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ABSTRACT

In the aftermath of the latest global economic crises, the role of financial standards within the existing international legal framework has gained centrality in the academic debate as well as among national regulators.

As a result of this renewed interest, the present thesis addresses the legal nature of international financial standards under a twofold perspective: first, as self-standing regulatory tools and, secondly, from the interaction with both the WTO regime and PTAs. Thus, the research questions investigated are: *What is the legal value of international financial standards? Does the nature of these standards get hardened by the interaction with hard law systems?*

This thesis has two main theoretical objectives. First, to provide a comprehensive picture of the "hard" rules that discipline the trade in financial services with the purpose of understanding whether and to what extent international financial standards influence the existing legal framework. Secondly, to assess whether the "soft" nature of these regulatory standards results "hardened" by the interaction with the WTO - through the recourse to these standards by the WTO Committee on Trade in Services in definition of financial-related commitments and by the WTO adjudicative bodies in the dispute settlement proceedings - and by the inclusion of these instruments into PTAs.

This work provides a critical literature review, a thorough explanation of the WTO discipline of trade in financial services, a detailed examination of the relevant WTO case law, a comparative analysis of standard-reliance between the financial sector and the food sector along with an intensive qualitative study on the most recent EU PTAs.

Despite a timid *overture* towards international financial standards remarked in the study on the EU PTAs, the transparency and legitimacy deficit prevent these standards from being the international reference framework for the financial sector, at least until a substantive restructuring of the decisional process takes place.

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INTRODUCTION

Over the last decades the world has known several economic crises that occur in countries as different as Mexico, Thailand, Argentina, and more recently the United States and Europe. Besides the large-scale dimension of the recent crises, a high cross-border interconnection has been remarked proving that in certain sectors, especially in the financial sector, territorial boundaries seem more a theoretical construct rather than effective barriers capable of containing adverse consequences. Indeed, it does not matter where the crisis originated since its impact is often global: national economies shrink, companies fail and unemployment rates increase.[1]

Public attention on financial markets has grown dramatically, concurrently with States' concerns on their right to regulate domains that are traditionally considered part of "domestic jurisdiction". Indeed, financial stability has always been a top priority for any government and national legislators have constantly enjoyed great discretion in regulating the financial sector even adopting measures with an indirect restrictive effect on trade.[2] In the wake of the recent crises, financial stability is more important than ever. Unfortunately, preserving financial stability does not depend on a single State's good policies: globalization and technology have tightened the already intertwined relations among different national economies, exposing all of them to systemic side-effects. Moreover, the cross-border capital activities have intensified the risk contagion among

[1] Sassen Saskia, *Losing control?: sovereignty in an age of globalization* (Columbia University Press, New York 1997) 1-13.

[2] Restrictive policies have sometimes been justified under the label "prudential". The term prudential is very broad and is not univocally defined. According to some scholars the word refers only to ex-ante policy, which is to say measures that would prevent future financial instability. Some others, underline the ultimate aim rather than the moment at which those policies are taken, instead. See Frank Partnoy, 'Financial System, Crises and Regulation', in Niamh Moloney, Eilís Ferran, and Jennifer Payne (eds), *The Oxford Handbook of Financial Regulation* (Oxford Handbooks Online, 2015) 69-91, at p.70; Paolo Angelini et al, 'Monetary and Macroprudential Policies' (Working Paper Series No 1449, European Central Bank, July 2012), p.3. See also Claudio E.V. Borio and Ilhyock Shim, 'What can (Macro-) Prudential Policy do to Support Monetary Policy?' (BIS Working Papers No 242, Bank for International Settlements, December 2007) p. 8-14; Thomas F Hellman et al, 'Liberalization, Moral Hazard in Banking and Prudential Regulation: Are Capital Requirements Enough?', 90 (1) American Economic Review 147 (2000), at 148.

countries to the point that policies adopted for prudential reasons might have indirect trade restrictive effects and consequently affect the international market.[3]

Concurrently, the alleged self-regulating capacity of the financial market promoted by economic liberalists has revealed its flaws. Banks frequently used speculative schemes or issued new debt instruments by restructuring products rated as "junk", which make a reliable risk-assessment almost impossible.[4] In addition, managers and executives, driven by short-term incentives and lack of accountability, have often adopted irresponsible or hazardous behaviours whose consequences have been paid by investors and tax-payers in the long-term.[5] Similarly, the belief that governments would assist a big firm or a financial institution in order to prevent disastrous economic effects consequent to its failure has proved overrated.[6] After the collapse of the investment bank Lehman Brothers in 2008, the idea "too big to fail" was proved wrong and the debate on bail-in and bail-out has become central again.[7]

Undoubtedly, the current global scenario has reawakened a widespread need for common international rules able to guarantee stability, lower systemic risks and regulate

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[3] International Monetary Fund, *Central Banking Lessons from the Crisis* (Monetary and Capital Department, 27 May 2010), p. 13.

[4] An overall view of securitization and its limits is provided by Falzon Joseph, *Bank performance, risk and securitization* (Palgrave Macmillan, Basingstoke 2013). For a critical analysis of the securitization process Buchanan Bonnie, 'Securitization: A Financing Vehicle for All Seasons?' (2016) 138(3) Journal of Business Ethics 559.

[5] The need for financial consumer protection has been called for by the EU Parliament and widely researched in the study conducted by the Economic and Monetary Affairs Committee. ECON Committee, *Consumer Protection Aspects of Financial Services* (IP/A/IMCO/ST/2013-07, 2014). The issue has been also addressed by a joint OECD-G20 Task Force established in November 2011 and based on the same year's G20 High-level Principles on Financial Consumer Protection. For the Task Force's action plan read G20, 'Effective Approaches to Support the Implementation of the G20 High-Level Principles on Financial Consumer Protection' (2012).

[6] Among a vast literature on the assumption "too big to fail", consult Lin Tom, 'Too Big to Fail, Too Blind to See' (2010) 80 Mississippi Law Journal, 355; Levchenko Andrei, Logan T. Lewis and Linda L. Tesar, 'The Collapse of International Trade during the 2008–09 Crisis: In Search of the Smoking Gun' (2010) 58(2) IMF Economic Review Palgrave Macmillan 214-253; Stern Gary H. and Feldman Ron J. *Too big to fail: the hazards of bank bailouts* (Brookings Institution Press, 2004).

[7] Ringe Wolf-Georg and Peter M Huber, *Legal challenges in the global financial crisis:bail- outs, the Euro and regulation* (Studies of the Oxford Institute of European and Comparative Law, Hart, Oxford, Portland, Oregon 2014); Roubini Nouriel and Brad Setser, *Bailouts or bail-ins?:responding to financial crises in emerging economies* (Institute for International Economics, Washington 2004).

global financial activities evenly. First declared in 1998 during the G8's Summit in Birmingham,[8] the necessity for a stable and resilient international financial architecture was renewed in the 2016 Hangzhou Summit where the G20 Leaders stated that "[*they*] *commit to finalize the remaining critical elements of the regulatory framework and a consistent implementation of the agreed financial sector reform agenda".*[9] This financial regulatory framework comprises principles, practices and guidelines crafted by standard-setting bodies, which operate at a supranational level and gather a wide array of actors ranging from heads of States, bank governors, national regulators to international organisations and private entities. In this multi-layered governance, the question that naturally comes up is what is the legal value of the standards established by those regulatory agencies?

Viewed under the lens of legal positivism, international financial standards would pertain to "soft law" given their non-binding nature.[10] The mainstream draws the line between soft law and hard law on the basis of the legally binding effects produced. According to Chinkin and Boyle, among a flourishing literature, it is the presence or the lack of normative significance what determines the hard nature – in the first case – or the soft force – in the second case – of a legal instrument.[11]

Differently, among many recent theoretical approaches, scholars of International Public Authority underline more the institutional aspects of these international regulatory bodies as additional criteria to better discerning between soft law principles and hard law rules.[12] This implies that in the analysis of the legal value of a regulatory

[8] In the aftermath of the Asian crisis the G8 Leaders started to consider financial stability as a collective priority. See G8, *Final Communique Birmingham Summit* (17 May 1998) para. 4.

[9] The G20, also known as Group of twenty, is an international forum that gather the heads of government and central bank governors. G20, *Leaders' Communique Hangzhou Summit* (6 September 2016).

[10] Shelton Dinah, *Commitment and compliance: the role of non-binding norms in the international legal system* (Oxford University Press, Oxford 2000) p.292.

[11] Christine Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38(4) The International and Comparative Law Quarterly 850; Alan E Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law' (1999) 48(4) The International and Comparative Law Quarterly 901, 902.

[12] Armir von Bogdandy and others (eds), *The Exercise of Public Authority by International Institutions* (Springer, Heidelberg 2010).

instrument, factors like a foundational treaty, the presence of independent organs, the attribution of public authority powers and the ascertainment of an organization's accountability towards its members cannot be overlooked.

However, international financial standards can hardly be defined as legally binding, yet they produce effects in the financial sector. Indeed, these standards serve as assessment devices for international organizations, such as the International Monetary Fund (IMF), the World Bank (WB) or the United Nations (UN),[13] they are taken into consideration by private actors (for example by banks or bond issuers in the field of securitization and capital requirements, credit rate agencies, banks' stress tests)[14] and by governments, which seem more and more keen to make explicit references to these standards in preferential trade agreements (TiSA)[15] or even transposed them into national legal orders (CRR and CRD IV in the EU legislation).[16] Using Brummer's

[13] International standards are used as a tool by the IMF to assess financial stability of a country under the Organization's conditionality policy. Robert P Delonis, 'International Financial Standards and Codes: Mandatory Regulation without Representation' (2004) 36(2-3) New York University Journal of International Law and Politics 563; Regis Bismuth, 'Financial Sector Regulation and Financial Services Liberalization at the Crossroads: The Relevance of International Financial Standards in WTO Law' (2010) 44(2) Journal of World Trade 489. Actually, also the UN Counter Terrorism Committee relies on standards established by BASEL, IOSCO and IAIS in its fight against financing terrorism. http://www.un.org/en/sc/ctc/practices.html.

[14] To give an example the Basel Committee's minimum capital requirements are applied in the banks stress test. Ducan Robert Wood, *Governing Global Banking: The Basel Committee and the Politics of Financial Globalisation* (Aldershot: Ashgate 2005).

[15] The Trade in Services Agreement (TiSA) includes a direct reference to international financial standards in its Annex on Financial Services, leaked draft version of 27 June 2016, art. X.15 par. 13.

[16] The Capital Requirement Regulation (CRR) and the Capital Requirement Directive IV (CRD IV) are clearly influenced respectively by Basel II and Basel III. Particularly, the preamble of CDR IV par.82 recites *"Basel Committee on Banking Supervision has developed a methodology on the basis of the ratio between credit and GDP. This should serve as a common starting point for decisions on buffer rates by the relevant national authorities"*. Even if the Basel capital requirements are not copied and pasted in the core text of the EU norms, the reference and the thresholds are evidently shaped over the Basel's ones. Capital requirement regulation - CRR Regulation (EU) No 575/2013 and Capital requirements Directive - CRD Directive 2013/36/EU. A further example is detectable within the European framework of the Bank Recovery and Resolution Directive (BRRD), The Financial Stability Board (FSB) and the Basel Committee on Banking Supervision (BCBS) published on 9 November 2015 a new standard on Total Loss Absorbing Capacity (TLAC) which sets a minimum level of loss absorbing capacity with which all Global Systemically Important Banks (GSIBs) will comply with starting from January 2019.

words, irrespectively from the coercive force of international regulatory standards, "*where standards and best practices are backed by mechanisms that enforce compliance, they can be viewed as species of international law, albeit promulgated by means other than traditional treaty-making processes*".[17]

Thus, in the light of a global need for financial stability and given the proliferation of international regulatory standards in the financial sector, this research will address the question: *how and to what extent those standards interact with legally binding commitments of international economic law*? The latter intended as obligations regulating trade in financial services deriving from the WTO regime and from preferential trade agreements (PTAs).[18] The main purpose of this thesis is understanding the role of these regulatory instruments in the development and the application of norms of international law in the financial services sector by clarifying their legal nature.[19]

Financial standards are not a new research topic *per se.* Cyclical economic crises and the proliferation of a global regulatory system have drawn scholars' attention since the 1980s. Particularly, economists have investigated the causes behind the latest financial crises, finding in the lack of adequate regulation and supervision - from a more radical stance - and in the inappropriateness of the response provided by international

EGOV, *Loss absorbing capacity in the Banking Union: TLAC implementation and MREL review* (PE 574.408, July 2016).

[17] Chris Brummer, *Soft law and the global financial system: rulemaking in the 21st century* (Cambridge University Press, Cambridge 2012) 5.

[18] The terms free trade agreement (FTA), regional trade agreement (RTA) and preferential trade agreement (PTA) are considered synonyms. According to a strict interpretation, regionalism only refers to those preferential agreements undertaken by countries belonging to the same geographic region.

[19] The interaction between norms of international law and regulatory standards does not concern exclusively the financial services sector. Indeed, the question results relevant in other fields such as anti-money laundering policies, global counter-terrorism strategies or in the contest of food safety. For an overview on the anti-corruption measures, refer to Joshua Cohen and Charles F Sabel, 'Global Democracy' (2005) 37 NYU Journal of International Law and Policy 763; Rose Cecily, *International anti-corruption norms: their creation and influence on domestic legal systems* (Oxford 2015) 35-60. In relation to the discussion on food safety regulation, see Jane Korinek, Mark Melatos and Marie-Luise Rau, 'A Review of Methods for Quantifying the Trade Effects of Standards in the Agri-Food Sector' (2008) 79 OECD Trade Policy Working Papers; Marie-Luise Rau, Frank van Tongeren, 'Modeling Differentiated Quality Standards in the Agri-food Sector: The Case of Meat Trade in the Enlarged EU' (2007) 37(2-3) Agricultural Economics 305.

financial standards - from a more cautious viewpoint - the origin of the systemic failures.[20]

Differently, realist legal scholars have rather analysed international standard-setters, identifying structural similarities and distinctions in comparison with recognized international organisations and national institutions.[21] Further insights have been provided by international legal scholars, who have focused on the proliferation of specialized regimes within public international law in the attempt to systematize the phenomenon in constitutionalism or pluralism. In essence, the former theory conceives the international legal framework as a hierarchical system with norms of both *jus cogens* and general international law highly ranked and followed by sector specific regulatory principles. Hence, the overall architecture results governed by the binomial formula *lex generalis – lex specialis*, which is used to solve potential conflicts of norms and overlapping jurisdiction.[22] Conversely, pluralism structures horizontally, rather than vertically, the plethora of legal regimes that compose public international law. Within this network of different legal disciplines, the centre is movable and it is defined by

[20] Some scholars blamed the lack of regulation for being one of the causes of the late and rigid market interventions, which produced unpredicted consequences. Another stream underlined the need for international requirement for bank self-assessment and credit rating agencies, as a preventing measure for future crises. According to other theories, the origin of the economic crisis is attributable to wealth inequality, to wrong international standards and misleading credit rating agencies' assessment. Concerning uneven wealth distribution, see among others, Era Dabla-Norris and al, 'Causes and Consequences of Income Inequality: A Global Perspective' (2015) IMF Strategy, Policy, and Review Department; Michael Kumhof and Romain Rancière, 'Inequality, Leverage, and Crises' (2010) 10/268 IMF Working Paper; Florence Jaumotte and al, 'Rising Income Inequality: Technology, or Trade and Financial Globalization?' 61(2) IMF Economic Review 271–309. For criticisms about international financial standards consult Arnoud Boot, Anjan Thakor, 'Self-interested bank regulation' (1993) 83(2) Am Econ Rev 206; Francesco Cannata and Mario Quagliariello, 'The Role of Basel II in the Subprime Financial Crisis: Guilty or Not Guilty?' (2009) 3(9) CAREFIN Research Paper.

[21] Starting from this comparative perspective, some authors have identified incentives in the recourse to and in the compliance with international regulatory standards, finding in the international credibility, the participation in law making processes and in political accountability the main drivers. For a complete description of political incentives behind State compliance with soft regulatory principles Brummer, *Soft law and the global financial system: rulemaking in the 21st century* (n 17).

[22] For an overview on the debate internal to the doctrine see Jan Klabbers, 'Constitutionalism Lite' (2004) 1 International Organizations Law Review 31; Ernst-Ulrich Petersmann, 'Towards World Constitutionalism: Issues in the Legal Ordering of the World Community' 44(5) Common Market Law Review 1535.

international tribunals any time that they establish both the main claims of the dispute and the consequent applicable law.[23] Furthermore, the doctrine has acknowledged the reasons behind the preference for soft legal devices, in matters strictly specialized, rather than for treaties. To frame it with Friedmann's words, *"international law has transformed from a law of coordination into law of world-wide cooperation where soft law principles promote a convergent and integrated legal system".*[24] By enhancing international cooperation, regulatory standard-setters enable States to agree upon common rules in area that traditionally belongs to the broad concept of public goods and, at the same time, they leave to national legislators a great regulatory autonomy.[25] Put differently, international financial standards present the peculiarities of the post-modern law-making process, meaning "global technical governance" and "functional specialization":[26] soft law tools result to be efficient and effective legal instruments as they provide the necessary flexibility to address promptly the ever changing global challenges[27] and, at the same time, their specialized nature favours their implementation into national legal frameworks.[28]

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[23] For a recognised definition of pluralism Hans Morgenthau, 'Positivism, Functionalism, and International Law' (1940) 34(2) The American Journal of International Law 260. For a more modern nuance of the concept consult George W. Keeton and Georg Schwarzenberger, *Making international law work* (first published 1972, Garland Pub 2010).

[24] Friedmann Wolfgang, *The Changing Structure of International Law* (Stevens, London 1964). This concept has subsequently widen by many scholars, among others, Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70(1) *Modern Law Review* 3.

[25] The Literature arisen during the last decades, distinguished between final or intermediate and tangible or intangible public goods. Inge Kaul, Isabelle Grunberg and Marc Stern (eds), *Global Public Goods: International Cooperation in the 21st Century* (Oxford University Press, 1999).

[26] Anne Peters underlines both the global dimension that international law has assumed and the technicality of the regulatory principles set by international standard bodies: the more the sector is specialized the higher is the presence of technical experts in the international "soft organizations". Anne Peters, 'Soft Law as a New Mode of Governance ' in Udo, Dietrichs, Reiners Wulf and Wesens Wolfgang (eds), *The dynamics of change in EU governance* (Edward Elgar Publishing, Cheltenham/Northampton 2011) 31-32.

[27] Stavros Gadinis 'Three pathways to global standards: private, regulator and ministry networks' (2015) 109(1) The American Journal of International Law 28-33; David Zaring,'Three Challenges for Regulatory Networks' (2009) 43 International Lawyer, 211-22.

[28] The awareness of the high technicality of the financial sector seems to justify the presence of experts in the law-making process (typically prerogative of national governments) and to create trustfulness in

Nevertheless, the legal scholarship has only partially depicted the relationship between soft regulation and hard law, recognising the former as a potential starting point for the progressive development of the latter. Even fewer scholars have researched the interaction between international financial standards and respectively the WTO and PTAs regime, whose relevance is twofold. First, soft regulation often detail general obligations contained in the form of treaties by providing technical standards essential for national implementation,[29] which translates soft law into complementary interpretative tools for binding norms or into benchmark in the trade policy assessment. Secondly, international financial standards may create new constraints to States' right to regulate, adding further commitments to the obligations already undertaken in trade in financial services in both the WTO and PTAs context. As a result, from the analysis of this interplay this work will ascertain whether the soft nature of international financial standards has substantively been hardened.[30]

Structurally, the dissertation will be divided into three parts. The first chapter will address international financial standards themselves. After a brief description of the relevant international financial regulatory bodies taken into consideration, a literature review on the normative significance attributed to these international standards will be presented. Thus, an account of the historical background of both the horizontal coordinating bodies (G20 and FSB)[31] and the more specialized ones (BCBS, IOSCO,

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both the acceptance and the implementation of international standards. David Kennedy, 'Challenging Expert Rule: The Politics of Global Governance' (2005) 27(1) Sydney Law Review 5; Anne-Marie Slaughter, *A New World Order* (Oxford, Oxford 2004).

[29] Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law' (n 11) 905.

[30] Roberta S. Karmel, and Claire R. Kelly, 'The Hardening of Soft Law in Securities Regulation Symposium: Ruling the World: Generating International Legal Norms' (2009) 34(3) Brook J Int'l L 883; Douglas W. Arner and Michael W. Taylor, 'The Global Financial Crisis and the Financial Stability Board: Hardening the Soft Law of International Financial Regulation' (2009) 32(2) University of New South Wales Law Journal 488-513.

[31] The Financial Stability Board (FSB) is an international forum that gathers the heads of government, central bank governors and representative of international financial organizations and bodies. While the membership of the G20 and the FSB is almost identical, the task is slightly different: the G20 sets up the agenda and provides guidelines concerning global growth and development (obviously including financial related issues). The FSB, is referred to as the G20's technocratic body, given its focus on the

IAIS)[32] will be provided along with an explanation of the standard-setting process of the different bodies to better understand the actors engaged, the dynamics and the level of commitment behind the standards produced. Besides, a presentation of the four doctrines - *Global Administrative Law, Network Theory, Informal International Law-Making and International Public Authority* – will follow, which elucidates how the international financial regulatory system works, how international standard-setters interact with national legislators and the level of informality of the final outcome. In order to provide a comprehensive picture, substantial, procedural and institutional aspects will be taken into consideration. With the purpose of categorizing international financial standards into soft law or hard law, international financial standards will be analysed in a comparative way with the legally binding sources of public international law. In practical terms, the work will investigate whether these regulatory standards belong to treaty law, customary law or if they can be assimilated into acts of international organization, in order to ultimately define if international financial standards are hard law instruments.

The second chapter will be dedicated to the interaction between the international financial standards and the WTO rules disciplining trade in financial services, first, under a more theoretical point of view and, then, in the light of the WTO jurisprudence. Thus, the analysis will consist of a detailed explanation of the general non-discrimination principle (diversified in national treatment and the most-favoured nation principle) and market access obligations. Furthermore, a thorough examination of the substantial provisions of domestic regulation discipline and the "prudential carve-out" will be provided. In regard to the latter, the definition of the provision as an exception or as a proper carve-out, namely with a limited scope of application of treaty obligations,

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global financial system, almost exclusively. For further information, refer to the institutions' official website browse http://www.g20.org and http://www.fsb.org/

[32] At the international level different standard-setters are present according to the field of specialization: for the bank sector Basel Committee on Banking Supervision (BCBS), for securities International Organization of Securities Commissions (IOSCO) and International Association of Insurance Supervision (IAIS) for insurance. Respectively, https://www.bis.org/bcbs/; https://www.iosco.org; http://www.iaisweb.org.

will be introductory to a deeper analysis on the merit, which is essential to understand who bears the burden of proof (if the claimant or the respondent) in a dispute.[33] This issue will be better addressed in the 2016 *Argentina - financial services* case, where the content and the scope of the "prudential carve-out" contained in the paragraph 2(a) of the GATS Annex on Financial Services will be critically studied.[34] Then, given the limited case law in the financial sector, the research will comparatively analyse the food sector in which the recourse to regulatory standards, specifically in relation to SPS and TBT agreements have been frequent.[35] The work will take into consideration disputes related to the SPS and the TBT discipline in order to verify if the presumption of conformity, repeatedly affirmed in the food sector disputes, is applicable also to trade in financial services.[36] In essence, the study will compare the two legal systems in order to understand whether the open approach used in the food sector towards regulatory standards can be extended to the financial sector due to the similarities in the standard-setting process and the high technicality of the two sectors. In other words, the conclusive part will attempt to answer the question: *do international financial standards relate to the GATS as the Codex Alimentarius' standards relate to the SPS Agreement?*

Last but not least, the relationship between Preferential Trade Agreements (PTAs) and international financial standards will be dealt in the third chapter. As a preliminary step, the historical background of PTAs and the legal basis contained in the WTO

[33] Carlo M. Cantore, '"Shelter from the Storm": Exploring the Scope of Application and Legal Function of the GATS Prudential Carve-Out' (2014) 48(6) Journal of world trade 1223. Vu Nhu Thang, 'Applicability of GATS Prudential Exception to Insurance Services: Some Interpretative Issues' (2007) 4(2) Manchester Journal of International Economic Law 88-123.

[34] The prudential carve-out clause had not been challenged until April 2016, when the Appellate Body first ruled on its scope and application. This signalled that WTO Members had implicitly recognized each other full right to regulate. A detailed comparative analysis on the prudential carve-out contained in the GATS and similar provision included in PTAs, see Andrew D. Mitchell, Jennifer Hawkins and Neha Mishra, 'Dear Prudence: Allowances Under International Trade and Investment Law for Prudential Regulation in the Financial Services Sector' (2016) 19 (4) Journal of International Economic Law 787.

[35] SPS stands for sanitary and phytosanitary measures, whereas TBT is the acronym used for technical barriers to trade.

[36] In this chapter the following WTO cases will be considered under the SPS Agreement: the EC-Hormones, India-Agricultural Products, the US-Meat Products, the Russian Federation – Pigs. For the TBT Agreement the EC-Sardine case and the US-COOL case will be analysed.

agreements will be presented in order to clarify under what conditions this particular trade treaties are compatible with the WTO regime. Then the research will address the interplay between international financial standards and PTAs by verifying whether PTAs include reference to or a textual translation of international financial standards. The final aim is to assess whether the soft nature of the regulatory standards has been hardened by the integration into international treaties.[37] In this regard, the intensive qualitative analysis will examine a selected number of the EU PTAs ascertaining any reference to international standards, the scope and the application of the relevant provisions as well as the level of commitment upon contracting parties. The data used will be the result of an empirical work based on a mapping exercise of the selected EU PTAs that will give accounts on the level of inclusion of international financial standards into PTAs and the legal enforceability of the PTA standard-related provisions.[38] Then, the dissertation will delve into situations of possible substantive and jurisdictional overlaps, which may occur when both a PTA and the WTO system regulate trade in the financial services at the same time. In details, the part dedicated to the overlaps of jurisdiction will attempt to clarify which adjudicative body, either the WTO panel or the PTA dispute settlement mechanism is entitled to settle a dispute covered by both legal instruments. Further, the chapter will focus on the substantive overlaps, meaning the applicable law in disputes where a conflict of two or more binding norms occur. The ultimate goal is to verify whether and under what conditions regulatory standards can be used in the interpretation of PTA and WTO commitments,[39] namely whether they can serve as benchmarks in the assessment of a restrictive measures (for example in the

[37] The intuition originates from the vast literature on WTO-plus obligations (WTO+), which refers to further commitments built on those already agreed to in the WTO Agreements and on WTO-extra provisions (WTO-X), meaning commitments that go beyond the WTO mandate. Henrik Horn, Petros C. Mavrodis, André Sapris, 'Beyond the WTO? An anatomy of EU and US Preferential Trade Agreements' (2009) 33(11) The World Economy 1565–1588.

[38] Legal enforceability is intended as the possibility to successfully bring a claim before a tribunal in case of non-compliance or a violation.

