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**EU Trade Barriers
Regulation -
An 'Insurance Policy' for
European Union Companies in
Accessing the Russian Market**

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Summary

Private party access to international law, EU's external (economic) competences and EU-Russia (trade) relations have traditionally been rather controversial subjects. In this thesis, one could follow an attempt to link the aforementioned topics together within the areas of a legal instrument of the EU, namely the Trade Barriers Regulation (TBR). This peculiar regulation provides EU companies with a trade remedy. Under the TBR, enterprises situated in the EU are offered a possibility to go to the European Commission and complain about obstacles to trade on third markets. Accordingly, although a simple concept in theory, the rights attributed to the companies cause various issues on several levels.

The TBR provides an indirect access to international trade rules of which WTO law is mostly considered. It has to be mentioned that the CJEU has not allowed WTO law to obtain direct effect in the legal order of the Union. However, when a private party submits a complaint under the TBR and relies on the WTO rules, the CJEU has not seen any problems with interpreting WTO provisions. Additionally, the TBR links to the external competences of the EU. Conclusively, the EU has created a situation in which it does not allow WTO rules to have direct effect, but nevertheless has the power to interpret them in the course of TBR process.

The aforementioned legal background has subsequently put into test vis-à-vis one of the most important trade partner of the EU. Although Russia is not in the WTO yet, the accession process to this central trade organisation is about to be finished in summer 2012. Accordingly, Russia will also become the subject of the TBR. In the thesis, it has been demonstrated which kind of trade issues have occurred in the EU-Russia commercial communication and on the basis of that, a currently theoretical application of the TBR has been tested.

Deriving from the aspects mentioned above, a conclusion has been reached. Firstly, Russia's accession to the WTO will significantly change the trade relations between the EU and Russia. Compared to the current legal basis, the Partnership and Cooperation Agreement, WTO's trade forum will offer a more binding dispute settlement mechanism. Secondly, with the legal background of the WTO, EU companies acquire a more rule-based access to Russian market, which would be achieved inter alia through the TBR. This legal instrument has been briefly tested in this thesis on the four model trade disputes between the EU and Russia to illustrate the fact that the TBR would be a useful tool in contesting trade barriers in Russia once the country has acceded to the WTO. This should be seen as an opposition to the current situation where the EU companies do not possess sufficient legal protection with regard to Russian market.

Preface

As a confession, I have to admit that this thesis has been a challenge. And at the same time a fascinating task in the writing process of which I often found myself separated from 'the real world'. Instead, I was trying to get out of the legal mazes that had surrounded me. However, it has all been worth it, since the knowledge I have acquired is priceless.

I think it is necessary to devote a few words on the topic. I continued with my research that commenced with my bachelor's thesis and I developed it further in the desired direction in this thesis. It is another step in improving my knowledge on my field of interest, which could be described by the areas of international economic law and EU external economic relations. As could be seen, a special attention has been attributed to Russia in discussing those legal subjects. The research of these topics is not easy. However, they are challenging and challenges are the impellent values for me.

Nonetheless, no fruitful research can be done without inspiration. Although some of it is already there inside me, I have acquired additional inspiration from the life and people around me. Those people who I have in mind should already know that. Nevertheless, I owe very special thanks to my family who have tolerated my moodiness when the research was not going so well. *Tänud teile võimaluste ja toetuse eest!* Also, I want to say *tack* for Lund and my friends from there – you are largely to blame for me being a person as I am today. Last but not least, I would like to thank my supervisor, because she gave me the freedom – which I of course used until the last minute – to work on my thesis as I wished. And in order not to forget anyone – thank you too!

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Abbreviations

CCP	Common Commercial Policy
CJEU	Court of Justice of the European Union (commonly known as the European Court of Justice (ECJ))
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
ECR	European Court reports
EU	European Union
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
ICJ	International Court of Justice
ITO	International Trade Organization
MFN	Most Favoured Nation
NATO	North Atlantic Treaty Organization
NCPI	New Commercial Policy Instrument
PCA	Partnership and Cooperation Agreement
SPS	Agreement on the Application of Sanitary and Phytosanitary Measures
TBR	Trade Barriers Regulation
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TRIPS	Trade-related Aspects of Intellectual Property Rights
UN	United Nations
US	United States of America
USSR	Union of Soviet Socialist Republics
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

1 Introduction

'We have always found the Irish a bit odd. They refuse to be English.'
Winston Churchill

To quote Churchill's view on the Irish may seem as a strange start to this thesis. Whichever the background of this quotation is, it nevertheless interestingly illustrates the topic of this paper too. By bearing in mind the theme of EU-Russia relations in a wider context, a rather philosophical question concerning the specific issue in this research arises: is the EU's Trade Barriers Regulation (TBR) another attempt to make Russia behave in a way as we do in the EU? In other words, could the European view on international trade law, which is among other legal instruments reflected by the TBR, be considered objective in a sense that it should be normatively acceptable at least for the majority of the subjects in international law? Accordingly, if the latter is found feasible enough, could it serve as a justification to constrain Russia to comply with those values? By expanding the approach even more and paraphrasing the quote, the confrontation of the West and the East could be strikingly illustrated by the aforementioned Churchill's saying – we have always found the Russians a bit odd, they refuse to be Western.

The TBR will be elaborated in more detail below, but it could be, nevertheless, stated shortly at the outset that it is a legislative act of the EU that offers an additional legal remedy to traditional protective trade measures for the EU enterprises so that they could raise objections concerning trade barriers on the third markets. Thus, the EU has created a framework in which they allow companies indirectly to access primarily the rules of WTO. Accordingly, the EU considers this kind of approach reasonable to tackle trade problems on the non-EU market. With that, however, many controversies may be spotted. Firstly, how is the private party access to international law generally understood? Secondly, should the values that the EU wishes to establish outside its borders be acceptable to other international entities? Thirdly, how do the overall relations on the global level link to the unilateral actions of the EU? The number of questions is probably not limited and it is not possible to address them all, because, in the opinion of the author, there cannot be clear-cut answers in this debate. Nonetheless, what could delimit those thoughts is an endeavour to strike a balance in as many aspects as conceivable. Deriving from the foregoing, researching a single legal instrument cannot be conducted without a wider context in mind.

This brings us back to have a look at the so-called big picture. Purportedly, the quest for supremacy seems to be an everlasting fight on the international level. The need to control the situations could therefore be claimed to be an integral part of global relations. By borrowing a concept from the field of economics, the ones interested in worldwide matters could see that the

‘market forces’ have, to some extent, shaped the equilibrium between political powers. The latter is dependant, for instance, on military power, size of the country and historical background. Accordingly, for example, small states do not have as much say as the large ones do. The strife is, nevertheless, not only evident in the latter relations, but also between the superpowers. Herewith, the modified quotation leads us at least to one presumption – an encoded opposition of the West and the East is perceptible.

Consequently, a voice from the Western side could presume that the global legal order understood in the West is the correct one and hence, Russia is often infringing the rules of (objective) international trade law. Although the notion of an objective international law is subject to further, probably never-ending debates, a popular stance in the West seems to be that Russia is regardless of the lack of a homogeneous understanding of international law a notorious violator of those rules. Yet, those latter statements could be challenged also due to the author’s background, which is, after all, Western. Hence, the opinions provided here might be slightly biased, because the author cannot speak from the Russian point of view. At the same time, would it be possible at all to get closer to the truth concerning relations with Russia regardless of the speaker’s ‘side’?

While aiming at simplicity as much as possible in all these rather philosophical discussions, it should be explained already in the beginning that in the opinion of the author, there are no clear answers to the questions concerning international trade law and regarding relations with Russia in the legal framework. Still, the author finds it worthy to try and test the ideas presented above through an EU’s TBR-approach towards its trade partners, including Russia. The latter is chosen to be the scope in this research. Even if the approach is European, it aims at understanding the issues as objectively as possible.

For establishing the foregoing, we need to start from the beginning. The research concerning EU’s external economic relations vis-à-vis Russia as an example of EU’s trade relations from an international economic law perspective started largely three years ago for the author. Interim results of the study were expressed in his bachelor’s thesis¹. There, the author built his argument on the presumption that the EU-Russia trade relations do not stand on an equal partner basis. Through the analysis of the Partnership and Cooperation Agreement (PCA) in light of the trade relations and trade disputes, the author concluded that the EU-Russia commercial communication is not based on firm legal grounds, but is largely influenced by politics. Accordingly, dissenting opinions on trade are not effectively solved due to the lack of binding dispute settlement mechanism. Hope was

¹ Kristjan Aruoja, ‘Legal Aspects of Russia’s Trade Disputes with the European Union’ (BA thesis, University of Tartu 2010) <<http://www.ut.ee/ABVKeskus/sisu/publikatsioonid/2010/pdf/Aruoja.pdf>>.

expressed that Russia's accession to the WTO would change the status quo in trade matters.²

The current paper is in many aspects an expansion of the previous thesis and it takes into account earlier findings with a purpose of building a new approach, thus providing another dimension to the preceding research. In this research, Russia's accession to the WTO is assumed to be completed in mid-2012 and hence an additional view is provided in light of the following hypothesis: will the WTO alter EU-Russia trade relations with regard to private party rights? This is analysed through the TBR and therefore not only the state-level is considered, but also that of the companies. Subsequently, the question is about the issues and potentials of the TBR in applying it to Russia once it has acceded to the WTO.

1.1 Purpose

As already implied above, the primary purpose of this thesis is to analyse a legal instrument of the EU and to see its possible application to trade relations with Russia – as opposed to the current weak legal protection of EU companies in Russia, would Russia's WTO membership in cooperation with the TBR improve the status quo? However, an approach like that reveals a set of issues related to this purportedly simple test. Hence, the aim is to acknowledge the matters, debate over them and if possible, provide suggestions in overcoming them. A wider purpose of the research is to provide an opinion of the influence of WTO accession to the EU-Russia communication – would this event add more law to trade relations?

In order to justify the purpose, the simplest clarification would probably be that it is just fascinating to explore Russia from various angles. Among other means, legal research is one option. Admittedly, it is quite clear that on the international stage, legal matters are not purely about law, but also mixed with, for instance, politics. Relations with Russia constitute no exception in this regard since the law-oriented approach to 'the Bear' is often accompanied by unpredictability and political considerations. This, however, should not intimidate one from making a legal effort.

Even though the previous thoughts may lead one to presume that the thesis is only dealing with Russia, it is not so. Russia is used here as an example of the external economic relations of the EU. As mentioned above, the main idea behind the current research is to analyse a regulation in the legal order of the EU – the TBR – and see its possible ways of application to trade relations with an extremely important partner of the EU – Russia. Hence, the thesis is from the European perspective. Moreover, as could be seen below, it is not 'easy' to use the TBR in relations with Russia mainly because the latter is not in the WTO. At the time of writing these lines, Russia has already received an invitation to join the WTO and has virtually

² *ibid* 37-39.

become a member of the world trade club, only ratification by the Eastern partner is still required.

Deriving from that, the thesis is currently, strictly speaking, of a theoretical nature. Yet, once Russia ratifies the necessary documents and becomes a full member of the WTO, this research will automatically gain a practical value. The author admits the possibility of non-ratification, but the overall intention is to examine the potentials of the existing EU legal regime. Additionally, the analysis could be used as a policy guide in developing the future bilateral relations and making them legally more transparent and more binding in essence even without the WTO. However, as Russia and its partners have agreed on the conditions for joining the WTO, there should not be considerable setbacks with the ratification either.

Having a look at the title, one might conclude that this research is strictly business-oriented, because it brings to the front the interests of EU companies in achieving unrestricted access to the Russian market. To refute this approach, the quick answer is no, it is not. Nonetheless, it is true that the author has practical considerations in mind while analysing a legal instrument. Namely, laws, in the best understanding of the author, should aim at providing legal certainty and attempting to smoothen the relations between the parties. Simply expressed, law should make matters easier, not more complex. According to that, it is important to see how a single legal instrument, the TBR, could add to this general goal. More precisely, if the EU has decided to draft this kind of legislation in its legal order, there should be benefits arising from it for the subjects of the instrument under discussion. For that reason, the purpose of the thesis is to see how effectively the European companies (i.e. companies situated in the EU) could enforce the TBR for a smooth functioning of unrestricted trade on the third markets (here, Russia) and through that, achieve a maximum economic benefit. Thus, the aim is to see the 'added value' of the TBR in attaining international trade environment, which is not distorted by measures that could affect free competition. In other words, how helpful is the TBR in contributing to the abolishment of trade barriers?

As was said before, the thesis is not only about private companies' business interests. The author would like to grasp how the TBR and the EU in general deal with the external world, at the same time bearing in mind that a single legal instrument is only a small particle of a larger system and therefore not capable of describing the EU's external relations thoroughly. It is not difficult to argue against the opinion that international law is purely composed of law. On the contrary, it consists of different other fields like politics and economics, not to forget history. The reader could see below how the TBR is being restricted in action precisely because of other fields. Accordingly, another purpose of the thesis is to see and describe the legal tool as much as possible in a wider perspective of international law and relations.

Last but not least, even if an educated reader skilled in the field might find familiar pieces of knowledge from this research, the topic itself has not been analysed nor compiled, at least not known to the author, in a way done in this thesis. Because of that, the discussions below provide a new chapter to the general study of EU-Russia relations.

1.2 Scope

Although it would be truly interesting and fascinating to try and catch the topic in its entirety, some limitations still have to be set. Simply put, the thesis is about the criticism concerning legal (un)regulation of trade relations between the EU and Russia. In order to open this statement from a chosen perspective, the array of subjects is here limited to the TBR. A study of this legal instrument in the framework of EU-Russia trade relations will serve as an example of how the EU has regulated its internal procedures on external trade matters. Thus, the thesis is limited to EU companies' possibility to rely on the TBR in tackling market access issues in Russia. The latter is connected to the predicted Russian WTO accession and hence the procedure under the TBR is particularly necessary to be understood for any future issues in the field of trade. The TBR, besides other means of handling trade problems between states, illustrates a process of litigation from a different angle than traditional state vis-à-vis state actions. Hence, by having a limited but innovative glimpse at the EU-Russia trade relations, the examination of TBR still allows the author to discuss the wider perspective of the bilateral communication. The following paragraphs explain what is included in and what is excluded from the research.

Firstly, as the approach of this research proceeds from the perspective of the companies situated in the EU, their interests are mainly in focus. That corresponds to the spirit of the TBR itself as it limits the so-called *locus standi* under the procedures of the regulation inter alia to EU enterprises. However, a will to grasp the so-called big picture puts those interests in a wider context. The author believes that issues connected to the TBR could reflect to some extent the problems in a broader scale. Thus, the TBR is a way among others to analyse trade relations between the EU and Russia.

Secondly, it could be noticed from the previous that the thesis does not cover the procedures at the WTO. This is intentional, because the 'centre of gravity' in this research is still, as already mentioned, the TBR. Illustratively described in light of the current topic, the complaints by the European companies provide input to the TBR, following which the processes inside the TBR in relation to the market access issues in Russia generate an output. Surely, since the focus is on the TBR, aspects outside its scope, for instance, the substance of WTO, will only be described as background information where necessary. Admittedly, although the WTO dispute settlement procedure might constitute an important part of the TBR, it is not always a decisive factor in relation to the TBR procedure. Even though the WTO is not analysed in detail, essential aspects for the sake of the comprehensiveness of the research are still described. That includes possible

analogies in cases taken to the WTO under the TBR and procedural time frames as essential factors for the companies.

Overall, the limits of the research remain within the TBR with necessary additional information for broader illustration of the matters connected to it such as EU external competences, WTO implications on future EU-Russia relations, issues concerning effective enforcement of the measures implemented for simplifying private party access to WTO law and general comments on economic cooperation between the two sides. In order to pave the path towards the purpose mentioned above, the following summarises the approach and limits.

