at issue is inconsistent with Article I:1 because it does not, "immediately and unconditionally", extend the same market access advantage to Canadian⁸⁹

4.2.2 National Treatment Principle

4.2.2.1 Article III:1 General Principle

The principle regarding the national treatment obligation is the discriminatory rule in WTO law that involves the obligation to treat foreign imported products no less favourably than like domestic products. The principle therefore focuses on preventing discrimination between domestic products and imported products, unlike the MFN principle, that focuses on preventing discrimination in trade between countries.⁹⁰ The principle applies to discrimination *de jure* and *de facto* and is codified in article III of the GATT. Paragraph 1 of the article entails a general principle and prohibits measures that are only applied "so as to afford protection to domestic production". Its main purpose is therefore to prevent protectionist measures. The substantive obligations are then found in paragraphs 2 and 4 of the article. However, the general principle in paragraph 1 is an integral part of the obligations in

⁸⁵ Panel Report, *Canada - Autos*, 11 February 2000, para. 10.22-10.24.

⁸⁶ Appellate Body Report, *EC - Seal Products*, 22 May 2014, para.

⁸⁷ Iceland joined consultations on 16 November 2009 and became a third party on the 25 March 2011. Iceland main input into the dispute regarded the test on public moral as an exception in article XX (a) of the GATT and Article 2.2 of the TBT Agreement, see Appellate Body Report, *EC - Seal Products*, 22 May 2014, para. 2.260-2.262.

⁸⁸ Appellate Body Report, *EC - Seal Products*, 22 May 2014, para. 5.95.

⁸⁹ Appellate Body Report, *EC - Seal Products*, 22 May 2014, para. 5.96.

⁹⁰ Peter Van den Bossche and Werner Zdouc: *The Law and Policy of the World Trade Organization*, p. 349.

paragraphs 2 and 4 and should be taken into account when the rest of the article is interpreted.⁹¹

4.2.2.2 Article III:2 Internal Taxation

Article III:2 of the GATT regards discrimination in internal taxation and charges. The paragraph is usually broken into two parts, first examining the first sentence and then the second. The paragraph in full states:

The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

In order for a measure to present a breach against the first subparagraph, three requirements must be met. First, the measures must constitute an internal tax or other internal charge imposed on the particular product, secondly, the imported and the domestic products that are under dispute must be "like products" and thirdly, the imported product must be taxed in excess compared to the domestic product.⁹² The second subparagraph, however, applies to broader type of products. Therefore, in addition to only applying to internal taxes or other internal charge, the imported and domestic products must be in direct competition or be substitutable product. Then it must be established that the products are being taxed differently and whether such taxation is only meant to afford protection to the domestic product.⁹³

The question of what constitutes an internal charge or tax is often debated and quite relevant as the principle only applies *internally*, unlike many other GATT provisions that refer to border measures, such as quantitative restrictions in article XI of and tariff concessions in article II of the GATT.⁹⁴ It must therefore be established whether or not a measure is an internal measure; otherwise the article will not apply. This was first addressed in the report by the AB in the case *China-Auto Parts (15 December 2008)* and referred to as the *threshold issue*. The case concerned the definition of an internal charge regarding measures enforced by China on imported auto parts for vehicles assembled within china. It was claimed that the charges imposed, contravened III:2 of the GATT, both sentences and

⁹¹ Appellate Body Report, *Japan - Taxes on Alcoholic Beverages II*, 4 October 1996, p. 16.

⁹² Peter Van den Bossche and Werner Zdouc: *The Law and Policy of the World Trade Organization*, p. 357.

⁹³ Peter Van den Bossche and Werner Zdouc: *The Law and Policy of the World Trade Organization*, p. 371.

⁹⁴ Peter Van den Bossche and Werner Zdouc: *The Law and Policy of the World Trade Organization*, p. 354.

breached against imported auto parts as it did not apply to domestic auto parts.⁹⁵ The AB started by examining whether the charge could be classified as an internal charge or a customs duty in regard to article II:1 (b). It concluded that in general "the obligation to pay must accrue due to an internal event, such as the distribution, sale, use or transportation of the imported product."⁹⁶ The *characteristic* of the charge was therefore considered to be the most dominant factor in establishing whether or not it was an internal charge.⁹⁷

Furthermore, the requirement involving the likeness of the products, in the first sentence has been debated. In the case *Japan - Taxes on Alcoholic Beverages II* (4 October 1996) the test regarding likeness was discussed. The case concerned an internal tax levied by Japan on imported liquor and the classification of taxes on different types of liquor according to the Japanese tax legislation.⁹⁸ According to the law, lower tax was levied on imported and domestic Shochu than on imported and exported vodka. It was claimed that, as these alcoholic beverages were like products and that this internal measure contravened the first subparagraph of article III:2. Furthermore, it was claimed that these measures were also affording protection to competitive or substitutable domestic products, thereby also breaching the second subparagraph of article III:2 along with article III:1.⁹⁹ The panel and the AB explored whether vodka and Shochu could be considered as like products and in addition whether it were directly competitive or substitutable products. The conclusion on likeness was:

The concept of "likeness" is a relative one that evokes the image of an accordion. The accordion of "likeness" stretches and squeezes in different places as different provisions of the *WTO Agreement* are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term "like" is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply. We believe that, in Article III:2, first sentence of the GATT 1994, the accordion of "likeness" is meant to be narrowly squeezed.¹⁰⁰

This test of likeness is also always based on a case-by-case basis and in this case the AB took especially into account tariff classification of the products.¹⁰¹ However, as stated above other important criteria can also play its part in defining what products are alike. Finally,

⁹⁵ Appellate Body Report, *Chine - Auto Parts*, 15 December 20008, para.2-3.

⁹⁶ Appellate Body Report, *Chine - Auto Parts*, 15 December 20008, para.162.

⁹⁷ Appellate Body Report, *Chine - Auto Parts*, 15 December 20008, para.171.

⁹⁸ Appellate Body Report, *Japan - Alcoholic Beverages II*, 4 October 1996, p. 1-2.

⁹⁹ Panel Report, *Japan - Taxes on Alcoholic Beverages II*, 11 July 1996, para. 3.1-3.3.

¹⁰⁰ Appellate Body Report, *Japan - Alcoholic Beverages II*, 4 October 1996, p. 21.

¹⁰¹ Appellate Body Report, *Japan - Alcoholic Beverages II*, 4 October 1996, p. 20

regarding the third criteria on whether taxation on imported products is in excess with domestic products, the AB concluded; "even the smallest amount of excess is too much".¹⁰²

The second subparagraph of the article was also addressed in the *Japan – Taxes on Alcoholic Beverages II* case. In the case the AB concluded that the local alcoholic beverages were in direct competition or substitutable with imported beverages such as vodka, brandy and whisky, etc. and fell under the scope of the second subparagraph of article III:2. Reaching that conclusion, the AB took into account all the former mentioned criteria, such as physical characteristics of the products but moreover other factors such as cross price elasticity of demand etc.¹⁰³ Regarding the similarity in taxation in the second subparagraph, the AB noted that there had to be some difference in the taxation. Finally, the AB emphasised that the protectionist aim of the measure had to be established on the grounds of "the design, the architecture, and the revealing structure of a measure".¹⁰⁴

An analysis of the case above implies that the test regarding likeness in the first sentence of article III:2 is interpreted narrowly, leaving a broader interpretation for the second sentence, thereby preventing the subparagraphs from overlapping.¹⁰⁵ The second subparagraph also differs from the first sentence whereas the standard applied in the first is *de-minimis*, meaning that all difference in the taxation is enough to prove a violation of the GATT. The standard applied in the second is not *de-minimis*.¹⁰⁶ Finally, the second subparagraph will not be applied except when a measure specifically affords protection. It is worth mentioning that the case is also famous for rejecting the so-called "aim and effect" test when examining the likeness of products. The method entailed including the protectionist intent of the measure when determining the likeness of products and is discussed in the EC-Asbestos case below¹⁰⁷

4.2.2.3 Article III:4 Internal Regulation

Article III also addresses measures regarding *internal regulation* as is stated in paragraph 4:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges

¹⁰² Appellate Body Report, *Japan - Alcoholic Beverages II*, 4 October 1996, p. 23.

¹⁰³ Appellate Body Report, *Japan - Alcoholic Beverages II*, 4 October 1996, p. 22.

¹⁰⁴ Appellate Body Report, *Japan - Alcoholic Beverages II*, 4 October 1996, p. 27-9.

¹⁰⁵ Peter Van den Bossche and Werner Zdouc: *The Law and Policy of the World Trade Organization*, p. 361.

¹⁰⁶ This refers to the wording of "similarly taxed" of the second sentence of article III:2 of the GATT.

¹⁰⁷ Panel Report, *Japan - Taxes on Alcoholic Beverages II*, 11 July 1996, para. 6.16-6.17.

which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

First of all, judging by the paragraph it only becomes applicable when a measure constitutes "laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use". This has received a broad meaning, entailing all measures that can change the market.¹⁰⁸ However the word *affecting* has also been disputed and according to case law "the ordinary meaning of the word "affecting" implies a measure that has "an effect on" and thus indicates a broad scope of application."¹⁰⁹

Secondly, the test of likeness is also a fundamental part of the article. The test differs from the one in article III:2 and receives broader interpretation and is more often applied.¹¹⁰ This was best demonstrated in the AB report on *EC - Asbestos (12 March 2001)*. The case concerned a French act prohibiting the importation of products containing asbestos and the question arose whether such prohibition was illegal and contravened article III:4 of the GATT. The case is interesting whereas it addressed the question of whether the *effect* of the product on health could be taken into account when likeness was examined. The AB decided that health care considerations could be taken into account when the competitive relationship of the product in the market was examined as well as the physical nature of the product.¹¹¹ The AB therefore reversed the finding of the panel and concluded that when:

examining the "likeness" of products, panels must evaluate all of the relevant evidence. We are very much of the view that evidence relating to the health risks associated with a product may be pertinent in an examination of "likeness" under Article III:4 of the GATT 1994.¹¹²

Thirdly, the paragraph forbids treating domestic products more favourably than like imported products. Under the criteria fall for example opportunities in the market and competitive status of the products, but such conditions have to be applied with non-protectionist manner.¹¹³ The article does not refer specifically to article III:1. The relationship between the paragraphs is therefore more general and based on an overall principle to avoid protectionism in the WTO. This was also addressed by the AB in the *EC-Asbestos*. The AB

¹⁰⁸ Peter Van den Bossche and Werner Zdouc: *The Law and Policy of the World Trade Organization*, p. 383.

¹⁰⁹ Appellate Body Report, *EC - Bananas III*, 9 September 1997, para. 220.

¹¹⁰ Mitsuo Matsushita, Thomas J. Schoenbaum and Petros C. Mavrodoidis: *The World Trade Organization, Law Practice and Policy*, p. 160.

¹¹¹ Appellate Body Report, *EC - Asbestos*, 12 March 2001, para. 115.

¹¹² Appellate Body Report, *EC - Asbestos*, 12 March 2001, para. 113.

¹¹³ Michael J. Trebilcock and Robert Howse: *The Regulation of International Trade*, p. 102.

concluded that even though products were considered "like", a measure would not be found unlawful except if it treated imported products less favourably.¹¹⁴

4.3 Rules on Market Access

4.3.1 Rules Regarding Tariff Barriers and Non-Tariff Barriers

Importation and exportation of products is essential for the proper function of the international trade regime. States, however, still seek to protect their domestic markets, for example by imposing high tariffs on imported products. Rules preventing or limiting such measures are referred to as the rules on *market access*. The GATT entails substantive rules regarding market access and trade barriers that differ depending on their form and purpose.¹¹⁵

This chapter will provide a short overview over WTO main principles regarding market access, dividing the discussion into two parts. The first part addresses tariffs regulations.¹¹⁶ Measures regarding tariff barriers are not prohibited within the WTO but instead the WTO aims to reduce the effects of such measures by ensuring continual negotiations involving tariff reductions.¹¹⁷ The rationale for the selection of this approach is political, economic and practical as tariffs are in general easy to monitor and usually provide the government with direct revenue.¹¹⁸ The second part of the chapter then addresses trade regulation regarding non-tariff barriers such as quantitative restrictions. Rules regarding non-tariff barriers are of great relevance in WTO law. Such measures are however not defined in WTO law and are generally defined negatively: as trade restrictive measures that are not customs duties or similar duties on imports and exports.¹¹⁹

4.3.2 Tariff Barriers

4.3.2.1 Custom Duties

International customs rules are found in various multilateral conventions and are managed by the WTO, the World Customs Organization and The UN economic Commission for Europe.¹²⁰ In this thesis WTO law will only be under discussion.

¹¹⁴ Appellate Body Report, *EC - Asbestos*, 12 March 2001, para. 100.

¹¹⁵ Peter Van den Bossche and Werner Zdouc: *The Law and Policy of the World Trade Organization*, p. 419.

¹¹⁶ In this essay the terms tariffs and customs duties are applied as synonyms, although the term tariff is technically a broader term including customs duties.

¹¹⁷ Andreas F. Lowenfeld: *International Economic Law*, p. 31.

¹¹⁸ John H. Jackson: *The World Trading System*, p. 140.

¹¹⁹ Peter Van den Bossche and Werner Zdouc: *The Law and Policy of the World Trade Organization*, p. 480.

¹²⁰ Carsten Willemoes Jørgensen: "Customs law: the Challenge of Non-centralised Customs Administrations in the EU", p. 385-386.

Goods that are imported and exported can be subjected to tariffs, often referred to as customs duties.¹²¹ Customs duties are the most common type of trade barriers and are tariffs/taxes levied on imports by national customs authorities and can be ad-valorem, a tax that is based on the value of that good, or non-ad valorem a tax that is specific.¹²² The definition of a custom duty is not found in the GATT but is usually understood as a charge that is only due to the importation of a product.¹²³ The definition of what constitutes a customs duty has occasionally been debated and sometimes thought to be directly related to the time when a charge is collected. However, this is not considered to be conclusive in clarifying the definition but rather whether the obligation to pay a charge is only due to the importation of the product.¹²⁴

The purpose of customs duties is to provide the government with revenue and to promote domestic industries when necessary.¹²⁵ Customs duties are therefore protectionist measures but due to the MFN principle, such duties are applicable to all other WTO members and cannot be based on discriminative grounds.¹²⁶ Despite the protectionist nature of custom duties, the adoption of such measures is not illegal within the WTO. Instead, the WTO encourages its member to keep negotiating further reduction of these duties on a mutual basis, as is described in *article XXVIIIbis* of the GATT.

Another important rule is article II of the GATT concerning *Schedules of Concessions*. The article describes the commitments regarding tariff concessions, in other words the commitment to not raise duties on certain products and involves the obligation of providing no other member more favourable treatment.¹²⁷ Each state then has its own schedule, with its tariff concession, annexed to the GATT and it is to be noted that even though the schedule provides a binding upper limit for a duty, members can always impose customs duties below it. Negotiations on lower tariffs are therefore included in this schedule.¹²⁸ The WTO provides access to its database to examine schedules of its members and tariff analysis online.¹²⁹ If

¹²¹ Mitsuo Matsushita, Thomas J. Schoenbaum and Petros C. Mavrodoidis: *The World Trade Organization, Law Practice and Policy*, p. 113.

¹²² Karsten Engsig Sørensen: "Trade in Goods", p. 121.

¹²³ Peter Van den Bossche and Werner Zdouc: *The Law and Policy of the World Trade Organization*, p. 419-420.

¹²⁴ Appellate Body Report, *China - Auto Parts*, 15 December 2008, para. 162.

¹²⁵ Peter Van den Bossche and Werner Zdouc: *The Law and Policy of the World Trade Organization*, p. 425-626.

¹²⁶ Peter Van den Bossche and Werner Zdouc: *The Law and Policy of the World Trade Organization*, p. 423.

¹²⁷ Peter Van den Bossche and Werner Zdouc: *The Law and Policy of the World Trade Organization*, p. 438.

¹²⁸ John H. Jackson: *The World Trading System*, p. 142.

¹²⁹ "Current Situation of Schedules of WTO Members", https://www.wto.org/english/tratop_e/schedules_e/goods_schedules_table_e.htm.

Iceland is taken as an example its schedule, that is annexed to the GATT, along with its tariff profile data, can easily be researched on the WTO website.¹³⁰

When a customs duty is imposed three additional factor relating to the product need to be established: the classification of the product, its custom value and its origin. The WTO provides a system regarding all these three factors that will be discussed in chapter 7.2.2.

4.3.2.2 Other Charges on Imports

The GATT also permits other charges referred to as "other duties and charges on imports" that do not entail customs duties. What falls under this category of measures is often unclear and the only benchmark is the development of case law.¹³¹ Article II:1(b) of the GATT regarding schedules also addresses these residual charges on imported products and the second subparagraph of the article state:

Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

An Understanding to Article II:1 (b) of the GATT 1994 clarifies this commitment. It makes it obligatory for WTO members to record in their schedules all other duties and charges on imports imposed on products bound tariff and obliges them to not apply them in excess.¹³²

4.3.3 Non-Tariffs Barriers

4.3.3.1 Quantitative Restrictions

Quantitative restrictions (hereafter QRs) are generally considered measures that limit the quantity of a product in relation to its importation and exportation and are usually in the form of total bans, quotas, licensing mechanism or other similar measures.¹³³ Article XI of the GATT prohibits the adoption of QRs:

¹³⁰ *Schedule annexed (L/6987/ Add.3) to the Geneva (1992) Protocol.* See also "Iceland" <http://stat.wto.org/TariffProfile/WSDBTariffPFView.aspx?Language=E&Country=IS> In the profile various data can be reached such as information on the tariffs and duty free imports, value for merchandise exports and imports and commercial services trade and industrial property

¹³¹ Peter Van den Bossche and Werner Zdouc: *The Law and Policy of the World Trade Organization*, p. 465.

¹³² Peter Van den Bossche and Werner Zdouc: *The Law and Policy of the World Trade Organization*, p. 467.

¹³³ Peter Van den Bossche and Werner Zdouc: *The Law and Policy of the World Trade Organization*, p. 481.

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

As many provisions of the GATT, article XI is open for interpretation and the word "other measures" implies that the article should receive a broad meaning.¹³⁴ In addition, the article also applies regardless of the legal status of the measures. This was confirmed in the Panel Report, *Japan- Semi Conductors (4 May 1998)*.¹³⁵ The case arose when the United States, having experienced trouble accessing the market of Japan in relation to semiconductors, started applying antidumping procedures against Japanese semi-conductors. Consequently, an agreement was concluded between Japan and the US that aimed at preventing Japan from dumping the US market. Additionally, the Japanese authorities began monitoring the exportation of semiconductors to the US and their prices and costs. However, these measures were not mandatory but did nonetheless restrict the export of certain semiconductors at below cost price. The question therefore arose whether these measures were QR, as there were no legally binding measures in the agreement. The panel concluded that it did not matter whether or not a measure was legally binding; the only thing that mattered was whether the measures restricted the exportation of semiconductors.¹³⁶

Although the WTO prohibits QRs and supports tariffs, the system does allow for a number of exemptions found in art XI:2 of the GATT, such as regarding fisheries and agricultural products. In general, the regulatory administration regarding QRs within the WTO is limited.¹³⁷ However, the GATT does entail that all administrative actions relating to *exemptions* on QRs shall be taken in a non-discriminative manner and on the grounds of the MFN principle.¹³⁸ Article XIII:1 of the GATT therefore ensures that if a member is allowed to apply QRs to one product of a another member state, the same restriction must be applied to all other members. The GATT also provides administrative rules on how the distribution of trade should be applied and rules on import licensing when exemptions are granted.¹³⁹ Finally, the principle both applies to *de facto* restrictions and *de jure* restrictions.¹⁴⁰

¹³⁴ Karsten Engsig Sørensen: "Trade in Goods", p. 134-135.

¹³⁵ Panel Report, *Japan - Semi Conductors*, 4 May 1998.

¹³⁶ Panel Report, *Japan - Semi Conductors*, 4 May 1998, para. 104-117.

¹³⁷ Karsten Engsig Sørensen: "Trade in Goods", p. 140.

¹³⁸ Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade*, p. 76.

¹³⁹ *The General Agreement on Tariffs and Trade*, art. XIII:2 and *the Agreement on Import Licensing Procedures*.

¹⁴⁰ Peter Van den Bossche and Werner Zdouc: *The Law and Policy of the World Trade Organization*, p. 486-7.

4.3.3.2 *The Line Between Article III:4 and Article XI of the GATT*

It is often difficult to establish whether a certain trade measure falls under the scope article III: 4 of the GATT, being an internal measure in that sense, or whether it falls under the scope of article XI of the GATT. Considering the different legal consequences of these articles, it is important to correctly decide under which article a particular measure belongs.¹⁴¹

The difference between these articles has especially been challenged on the grounds of what the objective of article XI is.¹⁴² As was formerly mentioned, the concept of "other measures" in article XI has generally received a broad meaning. The term "on importation", has however been interpreted narrowly. This was first addressed in the case *Canada Fire* (7 February 1984). In that case the panel drew a clear line "between measures affecting the 'importation' of products, which are regulated in Article XI:1 and those affecting 'imported products', which are dealt with in Article III." The panel, therefore, concluded that if article XI was to be interpreted to cover internal measures it would result in making article III of the GATT meaningless and also providing article III with the exceptions found in article XI:2.¹⁴³ Furthermore, according to *the Interpretative Note Ad Article III* of the GATT, the article will only be applied to imported products.¹⁴⁴ The note clarifies:

Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III.

Generally, in order to establish which article applies two main questions must be answered. First, does a measure only apply to imports or does it apply to both imported and domestic product? Second, is the measures applied only upon the importation of a specific product? If a discrimination takes place after the importation of the product, the measures automatically falls under the scope of article III:4. Furthermore, if the disputable measure applies in similar way to domestic products there can be no breach of article XI.¹⁴⁵

¹⁴¹ Mitsuo Matsushita, Thomas J. Schoenbaum and Petros C. Mavrodoidis: *The World Trade Organization, Law Practice and Policy*, p. 131.

¹⁴² Federico Ortino: "GATT", p. 131.

¹⁴³ Panel Report, *Canada - Fire*, 7 February 1984, para. 5.14.

¹⁴⁴ Federico Ortino: "GATT", p. 132.

¹⁴⁵ Karsten Engsig Sørensen: "Trade in Goods", p. 136.

4.3.3.3 Other Non-Tariff Barriers

In addition to QRs, rules on other non-tariff barriers may be relevant. The WTO, for example, provides rules that support transparency within the trade regime, rules on customs formalities and government procurement, etc. In addition the *Agreement on Technical Barriers to Trade* (TBT agreement) and the *Agreement Sanitary and Phytosanitary Measures* (SPS Agreement), both annexed to the WTO Agreement, provide important trade rules that are also binding.¹⁴⁶

4.3.4 Charges on Exports

Finally, it is worth mentioning that trade barriers are also applied to exports. Export duties are, like duties on imports, charges that are imposed when products are exported. Such measures include both export duties and charges, but neither the GATT, nor any other multilateral trade agreement, entails any specific provisions regarding export duties and charges. However, in general the same GATT obligations apply to exports such as the MFN principle. Also it is debatable whether the rule of article II of the GATT regarding concession and schedules can also be applied to export duties. In general it seems be nothing standing in the way of states binding their export duties and registering them in their schedule as long as they fulfil the MFN principle.¹⁴⁷

4.4 Exceptions

4.4.1 General Exceptions

As any legal system the WTO law is not absolute. There are various exceptions to the main principles of WTO law regarding trade in goods that all play a significant role in shaping rules and principles of international trade law. One of the most important one is article XX of the GATT that entails general exceptions. The article allows states to except themselves from the main principles of the GATT on the grounds of other non-trade values such as important social and policy values.¹⁴⁸

In order for the principle to become applicable two conditions must be met. Firstly, the restrictive measure contravening the GATT needs to fall under one of the 10 listed values in article XX. The values listed out in the article range from moral values to economic values and some have not been under dispute while others have been disputed on several occasions,

¹⁴⁶ These rules will not be further discussed here. For more information see Peter Van den Bossche and Werner Zdouc: *The Law and Policy of the World Trade Organization*, p. 498-514.

¹⁴⁷ Peter Van den Bossche and Werner Zdouc: *The Law and Policy of the World Trade Organization*, p. 470-472.

¹⁴⁸ Peter Van den Bossche and Werner Zdouc: *The Law and Policy of the World Trade Organization*, p. 544.

such as paragraphs (a), (b) and (g).¹⁴⁹ The requirements for each paragraph also differ depending on the protected value and its relationship with the trade restrictive measure. Some measures therefore need to be "necessary" in order to become applicable meanwhile others need to be "directly related to the preservation of the value".¹⁵⁰ Paragraph (g) of article XX of the GATT will here be taken as an example but the paragraph addresses measures that "relate to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption". The article describes three conditions that must be met. These conditions were all addressed in the case *US-Shrimp/Turtle* (6 November 1998). The case concerned a USA domestic legislation prohibiting the importation of shrimp products. The legislation made it a precondition for importation to provide proof that the imported shrimp was not harvested with un-environmental fishing techniques.¹⁵¹ The AB examined the conditions of paragraph (g) and concluded that all the conditions were fulfilled. Firstly the AB gave the scope of the value a broad meaning, entailing both living and non-living resources and read the article in conjunction with the preamble of the WTO Agreement.¹⁵² Secondly the AB examined the measure, and concluded that there was a close relationship between the measure and the goal of paragraph (g). The domestic legislation therefore directly aimed at only allowing those who fulfilled the domestic environmental standards to import shrimp into the USA.¹⁵³ Finally the AB concluded that the measure was applied impartially and also to domestic products.¹⁵⁴

Secondly, in addition to finding the right listed value, the requirements found in the first part of article XX, the *chapeau*, also have to be met. The chapeau mandates that "measures are not 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". The legal nature of the chapeau is often debated and was e.g. also addressed in the *US-Shrimp* case. In the case the AB examined the objective of the chapeau and emphasized that the purpose of the article was to prevent states from misusing article XX of the GATT and noted:

In our view, the language of the chapeau makes clear that each of the exceptions in paragraphs (a) to (j) of Article XX is a *limited and conditional* exception from the substantive obligations

¹⁴⁹ Stanford E. Gaines and Birgitte Egelund Olsen, "Trade and Social objectives", p. 206.

¹⁵⁰ Peter Van den Bossche and Werner Zdouc: *The Law and Policy of the World Trade Organization*, p. 554.

¹⁵¹ Appellate Body Report, *US - Shrimp*, 12 October 1998, para 156.

¹⁵² Appellate Body Report, *US - Shrimp*, 12 October 1998, para 130-131.

¹⁵³ Appellate Body Report, *US - Shrimp*, 12 October 1998, para. 140-141.

¹⁵⁴ Appellate Body Report, *US - Shrimp*, 12 October 1998, para.144.

contained in the other provisions of the GATT 1994, that is to say, the ultimate availability of the exception is subject to the compliance by the invoking Member with the requirements of the chapeau.¹⁵⁵

The AB then moved on to examine whether the measure was perhaps in form of a misuse of paragraph (g) and was arbitrary or unjustifiable.¹⁵⁶ The AB recalled that the measures of the US government were inflexible and noted:

However, it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to *require* other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member's territory, *without* taking into consideration different conditions which may occur in the territories of those other Members.¹⁵⁷

The AB furthermore noted:

We believe that discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries.¹⁵⁸

The measures were therefore found discriminative. In addition the AB addressed the *principle of fairness and due procedural process*, and noted that the certification process had been found unfair as it did not provide any procedural process to be heard before a decision was made etc.¹⁵⁹ Finally the AB noted that the US had not sincerely attempted to negotiate on environmental terms with all its trade-partners beforehand, but had instead negotiated with 5 exporting countries. All of this was considered discriminatory and a breach of the chapeau.¹⁶⁰ It is worth mentioning that the case demonstrates how the discrimination test put forth in the chapeau of article XX, is not the same test that is applied for the substantive rules of the GATT.

WTO members have often attempted to justify their domestic trade restrictive measures on the grounds of article XX. However due to the strict conditions laid out in the article, the attempted justification is most often in the end rejected. So far only one dispute has been successful to fulfil both the conditions of the listed values and the conditions of the chapeau.¹⁶¹

¹⁵⁵ Appellate Body Report, *US - Shrimp*, 12 October 1998, para. 156 -157.

¹⁵⁶ It is emphasized that the discriminative nature of the chapeau differs from the discriminative standard found in the substantive provisions of the GATT see Peter Van den Bossche and Werner Zdouc: *The Law and Policy of the World Trade Organization*, p. 574.

¹⁵⁷ Appellate Body Report, *US - Shrimp*, 12 October 1998, para. 164.

¹⁵⁸ Appellate Body Report, *US - Shrimp*, 12 October 1998, para. 165.

¹⁵⁹ Appellate Body Report, *US - Shrimp*, 12 October 1998, para. 180-181.

¹⁶⁰ Appellate Body Report, *US - Shrimp*, 12 October 1998, para 166.

¹⁶¹ Appellate Body Report, *US - Shrimp (Art. 21.5-Malasia)*, 22 October 2011, para.149-150.

4.4.2 Exceptions Relating to Regional Trade Agreements

4.4.2.1 Regional Trade Agreements: Costs and Benefits

Another important exception in this regard is article XXIV of the GATT that permits WTO members to conclude Regional Trade Agreements (RTAs) in groups. According to the WTO are "reciprocal trade agreements between two or more partners".¹⁶² In recent years a considerable increase of RTAs has occurred. According to the WTO website 406 RTAs are currently in force between WTO members.¹⁶³ This popularity of regionalism and RTAs has been highly debated within the WTO as many worry that the increasing amount of such agreements can undermine the global trade regime.¹⁶⁴ For example Director General, *Roberto Azevedo* recently delivered a speech on RTAs, where he discussed the harmony of RTAs within WTO and the legal complexity that such agreements can create.¹⁶⁵ Such agreements are also debated within the WTO in regard to the integrity of the MFN principle considering that RTAs are based on regional or preferential grounds and only apply to certain group of states. These agreements are thus discriminatory in their nature and contravene the MFN principle.