[39] International regulatory standards aim at achieving financial stability – sometimes pursuing also harmonization goals-, so they get to influence the WTO discipline on trade in financial services. For example, harmonization, and more generally the domestic regulation, are dealt under the GATS in article IV titled "domestic regulation" and in article VII titled "recognition".

proportionality or necessity test) or whether an ex-ante consistency to international financial standards should be construed or, again, whether these regulatory standards can justify a measure otherwise inconsistent with the WTO law.[40]

With this purpose in mind, special attention will be drawn to the relevant WTO case law, specifically Turkey-Textile case, Mexico-Soft Drink case, Brazil-Tyres case and Peru – Agricultural products case, which are central in the examination of the WTO – PTA relationship, in circumstances where trade in financial services is disciplined by both sources at the same time.

Overall, the methodology used throughout the entire work consists of a critical analysis of the literature and a detailed explanation of the international core obligations in trade in services complemented by an examination of the relevant jurisprudence. Despite the prevalent legal approach applied in the present research, also political, institutional and economic factors will be taken into due consideration to provide a comprehensive picture. In practical terms, the first chapter will summarize the literature review on international financial bodies and will present the jurisprudence of the International Court of Justice (ICJ) with reference to (i) the value of international organizations' acts and to (ii) soft law tools as instruments able to acknowledge the evolution of international law by capturing State practice. The second chapter will provide a legal analysis of the relevant WTO commitments in trade in financial services, followed by the WTO case-law on the use of international standards in dispute settlement, as assessment devices for the examination of a measure allegedly restrictive or as a justification to it. Finally, the third chapter will address the relationship between PTAs and international financial standards and it will include an empirical research based on the evaluation of PTA provisions related to trade in financial services. This

[40] By analogy with article 31(3) of the Vienna Convention of the Law of the Treaty (VCLT), international financial standards may be taken into account in dispute settlement when interpreting a treaty. As the provision recites, during this exercise "[shall] *be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties*".

mapping exercise will show whether soft law standards have been hardened by their inclusion into treaties and will clarify the substantive value of these provisions in terms of legal enforceability. In conclusion, a selection of case-law concerning substantive and jurisdictional overlaps will be analysed in order to define the WTO approach towards the recourse to non-WTO law both for interpretative reasons (meaning whether WTO norms can be interpreted in the light of relevant PTA obligations) and as a justification to trade restrictive policies.

At the end of the present work the legal nature of international financial standards will be clarified, along with the implications deriving from the interaction between these standards with the international legally binding framework for financial services.

CHAPTER I - INTERNATIONAL FINANCIAL STANDARDS

SUMMARY: *1.1 Introduction. 1.2 International Standard Setters.* 1.2.1 The G20. 1.2.2 The FSB. 1.2.3 The Basel Committee. 1.2.4 IOSCO. 1.2.5 IAIS. *1.3 Literature Review on International Financial Standards.* 1.3.1 Global Administrative Law. 1.3.2 Network Theory. 1.3.3 Informal International Law-Making. 1.3.4 International Public Authority. 1.3.5 Criticisms to the Four Theories. *1.4 International Regulatory Standards and the Sources of Public International Law.* 1.4.1 Conceptual Definition of "Soft Law" and "Hard Law" 1.4.2 Are International Financial Standards Acts of International Organisations? 1.4.3 Are International Financial Standards International Agreements? 1.4.4 Do International Financial Standards Pertain to Customary Law? *1.5. Conclusion*.

1.1 INTRODUCTION

The present chapter is devoted to the analysis of international financial standards, first, as stand-alone legal instruments and, secondly, in relation to the sources of public international law.[41]

The chapter will open with a description of the main financial standard-setters. At the international level many standards setting-bodies are involved in the regulatory process, however only the most relevant bodies dealing with the regulation of trade in financial services will be examined. In particular, great attention will be given to the Group of twenty (the G20) and the Financial Stability Board (the FSB), both defining the priorities and the economic and financial goals of the international agenda. Besides, the Basel Committee, the International Organisation of Securities Commission (IOSCO) and the International Association of Insurance Supervisors (IAIS) will be analysed since they adopt product-specific regulatory standards compared to the more general policy recommendations drafted by the first two bodies. In this first part, the architecture of these international bodies, the standard-drafting process, the type of actors engaged (meaning government representatives, officers of bank authorities, association members or stakeholders) and the informality of both the process and the outcome will be

[41] The terms "international financial standards" and "international regulatory standards" are used as synonyms in the present work. However, the first highlights the financial aspect, whereas the second the regulatory function rather than the sector of pertinence.

carefully examined since they will be decisive to outline the essential characteristics of this type of acts.

Then the dissertation will move to the literature review on international financial standards, offering thoughtful elements on the relation between these regulatory instruments and the national regimes, the level of participation of State organs in the drafting process and, consequently, the level of commitment expressed in these international standards. Thus, the four doctrines *Global Administrative Law, Network Theory, Informal International Law-Making and International Public Authority* will be presented under a comparative approach with the aim to highlight common features and divergences among the four depictions of international standards.

The ultimate goal is to categorize regulatory financial standards within the legal sources of public international law, namely to fit them either in the concept of "hard law" or "soft law". In this regard, the work will attempt to group international financial standards into primary law, meaning international agreements and customary law, or into secondary law insofar as they constitute acts of international organisations.[42] If none of these categories suits the standards under analysis, they will be excluded from the range of hard law instruments and will be assumed to be part of soft law. Yet, in this very hypothesis, the interplay between these regulatory standards and hard law principles will be studied in depth, given the international relevance of these standards and their potential impact on norms of international law regulating trade in the financial services.

Coherently with this purpose, international standards-setting bodies will be examined, by assessing the presence of a foundation treaty, the establishment of independent organs and the recognition of an international legal personality, in order to verify whether the elements that characterise international organisations are detectable also in these international regulatory bodies. In case international financial standards

[42] The term 'institutional acts' is also used in the literature to designate all forms of acts adopted by international organisations, which can have normative power. See Pierre Klein, 'International Organizations or Institutions, Decision-Making Process' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Vol 6, 2012) 27-31; Philippe Sands and Pierre Klein, *Bowett's Law of International Institutions* (Sweet and Maxwell, London, 2009) 284-296.

cannot be deemed acts attributed to international organisations, the study will move to the second hypothesis, which envisages international financial standards as international agreements. In this regard, the intent of the parties to undertake legally binding commitments, rather than simple political engagements, along with the acceptance procedure chosen (through ratification or simplified procedure) will be studied in depth. Finally, if also this hypothesis is proved wrong, the current examination will focus on customary law. Particularly, by analysing the jurisprudence of the International Court of Justice (hereinafter the ICJ) the research will elucidate whether international financial standards effectively capture State practice by being the starting point for the development of norms of public international law.

1.2 INTERNATIONAL STANDARD-SETTERS

1.2.1 The G20

The G20, or "Group of Twenty", is an informal body that gathers finance ministers or heads of State and central bank governors.[43] It counts for nineteenth States[44] plus the European Union and it is frequently associated to its elder sister the Group of eight (G8), originally composed of Canada, France, the UK, the US, Germany, Japan, Italy and Russia.[45] The G8 set the international agenda till the end of the 1990s, when the G8 was not representative of the balance of the economic powers any more as many emerging countries at that time known with the acronym of BRICS[46] had been left out. Thus, in the aftermath of the Asian crisis, it was clear that the small group could not address

[43] Peter I. Hajnal, *The G20: evolution, interrelationships, documentation* (Global finance series, Ashgate Publishing Group 2014) 2-4.

[44] The G8 Members plus Argentina, Australia, Brazil, China, India, Indonesia, Mexico, Saudi Arabia, South Africa, the republic of Korea, Turkey.

[45] Technically Canada and Russia joined after the establishment of the G6 in 1976.

[46] This acronym stands for Brazil, Russia, India, China and South Africa. Among emerging economies at the time also refer to Argentina, Chile, Indonesia, Malaysia, Mexico and Philippines. OECD, *Globalization and Emerging Economies* (Policy Brief, 2009).

delicate economic issues without including these emerging economies, so the G20 was founded in 1999.[47]

According to the 1999 Berlin Communiqué, released after the inaugural meeting, the G20's tasks are fostering the international dialogue on economic and financial top-priorities along with promoting cooperation and sustainable growth.[48] Starting from 2008 the G20 has been largely recognized as the main international forum for financial stability, energy market and transnational currency exchange and it has gradually eclipsed the G8's action.[49] While the relevance of the G20 in the financial scenario is not disputable, the relation with the G8 has not been neatly established. Even the doctrine is divided on this matter. Beeson and Bell, among others, point out the redundancy of the G20 rather than emphasising its practical role in the regulation of financial services.[50] Instead, rejectionists dismiss the primacy of the G20 over the G8[51]; whereas other scholars interpret the establishment of the G20 as the beginning of a transition period, which would end up in a comprehensive transfer of powers from the G8 to the G20. Finally, a minority warns about a potential mission creep, a sort of

[47] The G20 was established in response to the Asian crisis and it followed the G7 recommendations , where the need for opening up an international forum to the emerging economies was already highlighted. G7, *Summit Statement* (Kohl, 18 June 1999).

[48] The G20 Communiqué recites "*The G20 was established to provide a new mechanism for informal dialogue in the framework of the Bretton Woods institutional system, to broaden the discussions on key economic and financial policy issues among systemically significant economies and promote co-operation to achieve stable and sustainable world economic growth that benefits all. We propose establish a new mechanism for informal dialogue*". G20, *Final Communique of the G20 Finance Ministers, Central Bank Governors* (Berlin 1999) para.2.

[49] Deborah Bronnert, 'Making government policy: the G8 and G20 in 2010' in Nicholas Bayne and Steven Woolcock (eds), *The new economic diplomacy: decision-making and negotiation in international economic relations* (3rd, Farnham 2011).

[50] Mark Beeson and Bell Stephen, 'The G-20 and International Economic Governance: Hegemony, Collectivism, or Both?' (2009) 15(1) Global Governance 67.

[51] The authors emphasise the rapid diffusion of highly specialised international regulatory bodies after the crisis. In their view, those bodies complement each other and cooperate together instead of having the newly established body replacing the former one. Smith Gordon, 'The G8 and the G20: What Relationship Now?' in Colin Bradford, and Wonhyuk Lim (eds), *Global Leadership in Transition: Making the G20 More Effective and Responsive* (Brookings Institution Press, 2011) 48-53.

expansion of the G20's original mandate given the growing relevance of the G20 as a principal international forum, which targets issues beyond the financial services sector.[52]

As a matter of fact, over the last decades the G20's agenda has gradually evolved and adapted to the ever changing economic scenario. Although its primary goal has always remained strengthening the financial architecture, as it first declared at Pittsburgh meeting in 2009[53], the G20 has constantly shaped its policies. The G20 initially focused first on the financial crisis in 2008 during the Washington Summit, then on international economic cooperation (Pittsburgh 2009), further it shifted slightly towards fiscal consolidation, financial safety net, cross-border capital flow (Toronto 2010) and, finally, it tentatively targeted climate change (Seoul 2010). In 2011 the G20 addressed mainly the euro area crisis and Greece's economic instability (Cannes 2011, Los Cabos 2012); then dealt with trust, transparency and effective regulation (St Petersburg, 2013) until drawing its attention to societal interests, commonly referred to as public goods,[54] such as fighting unemployment, (Brisbane 2014) reducing inequalities (Antalya 2015) promoting better global governance in the new economy and increasing the resilience of the financial system (Hangzhou 2016).[55]

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[52] The G20 has progressively dealt with different global challenges related to ethical principles and societal values, such as environmental protection, sustainable distribution of resources or consumer protection. Kjell Engelbrekt, 'Mission Creep? The Non-traditional Security Agenda of the G7/8 and the Nascent Role of the G-20' (2015) 21(4) Global Governance 537.

[53] G20, *Final Communique Pittsburgh Summit* (Pittsburgh, 25 September 2009), paras10-13.

[54] Although the term public good is very recurrent in the doctrine, its conceptualisation is strictly related to the community in which the good is provided by the State or by national institutions. The literature is not uniform on what public goods are in practical terms and how to guarantee them. For a wide depiction see Inge Kaul, Isabelle Grunberg and Marc A. Stern, *Global public goods: international cooperation in the 21st century* (Oxford University Press, New York 1999). Santiago Villalpando, 'The Legal Dimension of the International Community: How Community Interests Are Protected in International Law' (2010) 21(2) European Journal of International Law 387-419. For a more modern perspective consult also Giorgio Gaja, 'The Protection of General Interests in the International Community' in *Collected Courses of the Hague Academy of International Law* (The Hague 2013) and Paolo Picone, *Comunità internazionale e obblighi "erga omnes":studi critici di diritto internazionale* (Terza edn Jovene, Napoli 2013).

[55] Gordon S. Smith, *G7 to G8 to G20 evolution in global governance* (Centre for International Governance Innovation, 2011) 5-6.

From an organisation point of view, the G20 meets regularly. Although it used to meet on annual basis till 2008, now it reunites four or five times per year with a rotating presidency system that gives continuity and enable all members to participate into the decision-making process. In addition, to the G20 ordinary members a maximum of five non-G20 members can attend meetings, Africa and Spain in quality of "permanent guests". Attendance is extended to representatives of International Organisations as well, involving mainly the UN Secretary General, the Organisation for Economic Co-operation and Development (OECD) officers and both the International Monetary Fund (IMF) and the Word Bank (WB) as permanent invitees.[56]

The G20's meetings occur at different levels ranging from summits, ministerial and working groups' conference and engage different participants. Summits at the Heads of the State, Government and finance ministers are the highest level meetings and are carried out in a confidential setting. The declaratory outcomes are published in Leaders' Communiqués or Declarations and Action Plans, which provide detailed information about the policies to be implemented. Ministerial meetings gather finance ministers and central bank governors, who are charged by G20 leaders to develop programmes related to the most debated economic issues. These meetings usually produce the Reports of Ministers to the G20, which contained highly technical details related to the priorities set in the Leaders' Communiqué. At the administrative level, working groups and sub-group bodies assist ministers and leaders in highly specialized issue-oriented meetings. To give a few examples, among almost thirty different working groups are the G20 anti-corruption Working Group[57], Global Partnership for Financial Inclusion (GPFI),[58] Trade

[56] Bernard Hoekman, 'Revitalizing the Global Trading System: What Could the G20 Do?' (2016) 24(4) China and World Economy 34.

[57] The Anti-Corruption Working Group was established in 2010 after the G20's Toronto meeting with the aim to fight corruption, money laundering and to facilitate the implementation of the OECD principles and the UN tools. This working group is part of a broader system that engages primarily the UN and the IMF in pursuant to the eradication of corruption and money laundry. For a detailed study refer to Mark Pieth and Gemma Aiolfi, *A comparative guide to anti-money laundering:a critical analysis of systems in Singapore, Switzerland, the UK and the USA* (Elgar, Cheltenham; Northhampton 2004); William C. Gilmore, *Dirty money: the evolution of international measures to counter money laundering and the financing of terrorism* (4th edn Council of Europe Publishing, Strasbourg 2011).

[58] http://www.gpfi.org

Finance Experts Group and the International Monetary System Reform Working Group.[59]

Structurally, although the G20 lacks its own secretariat and specific organs, all national representatives, called *sherpas*, are surrounded by specialized teams that help national representatives in the management of preparatory work, which includes consultations with different stakeholders, lobbyists, think-thanks and associations. This *sherpas* system has originally been adopted in the G8 where experts contribute to the final G8 documents.[60]

As many other international bodies, also the G20 is not immune from accusations of representation deficit, due to its restricted membership and to the inhomogeneity among its members, that differ for the economic system adopted and the export-import model chosen. Despite the criticisms, the G20 collectively represents almost the 65% of the world population and accounts for about 90% of the gross world product, which makes it be one of the major actors in global scenario.[61] Moreover, the G20 interacts constantly with international economic organisations. Indeed, a privileged relationship exists with the so called "Bretton Woods Institutions", namely the WB and the IMF, detectable in the attendance to the G20 meetings by the WB's and the IMF's representatives both at Summit and at ministerial levels. In turn, the IMF and the WB take into accounts the G20's priorities in their activities, where the FSB's recommended best-practices, substantially moulded on the G20's agenda, are used as benchmarks for country financial stability assessment and as reference in the definition of economic priorities for developing countries. Similarly, the G20 cooperates with IOSCO, the Bank

[59] Stephen Valdez and Philip Molyneux, *An introduction to Global Financial Markets* (Palgrave, 2015).
[60] To give an example, the foreign affairs sous-sherpa and the finance team effectively contributed to the G8's activities, since the G20 was declared the Premier Forum for internal economic cooperation during Pittsburgh Summit, so they have gradually lost their relevance. Deborah Bronnert, 'Making government policy: the G8 and G20 in 2010' in Nicholas Bayne and Steven Woolcock (eds), *The new economic diplomacy: decision-making and negotiation in international economic relations* (3rd, Farnham 2011) 39.
[61] Thomas A Bernes, 'IMF Legitimacy and Governance Reform: Will the G20 Help or Hinder?' in Colin Bradford and Wonhyuk Lim (eds), *Global Leadership in Transition: Making the G20 More Effective and Responsive* (Brookings Institution Press, 2011).

of International Settlement (BIS) and the Basel Committee, especially concerning policy analysis, impact assessment and performance evaluation.[62]

1.2.2 The Financial Stability Board – FSB

The Financial Stability Board (FSB) was created in 2009 to execute the multi-layered financial reform plan envisaged by the G20.[63] In fact, it is the successor of the Financial Stability Forum (FSF) founded in 1999 by the G7 Finance Ministers and Central Bank Governors with the purpose of bringing together national authorities responsible for financial stability regulators, supervisors engaged in standards-setting and international financial institutions in charge of the surveillance of standards' implementation.[64] Giving continuity to the FSF's original mandate, the FSB is responsible for assessing the vulnerabilities of the financial market, identifying prompt response and promoting coordination among agencies and institutions.[65] In pursuant to international financial stability, a compendium of twelve key standards, partially compiled by the FSF, represents the relevant principles whose implementation is assessed by the IMF and the WB through Reports on the Observance of Standards and Codes (ROSCs) and Financial Sector Assessment Programs (FSAPs).[66] Concurrently, the FSB uses a peer-review mechanism either country-based (focused on various practices within one member's territory) or by thematic-oriented analysis (examine one factor across all members).[67]

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[62] Francesco Cannata and Mario Quagliariello (eds), *Basel III and beyond: a guide to banking regulation after the crisis* (Risk Book, London 2011) 46-49.

[63] G20, *Leaders' Statement London Summit* (London, 2 April 2009) paras 13-16.

[64] Stuart P. M. Mackintosh, 'The Global Financial and Economic Crisis, and the Creation of the Financial Stability Board.' (2014) 15(3) World Economics 108.

[65] In November 2011, under the request of the G20, the original Charter was amended and the FSB's capacity, resources and governance strengthened in the promotion of international standards and policy recommendations. FSB, *Report to the G20 Los Cabos Summit on Strengthening FSB Capacity, Resources and Governance* (12 June 2012) and FSB, *Framework to Strengthening Adherence to International Standards* (9 January 2010).

[66] Mario Giovanoli, 'The Reform of the International Financial Architecture after the Global Crisis' 42(1) New York University Journal of International Law and Politics 84.

[67] Francesco Cannata and Mario Quagliariello (eds), *Basel III and beyond: a guide to banking regulation after the crisis* (Risk Book, London 2011) 53-55.

Structurally, the FSB presents a hierarchical organisation. Moving top-down we find a Chairperson, a Steering Committee, a Plenary, a Standing Committees and working groups. The Chair is the spokesperson of the FSB, he or she is appointed by the Plenary, under an unclear procedural process, and serves for three-year renewable term. It convenes and chairs both the Plenary and the Steering Committee along with having a pivotal role in defining the FSB's Agenda. The Steering Committee is appointed by the Plenary under the Chair's recommendation among top ranked officials and bank governors. It is the key decision-making body as it controls the entire work flow by both receiving reports from the different sub-committees and determining the FSB's action. The Plenary meets twice per year, it gathers all members and it decides by consensus. It is the body that officially makes decisions, however according to some scholars its action consists of a simple approval of the Chair and the Steering Committee's decisions.[68] At the lower level, the Plenary has established three main Standing Committees: (i) vulnerabilities assessment, (ii) supervisory and regulatory cooperation, (iii) implementation of standards and codes. There are other standing committees and working groups that are organized according to areas of specialization such as regulatory cooperation, standards implementation etc. They contribute to detail the general FSB' program outlined by the Steering Committee. Since 2012, also six Regional Consultative Groupings are part of the FSB and their aim is to facilitate the dialogue with non-G20 states, though they are not that effective in enlarging the organisation's membership. In this regard, the FSB has progressively enlarged its membership counting for thirty-six members, of which the twenty-four countries'

[68] In the FSB charter the modality of vote or the decisional process is not detailed. Stuart P. M. Mackintosh, 'The Global Financial and Economic Crisis, and the Creation of the Financial Stability Board' (2014) 15(3) World Economics 116-117. For a critical analysis of the limited participation in the activities of the key decisional organs see Giovanna Adinolfi, 'The Legitimacy of Global Networks Vis-À-Vis the International Organizations: The Example of the Financial Standards' in Laura Ammannati (ed), *Networks - In search of a Model for European and Global regulation* (Giappichelli 2012).

representatives[69], plus four international financial institutions, six standard-setters,[70] the European Central Bank and the European Commission.[71] The FSB is supported by a Secretariat composed of around twenty people headquartered in Basel at the the Bank of International Settlement (BIS) that provides administrative and logistical infrastructures.[72]

The 2009 London Communiqué by the G20 Leaders affirms a closer cooperation between the FSB and other international standard-setting bodies, as shown in the scheme below.[73] In this regard, the G20 proactively cooperate with the FSB and their agendas result mutually influenced. At the international level, the IMF and the WB use international financial standards in both the Financial Sector Assessment Program (FSAP) and through Reports on the Observance of Standards and Codes (ROSC).[74]

The flaws identified for the G20's action are attributed to the FSB as well. First of all, the lack of transparency in the decision-making process, secondly, the restricted membership to selected a group of technocrats. Concerning the transparency deficit, many scholars have warned about informal bilateral talks among key members that usually take place outside the Committee's meetings. As a consequence, members in the

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[69] Countries' representatives are senior policy makers from ministries of finance, central banks and supervisory or regulatory authorities from the G20 countries, plus four other key financial centres – Hong Kong, Singapore, Spain and Switzerland

[70] International standard-setters involved are the Basel Committee on Banking Supervision (BCBS), International Organisation of Securities Commissions (IOSCO), the International Association of Insurance Supervisors (IAIS), the International Accounting Standards Board (IASB), the Committee on Payment and Settlement Systems (CPSS), the Committee on the Global Financial System (CGFS).

[71] The FSB's membership can be revised periodically, though it is not much wider than the G20's one. On reporting arrangements refer to FSB, *Declaration on Strengthening the Financial System* and *Financial Stability Forum Re-established as the Financial Stability Board* (London, 2 April 2009).

[72] Daniel E Nolle, 'Who's in Charge of Fixing the World's Financial System? The Un[?]der-Appreciated Lead Role of the G20 and the FSB' (2015) 24(1) Financial Markets, Institutions & Instruments 1-82; Douglas W Arner and Michael W Taylor, ' The Global Financial Crisis and the Financial Stability Board: Hardening the Soft Law of International Financial Regulation' (2009) 32 University of New South Wales Law Journal 448.

[73] G20, *Leaders' Statement London Summit*, (London, 25 September 2009) paras 19-20.

[74] The goal of FSAP assessments is to gauge the stability and soundness of the financial sector and its potential contribution to growth and development. Renzo G Avesani and others, 'Review and Implementation of Credit Risk Models of the Financial Sector Assessment Program (FSAP)' (2006) IMF Working Papers 35; IMF, *IMF Reviews Financial Sector Assessment Program*' (No 38/1, 2001).

lead shape the FSB's agenda whereas the others get involved only during the Committees' meetings. Moreover, the information access is limited since decision-making is a closed-doors process where documents are published only ex-post. In relation to the limited membership, the FSB is definitely not a universal body. However, the FSB's standards impact national institutions and business operators that are left out of the process and result being standard-takers rather than standard-setters.[75]

1.2.3 The BASEL Committee – BCBS

The Basel Committee on Banking Supervision (BCBS) is one of the most important standing Committees within the cooperative network of the Bank for International Settlements (BIS).[76]

The BCBS was established jointly by the G-10 and Switzerland in 1974, in the aftermath of the collapse of the Bretton Woods system, with the aim of stopping foreign currency losses faced by many banks at that time.[77] The BCBS has rapidly become one of the leading global standard-setters concerning prudential regulation, especially after the adoption of the well-know *Core Principles for Effective Banking Supervision* and the Basel Accord on banking capital adequacy (Basel II) and its further versions.[78]

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[75] Gianni Toniolo and Clement Piet, *Central Bank cooperation and at the Bank for international settlements:1930-1973* (Cambridge University Press, Cambridge 2005).

[76] Hague Convention respecting the BIS of 20 January 1930. The status of international organisation has been recognised under Swiss Law and immunity from expropriation and protection of the archives granted by some jurisdictions. Briefly on the BIS, it was the first international financial institution established in 1930 to serve as international forum for central bank cooperation. The BIS meets six times per year and develops banking services to facilitate financial transactions and to offer support to national bank authorities. The BIS assists the work of nine committees and working groups, the BCBS included, and all of them have an independent governance arrangement and reporting line. It also coordinates and hosts the FSB, the International Association of Deposit Insurers (IADI) and International Association of Insurance Supervisors (IAIS) which have a separate legal personality.

[77] The Committee's members come from Argentina, Australia, Belgium, Brazil, Canada, China, European Union, France, Germany, Hong Kong SAR, India, Indonesia, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, Russia, Saudi Arabia, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States.

[78] Basel I - first version - was adopted in 1988. The Basel Accord consists of a set of rules governing banks' capital adequacy as a tool to prevent bank failure and consequently financial instability. For a comprehensive summary of the background and the content of the Basel Accord see Chey Hyoung-Kyu,

Moreover, it serves as an informal cooperation forum on bank regulation and supervision coherently with its mandate which targets financial stability by synchronisation of national regulation, supervision and practices.[79] As stated in the Charter, the BCBS first exchanges information to help identify systemic financial risks, secondly, promotes cross-border cooperation, third, establishes global standards, guidelines and sound practices, finally, oversees the implementation of BCBS standards in pursuant to a "level playing field".[80]

The BCBS is composed of countries' central banks and national authorities with prudential supervision responsibilities.[81] The membership results, however, limited to authorities of pre-established group of States. It meets four times per year and adopts a two-year work plan on consensus basis, which guides the Committee's activities.[82] It is overseen by the Group of Governors and Heads of Supervision (GHOS), which appoints the BCBS' chairman[83] and approves the BCBS' programs. It encompasses national central bank governors and national heads of supervision. The BCBS is organized in groups, working groups and task forces, according to different areas of expertise[84] and

International Harmonization of Financial Regulation? The Politics of Global Diffusion of the Basel Capital Accord (Routledge, 2014) 23-32.

[79] Pierre-Hugues Verdier, 'Transnational Regulatory Networks and Their Limits' (2009) 34(1) Yale Journal of International Law 133-136.