Firstly, the examples of trade disputes illustrating dissenting opinions in the field of trade between the parties originate from the EU member state–Russia opposition. Secondly, in light of the foregoing, Russia is treated as a new example in the external economic relations of the EU regarding the possible future applicability of TBR to this interrelation. Thirdly, procedural aspects will be described principally on the TBR level, not concerning the WTO process. Fourthly, the previously opened theoretical basis will be applied to the model trade disputes. Fifthly, conclusions with regard to EU-Russia trade relations resting on the analysis will be provided and opinions given.

By stressing the aim once again, the thesis, assuming that the Eastern partner accedes to the WTO, is primarily about the possible new trade remedy for the EU companies active on the Russian market. Additionally, the author wishes to express its view on the aspects not only relevant in the TBR context, but also more broadly concerning EU-Russia legal relations.

1.3 Methodology and structure

The method of unpacking the topic in hand is in itself straightforward. For building a solid basis for the application of the TBR, the examples of trade disputes between the EU and Russia need to be examined. Following that, an analysis of the TBR itself is essential. Lastly, in order to offer some value with the research, the trade disputes have to be linked to the legal instrument, namely the law has to be applied to those model trade issues. That is how the author has approached the topic.

Firstly, the chosen trade disputes should represent well enough how issues in trade between the EU and Russia may emerge. Presuming that the current legal framework does not live up to its expectations concerning bilateral relations, the overview of the trade disputes provided in this thesis not only shows the shortcomings of the system, but also reveals wider non-legal issues in the affairs. The model disputes generally illustrate the status quo with regard to the lack of mutual understanding in bilateral commercial communication.

As it became evident once again (a similar problem in earlier research), it is rather difficult to find detailed information about disagreements in trade concerning the EU member state–Russia opposition, so the author has selected trade issues, which have received more coverage in analyses. As a result of that, four model trade disputes were chosen: Poland-Russia dispute over agricultural products, Germany-Russia dispute concerning overflight tariffs, Finland-Russia dispute in relation to timber tariffs, and Estonia-Russia ‘hidden’ trade sanctions after the Bronze Soldier monument crisis.

Since every trade dispute is unique in nature, there is no practical point in trying to analyse all possible disputes and include every possible provision from the international agreements to the study for attributing the research a better representability. Hence, the four trade disputes described in this thesis bear an aim of giving an idea what kind of economic rows the EU member states have had with the Eastern partner.

Secondly, the TBR comes into play. Having acquired the knowledge concerning the status quo of EU-Russia trade relations and the model trade disputes between the sides, the reader might want to ask – but what could someone whose rights have been infringed do in such a situation? To start with, it is necessary to find out if there is a legal basis for suing someone. For instance, Russia’s trade partners have claimed that Russia is infringing international trade law, but as it has occasionally appeared, there lack provisions to back those allegations, because Russia is not a contracting party to a specific agreement (e.g. WTO treaties) and hence the law does not apply to Russia. As relations between states are regulated by international law, it has to be acknowledged that legal grounds could mainly derive from that branch of law. The problem here is the access to international law by individuals and companies. To overcome this, the EU has adopted a law that provides the companies with at least an indirect contact with one field of international law – we are talking here about the TBR and the WTO law. The second part of the thesis, therefore, deals with the functioning of a legal instrument of TBR.

In analysing the TBR, its nature will be discussed and an overview will be given of the procedure under that law. The study about TBR could be roughly divided into two spheres – one that includes internal problems on the EU level concerning the competences of the EU in external matters and another that deals with external practical issues of TBR that might emerge on the markets of third countries. The former of the spheres will be discussed briefly by bringing out only the core elements. Since the latter sphere is directly related to the research question – the benefits of TBR for a single company doing business outside the EU – it will be given greater attention.

Finally, the aforementioned parts of the thesis will be pieced together. The model trade disputes are used as an input for currently theoretical application of the TBR in relation to possible complaints of EU companies concerning trade barriers on the Russian market. Understandably, it is a

subjective evaluation, but nonetheless, it also carries objective weight. In light of the four trade disputes, the analysis concentrates on the prospect of forming a smoother business environment on the Russian market for EU companies with a legal backing. As a conclusion, the author assesses the possible new opportunities ('possible' because Russia is formally not in the WTO yet at the time of writing this thesis) from the perspective of his own view, which is based on the aspects described in this thesis and in the previous research.

1.4 Sources

In order to provide a 'timely' overview of the topic, information as recent as possible is used. This is not always conceivable, for instance, due to the restrictions in accessing documents about the facts of disputes; hence, other critically assessed sources are used. Since the topic does not involve, strictly speaking, any analysis of theories, but rather aims at debating over practical issues, the sources are corresponding.

Firstly, accessing materials concerning the trade disputes proved to be rather complicated. Because of that, the facts of the trade disputes are acquired from the few analyses available to the author. Since some of the disputes are still ongoing and in case of some disputes it is hard to tell if they have had an official final solution at all, materials concerning them are usually not made public. Hence, the circumstances concerning disputes have to be obtained from secondary sources. Since the economic rows are only for illustration purposes in this thesis, not for making substantial conclusions about trade disputes as such, the chosen sources are sufficient for building the argumentation on them. Accordingly, because no trade dispute is identical to another, it is, therefore, possible to base the evaluation of the TBR on general characteristics and principles of the trade disputes appearing in the selected cases.

Secondly, having read articles and additional literature, the author concludes that they describe the TBR in quite a similar way concerning the essence of this regulation. This could mean either that the scholars understand the TBR similarly or the works have been descriptive rather than analytical. Whichever the reason may be, for the sake of providing a thorough overview of the topic, important aspects of those articles have been abstracted here as well, accompanied by the analysis of the regulation itself.

2 EU-Russia trade relations

In today's Western society, it is thought and, to a certain extent, generally accepted that free international trade works in favour of everyone. Of course, this statement has both supporters and opponents. Nevertheless, as a foundation of the modern trade, the GATT³, an underlying multilateral agreement on international trade, is precisely based on the understanding that global trade is valuable and the returns from it outweigh the losses involved.⁴ Centred in David Ricardo's comparative advantage theory⁵, the value in international trade is established through specialisation and unrestricted exchange. The latter idea is reflected in the WTO system, which has the GATT integrated in it and where it is believed that every trade barrier would work against that long-term aim of free commerce emphasised by the comparative advantage theory. Accordingly, all obstacles to trade should be abolished.⁶

It could be questioned why trade is important at all, especially when talking about politics. It is strikingly expressed that 'trade is about money, and money is a powerful instrument to foster political relations'⁷. As trade is an influential tool, it has both encouraging and punishing qualities; it could be used as a 'carrot' and as a 'stick'.⁸ Those contradictions, not surprisingly, also appear in trade relations between the EU and Russia. However, the question is how much law could be seen in international relations?

2.1 A glimpse at the trade relations

Regardless of how trade is used in relations, the interconnections in these matters cannot be underestimated. From one side, Russia is the third trade partner of the EU, following the US and China. The Eastern companion holds 9,5% of the total share in the 'record-keeping' of all EU's trade partners, compared to 13,8% and 13,3% respectively of the two first 'spots'. From another side, the EU is by far Russia's most important trade fellow

³ General Agreement on Tariffs and Trade (1947) (15 April 1994 (*as amended by* GATT 1994)) LT/UR/A-1A/1/GATT/2 <<http://docsonline.wto.org>> (GATT).

⁴ Andreas F. Lowenfeld, *International Economic Law* (2nd edn, OUP 2008) 3.

⁵ 'Concept in economics that a country should specialize in producing and exporting only those goods and services which it can produce more efficiently (at lower opportunity cost) than other goods and services (which it should import). Comparative advantage results from different endowments of the factors of production (capital, land, labor) entrepreneurial skill, power resources, technology, etc. It therefore follows that free trade is beneficial to all countries, because each can gain if it specializes according to its comparative advantage.' 'Comparative advantage' <<http://www.businessdictionary.com/definition/comparative-advantage.html>> Accessed 10 May 2012.

⁶ Lowenfeld (n 4) 3-5.

⁷ Rafael Leal-Arcas, *International Trade and Investment Law. Multilateral, Regional and Bilateral Governance* (Edward Elgar Publishing Limited 2010) 23-24.

⁸ *ibid* 24.

with 47,1% of the total amount of Russia's international commerce. China is followed by 10,0% and Ukraine with 4,7%.⁹

For the EU, Russia is the source of mineral fuels, lubricants and related materials, which comprise 79,0% of the total value of Russian imports to the EU. This category of materials makes up 32,2% of the total EU imports in that respective sector. In addition, the EU gets, among other commodities, for instance, manufactured goods classified chiefly by material (7,5%) and chemicals and related products (2,8%). In return, Russia receives from the EU machinery and transport equipment (48,0% of total imports from the EU), chemicals and related products (16,5%) and miscellaneous manufactured articles (11,8%). One of the categories in which Russia receives from the EU 12,2% of its total imports in that sector is food and live animals. By way of generalisations, it could be concluded that Russia is the EU's primary provider of raw materials and fuels, and the EU is an important exporter of high-technology products (i.e. electronic data processing and telecommunication equipment) to Russia.¹⁰

As could be seen from the statistical overview, the EU and Russia are highly tied in trade matters. Interestingly, this kind of connectedness stands merely on a rather political agreement.¹¹ From the EU's side, Russia needs its investments, but inversely, Russia can 'play with the oil and gas'. The possibility of the Eastern collaborator to use its energy supply as a political bargaining instrument leaves the EU in a weak position because of the need for energy security.¹² For instance, although technical issues were put forward by Moscow, it could be suspected that Russia was not happy with the planned US missile shield defence system to be installed in the Czech Republic when it restricted oil supplies to that country.¹³

In conjunction with the foregoing, the relations seem to stand because of the status quo in the involvement on each other's markets, not because of any sufficient legal regulation.¹⁴ Essentially, Russia needs the EU and vice versa. Still, as there is a framework for regulating the relations in commercial matters, let us have a look at that.

2.2 Legal framework

Although trade relations are firm between the EU and Russia, as briefly presented above, it does not generally transform into solid regulation. It means that the relations concerning trade lack robust legal backing. Admittedly, there have been attempts to further develop the legal framework on trade, for instance, by trying to reassess the PCA, which will be

⁹ 'Russia. Main Economic Indicators' <http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113440.pdf> Accessed 25 April 2012.

¹⁰ *ibid.*

¹¹ See ch 2.2.1.

¹² Leal-Arcas (n 7) 145.

¹³ *ibid.*

¹⁴ See ch 2.2.

discussed below, but they have not succeeded. Since in the field of cross-border business communication between states, the connection to the legal basis of WTO rules is significantly strong, it makes the latter system necessary for advances in economic relations. This has exactly been the main issue in developing the legal framework in EU-Russia relations. Knowingly, Russia is not the member of WTO, but is most likely gaining its full right to participate in the organisation's future meetings quite soon. Although it is difficult to prove this, the fact that the parties have agreed on the conditions of joining lets us presume that the ratification of the necessary documents will only be a formality. Until then, however, the economic relations have to be based on bilateral treaties between the EU and Russia without direct exploitation of the WTO rules. The status of Russia's WTO accession is described below¹⁵.

Currently, there exists one major bilateral understanding on the commerce between the parties concerned. The main legal instrument to provide guidance in EU-Russia relations concerning their economic ties is the Partnership and Cooperation Agreement (PCA)¹⁶.

2.2.1 Current instrument – the PCA

The PCA is a treaty between the EU and Russia, which was signed in 1994 and came into effect in 1997 to provide a basis for economic, social, financial and cultural cooperation.¹⁷ It is also important to note that, in the agreement, the parties have laid down principles for achieving deeper integration of the markets with the aim of creating essential conditions for the future establishment of a free trade area between them.¹⁸ Additionally, the parties have shaped the so-called four 'common spaces' in the framework of the PCA.¹⁹ What could be concluded with this knowledge is that the understanding of the internal market we have in the EU would similarly extend to the territory of Russia if the relations evolve further. This seems to be the ultimate destination which the parties would ideally like to reach. Understandably, the sides to the treaty aim at a cooperation that is difficult to achieve in practice, due to various dissenting opinions, mainly related to politics. Despite those difficulties, theoretically, the PCA provides decent ideas for better mutual understanding. What is important for the topic in hand is the fact that trade, among other fields of cooperation, is also represented in the agreement.

Concerning the validity of the PCA, the parties have acknowledged the need to refresh and update the treaty, but the negotiations have not been fruitful

¹⁵ See ch 4.1.

¹⁶ Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, on one part, and the Russian Federation, of the other part [1997] OJ L327/3 (PCA).

¹⁷ PCA, art 1.

¹⁸ *ibid.*

¹⁹ 'EU-Russia Common Spaces' <http://eeas.europa.eu/russia/common_spaces/index_en.htm> Accessed 22 April 2012.

mainly because of the lack of WTO background in the relationship. Once Russia has acceded to the WTO, the latter legal framework would then become binding on the country and therefore firmer solutions in bilateral relations could be developed by directly relying on the WTO principles. Until changes in that respect occur, the PCA, which was originally meant to stay effective for ten years, has been annually renewed according to the possibilities provided in the agreement itself.²⁰ When a party wishes to exit the agreement, it has the obligation to notify the other party in written form at least six months in advance of the expiration.²¹ Additionally, it needs to be emphasised that the PCA was extended to all the new member states of EU after every enlargement (ie in 1995, 2004 and 2007)²², but not without comments from the Russian side²³.

Next, the provisions related to trade are essential for the topic. Overall, the PCA has 112 articles of which a considerable amount are relevant to economic matters such as trade liberalisation and investment cooperation. Already the preamble of the agreement gives the spirit to the relations. It is stated that parties commit to liberalise trade according to principles enriched in the legal environment of GATT and WTO. More specifically, the norms concerning commerce are written under title III – trade in goods. While giving some examples of how the parties have regulated their relations, it is necessary to bear in mind that although the agreement is connected to the rules of WTO, considerable restrictions to the principles apply. For instance, without going into detail with the regulation, even if the agreement suggests that some of the GATT articles are applicable *mutatis mutandis* between the parties²⁴, the borders of interpretation are quite vague, including justifications on the grounds of public morality, public policy, public security as well as concerning the protection of health and life of humans²⁵. True, similar principles are also apparent in the WTO agreements and they are generally acceptable, but nonetheless, it is possible to twist the content of these notions. It will be seen later if the GATT articles given effect in the PCA by analogy somehow connect with the possible infringements regarding the model trade disputes and if the principles could therefore be used to claim rights. This, however, is not the main issue concerning the PCA.

²⁰ PCA, art 106.

²¹ *ibid.*

²² Anne Härmaste, 'The European Union's policy towards Russia since 2004 and the Estonian-Russian relationship in this context' (2008) Report, ICDS, 4 <http://icds.ee/fileadmin/failid/Anne_H%C3%A4rmaste_-_The_European_Union%E2%80%99s_policy_towards_Russia_since_2004_and_the_Estonian-Russian_relationship_in_this_context.pdf> Accessed 22 April 2012.

²³ See further Margot Light, 'Keynote Article: Russia and the EU: Strategic Partners or Strategic Rivals?' (2008) 46 *Journal of Common Market Studies* 7, 15.

²⁴ PCA, eg arts 12 and 13.

²⁵ PCA, art 19.

2.2.2 Deficiencies

Considering the previous overview and acknowledging the theoretically effective and noble provisions of the PCA, the issue actually is somewhere else. It is the lack of binding dispute resolution system.²⁶ That said, no matter how good the regulation in the PCA might be, the problem is in enforcing those rights that have been written into this international contract.