Nonetheless, the benefits of RTAs are considerable. First and foremost, RTAs are often used as tools to achieve trade liberalization, first, by accomplishing such progress regionally. Such agreements can therefore even be necessary when the multilateral level is lacking cooperation. Additionally, such agreements often generate more economic growth that can eventually lead the way to an overall better trading outcome. Finally, the foundation of these agreements is often politically based rather than legally.¹⁶⁶

Seeing as the rationale behind these agreements in the multilateral trading system remains debated, it may come as a no surprise that the authors of the GATT 1947 had trouble deciding on how to combine the will of its contracting parties to conclude RTAs with the full power of the MFN principle. When the GATT 1994 was concluded this dilemma was again addressed and an attempt was made to reconcile these two different approaches to economic integration.¹⁶⁷ The conclusion was article XXIV of the GATT, along with the conclusion of an *Understanding on the Interpretation of Article XXIV of the GATT 1994* that reflected a

¹⁶² "Regional Trade Agreements", https://www.wto.org/english/tratop_e/region_e/region_e.htm.

¹⁶³ According to numbers dating back to 7th of April 2015, see "Regional Trade Agreements" https://www.wto.org/english/tratop_e/region_e/region_e.htm.

¹⁶⁴ David A. Gantz: "Regional Trade Agreements", p. 238.

¹⁶⁵ Roberto Azevedo: "RTAs are important for the multilateral trading system—but they cannot substitute it", http://www.wto.org/english/news_e/spra_e/spra33_e.htm.

¹⁶⁶ Peter Van den Bossche and Werner Zdouc: *The Law and Policy of the World Trade Organization*, p. 651-653.

¹⁶⁷ Andreas F. Lowenfeld: *International Economic Law*, p. 42.

mutual understanding that RTAs were unavoidable and necessary for the multilateral trade regime.

4.4.2.2 *Applicability of Article XXIV of the GATT*

The WTO provides its members with the opportunity to negotiate RTAs with other WTO members on the grounds of article XXIV of the GATT. According to paragraph 8 of the article, three different types of RTAs are allowed; customs unions (CUs), free trade agreements (FTAs) and interim agreements, that have yet to develop into CU or into FTAs.¹⁶⁸

CUs are defined in subparagraph 8(a) of the article and are generally considered to be arrangements where sovereign states make the commitment of not imposing duties or comparable charges on imported goods from other members of the CU. The parties of the custom union also agree upon a mutual external tariff on imported goods entering the CU.¹⁶⁹ Free trade agreements are agreements where parties maintain their individual external tariff rates on imported goods, but reduce or remove internal barriers among the trading countries.¹⁷⁰ Subparagraph 8 (b) defines FTAs in the WTO and states:

A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

These arrangements contradict the MFN principle *de facto*. Therefore in order to apply article XXIV of the GATT, certain conditions must be fulfilled. First it has to be established, that the parties to the RTA are also members of the WTO and are being offered a more favourable trade treatment with the RTA.¹⁷¹ Secondly, all the conditions laid out in the article must be fulfilled for a RTA to be WTO consistent¹⁷² The criteria of the article was more closely examined in the case *Turkey - Textile* (22 October 1999) where the AB additionally added that the restrictive measure imposed on the grounds of a RTA had to be necessary for the function of the RTAs in order to be justified under the article.¹⁷³ This criteria is not under further discussion in this thesis as the EU and the EFTA are RTAs that undoubtedly fulfil the criteria set forth in article XXIV. These entities will now be discussed and explored.

¹⁶⁸ Amin Alvai: "Regional Trade Agreements", p. 407.

¹⁶⁹ Catherine Barnard: *The Substantive Law of the EU - The Four Freedoms*, p. 8.

¹⁷⁰ Amin Alvai: "Regional Trade Agreements", p. 407.

¹⁷¹ Peter Van den Bossche and Werner Zdouc: *The Law and Policy of the World Trade Organization*, p. 651.

¹⁷² *Understanding on the Interpretation of Article XXIV of the GATT 1994*, art 1.

¹⁷³ Appellate Body Report, *Turkey - Textile*, 22 October 1999, para. 50.

5. European Union and the Internal Market

5.1 Foundation of the Internal Market

The historic development of the EU and the internal market is directly related to different stages of integration within the EU that originally began in 1951, when the *European Coal and Steel Community* (ECSC Treaty) was established, among 6 states in Europe on the grounds of the *Schuman Declaration*.¹⁷⁴ The ECSC Treaty is historically important whereas its framework was based on a "community" that possessed its own institutions, including the High Authority, an institution with the power to make binding decisions on behalf of its members and the CJEU that was established in order to balance the power of the authority.¹⁷⁵ This international framework was new of a kind and referred to as being supranational.¹⁷⁶

However, a more intense economic integration was introduced with the *Treaty of Rome* in 1957, where two additional agreements were signed, the *European Atomic Energy Community Treaty* and the *European Economic Community* (EEC Treaty).¹⁷⁷ These agreements represented a will to create a common market and a customs union, ultimately aiming at removing all trade barriers within the EU and setting up a mutual custom tariff through instalments.¹⁷⁸ The concept of the common market was further developed in 1985 when the *White Paper Report* was published and a year later the *Single European Act* (hereafter SEA) was signed. The report further explained the will to establish a "single integrated internal market", by removing physical barriers, technical barriers and fiscal barriers within the market.¹⁷⁹ The SEA was a reformation treaty of the EEC Agreement that shared the same goal, to establish an internal market with no internal frontiers ensuring free movement of goods, people, services and capital.¹⁸⁰ The completion of the internal market and the development of the EU kept on being formed with the *Maastricht Treaty* in 1992, *The Amsterdam Treaty* and *Nice Treaty*, each adding to the process of integration.¹⁸¹

¹⁷⁴ Trevor C. Hartley: *The European Union Law in a Global Context*, p. 9. The Declaration was proposed by the foreign minister of France, Robert Schuman and confirmed by Konrad Adenauer the chancellor of Germany. The plan had a political meaning and represented a change in the relationship between France and Germany after the World War II and established a partnership among the nations regarding regulation on coal and steel resources. The plan reflects the desire to establish peace and to reach peaceful co-existence among nations.

¹⁷⁵ Trevor C. Hartley: *The European Union Law in a Global Context*, p. 11.

¹⁷⁶ Paul Graig and Gráinne De Búrca: *EU Law*, p. 4-5.

¹⁷⁷ These agreements are often referred to the *Treaties of Rome* but the EEC is also often referred to as the *Treaty of Rome*.

¹⁷⁸ Paul Graig and Gráinne De Búrca: *EU Law*, p. 6.

¹⁷⁹ *White Paper on the Completing the Internal Market*, p. 4-6.

¹⁸⁰ Paul Graig and Gráinne De Búrca: *EU Law*, p.11.

¹⁸¹ For more historic information, see Joseph H.H. Weiler: "Transformation of Europe".

The most recent development in the EU treaty framework is the adoption of the *Treaty of Lisbon* in 2009. The treaty introduced drastic institutional changes in the EU and for example divided competence into three categories relating to areas of policies. Moreover, the treaty confirmed the legal personality of the EU and its position as an international organization. The treaty also addressed the external relations policy of the EU and reconciled the CCP with the subject of the WTO agreements. The CCP therefore now corresponds to the division of trade rules within the WTO regarding goods, services and IT.¹⁸²

5.2 Legal Framework of the EU

5.2.1 Legal Sources

The primary legal sources of EU law are the "treaties", *Treaty on European Union* (TEU) and the *Treaty on the Functioning of the European Union* (TFEU). The TEU is generally considered to be the framework while the TFEU describes how the objectives and principles of the TEU are to be achieved.¹⁸³ In addition, according to article 288 (1) of the TFEU, law-making acts of the EU institutions constitute secondary sources such as regulations, directives, decisions, recommendations and opinions, while only the first three are legally binding. Soft law instruments, such as guidelines, reports, white papers etc. are also important sources in shaping EU external policy even though they are unbinding in nature.¹⁸⁴

International agreements are a very important legal source in EU external relations.¹⁸⁵ The position of such agreements is addressed in article 216 (1) of the TFEU. According to the provision, the EU is allowed to conclude such agreements when it "is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope".¹⁸⁶ According to the EU, such agreements are *binding* both for the EU and its member states.

The rulings of the CJEU are also a very important contribution to the development of EU law and to the status of international law within the EU. Dating back to 1963, the Court has infrequently made landmark decisions pushing forward the integration process when it was

¹⁸² Piet Eeckhout: *EU External Relations Law*, p. 57-59.

¹⁸³ Bart Van Vooren and Ramses Wessel: *EU External Relations Law*, p. 9-10.

¹⁸⁴ Soft law can hold great value see e.g. CJEU C-233/02, *France v. Commission*, 23 March 2004, para. 41-44.

¹⁸⁵ In the CJEU Opinion 1/75, *Understanding on a Local Cost Standard*, p. 1360, the CJEU described such agreements as "an undertaking entered into by entities subject to international law which has binding force whether its formal designation."

¹⁸⁶ This article is to be read in conjunction with EU main principles found in the TEU regarding conferral, loyalty and institutional balance, see Bart Van Vooren and Ramses Wessel, *EU External Relations Law*, p. 9.

stalled. The Court established, via its case law, the doctrines of direct effect and supremacy, the doctrine of implied powers and the doctrine of human rights.¹⁸⁷ The influence of the rulings of the Court should therefore not be understated, especially in regard to the EUs external relations.¹⁸⁸

5.2.2 Institutional Framework

The institutional structure of the EU is complex. According to article 13 (1) of the TEU the EU has 7 main institutions that all have its role to play in promoting the interest of the Union and competence to carry out its tasks.¹⁸⁹ This is referred to as the *principle of institutional balance*, meaning that these institutions together carry out the functioning of the Union each contributing to the legal framework with its functionality. Formally there is therefore no hierarchy.¹⁹⁰ The Commission, The European Council (hereafter the Council) and the Parliament are therefore e.g. all key actors within the EU and in the legislative process. Another important institution is the Court of Justice of the European Union (CJEU). Its role and structure is described in article 19 of the TEU and it has the main task to interpret treaty law and to ensure the right application of the treaties. Its main role in relation to EUs external relations has mostly involved ruling on competence issues. According to article 218 (11) of the TFEU, EU member states and institutions can also ask the Court for a formal opinion regarding a specific international obligation and its compatibility with EU law.

5.2.3 Position of International Law within the EU and the Doctrine of Direct Effect

The position international law holds within the EU is often not perfectly clear. Nowadays international law is undoubtedly considered to be an *integral part* of EU law. This refers both to international agreements and other sources of international law such as customary law.¹⁹¹ However, what position within the EU, international law exactly holds as a legal source, is debatable and the CJEU has taken the approach to locate it somewhere between primary and secondary law.¹⁹² The EU has not proclaimed which theory, Monism or Dualism, it adheres to in relation to its external relations but a combination of the two is the most plausible

¹⁸⁷ J.H.H. Weiler: "Transformation of Europe", p. 2413-2417.

¹⁸⁸ Bart Van Vooren and Ramses Wessel: *EU External Relations Law*, p. 82.

¹⁸⁹ These institutions are the European Parliament, the European Council, the Council, the European Commission, the Court of Justice of the European Union, the European Central Bank, the Court of Auditors.

¹⁹⁰ Bart Van Vooren and Ramses Wessel: *EU External Relations Law*, p. 9-10.

¹⁹¹ This theory of integral part was first established in the CJEU C-181/73, *Haegeman*, 30 April 1974, para. 5.

¹⁹² Bart Van Vooren and Ramses Wessel: *EU External Relations Law*, p. 211.

solution.¹⁹³ Article 216 (2) of the TFEU implies that the EU adheres to the monist theory as it emphasizes how binding international treaties are for the EU and its member states and how it ranks above EU secondary law. On the contrary CJEU case law rather suggests a more dualist approach, emphasizing the autonomous legal order of the EU.¹⁹⁴

This debate regarding the position of international law is on-going and in general the Court keeps affirming and defending the legal autonomous status of the Union. However, that does not change the fact that the EU and its member states are undoubtedly bound by its international obligations but the legal commitment seems to derive from EU law itself and not international obligation *per se*.¹⁹⁵ This refers to the legal principles of direct effect and supremacy that are essential in EU law and whether or not international agreements can have direct effect within the EU.

The doctrine of direct effect provides citizens of the EU the ability to invoke their rights according to EU law directly before their domestic courts, either against the state or other individuals.¹⁹⁶ Furthermore, they have the ability to do so even though the rule has not been transformed into national law by the state. The principle is however not absolute and for rules to be directly effective they need to possess certain qualities; to be precise, clear, unconditional and to provide specific rights.¹⁹⁷ The rule was originally established in the case C-26/62, *Van Gend en Loos* and has been reaffirmed ever since. The case concerned tariff classification and an import duty imposed on imported chemicals from Germany into the Netherlands and whether the measures contravened article 12 of the EEC Agreement (now article 28 of the TFEU). However, more importantly it concerned the question of whether individuals could directly apply article 12 of the EEC Agreement in its national court. According to the case, the article should be interpreted as having direct effects and the Court ruled that the provision created individual rights and stated; "The implementation of Article 12 does not require any legislative intervention on the part of the states".¹⁹⁸

Since then the Court has kept developing the doctrine and today it applies to all binding EU law in form of treaties, regulations, decisions and partly to directives.¹⁹⁹ Furthermore, it can also apply to international agreements that have not been transposed into national law but the CJEU has agreed to provide international agreements direct effect on several occasions as

¹⁹³ Birgitte Egelund Olsen, Michael Steinicke, Karsten Engsig Sørensen: "The WTO and the EU", 93.

¹⁹⁴ Joined Cases C-402/05 and 415/05, *Kadi and Al Barakat International Foundation v. Council*, para. 316.

¹⁹⁵ Paul Graig and Gráinne De Búrca: *EU Law*, p. 338.

¹⁹⁶ Paul Graig and Gráinne De Búrca: *EU Law*, p. 181.

¹⁹⁷ John Errico: "The WTO in the EU: Unwinding the Knot", p. 183.

¹⁹⁸ CJEU C-26/62, *Van Gend en Loos*, 5 February 1963 p. 13.

¹⁹⁹ See further Paul Graig and Gráinne De Búrca: *EU Law*, p. 182.

long as the right criteria is fulfilled.²⁰⁰ This was established in case C-104/81, *Kupferberg*, a case concerning the importation of Portuguese port wines into Germany and an imposition of a custom duty, referred to as the monopoly equalization duty.²⁰¹ At that time Portugal was not a member of the EU and the trade was based on the grounds of a bilateral *Free Trade Agreement* between the EU and Portugal. The importer in Germany claimed that these measures contradicted the provisions of the FTA and that the FTA had direct effect in EU law.²⁰² The Court concluded that whenever a EU legal obligation with another non-member state is examined the origin of international provision must always be taken into account and emphasised:

In conformity with the principles of public international law Community institutions which have power to negotiate and conclude an agreement with a non-member country are free to agree with that country what effect the provisions of the agreement are to have in the internal legal order of the contracting parties. Only if that question has not been settled by the agreement does it fall for decision by the courts having jurisdiction in the matter, and in particular by the Court of Justice within the framework of its jurisdiction under the Treaty, in the same manner as any question of interpretation relating to the application of the agreement in the Community.²⁰³

The conclusion was that the agreement did fulfil all the essential criteria and therefore had direct effect.²⁰⁴ Although, the CJEU has not ruled out that international obligations can in *general* receive direct effect, it has been reluctant to provide WTO law direct effect, as will be further discussed in chapter 7.1.3.

5.2.4 The Principle of Conferral

Fundamentally linked with the question of competence within the EU is the principle of conferral. The principle is described in article 5(2) of the TEU and entails that "the Union shall act only within the limits of the competences conferred upon it by the Member States in the treaties to attain the objectives set out therein. Competences not conferred upon the Union in the treaties remain with the Member States". The principle entails that the EU only has power to conclude on external relations and agreements as long as it has received the competence to do so. This key principle clearly establishes that, even though the EU is a legal

²⁰⁰ John Errico: "The WTO in the EU: Unwinding the Knot", p 184.

²⁰¹ CJEU C-104/81, *Kupferberg*, 26 October 1982, para 1-2.

²⁰² CJEU C-104/81, *Kupferberg*, 26 October 1982, para. 7.

²⁰³ CJEU C-104/81, *Kupferberg*, 26 October 1982, para. 17.

²⁰⁴ CJEU C-104/81, *Kupferberg*, 26 October 1982, para. 21-27.

person, it does not possess the general capacity to enact legislation as it pleases and cannot extend its competence from what is stated in the treaties.²⁰⁵

5.2.5 Competence

5.2.5.1 Exclusive, Shared and Coordinated Competences

When the member states have conferred power to the Union with the treaties, the competence of the EU can be exclusive, shared or supportive depending on the topic or subject at hand.

According to article 3 of the TFEU the EU holds exclusive competence in various policy areas such as for the customs union and the CCP. This exclusive competence of the CCP was first addressed in Opinion 1/75, *Re Understanding on a Local Cost Standard*.²⁰⁶ The case concerned the question of whether the Commission had the exclusive competence to conclude this understanding, regarding export credits, on behalf of its members.²⁰⁷ The Court concluded that it did, as export credits clearly fell under the scope of article 207. Furthermore it concluded that CCP was influenced both by internal and external legislation. More importantly the Court concluded that the competence was exclusive and not shared.²⁰⁸ This conclusion was built on the argument that this would support the effectiveness of the common market. The Court therefore interpreted the scope of the CCP broadly and ensured the exclusive competence of the EU in a broader sense.²⁰⁹

According to article 2 (1) of the TFEU exclusive competence provides the EU with the power to "legislate and adopt binding acts" in that area. Shared competence, on the other hand, explains when the EU and the States both may legislate and adopt acts. However, the general rule according to article 2 (2) of TFEU is that the member states can only do so to the extent that the EU has not. This is referred to as *pre-emptive* competence, with few exceptions found in article 4 (3) and 4 (4) of the TFEU.²¹⁰ Shared competence is addressed and listed out in article 4 of the TFEU and includes e.g. subject areas, such as the internal market. Finally, article 5 of the TFEU discusses areas where the EU only has limited competence in form of support or supplementary competence.²¹¹ In addition there are two important clauses in the treaties that provide an additional competence basis. Article 352 TFEU provides a basis for competence when the EU shows that it is necessary to attain one of the objectives set out in

²⁰⁵ Bart Van Vooren and Ramses Wessel: *EU External Relations Law*, p. 75.

²⁰⁶ CJEU opinion 1/75, *R Understanding on a Local Cost Standard*, 11 November 1975.

²⁰⁷ CJEU opinion 1/75, *R Understanding on a Local Cost Standard*, 11 November 1975, p. 1355.

²⁰⁸ CJEU opinion 1/75, *R Understanding on a Local Cost Standard*, 11 November 1975, p. 1362-1363.

²⁰⁹ Piet Eeckhout: *EU External Relations Law*, p. 15-18.

²¹⁰ Paul Graig and Gráinne De Búrca: *EU Law*, p. 84-85.

²¹¹ Bart Van Vooren and Ramses Wessel: *EU External Relations Law*, p. 18.

the treaties. Article 114 TFEU provides a broad competence basis for the EU in areas involving the internal market.²¹²

5.2.5.2 Express and Implied Competences

Sometimes classifying a certain subject under the right competence clause can be difficult as competence can be *express* or *implicit*. This is important in relation to the act of entering into international obligations. Competence is explicit when a certain provision of the treaties specifically states that the EU has exclusive competence to conclude international agreements regarding a certain area, the best example being the CCP in article 207 TFEU.

However, competence of the EU can also be implied rather than expressed, meaning that the EU seeks exclusive competence on the grounds of its internal competence and applies it externally.²¹³ Implied competence is based on the famous case C-22/70, *AETR*. The case concerned the *European Agreement concerning the work of crews of vehicles engaged in international road transport* (AETR) and the question of whether or not the member states had the legal capacity and the competence to conclude this agreement.²¹⁴ The AETR was originally signed in 1962 but did not enter into force and in 1967 the agreement was revised.²¹⁵ However, simultaneously the EU had enforced a regulating regarding the matter. The topic of the AETR fell under the subject of *common transport policy* that, according to treaty law, provided the EU competence internally. The member states nevertheless concluded the AETR in 1970 and the Commission sought to get the proceedings annulled. The Commission claimed that on the grounds of its internal competence regarding the subject at hand it had the competence to enter into external relations in regard to it.²¹⁶ The Council, however, on behalf of the member states, claimed that it had the competence to conclude international agreements as long as it managed to also fulfil its legal obligations according EU law.²¹⁷ The main legal issue was therefore whether or not the member states held the power to negotiate the agreement and whether external competence of the EU had to be *explicitly* stated in the treaties.²¹⁸

The Court examined these issues and concluded that the EU had the power to enter into international agreements even though no clear provision allowed for such competence. The

²¹² Paul Graig and Gráinne De Búrca: *EU Law*, p. 89-93.

²¹³ Bart Van Vooren and Ramses Wessel: *EU External Relations Law*, p. 76.

²¹⁴ CJEU C-22/70, *Commission v. Council (AETR)*, 31 March 1971, para. 1.

²¹⁵ CJEU C-22/70, *Commission v. Council (AETR)*, 31 March 1971, p. 265-266.

²¹⁶ CJEU C-22/70, *Commission v. Council (AETR)*, 31 March 1971, para. 6

²¹⁷ *Opinion of G. Dutheillet d Lamothe on CJEU C-22/70 AETR*, p. 285-288.

²¹⁸ CJEU C-22/70, *Commission v. Council (AETR)*, 31 March 1971, para. 6-11.

Court first explored the provisional ground and the existence of a specific competence provision and concluded that when no such provision was available, other more general obligations should be taken into account.²¹⁹ The Court concluded:

Such authority arises not only from an express conferment by the Treaty—as is the case with Articles 113 and 114 for tariff and trade agreements and with Article 238 for association agreements—but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions.²²⁰

The Court then moved on to examining the *nature* of the issue and decided that whenever the EU had adopted a common policy, regardless of how it legally framed it, the states did not have the capacity to enter into relations with other nations that contradicted EU law.²²¹ The Court, therefore, concluded that whereas the topic fell under a common policy of the union and whereas the EU had, according to the regulation, received competence to enter into relations with third countries, the member states could not negotiate the treaty. The importance of this ruling lies in the fact that for the first time the Court acknowledged that there is a link between the internal and external dimension of the principle of conferral and that the internal obligations of the states could not be separated from external obligations.²²²

The Court has kept on developing the application of the doctrine and the doctrine of implied competence is now well established in EU law. The *Treaty of Lisbon* also significantly reformed EU law in relation to implied competence and article 3 (2) of the TFEU now states in relation to exclusive competence:

The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

This article should be read in conjunction with article 216 of the TFEU that addresses both expressed and implied competence.²²³ Despite the codification of these rules, the Court will undoubtedly keep on developing the issues of competence.

²¹⁹ CJEU C-22/70, *Commission v. Council (AETR)*, 31 March 1971, para. 12-15.

²²⁰ CJEU C-22/70, *Commission v. Council (AETR)*, 31 March 1971, para. 16.

²²¹ CJEU C-22/70, *Commission v. Council (AETR)*, 31 March 1971, para. 17.

²²² Piet Eeckhout: *EU External Relations Law*, p. 73.

²²³ Piet Eeckhout: *EU External Relations Law*, p. 113.

5.3 Substantive Trade Law of the EU

5.3.1 Four Freedoms: Free Movement of Goods

The EU entails comprehensive substantive law regarding the free movement of goods that is now codified in the TFEU and is essential for the functioning of the internal market. In order for the rules to become applicable, few fundamental conditions must be fulfilled. First, the good under discussion must fall under the scope of the provisions of the TFEU. Secondly, a good must be traded across borders within the EU or the EEA. Thirdly, the goods provisions apply only to formal members of the EU and EEA, including the central and local governments or even other relevant governmental branches of the member states.²²⁴

If all three conditions are fulfilled the EU rules regarding free movement of goods become applicable. These rules will now be explained. The discussion first examines EU internal and external customs law and rules regarding internal taxation. The chapter will then address trade rules regarding non-fiscal measures and examine both the internal and external dimension of those rules. Finally, derogations from these rules will be briefly elaborated up on.

5.3.2 EU Customs Law

The EU fulfils the criteria of article XXIV:8 (a) of the GATT and became a customs union (CU) on 1 July 1968.²²⁵ Article 28 of the TFEU states;

1. The Union shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.
2. The provisions of Article 30 and of Chapter 3 of this Title shall apply to products originating in Member States and to products coming from third countries which are in free circulation in Member States.

This article clearly manifests that the EU regulation on CU has an external and internal dimension when it comes to trade with goods. All goods originating inside the EU therefore enjoy unconditional free movement within the EU market while foreign goods entering the EU market have to pay a common custom tariff (hereafter CCT) in order to enjoy the same

²²⁴ Catherine Barnard: *The Substantive Law of the EU - The Four Freedoms*, p. 33-35. The general opinion is that rules regarding free movement of goods only have vertical direct effect and not horizontal direct effect, meaning that they can only be enforced against state centric bodies or bodies related to the state. This was e.g. confirmed in the case C-171/11 *Fra.bo SpA v. Deutsche Vereinigung de Gas – und Wasserfaches eV (DVGW) – Technisch – Wissenschaftlicher Verein*, 12 July 2012.

²²⁵ The EU originally became a CU with the Council Regulation No. 950/68 *on the Common Customs Tariff*, 28 June 1968, OJ 1968 L 172, art 4.

freedom.²²⁶ The external and internal dimension of EU as a CU was reflected in the Case 225/78, *Bouhelier*, a case regarding a French regulation on quality inspection on watches that were to be exported. Bouhiler and others were accused of forging documents relating to their exportation of such watches.²²⁷ The case mostly concerned the exportation of these watches to three countries that at the time were not parties of the EU and had concluded their own agreements with the EU. The question arose whether EU law, making it mandatory to receive a license or a certificate for the quality of exported watches, also applied to the exportation of the watches to these countries. The Court summarized its position as such:

With regard to those questions, it must be emphasized that the view adopted by the Court in its judgment of 3 February 1977 concerns intra-Community relations, the characteristic feature of which is a complete liberalization of trade, as a result of the abolition of all obstacles to imports and exports. Those provisions cannot as such be transposed to relations with non-member countries. The question of abolishing quantitative restrictions and measures having equivalent effect in relations with the three non-member countries referred to by the national court — Greece, Spain and Austria — must be considered in the light of the agreements in force between the Community and the States in question. As those provisions are not identical, the case of exports to each of those countries must be examined separately.²²⁸

The Court therefore examined all the agreements individually and came to the conclusion that these measures did not breach the provisions of these agreements.²²⁹

Article 30 of the TFEU states that "customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature." The first part of the provision completely forbids customs duties and is therefore seldom under debate but the general prohibition of customs duties and the purpose behind it was though addressed in the case C-2 and C- 3/69, *Diamantarbeiders*, that regarded a charge levied by Belgium on imported diamonds.²³⁰ The Belgian government refused that the charge had protectionist purpose and was illegal. The CJEU however disagreed and emphasized:

It follows from the system as a whole and from the general and absolute nature of the prohibition of any customs duty applicable to goods moving between Member States that customs duties are prohibited independently of any consideration of the purpose for which they were introduced and the destination of the revenue obtained therefrom. The justification for this prohibition is based on the fact that any pecuniary charge—however small—imposed on goods

²²⁶ Piet Eeckhout: *EU External Relations Law*, p. 12.

²²⁷ CJEU C-225/78, *Bouhelier Case*, 11 October 1979, para. 1-3.

²²⁸ CJEU C-225/78, *Bouhelier Case*, 11 October 1979, para. 6.

²²⁹ CJEU C-225/78, *Bouhelier Case*, 11 October 1979, para. 7-11.

²³⁰ CJEU C-2 and C-3/69, *Diamantarbeiders*, 1 July 1969, p. 213.

by reason of the fact that they cross a frontier constitutes an obstacle to the movement of such goods.²³¹

However, the second part of the provision, regarding charges having equivalent effect (hereafter CEE), is more open for interpretation and is meant to prevent measures that seem to be legitimate and but actually constitute customs duties.²³² This was first defined in the case C-24/68, *Statistical Levy*, a case concerning the imposition of charge referred to as a statistical levy that was levied on both export and imports.²³³ The Court discussed and analysed these issues and noted:

Consequently, any pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally on domestic or foreign goods by reason of the fact that they cross a frontier, and which is not a customs duty in the strict sense, constitutes a charge having equivalent effect within the meaning of Articles 9, 12, 13 and 16 of the Treaty, even if it is not imposed for the benefit of the State, is not discriminatory or protective in effect and if the product on which the charge is imposed is not in competition with any domestic product.²³⁴

From this ruling it can be established that there is no *de-minimis* rule; the amount of the charge is irrelevant, as is the name of the charge. Therefore, the Court always examines the *true effect* of the charge. In addition, it must be clear that the charge is being imposed at the borders and not internally. Otherwise, article 110 of the TFEU on internal taxation will apply. Whether the money is being charged for protectionist purpose or not, is also irrelevant. What matters is how the charge affects the imported product from a competitive point of view.²³⁵

According to article 28 of the TFEU foreign goods enjoy the same rights as goods originating from within the EU as long as the CCT is paid and other formalities are taken care of. The rules prohibiting internal customs duties will therefore apply to products that are in "free circulation" within the union as it is described in article 29 of the TFEU. Rules regarding EU external customs law will be further discussed in chapter 7.2.2.

5.3.3 Internal Taxation Rules

Different rules apply to charges that are levied internally and not at the borders between the members of the EU. Article 110 (1) and (2) of the TFEU addresses this:

No Member State shall impose, directly or indirectly, on the products of other Member States

²³¹ CJEU C-2 and C-3/69, *Diamantarbeiders*, 1 July 1969, para. 11/14.

²³² Catherine Barnard: *The Substantive Law of the EU - The Four Freedoms*, p. 44.

²³³ CJEU C-24/68, *Statistical Levy*, 1 July 1979, para. 1-2.

²³⁴ CJEU C-24/68, *Statistical Levy*, 1 July 1979, para. 9.

²³⁵ Catherine Barnard: *The Substantive Law of the EU - The Four Freedoms*, p. 46-47.

any internal taxation of any kind in excess of that imposed directly or indirectly on *similar* domestic products.

Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.