[80] The BCS keeps also relations with bank authorities from countries that are not members. Indeed, it consults with central banks and bank supervisory authorities which are not members of the BCBS to benefit from their input into the BCBS policy formulation process and to promote the implementation of BCBS standards, guidelines and sound practices. Richard Kibble and James Worsnip, 'Strategic Context' in Barfield, Richard (ed), *A practitioners' Guide to Basel II and Beyond* (Thomson Reuters, 2011) 21-25.

[81] The BCBS counts for 28 jurisdictions including the first membership enlargement in 2009 and the second in 2014.

[82] The Committee's members come from Argentina, Australia, Belgium, Brazil, Canada, China, European Union, France, Germany, Hong Kong SAR, India, Indonesia, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, Russia, Saudi Arabia, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. Mario Giovanoli, 'The Reform of the International Financial Architecture after the Global Crisis' 42(1) New York University Journal of International Law and Politics 116.

[83] The actual chairman is Stefan Ingves, Governor of Sveriges Riksbank, appointed until June 2017.

[84] Accounting experts group, supervision and implementation group, policy development group, macroprudential supervision group, Basel consultative group. Daniel K Tarallo, *Banking in Basel. The*

it receives support along the whole work flow, by the Secretariat and the sub-committees, which provide for technical advice. Technically speaking, the BCBS does not have enforcing powers or supranational authority over its members. For this reason the BCBS can only guide towards a regulatory convergence and encourage its members to adopt common standards and best practices.[85]

The cooperation with other standards-setting bodies is overall very high. To give an example, synergy with the International Organisation of Securities Commissions (IOSCO) and the International Association of Insurance Supervisors (IAIS) gave birth to a Joint Forum in 1996 aiming at regulating the banking, securities and insurance sector.[86] In order to fill the regulatory gap in international supervision, the BCBS conceived the "Concordat" on sharing supervisory responsibilities in case of foreign banks' branches, subsidiaries or joint venture, in 1975.[87] The text was subsequently revised in 1983 and soon became the core principles for the supervision of banks' foreign establishments. In 1990 a supplement discipline titled "Exchange of Information" between supervisors and participants in the financial markets was added. These principles inspired the *Minimum Standards for The Supervision of International Banking Group and their Cross-Border Establishments* (1992) and the *Report on the Supervision of Cross-Border Banking* drafted by the join working group, with the participation of supervisors of non-G20 and offshore centres. After many revisions, in 2012 the document comprised twenty-nine principles encouraging standard convergence and monitored implementation, but without prescribing a detailed harmonization among different supervisory approaches.[88]

Future of International Financial Regulation (Peterson Institute for International Economics, Washington DC 2008).

[85] George Walker, 'International Financial Instability and the Financial Stability Board' (2013) 47 International Lawyer 13-16.

[86] Francesco Cannata and Mario Quagliarello, *Basel III and beyond: a guide to banking regulation after the crisis* (Risk books, London 2011).

[87] Dimitris N Chorafas, *Basel III, the Devil and global banking* (Palgrave Macmillan 2012).

[88] Charles A Goodhart, *The Basel committee on banking supervision: a history of the early years, 1947-1997* (Cambridge University Press, Cambridge 2011).

1.2.4 The International Organisation of Securities Commission – IOSCO

The International Organisation of Securities Commissions (IOSCO) was created in 1984 to develop, promote and monitor a coherent implementation of standards in the securities sector. Originally, IOSCO was a mere regional association composed of eleven American regulatory agencies that cooperate in the securities field. Today IOSCO is a private organization with its headquarter in Spain with an international dimension bringing together the world's securities regulators, ranging from governments to statutory regulatory bodies, and covering around 95% of securities market with more than 115 jurisdictions.[89]

IOSCO members distinguish between ordinary, associate and affiliate.[90] The first category refers to national securities commissions, governmental, provincial or self-regulatory bodies with effective powers over securities or derivatives markets. Each ordinary member, as well as any associate member, is member of the Presidents Committee, which meets once per year.[91] Associate members are supranational governmental regulators, international organisations and standard-setting bodies, involved in securities regulation. Differently from the ordinary members, the associate members cannot vote at the Presidents Committee meetings. Finally, the affiliate members are self-regulatory organisations, securities exchanges, financial market infrastructures, international bodies other than governmental organisations with a demonstrate interest in securities regulation, investor protection funds and compensation funds.[92] They composed the Affiliate Members Consultative Committee (AMCC) that

[89] IOSCO accession procedure requires that prospective members apply in writing to the Secretary General by accompanying their request with a prescribed membership contribution. Roberta S Karmel, 'IOSCO's Response to the Financial Crisis' 37(4) Journal of Corporation Law 849.

[90] The ordinary members are 126, associate members 23 and affiliate members 65. The full list is consultable at under the dedicated sessions https://www.iosco.org.

[91] Each member generally holds one vote in the meetings of IOSCO's organs, with exception of different mechanisms adopted in very special cases. For a detailed explanation of the procedural rules see IOSCO, Processes for Policy Development and Implementation Monitoring available on the official website, in the session about IOSCO, under sub-session Policy and Implementation. https://www.iosco.org/

[92] Graeme Baber, 'The role and responsibility of credit rating agencies in promoting soundness and integrity' 17(1) Journal of Money Laundering Control 34. Bradley Berman, 'How Should Structured

seeks to enhance cooperation among its members. The Affiliates are not entitled to vote and can only hear detailed reports at the meetings of the Presidents Committee.[93]

Structurally, IOSCO is composed by the Presidents Committee, the IOSCO Board, the Growth and Emerging Markets Committee, Regional Committees and the Affiliate Members Consultative Committee. The Presidents Committee meets once a year during the Annual Conference and it is chaired by the President of the ordinary member hosting the Annual Conference. The IOSCO Board is the real standard-setting body. It is composed of 34 national regulators[94] and defines the policies that are carried out by the eight committees.[95]

The Growth and Emerging Markets Committee (GEM) is the largest Committee within IOSCO, it encompasses 87 members and 17 non-voting associate members, including the world's fastest growing economies and ten of the G20 members. GEM's main task is fostering development in emerging markets by guaranteeing minimum standards, providing technical assistance, customizing training programs and promoting exchange of information. The GEM's Chairman seats at the FSB Plenary.

In addition, regional issues on securities markets are dealt by four Regional

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Product Issuers and Distributors Respond to the IOSCO Principles for Financial Benchmarks?' 24(3) Journal of Investing 107.

[93] The AMCC also has its own streams of work, including the Regulatory Affairs Group, the Emerging Risks Group and the Regulatory Staff Training Working Group, which organizes every year the AMCC Training Seminar on Implementing IOSCO Principles. The AMCC establishes Task Forces to investigate topics with specific relevance for AMCC members and/or the broader IOSCO community (e.g., Cybersecurity, Investment Funds Data, and FinTech).

[94] The members of the IOSCO Board are the securities regulatory authorities of Argentina, Australia, Belgium, Brazil, China, Egypt, France, Germany, Hong Kong, India, Indonesia, Ireland, Italy, Jamaica, Japan, Kenya, Korea, Malaysia, Mexico, the Netherlands, Nigeria, Ontario, Pakistan, Peru, Quebec, Saudi Arabia, Singapore, Spain, Sweden, Switzerland, Turkey, United Kingdom and the United States.

[95] The IOSCO Committees are the following: Issuer Accounting, Auditing and Disclosure; Regulation of Secondary Markets; Regulation of Market Intermediaries; Enforcement and the Exchange of Information and the Multilateral Memorandum of Understanding Screening Group; Investment Management; Credit Rating Agencies; Commodities Derivatives Markets and Retail Investors. Despite the formal wide participation, members really engaged in the decisional process are only those of the IOSCO Board. Giovanna Adinolfi, 'The Legitimacy of Global Networks Vis-À-Vis the International Organizations: The Example of the Financial Standards' in Laura Ammannati (ed), *Networks - In search of a Model for European and Global regulation* (Giappichelli 2012).

Committees, specifically the African/Middle East Regional Committee, the European Regional Committee, Asian-Pacific Regional Committee, Inter-American Regional Committee. IOSCO's work is supported and assisted by a permanent General Secretariat.

In relation to IOSCO's mission, its main goals are facilitating cross-border cooperation, mitigating global systemic risk, protecting investors and ensuring fair and efficient securities markets. In this sense, the organisation has established numerous principles and guidelines, such as *Objectives and Principles of Securities Regulation* (IOSCO Principles) and the *Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information* (MMoU)[96], which is now recognized as the international regulatory benchmarks for all securities markets. Indeed, IOSCO principles constitute a useful tool in the evaluation of the securities sector for the Financial Sector Assessment Programs (FSAPs) of the IMF and the WB. The cooperation with the G20 and the FSB is particularly intense for what concerns the definition of the global regulatory reform agenda in the field of securities.[97]

1.2.5 The International Association of Insurance Supervisors – IAIS

The International Association of Insurance Supervisors (IAIS) was established in 1994 to promote and coordinate a stable regulation of insurance markets. This is a voluntary membership organisation of insurance supervisors and regulators from more than 140 countries which aims at providing a coherent supervision of the insurance industry and ultimately to contribute to the global financial stability.[98] In addition, IAIS' activities are opened to approximately 135 observers from international institutions and the private sector.[99] Overall, IAIS is assisted by a Secretariat located in Basel and headed

[96] In 2005, IOSCO endorsed the IOSCO MMoU as the benchmark for international cooperation among securities regulators, attempted to expand the network of IOSCO MMoU signatories by 2010. IOSCO's policy includes a follow-up assessment of the implementation of IOSCO principles at the national level.
[97] Peter I Hajnal, *The G20: evolution, interrelationships, documentation* (Ashgate, 2014).
[98] To an overview of the mission of the IAIS see its official website http://www.iaisweb.org.
[99] Among the actors of the private sector the IAIS counts for professional associations, insurance and reinsurance companies, consultants and other professionals.

by a Secretary General.

The IAIS is organised in committees and technical sub-committees. The four main committees, are overseen by the Executive Committee whose members come from different regions of the world.[100] Committees' meetings occur four times per year whereas once per year the IAIS holds the annual conference to foster multilateral discussion on insurance-related topic. Given the informal structure, IAIS has been offered considered as an informal association of regulators and professionals for insurance supervision.

With regard to IAIS' goals, they can be categorized into three different groups: standard setting, implementation and financial stability. The first activity concerns the establishment of principles, guidelines and good practice to guarantee an effective supervision through supporting papers, which provide insurance supervisors with a general background on specific topic-related issues. One of the leading code of standards in this sector is the *IAIS's Insurance Core Principles* The implementation task is carried out in cooperation with international and regional organisations and it is conducted through assessment analysis and peer review, also in the context of FSAP for the IMF and the WB. IAIS contributes to international financial stability by developing methodologies that help identify global systemically important insurers (G-SIIs) and tools for macro-prudential surveillance.[101]

1.3 LITERATURE REVIEW ON INTERNATIONAL FINANCIAL STANDARDS

The emergence of a global financial system, meaning the financial mechanisms, principles and practices elaborated by a group of private international standard-setting bodies and hybrid public-private organisations at a supranational level has drawn

[100] The main Committees are the following: Audit and Risk, Budget, Financial Stability, Implementation, and Technical Committee.

[101] Julian, Burling and Lazarus Kevin (eds), *Research Handbook on International Insurance Law and Regulation* (Edward Elgar, Cheltenham, UK 2011).

scholars' attention since the 1980s.[102] Four different doctrines on both sides of the Atlantic have tried to explain the architecture of this multi-layered governance, to understand its functioning and to detect strengths and weaknesses in order to provide a comprehensive overview of this international regulatory activity. The US streams, respectively *Global Administrative Law* and *Network Theory*, have mainly focused on the dynamics inside the system and the connections between the system and national governments in terms of authority, autonomy, accountability and executive powers. From the European side, two complementary visions have contributed to the academic discussion: *Informal International Law-Making,* which centres its analysis on the informality as the main peculiarity of the international financial system, and *International Public Authority*, which emphasizes the supranational dimension of standards-setting bodies and their regulatory powers.

1.3.1 Global Administrative Law

Global Administrative Law observes the growing number of international entities along with the progressive emergence of the so called global governance,[103] an international arena composed of actors different from States that take part in the standards-setting process. The doctrine starts analysing the break-down of the traditional dichotomy national versus international regime in order to identify the characteristics of the global regulatory system, of which the international financial architecture is part. The key features are summarised in the words "administrative" and "global". The first term traditionally defines domestic procedures, national institutions and States' internal

[102] Chris Brummer, *Soft law and the global financial system: rule making in the 21st century* (n 17) 4-5.

[103] In the literature various terms has been used to indicate the regulatory activities produced at international level and the international bodies involved. To make a few examples, "global regulatory system" emphasizes the global dimension and the synergy among different actors, "global governance" underlines the absence of a transnational government, "international regime" refers mostly to cross-border relationships without capturing the complexity of the international financial system and, finally, "international organization" that explains the structural nature of the regulatory bodies that participate in the standard-setting process. Sabino Cassese, 'Administrative Law Without the State? The Challenge of Global Regulation' (2006) 17(1) European Journal of International Law 670.

relation between the central authority and local powers.[104] However, in the context of the international regulation the notion "administrative" underlines more the technical-procedural nature of the international standards-setting. Besides, the term "global" emphasises the supranational dimension of the decisional process, encompassing the relations between standards setters and national authorities.

Many elements differentiate global administrative law from a more traditional domestic administrative law. The first difference lies in the lack of exclusivity that characterises international global administrative law, which deals with global issues regulated by a multitude of regimes. To give an example financial services is regulated by the WTO regime for what concerns trade, is influenced by the IMF's requirements for what concerns currency and balance of payment and by the EU law to the extent that freedom of capital movement is applicable. Secondly, at a national level the central authority regulates the decentralized entities, whereas at the international level standards setters, governments and national authorities interact horizontally in the decision-making process. Thirdly, domestic administrative law is the result of a political process where the principle command-control prevails, whilst international process is more informal. Thus, if national regimes present a neat competence distribution, global architecture shows a lax distinction and a wide engaging process. Furthermore, if the distinction between public and private is well defined at a State level, in the global scenario the line is not clearly drawn. Indeed, standard-setting bodies are often hybrid agencies that involve national governments, regulatory authorities, private actors, technical experts and lobbying groups at the same time.[105] The result is a mutual influence. From national to global level, the international system absorbs and mirrors principles of domestic administrative law (such as participation, transparency, proportionality, reasonableness) in a process labelled "State capture" by Marver H. Berstain.[106]

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[104] *Collins Dictionary of Law*, Retrieved on 18 January 2017.

[105] Stefano Battini, 'International Organisations and Private Subjects: A Move Toward A Global Administrative Law? ' (2005) 3 IILJ Working Paper 2-30.

[106] The "capture" theory underlies the tendency that the global system has to absorb States' models but it does not forcedly entail a complete supplantation of the State by the international regulatory regime:

From global to national, regulatory activities has expanded beyond national borders and domestic regulators are strongly influenced by it.[107] As Benedict Kingsbury, Nico Krisch and Richard Stewart depicted the phenomenon "D*omestic administrators are increasingly constrained by substantive and procedurals norms..at the same time global administrative bodies making those decisions in some cases enjoy too much de facto independence"*.[108] In other words, the expansion of the global administrative space blurs the boundaries between national administrative policy and inter-state cooperation at international level. The reasons are manifold. First, the issues that States have to cope with are not territorially locked down but they have global dimension, requiring state-cooperation at international level.[109] Secondly, private or hybrid public-private bodies, conventionally engaged only in the implementation phase, are now involved in the definition of financial standards as well, thanks to their highly technical expertise. In this way, national supervisory authorities or self-regulatory authorities play a rule-maker role instead of being simple rule-takers.[110] Finally, as Sabino Cassese skilfully

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international organisations have promoted intra-States cooperation and often tried to build a direct connection with citizens even by-passing the State itself, in a cooperative way. Marver H Bernstein, *Regulating business by independent commission* (Princeton University Press, Princeton 1955) and Sassen 'The Participation of States and Citizens in Global Governance' (n 1) 7-12.

[107] According to Global Administrative Law the expansion of activities beyond national borders have affected also the law-making exercise, which is not exclusively domestic anymore. This is particularly valid for the global financial regulation, given its transnational character. Charles Goodhart and Rosa M. Lastra, 'The Boundary Problems in Financial Regulation' in Barth James, Chen Lin and Clas Wihlborg (eds), *Research Handbook on International Banking and Governance* (Edward Elgar, Cheltenham UK 2013) 321-329.

[108] Benedict Kingsbury, Nico Krisch and Richard B. Stewart, 'The Emergence of Global Administrative Law' (2011) 1 International law 455-457; Benedict Kingsbury and Lorenzo Casini, 'Global Administrative Law Dimensions of International Organizations Law' (2010) 63(2) International Organizations Law Review 319.

[109] The Westphalian concept of sovereign State that provides its people with public goods has been challenged by the current international regulatory system. Giacinto Della Cananea, 'Beyond the State: the Europeanization and Globalization of Procedural Administrative Law' (2003) 9 European Public Law 563. Rüdiger Wolfrum, 'International Administrative Unions', *Encyclopedia of Public International Law* (1995) vol 2.

[110] The term "self-regulatory authority" refers to national administrative authorities involved in the procedural and administrative process and responsible for the market compliance. At the international level, self-regulatory authorities are engaged by standard-setting bodies according to their specificity (banking, insurance or securities) to contribute into the discussion of common practice and standards.

explained, global regulation corrodes the paradigm of unity that characterizes States, so that the contours of domestic and global laws result undefined.[111] Put differently, domestic implementation does no longer entails a significant independence of the national legislator from the international realm. Modern decision-making process usually starts at international level in the form of decision or preliminary examination and it ends at national level either through the direct implementation of international standards or through the adoption standard-conformed policies.[112]

1.3.2 Network Theory

Although from a different perspective, *Network Theory* analyses the variety of actors involved in the global financial system, which brings together States' representatives, national regulators, lobbyists and stakeholders. Similarly to Global Administrative Law, this academic stream underlines the progressive mingling of international framework and domestic regime, yet focusing mainly on the international network as a substantive peculiarity. Indeed, the doctrine lies down the aggregative and coordinating role of standard-setting bodies which represent the "nodes" of an intertwined global network and their connections reveal the systemic crisis resilience and risk of contagion. In this regard, Anne Marie Slaugthter was one of first scholars to popularize the idea of governmental networks. In her landmark piece "*A new order"*, she rethought the traditional construction of a State-centric international system by giving special

Emily Hammond, 'Double Deference in Administrative Law' (2016) 116(7) Columbia Law Rev 1705; Robert I Webb, 'The Role of SROs in Contemporary Derivative Markets' (2014) 22(1) Rev Futures Mark 7.

[111] Sabino Cassese, *Research handbook on global administrative law* (2016).

[112] This mutual influence is detectable also linguistically where neologisms capture the fusion of these different spheres. An explanatory example is the new construct "new public management", referring to the participation of regulators, experts, stakeholders and private actors in the decision-making process. Arie Reich, 'The WTO as a Law-Harmonizing Institution' (2004) 24(1) University of Pennsylvania Journal of International Economic Law 321-384; and Herbert V. Morais, 'The Quest for International Standards: Global Governance vs. Sovereignty' (2002) 50(4) The University of Kansas Law Review 779.

attention to international organisations and NGOs.[113] Under these lenses, not only do international regulatory bodies become crucial nodes of the global network, but they also constitute highly specialized fora where experts gain prominence in the regulatory decision-making process. To give a practical example, in the financial sector numerous standards-setting bodies, such as the G20, the FSB, BCSC and IOSCO effectively consist of networks of finance ministers, central bankers, national regulators and supervisors that contribute to standards-setting.[114]

The second feature identified by the scholarship is the remarkable presence of technocracy. The reason lies in a more efficient approach oriented towards time-saving, flexibility and response rapidity. In addition, the inherent specialization of international standards requires technical expertise, which facilitates both the recourse to standards and States' acceptance. In fact, cooperation among national homologates enhances trust and strengthen the relationship among participants, creating new incentives for compliance in terms of reputation, persuasion and sharing information. As many scholars have spotted, reliance upon soft law is driven by factors others than simple legal constraints and sanctions, such as political interests, access to decisional fora and subjective motives. Nevertheless, technocracy in international decision-making process doesn't come without flaws: the traditional holder of legislative and executive powers, national parliaments and governments, are no longer the exclusive actors in the regulatory process.

In this scenario, the concept of sovereignty assumes a different meaning, being defined as *"the capacity to participate in the international and transgovernmental regimes, network and institutions".*[115] Therefore, States' actions are constrained at international level where decisions are taken and where international institutions exercise great influence in decision-making.[116] In this regard, David Zaring deepened

[113] Anne-Marie Slaughter, *A New World Order* (Oxford, Oxford 2004) 20-25.

[114] Anne-Marie Slaughter, 'Global Government Networks, Global Information Agencies, and Disaggregated Democracy' (2003) 24 Michigan Journal of International Law 1041.

[115] Slaughter, *A New World Order* (n 113) 52.

[116] Sovereignty and States' powers in a networked world were originally conceptualized by Chayes and Chayes in Abram and Antonia H. Chayes, *The new sovereignty: compliance with international*

Slaughter's analysis by finding three main challenges in the study of international financial bodies: the effectiveness of the regulatory network, its prospective evolution and crisis-response capacity. To start with the effectiveness of standard-setters' action, assessing this analytical dimension is not a slip of a pen, also because international bodies are not all equal. By taking the BCBS and IOSCO as examples, Zaring explained what factors facilitate the impact assessment and help to understand differences between successful implementation of standards in the banking sector and less effective one in the insurance sector.

First, the level of regulatory harmonization indicates the degree of cooperation among members. This can gradually evolve, starting from a simple agreement on information exchange, to the establishment of a baseline regulation for domestic regimes, till concerning the practical implementation. A second relevant factor is the type of membership. IOSCO presents a wide membership that fosters larger participation, which doesn't create heavy exit costs, instead. Conversely, Basel results to be a more exclusive club, which discourages members from defection and consequently from opt-out.[117] As Brummer highlighted, the creation of exit costs is what draws the line between social network, more informal, and economic networks, more bureaucratic. Moving to the prospective evolution of these agencies, Zaring forecast their centrality at international level and a progressive convergence towards national administrative models. To support his speculations, he compared both IOSCO's and the BCBS's procedures, which have shifted from a confidential closed-door process to a more open standards-setting, including public comments and greater stakeholders' involvement.[118] With regard to crisis-response, the author cautiously avoided to blame

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regulatory agreements (Harvard University Press, 1998). Slaugthter elaborates a new concept of sovereignty defined as *"the capacity to participate in the international and transgovernmental regimes, network and institutions".* As a result, States' actions are constrained by the context in which decisions are taken, so influenced by international institutions, whose activity is relevant at the international level. Slaughter, *A New World Order* (n 113) 283-286.

[117] David Zaring, 'Informal Procedure, Hard and Soft, in International Administration' 5(2) Chicago Journal of International Law 547.

[118] This passage reports the Author's view since transparency and legitimate concerns in the standard-setting process remain a very central issue in the academic discussion, ibid 555.

international regulatory bodies for their alleged incapability of preventing economic crises, differently from other scholars.[119] In Zaring's view, while it cannot be hidden that BCBS and IOSCO did not sufficiently contain the recent crisis, it should also be considered that without the existing international cooperation the situation could have been much worse. Zaring used the capital injection and the recapitalization of the main credit institutions encouraged by BCBS as an example of international regulatory good practice facilitating cooperation among national regulators.[120]

From a macro-perspective, also Pierre-Hugues Verdier dealt with crisis management by recalling the globalization paradox, namely the need for a cohesive international regulatory system to better face global challenges vs fears for a centralized government.[121] Differently from Zaring, the author claimed that international bodies' effectiveness depends on two factors: domestic interests and distributive problems. The former influences both standards negotiations and their enforcement within national territory, the latter derives from global regulation.[122] In general terms, countries' interests may be similar, different or even conflicting. If international standards reflect national interests their implementation is not going to be contrasted, whereas an opposite scenario usually produces the enforcement can be backlash. Therefore, the more convergent domestic interests and international standards are, the more successful the regulatory agency's action will be.[123] At the same time, regulation may generate distributive inequalities and these side effects are more likely to occur when international standards do not reflect national interests. For this reason, Verdier affirmed that countries with similar standards or similar level of development will more likely

[119] David Zaring, 'Three Challenges for Regulatory Networks' (2009) 43 The international Lawyer 211.
[120] Ibid 213-214.
[121] The issue was raised by Keohane who spotted that globalization "can create potential gains from cooperation" but institutions can be oppressive. Robert O Keohane and Joseph S Nye, *Transnational relations and world politics* (Harvard University Press, Cambridge 1972) and by the some authors, *Power and interdependence: world politics in transition* (Little, Brown, Boston 1977).
[122] Verdier, Pierre-Hugues, 'Transnational Regulatory Networks and Their Limits ' (n 79) 114.
[123] Stavros Gadinis, 'Three pathways to global standards: private, regulator and ministry networks' (2015) 109(1) The American Journal of International Law 216-217.

reach a compromise and will easily implement regulatory standards at national level, with a lower risk of unequal distribution.

Despite capturing the dense international regulatory network, this scholarship does not clarify how regulators and institutions are connected or the implications of the international regulatory regime.[124] In details, the doctrine does not explain to whom the regulatory bodies ought to be accountable and it does not shed light on the dynamics between advanced economies and developing countries in the definition of international standards, namely if regulatory standards are imposed by the former to the latter. Finally, it does not sufficiently weight domestic democratic mechanisms that bind governments to pursue national interests, which are crucial in coordination games and in the decision-making process.[125]

1.3.3 Informal International Law-making

Informal International Law-making is a stream of the literature that draws the attention to the informality of the global regulatory system. While the previous theories have recognised informality as a peculiarity of the international architecture, this scholarship makes of it the core distinction between national regime and international law. Informal law-making is described as "*cross-border cooperation between public authorities, with or without the participation of private actors and/or international organisations (actor informality), in a forum other than traditional international organisations (process of informality) whose results are neither formal treaty nor traditional sources of*

[124] Brummer, *Soft law and the global financial system: rule making in the 21st century* (n 17) 67.

[125] Similar to the prisoners' dilemma in game theory, domestic interests influence the decisions made at the international level where governments tend to see national interests recognised as the preeminent ones. Applying the prisoners' dilemma and assuming that each State decides independently from other States, if two States agree on the same policy both will benefit evenly from standards harmonization than in a situation of non-cooperation. In the first situation the hypothetical value of +1 is attributed to both actors, whereas the second scenario counts for zero for both participants. However, defection may happen, so the State that alone complies with the agreed standards will have a damage estimated to -2, whereas the non-compliant one will gain more than in a cooperative situation +2. Roger A McCain, *Game theory and public policy* (Second edn Edward Elgar Publishing, Cheltenham, UK 2015).

international law (output informality)".[126]

In essence, informality is conceived as the antithesis of the traditional State-based law-making and permeates multiple aspects of the global financial architecture.