The PCA establishes a Cooperation Council whose purpose is to monitor the implementation of the agreement. The Cooperation Council meets at the ministerial level once a year and additionally when the circumstances call for it. The council acts in a form of advisory opinions on matters connected to the PCA.²⁷ It is also a body to review any disputes referred to it relating to the application or interpretation of the PCA. Yet, the Cooperation Council settles the disputes by means of recommendation and there is no binding nature in those recommendations.²⁸

Deriving from that, the outcome of trade disputes is by no means obligatory to the parties. This constitutes the main deficiency in this legal instrument. Even if there are good provisions in the agreement and even if the agreement is binding upon the parties in accordance with the *pacta sunt servanda* principle as stipulated in the VCLT²⁹, it lacks an important characteristic – it does not have legal enforcing power in the dispute situations, including the ones involving trade-related issues. Compared to the WTO system, possibilities for hazy justifications, for instance, concerning protection of health could be used under the PCA without a fear of being caught, because no institutional body is authorised to check the legitimacy of the arguments bindingly.

The author has no knowledge of the legal disputes taken up or solved under the PCA, which lets us presume that the problems have been settled in diplomatic ways. This shows another issue with regard to the legal regulation between the EU and Russia as it currently stands – political considerations are highly involved in the communication of the two sides. As a result of that, the PCA is a political document rather than a legal one, which makes the relations based on it challenging to unambiguously elucidate.

2.3 Examples of trade disputes

This, however, does not mean that there have not been any disputes between the parties. Quite the opposite, the disputes exist; only the solution of them is troublesome, because the current legal framework does not provide a

²⁶ PCA, art 101.

²⁷ PCA, art 90.

²⁸ PCA, art 101.

²⁹ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 26.

binding dispute settlement mechanism. This indicates, as one of the factors, that the framework for legal communication is feeble and vulnerable.

The model trade disputes for providing an overview of the problems that have arisen between the EU and Russia, are chosen primarily according to the materials available. It is true that the media has covered the disputes, but for the current research, two analyses, one written by Mathias Roth³⁰ and another by Tuomas Forsberg and Antti Seppo³¹, have mainly been used. Since these researches offer decent summaries of the facts concerning trade problems and for the sake of the thesis in hand, it is enough to establish, first, the types of disputes between the parties and, second, possible infringements under the WTO law. The reader could, however, acquire additional information about the political background of the trade disputes from the two main sources provided above.

The aim here is not to analyse trade disputes as such. The author certainly acknowledges that the disputes themselves include several issues and there may even raise questions concerning the causal link between the dispute and its alleged economic effect, but it does not hinder the assessment of those bilateral 'rows' from the perspective of the TBR discussed below. Because no single trade dispute is identical to another, the question concerning each case, including in a possible TBR situation, is about sufficient evidence to establish a violation of international trade rules. Accordingly, the model trade disputes discussed here are only illustrative.

2.3.1 Poland – meat embargo

The relationship between Poland and Russia has been complicated for several reasons. The interests have collided, for instance, because from one side, Warsaw has favoured the expansion of NATO and EU, whereas Moscow would rather prefer to maintain its presence in the former USSR. Among all political problems, the investigation of the Katyn catastrophe is probably one of the most well-known. In connection with the dispute to be opened below, it has to be mentioned that 2005 was a year of several tensions, for example, related to the Nord Stream pipeline and the historical anniversaries concerning World War II.³²

The dispute under discussion started in November 2005 when the Russian Service for Veterinary and Phytosanitary Surveillance decided to firstly ban the import of Polish meat and a few days later also plant products. They justified their resolution with ambiguous reasons and changing argumentation. In the beginning, Russia said that some specific meat products were harmful to human health and that these products were

³⁰ Mathias Roth, 'Bilateral Disputes between EU Member States and Russia' (2009) CEPS Working Document No. 319 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1513230> Accessed 22 April 2012.

³¹ Tuomas Forsberg, Antti Seppo, 'Power without Influence? The EU and Trade Disputes with Russia' (2009) 61 *Europe-Asia Studies* 1805.

³² Roth (n 30) 8.

brought to Russia from third countries by falsifying Polish certificates. Moscow later confirmed their standpoint by stating that a number of Polish meat deliveries failed to comply with Russian veterinary regulations or the supplies had fake documents with them. Similar allegations applied to plant products. When Poland started to deal with the issue, Russia took a wider stance by commenting upon the circulation of products inside the EU market as such. Russia went further and said that Poland should check all the agricultural imports to Russia, which are done via Poland.³³

The issue behind the dispute seemed to be the problematic competence division within the EU. The matters of veterinary and phytosanitary certification were not uniformly applied in the EU – some of the competences remained on the Union level, others on the member state level. Russia even put a complete ban on meat imports from the entire EU in 2004 with an aim of achieving a single EU export certificate. Despite that, so far, all the disputes were resolved on a case-by-case basis. Since Poland understood some problems in the certification system, it took proper actions to correct it. This lets us to presume that Russia's action was not entirely unjustified, because there indeed existed some discrepancies in the system, but as Poland explained it, the ban was discriminatory and not proportionate because other EU member states had also issues with the same matter.³⁴

In fact, the EU had notified Poland in 2003 that the member state concerned should deal with the sanitary requirements that were not fully in compliance with the EU standards. Even though the dispute that arose accused Poland in issuing certificates too easily for meat coming from third countries, it was presumed by the EU that Polish procedures already complied with the EU standards.³⁵

In the beginning, Poland had treated the dispute as a dissenting opinion over a technical issue, but later, when bilateral consultations were not fruitful, the issue was considered under the notion of market access. Misunderstandings in the Poland-EU-Russia line led to several problems and made the dispute highly political. Poland's step was a threat to block Russia's WTO accession. Including problems concerning the unity of EU in dealing with the matter, the dispute lasted for several EU presidencies, but the ban was finally lifted in the end of 2007 / beginning of 2008, when it had lost its political usefulness.³⁶

With this example, it could be claimed that actions towards resolving the situation were uncoordinated and vague. What is important to note is that the companies affected by the ban could not raise any legal claims which would result in binding judgments. This is due to the lack of WTO background in the legal communication. Accordingly, diplomatic methods prevailed over legal mechanisms.

³³ *ibid* 8-9.

³⁴ *ibid* 9.

³⁵ Forsberg, Seppo (n 31) 1814.

³⁶ Roth (n 30) 9-10.

2.3.2 Germany – overflight right dispute

It may seem that of all the EU member states, Germany's relations with Russia are the warmest. Nonetheless, trade disputes between them are still a reality. At the same time, it seems that Germany-Russia disputes have been resolved more easily compared to some other examples with another EU member states. That might be because Germany is the key player in the EU for Russia.³⁷ Consequently, it may explain the difference in Russia's approach towards large and small countries. Nonetheless, at least the following shows that may the relations be as good as they are, at times, opinions concerning same aspects tend to reflect different understandings.

The origins of the overflight fees date back to the late-1960s when the Soviet Union implemented those taxes collected for flying over Siberia. In the beginning, the fees did not have an effect on European aircraft, because they were not allowed to fly further than Moscow before mid-1980s. The problem started to influence the companies in the EU considerably when the taxes had reached a record-high level in 2005. Russia is in fact the only country in the world to have this kind of fees and, to make matters intriguing, the taxes are collected for supporting Russian own plane industry, especially Aeroflot. What is more, those fees do not apply to every Russia's trade partner.³⁸

The EU is of an opinion that such overflight charges infringe international law, more specifically the Chicago Convention³⁹. It is important for European aviation companies to have access to intermediary hubs on the way to East Asia. Those fees affect many European companies, because they are forced to spend more either on the taxes or for finding alternative longer and more costly routes, and therefore they lose in competition compared to the local companies.⁴⁰

The EU connected the issue with the bilateral talks on the Russian WTO accession. It seemed to carry at least some weight when the parties concluded an agreement that the current system of fees will be replaced in 2013. Generally, the Russian side replied that the charges are of an utmost importance for supporting Aeroflot and for building up new infrastructure in Russia. EU-Russia summit in 2006 was believed to be a turning point – the sides agreed that after 2014, the fees would be cost-based, transparent and non-discriminatory. Some months later, though, in May 2007 the Russian side seemed to procrastinate the final signing of the agreement. Few consequent high-level meetings proved the latter – the deal had not been closed. In addition to the general background, before an important bilateral meeting, a row emerged between Russian aviation authorities and the German company Lufthansa Cargo. Russia requested the company to

³⁷ *ibid* 15-16.

³⁸ Forsberg, Seppo (n 31) 1810-1811.

³⁹ Convention on International Civil Aviation (signed 7 December 1944, entered into force 4 April 1947) 15 UNTS 295 (Chicago Convention).

⁴⁰ Forsberg, Seppo (n 31) 1811.

convert its hubs from Kazakhstan to Russia when flying to the East. Otherwise, the Russian airspace was closed to Lufthansa. The company did not agree because of the poor quality of Krasnoyarsk's infrastructure, but expressed willingness to move its hubs to Russia if latter fixed the problems concerned. Russia therefore postponed its claim until the issues are solved. Generally, the EU and Russia kept blaming each other and the distrust deepened. What is interesting to note in the argumentation is that Russian side claimed the overflight charges not to infringe WTO rules – they stated that that international trade law does not cover matters related to air-traffic.⁴¹

As we could see here again, the lack of WTO seems to be an issue. Further examination will be provided below, but it could be said already here that, as was apparent in the Polish case, companies had no possibility to raise legal questions related to the described situation. In fact, even the EU could not rely on anything legally binding, not to mention private parties whose access to international law is restricted anyway.⁴²

2.3.3 Finland – export taxes on timber

Thousands of workers in the forest industry were influenced by Russia's plan to quintuple the export tariffs on timber. In two years' time, from 2007 to 2009, Russia had decided to increase the duties from €10 to €50 per cubic meter. That would cause vast problems for paper industries in Finland, which imports around one fifth of the timber from Russia, but also in Sweden, which imports mainly birch from the Eastern market. The reason behind the increase in tariffs stemmed most probably from the aim of modernising Russian economy. In a long run, raised duties on timber would yet inevitably cause the decrease, maybe even total termination of wood import from Russia. Due to that reason, the companies would have to build up pulp and paper mills in the East in order to acquire needed raw material and hence invest in the country of source of timber. This approach would give local companies a better competitive position because they could still get the wood with a considerably lower price.⁴³

This dispute involved competence issues from the EU's side, which was expressed in the considerations whether the issue should be dealt on the member state level or if the Union leverage was needed. Russians were irritated that the issue was linked to their WTO accession process, and for their justification with regard to the row, they claimed that the increase in price is merely due to the normal functioning of market economy mechanisms. Russia, however, submitted their solutions for the dispute, but the EU turned them down as not suitable enough. Most importantly, EU's approach was not working, because Russia did not buy the argument that its

⁴¹ *ibid* 1811-1813; Roth (n 30) 16.

⁴² See ch 3.1.

⁴³ Forsberg, Seppo (n 31) 1816-1817.

WTO accession was at stake. Instead, Russia said that the membership in WTO is more important for other states than it is for Russia itself.⁴⁴

By the end of 2007, the bilateral talks had not yielded any fruit as the obstacle to trade was still there. Russian prime minister then claimed that the negotiations could continue when Russia accedes to the WTO. He also revealed that their aim with the increase in price was to attract foreign investment to Russia and through that develop the industry. At least one Finnish company went along with the demands – UPM-Kymmene agreed on a 50-50 joint venture with a Russian company. This, however, did not mean that the dispute was settled. In the course of 2008, although the matter gained further importance in the agenda, the issue was not solved. Yet, in November 2008, Russia announced a postponement of the tariff hike by nine months. The reasoning behind the latter decision was said to be connected to the economic crisis, but some believe that it was a hand-washes-hand deal regarding the Nord Stream. With this rescheduling of the price climb, the dispute had theoretically found a ‘solution’, which clearly was not conclusive.⁴⁵

With this example, it is established how Russia can unilaterally make decisions which usually would infringe WTO rules as the tariff hike in the latter legal framework is only allowed on rather limited grounds. By any means, preceding consultations and notifications are required.

2.3.4 Estonia – ‘Don’t buy Estonian’ and more after the Bronze Soldier case

The relationship between Estonia and Russia has been quite explosive at times. Today, this is primarily based on the dissenting interpretation of history. From one side, Estonia claims that the Soviet Union occupied the country, whereas Russian side states that all the soviet republics wanted themselves to be a part of the union. After regaining its independence, Estonia implemented a policy, which did not let persons residing on the Estonian territory automatically to acquire Estonian citizenship. Besides that, Russia was also irritated by the wording of the border treaty with Estonia (it mentioned the continuity of the state and the Tartu Peace Treaty of 1920) and therefore disagreed to ratify it. In word, Russia has seen Estonia as an eyesore as the latter usually depicts Russia in a negative way.⁴⁶

The dispute concerning the Bronze Soldier monument, which was built in 1947 for the Liberators of Tallinn, and the economic effects thereafter are largely connected to the historical background of the two sides. Estonians mainly saw the monument as a symbol of Soviet occupation, but for Red Army veterans it embodied casualties of wartime. As the spot was a source

⁴⁴ *ibid* 1817.

⁴⁵ *ibid* 1818.

⁴⁶ Roth (n 30) 12.

for controversial feelings, the Government of Estonia decided to relocate the monument from the centre of Tallinn to its outskirts. In late-April 2007, the preparation works started, accompanied with riots started and attended primarily by Russian-speaking population throughout Tallinn. After the demonstrations, which lasted for two days, the Russian side even claimed to end diplomatic relations with Estonia. What is more, Estonia was hit by wide-scale cyber-attacks, which could be presumed to originate from the East.⁴⁷

Additionally, the event that got the most attention worldwide was the blockade of Estonian embassy in Moscow, which was seen as a breach of the Vienna Convention on Diplomatic Relations, because the Russian authorities did little to put an end to the incident. From the economical side, Estonia suffered from 'hidden sanctions'. The statements by Russian authorities, who discouraged Russian people from buying products originating from Estonia, expressed the consequences of the removal of Bronze Soldier. In addition, many agreements were terminated and new investments were postponed. To make matters worse, truck traffic at the most important border checkpoint between Estonia and Russia was blocked and Russian side stopped transportation of oil, petroleum products and coal by railways. Although the 'sanctions' lasted for a short time, they still caused damage to Estonian economy.⁴⁸

This case is the most complicated one with regard to WTO rules. Firstly, the measures created by Russia were of a temporary nature, and secondly, there most probably would lack sufficient evidence to prove a breach of WTO principles. However, under the WTO framework, Russia would have to base and explain its steps more than it has to do without this legal environment and therefore it would be possible to claim that Russia has infringed those trade rules.

2.4 Summary

An attempt to provide an overview as comprehensive as possible with as little space as needed brings out the meaningfulness of the relations of the two sides concerned. Even with this brief insight, it could be established that the trade as a subject is sufficiently vital in cross-border relations. Without a need to overemphasise the commercial connections between the EU and Russia, one could claim that they, nonetheless, are at least challenging to grasp in their entirety.

It is obviously good to know the legal background of trade relations, but at the outset, it could be stated that the real EU-Russia communication is based on rather other grounds. The latter is composed largely of politics in its widest definition. This understanding is reflected in the trade disputes between the parties. It has to be mentioned here that the four disputes

⁴⁷ *ibid* 13.

⁴⁸ *ibid*.

discussed in this thesis represent in a decent way the general substance of Russia's trade issues vis-à-vis other states. As could be seen, even if the rows are about very different subjects, some recurrent characteristics occur.