This rule allows member states to determine their own taxation policy, as long as the taxation policy does not discriminate and breach the conditions in the article.²³⁶

The CJEU has interpreted the measures falling under the scope of the article broadly, as to include any direct or indirect discrimination that favours domestic products.²³⁷ Given that there is no objective criteria justifying the taxation, the article becomes applicable but the products either need to be similar or have a competitive relationship. The CJEU applies two different methods to establish whether products can be granted similarity. The first method entails examining the official classification of the product from a governmental perspective such a customs classification, etc. The second method entails the perspective of the consumer and rather emphasizes the purpose or the end-use of the product. In addition to this the physical nature of the products plays a crucial part but is however not decisive.²³⁸

When products are similar, direct or indirect discrimination is forbidden.²³⁹ An example of indirect discrimination can be found in the case C-302/00 *Commission v. France (Dark and Light Tobacco)*. The case concerned a French legislation that imposed different tax rates on dark-tobacco and light-tobacco cigarettes and the question of whether this difference in tax rates was discriminatory.²⁴⁰ The Court first examined whether these products could be considered similar. The Court recalled, that according to its former case law the similarity of products was to be interpreted widely. The Court then applied the similarity test and examined whether the cigarettes shared similar characteristics and a similar view by consumers. The Court first established that the products did not have to be found identical in order to be similar. It then moved on and examined the *use* of the products and concluded that the products shared the same manufacturing process and usage and served the same consumer needs. The products were therefore similar in the sense of article 110.²⁴¹ Then the Court moved on to examine whether the internal taxation was discriminatory and noted that the French taxation system clearly divided the products into different tax rates categories. As a result, they imposed higher taxes on light cigarettes that were mostly imported into France

²³⁶ Catherine Barnard: *The Substantive Law of the EU - The Four Freedoms*, p. 53.

²³⁷ Catherine Barnard: *The Substantive Law of the EU - The Four Freedoms*, p. 55 and also CJEU C-106/84, *Commission v. Denmark*, 4 March 1986, para. 12.

²³⁸ Catherine Barnard: *The Substantive Law of the EU - The Four Freedoms*, p. 57.

²³⁹ Catherine Barnard, *The Substantive Law of the EU - The Four Freedoms*, p. 58.

²⁴⁰ CJEU C-302/00, *Dark and Light Tobacco*, 27 February 2002, para. 1.

²⁴¹ CJEU C-302/00, *Dark and Light Tobacco*, 27 February 2002, para. 23-26.

and lower taxes on dark cigarettes, which were mostly manufactured in France.²⁴² The Court therefore concluded that the tax system seemed to benefit domestic products and indirectly discriminated based on the origin of the cigarettes.²⁴³

When products are not similar the Court will also examine the competitive relationship between the products under article 110 (2) of the TFEU. The Court takes into account various factors such as economic and financial factors and other tangible factors such as production, manufacture process, taste, etc.²⁴⁴ When the competitive relationship has been confirmed the different taxation between the imported and domestic product must be confirmed and additionally that the difference in taxation is protectionist.²⁴⁵

The application of the article can best be explained by reviewing former case law of the CJEU. The article was e.g. referred to in the case C-170/78, *Commission v. UK* that regarded the UK tax system and a difference in taxation on wine and beer.²⁴⁶ The Court first examined whether beer and wine could be considered to be in competition and decided that they were. In its conclusion the Court noted that it was necessary to consider, both the status of the product in the current market and also the possible developments of its status in the market in regard to changes in the free movement of goods within the EU. In addition, the Court took into account the potential for the products to substitute each other on the market.²⁴⁷ However, the Court also agreed that the products were different and could be consumed under different circumstances and ruled:

In view of the substantial differences in the quality and, therefore, in the price of wines, the decisive competitive relationship between beer, a popular and widely consumed beverage, and wine must be established by reference to those wines which are the most accessible to the public at large, that is to say, generally speaking, the lightest and cheapest varieties. Accordingly, that is the appropriate basis for making fiscal comparisons by reference to the alcoholic strength or to the price of the two beverages in question.²⁴⁸

Having established the competitive relationship between these products the Court examined the protective effect of the measures and concluded that the tax system gave wine a glamorous image and as wine was imported and beer generally domestically produced, these measures were in fact protectionist for domestic beer.²⁴⁹

²⁴² CJEU C-302/00, *Dark and Light Tobacco*, 27 February 2002, para. 29.

²⁴³ Same conclusion as in Case 171/78 *Commission v. Denmark*, para. 36-37.

²⁴⁴ Catherine Barnard: *The Substantive Law of the EU - The Four Freedoms*, p. 62.

²⁴⁵ Catherine Barnard: *The Substantive Law of the EU - The Four Freedoms*, p. 55.

²⁴⁶ CJEU C-170/78, *Commission v. UK Case*, 12 July 1983, para. 1.

²⁴⁷ CJEU C-170/78, *Commission v. UK Case*, 12 July 1983, para. 7.

²⁴⁸ CJEU C-170/78, *Commission v. UK Case*, 12 July 1983, para. 12.

²⁴⁹ CJEU C-170/78, *Commission v. UK Case*, 12 July 1983, para. 27.

A more recent case is C-167/2008, *Commission v. Sweden* that related to the Swedish tax system regarding alcoholic products, more precisely, different excise duties on beer and wine. The Commission argued that beer and wine were in competition and cited the ruling of *Commission v. UK*. The Court first agreed that the products were in competition and secondly, that there was no doubt that higher tax was being levied on the imported wine.²⁵⁰ Thirdly, it examined the protective effect of the system and examined whether the taxation was influencing consumers behaviour.²⁵¹ The Court came to the conclusion that the different pricing of the products was almost the same before and after the taxation. Consequently, it concluded that the small change in price was not shown to have influenced the decisions of the consumers.²⁵² This methodology of the Court is referred to as the three-stage approach of article 110 (2) of the TFEU and was also confirmed by the EFTA Court in the case E-6/07, *Hob Vín* that is discussed below.

It is worth mentioning that it does matter whether products are considered to be similar or in competition, whereas the consequences of breaching the paragraphs differ. Therefore, it has been established that when a measure breaches paragraph 1 of article 110, the government is under the obligation to level the playing field and either impose the same taxation or provide imported products the same benefits as domestically produced products enjoy. However, if a measure breaches paragraph 2 of article 110, the protectionist feature of the measure must be immediately eliminated.²⁵³

5.3.4 Non-Fiscal Barriers to Trade

5.3.4.1 Quantitative Restrictions and Measures Having Equivalent Effect

Article 34 of the TFEU prohibits quantitative restrictions (hereafter QRs) on imports and all measures having equivalent effect (hereafter MEE). The difference between these two measures has been addressed by the CJEU but according to the Court QRs are "measures which amount to a total or partial restraint of, according to the circumstances, imports, exports or goods in transit. Measures having equivalent effect not only take the form of restraint described; whatever the description or technique employed they can also consist of encumbrances having the same effect".²⁵⁴

²⁵⁰ CJEU C-167/05, *Commission v. Sweden*, 8 April 2008, para. 42-51.

²⁵¹ CJEU C-167/05, *Commission v. Sweden*, 8 April 2008, para. 16.

²⁵² CJEU C-167/05, *Commission v. Sweden*, 8 April 2008, para. 57-58.

²⁵³ Catherine Barnard: *The Substantive Law of the EU - The Four Freedoms*, p. 66.

²⁵⁴ CJEU C-2/73, *Geddo v. Ente Nazionale Risi*, 12 July 1973, para. 7.

The definition of a MEE is still being developed by the CJEU but the Court has either widened or broadened the scope of the article. This development began in the landmark case C-8/74, *Dassonville*. The case concerned a Belgian legislation that made the importation of goods bearing a title in relation to its origin, such as Scotch whisky, required to provide certain official document from the exporting country, such as certificates verifying the origin of the product.²⁵⁵ A company importing Scotch whisky into Belgium claimed that these measures were MEE and breached EU law as these measures created an unfair trade environment between those who imported the whisky straight from the exporting country and those who imported the product from a third country where the product was in free circulation.²⁵⁶ The Court concluded the requirement of this certification constituted a MEE as it was in practice much harder for the latter to obtain such certification.²⁵⁷ The case is especially important as it entails measures that are distinctly and indistinctly applicable. Distinctly applicable measures are measures that directly discriminate between an imported and a domestic product and favour the domestic product without a legitimate reason.²⁵⁸ However, more interestingly, indistinctly applicable measures are measures that do not discriminate on the surface but do in fact favour domestic products over imported products.²⁵⁹ This is similar to *de facto* and *de jure* discrimination within the WTO.

What constitutes indistinctly applicable measures has received considerable examination and the CJEU has played its part in examining the nature of such measures. This was addressed in the famous case C-120/78, *Cassis de Dijon*. The case concerned a German legislation that fixed the requirements for alcoholic content in fruit liqueurs. As there was no harmonized EU legislation in force, it was up to the Member States to regulate the handling of alcoholic beverages. A company seeking to import an alcoholic beverage from France into Germany was on the grounds of the legislation prohibited to import the beverage due to its low alcoholic strength.²⁶⁰ The plaintiff argued that such fixing of alcoholic content was an unlawful restriction that hindered such products from being marketed in the German market.²⁶¹ The Court agreed and noted, "there is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic

²⁵⁵ CJEU C-8/74, *Dassonville*, 11 July 1974, para. 2.

²⁵⁶ CJEU C-8/74, *Dassonville*, 11 July 1974, para. 3.

²⁵⁷ CJEU C-8/74, *Dassonville*, 11 July 1974, para. 9.

²⁵⁸ Catherine Barnard: *The Substantive Law of the EU - The Four Freedoms*, p. 81. E.g. rules limiting channels of distribution, national rules giving preference to domestic goods, etc. see p. 83-85. .

²⁵⁹ Catherine Barnard: *The Substantive Law of the EU - The Four Freedoms*, p. 90.

²⁶⁰ CJEU C-120/78, *Cassis de Dijon*, 20 February 1979, para. 2-3.

²⁶¹ CJEU C-120/78, *Cassis de Dijon*, 20 February 1979, para. 4.

beverages should not be introduced into any other Member State".²⁶² The Court thereby established the rule of *mutual recognition* that allows member states to regulate matters regarding production and marketing of products as long as no harmonized legislation is available.²⁶³ This rule entails that all legally produced products from one member state can be sold in another member state without any restrictions, eventually giving the home state of the production the power to set the standards. This has created the problem of *race to the bottom* that involves a competition in creating a working environment with the lowest standards.²⁶⁴ However, in order to react to this problem, the Court allows derogations. The derogations can both be in form of provisional based exceptions and mandatory requirements that will be discussed below and are seen as a response to the problem. Shortly after the ruling the Commission also issued its view of the judgment, stating that when no harmonization was put in force within the EU, the rule of mutual recognition applied.²⁶⁵ The principle is now found in *the Mutual Recognition Regulation* no. 764/2008.²⁶⁶ The regulation clarifies that if a host state has decided to restrict its markets it has to provide proof for why it does so and make all necessary information available for traders.

The Court has also applied the so-called market access approach in regard to the scope of article 34 and examined if a measure impedes trade in any way. This approach was developed in the case C-110/05, *Trailers*. The case regarded an Italian legislation prohibiting certain use of a product; more precisely it prohibited the selling of motorcycles used to pull trailers.²⁶⁷ The Commission argued that this national legislation prevented the use of lawfully produced trailers in other members states in the Italian market and entailed a market restriction and a breach of article 34 TFEU.²⁶⁸ The Court accepted this argument and concluded that this prohibition of the use of the product unavoidably influenced the market and the attitude of consumers towards such products as it decreased the demand for the product in the Italian market. The Court therefore concurred that this national legislation hindered the access of these specific trailers in the Italian market. As the measure could not be justified the measures were found to constitute a MEE and a violation of article 34 of the TFEU.²⁶⁹

²⁶² CJEU C-120/78, *Cassis de Dijon*, 20 February 1979, para. 14.

²⁶³ CJEU C-120/78, *Cassis de Dijon*, 20 February 1979, para. 8.

²⁶⁴ Catherine Barnard: *The Substantive Law of the EU - The Four Freedoms*, p. 93.

²⁶⁵ *Communication from the Commission Concerning the Consequences of the Judgment Given by the Court of Justice on 20 February 1979 in case 120/78*, 3 October 1980, OJ 1980 C 256.

²⁶⁶ *The Mutual Recognition Regulation*, introductory note (3).

²⁶⁷ CJEU C-110/05, *Commission v. Italy*, 10 February 2009, para. 8.

²⁶⁸ CJEU C-110/05, *Commission v. Italy*, 10 February 2009, para. 39-40.

²⁶⁹ CJEU C-110/05, *Commission v. Italy*, 10 February 2009, para. 56-58.

The question, whether a certain selling arrangement can be MME, has also arisen. Certain selling arrangements include for example law regarding permitted opening hours to sell products, rules regarding selling location and pricing.²⁷⁰ This was addressed in the joined cases C-267/91 and C-268/91, *Keck and Mithouard*. The case concerned prosecutions against individuals who sold beer at a loss, or below the price they bought it. This was unlawful according to French law.²⁷¹ The individuals argued that the national measures restricted importation of such products as it influenced options of methods to promote the product in France. The Court, however, disagreed and examined certain selling arrangement in comparison with product requirements and noted:

By contrast, contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment (Case 8/74 [1974] ECR 837), so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.²⁷²

The Court then concluded that when a measure falls under the category of certain selling arrangements and is restrictive it does not breach EU law as long as it fulfils the conditions put forth in the paragraph above. Such rules do not prevent market access nor are they discriminative.²⁷³ The case is famous for narrowing the scope of article 34 and for reverting to a more non-discriminative approach and distinguished between product requirements and certain selling arrangements.²⁷⁴ It should be noted that whereas the EU is a customs union, all national rules that require certificates to identify the origin of a product originating from within the union or that is in free circulation are prohibited under the category of distinctly applicable measures, except justified.²⁷⁵

Article 35 of the TFEU regards QRs and MEE on exports within the Union. The article has exactly the same wording as article 34 of the TFEU but still is interpreted differently and applies only to measures that discriminate. This will be discussed in chapter 7.2.7.²⁷⁶

²⁷⁰ Catherine Barnard: *The Substantive Law of the EU - The Four Freedoms*, p. 129.

²⁷¹ CJEU joined cases C-267/91 and C-268/91, *Keck and Mithouard*, 24 November 1993, para. 2.

²⁷² CJEU joined cases C-267/91 and C-268/91, *Keck and Mithouard*, 24 November 1993, para.16.

²⁷³ CJEU joined cases C-267/91 and C-268/91, *Keck and Mithouard*, 24 November 1993, para 17.

²⁷⁴ Tamara Perisin: *Free Movement of Goods and Limits of Regulatory Autonomy in the EU and the WTO* p. 30-31.

²⁷⁵ Sven Norberg et al: *EEA Law a Commentary on the EEA Agreement*, p. 341.

²⁷⁶ Tamara Perisin: *Free Movement of Goods and Limits of Regulatory Autonomy in the EU and the WTO* p. 25.

5.3.4.2 External Non-Fiscal Barriers

The main principle regarding importation and exportation to and from non-EU members is free trade. The freedom of exportation is put forth in article 1 of *Regulation 1061/2009 Establishing Common Rules for Exports*.²⁷⁷ The article only refers to QRs but now also applies to MEE. This was established in the case 70/94, *Werner*. The case concerned a refusal for exportation license for owns to Libya on the grounds of public security reasons.²⁷⁸ The Court referred to the GATT and EU regulation and concluded that the article could also apply to MME.²⁷⁹ Imports from non-EU members are based on the same main principles, see *Regulation 260/2009 on the Common Rules for Imports*.²⁸⁰

5.3.5 Derogations from EUs Trade Law

Various derogations are permitted from some of the extensive trade law just explained. However, regarding fiscal barriers to trade, almost no derogations are allowed, as there are no exceptions permitted to the prohibition of article 30 of the TFEU and very limited exceptions to the internal taxation provision. On the other hand, various exceptions are allowed to non-fiscal measures. Article 36 of the TFEU allows for certain derogations to the main rule that prohibits non-fiscal measures. The article includes a list of legitimate values and states:

The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

As time has passed the CJEU has also, as a response to social change, added to the list of derogations described in article 36 of the TFEU. The CJEU first did this in the former mentioned *Cassis de Dijon* case. In the case Germany set forth two arguments to justify its restrictive measures based on public health and consumer protection considerations that both were dismissed.²⁸¹ The Court rejected the attempted justification but however noted:

²⁷⁷ Council Regulation No. 1061/2009 *Establishing Common Rules for Exports*, 19 October 2009, OJ L291/1.

²⁷⁸ CJEU C-70/94, *Werner*, 17 October 1995, para. 22.

²⁷⁹ CJEU C-70/94, *Werner*, 17 October 1995, para. 22.

²⁸⁰ Council Regulation No. 260/2009 *on the Common Rules for Imports*, 26 February 2009, OJ 2009 L84/1.

²⁸¹ CJEU C-120/78, *Cassis de Dijon*, 20 February 1979, para. 1-4.

Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the Consumer.²⁸²

These other non-listed values are now referred to as *mandatory requirements*. Under mandatory requirements fall e.g. consumer protection, public health, protection of the environment etc. What falls under mandatory requirements is undefined and up for interpretation. It should though be stressed that these values are in form of derogations that are to be applied carefully. The Court has therefore developed constraints on the application of these measures. The derogations may therefore only be based on objective of the EU, be neutral in origin and may not be enforced solely to promote economic prosperity.²⁸³

In addition to these general conditions, the Court has adopted the *proportionality test* based on suitability and necessity of the measures to balance the different interests. This proportionality test is generally strict but the Court applies it on case-by-case basis and the outcome seems to depend on which derogation is under scrutiny.²⁸⁴ The resemblance between article 36 of the TFEU and article XX of the GATT will be discussed in chapter 7. 2.8.

To the main rules regarding free importation and exportation of products from and to third countries, are also various derogations. Derogations to freedom of exports are mentioned in the article 6 and 8 in regulation on Common Rules on Exportation and are permitted on the grounds of preventing shortages or in the case of an emergency. Article 10 of the regulation also permits derogations based on article 36 of the TFEU but these articles are to be interpreted together.²⁸⁵ The same applies to the regulation on Common Rules for Imports where there are also derogations based on article 36 of the TFEU. In addition the regulation permits *safeguard measures*.²⁸⁶ Safeguard Measures are an exception from the rule of free importation, in the sense that it permits states to impose measures to decrease the quantity of a certain product in the market. In addition, to safeguard measures, the internal market can, can also be protected through the application of anti-dumping duties and countervailing duties, both exceptions to the free importation rule and both based on WTO law.²⁸⁷ The applications of these measures go beyond the scope of this thesis.

²⁸² CJEU C-120/78, *Cassis de Dijon*, 20 February 1979, para. 8.

²⁸³ Catherine Barnard: *The Substantive Law of the EU - The Four Freedoms*, p 171-172.

²⁸⁴ Catherine Barnard: *The Substantive Law of the EU - The Four Freedoms*, p.179.

²⁸⁵ See e.g. CJEU C-70/94, *Werner*, 17 October 1995, para 25.

²⁸⁶ Catherine Barnard: *The Substantive Law of the EU - The Four Freedoms*, p. 127 and 154-155.

²⁸⁷ Catherine Barnard: *The Substantive Law of the EU - The Four Freedoms*, p. 215-216.

6 The European Economic Area

6.1 Foundation of the EFTA and the European Economic Area

The European Free Trade Association, EFTA, is a FTA between Iceland, Liechtenstein, Norway and Switzerland and an intergovernmental organization that has the main goal of promoting free trade among its member states.²⁸⁸ It is based on the *EFTA Convention*, originally signed in 1960, only covering trade in goods. However, with time the scope of the convention has expanded and does now include various other trade related issues. In short, the convention has three main goals: to ensure free trade and trade liberalization, to conclude FTAs with other partners on behalf of its members and lastly, to manage and supervise the function of the EEA Agreement.²⁸⁹

EFTA was established as an alternative for states in Europe that did not want to join the EU but still wanted to participate in European trade cooperation on more traditional legal grounds.²⁹⁰ In 1984 negotiations on further improving the cooperation among the EFTA states and the EU began. This resulted in the conclusion of the *Agreement on the European Economic Area* (the EEA Agreement) in Oporto on 2 May 1992. The EEA Agreement is an international agreement that extends the EU internal market to EU non-member states, Iceland, Norway and Lichtenstein.²⁹¹

6.2 EEA Institutional Framework and Functionality

6.2.1 Structural Framework of the EEA Agreement

The EEA Agreement is divided into main parts, protocols and annexes that according to article 119 of the agreement "all constitute an integral part of the agreement."²⁹² The main legal source of EEA law is therefore the agreement itself. Secondary law stemming from the EU and considered EEA relevant is also an important legal source as most of the substantive EEA law is based on secondary legislation registered in the annexes. Protocols usually only cover issues that regard EEA rules and therefore they are not based on EU rules.²⁹³ In addition, various other sources hold fundamental value in EEA law such rulings of the CJEU and the EFTA Court and various soft law instruments.²⁹⁴ In short, all relevant decisions or

²⁸⁸ The original EFTA states were Austria, Denmark, Norway, Portugal, UK, Switzerland and Sweden.

²⁸⁹ *This is EFTA*, p. 42.

²⁹⁰ Sven Norberg et al: *EEA Law a Commentary on the EEA Agreement*, p. 43.

²⁹¹ *Agreement on the European Economic Area*, 3 January 1994, OJ 1993 L 1, p. 3.

²⁹² According to article 2(a) of the EEA Agreement the concept "Agreement" refers to all these parts of the agreement, see also Alth. 1992-1993, section A, p. 50.

²⁹³ Sven Norberg et al: *EEA Law a Commentary on the EEA Agreement*, p. 75.

²⁹⁴ Davíð Þór Björgvinsson: *EES réttur og landsréttur*, p. 32-37.

legal sources stemming from the EU/EEA are to be taken into account when EEA law is applied, both binding and unbinding, as well as legislation and individual decisions.²⁹⁵ This is referred to as the *acquis communautaire* meaning that all rules relating to the function of the internal market take effect in the EEA regardless of whether the rules were composed before or after the signature of the agreement.²⁹⁶

The EEA Agreement establishes an institutional framework based on a two-pillar approach, one regarding the EU and the other regarding the EFTA.²⁹⁷ The institutional framework of the EEA is addressed in part VII of the EEA Agreement. In addition two important institutions are in charge of the supervision of the agreement. These are the *EFTA Surveillance Authority* (ESA) that is in charge of ensuring that the member states fulfil their EEA obligations and the *EFTA Court* that is in charge of interpreting and developing the EEA Agreement by issuing advisory opinions on various EEA issues in the member states.²⁹⁸

The institutional framework of the EEA mostly corresponds to the EU pillar. In comparison with the institutional framework of the WTO, it is sufficient to refer to the former discussion in relation to the EU and the WTO institutional framework.

6.2.2 Objectives of the EEA Agreement: Opinion 1/91

The main purpose of the EEA Agreement is, according to article 1, to “promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, and the respect of the same rules, with a view to creating a homogeneous European Economic Area.” The goal of the EEA Agreement can be divided into two parts; the first to achieve further economic and political cooperation and the second relates directly to completing and expanding the internal market.²⁹⁹ It is therefore first and foremost a trade agreement aiming at removing trade barriers within the area and increasing economic growth.³⁰⁰

In comparison with the objectives of the EU, the fundamental difference lies in the

²⁹⁵ Stefán Már Stefánsson: *Evrópuréttur: Réttarreglur og stofnanir Evrópubandalagsins*, p. 111.

²⁹⁶ Thérèse Blanchet, Risto Piipponen and Maria Westman Clément: *The Agreement on the European Economic Area (EEA)*, p. 22.

²⁹⁷ Thérèse Blanchet, Risto Piipponen and Maria Westman Clément: *The Agreement on the European Economic Area (EEA)*, p. 4.

²⁹⁸ See *Agreement Between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice*. The term court will in this chapter refer to the EFTA Court and not the CJEU.

²⁹⁹ Davíð Þór Björgvinsson: *EES réttur og landsréttur*, p. 41.

³⁰⁰ Maria Elvira Méndez-Pinedo: *EC and EEA Law A Comparative Study of the Effectiveness of European Law*, p. 31.

political agenda supporting of the EU.³⁰¹ Negotiations of the EEA Agreement therefore became troublesome and before it was concluded the Commission sought a formal opinion from the CJEU regarding the compatibility of the draft Agreement of the EEA with EU law. In the first opinion, *opinion 1/91*, the CJEU addressed the different objectives of the EU and the EEA. The Court first examined the aim and context of the EEA Agreement in relation to *homogeneity* and interestingly concluded, that that even though the EEA Agreement held the same substantive provisions, the fundamental difference between the legality of the agreements could lead to different interpretation.³⁰² It furthermore concluded, among other things, that the accomplishment of establishing the internal market within the EU was a means to achieve another end, a European unity, while the objectives of the EEA were mostly to support economic relations among its members.³⁰³

The opinion led to new negotiations regarding the institutional structure of the EEA Agreement that was found to be EU compatible by the Court in *opinion 1/92*.³⁰⁴

6.2.3 Legal Effect of the EEA Agreement

Having reviewed the objectives of the EEA Agreement the question arises: how are these objectives achieved? The EEA is considered to be a legal system *sui generis* but not in the same way as the EU that is a supranational institution. This was formally established in the case E-9/97, *Erla María*, a case concerning an incorrect implementation of a directive and the interpretation of article 6 of the EEA Agreement.³⁰⁵ In that case the Court summarized the legal effect of the agreement as such:

The Court concludes from the foregoing considerations that the EEA Agreement is an international treaty *sui generis* which contains a distinct legal order of its own. The EEA Agreement does not establish a customs union but an enhanced free trade area, see the judgment in Case E-2/97 *Maglite* [1997] EFTA Court Report 127. The depth of integration of the EEA Agreement is less far-reaching than under the EC Treaty, but the scope and the objective of the EEA Agreement goes beyond what is usual for an agreement under public international law.³⁰⁶

This paragraph shows how the function of the EEA Agreement differs from the EU and from other traditional international agreements. The preamble of the agreement implies that the fundamental difference between the EEA and the EU is that the ratification of the EEA

³⁰¹ Sven Norberg et al: *EEA Law a Commentary on the EEA Agreement*, p. 184.

³⁰² CJEU Opinion 1/91, *Agreement on the European Economic Area*, 14 December 1991, para. 14.

³⁰³ CJEU Opinion 1/91, *Agreement on the European Economic Area*, 14 December 1991, para. 15-18.

³⁰⁴ CJEU Opinion 1/92, *re Agreement on the European Economic Area*, 10 April 1992, para. 42.

³⁰⁵ EFTAC E-9/97, *Erla María Sveinbjörnsdóttir v. Iceland*, 10 December 1998, para. 1.

³⁰⁶ EFTAC E-9/97, *Erla María Sveinbjörnsdóttir v. Iceland*, 10 December 1998, para. 59.

Agreement does not entail a transfer of sovereign power to the institutions of agreement. Nonetheless, based on the aim of reciprocity and homogenous application an obligation exists among member states to ensure the effectiveness and proper function of the EEA Agreement.³⁰⁷ This is articulated in article 3 of the agreement that states that "the Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this agreement."

The biggest difference between the legal nature of the EU and the EEA is also that the latter excludes the doctrines of direct effect, direct applicability and supremacy.³⁰⁸ However, that does not change the fact that EEA rules do have direct effect and supremacy in the EU states, just as is the norm *within the EU*.³⁰⁹ This is now well established in relation to four freedoms.³¹⁰ The main issue rather relates to what legal effect EEA rules have *within the EEA*. The dynamic legal nature of the EEA Agreement is therefore occasionally under debate before the EFTA Court and with time few main principles have emerged that are now applied and pursued to ensure the functionality of the agreement and as a response to the EU pillar.³¹¹ These main principles relate to the special supremacy of EEA law, reciprocity and homogeneity, state liability and to the indirect effect of the EEA Agreement.³¹²

According to article 6 of the EEA Agreement, EEA law should always, when possible, be interpreted in conformity with EU law. However, in addition to interpretation rules, the EEA Agreement also ensures a certain priority of EEA law over national law. Firstly in article 3 by confirming the obligation to fulfil the agreement and secondly with protocol 35 that states:

For cases of possible conflicts between implemented EEA rules and other statutory provisions, the EFTA States undertake to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in these cases.

³⁰⁷ Maria Elvira Mendez-Pinedo: *EC and EEA Law A Comparative Study of the Effectiveness of European Law*, p. 30

³⁰⁸ This was confirmed in the parliamentary records regarding the incorporation of the Agreement into Icelandic legislation. In the records it is stated that article 6 of the Agreement is only an interpretation rule. The Agreement is therefore not intended to receive direct effect in Icelandic law. See Alth.1991-1992, Section A, p. 5764.

³⁰⁹ See e.g. CFI T-115/94, *Opel Austria*, 22 January 1997, para 101-102.

³¹⁰ Stefán Már Stefánsson: *Evrópuréttur: Réttarreglur og stofnanir Evrópubandalagsins*, p. 85.

³¹¹ There was an on-going academic debate regarding whether EEA rules should have direct effect in EEA law see e.g. Walter Van Gerven: "The Genesis of EEA Law and the Principles of Primacy and Direct Effect", p. 955. However now there is a common understanding that non-implemented EEA law do not have direct effect see EFTAC E-1/07, *Criminal proceedings against A*, 3 October 2007.

³¹² Maria Elvira Méndez-Pinedo: *EC and EEA Law A Comparative Study of the Effectiveness of European Law*, p. 48.