First, the informal dimension embraces financial standards-setting bodies, which appear less structured than national authorities, yet not fully resembling classic international organisations. Despite having physical headquarters and permanent staff, international regulatory bodies basically consists of technical networks with cooperation and oversight tasks. Moreover, standard-setters gather a wide array of actors ranging from national regulators and supervisors to self-regulatory organisations, semi-independent agencies and private actors. This particular feature further complicates the doctrinal categorization of informal law making, which has already been doubted belonging to international law in the light of its institutional peculiarities.[127]

Likewise, the process can be defined as informal. The lack of detailed procedural rules makes the decisional process be time-saving and the system easily adjustable according to internal and external pressures. On the other side, the process results depoliticized and light-structured compared to national systems based on solid national checks and balances. As a consequence, this informal decisional process shakes down traditional international relation theories, according to which any government acts at two levels when it exercises regulatory authority: an internal dimension, in which handling internal pressure and divergent interests is crucial, and an external dimension, which focuses on national strategic objectives in the international scenario. The presence of an informal network that brings together regulators and experts adds an extra variable in the governmental action, namely international coordination mainly exercised through peer-to peer review, reputational incentives and accessibility in the regulatory

[126] Ayelet Berman and Ramses A Wessel, 'The International Legal Form and Status of Informal International Lawmaking Bodies: Consequences for Accountability' in Joost Pauwelyn, Ramses A Wessel and Jan Wouters (eds), *Informal international lawmaking* (Oxford University Press, Oxford 2012) 37-38.

[127] Joost Pauwelyn,' Is it International Law or Not and Does it Even Matter? ' Joost Pauwelyn, Ramses A Wessel and Jan Wouters (eds), *Informal international lawmaking* (Oxford University Press, Oxford 2012) 125-134.

process.[128]

Finally, the output of this aggregative network is deemed informal, in the sense that it produces non-legally binding instruments as such. Yet, other factors such as credibility, trustfulness, membership and reputational incentives push for compliance and implementation at domestic level.[129]

1.3.4 International Public Authority

Similar to Global Administrative Law, International Public Authority acknowledges a sort of delegation of competences from national to international level. While for the former theory administrative law has gained an international dimension being no longer produced exclusively by national parliaments, the latter doctrine detects powers associated to national public authorities exercised by bodies others than the domestic ones.

Armin von Bogdandy as the main proponent of this scholarship, recognized that a growing number of international organisations and supranational entities adopt standards that have a significant impact on national legal regimes. This phenomenon shows that those international standards agencies effectively have public authority powers, which can be simplified as the power to constitute a constraint over other authorities' freedom, often in pursuant to public interests and through standards, regulations and decisions.[130]

In order to identify what exactly international public authority is and how it

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[128] Dick WP Ruiter and Ramses A Wessel, 'The Legal Nature of Informal International Law: A Legal Theoretical Exercise' Joost Pauwelyn, Ramses A Wessel and Jan Wouters (eds), *Informal international lawmaking* (Oxford University Press, Oxford 2012) 165.

[129] Chris Brummer, 'How International Financial Law Works (And How It Doesn't)' (2011) 99(2) Georgetown Law Journal 257. Michael N Barnett and Martha Finnemore, 'The Politics, Power, and Pathologies of International Organizations' (1999) 53(4) International Organization 699–732.

[130] The role of international organisations has been at the centre of an intense debate among lawyers, especially concerning the ascertainment of standard-setters as international actors subject to international law in relation to their capability to influence the financial regulatory system. von Armin Bogdandy, Matthias Goldmann and Ingo Venzke, 'From Public International to International Public Law: Translating World Public Opinion into International Public Authority ' (2016) Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper.

differentiates from other forms of authority, the literature starts from the distinction between public and private law.[131] According to a general understanding, public law regulates relations between public institutions opposed to private international law that refers to conflict of laws.[132] This distinction appears difficult to apply considering the hybrid nature of many standards-setting bodies, which enjoy the participation of technocrats, experts and, sometimes, even private actors, with no delegated powers in the decision making process. The juxtaposition is even less clear considering the practical cross-fertilization between public and private dimension traceable for example in the highly technical vocabulary used or in the application of efficient models of the private sector to traditional public domains.[133] Yet, one crucial difference resides in the operational rationale that motives actions: while private law is self-interest oriented, public law pursues common goods.[134] This concept is very broad and recalls goods of a fundamental relevance for a community that cannot be provided without the intervention of States, governments or institutions. Public good could be tangible, such as access to food, or intangible, like human equality, it could refer to final goods, such as global

[131] According to some scholars within this stream, global governance flattens differences between private law and public law, between formal and informal to the point that the two spheres are so merged that the feasibility of drawing distinction is contested. Inger-Johanne Sand, 'Globalization and the Transcendence of the Public/Private Divide—What is Public Law under Conditions of Globalization?' in Cormac MacAmhlaigh and al. (eds), *After Public Law?* (Oxford University Press, 2013) 201-211; Lorenzo Casini, ''Down the Rabbit-hole': The Projection of the Public/Private Distinction beyond the State' 2014 12(2) International Journal of Constitutional 402-408.

[132] Carl J Friedrich, *Constitutional government and democracy. Theory and practice in Europe and America* (Ginn and Co., Boston 1973); Louis Henin, 'A New Birth of Constitutionalism: Genetic Influences and Genetic Defects ' in Michel Rosenfeld (ed), *Constitutionalism, identity, difference, and legitimacy: theoretical perspectives* (Duke University Press, Durham, N.C. 1994) 32.

[133] An alternative account suggests that public law constitutes a special and privileged regime that subtracts public actors from national administrative courts' jurisdiction due to the immunity that law recognizes to them. Unfortunately, this stance does not provide the substantive elements to correctly categorize and differentiate public law from private law. Antonio Cassese and Joseph H. H. Weiler, *Change and Stability in International Law-Making* (Berlin 2010).

[134] Nico Krisch, 'Decay of Consent: International Law in an Age of Global Public Goods, The' (2014) 108(1) American Society of International Law 1-40. Moreover, Armin von Bogdandy uses the term "publicness" to define the activities dealt by a public (mostly) and informal actors oriented towards the pursue of public interests. Armin von Bogdandy at al. 'From Public International to International Public Law: Translating World Public Opinion into International Public Authority ' (n 130) 13.

security, sustainable development, or to intermediate public goods, such as economic liberalization that is preliminary to the achievement of higher values.[135] In this sense, at the international level many NGOs or corporates claim to pursue public goods, which technically would make them operate in the public dimension. However, most of them lack a constitutional mandate which legitimises the organisations' mission. Although the mandate is what differentiates international informal actors from more institutionalised international organisations, it is not the only decisive factor in the attribution of a private or public character to an action. In fact, only the analysis of the legal basis of an act determines whether this act belongs to public law or private law.[136]

The second distinction is the global concept of public authority versus domestic public authority. On this point, the present scholarship and the literature on Global Administrative Authority share the same view. As affirmed by both theories, domestic and global system present inherent differences. While domestic public law is regulated by a State, whose authority is exercised in a defined territory over a specific population,[137] at a global level there is a multi-layered governance horizontally structured. The traditional construct of international law characterised by a pure anarchical system where States co-exist on a consent basis appears dated compared to the current global scenario. A remarkable proliferation of self-independent international institutions with their own physical headquarters, bureaucrats and even tribunals equipped with decision powers and oriented towards the pursue of community's interests has been registered in the last decades. Moreover, also the idea of authority has

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[135] Richard B Stewart, 'The Normative Dimensions and Performance of Global Adminsitrative Law' (2015) 13 International Journal of Constitutional Law 499-506. Jaqueline Best and Alexandra Gheciu, *The Return of the Public in Global Governance* (Cambridge University Press, 2014) 15-43. Kelsen, among others scholars, has raised the question of how public interest looks like in a pluralistic world. Generally, the concept of public good is associated to community interests and this entails that the community taken as a reference becomes essential in the definition of public law as well. Hans Kelsen, *Pure Theory of Law* (University of California Press, 2009) 281-284.

[136] Armin von Bogdandy at al. 'From Public International to International Public Law: Translating World Public Opinion into International Public Authority ' (n 130) 24.

[137] Malcolm N Shaw, *International law* (7th edn Cambridge University Press, 2014) 153; Rein Müllerson, *Ordering anarchy: international law in international society* (M. Nijhoff, The Hague 2000) 242-250.

to be reframed under a modern light: it was originally connected to coercive powers and sanctions but it has now broadened as the power to impact actors' freedom[138] through ways others than simple coercion or the authority to have commands been executed. At international level, three softer mechanisms are recurrently used by regulatory bodies.[139] First financial incentive and exclusion threats. This is the case of the IMF that requires standards compliance in exchange of financial support or the WTO that authorizes countermeasures to contrast unlawful trade policies. Similarly, if the risk of being excluded by a decisional forum is high or international reputation is at stake, States' freedom of regulation results being constrained. The second mechanism is called semantic authority. It originates from international tribunals, which define the meanings of legal terms and international obligations through precedent as an illustrative case.[140] Finally, "specificity" since most of standards-setting bodies hold technical expertise that is an essential tool for scientific analysis. To give an example, the OECD and the IMF conduct economic impact studies, issue-specific reports and monitoring assessment, which are often used in the evaluation of States' financial and economic stability.

In this renewed scenario, von Bogdandy summarised five elements that characterize International Public law: (i) it mirrors domestic public law however remaining independent from it[141], (ii) international institutions aim at pursuing community interests

[138] Matthias Goldmann, 'A Matter of Perspective. Global Governance and the Distinction between Public and Private Authority (and Not Law)' (2016) Global Constitutionalism.

[139] Koskenniemi suggests that the substantial differences between legality and legitimacy are linked to the current deformalization, fragmentation and *hierachisation* of the world order. Martti Koskenniemi, 'the Politics of international Law' (1990) 4. See also Eyal Benvenisti and George W Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law' (2008) 60 Stanford Law Review 595.

[140] In the monograph, an external approach and an internal approach is applied in order to identify the applicable law in public authority. The former is also called transnational legal process and it is generally associated to the managerial approach oriented toward efficiency. Conversely, the internal approach is the results of the combination of three different branches of law: costitutionalization, domestic administrative law and institutional law. Armin von Bogdandy and others, *The Exercise of Public Authority by International Institutions* (Springer, Heidelberg 2010) 6-15.

[141] This view raises the critical question as to whether soft law instruments should be comprised in the array of legal sources of global governance. The criteria listed result limited as they do not capture the the complexity of global governance and they do not help draw a neat line between domestic and international law since the latter always depends on the former in terms of implementation. ibid 33-41.

(iii) International Public law uses instruments others than legal binding instruments and its legal sources go beyond international law, (iv) it affects domestic entities and peoples (v) International Public law contributes to the regulatory activities.

1.3.5 Criticisms to the Four Theories

In essence, all four theories have spotted three key elements in the international regulation framework: first, informality in the actors involved and in the decision-making process, second the transnational dimension of both the issues tackled and the regulatory activity that takes place at the international level and, finally, the blurred contours of traditional juxtapositions, such as public vs private, national vs international and general vs specific.[142] Despite few differences in the explanatory assumptions, all streams share concerns about the legitimacy and the accountability deficit. Despite their broad meaning, the former indicates the delegation of power from constituency to elected actors in charge of making decisions that influence the electors as well.[143] Instead, accountability defines the responsibility of decision makers towards constituents and shareholders. In this regard, it has to be distinguished legal accountability, meaning compliance with rules, from political accountability, which concerns the regulator-regulated relationship and it is more discretional as dependent on national interests.[144] Concerning legal accountability, the mere fact of complying with international standards established by regulatory bodies does not compensate for democratic deficit, linked to legitimacy shortfall, deriving from the contestable nature

[142] Informality is identified by all theories however Network Theory and International Law Making focus more on the actors involved and on the technical expertise. The global aspect is underlined by different words according to the specific theory, such as the word "transnational" or the term "network", which comprises the concept of cooperation as well. In the Informal Law Making theory the global character has been conceived as one of reasons of informality. Finally, all theories spot mutual influence resulting from the combination of private and public factors, which makes traditional categories difficult to apply in the analysis of international regulatory system.

[143] The term legitimacy is very broad and not so easily defined, Cohen and Sabel, 'Global Democracy' (n19) 763.

[144] Simon Chesterman, 'Globalization Rules: Accountability, Power, and the Prospects for Global Administrative Law' (2008) 14(1) Global Governance 44.

of standards themselves. By the same token, difficulties in assessing political accountability stand. As Robert O. Keohane has pointed out, political accountability can assume different forms according to the relationship between those who delegate powers, those who make decisions and those who are affected by them.[145] Not surprisingly, international agencies have been often accused of democratic default and often referred to as "specialised clubs", an expression that underlines the closed-door process through which international financial standards are drafted.

Some authors have suggested to narrow the democratic gap by enhancing transparency or enlarging the participation to the public at large. However, this initiative may jeopardize both the efficiency and responsiveness to economic challenges, which are commonly recognised as strengths of international regulatory bodies. That being said, the idea of enhancing democratic checks and international coordination effort does not keep all scholars together. A part of the main stream, led by Nagel, has shown a strong pessimism based on the assumption that only the "Hobbesian State" can provide justice-generative solutions. Since the supply of public good, such as financial stability, requires direct democracy and accountability, reinforcing guarantees for civil society or introducing top-down legitimacy tools would not solve the legitimacy deficit in international standards.[146]

1.4 INTERNATIONAL REGULATORY STANDARDS AND THE SOURCES OF PUBLIC INTERNATIONAL LAW

1.4.1 Conceptual Definition of "Soft law" and "Hard law"

The abundant academic accounts given on international standards-setting bodies explain their functioning, their evolution and partially their interaction with national legal systems by spotting differences and similarities of the two regimes. Nevertheless, the

[145] Political accountability can assume different nuances, focusing more on hierarchical aspects, supervisory mechanisms, fiscal weight, market relevance, reputational costs or peer-accountability. Kenneth W Abbott and others, 'The Concept of Legalization (2000)' 54 International Organization 23.
[146] Cohen and Sabel 'Global Democracy' (n19) 763.

literature review does not reveal much about the legal value of international financial standards. While the conceptual distinction *"soft law"* vs *"hard law"* has been at the centre of the academic debate for a long time, the legal analysis of the acts produced by standards-setting bodies requires further study, especially in the light of their growing relevance in the international regulatory process.[147]

To start with the definition of soft law and hard law, their distinction is far from being self-evident. According to legal positivism, the difference should be found in the legally binding nature of a legal instrument. Thus, treaties, general rules of international law and customary law would pertain to "hard law" as they produce legal obligations. On the contrary, non-binding legal instruments should be categorized as soft law.[148] Arend, in his extreme stance, defines as paradoxical even the use of the term law after the adjective soft to indicate non-binding legal forms. As he synthetises: *"[if] a rule meets the criteria for law, then it should be called 'law'. If, however, the rule is not binding – as soft law has been described to be- then it should have law anywhere in its name"*.[149]

However, Boyle and Chinkin, among a flourishing doctrine, have warned about simplistic approaches that associate the distinction formally binding vs non binding, to the difference between hard law and soft law.[150] In their view, independently from the form that a legal instrument can assume, whether a treaty or other legal tools, is the normative significance, meaning the capacity to produce legal effects, even without being procedurally binding, what allows to draw the line between hard law and soft

[147] The academic debate on the role of traditional organisations as subjects of international law has started relatively late compared to the proliferation of the phenomenon. Moreover, only in the 1980s *"informal"* or *"soft"* international organisations, such as financial standards-setting bodies, was largely recognized as effective actors involved in the regulatory process, though the legal status has not been clarified yet.

[148] Dinah Shelton, *Commitment and compliance: the role of non-binding norms in the international legal system* (Oxford University Press, 2000) 292.

[149] Anthony C Arend, *Legal rules and international society* (Oxford University Press, 1999).

[150] Christine M Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38(4) The International and Comparative Law Quarterly 850; Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law' (n 11) 901.

law.[151] Moreover, through the interaction with public international law the original voluntary nature of a legal instrument can be hardened, for example by being included in treaties or being transposed into national law.[152] This would deconstruct the shared misconception that non-binding soft law influence States' actions less than traditional international legal norms.[153]

In this regard, Abbott and Keohane identified three elements in the definition of legalization. The maximized level of these three factors correspond to hard law system, its opposite extreme captures the absence of legalization, whereas middle values characterise multiple forms of soft law.[154] Obligation, the first element, is defined as the rule or commitment that binds States or other actors and it can vary from non-binding principles to binding rules. The latter comprises treaty provisions, rule of international law and *jus cogens*.[155] The second factor is precision, meaning how accurate and defined

[151] In this regard, it is noteworthy considering the distinction between legal normativity and legal imperativity. While the former is strictly linked to the creation of the so called *"l'act juridique"*, meaning the mere existence of a legal instrument, the latter consists of the creation of rights and obligations, also known as the normative power, following the drafting of the legal instrument. According to Jacque, it is possible to have legal normativity without legal imperativity but not the other way round. Jacque Jean-Paul, *Eléments pour une théorie de l'acte juridique en droit international public* (Librairie Générale de Droit et de Jurisprudence, Paris 1972) 227. Conversely, Virally considered the assessment of the legal power of an act exclusively based on whether the text creates legal obligations. In his view, parties' intention remains essential in the analysis regardless the form that the text assume. Michel Virally, 'La distinction entre textes internationaux de portée juridique et textes internationaux dépourvus de portée juridique (à l'exception des textes émanant des organisations internationales injunctions)' (1983) 60(1) Annuaire de l'Institut de Droit International 328-374.

[152] Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law' (n 11) 901.

[153] Guzman, among other authors, perceives soft law as the antithesis of hard law, so he defines soft law as what hard law is not. Andrew T Guzman, 'The Design of International Agreements ' (2005) 16(4) European Journal of International Law International Law 579-612. For an explanatory example of the influence of soft law over national systems consider the OECD's recommendations, which get implemented through soft control and soft measures.

[154] W Abbott Kenneth and others, 'The Concept of Legalization' (2000) 54 International Organization 401. The authors got inspired by Hart's 1961 work, who distinguished between primary and secondary rules and identified three features, namely recognition, change and adjudication. HLA Hart, *Concept of Law* (Oxford University Press 1961).

[155] *Jus cogens* refers to principles of international law with a peremptory character, binding *erga omnes* and usually crystallized in customary law or codified in a treaty form. Articles 53 and 64 of the Vienna Convention Law of the treaties (VCLT) affirm the primacy of *jus cogens* over both pre-existing obligations and post-established norms enshrined in subsequent treaty commitments in the light of their

a legal instrument is. It ranges from vague principle, in a non-legalized scenario, to a precise and highly detailed rule in a legally institutionalized framework. The final criterion concerns the delegation of implementing powers to a delegated authority. In case of international anarchy potential conflicts are settled through diplomacy in a state-to-state resolution. Conversely, if a rule is part of a hardly legalized system then the recognition and the application is concretized by international tribunals and domestic courts.[156] To be noted that these three features are independent of each other so multiple combination of the same parameters are possible. At the same time, the conceptual systematization depicted addresses procedural legalization rather than the substantive content of a legal instrument, which can be detected, in turn, through national implementation or through subsequent translation into legally binding document by the contracting parties.

The following sections will be dedicated to the legal value of international financial standards intended as legal instruments able to influence States' freedom of regulation the financial sector. In practical terms, the definition of hard law adopted throughout this chapter will be Boyles' and Chinkin's ones, based on the normative significance produced by an act. Legal bindingness is only one aspect of hard law, legal enforceability and national implementation come along. While the scope of the present work does not cover the analysis of national implementation, it does look at the substantive features of international standards in order to ascertain their legal enforceability, conceived as the possibility to bring a complain before an international tribunal in case of non-compliance, if a violation occurs or the possibility to recur to international standards to justify an unlawful act.[157] Thus, the research will go beyond the mere form of the instrument, treaty vs non-treaty dichotomy, in which those international standards are included. In a nutshell, the chapter will examine whether international financial standards are effectively more than simple voluntary guidelines

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widely recognized legal value. Cassese, Antonio, *International Law* (2nd edn Oxford University Press 2004).

[156] Abbott and others, ' The Concept of Legalization' (n 154) 401.

[157] Henrik H Horn, Petros Mavroidis and André Sapir, 'Beyond the WTO ?An Anatomy of EU and US Preferential Trade Agreements' (2009) 7 *Bruegel blueprint series* 1.

and whether they have enough normative power to be taken into consideration by national legislators when adopting regulatory policies.

In conducting this analysis, the study will try to define whether international regulatory bodies can be deemed international organisations *tout court* by looking at the institutional treaty -if any-, the presence of independent organs, the attribution of legal personality and the jurisprudence of the International Court of Justice (ICJ) on international organisations' responsibility. If this hypothesis is not satisfied, then the research will examine whether international financial standards are international agreements and, in case they are not, it will consider the affinity to customary law.

1.4.2 Are Financial Standards Acts of International Organisations?

In the analysis of the legal value of international financial standards, also the nature of the standards-setting bodies, meaning whether they are international organisations *tout court* acting independently and autonomously from their members, is noteworthy. The reason lies down the crucial role that international organisations can play in contributing to the formation of new law through the adoption of recommendations or by sponsoring conventions.[158] In fact, international organisations' activity can be theoretically grouped under two main categories, according to as international organisations are deemed actors of the global scenario able to draft and adopt instruments, such as recommendations (with a disputable legal value that varies according to the organisations taken into consideration) or as platforms for discussion and collective cooperation.[159] In the first case, the acts adopted by an international organization are assume significance for both

[158] Jan Klabbers, *Advanced Introduction to the Law of International Organisations* (Edward Elgar 2015) 67.

[159] Given the variety of the existing international organizations operating at the international level, the different powers attributed to them by the founders and the specific sectorial competences are hard to generalise. As a consequence, the range of instruments an organisation can adopt and the legal relevance this act assumes change according the organization under analysis. For example, acts adopted by UN Security Council under chapter VII related to the actions with respect to the threats to the peace and acts of aggression have a sound well-established relevance compared to recommendations of other international organisations, such as the OECD. Jan Klabbers, *International Law* (Cambridge University Press 2013) 71.

the organization and its members, whilst in the second case the instruments adopted are relevant – maybe just politically or for declaratory purposes – only for the members that acting in their capacity within an international cooperative forum have agreed on them. For these reasons, determining whether international financial setters are international organisations as such and whether the standards drafted are more than simple voluntary guidelines is a crucial issue. As Müllerson emphasises in his work "Ordering Anarchy - International Law in International Society" the content and the process of adoption are essential to understand the nature of a legal instrument, despite the form it takes.[160]

However, distinguishing international organisations from other entities operating at the international level is not an easy task. Notably, this doctrinal exercise presents many difficulties: first the huge variety of international organisations. Secondly, the wide terminology used to refer to them, ranging from typical organisations or independent organisations, to pseudo-organisations, organisations *sui generis* or soft law bodies.[161] While it is widely recognised that international organisations generally coordinates States' efforts on issues with a transnational dimension in pursuant to societal values, in practical terms detecting these two elements is rarely a piece of cake.[162] Moreover, the literature has extensively delved into international relations and international law having the State at the centre of the international system whereas the acknowledgement of international organisations as equally relevant actors in the global scenario has taken time.[163] In fact, the first scholar who theorised international organization was Reinsch

[160] Müllerson clarifies that the content and the adoption of a resolution may be essential in understanding the nature of a legal instrument, despite the form it takes. To give an example, according to the author, the 1962 Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space was adopted unanimously and the principles enshrined in it should be considered legally binding regardless the fact that the legal instrument was a resolution, which generally does not create obligations as such. Rein Müllerson, *Ordering Anarchy. International Law in International Society* (Martinus Nijhoff Publishers, The Hague 2000) 237- 239

[161] Angela Di Stasi, 'Le soft international organizations: una sfida per le nostre categorie giuridiche.' (2014) 1 La Comunità Internazionale, 40-43.

[162] Jan Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law' (2015) 26(1) European journal of international law 9, 1–3.

[163] For a comprehensive explanation of the difficulties in systematizing international organisations see Manuel Díez de Velasco Vallejo, *Las organizaciones internacionales* (Tecnos, Madrid 2014) 43; José E Alvarez, *International organizations as law-makers* (Oxford University Press, Oxford 2006).

in 1911, followed by Syres who finalised the doctrine called functionalism.[164] In a nutshell, as suggested by the name of the scholarship, functionalists focus on the functions the founding fathers of an international organization attributed to it, so the activity of the organisation itself is explicable through the relation between the former and its founders. Yet, the principal-agent theory applied by functionalist to explain international organization-member States relations does not capture either the dynamics internal to the organisation itself or the impact that an international organization's activity has on third parties.[165] As spotted by Klabbers, the functionalism marked the beginning of an academic interest in categorising international organisations, though by the time the theory got well-defined and grounded, the explanatory model provided did not fit the new wave of international organisations that had sprout out in the meanwhile.[166] Indeed, since Syres and Reinsch attempted to analyse around 30 organizations, similar to the League of Nations, in the early 1960s when functionalism was effectively in place the number of organisations in the international scenario had more than doubled and the features presented by the new organisations were not coinciding with the older ones.[167]

However, only at the end of 1970s academics started to consider international organisations not exclusively as delegated agents defined in relation to member States,

[164] Reinsch was the first one who explained the activity of international organisations in relation to the delegated authority attributed by the founding States. Syres, then, linked the activity of international organisations to the achievement of public goods and distinguished them from other entities that do not possess the same mission. Paul S Reinsch, *Public International Unions: Their Work and Organization, a Study in International Administrative Law* (first published 1911, Forgotten Books 2015); Francis B Sayre, *Experiments in International Administration* (classic reprint-original version 1919, Hardpress Ltd 2013). For a comprehensive description of the different streams within functionalism, among others purists, practitioners and rationalists, consult Jan Klabbers, 'The Emergence of Functionalism in International Institutional Law: Colonial Inspirations' (2014) 25 European journal of international law 645.

[165] José E Alvarez, 'International Organizations: Then and Now' (2011) Globalization and international organizations 3.

[166] Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law' (n 162) 21.

[167] On the proliferation and evolution of international organisations also in terms of far-reaching competences and a more active role in the international scenario see Bob Reinalda, *Routledge History of International Organizations: From 1815 to the Present Day* (Routledge 2013).

but as actors equally capable to influence the global scenario. One of the first scholars who tackled the systematisation of international organisations was Virally. He identified as essential features of a traditional international organisation an institutional agreement, a permanent system or a set of organs and the achievement of common interests by means of international cooperation.[168] Almost thirty years later, the *International Law Commission* (ILC), attempted to shed light on this complex topic driven by both the mushrooming of international organisations and their great impact on national systems.[169] With this ambitious project in mind, *Articles on the Responsibility of International Organisations* (hereinafter ARIO),[170] was adopted on 26 April 2011 and article 2(a) defines an international organisation "as an organisation established by a treaty or other instrument governed by international law and possessing its own international legal personality".[171] International organisations may include other entities as members in addition to States.[172] In line with the ILC's definition, Fitzmaurice identified as fundamental features (i) a collectivity of States established by treaty, (ii) with a constitution and common organs, (iii) having a personality distinct from that of its member-States, and (iv) being a subject of international law with treaty-making

[168] Michael Virally, 'Definition and classification of International organizations: A legal approach' in Georges Abi-Saab (ed), *The concept of International Organization* (Parigi 1981).

[169] Jan Wouters and Jed Odermatt, 'Are All International Organizations Created Equal' (2012) 9 International Organization Law Review 7-14.