Firstly, Russia tends to hinder free trade with a purpose of financing its national interests. This, however, is not unusual, because everyone should be – and actually are – protecting their interests. At the same time, there should exist some common principles, which let one to make sure that their hope for legal certainty will generally be respected. Illustrated by the German and Finnish examples, it was evident that Russia suddenly implemented disfavouring conditions on foreign companies in order to give advantages to its own industries. This kind of approach leads us to doubt in unrestricted trade. What is more, it makes the market forces suspicious towards legal instruments and through that, distrustful about legal regulation as a whole. Accordingly, the question about the possibility of regulating relations with Russia arises – is it just realpolitik that forms the communication or is there room for written law as well?

Secondly, trade could be considered as a political bargaining resource in Russia's opinion. In principle, this could be called reciprocity. The latter was proven by the Estonian case where a country's sovereign decisions were interpreted as 'attacks' against another sovereign state and hence adequate for counter-measures. Consequently, trade relations cannot be underestimated in political debates. Economic ties in globalised world are sound weapons in one type of modern war.⁴⁹

Thirdly, it seems that Russia wishes to challenge the EU in various possible ways. The Eastern partner is testing how unified the Union after all is in dealing with the issues. The previous statement includes questions of competences within the EU, but also concerning the external façade. This was demonstrated by all the model trade disputes, but most directly in the Polish case where Russia wanted to push the EU towards homogenizing its certificates on agricultural exports. Essentially, even if the EU has internal issues, it should act solidly and harmoniously externally, as a single actor at the international stage, when handling the problems posed to it. In addition, consistently approaching with the same line of argumentation, for instance, using the accession to the WTO as a manipulator has not carried any weight since Russia seems not to be threatened by this kind of matters.

Deriving from the previous, the issues between the two presumable partners are codified into their relations. Let us consider the PCA for a second. We have the EU-Russia bilateral relations regulated at least in theory. Considering that international law stands on the will of the states and agreements have practical value when enforced and respected properly, the PCA should function in the same way. The trade relations, however, reveal that the treaty between the EU and Russia is not something that the sides meticulously follow. If parties appreciated the law as it is written in the

⁴⁹ See similar approach in David Armstrong, Theo Farrell, H el ene Lambert, *International Law and International Relations* (CUP 2007) 223.

documents and presumably desired by the sides, then we would not have that many issues. The author does not want to create any illusions about global order, but wishes to question the necessity of agreements such as the PCA, which indeed show political goodwill, but are not entirely enforceable due to the lack of binding effects. Admittedly, the PCA offers a framework for better understanding, but when it comes to resolving trade disputes in reality, it practically has no use.

The argument here is that the parties do not want to deal with substantial problems. The trade disputes illustrate that the dissenting opinions are solved individually and separately. In other words, the parties solve a single dispute at once, but they do not approach the issues in trade relations as such. On the one hand, Russia is quite unpredictable in its actions, which logically does not allow us to work on something sustainable. This is shown, for instance, by the fact that the obstacles to trade usually emerge by surprise and there is no clarity in assessing the final solution of the disputes, if the resolution has been achieved at all. On the other hand, without any effort in that respect, we will constantly have to be engaged with every single issue in the future without firmer supporting legal surface that would provide us with more mutual understanding and predictability in relations.

3 Trade Barriers Regulation – a measure against unfair trade practices

Having had a look at the current situation in the relations, the thesis will next take a step into an expectable future. As it will be seen, in trade matters, the EU has drafted a regulation for tackling trade barriers on the international level. The Trade Barriers Regulation⁵⁰ in essence gives every single company situated in the EU a right to go to the European Commission and complain about issues relating to obstacles to trade on the third markets.

As private party participation has been an issue in international law, the EU has surely made an effort in contributing to widening the scale of possible use of the rules of international law with the TBR. This noble purpose should be welcomed; however, the following will prove that the system of allowing companies to have access to WTO principles does result in conflicting legal values, for instance, concerning the clash between private party access to WTO and attributing direct effect to WTO law in EU. Besides that, a question of effective functioning of the regulation rightfully arises.

It is believed that WTO accession will change the legal framework for EU-Russia relations by making it more rule-oriented. It definitely does, but the question, however, is how would it appear in practice. In order to elaborate on this approach from one perspective and explain one line of effects of Russia's WTO accession, the following will describe an EU regulation and its procedure, which contributes to the general set of implications.

It has to be admitted that this task of trying to include as many aspects as possible in the discussion for a better overview is not certainly easy. Therefore, a thorough analysis of every facet cannot be provided, however, the most important considerations will be mentioned. Those include, for instance, matters related to direct effect of WTO rules in the EU legal order; issues concerning EU's competences to act on behalf of its member states in the field of external economic relations; brief insight to WTO dispute settlement procedures, as this is important for completing the overview of the TBR processes.

⁵⁰ Council Regulation (EC) 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization [1994] OJ L349/71 (Trade Barriers Regulation, TBR).

3.1 Private enforcement of international law

It has to be acknowledged that the concept of private party access to the instruments of international law is a notably interesting research topic on its own. Here, consequently, the details of this area of study will be left aside, for others to explore. Instead, in this thesis, general observations will be made concerning the field. Consequently, the question is: who has the traditional privilege to access international law and how it associates with the topic under discussion?

Historically, international trade has been considered as a field for international law to regulate and accordingly difficult for private parties in making their voices heard at this forum.⁵¹ Until the 19th century, the set of norms known as international law was commonly perceived to exist between the states. In the course of 20th century, the approach developed further and widened due to a more globalised view at the relations on the international level. Accordingly, also individuals were claimed to acquire rights and obligations under international law regardless of their lack of a position as the subjects of this legal system. Although individuals have been attributed at least some kind of a status as a subject, there is little consensus what it actually means to involve them in the international legal order.⁵² As the issues have mainly been connected to individuals, strictly speaking, the foregoing discussion does not therefore explain the standing of companies in the international law. Surely, analogies could be drawn, but a complete lucidity seems to be even more severely absent here.

Anyhow, the developments generally prove that the once inaccessible rules have 'come closer' to the individuals. An issue related to the foregoing arose in the *Nottebohm* case, where it was ruled that a state, namely Liechtenstein was not allowed under customary international law to defend one of its nationals due to the lack of a 'genuine connection' between the individual and the state. The latter was an unexpected approach, because it had been assumed that states could always guard their nationals in all aspects. A similar position in relation to actions on behalf of the companies was also generally understood.⁵³ As a remark, this is linked to the understanding, at least in the EU, that companies should usually be considered as 'creatures of national law'.⁵⁴ Hence, the case before the International Court of Justice caused some controversy. Furthermore, the scope of protection of companies in international law had never been raised

⁵¹ Sujitha Subramanian, 'EU Obligations to the TRIPS Agreement: EU Microsoft Decision' (2010) 21 *The European Journal of International Law* 997, 1019.

⁵² Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (CUP 2011) 3.

⁵³ David Harris, 'The Protection of Companies in International Law in the Light of the *Nottebohm* Case' (1969) 18 *The International and Comparative Law Quarterly* 275.

⁵⁴ Case 81/89 *The Queen v. H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc* [1988] ECR 5483, para 19.

before the court prior to the decision in the *Nottebohm* case.⁵⁵ Regardless of the issues related to the matter, at least the need to identify the individual's rights and obligations in the global legal system was acknowledged with that case.

Although the status of individuals and companies in the international law is not conclusively determined, the question concerning the latter is of an utmost importance. Logically, when a law, be that international or domestic, affects someone, they should have at least some say with regard to their rights and obligations. In relation to possible fear of erosion of state sovereignty while allowing private parties to access international law⁵⁶, it is yet found that regardless of loosening the conditions in attributing individuals a standing at the international forum, states will continue to be in the centre of international law.⁵⁷ By any means, private parties already participate in the creation of global legal framework as they can represent national governments at the *fora*, where the new treaties are negotiated and adopted.⁵⁸

From another perspective, the international court system should not be overloaded by cases brought by private actors and matters should generally be solved close enough to the complainants. On the other hand, international provisions that affect individuals and companies should be open to be made use of them. Furthermore, in the globalised world, cross-border trade gains continuously more importance. Accordingly, in the view of the author, international trade rules should not only be enforced solely by states, but also by individual actors. However, it has to be admitted that the quest for striking the balance between the previously mentioned considerations is a rather difficult task to be fulfilled in this matter, mainly due to possible problems with regard to unified interpretation of the rules.

3.1.1 Access to WTO rules in the legal order of EU

In light of the foregoing, however, a legitimate question arises – to what extent then is one field of international law, namely WTO law accessible to EU companies? For instance, in international criminal law, individuals are considered to bear obligations. International human rights law, where individuals are assumed to hold various rights, offers similar approach.⁵⁹ True, we are talking about natural human persons here.⁶⁰ Still, could there

⁵⁵ Harris (n 53) 282. *Nottebohm case* was decided on 6 April 1955, see 'Nottebohm (Liechtenstein v. Guatemala)' <<http://www.icj-cij.org/docket/index.php?sum=215&code=lg&p1=3&p2=3&case=18&k=26&p3=5>> Accessed 14 May 2012.

⁵⁶ Duncan B. Hollis, 'Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty' (2002) 25 Boston College International & Comparative Law Review 235, 235-238.

⁵⁷ *ibid* 237.

⁵⁸ *ibid* 243.

⁵⁹ Parlett (n 52) 3.

⁶⁰ *ibid* 4.

be some clarification in relation to the situation of EU companies under international trade law? The Court of Justice of the European Union (CJEU or ECJ)⁶¹ has provided some guidance in this respect. Before discussing the Court's approach, it has to, however, be noted that, although private parties could lobby their respective state authorities to go to the WTO, it is generally understood that under the law of the WTO, only member governments are entitled to bring claims before the DSB.⁶²

Nonetheless, the question concerning companies' access to WTO posed above relates to the notion of direct effect. In the CJEU's judgment *Van Gend en Loos*⁶³, the Court stated the following:

'To ascertain whether the provisions of international treaty extend so far in their effects it is necessary to consider *the spirit, the general scheme and the wording of those provisions*.'⁶⁴

In connection with the EU treaties and their direct effect, the CJEU found the following:

'The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the [Union], implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which *refers not only to governments but to peoples*.

[...]

The conclusion to be drawn from this is that the [Union] constitutes 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. Independently of the legislation of Member States, *[Union] law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage*.'⁶⁵

According to the Court's view, the EU legal order is a special system of rules, which have been given direct effect so that affected individuals are able to rely on them. This, however, does not say anything about the direct effect of any other piece of legislation, among which are also the rules of WTO.

⁶¹ Although the Court is commonly known as the European Court of Justice (ECJ), it will hereinafter be referred to by its official name, the Court of Justice of the European Union ('CJEU'), or as the 'Court'.

⁶² Alan O. Sykes, 'Public versus Private Enforcement of International Economic Law: Standing and Remedy' (2005) 34 *The Journal of Legal Studies* 631, 635.

⁶³ Case 26/62 *N.V. Algemene Transport – en Expeditie Onderneming Van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1 (*Van Gend en Loos*).

⁶⁴ *ibid* 12, emphasis added.

⁶⁵ *ibid*, emphases added.

Nonetheless, in the *International Fruit Company*⁶⁶ case, the CJEU was asked to explain the direct effect of GATT in the EU's legal framework. In fact, the *International Fruit Company* decision was the first case where the CJEU applied the direct effect doctrine to the GATT and the decision in essence followed the analysis set out in the *Van Gend en Loos* case.⁶⁷ After the Court had dealt with the matter whether the GATT is binding upon the EU⁶⁸, and it was found to be so⁶⁹, it moved forward to discuss direct effect. In order to determine whether the GATT could have direct effect, the Court stated, as in *Van Gend en Loos* that, 'for this purpose, *the spirit, the general scheme and the terms* of the General Agreement must be considered'⁷⁰. Having analysed the characteristics of the contested legislation, the Court concluded, without ever addressing the language of article XI of GATT directly⁷¹, that 'those factors'⁷² 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 [Union] rights which they can invoke before the courts'⁷³. Since then, the CJEU has expressed consistency in its argumentation concerning the lack of direct effect of the GATT.⁷⁴

Consequently, although the EU law, as it now stands, comprises of similar principles in effect compared to the GATT⁷⁵, the latter does not have direct effect in the EU legal order. Concerning the WTO, the CJEU maintained the same line of reasoning as in relation to the GATT starting with the case *Portugal v Council*⁷⁶. The Court stated that 'that interpretation corresponds, moreover, to what is stated in the final recital in the preamble to Decision 94/800, according to which 'by its nature, the Agreement establishing the World Trade Organisation, including the Annexes thereto, *is not susceptible to being directly invoked in [Union] or Member State courts*'⁷⁷. There might be multiple reasons for denying direct effect of WTO law, but the EU's unwillingness to let the claims to be based directly on the WTO rules

⁶⁶ Joined cases 21 to 24/72 *International Fruit Company NV and others v Produktschap voor Groenten en Fruit* [1972] ECR 1219 (*International Fruit Company*).

⁶⁷ Ronald A. Brand, 'Direct Effect of International Economic Law in the United States and the European Union' (1996) 17 *Northwestern Journal of International Law & Business* 556, 575-576.

⁶⁸ *International Fruit Company* (n 66) para 7.

⁶⁹ *ibid* para 18.

⁷⁰ *ibid* para 20, emphasis added.

⁷¹ Brand (n 67) 577.

⁷² '[...] [T]he particular feature of GATT is the broad flexibility of its provisions, especially those concerning deviations from general rules, measures which may be taken in cases of exceptional difficulty, and the settling of differences between the contracting parties.' Case 70/87 *Fédération de l'industrie de l'huilerie de la CEE (Fediol) v Commission of the European Communities* [1989] ECR 1781 (Fediol), para 20.

⁷³ *International Fruit Company* (n 66) para 27.

⁷⁴ See overview of the case-law at Brand (n 67) 577-579.

⁷⁵ Piet Eeckhout, *EU External Relations Law* (2nd edn, OUP 2011) 11.

⁷⁶ Case C-149/96 *Portuguese Republic v Council of the European Union* [1999] ECR I-8395.

⁷⁷ *ibid* para 48, emphasis added.

could be derived from the fact that the Union's main trading partners also have not attributed direct effect to WTO agreements.⁷⁸

3.1.2 Indirect access via the TBR

Another question is the interpretation of WTO rules in the legal order of EU. This issue arises, for example, when the application of the TBR comes into play. The TBR seems to function as an alternative to the general approach, which suggests that there is no way WTO rules could be directly enforced before the EU courts, i.e. both domestic and the CJEU. Thus, since the WTO rules do not possess direct effect in the EU, the TBR is an instrument, which still lets companies to rely on international trade rules. Now, this certainly causes conflicting principles to collide with one another.⁷⁹

From one side, as WTO is to some extent still accessible through the TBR, the CJEU's case law on direct effect of GATT and WTO agreements does not seem so consistent anymore. Understandably, the possibility to rely on WTO rules in national courts and before the CJEU opposed to the interpretation of provisions of world trade law in the TBR complaint could be declared to be totally different approaches. At the same time, the question of consistency in general interpretation by the European courts is anyway there, because at the courthouse the judges essentially have to deal with the same matter – how to apply WTO law to the facts of the case in hand.

However, there is still a twist. With direct effect, all the courts in the EU could apply WTO rules and therefore interpret the legislation. Without direct effect, but with, for instance, the TBR, the European Commission is of a position to review the WTO law in light of the complaint brought under the TBR and hence, in cooperation with the CJEU, be in control of the interpretation. Accordingly, not providing WTO law direct effect in EU is in the interest of the Union as then it could retain its exclusive power to assess those international trade provisions.