With protocol 35 the supremacy of implemented EEA rules is ensured even though EEA law does not entail an unconditional doctrine of primacy as the EU.³¹³

Regarding the question of direct effect within the EEA, the case E-4/01, *Karl K. Karlsson* gave some clue. The case regarded an Icelandic monopoly on the importation and distribution of alcoholic beverages. The monopoly was not abolished until on 1 December 1995 and this prolonging was argued to breach articles 11 and 16 of the EEA Agreement whereas the agreement had entered into force on 1 January 1994. The plaintiffs therefore sought compensation from the state for their financial loss during that time.³¹⁴ The EFTA Court emphasized that *non-implemented* EEA rules could not be directly invoked by individuals before their national courts, as the conclusion of the agreement did not entail any transfer of sovereign powers but simultaneously concluded:

At the same time it is inherent in the general objective of the EEA Agreement of establishing a dynamic and homogeneous market, in the ensuing emphasis on the judicial defence and enforcement of the rights of individuals, as well as in the public international law principle of effectiveness, that national courts will consider any relevant element of EEA law, whether implemented or not, when interpreting national law.³¹⁵

The case established the doctrine of *indirect effect* for the first time in EEA law.³¹⁶ The Court furthermore confirmed that although the doctrine of direct effect was not applicable it did not prevent the state from becoming liable for possible financial loss that a private company had suffered due to the failure of the Icelandic state to harmonize the legislation regarding alcoholic beverages with EEA law. The state was therefore liable as long as the right conditions were fulfilled.³¹⁷ The conclusion that EEA law does not have direct effect has been confirmed in more recent case law, see E-1/07, *Criminal proceedings against A*.³¹⁸

6.3 EEA Rules Regarding Free Movement of Goods

6.3.1 The EEA as a Free Trade Union: Rules of Origin

Before moving on to the substantive rules of the EEA Agreement it is worth revisiting opinion 1/91 that emphasized that identical rules within the EU and the EEA did not necessarily lead to an identical interpretation methods. However, regarding specific

³¹³ This is sometimes called Quasi Primacy and is often referred to Carl Baudenbacher. See further Maria Elvira Méndez-Pinedo: *EC and EEA Law A Comparative Study of the Effectiveness of European Law*, p. 32.

³¹⁴ EFTAC E-4/01, *Karl K. Karlsson hf. v. The Icelandic State*, 30 May 2002, para. 2.

³¹⁵ EFTAC E-4/01, *Karl K. Karlsson hf. v. The Icelandic State*, 30 May 2002, para. 28.

³¹⁶ Maria Elvira Méndez-Pinedo: *EC and EEA Law A Comparative Study of the Effectiveness of European Law*, p. 174.

³¹⁷ EFTAC E-4/01, *Karl K. Karlsson hf. v. The Icelandic State*, 30 May 2002, para. 34.

³¹⁸ EFTAC E-1/07, *Criminal proceedings against A*, 3 October 2007, para. 31.

provisions, such as the ones relating to free movement of goods, the chances of a similar interpretation is much higher and nowadays the interpretation is generally identical.³¹⁹

All in all, the EEA Agreement is substantially similar to EU rules regarding trade in goods and its provisions are mostly identical with the provisions of the TFEU.³²⁰ However, due to the different legal nature and purpose of the EEA Agreement, its rules inevitable differ from the EUs in few fundamental ways. Part II of the agreement addresses rules regarding free movement of goods and article 8 (1) ensures free movement of goods within the area. As in the EU, the term "good" is not defined in the Agreement. Article 8 of the agreement however provides clues stating in paragraph 2 that the agreement only applies to goods originated in a member states. Furthermore, paragraph 3 states that the agreement only applies to:

- (a) products falling within Chapters 25 to 97 of the Harmonized Commodity Description and Coding System, excluding the products listed in Protocol 2;
- (b) products specified in Protocol 3, subject to the specific arrangements set out in that Protocol

In addition to article 8, other regulations that have been adopted and are EEA relevant, such as technical standards, examinations, certifications etc. can influence the definition of a good.³²¹ Judging by the article, it is clear that the EEA Agreement has a narrower scope than the EU regulation in relation to what falls under trade in goods within the area.³²²

The most distinctive difference between the EEA and the EU is first and foremost that the EEA is not a customs union. It is a free trade area that does not share a common external tariff as the EU. Instead other measures are applied to determine which products are entitled to free movement within the area. These measures relate to establishing the *origin of product*, as only products meeting certain local requirements can be considered originating in the area. The rules of origin are addressed in article 9 of the agreement that confirms that only products that are originated in the EFTA states, that also are members of the EEA, can enjoy the free movement of goods within the EEA. Consequently, the EFTA states have a strict customs inspection on products that are imported into the area from third countries.³²³ Rules of origin of goods are further elaborated in protocol 4 of the EEA Agreement, entailing the necessary criteria to establish what products are considered originated in the EEA. Article 2 of the

³¹⁹ Piet Eeckhout: *EU External Relations Law*, p. 313. This has been confirmed by case law see e.g. CFI T-115/94, *Opel Austria*, 22 January 1994, para. 103-112. This will not be further discussed here.

³²⁰ Stefán Már Stefánsson: *Evrópusambandið og Evrópska efnahagssvæðið*, p. 414.

³²¹ Stefán Már Stefánsson: *Evrópusambandið og Evrópska efnahagssvæðið*, p. 414.

³²² Thérèse Blanchet, Risto Piipponen and Maria Westman Clément: *The Agreement on the European Economic Area (EEA)*, p. 6.

³²³ Stefán Már Stefánsson: *Evrópusambandið og Evrópska efnahagssvæðið*, p. 413.

protocol entails the main principle on origin of good in the EEA. According to the article, products, “wholly obtained or sufficiently worked or processed” in the EEA are considered to be originated within the area. The protocol then also entails criteria for what products fall under this definition, in article 4 and 5 of the protocol. However, in article 3, the rule of diagonal cumulation of origin can apply as an exception. In addition, the protocol also entails rules regarding territorial requirements and lays out detailed rules regarding proof of origin.³²⁴

The rules of origin matter within the EEA whereas only products originating from within the EEA will benefit from the prohibition of customs duties, QRs, discriminative internal taxation and the special rules regarding agricultural and fisheries products.³²⁵ These rules will now be discussed.

6.3.2 EEA Rules on Customs Duties, Quantitative Restrictions and Derogations

Article 10 of the agreement prohibits "customs duties on imports and exports, and any charges having equivalent effect" within the area and is compatible with article 30 of the TFEU.³²⁶ The application of the article is therefore similar to the discussion before in the EU chapter and therefore any payment that is imposed when goods cross borders falls under the article, regardless of its amount or its protectionist purpose.³²⁷ In EEA law the same exceptions also apply that prevent a measure from falling under the scope of the agreement.³²⁸ Finally, the prohibition in article 10 also includes customs duties of fiscal nature within few exceptions found in protocol 5. This is in parallel to article 30 of the TFEU, which is though without exceptions.

Articles 11 and 12 of the agreement are compatible with articles 34 and 35 of the TFEU with the exception of rules regarding origin. Within the EEA, rules regarding proof of origin are permitted, as only products originating from the EEA benefit from the agreement.³²⁹ Besides few exceptions the EEA rules are compatible with the TFEU and are therefore directly related to the CJEU case law. Moreover the EEA has agreed to the *Mutual Recognition Regulation*. This compatibility has been confirmed by the EFTA Court and its

³²⁴ *Agreement on the European Economic Area Protocol 4*, art. 15-31. According to article 15 it uses the of movement certificate EUR.1, a movement certificate EUR-MED, and “origin declaration EUR-MED” as methods to establish the proof of origin.

³²⁵ Thérèse Blanchet, Risto Piipponen and Maria Westman Clément: *The Agreement on the European economic area (EEA)*, p. 43.

³²⁶ The principles also apply to customs duties of a fiscal nature without prejudice to the arrangements set out in Protocol 5 of the agreement, see article 10 EEA agreement.

³²⁷ See the former discussion regarding the CJEU C-2 and C-3/69, *Diamantarbeiders*, 1 July 1969.

³²⁸ See chapter 5. Sven Norberg et al: *EEA Law a Commentary on the EEA Agreement*, p. 323-325.

³²⁹ Sven Norberg et al: *EEA Law a Commentary on the EEA Agreement*, p. 341.

case law.³³⁰ Article 13 on derogations is compatible with article 36 of the TFEU. It only applies when certain conditions are fulfilled and is strictly applied within the EEA. It has as especially been provoked as a justification for restricting trade in alcoholic and tobacco products.

The scope of article 11 and its relationship with the TFEU was addressed in the case E-16/10, *Philps Morris*.³³¹ The dispute concerned a Norwegian legislation enforcing a total ban on visual display of tobacco products in Norway and whether such ban was compatible with article 11 of the EEA Agreement.³³² The question related to whether the ban entailed an indirect discrimination against imported products as there was no current tobacco production in Norway, but there had been until 2008. Philips Morris, one of the importers of tobacco products into Norway argued that this ban was inherently discriminative and hindered its market access to the Norwegian market.³³³ The Court first examined the national ban and concluded that it fell under a certain selling arrangement as the national provisions as it "lay down the manner in which these products may be presented at venues legally permitted to sell them".³³⁴ The Court then examined if the ban applied to all traders in the Norwegian market and how it affected the traders in the market and if they did so in the same way, directly or indirectly.³³⁵ The conclusion of the Court was that it was up to the national court to evaluate whether the measure in fact treated the former produced Norwegian tobacco products differently than the imported products.³³⁶ This case shows how the EFTA Court follows the former discussed methodology of the CJEU in relation to the scope of article 34 of the TFEU.

6.3.3 EEA Rules on Internal Taxation

Finally, article 14 of the EEA Agreement, regards internal taxation and is in parallel to article 110 of the TFEU. In general, taxation is allowed within the EEA, however, any kind of discrimination, direct and indirect, that promotes domestic products is prohibited. The article applies to similar products. If domestic and imported products are not similar, paragraph 2 can prevent protectionist taxation, given that the products are in competition. Due to the

³³⁰ See eg. EFTAC E-5/96, *Ullensaker*, 14 May 1997, para. 27-37.

³³¹ EFTAC E-16/10, *Philip Morris*, 12 September 2011.

³³² EFTAC E-16/10, *Philip Morris*, 12 September 2011, para. 5

³³³ EFTAC E-16/10, *Philip Morris*, 12 September 2011, para. 15-17.

³³⁴ EFTAC E-16/10, *Philip Morris*, 12 September 2011, para. 45.

³³⁵ Conditions laid out in CJEU joined cases C-267/91 and C-268/91, *Keck and Mithouard*, 24 November 1993, para.16-17.

³³⁶ EFTAC E-16/10, *Philip Morris*, 12 September 2011, para.50.

compatibility between article 14 of the EEA Agreement and article 110 of the TFEU, the coverage on article 110 of the TFEU will here suffice.

However, to provide an insight into the function of the EEA rules, the case E-6/07, *Hob Vin* will briefly be reviewed.³³⁷ The case regarded a port charge imposed on imported alcoholic products entering Iceland from other EEA countries but charges imposed differed depending on whether a product entailed alcohol or not. This difference in the charge was argued to constitute a violation of article 10, 11 or 14 of the EEA Agreement.³³⁸ The addressed these issues and began by drawing the line between article 10 and 14. It immediately ruled out the applicability of article 10, as the charges were imposed regardless of where a product was coming from another domestic port or from a foreign port and did not necessarily entail any crossing over borders.³³⁹ The Court then assessed the applicability of article 14 and its broad scope and assumed that the charge should be regarded as an internal taxation if there was no other option available for importers when importing products.³⁴⁰ Consequently, it examined whether the measure was discriminatory in regards to the fact that the charge was nearly only levied on imported alcoholic beverages in comparison to domestic alcoholic beverages.

The Court concluded that the charge was levied on all who needed to use the services and the fact that domestic products did not have to pay the charge and were almost always transported by road did not make the charge discriminative.³⁴¹ The Court then examined if the *different charge* depending on whether a product entailed alcohol or not, constituted a discriminatory measure when imported alcoholic beverages were compared to domestic non-alcoholic beverages.³⁴² In order for article 14 to apply in this sense, the products needed to be similar or in competition and the Court easily found that the alcoholic products and non-alcoholic products were not similar products. Therefore paragraph 2 came under discussion. When the Court examined the competitive relationship between the products it established the three-stage approach:

The second paragraph of Article 14 of the EEA calls for an assessment of whether or not the tax is of such a kind as to have the effect, on the market in question, of reducing potential

³³⁷ EFTAC E-6/07, *Hob Vin*, 5 March 2008.

³³⁸ EFTAC E-6/07, *Hob Vin*, 5 March 2008, para. 1-3.

³³⁹ EFTAC E-6/07, *Hob Vin*, 5 March 2008, para. 26. Regarding article 11 the Court emphasized that the article does not apply to fiscal measure and was therefore not applicable. EFTAC E- 6/07, *Hob Vin*, 5 March 2008, para. 36.

³⁴⁰ EFTAC E-6/07, *Hob Vin*, 5 March 2008, para. 37-39.

³⁴¹ EFTAC E-6/07, *Hob Vin*, 5 March 2008, para. 47.

³⁴² EFTAC E-6/07, *Hob Vin*, 5 March 2008, para. 49.

consumption of imported products to the advantage of competing domestic products. For this to be the case, it is not sufficient that the relevant products are in competition with one another. It must further be demonstrated that the higher tax rate applies chiefly to the imported products, cf. *Einarsson*, paragraph 31. Moreover, it must be demonstrated that the difference in tax burden caused by the charge in question would have an effect on the cross- elasticity of the demand. In making this assessment, one must take into account *inter alia* the discrepancy in price which may exist between the products independently of that difference. It is for the national Court to assess whether those three conditions are fulfilled in the present case.³⁴³

In short, the Court concluded that the port charges were not discriminative, whereas the charges did not influence the market in such a way that it reduced the demand for imported alcoholic products.³⁴⁴

Finally, regarding exportation among the parties of the EEA, article 15 applies. It entails that no discrimination shall be conducted between internal tax that is repaid and the one that is imposed.

6.3.4 Other Relevant EEA Rules

In comparison to the EU few crucial issues are exempted from the EU in this regard. Firstly, the EEA does not adhere to the CCP, the EMU or the justice and home affairs of the EU.³⁴⁵ Also, when article 8 of the EEA Agreement is examined it is clear that the Agreement excludes EU common policy regarding fisheries and agricultural products. Fish is dealt with in protocol 9 of the EEA Agreement and relates to the WTO framework. Rules regarding trade in agricultural products are found in article 9 of the EEA and in protocol 3 of the EEA Agreement that only addresses *processed* agricultural products. This also becomes clear when article 8 of the Agreement is examined as it clearly applies to a fewer categories of the *Harmonised Commodity Description and Coding system* (discussed in the next chapter), leaving out categories that address agricultural products.³⁴⁶ Negotiations regarding trade in *basic* agricultural products are however based on bilateral agreements.³⁴⁷ Finally, the EEA Agreement ensures trade facilitation. According to chapter 3 of the Agreement members are therefore committed to simplify administrative trade procedures, border controls, etc.

³⁴³ EFTAC E-6/07, *Hob Vin*, 5 March 2008, para. 52.

³⁴⁴ EFTAC E-6/07, *Hob Vin*, 5 March 2008, para. 54.

³⁴⁵ *This is EFTA*, p.

³⁴⁶ Thérèse Blanchet, Risto Piipponen and Maria Westman Clément: *The Agreement on the European economic area (EEA)*, p. 45.

³⁴⁷ *This is EFTA*, p. 17.

6.4 Conclusion

The EEA Agreement is an international agreement that might be categorised somewhere between the WTO and the EU. It goes further in integration than the WTO but is however not a supranational institution as the EU. The rule of direct effect does therefore not apply. Regarding the substantive trade law of the EEA, its provisions on trade in goods are mostly compatible with the TFEU. The discussion in the next chapter, relating to EU substantive trade rules therefore also refers, when fitting, to the similar provisions of the EEA Agreement.

7 Legal and Substantive Comparison

7.1 Legal Comparison

7.1.1 Institutional Structure and Membership

Before moving on to the substantive comparison between the trade provisions of the WTO and the EU, the differences in their institutional structure, scope and function must first be addressed. The terms institutions and organizations will be equally applied when referring to the EU or the WTO.³⁴⁸

The WTO and the EU both have legal personalities and are rule-based legal systems.³⁴⁹ However, the difference in their primary legal sources is considerable. The EU legal framework is more comprehensive, based on treaties, extensive secondary law, rulings of the CJEU and even soft law instruments. The WTO law is first and foremost based on its negotiated agreements; the WTO Agreement and the agreements annexed to it that are subjectively narrowed to trade.³⁵⁰ It is noteworthy, that the forum mentioned WTO rule of single undertaking applies, in a way, in both legal regimes. When a state joins the EU, it is committing to all the substantive agreements, regulations and rules of the EU, as well as its legal framework. The rule therefore also applies in the EU, but on a larger scale.

Both the WTO and the EU possess institutions that govern their function. The institutional frameworks of these organizations were thoroughly examined in the previous chapter and at first glance the EU institutional structure is undoubtedly more complex than the WTOs. To review, the EU has seven main institutions that all contribute to the function of the EU, internally and externally.³⁵¹ Furthermore, the EU institutional framework is based on the

³⁴⁸ Amin Alavi recalls in its article "Negotiating in the Shadow of Good Faith", p. 21, that an institution in international relations is a synonym for the principles, norms, rules and decision-making processes that apply to a certain international actor.

³⁴⁹ Amin Alavi: "Negotiating in the Shadow of Good Faith", p. 21,

³⁵⁰ Bugge Thorbjørn Daniel: "The WTO Institutions", p. 26.

³⁵¹ Paul Graig and Gráinne De Búrca: *EU Law*, p. 70.

principles of conferral and competence. On the grounds of these principles, the institutions have the capacity to conclude on matters, both trade related and non-trade related, and to even participate in international relations on behalf its member states.³⁵² However, in regard to the question of competence, the relationship between the institutions can often be complex as well as the relationship between the institutions and its member states. This sometimes creates an internal institutional power struggle regarding the question of *who* can act on behalf of the EU externally, the Commission representing the EU as a whole or the Council representing the member states.³⁵³ These competence issues are not within the WTO and the EEA. The WTO is based on a traditional international cooperation and cannot interfere with the internal affairs of its members. In addition, these institutional bodies have limited powers to be policy creative, unlike the EU institutions that possess the capacity to enforce law and adopt legislation, within the scope of the treaties.³⁵⁴

The WTO institutional structure is much more modest and is based on two main institutions that are both represented by its members: the Ministerial Conference, the highest authority within the WTO, and the General Council, that resembles the Council of Europe and the European Council.³⁵⁵ In the EU there is no hierarchy among the institutions on the grounds of the principle of institutional balance. However, in relation to the WTO, the Commission is an important player whereas it formally represents the EU and sets the agenda. In contrast, the WTO does not possess such an institution and within the WTO, the members represent themselves with little interference from the WTO secretariat.³⁵⁶ The WTO Director General however seems to hold a similar role as the president of the Commission as it can direct the focus of negotiations by drafting agreements.³⁵⁷ In addition, the organizations both hold judicial bodies: The CJEU, an independent body that makes binding rulings, and the DSB, a body that concludes reports that have to be adopted with consensus. The function of the DSB is therefore unarguably weaker than the CJEU, although most of the reports get adopted.³⁵⁸ Finally, the EU holds institutions that do not exist within the WTO. These are

³⁵² Bart Van Vooren and Ramses Wessel: *EU External Relations Law*, p. 36.

³⁵³ Stijn Billiet: "From GATT to the WTO: Internal Struggle for External Competences in the EU", p. 913.

⁷ Marco Slotboom: *A Comparison of WTO and EC Law: Do Different Objectives and Purposes Matter for Treaty Interpretation*, p. 61.

³⁵⁵ Marco Slotboom: *A Comparison of WTO and EC Law: Do Different Objectives and Purposes Matter for Treaty Interpretation*, p. 60.

³⁵⁶ Amin Alavi: "Negotiating in the Shadow of Good Faith", p. 41.

³⁵⁷ See e.g. *The Dunkel Draft 1991*.

³⁵⁸ Marco Slotboom: *A Comparison of WTO and EC Law: Do Different Objectives and Purposes Matter for Treaty Interpretation*, p. 62.

institutions such as the Central Bank and the EU Parliament consisting of elected representatives.

The membership of the organizations is also different. The WTO is a universal organization, currently holding 161 members, both states and customs territories.³⁵⁹ On the other hand, the EU only represents states that have gone through the accession process on the grounds of article 49 of the TEU. Moreover, a membership of the EU is bound to a certain regional limit.

7.1.2 Scope and Function

7.1.2.1 Scope

The EU and WTO fundamentally share the same goal, to promote trade liberalization and to encourage trade cooperation among its states.³⁶⁰ However, in practice they pursue this goal differently. While the EU pursues it as a part of a bigger goal of creating a full-integrated Union, the WTO pursues it as its ultimate goal.³⁶¹ The same can be said about the difference between the EFTA and the EU; as the EFTA mostly aims at pursuing trade liberalization rather than on further economic integration.

The scope of the WTO is defined in article II of the WTO Agreement, that states: "The WTO shall provide the common institutional framework for the conduct of trade relations among its members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement". The preamble of the WTO Agreement also manifests clearly that the main objectives of the organization are to increase trade liberalization. The scope of the EU is more ambitious as the EU represents much more than a trade union. The EU is also a political body that promotes various other goals than trade, such as human rights and democracy.³⁶² This ambition of the EU is best reflected in the preamble of the TFEU where it is stated that Union is: "resolved to continue the process of creating an ever closer Union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity". In addition, the scope of the EU also differs from the perspective of its CCP that reflects the external scope of the EU legal rules. The WTO does not possess a similar tool to the CCP.

³⁵⁹ The last member to join was Seychelles that joined 25 March this year see "Seychelles to become 161st WTO member", https://www.wto.org/english/news_e/news15_e/acc_syc_01apr15_e.htm.

³⁶⁰ Gráinne De Búrca and Joanne Scott: "The Impact of WTO on EU Decision-Making", p. 2

³⁶¹ Tamara Perišin: *Free movement of Goods and Limits of Regulatory Autonomy in the EU and the WTO*, p. 3-4.

³⁶² Tamara Perišin: *Free movement of Goods and Limits of Regulatory Autonomy in the EU and the WTO*, p 4.

7.1.2.2 Function and Decision-Making Process

In order to achieve its objectives an organization needs to function properly. The function of the WTO is described in article III of the WTO Agreement. According to the article the WTO has two main functions; the first is to ensure the right implementation and operation of the WTO framework, and the second to provide a forum for its members to negotiate on trade matters. Needless to say the function of the EU, as a supranational organization, is more extensive. According to article 10 of the TEU the function of the EU is based on a representative democracy. That is meant to ensure that all decisions are made on democratic grounds.

The decision-making authority of the WTO is in the hands of the representatives of the member states, sitting in the Ministerial Conference and the General Council. According to article IX:1 of the WTO Agreement the WTO makes its decisions based on *consensus*. Footnote to article IX:1 defines consensus as "if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision." When a decision cannot be based on consensus, each member has, according to the article, one vote and the main principle is the majority with some exceptions found in the agreements. Only members can propose amendments or new law in the WTO and such proposals can only be adopted when no other member objects to it.³⁶³ This can lead to slow process in reaching negotiations as can be reflected in stranding of the current negotiation round, the Doha Round.³⁶⁴ In addition, the members tend to promote their own interest rather than the interests of the WTO as an international organization. The organization is therefore "member-driven" and a traditional intergovernmental body.³⁶⁵

The decision-making process in the EU is much more complex than the WTOs and is split among all its main institutions that share the competence to set the EUs agenda.³⁶⁶ The process is therefore not based on consensus and entails the interaction between all the main institutions. This relates the theory of multi-level governance.³⁶⁷ The theory explains how all the actors within the EU along with its member states participate in the law- and policy-making process. There is no formal hierarchy among the participating institutions in the decision-making process within the EU. The Commission, Parliament and the Council

³⁶³ Amin Alavi: "Negotiating in the Shadow of Good Faith", p. 32.

³⁶⁴ Amin Alavi: "Negotiating in the Shadow of Good Faith", p. 27. In fact since the Uruguay round only few negotiations have been successful.

³⁶⁵ Amin Alavi: "Negotiating in the Shadow of Good Faith", p. 23.

³⁶⁶ Amin Alavi: "Negotiating in the Shadow of Good Faith", p. 23.

³⁶⁷ Paul Graig: "Democracy and Legitimacy", p. 22-23.

therefore all participate in the ordinary legislative procedure set out in article 294 of the TFEU.³⁶⁸ The same procedure applies when the EU concludes international agreements on the grounds of article 218 of the TFEU.

When the decision-making process between these organizations is compared it immediately becomes obvious how much more effective the EU system is. While the WTO relies on consensus, the decision-making authority has been transferred to the common institutions in the EU. However, from the perspective of the theory of multi-level governance, the decision-making process between these institutions is more similar than one might think, as it requires the participation and cooperation of *all* the EU institutions in the process. Also, while the WTO member states negotiate each on their own terms, the EU member states are more concerned with the common welfare and interests of the EU.³⁶⁹ This also relates to the issue that within the WTO the only goal is *to negotiate* while within the EU reaching *conclusion* is both necessary and crucial for the proper function of the Union.³⁷⁰

7.1.3 Legal Perspective

7.1.3.1 Legal Status of WTO Law in the EU

The WTO Agreement is a "mixed agreement" in EU law. Mixed agreements are agreements that both the EU itself and its member's states are collectively members of and relate to the division of competence and are an internal issue. As the EU can often not conclude agreements single-handedly, mixed agreements are often inevitable and necessary.³⁷¹ However, the adoption of mixed agreements can though sometimes be problematic and create situations where it is unclear what part of an international agreement binds who etc. In addition, it may cause issues externally in relation to negotiations.³⁷² The WTO Agreement itself is silent on competence and does not provide any explanation on how the EU, or its other members, should comply with the WTO Agreement.³⁷³ However, given that the EU holds the competence to conclude on WTO obligations, the question rather becomes what *effect* such an obligation includes.

According to article XVI: 4 of the WTO Agreement, members are obliged to ensure that their national law, regulations and administrative procedures are consistent with their WTO

³⁶⁸ Paul Graig and Gráinne De Búrca: *EU Law*, p. 3, 160-161.

³⁶⁹ Amin Alavi: "Negotiating in the Shadow of Good Faith", p. 39.

³⁷⁰ Amin Alavi: "Negotiating in the Shadow of Good Faith", p. 41-42.

³⁷¹ Piet Eeckhout: *EU External Relations Law*, p. 211-212.

³⁷² Piet Eeckhout: *EU External Relations Law*, p. 264-265.

³⁷³ Eva Steinberger: "The WTO Treaty as Mixed Agreement: Problems with the ECs and the EC Member States Memberships of the WTO", p. 840.

obligations. In addition, members must, according to article XIV:2, implement these obligations after entry into force. However, the WTO does not provide provision on how members must comply with WTO law and it is up to each member to decide how it ensures its WTO obligations. The legal nature of the organization is therefore based on the principle *pacta sunt servanda*, now codified in article 26 of the *Vienna Convention*.³⁷⁴

The EU is a formal member of the WTO and must therefore comply with its WTO obligations.³⁷⁵ It is up to the EU Council, Commission and the Parliament to ensure such compliance and the administrations of the member states also have to ensure the proper compliance with EU law, including WTO law, in their territory.³⁷⁶ According to article 216 of the TFEU, international agreements concluded by the EU are also considered to be *binding* instruments of EU law.³⁷⁷ International agreements become binding when the procedural process in article 218 of the TFEU is completed and generally there is no need for a specific transposition. However, this differs depending on the agreement and sometimes agreements need to be implemented. This for example refers to when an adjustment must be made to the current EU legislation in order to make it compliant with the international obligation.³⁷⁸

In general, WTO law is binding both for the EU and its member states according to public international law. However, what *exact* legal position WTO law holds within the EU is another question. This relates to the principles of direct effect, indirect effect, judicial review and interpretation of that will now be briefly discussed.

7.1.3.2 The Doctrine of Direct Effect

Whether or not WTO law should receive direct effect in the EU law is disputed, or at least, the CJEU has been hesitant in providing WTO law such effect in the EU although it has provided other international agreements with direct effect.³⁷⁹

The CJEU first approached the question, of direct effect of the GATT in EU law, in the joined cases C-21-24/72, *International Fruit Company*. The case concerned a regulation, putting in force protective measures on the importation of apples from third countries into the

³⁷⁴ Thomas Cottier and Krista Schefer: "The Relationship between WTO Law, National Law and Regional Law", p. 91.

³⁷⁵ This relates to the notion that the WTO was negotiated in good faith, see Amin Alavi: "Negotiating in the Shadow of Good Faith", p. 35-40.

³⁷⁶ Thomas Cottier: "Dispute Settlement in the World Trade Organization: Characteristics and Structural Implications for the European", p. 46.

³⁷⁷ This relates again the discussion above regarding theories of monism and dualism where it was assumed that the EU adheres to a combination of both.

³⁷⁸ Piet Eeckhout: *EU External Relations Law*, p. 327-328.

³⁷⁹ John Errico: "The WTO in the EU: Unwinding the Knot", p. 183. See the CJEU C-104/81, *Kupferberg*, 26 October 1982, discussed in chapter 5.

EU and whether the measure contradicted article XI of the GATT.³⁸⁰ When resolving the case the Court put forth two requirements that had to be fulfilled in order for international law to invalidate EU law and receive direct effect. Firstly, the relevant international provision had to be binding for the EU itself, and secondly, the provision had to possess the capacity to provide citizens of the EU with the ability to provoke the rights according to the obligation.³⁸¹ The Court concluded that the GATT did fulfil the first criteria, as the EU had adhered to the GATT on behalf of its member states in regard to tariff negotiations.³⁸² However, it did not fulfil the second criteria. In order to establish whether individuals of the EU could rely on the provisions of the GATT before their national courts, the CJEU examined the "spirit, the general scheme and terms of the General Agreement".³⁸³ The Court then denied direct effect to the GATT, on the grounds that the GATT was based on the principle of negotiations undertaken on the basis of "reciprocal and mutually advantageous arrangements".³⁸⁴ The Court thus concluded:

Those factors are sufficient to show that, when examined in such a context, Article XI of the General Agreement is not capable of conferring on citizens of the Community rights which they can invoke before the courts³⁸⁵

The conclusion, that the GATT does not have direct effect, has been confirmed later in case law, even after the establishment of the WTO in the case C-149/96, *the Portuguese Textiles Case*. The case regarded a memorandum of understanding, one concluded between the EU and Pakistan and another one between the EU and China, both regarding tariffs application to textile and clothing.³⁸⁶ Portugal claimed that this understanding contradicted WTO law, more specifically the GATT, the *Agreement on Textiles and Clothing* and the *Agreement on Import Licensing Procedures*.³⁸⁷ Portugal tried to convince the Court that the changes in the legal framework, with the establishment of the WTO with its DSB, should lead to direct effect of WTO law.³⁸⁸ The Court still kept its former conclusion, and emphasized the importance of negotiations and flexibility of the WTO framework, and referred to the article 22 of the DSU. The Court stated:

³⁸⁰ Joined cases 21-24/72, *International Fruit Company*, 12 December 1972, para. 3.