[170] Report of the International Law Commission on the work of its sixty-third session, 26 April - 3 June and 4 July-12 August 2011 (A/66/10), adopted by the International Law Commission in its 63rd session and *The Draft Articles of the Responsibility of International Organisations*, (A/66/10) 2011, article 2(a).

[171] In the ARIO, the ICL started from the conception that the great majority of international organisations are founded on a treaty. Yet, the ILC conceived other nuances in the definition of international organisations and embraced instruments other than treaties insofar as the same normative force is produced. Giorgio Gaja, *Introductory Note to Articles on the Responsibility of International Organizations* (United Nation 2014) and by the same author First Report on Responsibility of International Organizations, UN Doc A/CN.4/532 (26 March 2003).

[172] This initiative has followed some criticisms. First, differently from State responsibility, international organisation responsibility suffers from a very poor international practice, which makes it difficult to detect a real role of this international organisations in the codification of international law. Secondly, ARIO has been accused of being slavishly copied from the Draft Articles on State Responsibility, thus, characterised by an inappropriate state-oriented methodology. Jan Wouters, *Global Governance and Democracy:a Multidisciplinary Analysis* (Edward Elgar Publishing 2015).

capacity".[173] Alternately, Schermers and Blokker, categorized international organisations as forms of cooperation founded on an "international agreement, with at least one organ with a will of its own and established under international law".[174] Despite the many more different definitions available,[175] the recursive features identified by the literature are a constituting treaty and a distinct will of the organization from the founders, explicated both through independent organs and international legal personality.[176] For the sake of simplicity, the key elements considered for the analysis of standards-setting bodies will be (i) the establishment of the organisation through a foundation treaty agreed among States, (ii) the presence of independent internal organs, (iii) the possession of legal personality, which implies organisation responsibility.[177]

1.4.2.1 Foundation Treaty

The constituent treaty is an essential feature in the identification of international organisations since, as the functionalists highlighted, it establishes an organization defining its specific goals according to which a certain type of autonomous organs is

[173] Gerald G Fitzmaurice, 'The Law of the Treaty', *The Yearbook of International Law Commission* (1956).

[174] Henry G Schermers and Niels Blokker, *International Institutional Law Unity within Diversity* (5th edn, Martinus Nijhoff Publishers 2011) 32–35.

[175] A traditional definition was provided by P. Reuter and J. Combacau stating that an international organisation is "*an entity which has been set up by means of a treaty concluded by States to engage in cooperation in a particular field and which has its own organs that are responsible for engaging in independent activities*". P Reuter and J Combacau, *Institutions et Relations Internationales* (3rd edn, PUF 1985) 346. In the Italian doctrine, Angela Del Vecchio identified an institutional treaty and legal personality as constitutive features, which entail the organization's autonomous action from its members. Angela Del Vecchio, *Diritto Delle Organizzazioni Internazionali* (Edizioni Scientifiche Italiane 2012) 24–25.

[176] Klabbers, *Advanced Introduction to the Law of International Organisations* (n 158) 9.

[177] International organisations should not be mistaken with NGOs, which are composed of private persons rather than States, established under domestic law and are more appropriately considered as part of the Civil Society. Although they influence public opinion with their actions, they lack legal personality and capacity of imposing commitments upon States (for example Greenpeace, Red Cross, Amnesty International, etc.). Benedetto Conforti, *Lezioni di diritto internazionale* (Editoriale scientifica 1985) 50–56; Jan Klabbers, 'Institutional Ambivalence by Design: Soft Organizations in International Law' (2001) 70(3) Nordic Journal of International Law 403, 403–421.

designed as well as specific competences and powers are attributed. Thus, in line with the principal-agent theory, a group of States (the principal) confers an international organization (the agent) delegated powers in order to achieve the set goals within scope of the competences attributed.[178] This stance entails that the organization's powers are explicit and derive from the competences bestowed to the organization itself according to the will of the founding fathers.[179] However, not so often foundation treaties are that detailed. Theoretically, the constituting documents can discipline the functions of each organization organ or create formal procedure, but it is not rare that the mandate defines a general scope and broad-worded competences also for international organizations whose status is not disputed, such as the WHO, the IMF, the UN, the WTO.[180] Despite the effective content, the constituting treaty remains one of the decisive features in the ascertainment of international organisations. Even if the ARIO envisages a limited number of exceptions, mentioning OPEC among international organizations even if it is not founded on a treaty, an international body has to be established at least by an instrument of international law. [181]

With regard to international financial regulatory bodies, differently from typical treaty-based international organisations, most standard-setters lack a foundation treaty, being grounded on declarations, statements or mutual understandings.[182] To present an

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[178] Anne Orford and Florian Hoffmann, *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016) 125.

[179] After the advisory opinion of the ICJ the theory of the conferred power got integrated by the implicit powers theory. The theory will be further included in the section dedicated to legal personality 1.4.2.3.

[180] The constituent document can discipline the functioning of the organs of an international organization in line with article 20(3) of the VCLT. The UN, the WHO, the WTO and the IMF are generally recognised as independent international organisations. Klabbers, *Advanced Introduction to the Law of International Organisations* (n 158) 11.

[181] The relevant passage reads *"[t]his wording is intended to include instruments, such as resolutions adopted by an international organization or by a conference of States. Examples of international organizations that have been so established include the Pan American Institute of Geography and History (PAIGH), and the Organization of the Petroleum Exporting Countries (OPEC)*". International Law Commission, *Draft Articles on the Responsibility of International Organizations* (doc A/66/10*,* 2011), art 2(4).

[182] According to Schermers and Blokker, among others, agreements between branches of different governments or between particular public authorities do not normally create international organisations. Schermers and Blokker (n 174); Ernst-Ulrich Petersmann, 'Framework of Analysis: Towards

explanatory case, the G20 is grounded on a statement adopted by the G7 during a meeting in Washington in 1999, which is clearly not a treaty so it does not fulfil the first requirement.[183] Moreover, the intent of the founders was to create "*a new mechanism for informal dialogue on key economic and financial policy issues*" as affirmed in the statement itself, so the G20 has been designed in a more informal way than an international organisation.[184]

Besides, the FSB has a Memorandum of Understanding as founding Charter, which is substantially different from a constitutional treaty.[185] Despite being officially an association since January 2013 (under Swiss law exclusively and not under international law), the FSB has not changed its nature.[186] Thus, this institutional formalisation has simply structured an informal body without really modifying its competences expressed in the memorandum, which "was not intended to create any legal rights or obligations", as stated in article 23. [187]

By the same token, BASEL, IOSCO and IAIS are grounded neither on an institutional treaty, defined as in article 2 of the VCLT, nor on instruments of international law. Similarly to the previous cases, the intent of founding fathers was not to create an international organization as such, otherwise the instrument adopted, the competences attributed and the powers recognised would have been different. In fact, the functions declared in the respective constitutive documents generally refer to

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Multilayered Governance in Monetary Affairs' in Thomas Cottier and others (eds) (Cambridge University Press 2014) 346.

[183] Peter Holcombe Henley and Niels Blokker, 'The Group of 20: A Short Legal Anatomy from the Perspective of International Institutional Law' (2013) 14 Melbourne journal of international law 550.

[184] Ruffert and Walter stated "cooperation within the G20 has not been sufficiently condensed or crystallised, such that it has been transformed into an international organization". Matthias Ruffert and Christian Walter, *Institutionalised International Law* (Verlag C H Beck 2015) 93.

[185] In the occasion of the Los Cabos meeting, the G20 Leaders addressed directly the question but they did not consider appropriate to attribute to the FSB the status of international organisation. FSB, *Report to the G20 Summit on strengthening FSB Capacity* (Los Cabos 12 June 2012).

[186] It is worthy noticing that this document is exclusively valid and legally binding under Swiss law and it is not at the international level. FSB, *Articles of Association of the Financial Stability Board* (28 January 2013).

[187] FSB, *Charter of the Financial Stability Board* (June 2012) art 23. Chris Brummer, 'Charter of the Financial Stability Board: Introductory Note' (2012) 51(4) International Legal Materials 828.

coordination task and collective cooperation facilitation, showing that these regulatory bodies were conceived as international fora rather than proper international actors.[188]

1.4.2.2 Independent Organs

Functionalism has extensively tried to analyse the relations between an organisation and its members by correlating the specific architecture that an organisation has, meaning their competences, mandate and accession mechanisms, to the idea of international agency that the founders had in mind when they establish it. In other words, international organisations are designed according to the functions the States wanted to attribute to them.[189]

However, international organisations *tout court* are characterised by a distinct will from its founders conceived both internally, through independent organs, and externally expressed by the so called legal personality. Yet, distinguishing between the international organization and its founding members it is not always easy since the latter participate in the organization's activities mainly through the plenary and the executive organs.[190] Concerning the internal distinct will, even if not always decisive, the presence of a certain degree of formality in the structure and in the decisional process already signals the founders' will to attribute a certain degree of autonomy or independence.[191]

In general terms, to ascertain the presence of independent organs both the functions carried out by each organ and the type of acts adopted by the organization have to be considered in order to clarify whether the international organization under analysis serves as a platform for international cooperation or if it operates at the international

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[188] Jan Klabbers, 'Theorising International Organisation' in Anne Orford and Florian Hoffmann (eds), *The Oxford handbook of the theory of international law* (Oxford University Press 2016).

[189] According to this scholarship, intra-organs relations can be explanatory by looking at the kind of activities carried out and the checks and balances established. Yet, this approach does not cover the relations between an organisation and its personnel. Kenneth W. Abbott and Duncan Snidal, 'Why States Act through Formal International Organizations' (1998) 42(1) The Journal of Conflict Resolution 3-32.

[190] Jan Klabbers, *International law* (Cambridge University Press, Cambridge 2013) 21.

[191] With reference to centralisation vs independence see Kenneth W. Abbott, and Duncan Snidal, 'Why States Act through Formal International Organizations' (1998) 42(1) The Journal of Conflict Resolution 3-5.

level as an actor. Notably, international organisations handle a wide array of activities essential for the organization's functioning, such as staff recruitment, appointments with officials, budgetary decisions, etc. What is relevant is to verify how much autonomy from their members an organization organs enjoy. In practice, whether a secretariat carries out pure administrative tasks or if it sets up the organization's agenda makes a significant difference.[192] Thus, for example, if the secretariat provides exclusively for secretarial support (translation of documents, logistics, scheduling appointments), its tasks are basically organisational and do not imply a particular degree of autonomy. Differently, in the second situation, the secretariat shapes the decisional process getting to influence the priorities of the organization through the definition of the agenda. A similar reasoning can be applied to other organs of an international organization, which traditionally encompasses at least one plenary assembly with all members represented and a restricted executive organ, which usually takes care of day-to-day activities.[193] As in the previous case, also the powers of the plenary organ can vary substantially according to if it plays a barely formal representative role or if it is involved in the decision-making procedure, such as exercising an effective influence on the budgetary decisions or in the adoption of the organization's acts. While sympathising the idea that the adoption of an act by the assembly with majority vote may provide for more "legitimacy" compared to those acts approved by a restricted representative organ, plenary organs do not usually have effective decisional powers. By the same token, the participation of the executive organ in the decisional procedure along with the degree of representativeness of the organ itself may help to clarify the question of whether the acts adopted by the executive organ reflect the will of all organization members or alternatively the will of the members seating in it.[194] For what concerns the type of acts

[192] Klabbers, *Advanced Introduction to the Law of International Organisations* (n 168) 71.

[193] José E Alvarez, 'International Organizations: Then and Now' (2006) 100(2) The American Journal of International Law 324.

[194] In this regard, some scholars have questioned whether recommendations adopted by the UN general assembly can assume a different legal value given the large representativeness of this organ. Despite the sympathy for the stance, it can be argued that States would easily favour a recommendation, formally non-legally binding value, whilst officially binding legal instruments may not. Castaneda, Legal significance of the declarations of the General assembly of the United Nations (1966)

that an organization can adopt, we can distinguish between (i) recommendations, (ii) administration decisions and (iii) household acts. As a premise, it has to be noted that most international organisations do not have legislative powers *stricto sensu.* Except for few cases, international organisations mostly adopt recommendations.[195] While they cannot be reckoned formally legally binding, these instruments contain exhortations or principles deemed desirable, so that members are encouraged to take them into consideration.[196]

The second category of acts are administration decisions, instruments binding only for the addressees and regulating the application of pre-existing rules in specific factual situations. An explanatory example can be the EU Commission's acts imposing a fine to a company that had not respected competition principles or measures adopted by the UN Security Council under chapter VII of the UN charter.[197]

Finally, internal acts discipline the functioning of an international organization and comprise rules of internal procedure, budgetary decisions, expulsion acts and decisions creating subcommittees or sub-organs. They are the most common instruments adopted by international organisations and, generally by international bodies, therefore, they are hardly decisive in the ascertainment of the autonomy of an organ, differently from the first two.

To sum up, proper international organisations show bureaucratization and formal procedures that underline a certain degree of autonomy envisaged for their organs. Financial regulatory bodies do not seem to possess these qualities.[198] To start with,

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[195] The most popular exception is the Eropean Union, whose directives and regulations produce direct effect on member States' legal systems. In addition, also the WHO can be deemed an exception since it is recognised a sort of quasi legislative powers on health-related issues, as stated in article 22 of the charter of the WHO, see Klabbers, *Advanced Introduction to the Law of International Organisations* (n 168) 58.

[196] The original term used for these acts was the French word *voeux* meaning "desire" or "wish". Thus, even if the recommendations are no strictly legally binding, they contain exhortations that member States are invited to follow. ibid 64.

[197] Jan Klabbers and Asa Wallendahl, *Research Handbook on the Law of International Organisations* (Elgar 2011) 53-63.

[198] Aaditya Mattoo and Pierre Sauvé, *Domestic Regulation and Service Trade Liberalization* (World Bank, Washington, DC 2013) 30-35.

international financial standards setters are characterised by an acute degree of informality encompassing both the structure and the procedures. Moreover, not all of them have a permanent secretariat. The Basel Committee, for example, shares facilities and the Secretariat with the Bank for international Settlements BIS and its different committees. In the case of the FSB the agenda is not even set up by an internal organ exclusively since it is influenced by the G20 and G8. [199] Similarly, G20 does not fulfil the requirement of independent organs, which has driven some authors to definite this standard-setters at the edge of formal and informal mode of cooperation.[200] In addition, considering that BASEL, IOSCO and IAIS, for example, gather a limited number of regulators and national agencies rather than States' representatives through informal meetings and their decisions do not seem to reflect the will of the organization itself but rather the consent of the individual participants.[201] Finally, standards drafted by these international regulatory bodies are generally adopted by technical committees rather that the plenary organs, which raises doubts on the effective distinct will of these financial standard-setters, in the first place, and, consequently, it exacerbates concerns on the representativeness and legitimacy deficit.[202]

Concerning the type if instruments adopted, international financial standards can hardly be compared to recommendations of the UN or even of the WHO. The Basel Committee's *Minimum Standards for the Supervision of International Banking Group*, the IOSCO's *Objectives and Principles of Securities Regulation* and the IAIS' Insurance Core Principles can be more appropriately associated to conventions sponsored by international regulatory agencies, since they have rather declaratory value and non-

[199] Rein Müllerson, *Ordering Anarchy. International Law in International Society* (Martinus Nijhoff Publishers, The Hague 2000) 242-247.
[200] Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law' (n 162) 10.
[201] For criticisms on the limited State engagement in these international regulatory fora, see Underhill-X Zhang, *International Financial Governance under Stress: Global Structures versus National Imperatives* (Cambridge University Press, 2003) 324.
[202] Giovanna Adinolfi (n 95) 186.

legally binding force, however, being important in inspiring best-practices and harmonised regulation.[203]

In this regard, scholars have long debated on the issue as to whether the recommendations of unquestioned international organisations, specifically the recommendations adopted by the UN General Assembly could be recognised a special value being this organ the closest thing to a world parliament. Given that this stance has not gained wide support, it seems unlikely to attribute to international financial standards a value similar to the one recognised to acts of the UN General Assembly since the representativeness, the transparency and the participation in standards-setting is not even close to the level set by the UN.[204]

In essence, the architecture, the functioning and the instruments produced drive us to conclude that organs of international financial standards setters are not independent and autonomous, so these standard-setters serve more as international fora for collective cooperation rather than being proper actors in the international scenario.[205]

1.4.2.3 Legal Personality

Legal personality or *volonté distincte* refers to the capacity for an international organisation to act independently from its members.[206] The concept implies a double dimension, legal personality under domestic law and under international law. The former practically consists of the recognition of immunities and privileges to an

[203] According to some scholars, financial standard-setters' organs are mainly functional, in the sense that they facilitate the organization's activities. Bertjan Verbeek, 'International organizations: the ugly duckling of international relations theory?' in Bob Reinalda and Bertjan Verbeek (eds) *Autonomous policy making by international organizations* (1998).

[204] Klabbers, *Advanced Introduction to the Law of International Organisations* (n 168) 64–66.

[205] For a comparison of the architecture, the functioning and the actions of the four relevant institutions in global economic regulation, see Jan Wouters and Jed Odermatt, 'Comparing the 'Four Pillars' of Global Economic Governance: A Critical Analysis of the Institutional Design of the FSB, IMF, World Bank, and WTO' (2014) 17(1) Journal of International Economic Law 49, p.55.

[206] Definion of legal personality in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn, vol 3) 27-31.

international organization by the host-State.[207] In the settlement of an international organisation the headquarters, the permanent staff and the organs should be established according to the law on consular relations which allows host States' accreditation, the recognition of diplomatic immunity and privileges to State agents and diplomatic officers to guarantee the international organization free exercise of its functions.[208] This practice, agreed on a case-by-case basis among the involved parties, consists of an exception to the host State's jurisdiction towards one or more international organisations.[209] Particularly, this protection addresses four groups of subject: the organisation itself, the organisation's staff, the representatives of member States and experts on mission.[210]

Differently, the notion of international legal personality is related to the ascertainment or the attribution of responsibility to an international organisation for its actions. Yet, the doctrinal exercise is not intuitive and even the legal scholarship doesn't hold a unified position on what elements attribute autonomous exercise of powers to international organisations. Scholars from the "will theory" focus on the will of the drafters to determine whether an organisation has been granted legal personality. Thus, from the constitutional document is possible to recognise the founders' intentions and answer this question.[211] On the contrary, the "objective personality theory", formulated

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[207] Kein Schmalenbach, 'International Organizations and Institutions, General Aspects' (2006) Max Planck EPIL.

[208] Condorelli, Luigi, 'Diritto e non diritto nella CSCE' in Barberini, Giovanni and Natalino Ronzitti (eds), *La nuova Europa della CSCE: istituzioni, meccanismi e aspetti operativi della Conferenza sulla sicurezza e la cooperazione in Europa* (Angeli, Milano 1994).

[209] Customary rules on the concession of immunities and privileges have not been established yet, so each organisation negotiates its own conditions with the host State. Saverio De Bellis, *L'immunità delle organizzazioni internazionali dalla giurisdizione* (Cacucci 1992).

[210] Experts on mission are usually officers of one of the organs of an organisation. ICJ, *Advisory Opinion on the Applicability of Article 6 Section 22 of the Convention on the Privileges and Immunities of the United Nations* [15 December 1989] 573- ICJ.

[211] Unfortunately, foundation treaties do not always define the status of the organization they are establishing. For example, the case of the European Union is emblematic since in the Treaty establishing the European Economic Community generally affirmed "the organisation shall have legal personality", without explicitly defining if it under domestic or international law. The European Court of Justice addressed the issue in the case 22/70 Commission vs Council [1971] ECR 273. *See* Michael Barnett & Martha

by Finn Seyersted, links the international legal personality to what he called "organisationhood". According to this view, the mere establishment of an organisation confers automatically legal personality to the organisation itself in the same way as an independent State is self-determined as an international person.[212] However, both theories come with flaws: while the former may overestimate the founders' will, the latter risks to overlook it.[213] A more recent theory called "presumptive personality" assumes that all international bodies enjoy legal personality unless otherwise proven. This means that if the foundation treaty explicitly excludes it or the actions and the competences of an organization do not entail external relations, the legal personality can be excluded. [214]

With this regard, the International Court of Justice (ICJ) addressed the issue of legal personality of international organization in the advisory opinions on *Reparation for injuries suffered in the services of the United Nations* (hereinafter "Reparation case"),[215] which inspired the above mentioned theories. Specifically, the ICJ was called upon to recognize whether an international organisation, in the case at issue the UN, was entitled to bring international claims for reparation against the government of a non-Member State. Although, the claim was narrowly formulated, yet the issue addressed the broader question of legal personality attributed to international organisations. As to the factual background, a mediating mission headed by Count Folke Bernadotte was sent in the Middle East where a war had just occurred. During local violent turmoil triggered by a

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Finnemore, Rules for the World: International Organization in Global Politics (2004) 6-7.

[212] Seyersted, Finn, 'Objective International Personality of Intergovernmental Organizations - Do Their Capacities Really Depend upon the Conventions Establishing Them' (1964) 34 Nordisk Tidsskrift for International Ret 3-112.

[213] For a comprehensive literature review see Cho, Sungjoon, 'An International Organization's Identity Crisis' (2014) 34(3) Northwestern Journal of International Law & Business 359.

[214]Until 1990 very few organisations' constituent documents explicitly declared that the organisations enjoy international legal personality, among the rare exceptions the IMF and the WB. Jan Klabbers, 'Law-Making and Constitutionalism' in Jan Klabbers, Anne Peters and Geir Ulfstein (eds) (Oxford University Press 2009); Jan Klabbers, 'Presumptive Personality: The European Union in International Law' in Martti Koskenniemi (ed) (Leiden: Martinus Nijhoff Publishers 1998) 349–351.

[215] ICJ,*Reparation for Injuries Suffered in the Service of the United Nations - Advisory Opinion* [1949] ICJ Rep 174, ICGJ 232.

Zionist attack, Bernadotte's espouse died, and it was needed to clarify both whether Israel could be sued and who was responsible for compensation.

As a preliminary step, the ICJ defined legal personality as "*the capability of an entity of availing itself of obligations incumbent upon its Members*".[216] On the merits, the Court added "*If we accept that an international organisation operates at international level, international legal personality is a legitimate necessary attribute"*. The ICJ confirmed the separate will of the UN from its members somehow deriving its legal personality from the exercise and the enjoyment of certain kind of actions. In other words, the principles and the purposes of the UN contained in its Charter justify the recognition of legal personality as a necessary requirement to meet the objectives and accomplish the functions enunciated in the international organisation's mandate. In particular the existence of independent organs and specific tasks, the establishment of an obligation for members to give assistance to the organisation in the actions undertaken and the organization's treaty-making capability were the key substantive arguments pointed out.[217] The case was paramount since the ICJ recognised the legal personality of an international organization valid not only vis-à-vis its members but also for third-parties.[218] The ICJ's conclusion was ground on that the vast majority of the

[216] Gautier Philippe, 'The Reparation for Injuries Case Revisited: The Personality of the European Union' in A Frohsein and Rüdiger Wolfrum (eds), *Max Planck Yearbook of United Nations Law* (Kluwer Law International, the Netherlands 2000) 333. As the passage receites *"[it] is possible to draw a line between international organisations and other bodies or fora set up by states, which are not entrusted with tasks they fulfil independently through their own organs. Usually, a meeting of states parties to a treaty or a conference of states constitute examples of such fora which may be characterized as a mere juxtaposition of organs of States.*"

[217] ILC, *Draft Articles on the Responsibility of International Organizations with Commentaries* (2011) para 3.

[218] Some authors have criticised the advisory opinion for being unclear and found on a circular argument, since an organization is deemed having legal personality when possesses rights and duties, which very often derive from the fact that it is a legal person. The criticism addresses more the lack of specific criteria to ascertain legal personality rather than the ICJ's findings. Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law' (n 162) 31.

international community has recognised the UN an objective international personality, thus, not a personality valid among the founding members exclusively.[219] [220]

In addition, the ICJ clarified the type of powers that international organizations enjoy moving from the well-established conferred powers doctrine, according to which an international organization derives its powers and its authority from the goals attributed to the organisation itself, to the implicit powers theory.[221] In the relevant excerpt, the ICJ affirmed "*the Organisation was intended to enjoy, and is in fact exercising and enjoying rights which can only be explained on the basis of the possession ... of international personality"*. Therefore "*it must be acknowledged that its Members, by entrusting certain functions to it…have clothed it with the competence required to enable those functions to be effectively discharged"*.[222] The ICJ seemed to instil the idea that organisations can act even beyond their expressed powers provided that those powers are needed in the light of their very existence. Indeed, the ICJ's decision reads *"the organisation must be deemed to have those powers which, though not expressly provided in the charter, are conferred upon it by necessary implications as being essential to the performance of its duties"*.[223] In a nutshell, the implicit powers derive from the functions that the organization has to carried out rather than from the goals set up to it. Additionally, implicit powers derive from the conferred powers, since

[219] ICJ, *Reparation for Injuries Suffered in the Service of the United Nations - Advisory Opinion* (n 215) 185.

[220] Equally important is the Advisory Opinion on the Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, where the ICJ addressed the issue of the WHO's legal personality under the host agreement between the WHO and Egypt. The latter was both the host State and a contracting party of the WHO. In the case at issue the ICJ recognised to international organisation the "status" of legal subjects of international law, conferring them rights, duties and their treaty-making capacity. ICJ, Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt - Advisory Opinion [1980] ICJ Rep 73. Concerning the recognition of an international role for international organisations see Catherine M Brölmann, 'Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, advisory opinion, [1980] ICJ Reports 73' in Cedric Ryngaert and others (eds), *Judicial Decisions on the Law of International Organizations* (Oxford University Press, 2016).

[221] Klabbers, *Advanced Introduction to the Law of International Organisations* (n 168) 24.

[222] ICJ, *Reparation for Injuries Suffered in the Service of the United Nations - Advisory Opinion* (n 215) 180.

[223] ibid 182.

the former allow organisations to give effect to the attributed powers as well.[224] On one side, it is very rare that a foundation treaty express clearly all powers that an international organization has. Most of the time, mandates define a general scope and broadly-worded goals, which makes it difficult to derive the organization's powers by simply looking at the constituting treaty. On the other side, the wide interpretation of the ICJ on international organisations' powers has alerted scholars about a potential unlimited discretion assign to organisation that would justify any sort of intervention under the wide concept of implicit powers.[225] Although a certain degree of discretion has been reckoned in the international organisations' activity, it is not unbound. Implicit powers are grounded on "necessary intendment", so should technically be traced back to founders and consequently to members' consent. Moreover, competences should not be confused with capacity. The former consists of the functions bestowed to an international organization by the foundation treaty, whilst the latter refers to the acts and activities that an organization conducts at the international level, ranging from negotiating treaties, bringing claims or establishing a mission. Thus, an organization's capacity may exceed its competences, and in this case its actions would no longer result legitimate.[226]

Concerning international financial standard-setters, they cannot be recognised international legal personality. Definitely, none of the financial standard-setters can be reckoned representative of a significant part of the population or a relevant proportion of the economic activities. Neither, have these international regulatory bodies treaty-making capability and the activities conducted at the international level can hardly be considered something more than State cooperation-enhancement and promotion of collective discussion.[227] For all these reasons, the idea that financial standard-setters possess or need legal personality to carry out the general tasks attributed to them can be excluded.