Nonetheless, from the companies' perspective, even this workaround provided by the TBR should satisfy the enterprises more than no access at all. However, it has to be acknowledged that the issues related to this kind of alternative legal path may affect a smooth functioning of the system. Essentially, the TBR is providing private parties an access to the WTO court, but via the European Commission. Hence, there exists 'a mediator' between the companies and WTO for keeping the situation within set borders of the so-called alternative direct effect. Otherwise, from the EU's part, the European Commission would not be able to administer international trade, which naturally belongs to its competence⁸⁰. On the one hand, total ban of WTO rules would be too limiting, but on the other hand,

⁷⁸ Marco Bronckers, 'From 'Direct Effect' to 'Muted Dialogue'' (2008) 11 *Journal of International Economic Law* 885, 886.

⁷⁹ See more about interpreting WTO law under the TBR at ch 3.2.2.

⁸⁰ See ch 3.2.

when attributing rights to companies, a power to monitor the need and the effects of application should be reserved for a less cumbersome global trade system. Accordingly, the TBR is still a restricted version of intermediating WTO rules into the legal order of EU for private enforcement. Characteristics of the TBR will be discussed below,⁸¹ but before that, some words about EU's external economic competences.

3.2 EU external competence – Common Commercial Policy

In order to put the TBR into a wider context of EU law, it is wise to have a look at the legal basis of that regulation. As it is apparent from the official name of the TBR, the regulation is 'laying down [Union] procedures in the field of the *common commercial policy*'⁸². Accordingly, the latter field of EU law will be discussed here.

EU's common commercial policy (CCP) is considered the most developed external policy of the EU.⁸³ CCP is in the exclusive competence of the EU⁸⁴ and it is codified, strictly speaking, under Title II of Part Five⁸⁵ of the TFEU⁸⁶. However, guiding principles to support the CCP could also be found from other parts of the treaties, for instance, from article 218 TFEU. Nevertheless, the general aim of the EU, as a customs union⁸⁷, under the CCP is to 'contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers'⁸⁸. The underlying principles supporting the EU's idea of CCP are, for instance, democracy, rule of law, principles of equality and solidarity and respect for the principles of international law.⁸⁹

Article 207 TFEU adds to the latter and explains further, what the CCP is. The provision stipulates that '[t]he 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'. This long and

⁸¹ See ch 3.3.

⁸² See n 50 for the official name of the Trade Barriers Regulation, emphasis added.

⁸³ Eeckhout (n 75) 439.

⁸⁴ Consolidated Version of the Treaty on the Functioning of the European Union [2010] OJ C83/47 (TFEU), art 3(1)(e).

⁸⁵ Titled 'External Action by the Union'.

⁸⁶ Articles 205-207 TFEU.

⁸⁷ Articles 28 and 32 TFEU.

⁸⁸ Article 206 TFEU.

⁸⁹ Consolidated Version of the Treaty on European Union [2010] OJ C83/13 (TEU), art 21(1).

comprehensive list of aspects is, however, not exhaustive.⁹⁰ Additionally, article 207 TFEU also lays down relevant procedural rules for enforcing the aforementioned values.

As could be seen from the overview above, the CCP is an EU's core policy in dealing with its international partners. Importantly, the customs union, which defines the EU, gives a strong basis for external economic communication. Now, let us have a quick look at one example of the scope of CCP – the competences related to the WTO agreements.

3.2.1 Competences related to the legal areas of WTO agreements

Prior to the come into being of the WTO in 1995⁹¹, the CJEU was asked to provide an opinion concerning the competences of EU and its member states to conclude the WTO agreements.⁹² The CJEU had to take a stance, firstly, concerning the 'competence to conclude the Multilateral Agreements on Trade in Goods' and, secondly, also the external competence to contract the GATS and the TRIPS.⁹³ The general outcome of the case was that all the WTO agreements on trade in goods came within Union's commercial policy competence⁹⁴, but regarding the GATS and the TRIPS, the Union and its member states were jointly competent to conclude those agreements⁹⁵. The WTO agreements are therefore considered as mixed agreements in the legal order of the EU with respect to the competences of the Union.

However, it has to be mentioned that compared to the legal situation where the *Opinion 1/94* was given by the CJEU, article 207 TFEU now also considers services and intellectual property rights as an inherent part of the CCP. Hence, since some fields of law are still not harmonised at the EU level, the EU does now have a sole competence to act on behalf of the member states in all the fields, including services and intellectual property rights, named under the CCP. Accordingly, the Lisbon Treaty attributed the EU full control over the areas of WTO law, which are covered by the CCP. With that, it is established that although all the EU member states are separately the contracting parties to the WTO⁹⁶, the EU exclusively coordinates the Union's trade policy on behalf of its member states.

⁹⁰ Eeckhout (n 75) 440.

⁹¹ See ch 3.4.1.

⁹² *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-5267 (Opinion 1/94), para 1.

⁹³ *ibid.*

⁹⁴ Eeckhout (n 75) 29.

⁹⁵ *ibid.* 34.

⁹⁶ 'The European Union and the WTO' <http://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm> Accessed 15 May 2012.

3.2.2 Interpreting WTO law in the course of the TBR procedure

Acknowledging that the WTO rules do not possess the privilege to have direct effect in the legal order of EU and that the EU is the sole coordinator of the WTO rules that belong to the scope of the CCP, the question of interpretation of WTO law is still of an interest with regard to this research. As was stated before, for the TBR to function properly, the parties to the trade disputes have to deal with WTO law in the complaint under the TBR. Thus, the clash of those two approaches is expressed by the fact that even though the Union is not allowing WTO rules to possess direct effect in its legal order, those international trade principles are still ‘directly’ relied on in the TBR complaint.

As the language and spirit of *International Fruit Company* suggests, the CJEU should not in any case have the competence to interpret the GATT. However, a different conclusion was reached in the *Fediol*⁹⁷ case. There the EEC Seed Crushers’ and Oil Processors’ Federation (Fediol) asked the Court to annul a Commission decision, where the latter had not been willing ‘to initiate a procedure to examine certain commercial practices of Argentina regarding the export of soya cake to the [Union]’ under the predecessor of the TBR^{98,99}. In its analysis, the CJEU recalls the case law starting with *International Fruit Company* and admits the lack of direct effect of GATT.¹⁰⁰

However, the Court then takes a turn and states that ‘it cannot be inferred from those judgments that citizens may not, in proceedings before the Court, rely on the provisions of GATT in order to obtain a ruling on whether conduct criticized in a complaint lodged under [NCPI]¹⁰¹ constitutes an illicit commercial practice within the meaning of that regulation’¹⁰². Accordingly, the fact that GATT does not have direct effect in the EU¹⁰³, ‘does not, however, prevent the Court from *interpreting and applying rules of GATT* with reference to given case, in order to establish whether certain specific commercial practices should be considered incompatible with those rules’¹⁰⁴. The CJEU added that ‘[t]he GATT provisions have an independent meaning which, for the purposes of their application in specific cases, is to be determined by way of interpretation’¹⁰⁵. The Court also emphasises that ‘the fact that Article XXIII of GATT provides a special procedure for

⁹⁷ *Fediol* (n 72).

⁹⁸ See ch 3.3.

⁹⁹ *Fediol* (n 72) para 1.

¹⁰⁰ *ibid* para 19.

¹⁰¹ New Commercial Policy Instrument, predecessor of the TBR, see ch 3.3.

¹⁰² *Fediol* (n 72) para 19.

¹⁰³ See ch 3.1.1.

¹⁰⁴ *Fediol* (n 71) para 20, emphasis added.

¹⁰⁵ *ibid*.

settlement of disputes between contracting parties is not such as to preclude its interpretation by the Court¹⁰⁶.

Hence, the CJEU concluded that since the NCPI lets private parties to invoke GATT provisions in the complaints lodged with the European Commission, the Court consequently has the power to review the legality of Commission decisions in which they apply those pertinent provisions.¹⁰⁷ Although *Fediol* could be considered an exception due to its factual and legal background compared to other cases¹⁰⁸, the principle developed in it, nevertheless, is also relevant with regard to the TBR¹⁰⁹. For that reason, if a Union act in question such as the TBR refers to specific provision of a WTO agreement¹¹⁰, the so-called *Fediol* doctrine could be used in the argumentation of tackling, for instance, Commission decisions made in connection with that act.

With the *Fediol* case, the CJEU might have opened the Pandora's Box, but it could be considered good news for the EU companies. They have been given the confidence to, firstly, raise claims on the grounds of WTO law via the TBR, and secondly, protect their interests before the CJEU in a situation where there is a question of legality of a Commission decision. However, it is important to note that the actions by private parties are subject to some limitations as could be derived from the foregoing, and it is necessary to remember that in the view of the CJEU, the concept of direct effect of WTO law must be distinguished from the interpretation of WTO rules under the TBR. In summary, with the *Fediol* decision, the CJEU has expressed that it is indeed possible to make use of WTO rules in the EU's legal order, regardless of their status concerning direct effect.

3.3 TBR – what is it?

In order to understand the importance of all the previous discussions, they obviously have to be linked to the TBR. Accordingly, under this section, we can compile together the knowledge about private participation in international law and relevant competences of the EU so as to form the background for the overview of the TBR procedure. Even though there have already been a number of references to the TBR before, let us now have a more detailed look at what kind of legal instrument it actually is.

¹⁰⁶ *ibid* para 21.

¹⁰⁷ *ibid* para 22.

¹⁰⁸ Brand (n 67) 580-581. According to the referred source, '[t]he Commission decision was based solely on the application of GATT provisions, despite the fact that the regulation allows the Commission to reject a complain on grounds of "[Union] interest"' (see fn 133 of the referred source).

¹⁰⁹ José Manuel Cortés Martín, 'The European Community Trade Barriers Regulation: Private Party Involvement in International Procedures Regarding Unfair Foreign Trade Practices' (2004) 35 *Texas Tech Law Review* 269, 283. See also overview of other *Fediol* cases at the same place.

¹¹⁰ Mitsuo Matsushita, Thomas J. Schoenbaum, Petros C. Mavroidis, *The World Trade Organization. Law, Practice, and Policy* (2nd edn, OUP 2006) 98.

Let it be reiterated once more at the outset that the TBR is a 16-article regulation with an aim of establishing EU procedures in the field of CCP for ensuring the Union's rights under international trade rules, especially WTO rules, to tackle restrictive and discriminatory trade measures on the third markets.¹¹¹ The TBR entered into force on 1 January 1995¹¹² and to date there have been 27 formal investigations under the regulation¹¹³. The general effect of the TBR has been positive, because due to the WTO background, EU's trade partners tend to take it seriously.¹¹⁴

However, TBR has not been only such legal instrument in EU's history. As already mentioned above, the NCPI preceded the TBR. During the ten-year existence of the NCPI, however, only seven private complaints were formally dealt with under that instrument.¹¹⁵ Hence, the NCPI was not generally considered as an effective experiment in EU trade law and policy.¹¹⁶ The NCPI differed from the TBR in one important aspect – the instrument did not allow single enterprises to bring their claims concerning alleged breaches of WTO law on third markets.¹¹⁷ This new track¹¹⁸ offered by the TBR is particularly of an importance in this research.

In addition, the EU is not an only jurisdiction to have this kind of legislation. Several other WTO members, particularly Japan and the US, have also adopted national laws that allow countermeasures in response to foreign measures that render their rights under international trade law ineffective or even non-existent. Although private actors at the international scene do not possess rights to invoke WTO dispute settlement procedures, national trade retaliation laws function as links between a private party and a WTO member, who then has an access to the DSB.¹¹⁹ By any means, as the companies are the ones that hold up the economies, they should be allowed at least that kind of access to international trade rules regardless of the fact that those terms under which companies operate are negotiated and implemented by the states¹²⁰. Another question is the effective implementation of this type of a gateway.

¹¹¹ TBR, art 1.

¹¹² TBR, art 16.

¹¹³ 'Trade barriers. Investigations.' <<http://ec.europa.eu/trade/tackling-unfair-trade/trade-barriers/investigations/>> Accessed 16 May 2012.

¹¹⁴ Marco Bronckers, Natalie McNelis, 'The EU Trade Barriers Regulation Comes of Age' (2001) 35 *Journal of World Trade* 427.

¹¹⁵ *ibid* 430.

¹¹⁶ Robert M. MacLean, *The EU Trade Barrier Regulation: Tackling Unfair Foreign Trade Practices* (2nd edn, Sweet & Maxwell 2006) 4.

¹¹⁷ Marco C. E. J. Bronckers, 'Private Participation in the Enforcement of WTO Law: The New EC Trade Barriers Regulation' (1996) 33 *Common Market Law Review* 299, 309-310. See further comparison of NCPI and TBR from the same source.

¹¹⁸ TBR, art 4.

¹¹⁹ Matsushita, Schoenbaum, Mavroidis (n 110) 133.

¹²⁰ Petros C. Mavroidis, Werner Zdouc, 'Legal Means to Protect Private Parties' Interests in the WTO. The Case of the EC New Trade Barriers Regulation' (1998) 1 *Journal of International Economic Law* 407, 408.

With regard to the essence of the TBR, it is important to note that the EU has prioritised the protection of its industries' private interests outside EU's internal market when enforcing international agreements.¹²¹ This understanding stems from the EU's founding treaties, namely from article 21(2)(a) TEU. The provision indicates that '[t]he Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to *safeguard its values, fundamental interests, security, independence and integrity*'¹²².

Accordingly, the TBR is the EU's expression of its trade values and interests outside its borders. Those principles reveal themselves on several levels. For instance, with the TBR, the EU simply protects its enterprises' interests, but the regulation is also necessary to 'compete' with other WTO member with regard to allowing access to this set of trade rules.

3.3.1 Substance

Continuing with the description of the TBR, it has to be brought out that claims could be based on that legal instrument any time when there is an 'obstacle to trade' on a third market. The latter means that a non-EU country has adopted or maintained a trade practice in respect of which international trade rules establish a right to action.¹²³ The latter should be understood in a way that there exist international trade rules that 'either prohibit a practice outright, or give another party affected by the practice a right to seek elimination of the effect of the practice in question'.¹²⁴ Furthermore, from the wording of article 2(1) TBR, it could be concluded that a complaint has to be directed at government practices rather than private actions.

As it reads from the foregoing, any complaint under the TBR has to be based on recognised global trade provisions. In the context of the TBR, 'international trade rules' are primarily those established under the auspices of the WTO and laid down in the Annexes to the WTO Agreement¹²⁵. However, the enforceable rules are not limited to the latter set of rules.¹²⁶ Regardless of this observation, the general practice of the European Commission suggests that they have almost exclusively used the rules of WTO to interpret the notion of 'obstacles to trade'.¹²⁷

3.3.2 Procedure

Procedurally, the TBR lays down three tracks. Firstly, the European Commission welcomes complaints from the EU member states¹²⁸. This is

¹²¹ Subramanian (n 51) 1022.

¹²² Article 21(2)(a) TEU, emphasis added.

¹²³ TBR, art 2(1).

¹²⁴ *ibid.*

¹²⁵ TBR, art 2(2).

¹²⁶ *ibid.* However, according to Bronckers and McNelis (see (n 114) 434), TBR complaints cannot be based on bilateral agreements.

¹²⁷ MacLean (n 116) 44.

¹²⁸ TBR, art 6.

the most traditional way in which companies could protect their interests. In addition to other ‘tracks’, referrals by member states could be used, in the opinion of the author, as an alternative. It would be possible even without the TBR for the member states to raise questions concerning trade practices of third countries before the European Commission. Nevertheless, it has to be admitted that the TBR is useful in the respect that it lays down principles for the procedure and also provides time limits for it.¹²⁹

Secondly, complaints could be submitted on behalf of the Union industry.¹³⁰ This means that a TBR action could be initiated in the name of wider set of subjects, for instance, on behalf of those companies who produce similar products or whose combined output constitutes a major proportion of total EU production.¹³¹ The bottom line here is that in order to start a proceeding, there has to be a broader interest of a specific EU industry.