³⁸¹ Joined cases 21-24/72, *International Fruit Company*, 12 December 1972, para. 7-8.

³⁸² Joined cases 21-24/72, *International Fruit Company*, 12 December 1972, para. 17-18.

³⁸³ Joined cases 21-24/72, *International Fruit Company*, 12 December 1972, para. 20.

³⁸⁴ Joined cases 21-24/72, *International Fruit Company*, 12 December 1972, para. 21.

³⁸⁵ Joined cases 21-24/72, *International Fruit Company*, 12 December 1972, para. 27.

³⁸⁶ CJEU C-149/96, *Portugal v. Council*, 23 November 1999, para. 10-11.

³⁸⁷ CJEU C-149/96, *Portugal v. Council*, 23 November 1999, para. 31.

³⁸⁸ CJEU C-149/96, *Portugal v. Council*, 23 November 1999, para. 25.

While it is true that the WTO agreements, as the Portuguese Government observes, differ significantly from the provisions of GATT 1947, in particular by reason of the strengthening of the system of safeguards and the mechanism for resolving disputes, the system resulting from those agreements nevertheless accords considerable importance to negotiation between the parties.³⁸⁹

The fundamental point of this ruling therefore reinforces that the WTO Agreement is based on consensus and on negotiations.³⁹⁰ In addition to these precedents, the EU political view also seems to support this conclusion, but according to the preamble of the *Decision Adhering to the WTO Agreement* it was concluded the WTO Agreement and the agreements annexed to it would not be "susceptible to being directly invoked in Community or Member State courts".³⁹¹ From a broader view, EUs refusal to provide WTO direct effect can maybe also be a reflection of the fact that the many other states, including the USA, have refused to provide WTO such effect.

It will be sufficient in this thesis to mention that the topic of providing WTO law direct effect is both politically and academically debated. Supporters of the doctrine argue that such development can result in a better trade environment and provide the member states and their citizens with the fundamental right of trading on fair terms while simultaneously increasing the efficiency of WTO law.³⁹² Opponents however, consider that the principle is not necessary to promote international trade and that giving WTO law direct effect rather jeopardises democracy, as it is up to each state to decide how they incorporate treaty provisions and how they assemble its constitutional framework.³⁹³

7.1.3.3 Judicial Review

Whereas the Court has frequently denied WTO direct effect, the question of jurisdiction becomes important when reviewing international obligations.³⁹⁴

According to article 267 of the TFEU on preliminary rulings, the CJEU can interpret the treaties or other EU acts. The Court has come to the conclusion that it can interpret

³⁸⁹ CJEU C-149/96, *Portugal v. Council*, 23 November 1999, para. 36.

³⁹⁰ John Errico: "The WTO in the EU: Unwinding the Knot", p 187.

³⁹¹ Council Decision No. 94/800 *Concerning The Conclusion On Behalf Of The European Community As Regards Matters Within Its Competence Of The Agreements Reached In The Uruguay Round Multilateral Negotiations*, 22 December 1994, OJ 1994 L 336, preamble.

³⁹² See e.g. Thomas Cottier and Krista Schefer: "The Relationship between WTO Law, National Law and Regional Law" p. 93-97.

³⁹³ See e.g. Thomas Cottier and Krista Schefer: "The Relationship between WTO Law, National Law and Regional Law" p. 97-98. See also Piet Eeckhout: *EU External Relations Law*, p. 375.

³⁹⁴ Piet Eeckhout: *EU External Relations Law*, p. 279.

international agreements and even delegated acts stemming from the agreement.³⁹⁵ This was confirmed in the C-181/73, *Haegeman case*. The case regarded the jurisdiction of the Court to interpret an association agreement between Greece with the EU, as Greece did not have full membership of the EU at the time. The dispute regarded a charge imposed on wines imported from Greece into Belgium that was claimed to breach the association agreement.³⁹⁶ The Court accepted that it had jurisdiction to interpret the association agreement as it formed an integral part of EU law.³⁹⁷

According to article 263 of the TFEU, the Court also holds jurisdiction to review the *legality* of EU legislation. In regard to international agreements, the article is relevant in two ways: Firstly, the Court has on the grounds of this provision reviewed legality of concluded agreements. According to article 218 (11), the Court can issue reasoned opinions to establish if a *potential* commitment according to an international agreement violates EU law. On the grounds of article 263, the Court can therefore examine if a concluded agreement breaches EU law.³⁹⁸ Secondly, the Court can review EU law that contradicts EUs international obligations. However, the question becomes whether a breach of an international obligation can be challenged before the Court.³⁹⁹ This was addressed in *International Fruit Company Case* that confirmed that as long as international obligation did not have direct effect its legality could not be challenged before the Court.⁴⁰⁰ The CJEU, denying direct effect of WTO law in EU law, has consequently concluded that it cannot challenge the legality of EU law that contradicts WTO law. This was clearly stated in the *Portuguese Textile Case*:

It follows from all those considerations that, having regard to their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions.⁴⁰¹

However, the Court has agreed upon two exceptions from this standard rule. Firstly, the exception of indirect effect, and secondly, the exception involving consistent treaty interpretation, that now will be shortly elaborated on in this order.⁴⁰²

³⁹⁵ Piet Eeckhout *EU External Relation Law*, p. 275.

³⁹⁶ CJEU C-181/73, *Haegeman v. Belgian State*, 30 April 1974, p. 451.

³⁹⁷ CJEU C-181/73, *Haegeman v. Belgian State*, 30 April 1974, para. 5-6.

³⁹⁸ Piet Eeckhout: *EU External Relations Law*, p. 288- 289.

³⁹⁹ Piet Eeckhout: *EU External Relations Law*, p. 292.

⁴⁰⁰ Joined cases 21-24/72, *International Fruit Company*, 12 December 1972, para. 8.

⁴⁰¹ Case C-149/96 *Portugal v. Council*, 23 November 1999, para. 47.

⁴⁰² Birgitte Egelund Olsen, Michael Steinicke, Karsten Engsig Sørensen: "The WTO and the EU", p. 104.

7.1.3.4 The Doctrine of Indirect Effect

The doctrine of *indirect effect* is a way to allow WTO law to influence the legality of EU law on the grounds of implementation or reference. The CJEU has on numerous occasions, referred to the doctrine and according to the Court, it applies in two circumstances.⁴⁰³

First, the CJEU can review a measure, when the EU *intends* to implement a particular WTO obligation, referred to as the *Nakajima* doctrine that is based on the C-69/89, *the Nakajima case*. The case regarded anti-dumping measures on printers from Japan and a possible incompatibility between an EU anti-dumping regulations with the anti-dumping rules of the WTO.⁴⁰⁴ The Court affirmed that direct effect was not argued in the case. Instead, it emphasized the binding effect of the GATT and the importance for a uniform interpretation of its provisions. It also found that the EU regulation clearly stated in the preamble that it was adopted on the grounds of the EUs obligations, according to the GATT and the antidumping code.⁴⁰⁵ The Court then summarized:

It follows that the new basic regulation, which the applicant has called in question, was adopted in order to comply with the international obligations of the Community, which, as the Court has consistently held, is therefore under an obligation to ensure compliance with the General Agreement and its implementing measures (see the judgments in Case 104/81 Hauptzollamt Mainz v Kupferberg [1982] ECR 3641, at paragraph 11, and in Case 266/81 SIOT v Ministero delle Finanze and Others [1983] ECR 731, at paragraph 28).⁴⁰⁶

The second exception applies when a EU act *specifically refers* to a WTO provision. This review is based on the *Fediol* doctrine, C-70/87, *the Fediol case*. In the case, a regulation, allowing producers to complain to the EU on market practices of third countries that it suspected to be unlawful, was disputed.⁴⁰⁷ Fediol, the producer, claimed that an Argentinian producer of soya products had breached the GATT and subsequently the EU regulation. It claimed that these measures were illegal under international law. The Commission disagreed with the company and decided not to initiate the complaint and Fediol sought to get that decision annulled.⁴⁰⁸ The Court confirmed that the GATT did not have direct effect, but agreed that it did however belong to rules of international law and that the regulation in question specifically referred to it in its preamble. The Court then reviewed its former case

⁴⁰³ Piet Eeckhout: *EU External Relations Law*, p. 357.

⁴⁰⁴ CJEU C-69/89, *Nakajima v. Council*, 7 May 1991, para.1-10.

⁴⁰⁵ CJEU C-69/89, *Nakajima v. Council*, 7 May 1991, para. 28-30.

⁴⁰⁶ CJEU C-69/89, *Nakajima v. Council*, 7 May 1991. para. 31.

⁴⁰⁷ Birgitte Egelund Olsen, Michael Steinicke, Karsten Engsig Sørensen: "The WTO and the EU", p. 106-107.

⁴⁰⁸ CJEU C-70/87, *Fediol v. Commission*, 22 June 1989, para. 1-3.

law and stated that the lack of direct effect did not prevent the Court from interpreting the provisions of the GATT in this situation.⁴⁰⁹ It noted:

It follows that, since Regulation No 2641/84 entitles the economic agents concerned to rely on the GATT provisions in the complaint which they lodge with the Commission in order to establish the illicit nature of the commercial practices which they consider to have harmed them, those same economic agents are entitled to request the Court to exercise its powers of review over the legality of the Commission's decision applying those provisions.⁴¹⁰

So whereas the regulation explicitly referred to international law, including rules found in the GATT, the Court decided that it had the power to review the legality of the decision. WTO law will therefore only be considered when its particular rules are implemented in EU legislation or when a certain policy behind WTO legislation is arranged within EU law.⁴¹¹

7.1.3.5 Theory of Treaty Consistent Interpretation

Finally, considering that direct effect does not apply to WTO law, the CJEU has instead applied the principle of treaty consistent interpretation. The principle entails that whenever possible, EU law is to be interpreted in consistency with relevant WTO law.⁴¹² The principle thus ensures, that whenever national law provides for different interpretations, the one that is the most compatible with an international obligation should be chosen. This prevents unnecessary conflict.⁴¹³

The CJEU has construed this doctrine of treaty consistent interpretation in regard to WTO law on several occasions. This was e.g. addressed by the CJEU in the case C-53/96, *Hermès International*. The dispute regarded the trademark *Hermès* and the interpretation of article 50 of the *TRIPS Agreement*.⁴¹⁴ In the dispute the Court noted that whereas the EU was a member of the WTO and therefore bound by all the annexed agreements to the WTO Agreement it had to interpret the national law in "light of the wording and purpose of Article 50 of the TRIPs Agreement".⁴¹⁵

The principle is now well established and applies regardless of whether a state is monist or dualist. The application of the principle is especially important for the WTO, as it is one of

⁴⁰⁹ CJEU C-70/87, *Fediol v. Commission*, 22 June 1989, para. 19-22.

⁴¹⁰ CJEU C-70/87, *Fediol v. Commission*, 22 June 1989, para. 22.

⁴¹¹ Birgitte Egelund Olsen, Michael Steinicke, Karsten Engsig Sørensen: "The WTO and the EU", p. 81.

⁴¹² Birgitte Egelund Olsen, Michael Steinicke, Karsten Engsig Sørensen: "The WTO and the EU", p. 108.

⁴¹³ Thomas Cottier and Krista Schefer: "The Relationship between WTO Law, National Law and Regional Law", p. 88.

⁴¹⁴ CJEU C-53/96, *Hermès International v. FHT Marketing Choice BV*, 16 June 1998, para. 1,12.

⁴¹⁵ CJEU C-53/96, *Hermès International v. FHT Marketing Choice BV*, 16 June 1998, para. 28.

the main instruments providing WTO law weight in national law of its members. The WTO therefore expects its members to adjust its legislation and interpret its national law coherently with WTO law.⁴¹⁶ Likewise, the principle is also important for the EU as it gives WTO weight in EU law and in general the CJEU tries to interpret EU law consistently with WTO obligations. However, in regard to adopted DSB reports against the EU it seems to be more reluctant.⁴¹⁷ Despite the importance of this principle, it must be underlined that it only applies when it is possible to interpret national legislation coherently with international obligations. When such option is unavailable, the doctrine of direct effect is the only alternative.⁴¹⁸

7.2 Substantive Comparison

7.2.1 Integration Methods

As has now been reviewed the WTO and the EU are two fundamentally different organizations. The reason underlying this difference is first and foremost based on their different levels of integration that set the foundation for what these organizations are capable of achieving.

According to Tamara Perišin, a professor in European Public Law at the University of Zagreb, when trade restrictive measures are examined two integration methods can be applied; negative and positive integration methods. According to her, negative integration methods are in the hands of the judicial bodies that apply the law and remove all obstacles to trade by interpretation. Positive integration methods, on the contrary, are in the hands of the political bodies that set the law and try to harmonize and create a common regulated market.⁴¹⁹

The European integration is defined as "a polity creating process in which authority and policy making are shared across multiple levels of government, subnational, national and supranational".⁴²⁰ The EU applies both methods. The positive integration of the EU is reflected in how the EU is governed and how it represents two entities, the EU as a whole and each member state, referring again to the issues regarding competence.⁴²¹ Positive integration is therefore based on harmonization and its regulatory framework. In addition, the EU also

⁴¹⁶ This relates to the obligation found in article XVI:4 of the WTO Agreement and in article XXIV:12 of the GATT.

⁴¹⁷ Piet Eeckhout: *EU External Relations Law*, p. 356-357.

⁴¹⁸ Thomas Cottier and Krista Schefer: "The Relationship between WTO Law, National Law and Regional Law", p. 89-90.

⁴¹⁹ Tamara Perišin: *Free Movement of Goods and Limits of Regulatory Autonomy in the EU and the WTO*, p. 9.

⁴²⁰ Gary Marks, Leisbet Hooghe and Kermit Blank: "European Integration from the 1980s", p. 341.

⁴²¹ Tamara Perišin: *Free Movement of Goods and Limits of Regulatory Autonomy in the EU and the WTO*, p. 81.

applies negative integration on the grounds of its case law and its dynamic development of its trade rules. Both integration methods significantly influence EUs external trade policy.⁴²²

The WTO is mostly based on the negative integration method. In general, the WTO seems to share a similar approach regarding negative integration as the EU and entails a similar framework as the EU on the grounds of the GATT. However, the WTO does not share the same regulatory autonomy and is decentralized in comparison with the EU. Instead, it is a member-driven organization that mainly focuses on eliminating unjustified protectionist trade measures, rather than to create a harmonized trade system. The WTO therefore lacks the foundation for positive integration. Notwithstanding, there are traces of such development in specialized areas of WTO law. The TBT and the SPS agreements for example, entail technical and scientific provisions that bind the autonomy of its members in a limited field of law.⁴²³

The substantive law of these organizations will now be examined and compared. These different integration methods should be kept in mind as they shine a light on how the substantive rules between these institutions differ in function and why these rules are interpreted differently. The chapter will begin by comparing the trade rules of these organizations. The chapter will then focus on how the systems approach trade restrictive measures on the grounds of the principle of non-discrimination and on the grounds of non-discriminatory restrictions taking into account external relations of the EU. Finally, rules on export charges and exceptions to trade rules in these legal systems will be compared. The chapter will end by examining how the WTO may influence the EU in any way.

7.2.2 Customs Duties

7.2.2.1 EU as a Customs Union

EU custom law was originally developed on the grounds of the GATT but still differs in various ways.⁴²⁴ First and foremost, EU internal rules regarding customs duties are fundamentally different from the WTOs as article 30 of the TFEU forbids tariffs within EU. Meanwhile, the WTO permits tariffs among its members and rather seeks to negotiate tariffs reductions on the grounds of article II of the GATT. Thus the biggest difference is that in the EU internal tariffs are completely prohibited while the WTO considers tariff barriers as the

⁴²² Tamara Perišin: *Free Movement of Goods and Limits of Regulatory Autonomy in the EU and the WTO*, p. 7.

⁴²³ Tamara Perišin: *Free Movement of Goods and Limits of Regulatory Autonomy in the EU and the WTO*, p. 165, 169.

⁴²⁴ Piet Eeckhout: *EU External Relations Law*. p. 11.

"preferred type of trade barriers".⁴²⁵ Furthermore, the WTO tariffs negotiations are managed by the MFN principles regarding binding tariffs. The MFN principle does not apply within the EU as the EU is exempted from the principle on the grounds of article XXIV of the GATT.

Externally, the customs law of the EU is surprisingly similar to the WTO customs rules. In its external trade relations the EU applies the Common Customs Tariff (CCT) on the grounds of article 28 of the TFEU and the rules of Council Regulation no. 2658/87, *on the Tariff and Statistical Nomenclature and on the Common Customs Tariff*, (hereafter EU tariff regulation). The CCT entails applying the same external tariff in the whole union and is an integral part of the customs union. The CCT however, only applies to tariffs unlike article 30 of the TFEU that also entails Charges having equivalent effect (CEE).⁴²⁶ In addition to the CCT, EU customs law is nowadays based on two fundamental legal instruments; Council Regulation no. 2913/92 *Establishing the Community Customs Code* (hereafter CCC) and Commission Regulation no. 2454/93 *Laying Down Provisions For the Implementation of Council Regulation (EEC) No 2913/92 Establishing the Community Customs Code* (referred to as the *Consolidated Implementing Provisions*, hereafter CCIP). Customs law of the EU is therefore based on these codes, as adopted by the EU and its member's states.⁴²⁷ These codes will only apply until 1 May 2016, when the substantive rules of the *Union Customs Code* (UCC) will fully enter into force.⁴²⁸

The WTO applies its general GATT rules on tariffs regarding schedules of concessions and all its main principles, including the MFN principle. The same applies to the EU, as a member of the WTO. Both legal systems also apply three main rules before a customs duty is imposed. These are rules that regard the classification, the customs valuation and the origin of the good. These rules will now be examined.⁴²⁹

⁴²⁵ Tamara Perišin: *Free Movement of Goods and Limits of Regulatory Autonomy in the EU and the WTO*, p. 129.

⁴²⁶ Timothy Lyons: *EC Customs Law*, p. 69

⁴²⁷ Laurence W. Gormley: *EU Law of Free Movement of Goods and Customs Unions*, p. 3.

⁴²⁸ On the 9 October 2013 the Union Customs Code (UCC) was adopted as a part of modernized customs code and will become the new legal framework. Until then the CCC will keep applying. See further; "The Union Customs Code: a Recast of the Modernized Customs Code", http://ec.europa.eu/taxation_customs/customs/customs_code/union_customs_code/index_en.htm

⁴²⁹ Peter Van den Bossche and Werner Zdouc: *The Law and Policy of the World Trade Organization*, p. 453.

7.2.2.2 Rules on Classification of Goods

A classification means "the determination of the subheading of the nomenclature under which the commodities are to be classified according to the rules in force".⁴³⁰ Most members of the WTO have adopted the *International Convention on the Harmonized Commodity Description and Coding System*, referred to as the harmonized system (hereafter HS). The system categorizes products and gives them a number, chapter, headings and subheading notes and provides specific interpretation rules for the system.⁴³¹ It is then in the hands of the Harmonized Committee to develop and conclude explanatory notes on amendments to the system etc. The HS is therefore an international standard that categorizes products.⁴³²

In general, the WTO does not refer to the HS, but in practice it is applied as the standard, to interpret schedules, based on article II:7 of the GATT.⁴³³ WTO members therefore seem to believe that they are bound by the system when adopting their schedules of concession.⁴³⁴ However, the legal status of the HS within the WTO has been addressed by the DSU on several occasions and in the case *China - Auto Parts (15 December 2008)* the AB summarized the situation as such:

Because WTO member schedules of Concession were constructed using the nomenclature of the Harmonised system, the harmonized system is apt to shed light on the meaning of terms used in these schedules.⁴³⁵

According to the AB, the HS is considered binding for WTO members on the grounds of a mutual understanding. In relation to interpretation of the rules, the AB has also defined the situation as to apply both the HS and the explanatory notes and decisions taken by the HS committee, when ruling on classification in regard to schedules.⁴³⁶

EU rules, regarding classification of goods, are found in the tariff regulation that includes CCT and goods covered by combined nomenclature that mostly corresponds to the HS, but

⁴³⁰ Carsten Willemoes Jørgensen: "Customs Law: the Challenge of Non-Centralized Customs Administrations in the EU", p. 387.

⁴³¹ Peter Van den Bossche and Werner Zdouc: *The Law and Policy of the World Trade Organization*, p. 455.

⁴³² Carsten Willemoes Jørgensen: "Customs Law: the Challenge of Non-Centralised Customs Administrations in the EU", p. 389.

⁴³³ Carsten Willemoes Jørgensen: "Customs Law: the Challenge of Non-Centralised Customs Administrations in the EU", p. 389-92.

⁴³⁴ Carsten Willemoes Jørgensen: "Customs Law: the Challenge of Non-Centralised Customs Administrations in the EU", p. 391.

⁴³⁵ Appellate Body Report, *China - Auto Parts*, 15 December 2008, para. 151.

⁴³⁶ Carsten Willemoes Jørgensen: "Customs Law: the Challenge of Non-Centralised Customs Administrations in the EU", p. 392-293.

also adds categories that are not found in the HS.⁴³⁷ Article 7 of protocol 4 of the EEA Agreement also describes the HS system for classification of goods. In the EU it is the Commission that issues regulations on classification on goods that is based on the HS and its interpretation. The EU has almost identically taken up the HS into its national legislation and therefore it holds hands with any amendments that may take place at the international level.⁴³⁸ According to case law if any inconsistency exists between the regulation and the HS, the HS prevails. However, it will only prevail as long as no special note regarding HS interpretation has been adopted or as long as it regards a product found in the HS. Carsten Willemoes Jørgensen summarizes the situation as such:

The classification rules of the HS apply in the EU but while the second level interpretation in the decision and explanatory notes of the WCO HS committee are important aids to the interpretation of the common customs tariff, they are not legally binding on the institutions of the EU.⁴³⁹

The tariff regulation also entails the duty rates that more or less mirror the GATT bound duties that apply to all WTO members on the grounds of the MFN principle. According to the CCT, there are also various exceptions from the conventional duty rate. The most significant being when the EU concludes FTA with other countries, exceptions granted to developing countries under the Generalized System of Preferences and elimination of duties to ACP countries (discussed below in relation to the Banana dispute).⁴⁴⁰

The difference between the legal systems first and foremost reflects in the fact that the HS convention is not a formal part of the WTO law even though most members of the WTO adhere to it and apply it to classify goods in addition to article II of the GATT. WTO members are therefore not legally bound by it. The EU however, is itself a party to the HS convention and has incorporated the HS into its secondary legislation via regulations imposed by the Commission. Therefore, it is clear that the EU has extensive classification rules based on the HS. However, an inconsistency may arise, in relation to added categories by the EU that do not apply at the international level. Furthermore, the difference in interpretation of the rules is also interesting. The CJEU acknowledges that the decisions by the HS committee can be an important aid when interpreting the rules meanwhile the DSB seems to follow the

⁴³⁷ Carsten Willemoes Jørgensen: "Customs Law: the Challenge of Non-Centralised Customs Administrations in the EU", p. 394.

⁴³⁸ Michael Lux: "EU Customs Law and International Law", p. 23.

⁴³⁹ Carsten Willemoes Jørgensen: "Customs Law: the Challenge of Non-Centralised Customs Administrations in the EU", p. 393-395.

⁴⁴⁰ Piet Eeckhout: *EU External Relations Law*. p. 449-450.

decisions of the committee firmly. Generally, the case law of both organizations seems to be in parallel; the AB, following strictly the decision of the HS, and the Union, applying the HS as a interpretation mechanism, both leading to the same outcome.⁴⁴¹

7.2.2.3 Customs Valuation

Secondly, when a product is imported, the valuation of the good has to be established as most tariffs are calculated as percentage of the value of the good, *ad valorem*, or they can also be specific.⁴⁴² The rules regarding valuation of goods in WTO are found in article VII of the GATT, the *Note Ad of the GATT* and in the *Customs Valuation Agreement* (hereafter CVA).⁴⁴³ According to article 1 and 8 of that CVA, the main principle of valuation is based on the transaction value or "the price of the good".⁴⁴⁴ In addition, the CVA provides for five other methods that can be applied when the transaction value method becomes inapplicable.⁴⁴⁵ The application of the CVA has been discussed in few cases before the DSB that all underline the binding effect of the agreement and its principles within the WTO.⁴⁴⁶

The EU has incorporated the rules of the CVA into its CCC and the CCIP and protocol 4 of the EEA Agreement also refers to the CVA. The main principle to valuate customs on imported products is found in article 29 of the CCC and is based on the actual value of the product that relates to the transaction value standard. In addition, the five alternative methods also apply when the transaction value is inapplicable.⁴⁴⁷ The EU rules are therefore similar to the WTOs. In the case C-422/00 *Capespan International* it was argued that a EU regulation entailing method for calculating customs on imported fruits and vegetables in accordance with entry price was inconsistent to the WTO law on customs valuation.⁴⁴⁸ The Court however concluded that in the case it had not been established how the rules on entry price,

⁴⁴¹ Carsten Willemoes Jørgensen: "Customs Law: the Challenge of Non-Centralised Customs Administrations in the EU", p. 395.

⁴⁴² John H. Jackson: *The World Trading System*, p. 151.

⁴⁴³ *The Agreement on the Implementation of Art VII of the General Agreement on Trade and Tariffs 1994*.

⁴⁴⁴ According to general introductory commentary of the CVA transaction value is based on "the price actually paid or payable in cases where certain specific elements which are considered to form a part of the value for customs purposes are incurred by the buyer but are not included in the price actually paid or payable for the imported goods".

⁴⁴⁵ These alternative methods are: transaction value of the goods, transaction value of identical goods, transaction value of similar goods, the deductive value, when the value is determined on information from the importer and the computed value, based on information from the manufacturer. See *The Agreement on the Implementation of Art VII of the General Agreement on Trade and Tariffs 1994*, art. 2-7.

⁴⁴⁶ Carsten Willemoes Jørgensen: "Customs Law: the Challenge of Non-Centralised Customs Administrations in the EU", p. 399.

⁴⁴⁷ Laurence W. Gormley: *EU Law of Free Movement of Goods and Customs Unions*, p. 73-75.

⁴⁴⁸ CJEU C-422/00, *Capespan International plc*, 16 January 2003, para. 35-38 .

based on EUs CCC, were in breach of the WTO rules.⁴⁴⁹ The method was therefore legitimate on the grounds of the EU internal regulation and CCC. The case shows that the Court only refers to the WTO law on customs valuation and the CVA when no EU rules exist on the matter or applies it as an interpretive aid.⁴⁵⁰

7.2.2.4 Rules of Origin

Finally, the *origin* of products matter for both organizations whereas different rules regarding customs duties apply depending on origin of products.

The GATT does not provide rules of origin and the rules therefore differ between the member states. States usually apply two general standards to establish from where a product is originated: One regarding substantial transformation of the product and the other regarding value added to a product.⁴⁵¹ However, annexed to the WTO Agreement is the *Agreement on Rules of Origin*. According to article 1:2 of this agreement, it only aims at harmonizing non-preferential rules of origin but rules regarding origin of goods are generally divided into preferential and non-preferential rules. According to Timothy Lyons, an advocate and specialist in EU customs law, preferential rules of origin "are designed to determine whether or not a particular product is subject to preferential measures negotiated between the community and third country or group of countries".⁴⁵² On the contrary, non-preferential rules are then general rules applied in the absence of preferential rules. The Origin Agreement is still being negotiated. Today only article 2 is in force as a temporary solution, as the rest of the rules are still in transition period. The article describes in sub-paragraph (a)-(k) how the members should administer their origin laws and regulations. It for example provides criteria for origin and establishes that these rules may not pursue trade objectives and may not discriminate. It furthermore entails that rules of origin should be administered in a proper manner and be consistent and impartial. Within the WTO there is no plan to harmonize preferential rules of origin, see though annex II of the Origin Agreement that entails, *Common Declaration With Regard To Preferential Rules of Origin*. This declaration is similar to article 2 of the agreement.

In the EU the rules of origin are also divided into preferential and non-preferential rules. Non-preferential rules are found in the CCC and CCIP. According to article 23 (1) of the

⁴⁴⁹ CJEU C-422/00, *Capespan International plc*, 16 January 2003, para. 74, 99-100.

⁴⁵⁰ Carsten Willemoes Jørgensen: "Customs Law: the Challenge of Non-Centralised Customs Administrations in the EU", p. 402.

⁴⁵¹ John H. Jackson: *The World Trading System*, p. 167-168.

⁴⁵² Timothy Lyons: *EC Customs Law*, p. 229.

CCC the origin of imported product is generally based on where the product was "wholly obtained or produced".⁴⁵³ However, the situation becomes trickier when products originate in more than one country. This is addressed in article 24 of the CCC that states:

Goods whose production involved more than one country shall be deemed to originate in the country where they underwent their last, substantial, economically justified processing or working in an undertaking equipped for that purpose and resulting in the manufacture of a new product or representing an important stage of manufacture.⁴⁵⁴

This must be evaluated each time but WTO rules may also become relevant. The EU, as a customs union, can therefore be in the position of having to apply three different levels of tariffs depending on the origin of a product. The first, relating to products originating from the EU, as no customs duties are permitted within the EU. The second, regarding a product originating in another WTO state, and then the third, regarding a product originating in a state that is not a member of the WTO.⁴⁵⁵ This situation does not arise within the WTO.

Both organizations divide their rules regarding preferential and non-preferential rules of origin and a parallel may be drawn between their rules regarding non-preferential rules of origin, see article 23 and 24 of the CCC in comparison with the provisions of the WTO's Rules of Origin Agreement. Furthermore, the Commission has announced that all rules of origin, that are not directly found in the CCIP or CCC, shall be based on the harmonization negotiations taking place within the WTO, referred to as the list-rules. These list-rules are published online and based on the WTO framework and are seen as tools to facilitate the application of article 24, but the legal status of these list rules has been disputed.⁴⁵⁶ This was e.g. addressed in the case C-260/08, *Heko*, a case regarding the origin of steel cables manufactured in North Korea but made out of material from China.⁴⁵⁷ In the case the information regarding the origin of the cable steels were decided on the grounds of the list rules. The list rules provided that products could not fall under the heading of having undergone substantially processing or working, unless they changed tariff heading under the combined nomenclature, in the sense of article 24 of the CCC.⁴⁵⁸ The case therefore regarded the interpretation article 24 and the legal status of the list rules. The Court first addressed the legal nature of the rules and concluded:

⁴⁵³ Same as in the *Protocol 4 of Agreement on the European Economic Area*, art 4.