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[224] Engström Viljam, *Constructing the Powers of International Institutions* (Martinus Nijhoff Publishers 2012).

[225] Jan Klabbers, *International Law* (Cambridge University Press 2013) 98–100.

[226] Klabbers, *Advanced Introduction to the Law of International Organisations* (n 168) 100.

[227] Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law' (n 218) 15.

1.4.2.4 Financial Standards are not Acts of International Organisations

Despite acknowledging the relevance of international financial standards in the international scenario, they cannot be defined as acts of international organisations *tout court*.[228]

The present analysis shows that international financial regulatory bodies do not possess the features corresponding to traditional international organisations. First of all, these international regulatory bodies are very rarely established through a constituent treaty. Indeed, they are mostly grounded on mutual understandings that do not confer strong competences and powers, showing the founders unwillingness to design well-structured and autonomous international organisations.[229] Secondly, the informality in the architecture of these standard-setters and in the decisional process signal the lack of independent organs. Some international agencies do not even have their own secretariat or facilities, which are in turn shared with other international bodies, such as the case of Basel Committee and the BIS.[230] In general terms, the organs of international financial standards bodies simply deal with administrative tasks and provide mainly for secretarial support, marking the lack of autonomy that characterises, in turn, the functions of the organs of international organisations as such[231]. Besides, recommendations or administration acts have not been detected among the instruments adopted by financial standard-setters, which drives us to associate financial standards to sponsored conventions. Finally, these international bodies cannot be deemed possessing international legal personality. The latter, can be drawn by the type of activities and

[228] As already specified, one of the international organisations *par excellence* is the UN. For a detailed analysis refer to Có Kenny, 'Responsibility to recommend: the role of the UN General Assembly in the maintenance of international peace and security' (2016) 3(1) Journal on the Use of Force and International Law 3; Giorgio Gaja, 'Réflexions sur le rôle du Conseil de Sécurité dans le nouvel ordre mondial' (1993) 97(1) Revue Générale de Droit International Public 297-320.

[229] Klabbers, 'The Emergence of Functionalism in International Institutional Law: Colonial Inspirations' (n 164).

[230] Bart De Meester, *Liberalization of Trade in Banking Services: An International and European Perspective* (Cambridge University Press 2014).

[231] Henley and Blokker (n 183) 585–586.

functions exercise at international level. As mentioned, these standard-setters do not posse treaty-making capacity, serve mostly as platform to facilitate collective discussion on transnational issues and the standards drafted are generally adopted by technical committees rather than the plenary organs, which raise questions as to whether they are representative of all members' consent or simply the agreement of those members seated in the organ that adopt the standards.[232] Thus, the role that these international regulatory agencies play is rather international fora promoting State cooperation in the financial sector, rather than proper actors in the international scenario. To conclude, the acts produced by international financial bodies can be hardly associated to secondary legal sources as international financial standard-setters cannot be recognised as international organisations as such.[233] Given the preliminary findings on the nature of these international regulatory instruments, the study will now research whether international financial standards can be categorised as international agreements.

1.4.3 Are International Financial Standards International Agreements?

In the Vienna Convention Law of the Treaties (VCLT) the treaty is defined as "[a]n international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".[234]

A treaty can assume a multitude of forms, from strictly formal to informal, and also the nomenclature varies.[235] As a consequence, the mere fact of non-possessing the word

[232] Ruffert and Walter (n 184); Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law' (n 162); Schermers and Blokker (n 174).

[233] Brummer differentiates among acts produced by international standard-setting bodies. According to the author, financial regulation instruments can be categorised into three main groups: best practices, usually translated into "code of conduct" with politically binding effects, addressing private actors as well. Secondly, regulatory reports in the form of data collection or assessing documents that generate compliance expectations, at least in terms of reputational costs. Finally, information sharing agreements and memorandum of understandings that provide procedural means by which enforcing cooperation. Yet, none of them can be considered as secondary legal sources. Chris Brummer, *Soft law and the global financial system: rule making in the 21st century* (n 17) 116-120.

[234] Vienna Convention on the Law of Treaties (23 May 1969) art 2.2.

[235] To mention few of the numerous terms used to refer to treaties: "intent", "pact", "covenant", "declaration", "charter". *Yearbook of the International Law Commission (2003, vol 2*) 188.

treaty in the name does not automatically exclude a legal instrument from being de facto a treaty, and the other way round.

While discerning between treaty and non-treaty acts creates objective difficulties, there are recurrent factors in treaty-making that can help international courts and adjudicative bodies clarify their nature every time it is ambiguous. The first element concerns the authority to conclude treaties. On this matter, article 7(1) of the VCLT, titled "full powers", recites "[a] person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expression the consent of the State to be bound by a treaty".[236] Paragraph (2) of the same article provides a list contemplating Heads of State, Governments, Ministers and Heads of Diplomatic Mission as full power representatives.[237] However, the ICJ in the case Armed Activities on the territory of Congo (Congo vs. Ruanda) remarked that a growing number of technical representatives with specific expertise are more and more authorised by the State to participate in the negotiations of treaties.[238] Despite this diffused tendency in modern treaty-making, none of the international standards-setting bodies can be acknowledged the delegation of powers by State members. Even considering treaty between State and international organisations, financial standard-setters do not belong to those international organisations able to conclude agreements given the lack of both independent organs and legal personality.[239]

The second element is the expression of consent to be bound, namely the mechanism by which a treaty becomes a juridical act. According to articles 10, 11 and 12 of the

[236] Vienna Convention on the Law of Treaties (1969) art 7.1.

[237] To be noticed that full powers should be distinguished from credentials, which are submitted to the host organisation or host government for a conference. Evans Malcolm, *International Law* (4th edn Oxford University Press, 2014) 170-171.

[238] *Case Armed Activities on the Territory of the Congo (the Democratic Republic of Congo v Rwanda)* (Jurisdiction and Admissibility) [2006] ICJ General List No 126, para 47.

[239] Enzo Cannizzaro, *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press, 2011).

VCLT, the expression of consent to be bound can be manifested respectively through signature, ratification, acceptance or approval and accession.[240]

Signature can have a double significance. In case of a traditional treaty making with ratification procedure, signature means the authentication of the text negotiated, which has to go through the national examination before the final ratification. Thus, signing a treaty does not make a State be a treaty party. On the contrary, in case of a simplified process, full signature expresses contracting parties' consent to be bound, which technically manifests their acceptance or approval to the treaty as well. Basically, the choice between the traditional or the simplified procedure is most of the times a matter of whether involving national parliaments into the negotiations of international agreements.[241]

Ratification is an important step of the traditional treaty-making procedure, which comes after negotiations and signature, and constitutes the means by which contracting parties bind themselves to a treaty. Under article 11 of the VCLT, ratification constitutes the formal and solemn expression of consent only if the treaty expressly so provides, the contracting parties agree on that, the treaty has been signed subject to ratification, the intention to sign subject to ratification was expressed during the negotiation.[242] Unless otherwise declared, ratification is unconditional upon exchange, deposit or notification of instruments of ratification.[243] To be noted that for acceptance and approval all rules applicable to ratification apply, so that in practical terms the difference between the former and the former and treaty ratification is irrelevant.[244]

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[240] Respectively article 10 of the VCLT refers to the consent to be bound by signature, article 11 VCLT deals with consent expressed through ratification, approval and acceptance and, finally, article 12 of the VCLT consent through accession.

[241] In many jurisdictions, such as in Italy, ratification and parliament engagement is prescribed by the Constitution where sensitive sectors or general interests are involved. Refer to article 80 of the Italian Constitution. For a general dissertation of the Italian case see Giorgio Gaja, *Introduzione al diritto comunitario* (Manuali Laterza, Roma 2005).

[242] Vienna Convention on the Law of Treaties (1969) art 11.

[243] Vienna Convention on the Law of Treaties (1969), art13.

[244] The preference for ratification acceptance or approval is decided by negotiators and it is generally expressed in the treaty with the formula "the treaty is subject to". In essence, it does not present particular implications. To a certain extent, acceptance or approval without prior signature is analogous to

Finally, accession is the act by which a State accepts the offer or the opportunity to become a party to a treaty already negotiated and signed by other States, is regulated by Art. 15 VCLT according to which a State may accede to a treaty if it so provides or if the parties agree.[245]

Given the essential elements of international agreements, financial regulatory standards can hardly be deemed possessing the features above highlighted. A wide majority of the doctrine excludes that international financial standards are international treaties stricto sensu, as a consequence, they do not create legally binding obligations upon States.[246] First of all, most international financial standards, especially IOSCO and IAIS, do not gather State representatives or diplomats but rather national regulators and technical experts that can hardly be reckoned as full powers representatives. This raises doubts about the hypothesis that participants to financial standards-setting process are acting on behalf of the States, but conversely, it strengthens the assumption that they are acting in their individual capacity. Moreover, the meetings in the context of international financial setters (even at the G20 level) can not be considered proper negotiations since international regulatory bodies serve mostly as facilitators to discussions and State cooperation on transnational issues, in line with the functions defined in their mandates.[247]

Concerning the expression of consent, none of the standards adopted by any of the international regulatory body considered has been ratified, which leads us to exclude the

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accession, based on tacit approval unless a State opts out. Hart, H. L. A., *Concept of Law* (Oxford University Press, New York 1961).

[245] Maurice Fitzmaurice, Elias Olufemi and Panos Merkouris, *Treaty Interpretation and the Vienna Convention on the Law of Treaties : 30 Years on* (Martinus Nijhoff Publishers 2010) 114–115.

[246] The lack of sanctions deriving from non-compliance or a violation of the regulatory stadards has been interpreted as a significant argument in favour of the lack of legal effects *tout court* of international financial standards. Alexandru Bolintineanu, 'Expression of Consent to Be Bound by a Treaty in the Light of the 1969 Vienna Convention' (1974) 68(4) *The American Journal of International Law* 672–686.

[247] Indeed, most constituent documents of international financial standard-setters define them as international platforms for dialogue and cooperation in a specific sector or in a specific field. Henley and Blokker (n 183); Jan Wouters and Jed Odermatt, 'Comparing the "Four Pillars" of Global Economic Governance: A Critical Analysis of the Institutional Design of the FSB, IMF, World Bank, and WTO' (2014) 17 Journal of International Economic Law 49.

solemn procedure. Furthermore, most international standards are self-defined as recommendations or guidelines with a highly political connotation, which do not require for ratification or treaty formal approval.[248] However, even if considering the simplified treaty-making procedure, the constitutive elements of international agreements are not established. As seen, standards-setting bodies' meetings do not constitute proper negotiations, participants can doubtfully be deemed State representatives or individual acting on behalf of States and, finally, signature does result to express States' acceptance to texts conceived as to legally binding instruments. Therefore, the assumption that international financial standards belong to the category of international treaties has to be rejected.

1.4.4 Do International Financial Standards Pertain to Customary Law?

The existence of customary international law is, to a greater extent, universally accepted and it is also formally recognized in Article 38(1)(b) of Statute of the International Court of Justice that defines it as "evidence of a general practice accepted as law".[249]

However, the recognition of custom was first solidly conceptualised by the ICJ in 1969 in The North Sea Continental Shelf Cases where it explained the essential features of customary law.[250] On the merit, the controversial issue concerned the delimitation of the North Sea continental shelf by using the equidistance principle, as suggested by Denmark and the Netherlands, opposed to the doctrine of the fair and equitable share, as claimed by Germany. The legal reasons for the application of the former principle, according to Denmark and the Netherlands, was traceable in the 1958 Convention on the Continental Shelf, whose Article 6(2) exhorted to use the equidistance principle in case of disagreement concerning the delimitation of the continental shelves.[251] While Germany had not ratified the convention by the time the dispute arose, Denmark and the

[248] László Blutman, 'In the Trap of A Legal Metaphor: International Soft Law' (2010) 59(3) The International and Comparative Law Quarterly 605. For an overall view, see Giorgio Gaja, 'The law of treaties' 172 Recueil des cours, Collected Courses of the Hague Academy of International Law 271-278.
[249] Statute of the International Court of Justice (26 June 1945) art 38.
[250] *North Sea Continental Shelf (Germany v Denmark)* (Merits) Judgment, [1969] ICJ Rep 3.
[251] Convention on the Continental Shelf (29 April 1958) art 6.2.

Netherlands considered Germany's signature as a manifest acceptance of the obligations of the Convention. By defining the formation of customary law, the ICJ identified both a quantitative and a qualitative factor. The former refers to the Latin concept "diuturnitas" meaning State practice being established through "a usage or continuous repetition of the same kind of acts".[252] Concurrently, in order for such State practice or usage to constitute a binding custom, the so called "opinion juris sive necessitates" is required,[253] which Mendelson summed up as "a belief in (or claim as to) the legally permissible or obligatory nature of the conduct in question, or if its necessity".[254] The definition of this subjective element has generated many academic controversies.[255] McDougal, for example, underlined the reciprocal aspect of opinion juris, declaring that it occurs when "*the reciprocal tolerance of the external decision-makers, which creates expectations of pattern and uniformity in decision of practice in accord with rule, commonly regarded as law*".[256] Some modern writers have rejected this two-element theory, by favouring an alternative interpretation based exclusively on the psychological aspect, as the only necessary requirement.[257] In other words, according to this view, opinion juris is what differentiate customary law from courtesy or comity, which does not create any legal obligation, instead. On the other hand, *diuturnitas* should not be

[252] Antonio Cassese, *International Law* (2nd edn Oxford University Press 2004).

[253] Malcolm Evans, *International Law* (4th edn Oxford University Press, 2014) 97.

[254] Maurice H Mendelson, 'The subjective element in customary international law' 272 Recueil des cours, Collected Courses of the Hague Academy of International Law, pp. 245-293.

[255] Fitzmaurice specified that "consent is latent in the mutual toleration that allows the practice to be built up". Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951-54: General Principles and Sources of Law' (1953) 30 British Year Book of International Law 68. Similarly, Kelsen underlined the collective dimension beyond *opinion juris*, since the acquiescence of the States Community rather than the belief of a single State results essential in the analysis. Hans Kelsen and Max Knight, *Pure theory of law* (The Lawbook Exchange, New Jersey 2009) 446-449.

[256] In other words, the key element of reciprocity is the ascertainment that a certain practice is generally recognised as as obligatory of that law of nations among a certain group of States. Myres S McDougal, 'The Hydrogen Bomb Tests and the International Law of the Sea' 49(3) The American Journal of International Law 356, 358.

[257] Jörg Kammerhofer, 'Uncertainty in the formal sources of international law: customary international law and some of its problems' (2004) 15(3) European Journal of International Law 523-553; Brian D Lepard, *Customary international law: a new theory with practical applications* (Cambridge University Press, Cambridge 2011).

overlooked either, as many forms of consent exist and a consistent State practice, consolidated by a repeated behaviour, can constitute a relevant evidence of generalised States' acceptance. Despite various interpretations, the ICJ has embraced a more complementary vision of the two elements, confirming a tight link between *diuturnitas* and *opinion juris* in its jurisprudence.[258]

Concerning the temporal factor, time can come in handy in the determination of customary law but it is not a fixed precondition. As pointed out by the ICJ in The North Sea Continental Shelf Cases "*an indispensable requirement would be that within the period in question, short though it might be, State practice (...) should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved".*

From this excerpt, legal instruments and more frequently treaties result interconnected with customary law in two ways. First, by ex-ante treaty custom formation that occurs when legal instruments 'crystalize' custom through a collective agreement of States. Thus, a treaty, technically, enshrines already existing custom through the adoption of custom-related provisions by States parties. Secondly, by ex-post custom treaty formation, when a subsequent States' adoption or observance of treaty provisions or State practice consolidate the agreed norms into custom. In the North Sea Continental Shelf Cases the conception of customary law was conceived under a dynamic light, as a constant evolutionary force that responds to the multilateral goals of States and of global society as a whole.

A coherent opinion was upheld by the ICJ in the case Nicaragua v The United States (1986), though it did not add further clarifications to the previous ICJ's position. The dispute focused on whether the rule of prohibition of the use of force contained in Article 2(4) of the United Nations Charter formed customary law. The ICJ clarified that *"for a rule to be established as customary, the corresponding practice must not be in*

[258] The intertwined relation is not under discussion, however the recent case Jurisdictional Immunities of the State (Germany vs Italy) confirmed the objective difficulties in assessing *opinion juris* in case the subjective element occurs only in the practice of a (limited) group of States. *Case Jurisdictional Immunities of the State (Germany v Italy)* (Judgment), [2012] ICJ 434.

absolutely rigorous conformity with the rules",[259] on the other side, a practice inconsistent with en existing rule does not prove the emergence of a new rule *per se*.[260] In the case Nicaragua vs The United States, despite the fact that State practice was not found *"in absolutely rigorous conformity with the rule",* the ICJ deemed it could not be excluded from the establishment of a custom. The case is particularly significant as the ICJ recognised the valuable role of the UN General Assembly in the codification of customary law.[261] In other words, it showed that acts of international organisations can serve to codify international law. According to functionalists, not only can regulatory standards influence or even shape State practice[262] but they can also provide evidence of *opinion juris*. At the same time, they can crystalize best practices that, once agreed upon, are more likely to be consistently applied in States' activities, expressing the complementary element as to "*diuturnitas".*[263]

From a pure theoretical point of view, international financial standards could be comprised in the means of codification of international law. The Statute of the International Law Commission (ILC), in the non-exhaustive list in article 17, mentions only treaties and conventions, but it does not exclude other possibilities. Nevertheless, international financial standards can be hardly deemed customary law or solid means of codification of international law at this stage. Even if hypothesizing that those standards capture *diuturnitas*, so the consistent repetition of specific kind of behaviours in the

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[259] *Case Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)* (Judgment and Merits) [1986] ICJ Rep 14, para186.

[260] *Case Jurisdictional Immunities of the State (Germany v Italy)* [2012] ICJ 434.

[261] On 9 April 1984, Nicaragua filed proceedings against the United States concerning a dispute on alleged US' responsibility for military and paramilitary activities in and against Nicaragua. The Court rejected the justification of collective self-defence advanced by the United States since it found that the obligations imposed by customary international law not to intervene in the affairs of another State had been violated. Case Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States) paras 24,107,189.

[262] László Blutman, 'In the Trap of A Legal Metaphor: International Soft Law' (2010) 59(3) The International and Comparative Law Quarterly 605, 614.

[263] Müllerson clarified that the content and the adoption of a resolution may be essential in understanding the nature of a legal instrument regardless the form it takes: even a declaration can result legally binding in practical terms despite its formal soft nature. Rein Müllerson, *Ordering Anarchy. International Law in International Society* (Martinus Nijhoff Publishers, The Hague, 2000) 237- 239.

financial sector, the subjective element is very unlikely to be proven. Indeed, *opinion juris* reveals general acceptance of a behaviour as a rule of law and, in the present context, the number of States engaged in the international financial regulatory process remains limited, especially concerning the G20, the FSB and the BCBS.[264] Moreover, standard-setting bodies are international fora for discussion and regulatory convergence where national supervisors and regulators try to facilitate trade in financial services rather than official venues for diplomatic representatives committed to capture State practice.[265] Generally, a widespread State acceptance is required to confirm the formation of *opinion juris,* which is undoubtedly not detected for international financial standards. Thus, none of the two scenarios delineated by the ICJ about the crystalizing custom, meaning ex-ante and ex-post custom formation, can be affirmed when considering international financial standards.[266] For all these reasons, the hypothesis of international financial standards as customary law has to be rejected.

1.5 CONCLUSION

The modern tendency to recur to "soft law" instruments as both a complementary and an alternative means to traditional treaty-making has largely overspread. Many authors, Brummer as forerunner, have pointed out the numerous advantages of soft law compared to treaties: soft law facilitates the compromise between weak and powerful States,[267] it

[264] Some scholars have highlighted the reluctance of emerging economies and developing States to adopt Basel II standards or any other standard drafted by financial regulatory bodies characterised by a limited membership and a restricted representativeness. Henley and Blokker (n 183); De Meester (n 230); Jain G Abhimanyu, 'Derivatives as a Test Case for International Financial Regulation through the WTO' (2014) 48 Journal of world trade: law, economics, public policy 135.

[265] Klabbers, 'Law-Making and Constitutionalism' (n 214); Ruffert and Walter (n 184).

[266] The establishment of State practice is linked to the presence of the following constitutive elements: generality, consistency, the relevance of participating States. Maurice Fritzmaurice and Quast, *Law of treaties – Section A: introduction to the law of the treaties* (University London Press, London,2007) 13.

[267] As Abbott and Snidal have observed, States are generally reluctant to strictly commit themselves in strategic sectors as it would limit their freedom to regulate their domestic domains. Not surprisingly, the financial sector belongs to those sensitive areas and many regulators prefer to pursue harmonization targets while maintaining full discretion in adopting policies influencing financial stability. Kenneth W Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 International

allows a wider agreement on more detailed matters thanks to the absence of formal sanctions in case of non-compliance[268] and it enables contracting parties to avoid ratification process or treaty amendments in case of subsequent modifications, providing flexibility and capacity to fast adapt to challenges.[269] Yet, the high informality that characterises the type of actors involved and the standard-making process significantly influences the outcome. Thus,the financial standard-setters' activity results in international voluntary guidelines and best practice recommendations produced by and addressed to a collaborative network of national authorities, technical experts and sector associations rather than government representatives.

Moreover, from the analysis of international financial standards and public international law it is clear that the former belong neither to primary nor to secondary sources of international law. First of all, international standard-setting bodies are not international organisations as such due to the lack of their constitutive elements, namely an institutional treaty, independent organs and legal personality. Indeed, all financial standards setters analysed have statements or memoranda as their constitutive document – rather then a foundation treaty – which frequently define these financial regulatory bodies as international fora for collective dialogue. In addition, the functions carried out by the organs of these regulatory bodies are basically administrative and secretarial

Organization 421, 449. In line with this approach, see Charles Lipson, 'Why Are Some International Agreements Informal?' (1991) 454 International organization.- 495, 518.

[268] Even if the threat of sanctions does not work as a deterrent against defection, still numerous factors incentivise compliance, such as credibility, inclusion or 'naming and shaming' practice. The latter is a popular strategy particularly used in the enforcement of human rights law. In essence, it consists of making public countries' violations – usually through NGOs and mass-media. The international multi-layered network, which generates powerful bonds among the actors involved, translates non-compliance into political and social costs, such reputational costs that eventually push a State to abide by international regulation. The same strategy often occurs in international financial regulation, where incentives to compliance are expressed in terms of inclusion in the law-making process, trustfulness and cooperation. Hafner-Burton, 'Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem' (2008) 62(4) International Organisation 689 -716.

[269] The rational-legal features pointed out by Barnett and Finnemore explain the need of technocratic expertise in shaping other actors' autonomy through highly specific standards. Barnett, Michael N. and Martha Finnemore, 'The Politics, Power, and Pathologies of International Organizations' (1999) 53(4) International Organization 699–732.

tasks, which do not mark their independence from the organization members. Secondly, international financial standards are frequently adopted by the executive organs rather than assemblies – more representative bodies - which raises concerns about the kind of consent these instruments express, if the consent of all organization members acting through a fully-powered organ of an international organization or – more likely- if they would better represent the consent of the single participants to the adoption phase acting in their individual capacity. Likewise, financial standard-setters do not possess legal personality either under the conferred powers theory or under the implicit powers theory, so they cannot be considered actors of international law contributing to the regulation of the financial sector, but rather international platforms drafting non-legally binding instruments with a declaratory value. In conclusion, international standard-setters would rather serve as international fora promoting State cooperation, best-practices and harmonised regulation so that they regulatory cannot be deemed acts of international organizations.

Nor can international financial standards be deemed international agreements given the informal character of both the actors engaged and the standard-setting process. International regulatory bodies gather mainly technical experts, national regulators and supervisors rather than State representatives or diplomats. The former can hardly be considered State negotiators with full-powers and the standard-drafting procedure differs from a proper negotiation phase typical of treaty making. Moreover, the signature does not express State's consent to be bound and ratification for financial standards has never occurred. As a result, neither the solemn nor the simplified treaty-making procedure applies to the standards-setting process, which leads us to reject the hypothesis that these instruments pertain to treaty law.

Finally, regulatory standards do not constitute principles of customary law. Indeed, neither the objective element "*diuturnitas"* or the subjective element o"*opinion juris"* are traceable. So far, State practice has not been consolidated through international financial standards and the belief of the obligatory nature of the conduct required by these standards has not established yet.

To sum up, international financial standards belong to soft law. They contain mostly

political commitments rather than legally binding obligations. Yet, this doesn't mean that they do not have legal significance.[270] Although they have a political connotation rather than a proper legal value, they may not be legally irrelevant. As Dworkin has conceptualized "*some forms of law may be soft but they are not weak*".[271] Hence, international financial standards may still constitute an important step in the law-making process or can serve as auxiliary tools in treaty interpretation before national courts and international adjudicative bodies or, again, can help ascertain the formation and the establishment of State practice.[272]

Furthermore, interactions between standards and norms of public international law are frequent and standards may end up influencing States' trade policy design. To frame it with Boyle's words "*the interactions between soft law and hard law, can effectively take place through the transposition into treaties or via incidental legal interpretation*". In this way, regulatory principles would *"loose their non-obligatory character or at least undergo to significant changes in its nature"*.[273] Thus, starting from this intuition, the following chapter will be dedicated to the interplay between international financial standards and the WTO obligations regulating trade in financial services.

[270] Alan E Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law' (n 11) 901-904.

[271] Robbie Sabel, *Procedure at international conferences: a study of the rules of procedure at the UN and at inter-governmental conferences* (Cambridge University Press, New York, 2006).

[272] Many principles drafted as declarations have lately been transformed into general law e.g. UN Convention on the Law of the Sea. José E Alvarez, *International organizations as law-makers* (Oxford University Press, Oxford 2006) 329. Joost Pauwelyn, ' Is it International Law or Not and Does it Even Matter? ' in Pauwelyn, and Wouters (eds), *Informal International Lawmaking* (Oxford University Press, Oxford 2012) 125-161; Eilis Ferran and Alexander Kern, 'Can Soft Law Bodies be Effective? Soft Systemic Risk Oversight Bodies and the Special Case of the European Systemic Risk Board ' (36/2011 University of Cambridge Faculty of Law Research Paper, 2011) 5-7.

[273] Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law' (n 11) 901.

CHAPTER II – INTERNATIONAL FINANCIAL STANDARDS AND THE WTO REGIME

SUMMARY: *2.1 Introduction. 2.2 Trade in Financial Services under The WTO Discipline.* 2.2.1 Definition of Financial Services. 2.2.2 The Most-Favoured-Nation Principle. 2.2.3 National Treatment. 2.2.4 Market Access. 2.2.5 Domestic Regulation. 2.2.6 The Prudential Carve-Out. *2.3 The Use of International Regulatory Standards in the WTO Case Law.* 2.3.1 The WTO Dispute Settlement Mechanism. 2.3.2 The Financial Sector: Interpretation and Application of the Prudential Carve Out in the Argentina – Financial Services Case. 2.3.3 The Food Sector: Standards Reliance and Presumption of Conformity under the SPS Agreement. 2.3.4 The Food Sector: Standards Reliance and Presumption of Conformity under the TBT Agreement. *2.4 Conclusion.*

2.1 INTRODUCTION

The present chapter examines the interaction between international financial standards and the WTO rules disciplining trade in financial services. The academic curiosity originates from the indirect adverse effects that international regulatory standards can have on trade in financial services.[274] By pursuing financial stability, international financial standards can introduce capital or technical requirements that can restrict market access or alter the market competitive conditions in contrast with the WTO discipline.[275] To give an example, international financial standards can attempt to

[274] According to some scholars, such as Boyle, Kennedy and Peters among other, international standards constitute a detailed regulation of the more general commitments spelt out in international economic law, including the WTO law. Alan E Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law' (n 11) 901; David Kennedy, 'Challenging Expert Rule: The Politics of Global Governance' (2005) 27 Sydney Law Review 5; Anne Peters, 'Soft Law as a New Mode of Governance' in Dietrichs Udo, Reiners Wulf and Wesens Wolfgang (eds) (Edward Elgar Publishing 2011).