Thirdly, the track we are especially interested in, as it is the focus of this thesis, considers complaints on behalf of Union enterprises.¹³² Under this track, ‘any [Union] enterprise, or any association, having or not legal personality, acting behalf of *one* or more [Union] enterprises’,¹³³ is able to bring an action under the TBR. It is important to note that a single EU company could initiate the procedure under this TBR provision. It also has to be mentioned that instead of proving ‘injury’ on the third market as is required under the second track¹³⁴, here the company has to provide evidence concerning ‘adverse trade effects’¹³⁵, which is a lighter version of the injury test¹³⁶. Consequently, the conditions for single companies under the TBR should be favouring at least in theory.

Having established the subjects who are entitled to bring claims under the TBR, let us now have a quick view on the procedure itself¹³⁷. Essentially, the TBR procedure consists of four stages, which are (1) admissibility review, (2) internal investigation, (3) international dispute settlement procedure, and (4) review of retaliation.

3.3.2.1 Complaint

The procedure starts with a written complaint¹³⁸. However, companies are suggested to contact the European Commission prior to submitting of their documents.¹³⁹ For ensuring that the Commission will initiate the

¹²⁹ See also Natalie McNelis, ‘The European Union Trade Barriers Regulation: A More Effective Instrument’ (1998) 1 *Journal of International Economic Law* 149.

¹³⁰ TBR, art 3.

¹³¹ TBR, art 2(5).

¹³² TBR, art 4.

¹³³ TBR, art 4(1), emphasis added.

¹³⁴ TBR, art 3(1).

¹³⁵ TBR, art 4(1) and 2(4).

¹³⁶ Bronckers, McNelis (n 114) 441.

¹³⁷ For the overview of procedural steps and time limits, see Supplement A.

¹³⁸ Jean Charles Van Eeckhaute, ‘Private Complaints against Foreign Unfair Trade Practices. The EC’s Trade Barriers Regulation’ (1999) 33 *Journal of World Trade* 199, 204.

¹³⁹ ‘Trade barriers. Complaints’ <<http://ec.europa.eu/trade/tackling-unfair-trade/trade-barriers/complaints/>> Accessed 16 May 2012.

investigation, the complaint must include sufficient evidence to support the claim.¹⁴⁰ Steps in drafting a TBR complaint are published at the Commission's webpage.¹⁴¹

Concerning the evidence, a party alleging a breach of international trade law must submit its materials according to the principles set in the article 10 TBR. With regard to single companies and their obligation to establish adverse trade effects, the provision lays down certain principles to be followed. For instance, the party has to convince the Commission that a contested trade practice has effects on the EU's economy, be it general, regional or sector-based.¹⁴² In order to establish the effects on the economy for the Commission to consider, the company has to provide evidence¹⁴³ such as significant change in the volume of Union imports or exports¹⁴⁴, information about price adjustments on particular third market¹⁴⁵ or/and show impact of the trade measure on economic factors like production, market shares and profits¹⁴⁶, to mention some. Additionally, only a threat to adverse trade effects could be tackled by proving a particular situation's clear foreseeability to develop into actual trade effect.¹⁴⁷

3.3.2.2 Admissibility

After the complaint has been lodged with the Commission, the admissibility review starts. At this stage, the Commission makes clear if there is 'sufficient evidence' to support the claim and justify further examination.¹⁴⁸ Normally within 45 days of the submission of the complaint¹⁴⁹, the Commission decides, by way of consultations, whether to continue with the investigation or not. The consultations are carried out at the Advisory Committee, which consists of representatives of each EU member state.¹⁵⁰ If the Commission, in the course of the consultations, does not find the evidence to be sufficient to investigate the case further, it informs the complainant.¹⁵¹ However, if the Commission finds enough proof to initiate a further investigation, it starts examining the evidence.

3.3.2.3 Investigation

Firstly, a sign of the initiation of the investigation is the publication of a notice in the Official Journal of the European Union.¹⁵² In this announcement, summary of the factual background accompanied with other relevant information to the case is provided. Additionally, the Commission

¹⁴⁰ *ibid.*

¹⁴¹ *ibid.*

¹⁴² TBR, art 10(4).

¹⁴³ *ibid.*

¹⁴⁴ TBR, art 10(1)(a).

¹⁴⁵ TBR, art 10(1)(b).

¹⁴⁶ TBR, art 10(1)(c).

¹⁴⁷ TBR, art 10(4).

¹⁴⁸ Bronckers, McNelis (n 114) 444.

¹⁴⁹ TBR, art 5(4).

¹⁵⁰ TBR, art 7(1).

¹⁵¹ TBR, art 5(3).

¹⁵² TBR, art 8(1)(a).

sets a period within which interested parties may apply to be heard orally at the Commission.¹⁵³ Secondly, all the parties to the case are notified about the commencement of the investigation.¹⁵⁴ Thirdly, the Commission in cooperation with the member states arrange the conduct of examination at the Union level.¹⁵⁵

The investigation normally takes 5-7 months¹⁵⁶ and during that, the Commission examines the information provided by the complainant, may also request additional information from the parties to the case and other sources and may hear the parties concerned; it may even carry out investigations on the territory of third countries.¹⁵⁷ It is important to note that all the information gathered by the Commission is subject to confidential treatment.¹⁵⁸ When the investigation is concluded, the Commission reports the findings to the Advisory Committee.¹⁵⁹

3.3.2.4 After the investigation

In light of the investigation results, there are roughly two ways to proceed – end/suspend the procedure or continue with possible commercial policy measures. The latter is a more common result of a TBR examination, meaning that the case will continue at the WTO.¹⁶⁰

When it is found that the interests of the Union do not require any action to be taken, the procedure shall be terminated.¹⁶¹ The investigation could also be suspended. The latter is usually a reflection of satisfactory measures implemented by the allegedly infringing third country.¹⁶² The Commission, then, will ‘keep an eye on’ the application of the promised measures.¹⁶³ Moreover, the procedure will also be suspended when there is a need to start negotiations with the third country to improve the bilateral agreements.¹⁶⁴

When it is considered necessary, according to the findings, to take appropriate measures to tackle the trade problem, retaliatory actions will be decided.¹⁶⁵ However, it has to be noted that if the international obligations of the EU entail prior consultation or settlement of disputes, e.g. stemming from WTO law, any reciprocal measures will be decided after discharging the previously mentioned obligations¹⁶⁶. For instance, a raise of customs tariffs or an introduction of quantitative restrictions could accordingly be approved by the WTO. If the ‘judgment’ of the WTO is positive for the EU,

¹⁵³ *ibid.*

¹⁵⁴ TBR, art 8(1)(b).

¹⁵⁵ TBR, art 8(1)(c).

¹⁵⁶ TBR, art 8(8).

¹⁵⁷ TBR, art 8.

¹⁵⁸ TBR, art 9.

¹⁵⁹ TBR, art 8(8).

¹⁶⁰ Eeckhaute (n 138) 208.

¹⁶¹ TBR, art 11(1).

¹⁶² TBR, art 11(2)(a).

¹⁶³ TBR, art 11(2)(b).

¹⁶⁴ TBR, art 11(3).

¹⁶⁵ TBR, arts 12 and 13.

¹⁶⁶ TBR, art 12(2).

the case comes back to the Advisory Committee, where the retaliatory measures will be decided by a qualified majority.¹⁶⁷

As the WTO dispute settlement procedure has a considerable role in the TBR process, let us next have a look at this system.

3.4 Overview of the dispute settlement at the WTO

Generally, as disputes tend to arise when there are dissenting opinions about something, there should also be forums for solving those deviating understandings. Since the same principle applies in the field of international trade law, world leaders have developed a system in the ‘world trade club’ to satisfy the need to resolve disputes. As a potential part of the TBR procedure, the following provides a brief overview of the WTO and its well-developed and legally binding dispute settlement mechanism.

3.4.1 Generally about the WTO

The idea about forming a fundamental trade organisation dates back to the end of World War II, after which the new global economic system started to develop. More specifically, it was at the meeting in Bretton Woods in 1944 where the thought started to evolve and after 1945 when the United Nations was founded, negotiations regarding international trade were commenced under the institutional umbrella of the UN. Preceding the creation of the WTO, another trade organisation was supposed to ‘come to live’, but it never did. It was the International Trade Organization (ITO) and due to the pessimism from the US, other participants did not see the future in this institution under the auspices of the UN.¹⁶⁸

After the ITO had failed, the parties acknowledged a missing part in the new global order and hence contracted the GATT in 1947. The latter was not supposed to function as an international organisation, but despite that, it still substituted the absent institution.¹⁶⁹ Since there was a continuous need for a central forum for trade matters, the WTO was eventually formed as an outcome of the Uruguay Round and the organisation came into being on 1 January 1995. The WTO, unlike the GATT, provides an organisational structure and a binding dispute settlement mechanism.¹⁷⁰ For stressing the similarity, the WTO is largely based on the principles of the GATT.¹⁷¹

The WTO is an international organization that provides common institutional framework for the conduct of trade relations among its members in matters related to the agreements and associated legal

¹⁶⁷ TBR, arts 13 and 14. Time limits for the decision-making are set by the same articles.

¹⁶⁸ Matsushita, Schoenbaum, Mavroidis (n 110) 1-2.

¹⁶⁹ *ibid* 2-3.

¹⁷⁰ *ibid* 6-7.

¹⁷¹ Leal-Arcas (n 7) 273.

instruments included in the annexes to the WTO agreement¹⁷². The main function of this fundamental trade organisation is to provide a forum for negotiations among its members concerning their multilateral trade relations in matters dealt with under the corresponding agreements.¹⁷³ Additionally, the WTO assists on technical matters concerning trade, provides training for developing countries and cooperates with other international organisations.¹⁷⁴ The WTO also administers the Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding, DSU¹⁷⁵).¹⁷⁶ The latter is of an interest in the current thesis.

3.4.2 Steps in resolving the trade disputes at the WTO

Firstly, it has to be noted that the basis for WTO dispute settlement mechanism is article XXIII of the GATT. However, the latter provision does not explain the procedure itself. Instead, the process is described in the DSU. This document lays down steps for resolving disputes at the DSB.¹⁷⁷

The process for settling trade disputes¹⁷⁸ starts with consultations between the parties involved. If the consultations do not yield any fruit, a party may call for a DSB panel to be set up. This panel takes account of all the submissions by the parties and intervening third-party members. If the hearing is concluded, the panel delivers an interim report to the sides in order for them to give additional explanations or remarks. After the parties have provided their further observations, the panel forwards the final report to the DSB. If there is no resistance in adopting the panel report and it is not appealed to the Appellate Body, the 'judgment' will be adopted within 60 days from its issuance.¹⁷⁹

When it is found that an objection has been rightfully raised, the panel usually suggests the breaching party to abolish the infringing obstacle to trade. When the report has been implemented, the DSB keeps observing the adherence of its recommendations. In a situation where the party who lost does not stick to its obligations according to the report, the prevailing party could claim compensation or under the authorisation of the DSB, suspend concessions previously made to that member.¹⁸⁰

¹⁷² Agreement Establishing the World Trade Organization (15 April 1994) LT/UR/A/2 art II:1 <<http://docsonline.wto.org>> (WTO Agreement).

¹⁷³ WTO Agreement, art III:2.

¹⁷⁴ 'Understanding the WTO. What we do.' <http://wto.org/english/thewto_e/whatis_e/what_we_do_e.htm> Accessed 23 April 2012.

¹⁷⁵ WTO Agreement, Annex 2.

¹⁷⁶ WTO Agreement, art III:3.

¹⁷⁷ Martin Lukas, 'The Role of Private Parties in the Enforcement of the Uruguay Round Agreements' (1995) 29 *Journal of World Trade* 181, 184.

¹⁷⁸ For the overview of the steps and time limits, see Supplement B.

¹⁷⁹ Lukas (n 177) 184.

¹⁸⁰ *ibid* 184-185.

This short overview of the WTO dispute settlement procedure gives an idea how the ‘rows’ are approached at the world trade forum. It should, however, not be understood that the mechanism is in fact as simple as provided here. In reality, the system is a complex one and separate theses could be written on that subject. Here, only the glimpse at it is provided in order to understand the TBR procedure in its completeness.

3.5 Synthesis

As it was shown with the previous discussions, the TBR, although a ‘simple’ piece of legislation, is connected to a number of legal fields. Thus, the TBR is more than just a set of procedural rules. It could be questioned if the TBR is an effective legal instrument¹⁸¹ mainly due to its long investigations of which majority have lasted more than the prescribed time limits¹⁸². Prolonged investigation may result, for instance, in bankruptcies of companies facing trade issues on the third market. Furthermore, the scope of application of the regulation, as represented by the issues with private party participation in international law and regarding competences of the EU, may be put into doubt. Additional problem is related to remedies for the companies as according to mainstream opinions, the complainant is not entitled to compensation when the violator conforms its actions within a reasonable time.¹⁸³

At the same time, the mere existence of this instrument has the presumably infringing parties ‘on the hook’ and therefore only threatening with trade sanctions may prove to be useful. However, threat is not an only purpose of the TBR. Besides that, the fact that the TBR procedure may continue at the WTO level, provides the regulation with more credibility in the eyes of EU’s trade partners. Accordingly, as the EU is an important trade bloc, the TBR has a strong potential at least in theory in tackling trade obstacles ‘abroad’ and with that the interests of the Union as a whole and also of single EU companies shall be protected.

Taking into account the knowledge concerning the TBR and its affected areas of law, the thesis continues now with a theoretical test. However, although not practical at the time being, this experiment carries an important value, because it aims at applying the TBR to the model trade disputes with Russia, which were summarised in the first part of the thesis. Naturally, the TBR is not designed for Russia, but once the country accedes to the WTO, it provides a strong basis for the use of TBR also in relation to the EU’s Eastern partner.

¹⁸¹ See more regarding the reasons why TBR has been restricted in use at Bronckers, McNelis (n 114) 453-461.

¹⁸² Bronckers, McNelis (n 114) 446.

¹⁸³ Sykes (n 62) 636-637.

4 Russia as a ‘New Market’ for the Trade Barriers Regulation

Let us now have another glimpse at Russia and its fittingness into the aforementioned legal context. There would not be an issue in applying TBR to trade relations with Russia if the latter was in the WTO. Therefore, firstly, an overview of the current state of Russia’s guest in joining the WTO is delivered and secondly, presently a theoretical test of applying TBR to the model trade disputes is provided.

4.1 Russia becoming a member of the world trade club

Russia has negotiated its WTO accession since 1993.¹⁸⁴ After a long and often problematic accession process – for instance, related to Russia’s concerns about the economic implications of joining the WTO¹⁸⁵ and political considerations¹⁸⁶ – a turn came on 16 December 2011, when Russia received an official invitation from the Ministerial Conference to join the organisation.¹⁸⁷ This event marks an end of a more than 18 years of strivings and shows that the parties have finally reached a satisfactory result in the multilateral negotiations. Russia has now until 23 July 2012 to ratify the accession documents and 30 days after doing so, Russia will officially become a member of the WTO.¹⁸⁸ Logically, there could be a possibility of non-ratification and there probably is some lobbying against joining the WTO, but ‘closing the deal’ is not seen as a problem anymore.¹⁸⁹ In the author’s view, the rationale behind this understanding stems from the aspect that if Russia has already agreed to the terms of the accession, why would it withdraw from them now.

Deriving from the foregoing, a long-awaited event in international economic affairs should be ‘in a reach of an arm’. With the accession, Russia will take a step towards a more rule-based communication in international trade and accordingly will become legally committed to the mechanisms of WTO. This, eventually, provides the EU companies with a more legally stable

¹⁸⁴ ‘Accessions. Russian Federation’ <http://wto.org/english/thewto_e/acc_e/a1_russie_e.htm> Accessed 17 May 2012.