⁴⁵⁴ See *Protocol 4 of Agreement on the European Economic Area*, art 5.

⁴⁵⁵ John H. Jackson: *The World Trading System*, p. 167.

⁴⁵⁶ Carsten Willemoes Jørgensen: "Customs Law: the Challenge of Non-Centralised Customs Administrations in the EU", p. 407.

⁴⁵⁷ CJEU C-260/08, *Heko*, 10 December 2009, para. 1.

⁴⁵⁸ CJEU C-260/08, *Heko*, 10 December 2009, para. 13.

It should be added that, although relevant acts of secondary legislation must be interpreted in the light of the agreements adopted in the context of the WTO (see, to that effect, Case C-300/98 *Dior and Others* [2000] ECR I-11307, paragraph 47, and Case C-245/02 *Anheuser-Busch* [2004] ECR I-10989, paragraph 55), the fact remains that the Agreement on Rules of Origin establishes, for the present, only a harmonisation work programme for a transitional period. Since that agreement does not constitute complete harmonisation, the members of the WTO enjoy a margin of discretion with regard to the adaptation of their rules of origin. In that regard, it is clear from the WTO Panel Report, presented on 20 June 2003 (United States) – Rules of Origin for Textiles and Apparel Products (DS243), paragraphs 6.23 and 6.24, that the members of the WTO are free to determine the criteria which confer origin, to alter those criteria over time, or to apply different criteria to different goods.⁴⁵⁹

Secondly the Court examined the interpretation of article 24 and concluded that the list did not entail all the essential criteria:

‘substantial processing or working’, within the meaning of Article 24 of the Customs Code, may cover not only such processing or working as leads to the goods which have undergone the process being classified under a different heading of the CN, but also such processing or working as results, without such a change of heading, in the creation of a product with properties and a composition of its own which it did not have before the operation.⁴⁶⁰

For future reference, to prevent inconsistency between the EU and the WTO, the list rules should be incorporated into EU law. Otherwise the CJEU might adopt a different interpretation and create an unnecessary inconsistency in the application of non-preferential rules of origin. EU rules, regarding preferential rules of origin, are based on various agreements that the EU concludes with other states and are most likely more detailed and in accordance with the declaration on preferential origin rules found in annex II of the Agreement on Rules of Origin.⁴⁶¹ The EU therefore has binding rules on preferential agreements on the contrary to the WTO based on its mutual obligations.

7.2.2.5 Conclusion

To conclude, both institutions entail rules on classifying goods, valuation customs and rules of origin that are based on international conventions that the EU adjusts to its regulations. Therefore, many of these regulations are similar, such as the ones based on the HS, Customs Value agreement etc. However, different interpretation of these rules can lead to a different

⁴⁵⁹ CJEU C-260/08, *Heko*, 10 December 2009, para. 22.

⁴⁶⁰ CJEU C-260/08, *Heko*, 10 December 2009, para. 37.

⁴⁶¹ Carsten Willemoes Jørgensen: "Customs Law: the Challenge of Non-Centralised Customs Administrations in the EU", p. 409.

outcome.⁴⁶² This relates directly to the discussion in chapter 7.1.3 on the legal status of international obligations within the EU. Where these instruments have not been directly incorporated into EU law, EU law prevails. This can create an inconsistency between the two legal systems in regard to their application of the rules.

Additionally, customs law of the EU is based on its CCP and is therefore centralized. However the administrations of these rules are in the hands of the member states. The EU might therefore, with its 28 different customs administrations, be at a higher risk of breaching its obligations in article X (3) of the GATT that entails the rule that restriction and import procedures must be administered in a "uniform, impartial and reasonable manner".⁴⁶³ The AB addressed these issues relating to administration in the case, *EC-Selected Customs Matter (13 November 2006)*. In that case, the USA argued that the EU customs regulations were inconsistent with article X:3 (a) of the GATT and that the administrative process regarding tariff classification was non-uniform and in breach of the article.⁴⁶⁴ The AB rejected that the rules were in breach of the GATT, as there was a lack of factual grounds to confirm that the customs administration in the EU was non-uniform.⁴⁶⁵ However, it did agree that a tariff classification on monitors, that either fell under the heading of computer monitors or the heading of video monitors, depending on the national customs administration, was not uniform and breached article X:3(a) of the GATT.⁴⁶⁶

EU rules regarding classification of goods, customs valuation, and origin of products are irrelevant in the internal market. Also, in relation to the internal and external dimension of article 30 of the TFEU the question came up in the case C-125/94, *Aprile*, whether charges having equivalent effect (CEE) in the article also applied when member states were importing *into* the EU. The case regarded charges that had been collected for customs transactions in Italy. The Court confirmed that on the grounds of uniformity and the CCP the member states could not individually impose CEE in its external trade relations, as it would undermine the CCP.⁴⁶⁷

After having classified the product, valued it and established its origin, the CCT is imposed on the grounds of article 31 of the TFEU and the former discussed codes. This

⁴⁶² Carsten Willemoes Jørgensen: "Customs Law: the Challenge of Non-Centralised Customs Administrations in the EU", p. 409-10.

⁴⁶³ Carsten Willemoes Jørgensen: "Customs Law: the Challenge of Non-Centralised Customs Administrations in the EU", p. 389.

⁴⁶⁴ Appellate Body Report, *EC - Selected Customs Matters*, 13 November 2006, para. 2-3.

⁴⁶⁵ Appellate Body Report, *EC - Selected Customs Matters*, 13 November 2006, para. 286.

⁴⁶⁶ Appellate Body Report, *EC - Selected Customs Matters*, 13 November 2006, para. 244-260.

⁴⁶⁷ CJEU C-125/94, *Aprile*, 5 October 1995, para. 32-37.

application of the tariff must not be discriminative and is based on the GATT principles.⁴⁶⁸ All in all, the GATT and other international conventions despite their fundamental difference therefore influence EU customs law in various ways.⁴⁶⁹

7.2.3 *Quantitative Restrictions, Internal Regulations and Internal Taxation Rules*

Both legal regimes prohibit QRs and define such restrictions broadly.⁴⁷⁰ However article 34 of the TFEU is more open ended in comparison to article XI of the GATT. The concept of MEE has therefore provided the CJEU the tools to develop the scope of the article and respond to legal and political changes within the EU as it did in the *Dawsonville case*.⁴⁷¹

In the WTO it is also important to distinguish between restrictions that apply on importation and other internal measures, whereas QRs are completely forbidden, meanwhile internal rules, on the grounds of article III:4 of the GATT, are only forbidden as long as they discriminate between imported and domestic products.⁴⁷² The EU prohibits discriminatory trading rules and customs duties. It is therefore not necessary to draw the line between internal measures and importation measures.⁴⁷³ These issues will be discussed in more detail below.

7.2.4 *Principle of Non-Discrimination*

Non-discrimination in trade is a fundamental principle based on the notion of eliminating protectionist trade measures against foreign products and levelling the playing field between imported and domestic products. Both the WTO and the EU prohibit discrimination and seek to create equal trade opportunities and prohibit both direct and indirect discrimination.⁴⁷⁴ Due to their different objectives and institutional structures their application of the principle is however different in many ways.

The EU entails a more advanced version of the principle and the scope of the principle is wider in comparison with the WTO. The principle is found in various TFEU provisions that do not solely address trade issues, see for example article 18 of the TFEU that prohibits all discrimination based on nationality. The principle is also linked to human rights

⁴⁶⁸ Catherine Barnard: *The Substantive Law of the EU - The Four Freedoms*, p. 209.

⁴⁶⁹ Timothy Lyons: *EC Customs Law*, p. 17.

⁴⁷⁰ Tamara Perišin: *Free Movement of Goods and Limits of Regulatory Autonomy in the EU and the WTO*, p. 130.

⁴⁷¹ Tamara Perišin: *Free Movement of Goods and Limits of Regulatory Autonomy in the EU and the WTO*, p. 20.

⁴⁷² The line between article III:4 and XI of the GATT were thoroughly discussed in chapter 4.3.4.2.

⁴⁷³ Karsten Engsig Sørensen: "Trade in Goods", p. 142.

⁴⁷⁴ Thomas Cottier and Matthias Oesch: "Direct and Indirect Discrimination in WTO Law and EU Law", p. 146-147.

considerations in the EU. The scope of the principle therefore reaches to all the four freedoms and ensures that the function of the internal market is conducted without discrimination on the grounds of nationality or origin.⁴⁷⁵ In regard to trade issues the principle is found in three important provisions of the TFEU; article 34 on QRs, article 37 that ensures that conditions regarding state monopolies are non-discriminative and article 110 on internal taxation.⁴⁷⁶ WTO law is based on the MFN and NT principles and their requirements. The situation can roughly be explained that while the WTO mainly focuses on eliminating discriminative trade measures, the EU considers it as a fundamental part of the EU.⁴⁷⁷

Both legal systems apply the principle of non-discrimination in relation to its fiscal measures but differ in their application. According to Professor. J. H.H. Weiler, the EU divides its fiscal law into two parts, law regarding market access and law regarding market regulation. Here the first refers to the EUs internal customs law and the latter to its internal taxation law.⁴⁷⁸ As the customs law of the organizations has already been analysed above, the coverage here will only focus on internal taxation.

Internal taxation, referring here to the market regulation, is permitted within both legal regimes as long as it *does not discriminate* between imported and domestic products. The WTO is therefore neutral towards how its members construct its taxation rules, as long as the system does not discriminate. Within EU the same applies, with the exception of harmonized internal taxation rules.⁴⁷⁹ Article III:2 of the GATT and article 110 of the TFEU on internal taxation are similarly structured and entail similar tests based on dividing taxation into two parts; taxation regarding similar/like products and taxation on products in competition. The like/similarity test between the organizations differs whereas the WTO seems to interpret it narrowly, as was demonstrated in the case *Japan – Taxes on Alcoholic Beverages II* (4 October 1996) where the AB stated: "We believe that, in Article III:2, first sentence of the GATT 1994, "the accordion of "likeness" is meant to be narrowly squeezed."⁴⁸⁰ The EU, on the other hand, seems to give the similarity test a broader meaning, as was shown in the case C-168/78, *Commission v. France*, where light and dark tobacco were considered similar products.⁴⁸¹ Notwithstanding, both legal systems seem to apply the same approach when

⁴⁷⁵ Marise Cremona: "Neutrality or Discrimination: The WTO, the EU and External Trade", p. 151.

⁴⁷⁶ Thomas Cottier and Matthias Oesch: "Direct and Indirect Discrimination in WTO Law and EU Law", p. 155.

⁴⁷⁷ Laurence W. Gormley: *EU Law of Free Movement of Goods and Customs Unions*, p. 2.

⁴⁷⁸ Joseph H.H. Weiler: "Epilogue: Towards A common Law of International Trade". p. 207-208.

⁴⁷⁹ Thomas Cottier and Matthias Oesch: "Direct and Indirect Discrimination in WTO Law and EU Law", p. 160.

⁴⁸⁰ Appellate Body Report, *Japan - Alcoholic Beverages II*, 4 October 1996, p. 21.

⁴⁸¹ Case C-7/68 *Commission v. Italy*, 10 December 1968, para. 23-26.

examining the likeness/similarity by taking into account objective characteristics.⁴⁸² In addition both legal systems are reluctant to give much weight to domestic consumer behaviour when examining the test of likeness, as it would most likely result in favouring domestic products.⁴⁸³ In general, the application of the test is therefore similar as both articles also take into account other tax issues rather than only the tax itself and apply the non-discrimination rule strictly and not on the grounds of the *de-minimis* standard.⁴⁸⁴ Finally, it is worth mentioning that both provisions address direct and indirect discrimination.

The second test on the *competitive relationship* between the products under article 110 (2) of the TFEU and article III:2 second sentence of the GATT are also similar. Both examine three issues, first the competitive relationship between the products, then whether the products are dissimilarly taxed and finally whether the measure is protectionist. This reflects EUs three-stage approach discussed earlier in C-167/05, *Commission v. Sweden* and E- 6/07 *Hob vîn*. The WTO gives a broader interpretation of the definition of a competitive relationship than of its likeness test. The EU seems to do the same and also seems to apply it coherently with the GATT. The EU e.g. gave the second paragraph a broad meaning in the case C-170/78, *Commission v. UK* where the Court concluded that beer and wine were in competition. Regarding the dissimilarity of taxation, the WTO applies the *de-minimis* standard meaning that the dissimilarities in the taxation must be more than *de-minimis*. It follows that the EU also applies the *de-minimis* standard. That leads to the third issue, regarding whether the measures are affording protection to domestic products. The WTO seems to examine how the tax system is generally applied, rather than focusing only on the intention or the aim of the taxation. The EU however seems to emphasis both the effect of the measures and its purpose and protectionist aim, citing again in the *Commission v. Sweden* where it was taken into account whether the measure had influenced the decision of the consumers.⁴⁸⁵

All in all, the WTO seems to focus a lot on examining the likeness/competitive relationship between the products while the EU more examines the effect of the measures. Also in regard to the application of these tests, the WTO seems to rather begin by examining the competitive status of the products and then examines the likeness. The CJEU first

⁴⁸² Karsten Engsig Sørensen: "Trade in Goods", p. 159.

⁴⁸³ Marco Slotboom: *A Comparison of WTO and EC Law: Do Different Objectives and Purposes Matter for Treaty Interpretation*, p. 86.

⁴⁸⁴ Marco Slotboom: *A Comparison of WTO and EC Law: Do Different Objectives and Purposes Matter for Treaty Interpretation*, p. 87.

⁴⁸⁵ Marco Slotboom: *A Comparison of WTO and EC Law: Do Different Objectives and Purposes Matter for Treaty Interpretation*, p. 80-91. Karsten Engsig Sørensen: "Trade in Goods", p. 152.

examines the similarity and then moves on the question of competition.⁴⁸⁶ Aside from that, the tests and the interpretation of the provisions seem more or less similar.

7.2.5 Non-Discriminatory Restrictions

7.2.5.1 Fiscal Measures

Measures can be trade restrictive even though they do not discriminate *per se*. The WTO and The EU have developed different ways of approaching the question of whether non-discriminatory restrictions should to be struck down.⁴⁸⁷

According to the general view, all obstacles to EU internal customs law are prohibited, regardless of whether they discriminate or not. This was established in the case C-24/68, *Statistical Levy Case*. In that case a charge was imposed on both imported and exported products and was neither discriminatory nor protectionist. The measure was found to constitute a charge having equivalent effect (CEE) and to be in breach of article 30 of the TFEU.⁴⁸⁸ In the case the Court first extended the *obstacle approach* to market access and established the rule that any fiscal obstacles to market access would be considered unlawful.⁴⁸⁹

The GATT only addresses trade discriminative measures.⁴⁹⁰ Tariff schedules must therefore be applied on the grounds of the MFN principle. However, in a way the tariff regime within the WTO is also obstacle based, as the main point of the rule is to provide the members with the advantages they have negotiated on rather than focusing on whether the principle has been breached. Therefore, if tariff negotiations and tariff executions are not being upheld, it becomes irrelevant whether or not it is discriminative.⁴⁹¹

7.2.5.2 Non-Fiscal Measures

Article 34 of the TFEU and its case law was thoroughly described in chapter 5.4.3.1. To review, the CJEU developed the term measures having equivalent effect (MEE) first in the former discussed case C-8/74, *Dassonville*, and gave it a broad meaning. The Court defined

⁴⁸⁶ Marco Slotboom: *A Comparison of WTO and EC Law: Do Different Objectives and Purposes Matter for Treaty Interpretation*, p. 85.

⁴⁸⁷ Karsten Engsig Sørensen: "Non-discriminatory restrictions on trade". p. 176.

⁴⁸⁸ CJEU C-24/68, *Statistical Levy*, 1 July 1979, para. 9.

⁴⁸⁹ Tamara Perišin: *Free Movement of Goods and Limits of Regulatory Autonomy in the EU and the WTO*, p. 21. CJEU C-24/68, *Statistical Levy*, 1 July 1979, para.10.

⁴⁹⁰ Thomas Cottier and Matthias Oesch: "Direct and Indirect Discrimination in WTO Law and EU Law", p. 143. The principles are also found in article XVII and XVIII the GATS regarding scheduled services and in article 3 of the TRIPS Agreement.

⁴⁹¹ Joseph H.H. Weiler: "Epilogue: Towards A common Law of International Trade". p. 208.

MEE as "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade".⁴⁹² According to J.H.H Weiler the case is important whereas it created an obstacle based rule in the area of market regulation and market access in regard to non-fiscal barriers.⁴⁹³ The Court therefore did not divide the scope of the article by rules on internal regulations and rules on QRs and MEE, as the GATT does via article III:4 and article XI of the GATT. Instead it decided that both measures fell within the scope of the article. The reason the Court decided to apply the obstacle approach on both market access and market regulation is not clear. The Court could have gone the same way as it did in the *Statistical Levy* case and divided the issue into internal regulations and other restrictions and simultaneously followed the division in the GATT. Various explanations have been put to the table to describe this approach of the Court; such as perhaps the Court sought to intentionally diverge from the GATT regime or wanted to accelerate the development of the internal market.⁴⁹⁴ Whatever the reason may be, this case and development relates directly to the harmonization goal within the Union.⁴⁹⁵

In the case C-120/78, *Cassis de Dijon*, the CJEU even went so far to establish that measures could be considered as a MEE although they were not discriminative and that the TFEU covered all indistinctly applicable measures.⁴⁹⁶ This was further developed by the CEJU in the case C-110/05, *Trailer case*, when the Court adopted the *market access approach*. In the case the Court decided that it was enough that a measure "impedes, hinders or creates an obstacle to trade" to be considered illegal regardless of whether it is discriminative.⁴⁹⁷

The scope of article 34 of the TFEU was however narrowed with the case C-267/91 and C-268/91, *Keck*, when the Court exempted certain selling arrangements from the obstacle approach but kept the products requirements still as a part of the principle. This approach of the Court might have been seen as a step back to the traditional understanding of the trade regime and has created various issues, such as what measures fall under the definition of certain selling arrangements etc.⁴⁹⁸

⁴⁹² CJEU C-8/74, *Dassonville*, 11 July 1974, para. 5.

⁴⁹³ Joseph H.H. Weiler: *The EU, the WTO and the NAFTA. Towards a Common Law of International Trade?* p. 212. See also Tamara Perišin: *Free Movement of Goods and Limits of Regulatory Autonomy in the EU and the WTO*, p. 21-22.

⁴⁹⁴ Joseph H.H. Weiler: "Epilogue: Towards A common Law of International Trade". p. 213.

⁴⁹⁵ Joseph H.H. Weiler: "Epilogue: Towards A common Law of International Trade". p. 214.

⁴⁹⁶ CJEU C-120/78, *Cassis de Dijon*, 20 February 1979, para 8.

⁴⁹⁷ CJEU C-110/05, *Commission v. Italy*, 10 February 2009, para. 8

⁴⁹⁸ Karsten Engsig Sørensen: "Trade in Goods", p. 138.

The importance of these cases is significant for EU law and they have also influenced the WTO, especially in relation to their approach towards the non-discriminatory restrictions. Article XI of the GATT prohibits QRs. In general the principle is also obstacle based, judging by its wording. Internal taxes and regulations found in article III of the GATT however are not based on the obstacle approach but rather on the NT principle.⁴⁹⁹ Weiler summarizes the situation in the GATT as such:

An obstacle oriented prohibition on point of entry and/or Market Access denial, whether instituted through unauthorized pecuniary charges (duties and charges of equivalent effect) or unauthorized quantitative restriction and measures having equivalent effect; a discriminatory oriented prohibition on internal market Regulation, whether instituted by pecuniary means (taxes) or legislative and administrative measures; an overarching Derogation Clause - The General Exception of Article XX - which applies to all aspects of the agreement, i.e. equally to the provisions on Market Access and Market Regulation.⁵⁰⁰

In general, the view however is that QRs in article XI of the GATT do not become prohibited if the measure applies equally to domestic and imported products. However, there is nothing standing in the way of the DSB to start interpreting article XI wider and the beginning of such interpretation has been implied in relation to product production methods (hereafter PPMs)⁵⁰¹ This was first implied in the Panel reports, *US-Tuna/Dolphin I and II (un-adopted)*. These cases regarded a US *Marine Mammal Protection Act of 1972* that prohibited the importation of yellowfin tuna harvested by certain environmental fishing techniques and whether the PPM of a product fell under the scope of article XI.⁵⁰² The US argued that the importation ban fell under the scope of article III:4, as the prohibition was directly related to *how* the product was harvested and therefore affected the internal sale of the product and that the measures represented a part of US law regarding the harvesting of domestic tuna.⁵⁰³ The panel however, disagreed and rejected the argument that the prohibition fell under the scope of article III:4, as it did not affect the *product as such*, but rather regarded certain policies of how the product was made in the original country.⁵⁰⁴ Having established that the measure did not fall under article III:4 the panel concluded that US importation restrictions on yellowfin

⁴⁹⁹ Joseph H.H. Weiler: "Epilogue: Towards A common Law of International Trade". p. 208-209.

⁵⁰⁰ Joseph H.H. Weiler: "Epilogue: Towards A common Law of International Trade". p. 208-209.

⁵⁰¹ While the WTO focuses on products production methods (PPM) the EU, refers to certain selling arrangements (CSA) and products requirements.

⁵⁰² Product Production Method (PPM) is a method for valuating a certain product by taking into account the impact its production has on the environment.

⁵⁰³ Report of the Panel, *US-Restrictions on Imports of Tuna I*, 3 September 1991, para. 5.1-5.6

⁵⁰⁴ Report of the Panel, *US-Restrictions on Imports of Tuna I*, 3 September 1991, para. 5.14.

tuna harvested with unsatisfactory fishing techniques, violated article XI of the WTO and was illegal. It was therefore irrelevant for the measure whether it was discriminative or not.⁵⁰⁵

This conclusion of the panel is controversial. Firstly, whereas it implies that after having established that article III does not apply, restriction automatically falls under the scope of article XI, given that the exemptions of QRs are not applicable. Secondly, the case implies that the scope of article XI has been open for broader interpretation, but this interpretation has not been fully confirmed since.⁵⁰⁶

In addition to the Tuna/Dolphin reports some provisions found in other WTO agreements, such as in the TBT Agreement, SPS Agreement and the GATS, allow for certain non-discriminatory restrictions.⁵⁰⁷ Article 2.2 of the TBT Agreement e.g. states:

Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.

The provisions of these agreements are more technical, specialized and limited in comparison with the GATT, considering that the GATT only prohibits discriminatory measures. These agreements also entail provisions that promote mutual standards, comparable to the principle of mutual recognition.⁵⁰⁸ These standards are though more limited than the principle of mutual recognition and provide a ceiling for the national standards rather than the ground, as the harmonized EU legislation does within the internal market.⁵⁰⁹ The rule does therefore not hold the same importance in the WTO legal regime as it does in EU law.

In a way the TBT and SPS Agreements with their detailed regulatory framework therefore do affect national autonomy and represent a step by the WTO towards positive integration.⁵¹⁰ Finally, the WTO, allows its members, on the grounds of article XI: 1-5 to require that a product be specially marked where it is originated, even though such marking might technically be considered discriminative. These articles provide for a limited possibility of applying non-discrimination restrictions in form of PPMs.⁵¹¹

⁵⁰⁵ Report of the Panel, *US-Restrictions on Imports of Tuna I*, 3 September 1991, para. 5.16.

⁵⁰⁶ Karsten Engsig Sørensen: "Non-discriminatory restrictions on trade", p. 186

⁵⁰⁷ Karsten Engsig Sørensen: "Non-discriminatory restrictions on trade", p. 187-190. The scope of these agreements will not be discussed in this thesis.

⁵⁰⁸ See e.g. article 2.4 of the TBT.

⁵⁰⁹ Tamara Perišin: *Free Movement of Goods and Limits of Regulatory Autonomy in the EU and the WTO*, p. 201-202.

⁵¹⁰ Tamara Perišin: *Free Movement of Goods and Limits of Regulatory Autonomy in the EU and the WTO*, p. 165, 169.

⁵¹¹ Karsten Engsig Sørensen: "Non-discriminatory restrictions on trade", p.187.

7.2.5.3 Conclusion

J.H.H Weiler is of the opinion that the GATT regime regarding QRs is based on an obstacle approach, but that internal regulations on the grounds of article III:4 are based on a discriminative approach and that both these measures can then be justified by article XX of the GATT.⁵¹² He believes that the WTO is gradually allowing non-discriminative measures to be taken into account when the article is interpreted.⁵¹³

In the *EC-Asbestos (12 March 2001)* the Panel adopted a market access approach. The panel concluded that the products in the case were like products, despite different *effect* on health. The panel concluded that the main purpose behind article III:4 was to ensure market access and did not give much weight to whether or not the measure was protectionist. It also noted that after having applied the market access approach it then came under consideration to examine whether a certain trade restrictive measure could be justified on the grounds of article XX of the GATT.⁵¹⁴ The AB disagreed. The AB first concluded that the products were not like products, taking into account health risks of the products. It then emphasised the protectionist nature of the measure and concluded that even though products were to be considered like products, it would not necessarily mean that states had to treat them in the same way. This case shows the emphasis the WTO puts on preventing protectionism rather than providing market access. This also shows that, PPMs can become lawful when evaluating a trade restrictive measure, as long as the measure applies equally to domestic and imported products in regard to PPMs.⁵¹⁵ This also relates to *de-facto* discrimination that can often be hard to confirm and is established on a case-by-case basis and relates again to finding the protectionist nature of the measure.⁵¹⁶ On these grounds the WTO therefore seems reluctant to accept other non-discriminatory measures as trade restrictive measures.

All in all, the current situation can be summed up as such: The EU now focuses more on whether or not a measure hinders market access and is more liberal in its interpretation of products requirements. Meanwhile, the WTO still examines the protectionist feature of the measures as was for example confirmed in the *Japan - Taxes on Alcoholic Beverages II (4 October 1996)* where the AB noted: "The broad and fundamental purpose of Article III is to

⁵¹² Joseph H.H. Weiler: *The EU, the WTO and the NAFTA. Towards a Common Law of International Trade?* p. 211. Thomas Cottier and Matthias Oesch: "Direct and Indirect Discrimination in WTO Law and EU Law", p. 164.

⁵¹³ Joseph H.H. Weiler: "Epilogue: Towards A common Law of International Trade", p. 229.

⁵¹⁴ Robert Howse and Elisabeth Tuerk: "The WTO Impact on International Regulations", p. 288.

⁵¹⁵ Robert Howse and Elisabeth Tuerk: "The WTO Impact on International Regulations", p. 289.

⁵¹⁶ Robert Howse and Elisabeth Tuerk: "The WTO Impact on International Regulations", p. 285.

avoid protectionism in the application of internal tax and regulatory measures".⁵¹⁷ Judging by the report of the panel in the *Tuna/Dolphin case*, it is however not impossible that the WTO might do so in the future in regard to QRs. From that point of view one can assume that the scope of article XI has expanded while the scope of article III:4 has diminished.⁵¹⁸

7.2.6 Principle of Non-Discrimination in EU External Trade Relations

The rules regarding the internal market have now been reviewed and clear that the MFN principle does not apply to trade within the EU. Notwithstanding, externally in its trade relations with other WTO members, the EU must adhere to the WTO's main principles.⁵¹⁹

As was formerly described the principle of non-discrimination is a fundamental principle within the EU with a wide scope. However, in relation to external trade the scope of the principle is more limited.⁵²⁰ The EU concludes various agreements with non-EU members and the nature of these external commitments vary depending on the negotiating party.⁵²¹ As a member of the WTO, the EU is bound by the MFN and NT principles in its external relations. However, as was formerly discussed the rules of the GATT, including the MFN/NT principles, do not have direct effect in EU law. The question therefore arises what legal status these international obligations have internally within the EU and how such obligations can affect and regulate the EU's external trade relations.⁵²²

Externally, the EU has e.g. adopted *Regulation 1061/2009 Establishing Common Rules for Exports* and the *Regulation 260/2009 on the Common Rules for Imports* that are based on the rule of free trade and on the MFN principle and apply to EU's trade with other WTO members. As was mentioned before, the MFN principle entails various exceptions. Many of these exceptions are also found within these instruments such as the Generalized System of Preference that entails special rules for trade with developing countries, rules on safeguard measures and anti-dumping measures etc. Special rules can also be found in the TBT Agreement but the EU has incorporated into its internal framework the national treatment obligation in relation to technical barriers on the grounds of the TBT Agreement.⁵²³

The issue raised above regarding how the EU manages its external trade negotiations, in relation to *non-discrimination*, is less clear. This was first addressed in C-52/81, *Faust v.*

⁵¹⁷ Appellate Body Report, *Japan - Taxes on Alcoholic Beverages II*, 4 October 1996, p. 16.

⁵¹⁸ Karsten Engsig Sørensen: "Trade in Goods", p. 139-140.

⁵¹⁹ Gráinne De Búrca and Joanne Scott: "The Impact of WTO on EU Decision-Making", p. 25.

⁵²⁰ Marise Cremona: "Neutrality or Discrimination: The WTO, the EU and External Trade", p. 151-152.

⁵²¹ Timothy Lyons: *EC Customs Law*, p. 201.

⁵²² Marise Cremona: "Neutrality or Discrimination: The WTO, the EU and External Trade", p. 152.

⁵²³ Marise Cremona: "Neutrality or Discrimination: The WTO, the EU and External Trade", p. 161-163.

Commission. The case regarded a regulation enforcing importation restrictions in form of import licenses on preserved mushrooms from Taiwan. Faust, a German company importing mushrooms from Taiwan, argued that the regulation, was discriminative and that Taiwan was being treated less favourably in its trade relations with the EU in comparison with the treatment of other third countries.⁵²⁴ The Court agreed with the statement of discrimination but noted that whereas there were no rules in EU law, specifically obliging the EU to treat their trading partners less favourably, these measures were legal. The Court concluded:

Although Taiwan certainly appears to have been treated by the Commission less favourably than certain non-member countries, it should be remembered that there exists in the Treaty no general principle obliging the Community, in its external relations, to accord to non-member countries equal treatment in all respects. It is thus not necessary to examine on what basis Faust might seek to rely upon the prohibition of discrimination between producers or consumers within the Community contained in Article 40 of the Treaty. It need merely be observed that, if different treatment of non-member countries is compatible *with Community law*, different treatment accorded to traders within the Community must also be regarded as compatible with Community law, where that different treatment is merely an automatic consequence of the different treatment accorded to non-member countries with which such traders have entered into commercial relations.⁵²⁵

Another example that reflects the tension in EU external trade interactions is the *Banana dispute*. When the treaty of Rome was concluded in 1957, the importation market for bananas was a hot topic in Europe. The banana market was divided, when it came to tariff quotas and was composed of three main traders, traders from within the EU, of traders from the ACP countries and traders from the Latin America Countries.⁵²⁶ Gradually these issues became more fragile especially in regard to the MFN and NT principle and in regard to how this divided market complied with target of achieving a single market and with EUs international obligations.