[275] The WTO's mandate is stated in the preamble of the Marrakesh Agreement and recites *"Recognizing that [Members] relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods"*. The means by which attaining the expressed objectives can be summarised in trade liberalisation conceived as "*reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce"*. The two paragraphs of the preamble of the

guarantee banks' solvency by introducing minimum capital requirements that affect the free movement of capital flows and reduce the quantity of financial services supplied since a part of banks' assets cannot be invested or mobilised.[276]

Moreover, the growing global relevance of voluntary international standards (especially among market operators and international organisations) has led to question whether those standards can serve as a baseline for national policy design, if they can be used as a benchmark in the adequacy assessment of trade policies or if they can assist in the interpretation and application of norms of international law related to the financial sector. Specifically, in the WTO context international financial standards can come into handy when examining State compliance with national treatment and MFN principle, especially in the 'likeness' test of services or service providers if the same international standards have been applied.[277] In addition, when trade partners refer to the same international financial standards or align domestic procedural requirements to those outlined by international standard-setters, an assumption of general conformity can be drawn. Last but not least, international financial standards can be used to interpret the meaning of the WTO commitments concerning trade in financial services and, hypothetically, could serve as a justification for measures otherwise inconsistent with WTO obligations, if standard reliance is recognised in the WTO discipline.

For all these reasons, the present chapter will attempt to answer the following question: *has the nature of international financial standards hardened by the interaction with the WTO system?*

Marrakesh Agreement when read together turn down the assumption according to which the WTO would exclusively be an international organisation oriented towards trade liberalisation without pondering sustainable development and resource allocation. Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (3rd edn, Cambridge University Press 2013) 83; Thomas Cottier, 'From Progressive Liberalization to Progressive Regulation in WTO Law' (2006) 9 Journal of international economic law 779

[276] According to Basel Minimum Capital Requirements for banks the minimum capital ratio is fixed to 8%. Basel II Minimum Capital Requirements (2010) para 40.

[277] Theoretically, these standards can be deemed as 'objective characteristics' when widely applied, since they attempt to level playing field and harmonisation. De Meester (n 230) 201.

The chapter will open with a thorough examination of the WTO rules that liberalize and regulate trade in financial services. In essence, The WTO favours the liberalisation of the sector through market access and non-discrimination principle (the latter declined in national treatment and most-favoured nation principle). Concurrently, it promotes a balanced domestic regulation and recognises States' right to regulate through domestic regulation obligations and prudential clauses.[278] So, these five core principles - market access, national treatment, the MFN principle, the domestic regulation discipline and prudential clauses - will be carefully analysed respectively under the GATS, the GATS Annex on Financial Services[279] and the Understanding on Commitments in Financial Services in order to understand the breadth of those commitments, in terms of States' discretion in policy making.[280]

Subsequently, an examination of the relevant WTO case law concerning disputes addressing the recourse to international regulatory standards will follow, with a specific focus on the financial sector and the food sector. Given the presence of a quasi-judicial mechanism of dispute settlement that guarantees predictability, transparency and a fair implementation of the WTO obligations, the WTO case law is of a great importance since it creates binding precedents to all WTO members. [281] Hence, the WTO jurisprudence will be investigated to verify whether and to what extent WTO panels or the Appellate Body have used international standards as supplementary means of interpretation according to article 31 of the VCLT, as an assessment tool in the conformity analysis or as a justification for WTO inconsistent measures.[282]

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[278] For a comprehensive depiction see Mary Footer, *An Institutional and Normative Analysis of the World Trade Organization* (Nijhoff 2006).

[279] Annex of General Agreement on Trade in Services on Financial Services 1994. The Annex on Financial Services is an integral part of GATS; Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle, *WTO : Trade in Services* (Martinus Nijhoff 2009) 621.

[280] Understanding on Commitments in Financial Services [LT/UR/U/1].

[281] For a comprehensive study on the WTO dispute settlement see MJ Trebilcock, Robert Howse and Antonia Eliason (eds), *The Regulation of International Trade* (4th edn, Routledge 2013) 172; Van den Bossche and Zdouc (n 275) 156; Wouters and De Meester (n 230) 226.

[282] Vienna Convention on the Law of Treaties (1969) art 31.

First, the case law related to the financial sector will be examined. So, the 2016 Argentina-Financial Services case will be studied, being the first dispute in which the GATS prudential carve-out has been challenged. Then, in light of the limited case law on standard-reliance in the financial sector and given the significant similarities between the financial sector and the food sector, the research will move to the WTO jurisprudence related to health and food safety.

Hence, the analysis will take into consideration the food sector where a more abundant case law has established standard-reliance and the presumption of conformity to the WTO regime when a national measure adheres to international standards, according to article 3 of the SPS Agreement[283] and article 2 TBT Agreement.[284] Specifically, the cases examined are EC-Hormones,[285] India-Agricultural Products,[286] US-Meat Products,[287] Russian Federation-Pigs,[288] in relation to standard reliance upon international standards under article 3 of the SPS Agreement. Similarly, the recourse to international standards under article 2 of the TBT Agreement will be analysed in the EC-Sardine case[289] and the US-COOL case.[290] The selected case law will be presented under a comparative light in order to define whether and to what extent standards

[283] SPS is the acronym used for sanitary and phytosanitary measures, in this context explicitly related to the SPS Agreement within the WTO system.

[284] TBT is the acronym used for technical barriers to trade, in this context explicitly related to the TBT Agreement within the WTO system.

[285] WTO, *European Communities: Measures Concerning Meat and Meat Products - Report of the Panel* (18 August 1997) WTO/DS26/R *and Report of the Appellate Body* (16 January 1998), WTO/DS26/AB/R.

[286] WTO, *India: Measures Concerning the Importation of Certain Agricultural Products - Report of the Panel* (14 October 2014) WTO/DS430/R *and Report of the Appellate Body* (4 June 2015) WTO/DS430/AB/R.

[287] WTO, *United States: Measures Affecting the Importation of Animal Products of Argentina - Report of the Panel* (24 July 2015) WTO/DS447/R.

[288] WTO, *Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products- Report of the Panel* (19 August 2016) WTO/DS475/R and *Report of the Appellate Body* (23 February 2017) WTO/DS475/AB/R.

[289] WTO, *European Communities: Trade Description of Sardines - Report of the Panel* (29 May 2009) WTO/DS231/R and *Report of the Appellate Body* (26 September 2002) WTO/DS231/AB/R.

[290] WTO, *United States: Certain Country of Origin Labelling (COOL) Requirements - Report of the Panel* (18 November 2011) WTO/DS384/R, WTO/DS386/R and *Report of the Appellate Body* (29 June 2012) WTO/DS384/AB/R, WTO/DS386/AB/R.

reliance in the SPS and the TBT regime can be extended to trade in financial services, by analogy. In other words, the study aims at clarifying whether the formula *the standards of the Codex Alimentarius Commission are to the SPS agreement as international financial standards are to GATS provisions* can be proved right.[291]

The ultimate goal consists of answering the questions whether and under what conditions international financial standards impact the WTO legal framework in trade in financial services and whether their soft law nature - ascertained in the first chapter- results "hardened" by the WTO adjudicative bodies' interpretation.

2.2 TRADE IN FINANCIAL SERVICES UNDER THE WTO REGIME

The World Trade Organization (hereinafter The WTO) was established in 1994, however its creation was the result of a long process that traced back to the aftermath of the II World War, when the idea of forming an institutionalized framework for international trade got fast diffused, partially as a reaction to the Great Depression and partially as a boost to generally promote trade liberalisation.[292] In fact, in 1944 during the Bretton Woods Conference, which aimed at designing a new monetary system, a first attempt to define an international trade institution was unsuccessfully made, whereas two pillars institutions for the financial system were launched, the IMF and the WB.[293] Yet, the widely shared need to regulate and stabilise international trade remained. Hence, following a detailed set of "Proposal" drafted by the US government in December 1945,[294] the US Government led a multilateral effort to create an

[291] Written in mathematical terms, the proportion appears as Codex Alimentarius: SPS=International Financial Standards: GATS. To be noted that the term GATS provisions is used in a simplistic way to summarise all commitments examined so far and embraces the GATS Annex and the Understanding.

[292] Rüdiger Wolfrum, Peter-Tobias Stoll and Karen Kaiser, *WTO : Institutions and Dispute Settlement* (Martinus Nijhoff 2006) 17–23.

[293] According to the original idea, ITO should have worked in synergy with the IMF, in the stabilization of currency exchange, and the WB for State assistance under the aegis of the UN. Due to a strong opposition manifested by the US Congress, worried about a consequent limitation of State sovereignty, the project was abandoned. Jan Wouters and Bart De Meester, *The World Trade Organization: A Legal and Institutional Analysis* (Intersentia 2007) 6–11.

[294] The need to strengthen global trade system emerged in "Proposals for Expansion of World Trade and Employment" prepared for an International Conference on Trade and Employment during; US

international trade regime concretized under the aegis of the UN Economic and Social Committee (ECOSOC), which in February 1946 was call for establishing the international trade organization (ITO), on one side, and negotiating the General agreement on Tariffs and Trade, on the other.[295] With regard to the collective endeavour to create the ITO, the Preparatory Committee of the ECOSOC adopted a "suggested Charter" which was discussed at the Havana Plenary Conference, where the text of the ITO Charter was signed.[296] Nevertheless, the Havana Charter remained a dead letter, due to the lack of the US Congress' ratification that drove many countries to align with the main proponent's step back.[297]

Conversely, parallel tariff negotiations advanced steadily resulting in 1947 in an instrument agreed upon by 23 countries. The document titled "General Agreement on Tariffs and Trade" (GATT) contained both trade-related provisions and the tariff schedules for each participating country. While it was conceived as a mere treaty, the GATT 1947 progressively evolved into an international organisation, which played a crucial role in developing the world trade system and filling the vacuum left by the unsuccessful predecessor ITO.[298] Over the GATT system, eight rounds of negotiations took place with an ever inclusive focus, ranging from tariffs to technical barriers to trade and from goods to services, which gradually strengthened the multilateral institution GATT.[299] During the Uruguay round Canada, the EC and Mexico, proposed the creation of a new trade organisation, with a structured legal framework composed of a foundation treaty and various subject-specific annexes, among which the GATT 1947. Thus, on 1st

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department of State pub. No. 2411, commercial policy series n.79,1945.John Croome, *Reshaping the World Trading System : A History of the Uruguay Round* (Kluwer Law International 1999).

[295] Dukgeun Ahn, 'Linkages between International Financial and Trade Institutions : IMF, World Bank and WTO' (2000) 34 *Journal of World Trade* 1, 3–5.

[296] John Howard Jackson, *World Trade and the Law of GATT : (A Legal Analysis of the General Agreement on Tariffs and Trade)* (Bobbs-Merril Co, 1975) 45.

[297] William Diebold, *The End of the I.T.O.* (International Finance Section, Dept of Economics and Social Institutions, Princeton University 1952).

[298] Douglas Irwin, Petros C Mavroidis and Alan Sykes, *The Genesis of the GATT* (Cambridge University Press 2009).

[299] Juan A Marchetti and Martin Roy, *Opening Markets for International Trade in Services : Countries and Sectors in Bilateral and WTO Negotiations* (Cambridge University Press 2009).

January 1995 the WTO, as it is known today, came into existence, after the signature of the Marrakesh Agreement Establishing the Word Trade Organization on 15 April 1994.[300]

Concerning the legal framework, the WTO architecture is quite articulated. The WTO regime composes of a brief agreement, which establishes the Organization, and four Annexes which contain subject-specific agreements.[301] In details, Annex 1 titled *Multilateral Agreement on Trade in Goods* is composed of three parts. The Annex 1A that consists of thirteen agreements on trade in goods, of which the 1994 General Agreement on Tariffs and Trade (GATT 1994) that contains the major part of the WTO substantive law,[302] then Annex 1B titled *the General Agreement on Trade in Services* (GATS)[303] and, finally, Annex 1C that deals with the *Trade-Related Aspects of Intellectual Property Rights* (TRIPS).

The Annex 2 includes *the Understanding of Rules and Procedure of Dispute Settlement* (DSU) that provides the general rules to be applied if and when a controversy among WTO members arises. Finally, Annex 3 deals with the Trade Policy Review Mechanism, which aims at promoting member States' adherence to the WTO system.[304]

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[300] In 1994 with the Marrakesh Agreement the permanent institution GATT ceased to exist and the WTO replaced it. To a synthetic excursus consult Paul Demaret, 'Les Métamorphoses Du GATT: De La Charte de La Havanne À l'Organisation Mondiale Du Commerce' [1994] Journaux des tribunaux de droit Européen 121, 121–130; in the Italian doctrine refer to Paolo Picone and Aldo Ligustro, *Diritto dell'organizzazione mondiale del commercio* (CEDAM 2004); To the text establishing the WTO see the Marrakesh Agreement in WTO, *The Legal Texts the Results of the Uruguay Round of Multilateral Trade Negotiations* (1999).

[301] Indeed, the Marrakesh Agreement is composed of sixteen articles.Paolo Picone and others, *Diritto internazionale dell'economia : raccolta sistematica dei principali atti normativi internazionali ed interni con testi introduttivi e note* (Franco Angeli 1994).

[302] The agreements included are Agreement on Agriculture, Sanitary and Phytosanitary Measures (SPS), Textile and Clothing, Technical Barriers to Trade (TBT), Trade-Related Investment Measures (TRIMS), Anti-dumping, Customs Valuation, Pre-shipment Inspection, Rules of Origin, Import licensing, Subsidies and Countervailing Measures, Safeguards, Trade facilitation. The Legal Texts the Results of the Uruguay Round of Multilateral Trade Negotiations (1999).

[303] The General Agreement on Trade in Services (1994); David Hartridge, *Handbook of GATS Commitments : Trade in Services under the WTO* (Cameron May 2003).

[304] Gabrielle Marceau and World Trade Organization., *A History of Law and Lawyers in the GATT/WTO : The Development of the Rule of Law in the Multilateral Trading System* (Cambridge University Press 2015).

The WTO Agreement along with these three Annexes constitutes the so called "single undertaking", also referred to as the WTO multilateral agreements, which are legally binding to all members. Indeed, at the moment of accession member States are recognised rights and responsibilities deriving from the entire package they are required to accept, so avoiding a cherry-picking approach.[305]

The forth Annex, is commonly referred to as "Plurilateral Trade Agreements" and includes four different agreements, of which only two are still in force, namely Annex 4A *Agreement on Trade in Civil Aircraft*, Annex 4B *Agreement on Government Procurement*, whereas Annex 4C *International Dairy Agreement* and Annex 4D *International Bovine Meat Agreement* were terminated in 1997. Differently from the single undertaking approach, plurilateral trade agreements do not bind all WTO members, but exclusively their signatories.[306]

Despite the highly structured complex of agreements that composes the WTO regime, for the purposes of the present chapter only the agreements that have an impact on trade in financial services will be taken into consideration. WTO rules discipline both the liberalisation and the regulation of trade in financial services. Liberalisation is promoted by market access and non-discrimination principle, the latter declined in national treatment and most-favoured-nation principle (MFN). Concerning the regulation side, the WTO discipline favours a balanced domestic regulation avoiding overregulation and, at the same time, it recognises States' right to regulate through prudential clauses, however, detailing the conditions under which prudential measures can be adopted in order to prevent disguised restrictive measures.[307]

So, these core principles - market access, national treatment, the MFN principle, the domestic regulation discipline and prudential clauses - will be analysed respectively

[305] Matthew Kennedy, 'Two Single Undertakings-Can the WTO Implement the Results of a Round?' (2011) 14 Journal of International Economic Law 77.
[306] Wolfrum, Stoll and Kaiser (n 292) 24–25.
[307] For a comprehensive depiction see Mary Footer, *An Institutional and Normative Analysis of the World Trade Organization* (Nijhoff 2006).

under the GATS, the GATS Annex on Financial Services (hereinafter the Annex)[308] and the Understanding on Commitments in Financial Services (hereinafter "Understanding").[309] While the first two legal instruments are part of the single undertaking, therefore, binding for all WTO members, the latter is optional and creates obligations only upon States that have undertaken it.[310]

The Understanding originated from different negotiations than the single undertaking, though always within the context of the Uruguay Round. It contains clauses that were not included in the GATS or in the Annex due to lack of consent.[311] In the analysis of the interaction between the GATS and the Understanding the doctrine is divided. Scholars led by Trachtman embrace the idea that the Understanding offers an 'alternative approach' to Part III of the GATS, driven by the literal interpretation of the introductory paragraph of the Understanding, which explicitly mentions this kind of approach.[312] According to this stance, any time that an additional commitment is made on market access and national treatment the Understanding comes to replace mirrored GATS general obligations in articles XVI and XVII, consistently with *lex specialis*

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[308] Annex of General Agreement on Trade in Services on Financial Services 1994. The Annex on Financial Services is an integral part of GATS; Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle, *WTO : Trade in Services*, (Martinus Nijhoff 2009) 621.

[309] Understanding on Commitments in Financial Services [LT/UR/U/1]. It has to be specified that, with reference to financial services, further WTO documents are subject-related, specifically the Second Annex on Financial Services and the Fifth Protocol (1997). The former consisted of an interim agreement that extended multilateral negotiations on financial services after the Uruguay Round, the latter basically confirmed *the status quo* proceeding the agreement without adding new substantive commitments. Since the aim of this chapter is verifying the nature of international financial standards in relation to legally binding WTO provisions in trade in services, only the GATS, the GATS Annex and the Understanding, which contain substantive obligations will be analysed in the present work.

[310] The obligations included in the Understanding are binding only for those members which have declared it in their Schedules of Commitments. See Jan Wouters and Bart De Meester, *The World Trade Organization: A Legal and Institutional Analysis* (Intersetia, 2007) 14; Philip Raworth, *Trade In Services : Global Regulation and the Impact on Key Service Sectors* (Oceana Publications 2005).

[311] Bart De Meester, *Liberalization of Trade in Banking Services : An International and European Perspective* (Cambridge University Press 2014) 64.

[312] The Preamble reads "*Participants in the Uruguay Round have been enabled to take on specific commitments with respect to financial services under the General Agreement on Trade in Services (here in after referred to as the 'Agreement') on the basis of an alternative approach to that covered by the provisions of Part III of the Agreement*". The Understanding of Commitments on Financial Services (n 30); Cottier (n 275).

principle.[313] Yet, this approach may prejudice other members' rights since the Understanding does not always contain further or wider commitments respect to the GATS. Conversely, an opposite stream of the literature supports a more integrated interpretation based on the application of the GATS in conformity with additional commitments enshrined in the Understanding. This stance is backed by the inclusion of a headnote in some members' Schedule of Commitments declaring that the obligations listed are in accordance with the three legal texts, namely the GATS, the Annex and the Understanding.[314]

From a functional point of view, it has to be mentioned that differently from the GATT the GATS and the Annex are designed following the so called "positive listing" or "bottom-up approach", meaning that commitments agreed upon are valid exclusively for those sectors expressly indicated by the contracting parties in their Schedule of Commitments.[315] The reasons for this structural difference may be manifold. First, traditionally negotiations focused primarily on trade in goods rather than in services. Indeed, negotiations on trade in services started only at the beginning of the 1980s and were characterised by division among the negotiating parties on several issues, such as the inclusion of trade in services in the GATT and the breadth of the final document, meaning whether to include all sectors or simply a part of them; as well as whether to apply GATT principles to trade in services.[316] Another explanation for the different approach used may reside in the fact that trade in services is twice as flourish as trade in goods and it amounts to around two-third of the global GNP, thus, member States

[313] Joel Trachtman, 'Trade in Financial Services under GATS, NAFTA and the EC: A Regulatory Jurisdiction Analysis' [2006] The international economic law revolution and the right to regulate 323.
[314] De Meester (n 230) 67; Geza Feketekuty, 'Trade in Services: Bringing Services into the Multilateral Trading System' in Jagdish Bhagwati and Mathias Hirsch (eds), *The Uruguay Round and Beyond* (Springer Berlin 2014).
[315] Alexandre Kern, *The World Trade Organization and Financial Stability: The Balance between Liberalisation and Regulation in the GATs* (CFAP, University of Cambridge 2003).
[316] One of the first explicit mentions to negotiations on trade in services was made during the 38th Session of the GATT. Rudolf Adlung, 'Services Negotiations in the Doha Round : Lost in Flexibility?' (2006) 9 Journal of International Economic Law; GATT Secretariat, Ministerial Declaration (1982) BISD 29S/9.

preferred to carefully select the sectors in which undertaking commitments.[317] In addition, trade in services is politically very sensitive compared to trade in goods (especially financial services), so that States decided to keep a separate regime for services.[318]

2.2.1 Definition of Financial Services

Before examining the WTO provisions influencing the financial sector, a clarification of the terms services and service suppliers along with an explanation of different modes of supply are necessary. Services are typically described "*as intangible, invisible non-durable products of commercial value, requiring simultaneous production and consumption".*[319] The GATS regime provides a broad-worded notion of services in article I(3)(b), which reads the term "*services includes any service in any sector except services supplied in the exercise of governmental authority."*[320] A more sector-centred definition is offered in the Annex, where paragraph 5 describes financial services as *"any service of financial nature, includ[ing] insurance, banking and other financial services."* Especially for the last two categories, the paragraph further identifies, in a non-exclusive list, a wide array of financial services encompassing commercial bank activities (such as acceptance of deposit, any type of lending, leasing, payment services and guarantee) and investment services as well (trading between customers' accounts including over-the-counter operations, trade in security, money broking, asset management).

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[317] GNP stands for Gross National Product, meaning the market value of goods and services produced in one year. OECD, Implications of Global Value Chains for Trade, Investments, Development and Jobs - Prepared for the G20 Leaders Summit, Saint Petersburg in September (2013).

[318] Mitsuo Matsushita and others (eds), *The World Trade Organization: Law, Practice, and Policy.* (3rd edn, Oxford University Press, 2015) 555–556.

[319] Diana Zacharias, 'Art.I GATS' in Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle (eds) (6th edn, Martinus Nijhoff Publishers 2008) 38; Aaditya Mattoo, Robert M Stern and Gianni Zanini, *A Handbook of International Trade in Services* (Oxford University Press 2010) 85.

[320] To be noted that all services provided in the exercise of governmental authority are excluded *a priori* regardless of the sector. The exclusion of "services supplied in the exercise of governmental authority" is reaffirmed also in the Annex on Financial Services, paragraphs 1(b) and (d). Wolfrum, Stoll and Feinäugle (n 292) 44.

Overall services can be commonly classified either by the mode of supply or by the type of service supplied rather than being characterised by the institutions that provide them, which would result in a dated approach given the fast changing structure of both market and industry.[321]

With regard to the former criterion, the definition of trade in services enshrined in article I(2) GATS distinguishes among 4 different modalities or "modes of supply".[322] Mode 1, also referred to as "cross-border supply", occurs when a service is delivered within the territory of a Member from the territory of another Member, comparably to service export.[323] For example, a bank that accords a loan to a foreign client is providing a cross-border banking services. More generally, any time that a supplier obtains payments for a cross-border services it supplies constitutes a financial-capital service under mode 1.[324] Differently, Mode 2 or "consumption abroad" consists of a service that is enjoyed by a foreigner within the domestic border of the State of the supplier's nationality. In order words, the consumers move abroad to use, benefit or receive a service. As an explanatory case, a foreign client that opens a bank account abroad or enjoys financial services within the territory in which the bank is established constitutes a supply of financial services under mode 2. "Commercial presence" or Mode 3, is a service supplied through the presence of any type of business or professional

[321] European Commission, *Panorama of EU Industry 97 : An Extensive Review of the Situation and Outlook of the Manufacturing and Service Industries in the European Union* (Office for Official Publications of the European Communities, 1997).

[322] K Karsenty, 'Assessing Trade in Services by Mode of Supply' in Pierre Sauvé and Robert Mitchell Stern (eds), *GATS 2000 new directions in services trade liberalization* (Brookings Institution Press 2000); Rolf H Weber and Mira Burri, *Classification of Services in the Digital Economy* (Springer, 2013).

[323] Article I(2)(a) of the GATS. The cross-border financial services provided are numerous, and notably comprise advisory and trading activities made easier thanks to IT techniques.

[324] The Panel first and the Appellate Body then underlined the importance of the movement of capital connected to the supply of financial services in WTO, *United States: Measures Affecting the Cross-Border Supply of Gambling and Betting Services- Report of the* Panel (10 November 2004) WTO/DS285/R and *Report of the Appellate Body* (7 April 2005) WTO/DS285/AB/R para 6.442. Online gambling and betting services belong to cross-border financial services insofar as capital flows and exchange currencies are involved.

establishment in the territory of another State.[325] The notion in article XXVIII of the GATS is particularly broad and includes the constitution, acquisition or maintenance of a juridical person, under letter d(i), as well as the creation and maintenance of a representative office or a branch, under letter d(ii).[326] In this regard, a distinction between subsidiaries and branches is legally significant. The latter is basically a business establishment in a foreign country, which remains integral part of the larger company that created it. Thus, branches and the headquarters are unified as a unique legal entity.[327] Conversely, establishing a subsidiary produces a new and separate legal personality so that the subsidiary and the original service supplier are two separate businesses under a legal point of view. The decision to opt for a branch or for a subsidiary happens for functional and economic reasons, such as financial facilitation or administrative requirements.[328] In a simplified example, a client that enjoys financial services provided by foreign bank through a branch, a representative office or a

[325] Commercial presence can be a representative office or a branch, as indicated in the footnote of article XXVIII (g). In the case Mexico – Telecoms (2004) the Panel clarified that the location of the service is a crucial element as commercial presence has to be in the territory of a State different from the State in which the supplier has its headquarters or where it carries substantial business activities. On the contrary, this criterion is not mentioned for Mode 1 and 2. *Mexico — Measures Affecting Telecommunications Services* [2004] Panel WTO/DS204/R [7.30-7.35].

[326] General Agreement on Trade in Services, article XVIII (d). The definition of the respective terms can be found in the same article letters (l), (m) and (n).

[327] On the lack of legal personality that characterises branches, footnote 12 specifies that "*Where the service is not supplied directly by a juridical person but through other forms of commercial presence such as a branch or a representative office, the service supplier (i.e. the juridical person) shall, nonetheless, through such presence be accorded the treatment provided for service suppliers under the Agreement"*. Thus, the footnote clarifies that branches enjoy the same treatment as other service suppliers, despite not being legal entities. This explanation is of a particular importance since from a superficial reading of paragraph 5(b) of the Annex that defines "financial service suppliers" as "*natural and juridical persons wishing to or supplying financial services*", seems to exclude branches given that they are not juridical person conceived as "*legal entities constituted under the law of another member State*" article XXVIII let (l). To avoid any misleading interpretative doubt, the same article in the following letter (m) branches among services suppliers.