¹⁸⁵ See eg Jason Z. Yin, ‘Can Russia Learn from China in Its Quest for WTO Entry?’ (2009) 42 *The Chinese Economy* 60, 68-70; William H. Cooper, ‘Russia’s Accession to the WTO’ <<http://www.au.af.mil/au/awc/awcgate/crs/r131979.pdf>> Accessed 17 May 2012.

¹⁸⁶ See eg Anders Åslund, ‘Russia’s WTO Accession’ <<http://www.iie.com/publications/papers/paper.cfm?ResearchID=686>> Accessed 17 May 2012.

¹⁸⁷ ‘Accessions. Russian Federation’ (n 184).

¹⁸⁸ ‘Bilateral relations. Russia’ <<http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/russia/>> Accessed 17 May 2012.

¹⁸⁹ Expressed also by Peter van Elsuwege, Professor of European Union law, University of Ghent, at his lecture ‘Towards a Modernization of EU-Russia Legal Relations?’ (Tartu, Estonia, 3 May 2012).

access to the Russian market. Furthermore, the ‘offensive actions’ of TBR will become functional regarding trade with the Eastern partner.¹⁹⁰

4.2 TBR applicable to Russian market?

Although Russia is not in the WTO yet, the EU has constantly paid attention to what is happening in Russia with special regard to trade.¹⁹¹ Regrettably, the attention has often been on the trade barriers. However, the latter obviously suggests that there are issues in that respect. Again, further trade relations will be renegotiated once Russia has acceded to the WTO and after that, the future reports will hopefully focus more on the increased cooperation rather than only concerning the problems.

Nevertheless, the following will deal with the issues that have already arisen. After a short recap of the model trade disputes described under Chapter 1, a possible TBR application to those cases will be provided.

4.2.1 Short recap of the model trade dispute

In the Polish meat embargo case, Poland and also the EU as a whole were faced with a trade problem, where Russia had put a ban on the import of meat and plant products originating from the Union. Russia claimed that the products were harmful to human health.

In the German overflight fees dispute, Russian side closed its airspace to Lufthansa with an aim of converting the German company’s hubs en route to Asia from Kazakhstan to Russia. What is important for the analysis is the fact that, according to the sources used here, the fees do not apply to every Russia’s trade partner in the same way.

In the Finnish case, where Russia had decided to quintuple the export tariffs on timber, we saw Russia’s unilateral trade action with a purpose of making the wood exporters to build up the corresponding industry’s infrastructure in Russia.

In Estonian Bronze Solder affair’s follow-up, Russia’s officials discouraged Russians from buying products originating from Estonia and hence put ‘hidden sanctions’ on the country’s economy. That could be seen as a reciprocal act to the removal of the Red Army monument.

¹⁹⁰ Candido Garcia Molyneux, ‘The Trade Barriers Regulation: The European Union as a Player in the Globalisation Game’ (1999) 5 European Law Journal 375, 404.

¹⁹¹ For instance, a separate section is devoted to Russia in ‘Trade and Investment Barriers Report 2012’ <http://trade.ec.europa.eu/doclib/docs/2012/february/tradoc_149143.pdf> Accessed 17 May 2012.

4.2.2 Applying TBR to former trade disputes

The purpose of this part is to demonstrate how the model trade disputes could be handled under the TBR. However, in real situations, the litigation and argumentation of cases similar to the model trade disputes may differ significantly. This is mainly due to the restricted information about the details of the trade disputes. However, some theoretical conclusions could nevertheless be reached.

4.2.2.1 Poland – meat embargo

Let us start with the Polish case. Concerning the sanitary and phytosanitary measures, the WTO members have laid down rules in the SPS agreement¹⁹². Article 2(2) of that agreement stipulates that '[m]embers shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on *scientific principles* and is not maintained without sufficient *scientific evidence*'¹⁹³. When there is no scientific justification for the measures, the latter could be considered an actionable obstacle to trade under the TBR.¹⁹⁴ Furthermore, the Committee on Sanitary and Phytosanitary Measures provides a regular forum for consultations, where the parties have an opportunity to react promptly to any sanitary or phytosanitary issues.¹⁹⁵ Thus, the measures could be consulted prior to their implementation at this forum. According to the overview of the trade dispute concerning ban on Polish meat, there is no information about Russia's scientific evidence or prior consultation with regard to the measures implemented. Hence, this kind of practice could be considered a trade barrier and thus actionable under the TBR.

4.2.2.2 Germany – overflight right dispute

Next, let us have a look at the German case. Although admitting that, for establishing an infringement under WTO rules, if possible at all, a further research of all facets of the presented German case is necessary. However, it could be claimed, by analogy, that the distinguishing overflight fees among Russia's trade partners could constitute a breach of the MFN principle¹⁹⁶. This argumentation would probably prove to be problematic since the MFN traditionally considers discriminatory charges on exports or imports, which is not apparent in this case. The dispute rather concerns a right to free transit, not EU companies' trade to Russia.

Alternatively, since article V of GATT deals with freedom of transit, the case could be connected to this provision. However, '[t]he provisions of this [a]rticle shall not apply to the operation of aircraft in transit, but shall apply

¹⁹² Agreement on the Application of Sanitary and Phytosanitary Measures (15 April 1994) LT/UR/A-1A/12 <<http://docsonline.wto.org>> (SPS).

¹⁹³ Emphases added.

¹⁹⁴ Robert M. MacLean, 'The European Community's Trade Barrier Regulation Takes Shape. Is it Living Up to Expectations?' (1999) 33 *Journal of World Trade* 69, 79.

¹⁹⁵ SPS, art 12.

¹⁹⁶ GATT, art I.

to air transit of goods (including baggage)¹⁹⁷. It depends on the general nature of those overflight fees in order to establish whether they fall under the article V of GATT or not. Yet, in preparatory notes of the article, ‘it was generally felt that air traffic should be exempted as a matter which is being dealt with by International Civil Air Organization’¹⁹⁸. This is in line with the EU’s reference to the Chicago Convention in its argumentation. The reason for not invoking this legal agreement probably lies in the fact that the dispute settlement under the convention involves the ICJ¹⁹⁹ which does not have automatic jurisdiction over Russia²⁰⁰. Nevertheless, the EU has connected the issue to Russia’s WTO accession most likely due to wider considerations regarding Russia’s actions such as the dispute under discussion here.

Even if the issue of overflight fees might be connected to the notion of increased costs for exporters²⁰¹, there seems to lack legal grounds to ‘sue’ Russia regarding this type of action. Accordingly, the action under the TBR would be difficult, perhaps even impossible.

4.2.2.3 Finland – export taxes on timber

In the Finnish timber case, general principles of WTO apply. Although the general aim of the GATT is to promote the lowering of tariffs²⁰², this is not an explicit obligation²⁰³. Deriving from that, the members of the WTO negotiate the level of tariffs to which they have to bind themselves. In a situation where the actual tariff levied is lower than the one stated in the concession, there is logically some room for increase. Unfortunately, in the case under scrutiny, there is no benchmark to test whether Russia’s increase would exceed its concession, because Russia is not obliged to commit to such bindings due to its non-member status at the WTO. However, once Russia accedes to the WTO and it would become evident that the tariffs do not meet the promised levels, the hike in timber tariffs would most likely constitute a breach of WTO law.

Alternatively, charges, which do not let the EU industry to obtain raw materials at the lowest international prices²⁰⁴, might be a kind of practice that could be a ground for a TBR complaint. A similar situation also appeared in the *Argentinean Raw Hides and Finished Leather* case. There the EU industry complained that a 15% export tax, not calculated on the basis of international market but US market prices, on raw hides and skins

¹⁹⁷ GATT, art V:7.

¹⁹⁸ Nora Neufeld, ‘Article V of the GATT 1994 – Scope and Application’ 6 <<http://r0.unctad.org/ttl/ppt-2004-11-24/wto.pdf>> Accessed 19 May 2012.

¹⁹⁹ Chicago Convention, art 84.

²⁰⁰ ‘Declarations Recognizing the Jurisdiction of the Court as Compulsory’ <<http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3>> Accessed 19 May 2012.

²⁰¹ MacLean (n 194) 86.

²⁰² GATT, recital 3 and art XXVIIIbis:1.

²⁰³ Relates to the concessions (binding commitments on tariffs), GATT, art II.

²⁰⁴ MacLean (n 194) 75-76.

imposed by Argentina constituted an obstacle to trade.²⁰⁵ This kind of practice was deemed a quantitative restriction on exports²⁰⁶ and customs valuation not based on actual value of the merchandise²⁰⁷.²⁰⁸ Even though the legal basis changed during the TBR process, the DSB, ultimately, found a breach of WTO law and hence ruled in favour of the EU.²⁰⁹

Taking the aspects together, a behaviour similar to the facts in this case, which concerns increase in export tariffs on timber, would most likely constitute an infringement of WTO law and thus could be ‘attacked’ under the TBR.

4.2.2.4 Estonia – ‘Don’t buy Estonian’ and more after the Bronze Soldier case

Lastly, let us briefly analyse the Estonian case from the TBR perspective. This trade dispute is probably the trickiest of the four model trade disputes. The central issue in this case seems to be a possible breach of the national treatment principle²¹⁰. The latter core value of the WTO is expressed by the following: ‘[t]he 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’²¹¹. A complaint concerning this issue was dealt with under the TBR in *USA – Antidumping Act of 1916*. In this case, the Commission raised an issue where it claimed that the US antidumping act ‘leads to stricter treatment of some imported products than domestic products’²¹². Although the case was ruled in favour of the EU at the DSB under several other WTO provisions²¹³, the argumentation concerning national treatment could still be relevant in the Estonia’s situation.

To develop the argument further, it could be claimed that trade measures on third markets that hinder the EU exporters from selling their products on that market, distort normal trade patterns.²¹⁴ Accordingly, this kind of trade practice could constitute adverse trade effects on Union’s economy (‘material impact of the economy of the [Union] or of a region of the [Union], or on a sector of economic activity therein’)²¹⁵ and therefore be

²⁰⁵ *ibid* 76.

²⁰⁶ GATT, art XI.

²⁰⁷ GATT, art VII.

²⁰⁸ MacLean (n 194) 76.

²⁰⁹ ‘ARGENTINA: exports of hides and import of finished leather’ <http://ec.europa.eu/trade/tackling-unfair-trade/trade-barriers/investigations/countries/argentina/inv_argentina_001.pdf> Accessed 19 May 2012.

²¹⁰ GATT, art III:4.

²¹¹ *ibid*.

²¹² Natalie McNelis, ‘Success for Private Complainants under the EU’s Trade Barriers Regulation’ (1999) 2 *Journal of International Economic Law* 519, 521.

²¹³ ‘USA: Antidumping Act of 1916’ <http://ec.europa.eu/trade/tackling-unfair-trade/trade-barriers/investigations/countries/usa/inv_usa_004.pdf> Accessed 19 May 2012.

²¹⁴ MacLean (n 194) 84-85. See an overview of the TBR cases concerning this issue at the same place.

²¹⁵ TBR, art 10(5) and 2(4).

sufficient evidence in the TBR procedure.²¹⁶ In the Estonian case, such measure could be the call for avoiding Estonian products and hence the situation fits quite well into the framework, because the ‘buy domestic’ policies are also considered actionable under the TBR.²¹⁷

However, a major problem exists in this argument. Among the Russian officials, only some discouraged people from buying Estonian products. Hence, this was not an official position of the Russian government. If the government only tolerates restrictive business practices by private parties, but does not encourage them, those measures would fall outside the TBR²¹⁸, because under article 2(1) of the TBR, the complaint has to be directed at government practices. Consequently, it is problematic to tackle private practices that are tolerated or encouraged by a government.²¹⁹ Therefore, in the Estonian case, it is difficult to prove the infringement of WTO rules under the TBR.

4.2.3 Evaluation

The aim of this short analysis was to demonstrate that Russia’s trade practices could indeed be caught by WTO rules. However, the question of sufficient evidence is central in any TBR proceeding. It has to be remembered that the facts of the cases provided in this thesis are limited and the theoretical application of the WTO rules via the TBR considers only some arguments that could be raised. Nevertheless, it is without considerable doubt, according to the findings here, that Russia’s behaviour could be scrutinised by WTO principles and in many cases, the breaches seem to be evident. At the same time, no fundamental and legally binding assessment could be provided largely because of the restricted information available about the cases. Nonetheless, the analysis has fulfilled its purpose – theoretically, the TBR could be used in future ‘WTO law based’ EU-Russia trade disputes and positive outcomes for the EU could be expected.

4.3 Appraisal

Although it is possible, as shown above, to establish infringements of WTO law in Russia’s trade behaviour, it needs to be further discussed, how the TBR would ‘intervene’ in future EU-Russia trade relations. Quite clearly, this instrument does not function in a clinical isolation and hence the application of the TBR has to be seen in a wider context as it surely does have an important role at the international stage. At the same time, paradoxically, the TBR is only a small player in the big game, reflecting the values and interests of the EU and often not taking into account the opinions of the world outside the EU. By protecting the Union companies, this legal instrument does it on the account of the actors on third markets, because the

²¹⁶ Eeckhaute (n 138) 202.

²¹⁷ MacLean (n 116) 8.

²¹⁸ Mavroidis, Zdouc (n 120) 416.

²¹⁹ Bronckers (n 117) 307.

laws or measures that the TBR attacks are primarily set up to protect the interests of the companies on that other market. With this in mind, let us put the TBR into a broader framework of EU-Russia trade relations.

It could be presumed that the competition between the East and the West is apparent in all the fields where cooperation is done, be it politics, economy or law. From the European perspective, the TBR is another ‘weapon’ in the EU’s ‘arsenal’ to enforce its understandings of international trade law abroad, probably also in Russia in the future. Thus, the EU is of the opinion that its values and views on this ‘section’ of international trade laws should be followed also outside the EU. It is enough to look at the EU treaties and note that ‘[t]he Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, *founded on the values of the Union* and characterised by close and peaceful relations based on cooperation’.²²⁰ In relation to Russia, we can spot the same approach in the PCA, where it is stated that ‘Russia shall endeavour to ensure that its legislation will be gradually made compatible with that of the [Union]’.²²¹ Deriving from the foregoing, the EU, acknowledging its power, is trying to make Russia act according to the Union principles.

Even if the EU finds the TBR to be a decent approach towards ‘abroad’, it does not necessarily mean that that ‘abroad’ agrees with the Union regarding the promotion of those allegedly universal trade qualities everywhere. The TBR does constitute, after all, an encroachment of EU values worldwide. What if Russia has another view on international law? Most probably it does and it is protecting its understanding of the same ‘universal’ principles of international law accordingly.²²² It is believed that Russia does not easily accept the rules from outside and there has to be some kind of a shift in Russia’s internal understanding towards international law, because only then they could accept the rules of, for instance, the WTO.²²³ Consequently, from the Russian side we could recognise another view on international trade regulation.

Yet, would a balance be conceivable? In the view of the author, it is never completely achievable in international relations. Even if the democratic values and rule of law could be objectively justified as entirely good standards in their essence, applying their Western interpretation in the East would cause some reluctance anyway.²²⁴ By the same token, Russia is not pleased with ‘the intrusive nature of EU polic[ies]’.²²⁵ This notion could be easily linked to the TBR and its possible future application in Russia. The Eastern partner has expressed that it would take part in EU affairs ‘not as an

²²⁰ Article 8(1) TEU, emphasis added.

²²¹ PCA, art 55(1).

²²² Derek Averre, “Sovereign Democracy” and Russia’s Relations with the European Union’ (2007) 15 *Demokratizatsiya* 173, 182.

²²³ *ibid* 185.

²²⁴ Light (n 23) 22.