In 1992 the EU had adopted a regulation establishing a common organization of the market in bananas, based on the grounds of common agricultural policy.⁵²⁷ Germany argued in the case C-280/93, *Germany v. Council*, that this regulation subdivided tariff quota after origin of the traders and was discriminative.⁵²⁸ The Court examined the regulation and agreed that the traders importing bananas were being treated differently, depending on whether they were from the ACP countries or the EU itself or on whether they were from non-ACP

⁵²⁴ CJEU C-52/81, *Faust v. Commission*, 28 October 1982, para. 3.

⁵²⁵ CJEU C-52/81, *Faust v. Commission*, 28 October 1982, para 25. (Emphasis added).

⁵²⁶ ACP stands for African, Caribbean and Pacific countries.

⁵²⁷ Council Regulation No. 404/93 *on the Common Organization of the Market in Bananas*, 13 February 1993, OJ 1993 L 47, p. 1.

⁵²⁸ CJEU C-280/93, *Germany v. Council*, 5 October 1994, para. 30.

countries. Nevertheless the Court dismissed the claim on the grounds of the general principle of equality and noted:

However, such a difference in treatment appears to be inherent in the objective of integrating previously compartmentalized markets, bearing in mind the different situations of the various categories of economic operators before the establishment of the common organization of the market. The Regulation is intended to ensure the disposal of Community production and traditional ACP production, which entails the striking of a balance between the two categories of economic operators in question.⁵²⁹

The Court held that on the grounds of the objective of the regulation, of preserving and balancing the internal market, the discrimination was justified.⁵³⁰ This conclusion was criticized, as this argument of the Court was thought to be weak and hard to see how the discrimination could be directly linked and justified to the aim of the regulation.

The dispute was brought before the DSB that declared that the regulation breached the MFN principle.⁵³¹ It followed, that the EU changed its framework and concluded the *Framework Agreement on Bananas*.⁵³² The agreement introduced different export quotas to countries and an export license system that exempted the ACP countries and the EU. Germany, in the case C-122/95, *Germany v. Council*, challenged the Framework Agreement and argued that it was discriminative.⁵³³ It first argued that it discriminated between those countries that were not parties to the agreement and those that were, in regards to country quotas.⁵³⁴ The Court reviewed the conclusion of its former banana dispute where it was found lawful to enforce tariff quotas on imports from non-ACP countries and other third countries in comparison to imports from the ACP countries, whereas these countries enjoyed a special treatment under the *LOME convention*.⁵³⁵ In this case the difference in the country quota was therefore also legitimate regardless of whether or not a country was a member of the agreement.⁵³⁶ Regarding the exemption on export licenses, the Court noted that the system was based on an EU regulation and not on the provisions of the Framework Agreement.⁵³⁷ The Court then noted that there was no solid foundation for exempting one category of

⁵²⁹ CJEU C-280/93, *Germany v. Council*, 5 October 1994, para. 74-75.

⁵³⁰ Marise Cremona: "Neutrality or Discrimination: The WTO, the EU and External Trade", p. 168.

⁵³¹ In between the AB concluded that different procedures and regulation for importation from the ACP countries versus importation from other countries contradicted the MFN principle. Appellate Body Report, EC – *Bananas III*, September 1997.

⁵³² The Framework Agreement was an agreement concluded between the EU with the Republic of Colombia, the Republic of Costa Rica, the Republic of Nicaragua and the Republic of Venezuela on the 28 and 29 March 1994.

⁵³³ CJEU C-122/95, *Germany v. Council*, 10 March 1998, para. 1.

⁵³⁴ CJEU C-122/95, *Germany v. Council*, 10 March 1998, para. 48-50.

⁵³⁵ CJEU C-122/95, *Germany v. Council*, 10 March 1998, para. 55.

⁵³⁶ CJEU C-122/95, *Germany v. Council*, 10 March 1998, para. 57-58.

⁵³⁷ CJEU C-122/95, *Germany v. Council*, 10 March 1998, para. 60.

operators from the export-license system simply on the grounds of balance as a justification. The Court also concluded:

The Council has not, however, provided the Court with sufficient information to explain why the increase in the tariff quota and its division into country quotas, together with the concomitant lowering of customs duties, were not sufficient to offset the limitations which Regulation No 404/93 had imposed on the marketing of bananas from the third countries party to the Framework Agreement and why that objective had therefore to be achieved by the imposition of a financial burden on only some of the economic operators importing bananas from those countries.⁵³⁸

According to Marise Cremona, a professor in European law, the banana cases demonstrate few crucial rules that apply to EUs external trade policy and show the line between the internal market and external relations of the EU. She argues that first, it shows us that there is no treaty-based principle of non-discrimination in relation to third countries as was originally confirmed in the *Faust v. Commission*. Secondly, the case shows that differential treatment between traders within the EU is considered permitted when it is just a direct consequence of different treatment contributed between third countries. However, internal discrimination within the EU is based on the principles of the internal market and must be objectively justified and based on internal policy.⁵³⁹

As is now clear, EU internal market regulations mostly reflect the WTO obligations. However, externally this interaction between the legal systems in relation to non-discrimination becomes unclear. Apparently no specific rule is mandating the EU to apply the principle of non-discrimination in its external relations. Such obligation of course arises from EUs bilateral trade agreements or from its WTO membership, based on the principle *pacta sunt servanda*. Nevertheless, in neither of the banana cases did the CJEU take the EUs obligation under the MFN under consideration. This must lead back to the fundamental issue of WTO law lacking direct effect within the EU and to the doctrine of indirect effect.

Additionally, the EU often seeks to conclude its external trade relations via the conclusion of preferential trade agreements on the grounds of article XXIV of the GATT. The EU also often receives a waiver by the WTO to conclude its matters differently such as it did in the banana dispute. By applying these measures, it thereby is exempted from the MFN principle.⁵⁴⁰ Although, the EU does not specifically command its members to apply its internal trade principles in their trade relations with third countries nor seems to be very

⁵³⁸ CJEU C-122/95, *Germany v. Council*, 10 March 1998, para. 71.

⁵³⁹ Marise Cremona: "Neutrality or Discrimination: The WTO, the EU and External Trade", p. 170.

⁵⁴⁰ Marise Cremona: "Neutrality or Discrimination: The WTO, the EU and External Trade", p. 170.

committed to enforce the MFN principle, there are some clues that imply a change in that regard. This can for example be found in the importation and exportation regulations and its provisions on safeguard measures that directly relate to the *WTO Agreement on Safeguard Measures*. The, eventual compliance of the EU in the banana dispute is then another clue. The rules on trade within the internal market might therefore slowly spill over to EUs external trade relations.⁵⁴¹

7.2.7 Rules Regarding Charges on Exports

The prohibition in article 30 of the TFEU applies equally to duties on imports and exports and the situation regarding customs duties on exports is therefore straightforward. Charges on exports in the WTO were discussed in chapter 4.3.4. Generally the MFN principle also applies export duties and members are therefore obliged to offer WTO members the same export duties.⁵⁴² However, the NT principle, in article III of the GATT, does not apply to other charges on exports even though article XI of the GATT does. This again refers to the discussion of the importance of distinguishing between internal and border measures.⁵⁴³

Article 35 of the TFEU on QRs on exports is identical to article 34 of the TFEU. Nevertheless, the scope of the article has received different interpretation. The prohibition of QRs to exports is now interpreted to only apply to measures that discriminate.⁵⁴⁴ This was confirmed in C-15/79, *Groneveld*, a case regarding measures on stocking of horsemeat that were considered indistinctly applicable. The Court concluded that if a measure does not discriminate between exports and those marketed in member states it will not breach EU law.⁵⁴⁵ Various reasons have been put forth as a possible explanation for this difference in interpretation. These include that exportation restrictions do not impose dual burdens on exporters and that the TFEU only holds one provision on exports that might be considered as a clue for intended different interpretation.⁵⁴⁶ The explanation can also be based on the fact that imports and exports are just fundamentally different in nature and that exports restrictions are seldom applied.⁵⁴⁷

⁵⁴¹ Catherine Barnard: *The Substantive Law of the EU - The Four Freedoms*, p. 225.

⁵⁴² Karsten Engsig Sørensen: "Trade in Goods", p. 173.

⁵⁴³ Karsten Engsig Sørensen: "Trade in Goods", p. 175.

⁵⁴⁴ Tamara Perišin: *Free Movement of Goods and Limits of Regulatory Autonomy in the EU and the WTO* p, 25.

⁵⁴⁵ CJEU C-15/79, *Groneveld*, 8 November 1979, para. 9.

⁵⁴⁶ Tamara Perišin: *Free Movement of Goods and Limits of Regulatory Autonomy in the EU and the WTO* p, 27.

⁵⁴⁷ Karsten Engsig Sørensen: "Non-discriminatory Restrictions on Trade", p. 183.

7.2.8 Balancing Social Values with Trade Rules

7.2.8.1 A Comparison between Article 36 of the TFEU and Article XX of the GATT

Both the EU and the WTO have struggled with permitting its members to pursue other non-trade related values in harmony with the full application of its trade rules.⁵⁴⁸ Article XX of the GATT and article 36 of the TFEU both provide an exhaustive list of values that can be used as general exceptions to trade rules, but article 36 of the TFEU is based on the same fundamental values as article XX of the GATT. However despite similar provisions, the regimes differ in their application of these exceptions and in their approach to balance social values with their trade principles.

First of all, the scope of those two provisions is different. Article XX of the GATT unarguably applies as an exception to all the main principles found within the GATT. Whether it can extend its scope, as a possible justification, for a breach against another WTO agreement is however disputed. This issue was addressed by the AB in the case, *China Publication and Audio-visual Products* (9 January 2010). In the case China was accused of breaching its trading right commitments according to its *Accession Protocol*.⁵⁴⁹ China argued that its measures were legitimate on the grounds of paragraph (a) of article XX of the GATT and based its argument on article 5.1 of its accession protocol. The AB examined the wording of the introductory clause of article 5.1 of the protocol that allowed China to regulate their "trade consistently with the WTO Agreement" and concluded that this implied that China could apply article XX as a justification.⁵⁵⁰ In addition to interpretation in case law, some WTO agreements have also specifically announced that article XX of the GATT applies as an exception to its rules. This may imply that the meaning was to not allow the article to apply except when specifically indicated. It therefore still remains to be seen how the scope of the article will develop. Article 36 of the TFEU, on the other hand, only applies to QRs and MEE, even though similar derogations can be found in relation to other freedom provisions.⁵⁵¹

Secondly, the list of values in article XX of the GATT is considered to be exhaustive, meaning that no other important values are applicable as exceptions. Within the EU the values listed out in article 36 of the TFEU are also exhaustive. However, the CJEU has added new social values to the list referred to as *mandatory requirements*, see *Cassis de Dijon* case in

⁵⁴⁸ Tamara Perišin: *Free Movement of Goods and Limits of Regulatory Autonomy in the EU and the WTO*, p. 2-3.

⁵⁴⁹ Appellate Body Report, *China-Publications and Audiovisual Products*, 21 December 2010, para. 214.

⁵⁵⁰ Appellate Body Report, *China-Publications and Audiovisual Products*, 21 December 2010, para. 233.

⁵⁵¹ Similar derogations of article 36 of the TFEU are also incorporated into other freedom articles within its treaty see Stanford E. Gaines and Birgitte Egelund Olsen: "Trade and Social objectives", p. 209.

chapter 5.3.5.⁵⁵² The scope of mandatory requirements is more limited in comparison with the scope of article 36 of the TFEU and direct discriminatory measures are for example only justified on the grounds of article 36 of the TFEU. Furthermore, mandatory requirements can only be applied to imports and not to exports and originally it could only be applied as a justification to indistinctly applicable measures. Yet, current case law is unclear, as the Court has implied that it intends to broaden the scope of mandatory requirements by gradually allowing more types of measures, such as distinctly applicable measures, to be justified under mandatory requirements.⁵⁵³ This has especially been implied in the cases regarding environmental protection see e.g. case C-2/90, *Walloon Waste*. In the case, Belgium tried to justify its restriction of only allowing waste originated within the Wallon area to be dumped in the Wallonia region.⁵⁵⁴ This was argued to be a direct discrimination, depending directly on the origin of the waste, and could therefore not be justified on the grounds of mandatory requirements. The Court agreed, but stated:

However, in assessing whether or not the barrier in question is discriminatory, account must be taken of the particular nature of waste. The principle that environmental damage should as a matter of priority be remedied at source, laid down by Article 130 r (2) of the Treaty as a basis for action by the Community relating to the environment, entails that it is for each region, municipality or other local authority to take appropriate steps to ensure that its own waste is collected, treated and disposed of; it must accordingly be disposed of as close as possible to the place where it is produced, in order to limit as far as possible the transport of waste.⁵⁵⁵

The case therefore approved that direct discrimination was justified, in regard to the differences between the produced waste and its connection with its origin. The case therefore supported a more state regulatory approach and indicated an approach that would allow distinctly applicable measures to be justified on the grounds of mandatory requirements.⁵⁵⁶ Despite some indication in case law, it will assumed, at least for the time being, that the Court still applies a narrow interpretation of mandatory requirements and makes a distinction between indistinctly and distinctly measures.

Although the WTO does not provide an additional list to its derogations found in the GATT it has implied that other values matter. This was addressed in case *US-Shrimp* (6 November 1998), thoroughly discussed in chapter 4.4.1, where the AB emphasized the importance of environmental protection and concluded:

⁵⁵² CJEU C-120/78, *Cassis de Dijon*, 20 February 1979, para. 8.

⁵⁵³ Catherine Barnard: *The Substantive Law of the EU - The Four Freedoms*, p. 127 and 154-155.

⁵⁵⁴ See e.g. C 2/90, *Walloon Waste*, 9 July 1992, para.1-3.

⁵⁵⁵ See e.g. C 2/90, *Walloon Waste*, 9 July 1992, para. 33-34.

⁵⁵⁶ See e.g. C 2/90, *Walloon Waste*, 9 July 1992, para. 336.

WTO Members are free to adopt their own policies aimed at protecting the environment as long as, in so doing, they fulfill their obligations and respect the rights of other Members under the WTO Agreement.⁵⁵⁷

In addition to a list of lawful derogations, both the legal systems require two other conditions to be fulfilled and in both legal systems it comes under the national authorities of the member states to prove that these conditions have been met. Firstly, they need provide evidence that a trade restrictive measure falls under one of the lawful derogations of the legal systems and classify it under the right derogation. Secondly the derogations must fulfil certain conditions and be proportionate or necessary. The EU applies the traditional *proportionality test* and evaluates on a case-by-case bases whether a measure is proportionate. However, all the exceptions in article XX of the GATT have its own conditions that must be fulfilled, as was demonstrated earlier in relation to paragraph (g). These include the necessity of the exception and whether the measure relates to the goal of the exception. The necessity test of the WTO has been greatly influenced by the EUs proportionality test in its case law without ever mentioning the proportionality test.⁵⁵⁸ In the *US-Shrimp case* it was e.g. proven that the purpose of the measure directly related to the goal of the measure.⁵⁵⁹ This mirrors the application of the proportionality test by the CJEU.

Both articles also entail additional criteria that must be fulfilled, that are similarly worded and essentially entail the same conditions. This is referred to as the chapeau in article XX of the GATT and as the second part of article 36 of the TFEU. The *US-Shrimp case*, addressed the definition of the chapeau. In the case the AB referred to the chapeau as "equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions."⁵⁶⁰ This statement implies that the AB assesses both the purpose of the measure and the consequence of the measure. This case also demonstrates how the discrimination test put forth in the chapeau of article XX, is not the same discrimination test applied for the substantive rules of the GATT, as the case implies that the test in article XX is rather built on the principle of good faith.⁵⁶¹ The case also emphasized that the WTO is an international body. When the AB addressed whether the measure was justifiable or unjustifiable discriminated it therefore took into account:

⁵⁵⁷ Appellate Body Report, *US - Shrimp*, 12 October 1998, para. 186.

⁵⁵⁸ Thomas Cottier and Matthias Oesch: "Direct and Indirect Discrimination in WTO Law and EU Law", p. 173.

⁵⁵⁹ Appellate Body Report, *US - Shrimp*, 12 October 1998, para. 141-142.

⁵⁶⁰ Appellate Body Report, *US - Shrimp*, 12 October 1998, para. 159.

⁵⁶¹ Marise Cremona: "Neutrality or Discrimination: The WTO, the EU and External Trade", p. 156 and Appellate Body Report, *US - Shrimp*, 12 October 1998, para. 158.

the failure of the United States to engage the appellees, as well as other Members exporting shrimp to the United States, in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition against the shrimp exports of those other Members.⁵⁶²

The case shows that the WTO takes into account, when assessing the conditions of the chapeau, whether its members have had the opportunity to negotiate in good faith on the trade restrictive measures before they are imposed. The case then reaffirms that the WTO is an international organization based on negotiations and reciprocity.

In comparison the EU has not focused as much on this second part of article 36 and rather focuses on the proportionality test that is more or less similar to the application of the conditions found in the chapeau.⁵⁶³ The CJEU also seems to apply article 36 of the TFEU and the proportionality test simultaneously while the DSB, on the other hand, considers these as two separated questions that must be answered.⁵⁶⁴

All in all, despite the different application of these derogations, they both share the same goal of reconciling different interests. Both legal systems are though cautious about the misuse of these exceptions and address all listed (an unlisted) derogations separately and on a case-by-case basis.⁵⁶⁵ However, the process of assessing the conditions of the derogations can differ. While the DSB examines the different interests of different WTO members, the CJEU rather examines the balance between the social value at stake and the national autonomy with the aim of improving market integration.⁵⁶⁶ In addition, article 36 of the TFEU and the mandatory requirements only apply in areas where the EU has not enforced a harmonized rule that protects the same interest.⁵⁶⁷ Thus if a justification is harmonized within the EU the member states are bound by the harmonization. However, within the WTO the link between unjustifiable discrimination and international law is significant as the Shrimp Turtle clearly demonstrates.⁵⁶⁸

⁵⁶² Appellate Body Report, *US - Shrimp*, 12 October 1998, para. 166.

⁵⁶³ Stanford E. Gaines and Birgitte Egelund Olsen: "Trade and Social objectives", p. 214-215.

⁵⁶⁴ Marise Cremona: "Neutrality or Discrimination: The WTO, the EU and External Trade", p. 156.

⁵⁶⁵ Stanford E. Gaines and Birgitte Egelund Olsen: "Trade and Social objectives", p. 208

⁵⁶⁶ Marise Cremona: "Neutrality or Discrimination: The WTO, the EU and External Trade", p. 156.

⁵⁶⁷ Catherine Barnard: *The Substantive Law of the EU - The Four Freedoms*, p. 172.

⁵⁶⁸ Marise Cremona: "Neutrality or Discrimination: The WTO, the EU and External Trade", p. 158.

7.2.8.2 Other Derogations

In regard to fiscal measures the EU generally allows for no derogations, see article 30 of the TFEU regarding ban on customs duties. However, in some circumstances, a measure might not fall under the scope of the article and thus become permissible. These measures include charges that involve genuine administrative services rendered to the importer or the exporter, charges that are required by EU law such as mandatory inspection charges and occasional charges that are rather considered as internal taxation.⁵⁶⁹ These are similar to Article II (2) (a) and article VIII:1 (a) of the GATT.

In regard to article 110 of the TFEU on internal taxation the EU does generally not allow for derogations and direct discrimination on similar products automatically leads to a breach of article 110 of the TFEU. Indirect discrimination on similar products can however be legitimate if it is objectively justified, proportionate and based on a national interest.⁵⁷⁰ In comparison, the WTO is more flexible, as article XX can apply as an exception to any trade obligation according to the GATT, including tariff negotiations and internal taxation rules.⁵⁷¹

7.3 Does the WTO Influence EUs Trade Rules and Policy?

It is clear that the EU is a major player in the WTO system. The WTO has made adjustments to fit the EU comfortably into its legal system and has been greatly influenced by the EUs advanced legal system.

This goes both ways though. According to Gráinne De Búrca and Joanne Scott, scholars and experts in European law, the binding feature of the WTO in the EU is bound by the *membership* of the EU in the WTO. Therefore, EU institutions must give effect to the substantive law of WTO.⁵⁷² This was discussed earlier in relation to the status of WTO law within the EU legal order

Legal status aside, the WTO undoubtedly influences the EU trade regime in various ways. First and foremost, many of the above mentioned rules of the TFEU are clearly based on the GATT 1947 and are nowadays still being influenced by the WTO legal system. The development of the CCP provides a more recent example but *Opinion 1/94* from the CJEU

⁵⁶⁹ Catherine Barnard: *The Substantive Law of the EU - The Four Freedoms*, p. 50 and Sven Norberg et al: *EEA Law a Commentary on the EEA Agreement*, p. 323-325.

⁵⁷⁰ Catherine Barnard: *The Substantive Law of the EU - The Four Freedoms*, p. 61.

⁵⁷¹ Stanford E. Gaines and Birgitte Egelund Olsen: "Trade and Social objectives", p. 209.

⁵⁷² In order to support their case they conducted a case study on the adoption of a *Cosmetics Directive*, banning certain cosmetics due to consumer safety and animal suffering in the Union. The study shows how the Commission sought to rationalise the directive and to make it WTO compliant, whereas the ban itself most likely contravened WTO Law. See further Gráinne De Búrca and Joanne Scott: "The Impact of WTO on EU Decision-Making", p. 6-12.

showed how the EU had adopted a traditional view of its trade policy and considered it only to cover trade in goods even though the world trade regime was steadily including trade in IT and services as well. The EU then finally came to its senses and adjusted its trade policy coherently, with the adoption of the Lisbon treaty. The CCP now applies to all the three trade subjects that fall under the WTO; goods, services and intellectual property rights.⁵⁷³

Finally the reports of the DSB have also influenced the EU legal regime. The banana cases are good examples and explain the complex interaction between these legal regimes as it shows that the EU eventually had no choice but to adjust its regulation in order to comply with the DSB reports.⁵⁷⁴

8 Iceland

Iceland is a sovereign state that is both a member of the EEA and the WTO. According to article 1 of *Act No. 33/1944 on the Constitution of the Republic of Iceland*, Iceland is a Republic with a parliamentary government. Iceland is an international actor that can participate in international negotiations. According to article 21 of the Constitution, the authority to conclude international agreements belongs to the executive branch. In a limited type of subjects, the approval of the parliament, Althingi, is also needed. Aside from article 21 of the Constitution, there are no other codified principles in the Constitution on how international cooperation and communication between Iceland and other international entities should be administered or on the legal status of these international obligations. Iceland's attitude towards international law has therefore partly been developed through customary law and is based on the theory of Dualism. This means that Iceland views international law and domestic law as two distinct legal orders and therefore international obligations need to be incorporated into Icelandic legislation in order to receive the force of law.⁵⁷⁵

Iceland is a member of the EFTA and concludes, through its membership of the EFTA, various FTAs.⁵⁷⁶ The biggest FTA that Iceland has concluded is the EEA Agreement and according to Statistic Iceland, the State mostly conducts its trade affairs with Europe on the grounds of the EEA Agreement.⁵⁷⁷ Iceland incorporated the EEA Agreement into its national

⁵⁷³ Pieter Jan Kuijper and Frank Hoffmeister: "WTO Influence on EU Law: To Close for Comfort", p. 137. See also *Treaty of the Functioning of the European Union*, art. 207 (1).

⁵⁷⁴ See e.g. Appellate Body Report, *EC - Bananas III*, 9 September 1997.

⁵⁷⁵ Björg Thorarnesen: *Stjórnskipunarréttur undirstöður og einkenni íslenskrar stjórnskipunar*, p. 107-109,

⁵⁷⁶ According to the EFTA website, there are currently 25 agreements in force see: "Free Trade Agreements", <http://www.efta.int/free-trade/free-trade-agreements>.

⁵⁷⁷ According Statistics Iceland, around 80,3% of exports and 47% of imports in January and February 2015, were on the grounds of the EEU Agreement.

legislation with *Act No. 2/1993 on the European Economic Area* that entered into force on 1 January 1994. According to article 3 of the EEA Agreement, members are obliged to ensure the fulfilment of the Agreement. Iceland is therefore, strictly speaking, bound by the substantive provisions of the EEA Agreement and accordingly *de facto* by the similar rules of the EU internal market. The Agreement therefore plays a crucial role in shaping the Icelandic trade regime. It is worth mentioning, that the fulfilment and the legal effect of the EEA Agreement, were controversial from a constitutional perspective in Iceland.⁵⁷⁸ Last year, the Icelandic government introduced an extensive European policy meant to improve the administration and the enforcement of the Agreement, as well as to strengthen the trade relations based on the Agreement.⁵⁷⁹

According to the *Report of the Icelandic Foreign Ministry* from 2014, Iceland's external trade policy mainly focuses on progressing in the international trade regime. Furthermore, the policy involves a systematic commitment to encourage foreign investment, to increase exports and to react to changes in the global trade regime. The trade policy of the Icelandic government also seems to lean towards regionalism. The report reflects the emphasis of the Icelandic government to keep concluding various FTAs, both on the grounds of the EFTA and on bilateral grounds. The report reinforces its approach for regionalism on the economic crises, as well as on the lack of reaching results at the Doha Development Round, the current negotiation round at the WTO. The report also reflects a strong will of the Icelandic government to keep negotiating with new states and for example, the Icelandic government recently concluded a free trade agreement with China.⁵⁸⁰ Additionally, the report emphasizes the importance of strengthening trade relationships that are already in force and to improve trade relations with neighbouring countries, such as with Greenland.⁵⁸¹ The current government of Iceland now aims at putting forth a thorough trade policy in Iceland that focuses on lower tariffs and increasing bilateral trade agreements. The policy will hopefully be proposed in the form of a parliamentary resolution, before 1 July 2015.⁵⁸²

Iceland became a contracting party of the GATT in 1968. It then became a founding member of the WTO on 29 December 1994 when the Parliament of Iceland issued a parliamentary resolution and ratified the WTO Agreement. The government made a

⁵⁷⁸ Maria Elvira Méndez-Pinedo: *EC and EEA Law A Comparative Study of the Effectiveness of European Law*, p. 113-114. These constitutional issues will not further be discussed here.

⁵⁷⁹ Is: *Áherslur og framkvæmd Evrópustefna*.

⁵⁸⁰ "Free Trade Agreement between Iceland and China", <http://www.mfa.is/foreign-policy/trade/free-trade-agreement-between-iceland-and-china/>.

⁵⁸¹ *Skýrsla Gunnars Braga Sveinssonar utanríkisráðherra um utanríkis- og alþjóðamál*, p. 20-22.

⁵⁸² Doc. no. 35, 143 Parliament. 2013-2014, p.1 (still unpublished in section A of the parliamentary records).

reservation to the importation rules on agricultural products and the adjustment that had to be made on the current legislation in Iceland.⁵⁸³ Iceland did not incorporate the Agreement and all its annexed agreements, as it did with the EEA Agreement. Instead, the Prime minister appointed a committee to prepare and adjust Icelandic legislation for the adoption of Agreement.⁵⁸⁴ Upon joining, the Icelandic government examined the direct and indirect advantages of the country joining the WTO and noted that Iceland would benefit from tariff reductions, especially in its trade relations with USA and Asia. In addition, it noted that Iceland would most likely benefit in various ways from this new international trade framework, such through the DSB and through its new agreements, as it would make Iceland more involved in global cooperation.⁵⁸⁵

According to the WTO, Iceland has not yet been a claimant or a respondent in any disputes before the DSB. However, it has been a third party in 9 cases, one of the most recent one being, the case *EC-Seal Products* (22 May 2014). Iceland is a participant in three negotiations groups. The first regards the special treatment of agricultural products (non-trade related), the second regards rules on fisheries subsidies and the third regards negotiations on geographical indications and disclosure (falls under intellectual property rights).⁵⁸⁶ The last *Trade Policy Review* on Iceland was conducted in 2012.⁵⁸⁷ The report begins by noting that the Icelandic economy is currently recovering after a banking crisis and has done so without imposing protectionist measures. Iceland has instead firmly focused on its exportation and allowed the importation to slowly recover. According to the report, chapter 5 of the *Act no. 88/2005 on Customs Law*, on customs valuation mostly corresponds with the abovementioned rules of the EEA and the WTO and is based on the transaction value method. Rules of origin are also found in the act, in chapter XX of the act, and correspond to the rules of the EEA Agreement, formerly reviewed. The report also mentions that generally MFN tariffs are low and notes that most restrictions in Iceland that are imposed on imported products are applied on the grounds of safety reasons.⁵⁸⁸

The report addresses that the rules regarding trade in goods have not changed in recent years in Iceland. This standstill corresponds to the fact that Iceland mostly trades on the

⁵⁸³ Alth. 1994-1995, Section A, p. 2872.

⁵⁸⁴ Alth. 1994-1995, Section A, p. 1662.

⁵⁸⁵ Alth. 1994-1995, Section A, p. 1672-1673.

⁵⁸⁶ "Iceland and the WTO", http://www.wto.org/english/thewto_e/countries_e/iceland_e.htm.

⁵⁸⁷ In order to monitor the trade policies of its members, the WTO has, according to article III:4 of the WTO Agreement, established a Trade Policy Review Mechanism (TPRM) see "Overseeing national trade policies: the TPRM", https://www.wto.org/english/tratop_e/tpr_e/tp_int_e.htm.