²²⁵ *ibid*.

object of ‘civilizing influences’ on the part of other states or groups thereof, but precisely as an equal among equals’²²⁶. For instance, the TBR works against this approach. It is easy to say that cooperation is needed with Russia as opposed to competition, but in reality, the balance between opposing opinions is difficult to achieve.²²⁷

Taking these considerations into account, the TBR in this context now acquires a quite different character. From one side, even if the procedure under the TBR is time-consuming and might involve a number of issues concerning the private party access to international law and the competences of the EU, it is apparent that the regulation is protecting the values and interests of the EU. It indeed should be like that, but from another side, it is a reflection of Union’s intrusive policies and accordingly it undermines the cooperation aspect on the international level. Those considerations are far from the purely legal understandings. Admittedly, from a perspective of law, the TBR is a powerful instrument despite its aforementioned weaknesses. As presented previously, the TBR in cooperation with WTO law would define many Russia’s trade actions as damaging to the international trade system. At the same time, Russia has not had a notable say in forming, for example, the WTO system as it now stands. Certainly, the TBR is a clever instrument, but the values it protects worldwide originate primarily from the West.

However, what goes around, comes around. Although a useful legal ground for EU companies, the application of the TBR is not untouched by politics, which could be considered one of the most powerful reactions to such approaches that are represented by the TBR. It is not difficult to see how Russian authorities could make the businesses of EU companies in Russia uncomfortable even in the WTO framework. Not everything is legally definable and therefore the fear for political outcome of any dispute²²⁸ may intimidate companies away from bringing a formal complaint against a country the territory of which they operate. Accordingly, a legal approach is getting a political reaction, which brings us back to the cooperation element as a possible avoidance of conflicts. All in all, although helpful for the EU, the TBR causes tensions due to its nature and therefore, instead of competing, more attention should be paid to partnership. The latter, however, might just remain a dream on the international level, where the East and the West have deviating values and interests.²²⁹

²²⁶ *ibid.*

²²⁷ Rafael Leal-Arcas, ‘EU Relations with China and Russia: How to Approach New Superpowers in Trade Matters’ (2009) 4 *Journal of International Commercial Law and Technology* 22, 39-40.

²²⁸ Paulette Vander Schueren, David Luff, ‘The Trade Barrier Regulation and the Community’s Market Access Policy’ (1996) 2 *European Foreign Affairs Review* 211, 221.

²²⁹ See one possible opinion on the differing approaches of the EU and Russia at Mark Leonard, Nicu Popescu, ‘A Power Audit of EU-Russia Relations’ (2007) *European Council on Foreign Relations* 1 <http://ecfr.eu/content/entry/eu_russia_relations> Accessed 12 May 2012.

5 Conclusion

Ronald Reagan has once said that ‘status quo, you know, is Latin for ‘the mess we’re in’’. Contrary to this rather pessimistic ‘speaking’, however, the status quo could be approached and researched from various sides. And then, however, one could acknowledge the mess in it. This thesis has focused on one legal instrument, the TBR, and its potentials in applying it to the Russian market. Besides the pure TBR-centeredness, this approach also lets the author draw some conclusions concerning a wider context of EU-Russia trade relations.

The four model trade disputes described above in light of the current legal framework between the EU and Russia set the starting point for the TBR analysis. Presently, as it appears, the bilateral relations of those two important international law subjects are based on the PCA, which is an agreement of a rather political nature. It means that in case of possible trade disputes, the treaty does not offer a binding dispute resolution system. Hence, the status quo of relations in the field of trade stands more on the interdependence than on legal grounds.

Furthermore, since the PCA is an international agreement, private parties’ access to it is limited, at least in relation to trade matters. Even if they had a standing, it would not be useful largely due to the lack of enforcing power of that treaty. Thus, the protection of EU companies on the Russian market is currently not efficient. This is illustrated by the sample trade disputes, where the Union companies, the ones that hold up the economy, have suffered from trade measures on the Eastern market, which allegedly infringe international trade law. When even the EU had difficulties in scrutinising those presumable obstacles to trade due to the lack of e.g. binding WTO background in EU-Russia communication, then the companies were even in a less favourable situation. Hence, there is a problem of legal regulation of trade matters between the EU and Russia.

However, Russia is in all probability becoming a member of the WTO in summer 2012 after more than 18 years of negotiations. Thus, this important event in global economy would add a more rule-based approach also to EU-Russia relations. With that, also the TBR would become functional, because under this legal instrument, single EU companies, EU industries and member states are allowed to base their claims on WTO law concerning trade barriers on the third markets. This would ‘amend’ the currently weak system of solving trade disputes and be specially welcomed by the single companies. The private parties’ trade in Russia would then be backed by WTO’s binding dispute settlement mechanism as the procedure under the TBR has the WTO level as an integral part in its litigation process.

However, the TBR is in itself a peculiar legal instrument. It provides EU companies with indirect access to international trade rules, specifically to

those that are under the auspices of the WTO. With the procedure under the TBR, EU companies are able to complain about trade measures, which are negatively affecting them on the third markets. Although theoretically useful for companies, this legal instrument entails issues related to, for instance, EU competences to interpret WTO rules and concerning the aforementioned private enforcement of international law. Additionally, the lengthiness of the procedure under the TBR could be considered one of the most substantial practical deficiencies, because this kind of time-consuming procedure does not meet the needs of companies whose interests might be affected seriously enough to cause their possible bankruptcy before the TBR 'judgment' is implemented. Even if the companies survive the illicit trade practices, the TBR does not entitle them to claim compensation, because the effect of the TBR is mainly seen in the abolishment of trade barriers.

The author's suggestion with regard to the foregoing is to amend the regulation with respect to the time limits by, for example, allowing an accelerated procedure in case of a serious threat to EU companies. Obviously, if the WTO, the procedures of which are also quite time-consuming, is needed to establish an infringement, the amendments for achieving a faster dispute resolution require wider reforms of the system as a whole. However, the EU could do its part in this by first improving the TBR.

However, the analysis concerning TBR's applicability in Russia does require a broader context. Namely, the question is about Russia's trade behaviour (could the actions be caught by WTO rules at all?) and the acceptance of TBR-approach outside EU's borders. Surely, the EU has aimed at promoting its values and interests worldwide, but this kind of approach does not necessarily promote cooperation and mutual understanding with respect to international law. The intrusive essence of TBR is a reflection of the foregoing.

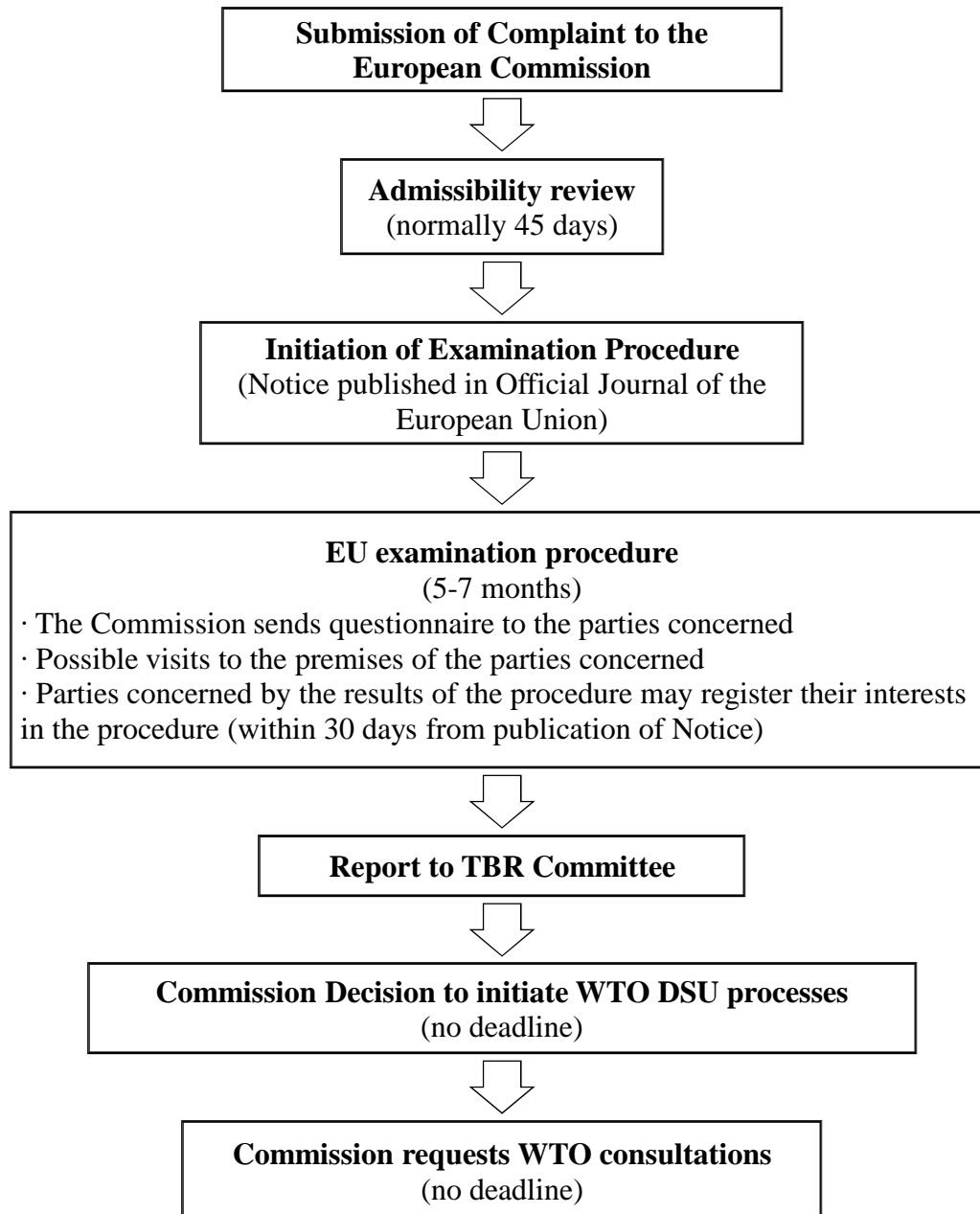
Yes, it is possible to find infringements of international law, particularly WTO law, in Russia's behaviour and hence the TBR would pose as a useful tool in enforcing the rights of EU companies under those rules. At the same time, this unilateral approach would probably not solve the fundamental opposition of the East and the West. It is a substantial matter to consider whether a one-sided approach really contributes to the development of a smoother world order and peace-oriented relations between powers. This is extremely important with regard to Russia, where it would be naïve to believe that pure imposition of mainly Western rules to the relations with Russia would solve the dissenting opinions.

It will be seen how the WTO alters the trade relations between the EU and Russia. Nevertheless, this thesis offers one opinion on this topic from the perspective of companies. It would be splendid to provide some solutions and answers, but this is not always possible. However, the author believes that through collaboration, a better mutual understanding could be reached. This, nevertheless, is difficult to achieve in the reality.

Even if the author unsuccessfully ripped Churchill's quote out of its context and arbitrarily paraphrased it, it did not seem appropriate to use, a yet another, probably more famous Winston Churchill's quote on Russia that says the following: 'I cannot forecast to you the action of Russia. It is a riddle wrapped in a mystery inside an enigma: but perhaps there is a key. That key is Russian national interests.' According to that, whatever legal instruments there are to regulate the relations between individuals, states and organisations, realpolitik will most likely prevail also in the future. That does not necessarily mean that we should opt out all possibly better and more effective laws, but we should not, in the course of these kinds of debates, create ourselves any great legal illusions either.

Supplement A

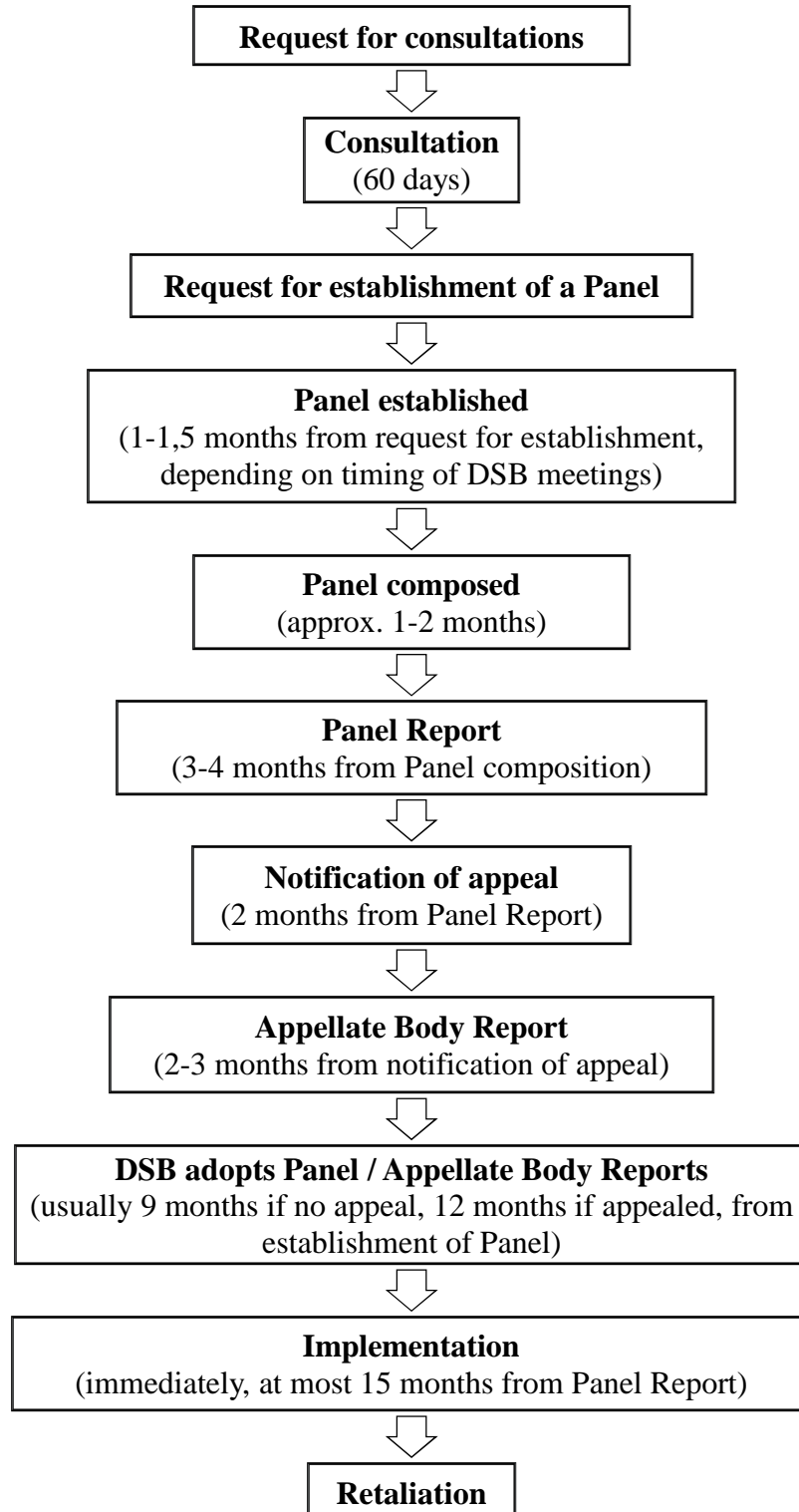
Overview of the TBR Procedure



Source: Robert M. MacLean, *The EU Trade Barrier Regulation: Tackling Unfair Foreign Trade Practices* (2nd edn, Sweet & Maxwell 2006) 59.

Supplement B

Overview of the Procedure at the WTO



Source: Marco Bronckers, Natalie McNelis, 'The EU Trade Barriers Regulation Comes of Age' (2001) 35 Journal of World Trade 427, 445.

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