⁵⁸⁸ *Trade Policy Review Report by the Secretariat Iceland*, p. viii

grounds of the EEA Agreement. Two of the most important products for the Icelandic market, are fisheries and agricultural products. The report acknowledges that the special environmental conditions in Iceland make the production of agricultural products even more valuable and that the production of fish products is a central industry for the economy of the country. Finally, the report also addresses the main imports and exports in Iceland. The importation in Iceland is evenly spread between various products, fuel being a considerably large one. The report also notes that Iceland's main export products are fisheries and aluminium.⁵⁸⁹ These numbers do not seem to vary from year to year, whereas according to Statistic Iceland, marine products constituted around 37% and products of power intensive plants around 47% of exports in February 2015.⁵⁹⁰

Lastly, Iceland participates in the Doha Round.⁵⁹¹ The Doha Round is the most recent negotiation round held within the WTO. Trade in agricultural products is the most delectated topic being negotiated at the round and negotiations have more or less stranded on the issue of liberalizing further trade in agricultural products. However, at the last Ministerial Conference meeting in Bali in December 2013, a conclusion was reached on improving *transparency* in trade in agricultural products, improving trade facilitation and in various issues relating to trade with developing countries. Aside from that, the Round is on-going.⁵⁹² According to the Foreign Ministry of Iceland, Iceland's current main goal as a participant in the WTOs is to focus on negotiating removal of subsidies on fisheries products.⁵⁹³

9 Conclusion

This thesis sought to examine these trade regimes from a comparative perspective and to explore their different approaches, challenges and influences in relation to their trade rules. The examination began by exploring separately the institutional, legal and functional structure of these organizations. Then their substantive trade law was compared, taking into account the EEA Agreement and the position of Iceland as a sovereign state.

The fundamental difference in the internal structure of the organizations unarguably spills over to the application of its substantive law. The biggest difference between the systems is obviously that one is a customs union while the other is not. The MFN principle does therefore not apply within the EU. Instead the EU entails an impressive and comprehensive

⁵⁸⁹ *Trade Policy Review Report by the Secretariat Iceland*, p. viii-ix.

⁵⁹⁰ Based on the unit fob million ISK, "Trade in Export", <http://www.statice.is/Statistics/External-trade/Exports>.

⁵⁹¹ "The Doha Round", https://www.wto.org/english/tratop_e/dda_e/dda_e.htm.

⁵⁹² *Skýrsla Gunnars Braga Sveinssonar utanríkisráðherra um utanríkis- og alþjóðamál*, p. 28.

⁵⁹³ *Skýrsla Gunnars Braga Sveinssonar utanríkisráðherra um utanríkis- og alþjóðamál*, p. 32.

internal trade law that is though obviously modelled on the GATT regime. This parallelism can be reflected in similar provisions on internal taxation and non-discrimination. However, despite similar provisions, the application of the provisions differs in many ways. The agenda behind the non-discrimination principle therefore differs between the regimes. The NT principle of the WTO is interpreted more narrowly in comparison with the non-discrimination rules within the EU, as the main purpose of the rule is to avoid protectionism. For the WTO it is therefore also crucial to divide between borders measure and internal measures, whereas different rules apply. In EU, on the other hand, this becomes less of a problem, whereas all obstacles that hinder trade are forbidden. This also especially relates to non-discriminatory restrictions, as the EU focuses on opening up its internal market and to prevent unnecessary obstacles to trade. This is essential for the proper function of the four freedoms. The WTO, on the other hand, has been more hesitant in allowing non-discriminatory measures to be struck down. Joseph H.H. Weiler argues that these legal regimes are continually coming more together in this regard.⁵⁹⁴ This might be reflected in the recent *Keck* decisions where the CJEU narrowed the scope of article 34 of the TFEU, read in conjunction with e.g. *Tuna/Dolphin* report where the scope of article XI of the GATT seemed to be broadly interpreted. This might be a clue that these legal regimes are developing towards each other. However, only time will tell whether the WTO will someday take up such an approach, as such development would involve more interference into its members affairs. As the WTO is an international body and a member-driven organization, aiming first and foremost at eliminating protectionist measures, this seems unlikely, at least for now. All in all, the current main difference between the WTO and the EU in its application of its substantive rules therefore seems to lie in the *priorities* of these institutions: While the EU focuses on the *effect* of a trade measure, the WTO focuses on whether or not a measure is *protectionist*.

This thesis also aimed at showing how both the EU and the WTO have managed to take into account other social values when reviewing trade rules. The WTO has been criticized for its application and approach towards article XX of the GATT and for not being sympathetic enough in regard to various other social values such as the environment. This reflects in the fact that only once has article XX been successfully applied. The WTO has tried to respond to this criticism with a wider approach and concluded more often than not that values do fulfil the criteria put forth in the listed exceptions in article XX but then fail the chapeau text. The EU as a respond to the obstacle approach and the mutual recognition doctrine also allows for

⁵⁹⁴ Joseph H.H. Weiler: "Epilogue: Towards A common Law of International Trade".

various derogations. The CJEU has though been more flexible in this regard and found that trade restrictive measures could be justified on the grounds of the derogations on various occasions. This difference might be a reflection of how more extensive EU internal case law is, in comparison with the DSB. Derogations are therefore more frequently disputed and argued before the CJEU and seen as a regulatory response for the member states against the harmonised EU system and as a tool for member states to protect their different interests.

The comparative analyses of this thesis ended by examining shortly EUs external trade policy on the grounds of its common commercial policy. The EU as a member of the WTO has been surprisingly reluctant to fully apply the WTO framework and seems to seek other ways to conclude their trade affairs, such as by concluding their trade relations on bilateral grounds etc. This also relates to the interaction between the legal regimes. The EU has refused to provide WTO law direct effect, even though other international obligations have received such effect. This thesis sought to provide a simple overview of the main issues that have arisen regarding the EUs refusal, as it directly relates to the issue of what legal status substantive rules of the WTO have received within the EU. The banana dispute showed how the EU seeks to avoid applying the MFN principle and how it plays a minor role in EU trade law. This dispute also reflects well the direction that the EU has taken that entails that while trade liberalization is certainly a crucial part of the EUs overall policy it is not an obligation when it comes to external relations.

Lastly, this thesis provided a short overview over Iceland's current trade policy. Iceland is a good example of a sovereign state that interacts, in regard to its trade policy, on all three levels; multilateral, bilateral and national. On the grounds of the EEA Agreement, Iceland has made a commitment to honour the substantive rules of the EEA Agreement and to adjust its national legislations coherently. It follows, that if Iceland decides to join the EU in the near future, it would fundamentally change the Icelandic trade regime, as Iceland would become bound by the CCP, the EUs common agricultural and fishery policy and become bound by the EUs competence rules. Such accession would also change its position and competence within the WTO, as Iceland would be a member alongside the EU. The current trade policy of Iceland also supports regionalism and therefore reflects the tension that has emerged between multilateralism and regionalism.

The conclusion of this thesis is that although both organizations were established in the aftermath of the WWII, with the same goal of pursuing trade liberalization and supporting increased trade, their approach towards that goal is significantly different. This different development starts and ends with different integration. The WTO, as a negatively integrated

international body, lacks the legislative authority that the EU possesses on the grounds of its positive integration. Consequently, the decision-making process between these institutions is fundamentally different. The WTO decisions are based on the consensus of 161 autonomous states while the EU is based on a complex participation of all its institutions on the grounds of the theory of multi-level governance. The Doha Round is a good manifestation on how stiff the decision-making process in the WTO can be and how it can affect the development of the organization and even the application of its substantive rules. Perhaps, the Doha Round has stranded because all the *easy* trade topics have already been negotiated on, leaving controversial topics, such as trade in agricultural products, unresolved. Whatever the reason may be, the integration methods and the decision-making process have undoubtedly played its part.

BIBLIOGRAPHY

Books and Journals

Adam Smith: *An inquiry Into the Nature and Causes of the Wealth of the Nations*. New York 1937.

Amin Alavi: "Negotiating in the Shawdow of Good Faith". *Liberalising Trade in the EU and the WTO: A Legal Comparison*. Eds. Stanford E. Gaines, Birgitte Egelund Olsen, Karsten Engsig Sørensen. Cambridge 2012, p. 21-42.

Amin Alvai: "Regional Trade Agreements". *WTO Law from a European Perspective*. Eds. Birgitte Egelund Olsen, Michael Steinicke, Karsten Engsig Sørensen. Netherlands 2012, p. 407-421.

Andreas F. Lowenfeld: *International Economic Law*. 2nd ed. Oxford 2008.

Bart Van Vooren and Ramses Wessel: *EU External Relations Law. Text Cases and Materials*. Cambridge 2014.

Birgitte Egelund Olsen, Michael Steinicke, Karsten Engsig Sørensen: "The WTO and the EU". *WTO Law from a European Perspective*. Eds. Birgitte Egelund Olsen, Michael Steinicke, Karsten Engsig Sørensen. Netherlands 2012, p. 79-108.

Björg Thorarnesen: *Stjórnskipunarréttur Undirstöður og einkenni íslenskrar stjórnskipunar. Handrit til kennslu við lagadeild Háskóla Íslands*. Reykjavík 2013.

Bugge Thorbjørn Daniel: "The WTO Institutions". *WTO Law from a European Perspective*. Eds. Birgitte Egelund Olsen, Michael Steinicke, Karsten Engsig Sørensen. Netherlands 2012, p. 19-36.

Carsten Willemoes Jørgensen: "Customs law: the Challenge of Non-Centralised Customs Administrations in the EU". *Liberalising Trade in the EU and the WTO: A Legal Comparison*. Eds. Stanford E. Gaines, Birgitte Egelund Olsen, Karsten Engsig Sørensen. Cambridge 2012, p. 385-411.

Catherine Barnard: *The Substantive Law of the EU - The Four Freedoms*. 4th ed. Oxford 2013.

David A Gantz: "Regional Trade Agreements". *The Oxford Handbook of International Trade Law*. Editors Daniel Bethlehem, Donald MC Rae, Rodney Neufeld and Isabelle Van Damme. Oxford 2009, p. 237-268.

David Ricardo: *The Works and Correspondence of David Ricardo. On the Principles of Economy and Taxation*. Indianapolis 1951.

Davíð Þór Björgvinsson: *EES réttur og landsréttur*. Reykjavík 2006.

Douglas A. Irwin: *Free Trade Under Fire*. Princeton 2002.

Eva Steinberger: "The WTO Treaty as Mixed Agreement: Problems with the ECs and the EC Member States Memberships of the WTO". *The European Journal of International Law*, vol. 17 no. 4 2006, p. 837-862.

Federico Ortino: "GATT". *The Oxford Handbook of International Trade Law*. Eds. Daniel Bethlehem, Donald MC Rae, Rodney Neufeld and Isabelle Van Damme. Oxford 2009, p. 129-156.

Gary Marks, Leisbet Hooghe and Kermit Blank: "European Integration from the 1980s: State Centric v. Multiple Level Governance". *Journal of Common Market Studies*, vol. 34 issue 3 1996, p. 341-378.

Gilbert R. Winham: "The Evolution of the World Trading System - The Economic and policy Context". *The Oxford Handbook of International Trade Law*. Eds. Daniel Bethlehem, Donald MC Rae, Rodney Neufeld and Isabelle Van Damme. Oxford 2009, p. 5-29.

Gráinne De Búrca and Joanne Scott: "The Impact of WTO on EU Decision Making". *The EU and the WTO Legal and Constitutional Issues*. Eds. Paul Graig, Gráinne De Búrca and Johanna Scott. Oxford 2001, p. 1-25.

Ian Brownlie: *Principles of Public International Law*. 6th ed. Oxford 2003.

Jason Cuah: *Law of International Trade Law*. London 2005.

John Errico: "The WTO in the EU: Unwinding the Knot". *Cornell International Law Journal*, vol. 44 no. 1 2011, p.179-208.

John H. Jackson: "International Economic Law: Reflections on the "Boilerroom" of International Relations". *American University Journal of International Law and Policy*, vol. 10 issue 2 1995, p. 595-606.

John H. Jackson: "Regional Trade Blocs and the GATT". *The World Economy*, no. 16 1993, p. 121-131.

John H. Jackson: *The World Trading System: Law and Policy of International Economic Relations*. 2nd ed. Massachusetts 1997.

Joseph H.H. Weiler: "Epilogue: Towards A common Law of International Trade". *The EU, the WTO and the NAFTA. Towards a Common Law of International Trade?* Ed. J.H.H. Weiler Oxford 2000, p. 201-231.

Joseph H.H. Weiler: "Transformation of Europe". *The Yale Law Journal*, vol. 100 issue 8 1991, p. 2403-2483.

Karsten Engsig Sørensen: "Non-discriminatory restrictions on trade". *Liberalising Trade in the EU and the WTO: A Legal Comparison*. Eds. Stanford E. Gaines, Birgitte Egelund Olsen, Karsten Engsig Sørensen. Cambridge 2012, p.176-202.

Karsten Engsig Sørensen: "Trade in Goods". *WTO Law From a European Perspective*. Eds. Birgitte Egelund Olsen, Michael Steinicke, Karsten Engsig Sørensen. Netherlands 2012, p. 113-179.

Konrad Zweigert and Hein Kötz: *An introduction to Comparative Law*. Oxford 1998.

Laurence W. Gormley: *EU Law of Free Movement of Goods and Customs Unions*. Oxford 2009.

Marco Slotboom: *A Comparison of WTO and EC Law: Do Different Objectives and Purposes Matter for Treaty Interpretation*. Brussels 2005.

Marise Cremona: "Neutrality or Discrimination: The WTO, the EU and External Trade". *The EU and the WTO Legal and Constitutional Issues*. Eds. Paul Graig, Gránne De Búrca and Johanna Scott. Oxford 2001, p. 151-184.

Maria Elvira Méndez-Pinedo: *EC and EEA Law A Comparative Study of the Effectiveness of European Law*. Groningen 2009.

Michael J. Trebilcock and Robert Howse: *The Regulation of International Trade*. 3rd ed. New York 2005.

Michael Lux: "EU Customs Law and International Law". *World Customs Journal*, vol. 1 No. 1 2004, p. 19-29.

Mitsuo Matsushita, Thomas J. Schoenbaum and Petros C. Mavrodoidis: *The World Trade Organization, Law Practice and Policy*. Oxford 2003.

Oxford Advanced Learners Dictionary. Eds. Sally Wehmeier, Colin McIntosh, Joanna Turnbull. 7th ed. Oxford 2005.

Paul A. Samuelsson and William D. Nordhaus: *Economics*. 16th ed. China 1998.

Paul Graig: "Democracy and Legitimacy". *The Evolution of EU Law*. Eds. Paul Graig and Gráinne De Búrca. 2nd ed. Oxford 2011, p. 13-28.

Paul Graig and Gráinne De Búrca: *EU Law. Text Cases and Materials*. 5th ed. Oxford 2008.

Peter Van den Bossche and Werner Zdouc: *The Law and Policy of the World Trade Organization*. 3rd ed. Cambridge 2013.

Piet Eeckhout: *EU External Relations Law*. 2nd ed. Oxford 2011.

Pieter Jan Kuijper and Frank Hoffmeister: "WTO Influence on EU Law: To Close for Comfort". *Between Autonomy and Dependence. The EU Legal Order Under the Influence of Institutional Organisation*. Eds. Ramses A Wessel and Steven Blockmans. Brussels 2013, p. 131-159.

Regine Adele Ngono Fouda: "Protectionism and Free Trade: A Country's Glory or Doom?" *International Journal of Trade, Economics and Finance*, vol. 3 issue 5 2012, p. 351-353.

Robert Howse and Elisabet Tuerk: "The WTO Impact on International Regulations". *The EU and the WTO Legal and Constitutional Issues*. Eds. Paul Graig, Gránne De Búrca and Johanna Scott. Oxford 2001, p. 283-328.

Stanford E. Gaines, Birgitte Egelund Olsen, Karsten Engsig Sørensen: "Comparing Two Trade Liberalization Regimes". *Liberalising Trade in the EU and the WTO: A Legal Comparison*. Eds. Stanford E. Gaines, Birgitte Egelund Olsen, Karsten Engsig Sørensen. Cambridge 2012, p. 3-17.

Stanford E. Gaines and Birgitte Egelund Olsen: "Trade and Social objectives". *Liberalising Trade in the EU and the WTO: A Legal Comparison*. Eds. Stanford E. Gaines, Birgitte Egelund Olsen, Karsten Engsig Sørensen. Cambridge 2012, p. 203-233.

Stefán Már Stefánsson: *Evrópuréttur: Réttarreglur og stofnanir Evrópubandalagsins*. Reykjavík 1991.

Stjin Billiet: "From GATT to the WTO: Internal Struggle for External Competences in the EU". *Journal of Common Market Studies*, vol. 44 issue 5 2006, p. 899-919.

Sven Norberg et al: *EEA Law a Commentary on the EEA Agreement*. Sweden 1993.

Tamara Perišin: *Free Movement of Goods and Limits of Regulatory Autonomy in the EU and the WTO*. Hague 2008.

Timothy Lyons: *EC Customs Law*. 2nd ed. New York 2008.

Thérèse Blanchet, Risto Piipponen and Maria Westman Clément: *The Agreement on the European Economic Area (EEA): a Guide to the Free Movement of Goods and Competition rules*. Oxford 1994.

Thomas Cottier: "Dispute Settlement in the World Trade Organization: Characteristics and Structural Implications for the European". *The Challenge of WTO Law: Collected Essays*. Ed. Thomas Cottier. London 2007, p.13-56.

Thomas Cottier and Matthias Oesch: "Direct and Indirect Discrimination in WTO Law and EU Law". *Liberalising Trade in the EU and the WTO: A Legal Comparison*. Eds. Stanford E. Gaines, Birgitte Egelund Olsen and Karsten Engsig Sørensen. Cambridge 2012, p. 141-175.

Thomas Cottier and Krista Schefer: "The Relationship between WTO Law, National Law and Regional law". *Journal of International Economic Law*, vol. 83 issue 1 1998, p. 83-122.

Trevor C. Hartley: *European Union Law in a Global Context*. Cambridge 2005.

Walter Van Gerven: "The Genesis of EEA Law and the Principles of Primacy and Direct Effect." *Fordham International Law Journal*, vol. 16 issue 4 1992, p. 956-989.

Reports

Completing the Internal Market. Commission of the European Communities, Brussels 1985.

Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations. Uruguay Round Trade Negotiations Committee, Geneva 1992.

European Union Explained: Trade. European Commission, Brussels 2014.

The Future of the WTO Addressing Institutional Challenges in New Millennium. World Trade Organization, Geneva 2004.

Skýrsla Gunnars Braga Sveinssonar utanríkisráðherra um utanríkis- og alþjóðamál. Utanríkisráðuneytið, Reykjavík 2014.

This is EFTA. European Free Trade Association, Brussels 2014.

Trade Policy Review Report by the Secretariat. World Trade Organization, Geneva 2012.

Websites

"Free Trade Agreements", <http://www.efta.int/free-trade/free-trade-agreements> (viewed on April 22, 2015).

"Free Trade Agreement between Iceland and China", <http://www.mfa.is/foreign-policy/trade/free-trade-agreement-between-iceland-and-china/> (viewed on April 18, 2015).

"Trade in Export", <http://www.statice.is/Statistics/External-trade/Exports> (viewed on April 19, 2015).

"Current Situation of Schedules of WTO Members", https://www.wto.org/english/tratop_e/schedules_e/goods_schedules_table_e.htm (viewed on April 18, 2015).

"The Doha Round", https://www.wto.org/english/tratop_e/dda_e/dda_e.htm (viewed on April 20, 2015).

"The European Union and the WTO", http://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm (viewed on February 11, 2015).

"Iceland", <http://stat.wto.org/TariffProfile/WSDBTariffPFView.aspx?Language=E&Country=ISm> (viewed on April 18, 2015).

"Iceland and the WTO", http://www.wto.org/english/thewto_e/countries_e/iceland_e.htm (viewed on February 9, 2015).

"Overseeing national trade policies: the TPRM", https://www.wto.org/english/tratop_e/tpr_e/tp_int_e.htm (viewed on April 20, 2015).

"Regional Trade Agreements and Preferential Trade Arrangements", http://www.wto.org/english/tratop_e/region_e/region_e.htm (viewed on February 10, 2015).

"Seychelles to become 161st WTO member", https://www.wto.org/english/news_e/news15_e/acc_syc_01apr15_e.htm (viewed on April 4, 2015).

"The Union Customs Code: a Recast of the Modernized Customs Code", http://ec.europa.eu/taxation_customs/customs/customs_code/union_customs_code/index_en.htm (viewed on April 12, 2015).

Other Sources

Alþingistiðindi

Roberto Azevedo: "RTAs are important for the multilateral trading system—but they cannot substitute it". *WTO Seminar on Cross-Cutting Issues in Regional Trade Agreements (RTAs) on 25 September 2014*. http://www.wto.org/english/news_e/spra_e/spra33_e.htm (viewed on January 15, 2015).

TABLE OF RULINGS

Judgments and Opinions of the Court of Justice of the European Union

Judgments

Case C-26/62, *NV Algemene Transport- en Expeditie Onderneming Van Gend & Loos v Netherlands Inland Revenue Administration*, [1963] ECR 1 (5 February 1963).

Case C-7/68, *Commission of the European Communities v. Italian Republic*, [1968] ECR 423 (10 December 1968).

Case C-24 /68, *Commission of the European Communities v Italian Republic (Statistical Levy case)*, [1969] ECR 193 (1 July 1969).

Cases C-2 and 3/69, *Sociaal Fonds voor de Diamantarbeiders*, [1969] ECR 211 (1 July 1969).

Case C-22/70, *Commission v. Council (AETR)*, [1971] ECR 263 (31 March 1971).

Joined cases 21/72 and 24/74, *International Fruit Company NV v. Produktschap voor Groenten en Fruit*, [1972] ECR 1219 (13 May 1971).

Case C-2/73, *Geddo v. Ente Nazionale Risi*, [1973] ECR 865 (12 July 1973).

Case C-155/73, *Giuseppi Sacchi*, [1974] ECR 409 (30 April 1974).

Case C-181/73, *R. & V. Haegeman v Belgian State*, [1974] ECR 449 (30 April 1974).

Case C-8/74, *Procureur du Roi v. Dassonville*, [1974] ECR 837 (11 July 1974).

Case C-7/78, *Regina v. Ernest George Thompson, Brian Albert Johnson and Colin Alex Norman Woodiwiss*, [1978] ECR 2248 (23 November 1978).

Case C-120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649 (20 February 1979).

Case C-170/78, *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*, [1980] ECR 417 (12 July 1983).

Case C-225/78, *Procureur de la République de Besançon v. Bouhelier and others*, [1979] ECR I-3151 (11 October 1979).

Case C-15/79, *Groneveld BV v. Productschap voor Vee en Vlees*, [1979] ECR 3409 (8 November 1979).

Case C-52/81, *Offene Handelsgesellschaft in Firma Werner Faust v. Commission of the European Communities*, [1982] ECR 3745 (28 October 1982).

Case C-104/81, *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.*, 1982] ECR 3641 (26 October 1982).

Case C-106/84, *Commission of the European Communities v. Kingdom of Denmark*, [1986] ECR 833 (4 March 1986).

Case C-70/87, *Fédération de l'industrie de l'huilerie de la CEE (Fediol) v. Commission of the European Communities*, [1989] ECR 1781 (22 June 1989).

Case C-69/89, *Nakajima All Precision Co. Ltd v. Council of the European Communities*, [1991] ECR I-2069 (7 May 1991).

Joined cases C-267/91 and C-268/91, *Criminal proceedings against Bernard Keck and Daniel Mithouard*, [1993] ECR I-6097 (24 November 1993).

Case C-2/90, *Commission of the European Communities v. Kingdom of Belgium (Walloon Waste)*, [1992] ECR I-4331 (9 July 1992).

Case C-280/93, *Federal Republic of Germany v. Council of the European Union*, [1994] ECR I-4973 (5 October 1994).

Case C-70/94, *Fritz Werner Industrie-Ausrüstungen GmbH v. Federal Republic of Germany*, [1995] ECR I -3189 (17 October 1995).

Case C-125/94, *Aprile Srl, in liquidation v. Amministrazione delle Finanze dello Stato*, [1995] ECR I-2919 (5 October 1995).

Case C-53/96, *Hermès International v. FHT Marketing Choice BV*, [1998] ECR I- 3603 (16 June 1998).

Case C-122/95, *Federal Republic of Germany v. Council of the European Union*, [1998] ECR I-973 (10 March 1998).

Case C-149/96, *Portuguese Republic v. Council of the European Union*, [1999] ECR I-8395 (23 November 1999).

Case C-302/00, *Commission of the European Communities v. French Republic (Dark and Light Tobacco)*, [2002] ECR I-2055 (27 February 2002).

Case C-422/00, *Capespan International plc v. Commissioners of Customs & Excise*, [2003] ECR I-597 (16 January 2003).

Case C-110/05, *Commission of the European Communities v. Italian Republic*, [2009] ECR I-519 (10 February 2009).

Case C-167/05, *Commission of the European Communities v. Kingdom of Sweden*, [2008] ECR I- 2127 (8 April 2008).

Joined Cases C-402/05 and C-415/05, *Kadi and Al Barakaat International Foundation v. Council*, [2008] ECR I- 6351 (3 September 2008).

Case C-260/08, *Bundesfinanzdirektion West v. HEKO Industrieerzeugnisse GmbH*, [2009] ECR I-11571 (10 December 2009).

Case C-171/11, *Fra.bo SpA v. Deutsche Vereinigung de Gas – und Wasserfaches eV (DVGW) – Technisch – Wissenschaftlicher Verein*, [2012] published in the electronic Reports of Cases (12 July 2012).

Case T-115/94, *Opel Austria GmbH v Council of the European Union*, [1997] ECR II-39 (22 January 1997).

Opinions

Opinion of G. Dutheillet d Lamothe on CJEU C-22/70 AETR, [1971] ECR 264 (10 March 1971).

Opinion 1/75, *Re Understanding on a Local Cost Standard*, [1975] ECR I-1355 (11 November 1975).

Opinion 1/91, *Agreement on the European Economic Area*, [1991] ECR I-6079 (4 December 1991).

Opinion 1/92, *re Agreement on the European Economic Area*, [1992] ECR I-2821 (10 April 1992).

Opinion 1/94, *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property - Article 228 (6) of the EC Treaty*, [1994] ECR I-05267 (15 November 1994).

Judgments of the EFTA Court

Case E-5/96, *Ullensaker kommune and Others v. Nille AS*, [1997] EFTA Ct. Rep. 30 (14 May 1997).

Case E-9/97, *Erla María Sveinbjörnsdóttir v. Iceland*, [1998] EFTA Ct. Rep. 95 (10 December 1998).

Case E-4/01, *Karl K. Karlsson hf. v. The Icelandic State*, [2002] EFTA Ct. Rep. 240 (30 May 2002).

Case E-1/07, *Criminal proceedings against A*, [2007] EFTA Ct. Rep. (3 October 2007).

Case E- 6/07, *HOB vín ehf. v. Faxaflóahafnir sf*, [2008] EFTA Ct. Rep. 128 (5 March 2008).

Case E-16/10, *Philip Morris Norway AS v. Staten v/Helse- og omsorgsdepartementet*, [2011] EFTA Ct. Rep. 330 (12 September 2011).

Dispute Settlement Reports of the WTO and the GATT

Appellate Body Reports

Appellate Body Report, *Japan - Alcoholic Beverages II*, circulated on 4 October 1996, WT/DS8/AB/R WT/DS10/AB/R WT/DS11/AB/R (adopted by the DSB on 1 November, 1996).

Appellate Body Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, circulated on 9 September 1997, WT/DS27/AB/R (adopted by the DSB on 25 September, 1997).

Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, circulated on 12 October 1998, WT/DS58/AB/R (adopted by the DSB on 6 November, 1998).

Appellate Body Report, *Turkey - Restrictions on Imports of Textile and Clothing Products*, circulated on 22 October 1999, WT/DS34/AB/R (adopted by the DSB on 19 November, 1999).

Appellate Body Report, *Canada - Certain Measures Affecting the Automotive Industry*, circulated on 31 May 2000, WT/DS139/AB/R WT/DS142/AB/R (adopted by the DSB on 19 June, 2000).

Appellate Body Report, *European Communities - Measures Affecting Asbestos and Products Containing Asbestos*, circulated on 12 March 2001, WT/DS135/AB/R (adopted by the DSB on 5 April, 2001).

Appellate Body Report, *European Communities - Conditions for Granting of Tariff Preferences to Developing Countries*, circulated on 7 April 2004, WT/DS246/AB/R (adopted by the DSB on 20 April, 2004).

Appellate Body Report, *European Communities - Selected Customs Matters*, circulated on 13 November 2006, WT/DS315/AB/R (adopted by the DSB on 11 December, 2006).

Appellate Body Report *United States - Final Anti-Dumping Measures On Stainless Steel From Mexico*, 30 April 2008 WT/DS344/AB/R (adopted by the DSB on 20 May, 2008).

Appellate Body Report, *China - Measures Affecting Imports of Automobile Parts*, circulated on 15 December 2008, WT/DS339/AB/R WT/DS340/AB/R WT/DS342/AB/R (adopted by the DSB on 12 January, 2009).

Appellate Body Report, *China Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, circulated on 10 December 2009, WT/DS363/AB/R (adopted by the DSB on 19 January, 2010).

Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products - Recourse to Article 21.5 of the DSU by Malaysia*, circulated on 22 October, 2011 WT/DS58/AB/RW (adopted by the DSB on 21 November, 2011).

Appellate Body Report, *European Communities - Measures Prohibiting the Importation and Marketing of Seal Products*, circulated on 22 May 2014, WT/DS400/AB/R WT/DS401/AB/R (adopted by the DSB on 18 June, 2014).

Panel Reports and Working Party Reports

Panel Report, *Canada - Administration of The Foreign Investment Review Act*, circulated on 25 July 1983, L/5504 (adopted on 7 February, 1984).

Panel Report, *Japan - Trade in Semi-Conductor*, circulated on 24 March 1988, L/6309 (adopted on 4 May, 1988).

Panel Report, *United States - Restrictions on Imports of Tuna I*, circulated on 3 September 1991, DS21/R (un-adopted).

Panel Report, *Japan - Taxes on Alcoholic Beverages II*, circulated on 11 July 1996, WT/DS8/R WT/DS10 WT/DS11/R (adopted by the DSB as modified by the Appellate Body Report on 1 November, 1996).

Panel Report, *Canada - Certain Measures Affecting the Automotive Industries*, circulated on 11 February 2000, WT/DS139/R WT/DS142/R (adopted by the DSB as modified by the Appellate Body Report on 19 June, 2000).

Working Party Report, *Border Tax Adjustments*, circulated on 2 December 1970, L/3464 (adopted on 2 December, 1970).