[328] Geza Feketekuty, *Negotiating Strategies for Liberalizing Trade and Investment in Services* (Dept of Economics, University of Western Ontario 1984); Pierre Sauvé and Robert Mitchell Stern, *GATS 2000 New Directions in Services Trade Liberalization* (Brookings Institution Press 2000).

subsidiary is receiving services under mode 3.[329] Finally, Mode 4 refers to a service that is delivered within the territory of the Member through the "presence of natural person". Thus, the concept is similar to Mode 3 with the difference that it is a professional who moves abroad and delivers a service instead of establishing a commercial presence in a host country.[330] A situation in which a private banker or a bank trader provides a financial consulting to a client located in a foreign country constitutes an example of financial services supplied under mode 4. However, differently from goods, services can hardly be located geographically, which makes the categorisation of services and the attribution of the competent jurisdiction even more problematic.[331]

Concerning the type of services provided, an official services classification was included in the document titled "Services Sectoral Classification List",[332] which followed the UN Provisional Central Product Classification (CPC). Despite being inspired by the UN CPC, the WTO Service Classification does not fully match the

[329] However, a distinction in terms of current transaction has to be made: in case a service is supplied through a branch, which legally remains part of the headquarters, a payment occurs between resident (the client) and non-resident (the branch). Conversely, if the service is provided through a subsidiary, which is a separate legal entity locally incorporated, the service is still supplied under mode 3 but payments technically occurs between resident (the subsidiary) and the client, rather than international current transactions. Yet, transfers from the subsidiary, the locally presence of the foreign bank to the headquarters. These differences become relevant for the application of article XI(1) of the GATS concerning the prohibition of restriction of current payments and transactions and even more for the application of article VIII of IMF Articles of Agreement concerning payment restrictions. Bart De Meester, 'Liberalization of Financial Flows and Trade in Financial Services under the GATS' (2012) 46 Journal of World Trade 733, 759–761; DE Siegel, 'Legal Aspects of the IMF/WTO Relationship: The Fund's Articles of Agreement and the WTO Agreements' (2002) 96 American journal of international law 561, 586.

[330] Federico Lupo Pasini, 'Movement of Capital and Trade in Services : Distinguishing Myth from Reality Regarding the GATS and the Liberalization of the Capital' (2012) 15 Journal of International Economic Law.

[331] The foundation assumption is that jurisdiction is primarily based on the concept of territory and consequently, being unable to locate geographically a service produces jurisdictional problems as well. Moreover, while trade in goods can be condensate in a single moment, financial transaction may take place over an extended period of time. Trachtman, 'Trade in Financial Services under GATS, NAFTA and the EC : A Regulatory Jurisdiction Analysis' (n 34) 44; Yokoi-Arai, Mamiko, 'GATS' Prudential Carve Out in Financial Services and Its Relation with Prudential Regulation' (2008) 57 International and Comparative Law Quarterly 613, 630.

[332] GATT Secretariat, Services Sectoral Classification List 1991 [WTO, MTN,GNS/W/120].

former document, neither does it in comparison with the non-exhaustive list of financial services referred to in the Annex since differences are detectable in the two documents.[333] However, according to the WTO services classification list, financial services can be grouped into two macro categories: banking services, on one side; insurance and insurance-related services, on the other.[334] The Appellate Body in the US-Gambling case clarified the legal status of the Services Sectoral Classification List and it specified that the document is not part of the GATS schedules, contrary to what the Panel affirmed in the same case, but it is rather a "*supplementary means of interpretation*", as conceived in article 32(a) rather than in 31(2)(a) of the VCLT.[335] This conclusion implies that the Service Sectoral Classification List cannot be considered as relevant contextual part of the GATS, since article 31(2) of the VCLT refers to agreement or acceptance of the Parties.[336] This document is rather seen as an additional means of interpretation, to the same level as to preparatory works or supplementary documents, which can be used exclusively when the ordinary meaning of a GATS provision results ambiguous or unclear, only after the analysis of the relevant context.

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[333] *Guide to the GATS: An Overview of Issues for Further Liberalization of Trade in Services* (Kluwer Law International 2001) 332–333. Briefly, the CPC is a five-digit system that allows to identify divisions, sessions, groups, classes and subclasses to which a specific service belongs to. For a detailed explanation of the system consult introductory note to the CPC, para 31.

[334] Among insurance and insurance-related services there are direct insurance, reinsurance, and auxiliary services to insurance. Banking services include all activities related to bank deposits, lending, financial leasing, payment system, negotiable instruments and financial assets. Securities usually fall within banking services. James Barth, Chen Lin and Clas Wihlborg (eds), *Research Handbook on International Banking and Governance.* (Edward Elgar 2013).

[335] *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services - Report of the Panel* (n 324) para 6.82. For a thorough analysis on good faith interpretation of the WTO agreements including the use of supplementary tools to fill interpretation gaps refer to Marion Panizzon, *Good Faith in the Jurisprudence of the WTO the Protection of Legitimate Expectations, Good Faith Interpretation, and Fair Dispute Resolution* (Hart 2006) 197–213.

[336] This stance was clearly expressed in *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services - Report of the Appellate Body* (n 324), para 175. For a detailed analysis on the findings and the consequences of the US- Gambling case consult Panagiotis Delimatsis, 'Don't Gamble with GATS : The Interaction Between Articles VI, XVI, XVII and XVIII GATS in the Light of the "US-Gambling" Case' (2006) 40 Journal of world trade : law, economics, public policy Journal of World Trade 1059; Federico Ortino, 'Treaty Interpretation and the WTO Appellate Body Report in US-Gambling : A Critique' (2006) 9 Journal of International Economic Law 117.

In other words, the Appellate Body affirmed that the WTO services classification cannot be used to interpret the ordinary meaning of a provision or of the terms within it.[337] In conclusion the Services Sectoral Classification List remains a useful instrument, though limited. While it can serve as a positive indicator to verify whether a specific activity constitutes a service, it does not clarify on what bases some activities are included and some others are not. Consequently, the List does not provide any guidance to define new commercial activities, such as new types of financial services.[338]

That being said, within the context of services a brief clarification on the special regime recognised to capital transaction has to be made.[339] Article XI.1 proscribes restrictions on international transfers and payment for current transactions, and footnote 8 guarantees free transfers of capital and financial resources insofar as they are essential to cross-border activities or service supply through commercial presence in the Members' committed sectors.[340] In essence, both inwards and outwards capital flows are assured when fundamental to service supply under mode 1 and 3.[341] Trade in

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[337] *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (n 324) paras 211-213.

[338] The concept "new financial services" is contained only in some WTO documents, such as the Understanding, and not in other legal documents, which makes the question of legal textual reference or cross-reference very significant. The WTO regimes does not provide guideline for the huge ongoing discussion on the definition and regulation of new financial services such as "FinTech" (financial technology refers to new forms of services and way of supply based on the most advanced technology) or "Green Finance" (financial products used to finance environmental friendly-policies and long-term sustainable economic development). Rüdiger Wolfrum, Stoll, Peter-Tobias and Feinäugle, Clemens, *WTO:trade in Services* (6th edn, Martinus Nijhoff Publishers 2008) 41–43; Weber and Burri (n 322). The issue of promoting a harmonised cross-reference along with the need for an updated list, which includes new services have been underlined already during the meetings of the WTO Council for Trade in Services. WTO Council for Trade in Services, 'Financial Services' (1998) S/C/W/72 para 15.

[339] A State government may decide to introduce restrictions on capital transactions as part of its monetary policy to avoid for example an excessive concentration of national currency held by foreigners or significant outflows. Meester (n 230) 737.

[340] Mann, F., 'International Monetary Co-Operation' (1945) 22 British Yearbook of International Law 251, 254.

[341] In case of commercial presence only inwards flow, for the creation and maintenance of branches or subsidiaries are ensured in order to allow regular service supply under mode 3. Giovanna Adinolfi, 'The Legitimacy of Global Networks Vis-À-Vis the International Organizations: The Example of the Financial Standards' in Laura Ammannati (ed), *Networks - In search of a Model for European and Global regulation* (Giappichelli 2012) 173–174.

financial services and financial flows are strictly related as the nature of certain specific services entail capital flows. Thinking about cross-border banking services, capital flows often followed. For example, if a bank provides a foreign consumer with a loan (mode 1), an outward transfer of capital from the country where the bank is established to the country of the consumer will occur. Likewise, if banking services are provided through a bank branch in a host country, a capital transfer is usually needed to establish a commercial presence. For these reasons, despite the recognisance of States' right to regulate, restrictions to capital and financial transactions cannot be imposed if the transactions are essential to cross-border trade and trade in services under mode 3 since the unintended consequences can be significantly harmful to trade.[342]

2.2.2 The Most-Favoured Nation Principle – Article II of the GATS

The most-favoured nation (MFN) principle is one of the core pillars of the WTO system as it extents automatically the best treatment accorded by a State to another country to all member States. In such a way, not only does trade liberalisation result fostered, but it also impedes WTO members to discriminate among trade partners. This principle is included in Part II of the GATS, containing general obligations, which applies immediately and unconditionally to all WTO members, unless explicitly exempted in the Schedule of article II exemption.[343]

In article II(1) of the GATS the prohibition to discriminate covers both like services and like service suppliers, which entails that a member shall guarantee the best treatment accorded to any other State to all WTO members.[344] The GATS MFN clause is modelled

[342] A thorough study on financial flows divided into current transaction and capital transaction consult Meester (n 329) 735. For an analysis on the costs deriving form capital control and control on foreign exchange transactions, see Shang-Jin Wei and Zhiwei Zhang, 'Collateral Damage: Exchange Controls and International Trade' (2007) 26 Journal of International Money and Finance 841.

[343] Van den Bossche and Zdouc (n 275) 36; Gabriella Venturini, *L'organizzazione mondiale del commercio* (Giuffrè 2015).

[344] In the case of Members' Schedule of Article II exemption, the negative approach is applied, in the sense article II generally applies unless differently stated in the Annex article II exemptions. For a general dissertation on the application of the MFN specifically to trade in services see Yi Wang, 'Most-

on the respective GATT principle, article I(1). The purpose of this provision has been summarised in the Canada-Autos case (2000) that clarified "[*the*] *object and the purpose is to prohibit discrimination among like products originating in or destined for different countries and it also serves as an incentive for concessions negotiated reciprocally"*.[345]

In the same case, the Appellate Body also established a three-step test to assess the conformity of a measure to the MFN obligation: (i) a measure shall fall within the scope of article II(1) of the GATS, (ii) it shall be verified that the services and the services suppliers at issue are "like services" and "like service suppliers" and (iii) it shall be checked whether like services or like service suppliers are given a less favourable treatment.[346]

The first step of the three-tier test ascertains, first, the existence of trade in services under one of the four modes of supply and, secondly, whether the measure at issue affects trade in services.[347]

As established in the *EC-Banana case,* the broad meaning of article II:1 implies a wide coverage, thus no measures can be excluded *a priori* from the scope. As a consequence, a measure can effectively be found detrimental to a specific sector even if it was introduced to regulate another sector or for reasons other than regulating trade.[348]

Favoured-Nation Treatment under the General Agreement on Trade in Services - And Its Application in Financial Services' (1996) 30 Journal of world trade 91.

[345] *Canada — Certain Measures Affecting the Automotive Industry* [2000] Appellate Body WTO/DS139/AB/R, para 84.

[346] ibid 170–173; Werner Zdouc, 'WTO Dispute Settlement Practice Relating to the GATS' (1999) 2 Journal of international economic law Journal of international economic law 295; Juan Marchetti and Petros C Mavroidis, 'What Are the Main Challenges for the GATS Framework? : Don't Talk About Revolution' (2004) 5 European business organization law review European Business Organization Law Review 511.

[347] In the case of financial services mode 1 and mode 3, namely cross-border supply and commercial presence, are the most likely affected by restrictive measures Van den Bossche and Zdouc (n 275) 335–339.

[348] *European Communities — Regime for the Importation, Sale and Distribution of Bananas* [1997] Appellate Body WTO/DS27/AB/R, para 231-233.

In other words, not only *de jure* discriminations but also *de facto* discriminations are considered over the entire analysis.[349]

The second step concerns the assessment of like services or like service providers, however how to evaluate likeness in the services sector has long been debated. The abundant GATT-related jurisprudence on like products may be taken as a reference for services analysis as well.[350] Under the GATT, three main elements in the likeness test have been identified: (a) the visibility of a product in a given market, (b) customers' taste and habits, namely whether two products are interchangeable and (c) the product's properties.[351] While these aspects are perfectly sensible in the context of trade in goods, the services sector is characterised by an intangible nature, which makes these criteria hard to detect and even more unsuitable for service suppliers. This weakness was already highlighted by the Panel in the case *EC-Banana,* which acknowledged that the peculiarities used for like products analysis offer a limited guidance in the equivalent test concerning services.[352] To give a practical example, customers' taste and habits are centred on the interchangeability of goods in a given market, also called product "substitutability", which is not so intuitive and not always detectable in the services sector.[353] Moreover, physical product characteristics, such as shape, size or function

[349] An essential step is to verify that the measure affecting trade in services is not listed in the GATS Annex on article II exemptions, which allows Members to depart from the general MFN obligation. Differently form the GATT, the GATS allowed WTO original members to "maintain" measures otherwise inconsistent with the MFN principle provided that they are listed. The Annex only covered measures in existence before the entry into force of the WTO agreement. The same opportunity is given to new members acceding the Institution and they have to specify the measures they intended to maintain. No further exceptions can be added afterwards. Stoll Peter-Tobias Wolfrum and Clemens Feinäugle, (n 338) 89.

[350] For a comparative approach between GATT and GATS regime, read Werner Zdouc, *Legal Problems Arising under the General Agreement on Trade in Services : Comparative Analysis of GATS and GATT* (2002).

[351] Wolfrum, Stoll, Peter-Tobias and Feinäugle, Clemens (n 329) 83; Won-Mog Choi, *'Like Products' in International Trade Law: Towards a Consistent GATT/WTO Jurisprudence* (Oxford University Press 2005).

[352] *European Communities — Regime for the Importation, Sale and Distribution of Bananas* [1997] Panel WTO/DS27/R, para 7.346.

[353] The economic concept of substitutability is based on the assumption that two products or services with similar final purposes can be interchanged according to price fluctuations. Thus, if the price of

have little sense in a comparison between services or service suppliers given their intangible nature.[354] Some scholars have suggested taking into consideration productive methods or modes of supply as possible thresholds to assess services and service suppliers alike, yet these two aspects would hardly be decisive in the likeness examination.[355]

Although the GATS itself does not provide a one-fits-all approach, the WTO jurisprudence has clarified that evidence that pertain to the competitive relationship of the service being compared should be brought on a case-by-case analysis.[356] In other words, conditions of competition are the crucial element to verify whether the competitive relationship is equal among services traded and service suppliers operating in a given market.[357]

To be noted that the assessment of 'like service suppliers' entails a further level of complexity. In EC-Banana III (1997) and Canada-Auto (2000) the adjudicative bodies overcame this issue by linking the likeness of services providers to like services by affirming "*to the extent that service suppliers provide 'like services', they are 'like*

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product A increases, customers would shift their preference towards the product B. Two products are interchangeable when buying one of the two alternatives does not change clients' satisfaction. An example is sugar and sweetener, they both share the same function and buying one of the two is, theoretically driven only by the price difference rather than differences in consumers' satisfaction. The general idea is that like services are substitutable each other, similarly to goods. This was the approach of the Appellate Body in *Korea — Taxes on Alcoholic Beverages* [1999] Appellate Body WTO/DS75/AB/R [115–121]; Choi has strongly supported the Appellate Body's approach emphasizing the similarities between the GATT and the GATS, and, consequently, between services and goods in their 'likeness' test. Choi (n 67); On the other side, Howse and Türk have warned about the supposition of a 'reasonable consumer', which assumed an ideal market place where consumers can consciously choose their optimal level of satisfaction having access to all market information, which does not correspond to the reality. Robert Howse and Elisabeth Türk, 'The WTO Impact on Internal Regulations : A Case Study of the Canada-EC Asbestos Dispute' [2006] Trade and human health and safety 77.

[354] Gaetan Verhoosel, *National Treatment and WTO Dispute Settlement : Adjudicating the Boundaries of Regulatory Autonomy* (Hart Pub 2002) 62.

[355] These two criteria were not considered enough relevant in the GATT context. Nicolas F Diebold, 'Standards of Non-Discrimination in International Economic Law' (2011) 60 The International and Comparative Law Quarterly 831.

[356] Wolfrum, Stoll, Peter-Tobias and Feinäugle, Clemens (n 329) 82–85.

[357] Beviglia Zampetti A. and Pierre Sauvé, 'Rules of Origin for Services: Economic and Legal Considerations' in Olivier Cadot (ed), *The origin of goods : rules of origin in regional trade agreements* (Oxford University Press 2006).

service suppliers'".[358] Hence, the link between services alike extends the MFN treatment to service providers as well, in order to avoid distorted competition also among market operators.[359]

Finally, the three-tier test requires that a less favourable treatment is proven introduced by a discriminatory measure, inconsistently with the MFN obligation. Similar to the 'like test', also for the analysis of a less-favourable treatment entails the examination of competitive conditions before and after the adoption of the measure. The final aims is to verify whether certain services or certain suppliers have been impaired *vis-à-vis* other services alike originated or traded from another country, due to a more favourable treatment accorded to the latter.[360] Thus, it is necessary to assess whether the measure negatively 'affects' trade in services, meaning whether the measure *"[m]odifies or alters the conditions of competition"*[361] regardless of whether the measures are formally identical or formally different, since the provision covers both *de jure* and de facto discrimination.[362]

To conclude, in the application of the MFN principle WTO members' regulatory discretion seems largely dependant on the interpretation given to both "like services" or "like service providers" and "less favourable treatment" by panels and the Appellate Body on a case-by-case analysis.[363]

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[358] The same reasoning has been recalled also in the Argentina-Financial Services case, examined in depth in the section 3.2.2. *European Communities: Regime for the Importation, Sale and Distribution of Bananas - Report of the Panel* [7.322]; WTO, *Canada — Certain Measures Affecting the Automotive Industry - Report of the Panel* [10.248].

[359] On the issue as to how assess the likeness among suppliers, the academic debate has embraced the relevance of process and production methods in the analysis. Despite being disregarded in the likeness examination under GATT, process methods may be considered differently in the context of GATS. Wolfrum and Feinäugle (n 329) 84; Feketekuty (n 328).

[360] Van den Bossche and Zdouc (n 275) 333; Matsushita and others (n 318).

[361] WTO, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services - Report of the Panel* [6.252]; For a recent dispute see WTO, *Argentina: Measures Relating to Trade in Goods and Services - Report of the Panel* (30 September 2015) WTO/DS453/R and *Report of the Appellate Body* (14 April 2016) WTO/DS453/AB/R.

[362] WTO, *European Communities: Regime for the Importation, Sale and Distribution of Bananas - Report of* (n 69), paras 231-233. Also in the final step of the analysis the Appellate Body considered both *de jure* and *de facto* discrimination by affirming their equal relevance.

[363] De Meester (n 230) 171; Van den Bossche and Zdouc (n 275) 335–337.

2.2.3 National Treatment – Article XVII of the GATS

National treatment principle, along with the MFN commitment, constitutes the non-discrimination obligation within the WTO system. Article XVII:1 of the GATS prohibits measures that favour domestic services and domestic service providers *vis-à-vis* foreign 'like services' and 'like service suppliers'. As clearly stated in paragraph 1 "*[I]n the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like service and service suppliers".*[364]

From the wording of Article XVII:1 is evident that national treatment has not a general application, differently from the MFN principle, so it does not cover all measures affecting trade in services being its scope limited to the sectors listed in the "*Schedule of Specific Commitments"* of each Member. [365] Schedules of Specific Commitments, also called Services Schedules, are an integral part of the GATS and contain market access and national treatment concessions accorded by a WTO member in specific sectors.[366] In fact, Services Schedules encompass horizontal commitments, which apply to all sectors listed therein, and sectoral commitments, which are, as their name suggest, exclusively sector-specific.[367] Visually, the Schedules of Commitments are divided into four columns: the first column indicates the sector or the sub-sector in

[364] Annex of General Agreement on Trade in Services on Financial Services, art XVII:1.

[365] To be noted that national treatment obligations are included in part III of the GATT dealing with "Specific Commitments", whereas the MFN principle was integrated in Part II titled general obligation. Van den Bossche and Zdouc (n 275) 527–528.; Rudolf Adlung, 'Public Services and the GATS' in Bernard Hoekman (ed), *The WTO and Trade in Services* (Elgar, 2012).

[366] The EU submitted the first collective Schedule of Commitments in 1995, which binds all its twelve members at the time. Then the EU introduced new modifications, called supplements (influential for telecommunication and financial services) and it finally submitted a consolidated GATS Schedule of Commitments, which merges WTO European States and binds all WTO members. Communication from the European Communities and Its Members - Draft Consolidated GATS Schedule (S/C/W/273, 2006).

[367] Usually horizontal commitments refer to Mode 3 and Mode 4, whereas for sector commitments WTO members distinguish between 12 different sectors and more than 150 sub-sectors. Financial Services belong to the 12th sector. Peter van den Bossche and Denise Prévost, *Essentials of WTO Law* (Cambridge University Press 2016).

which a WTO member commits, the second and the third columns refer to the undertaken obligations respectively to market access and national treatment principle, whereas the last one is dedicated to additional commitments.[368] In addition, WTO members choose the level of commitment to undertake in each sector listed and for each mode of supply. Thus, members that accept to commit fully in the listed sectors will indicate the term 'none', meaning no limitations to market access and national treatment principle, in the relevant sections of their Schedule. Possible alternatives to full commitment are remaining 'unbound', essentially preserving States' right to regulate, or undertaking commitments limited to specific circumstances and conditions that have to be expressly and clearly listed.[369] To sum up, in the Schedule of Commitments, each member has to specify the sectors, the mode of supply and the level of commitment accorded by indicating the prospective limitations to market access and national treatment obligations – if any –. [370]

In order to verify the consistency of a measure with article XVII, a three-tier test has been adopted in the WTO jurisprudence. This is almost identical to the MFN-test with a preliminary check related to specific commitments, namely whether the measure at issue affects trade in a sector listed in the respondent's Services Schedule.[371] In a nutshell, the national treatment test consists of examining (i) whether the measure falls within national treatment commitments (ii) whether domestic and foreign services at issue are 'like services' or whether domestic and foreign service suppliers are 'like

[368] In case of limitations to both market access and national treatment principle, limitations are inserted under market access column, according to article XX(2) GATS. Raworth (n 310) 525.

[369] The word 'unbound' indicates that no commitments are undertaken in a given sector and mode of supply for national interests or for technical unfeasible. Van den Bossche and Zdouc (n 275) 404.

[370] Listing limitations to general commitments, whose scope is limited to the sectors included in the Services Schedule has been seen as the negative elements within the positive listing approach. For this reason the literature has sometimes referred to the GATS approach as a combination of positive listing, concerning the sector in which a State commits, and a negative listing, intended as limitations to the national treatment and mark access commitments accorded in the listed specific sectors. Karsenty (n 322); Joseph F Francois, Ian Wooton and Centre for Economic Policy Research (Great Britain), *Market Structure, Trade Liberalization, and the GATS* (Centre for Economic Policy Research 2001).

[371] Gaetan Verhoosel, *National Treatment and WTO Dispute Settlement : Adjudicating the Boundaries of Regulatory Autonomy* (Hart Pub 2002).

service suppliers', (iii) whether foreign services or foreign service suppliers are given a treatment less favourable than the one accorded to domestic services and domestic service suppliers alike.[372]

As mentioned, the preparatory step consists of looking at the Service Schedules to verify that a State's undertaken national treatment obligations apply to the sector and the mode of supply that the contested measure allegedly affects. The first step of the test addresses both the scope of article XVII and the impact that the measure has on the supply of a service. Concerning the scope, the EC-Banana case clarified that the term is broad and it is not limited exclusively to measures "governing" or "regulating" the sector impaired, in a way, conceiving potential cross-sector implications.[373] With regard to the impact, article XVII(2) specifies that the concept of less favourable treatment covers both formally identical and formally different treatment, thus it takes into account both *de jure* and *de facto* discriminations.[374]

In the second step of the test the likeness of both services and service suppliers is examined and the considerations made for the MFN test remain valid also for the national treatment analysis, where the examination of the conditions of competition are the key factors.[375] In relation to "like services" and "like service suppliers", the UN CPC is a useful document for a first approximation since two services belonging to the same sector or to the same subsector already share common characteristics, however, the document alone does not provide for a decisive outcome.[376] By the same token, modes

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[372] WTO, *China — Certain Measures Affecting Electronic Payment Services- Report of the Panel* (16 July 2016) [7.942].

[373] WTO, *European Communities — Regime for the Importation, Sale and Distribution of Bananas* (22 May 1997), para 10.286; Verhoosel (n 371) For further analysis see; Mary E Footer and Carol George, 'The General Agreement on Trade in Services' in Patrick F.J. Macrory, Michael G. Plummer and Arthur E. Appleton, (eds), *The World Trade Organization: legal, economic and political analysis The World Trade Organization : Legal, Economic and Political Analysis* (2005).

[374] General Agreement on Trade in Services, art XVII:2.

[375] Bernard M Hoekman, *Rules of Origin for Goods and Services : Conceptual Issues and Economic Considerations* (Centre for economic policy research 1993).

[376] WTO, *European Communities — Regime for the Importation, Sale and Distribution of Bananas - Report of the Panel*, para 7.322; WTO, *Canada — Certain Measures Affecting the Automotive Industry - Report of the Panel* (11 February 2000) WTO/DS139/R, para 10.289.

of supply can underline similarities among services but do not identify substantive characteristics. In this regard, the question of likeness across modes of supply has been raised by the Panel in Canada-Autos case and, subsequently, debated among scholars.[377] Specifically, the Panel affirmed that likeness cannot be excluded simply because two services are provided by different modes of supply.[378] Nevertheless, the idea that like services can be provided through different modes of supply is not fully convincing, first because commitments and limitations in the Services Schedules are listed and can vary according to the modes of supply. Secondly, the case US-Gambling concerning the comparison between gambling services supplied by casinos, on one side, and the same service provided online, on the other, raised perplexities both on effective similarities in the services provided through different modes and on the presumed coincident end-uses.[379] With regard to likeness among service suppliers, as for the MFN test, it is assumed from the ascertainment of "like services".

The final step aims at verifying whether a less favourable treatment is given to foreign services respect to the treatment accorded to domestic like services. As in the MFN analysis, conditions of competition are crucial to assess a violation of non-discriminatory principle.[380] However, differently from the MFN test, the pair of comparison is domestic services versus foreign services rather than like services produced from and provided by different countries.[381] Moreover, while the MFN obligation concerns exclusively treatments accorded to two or more different foreign

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[377] The Panel's view was supported in the literature, for example by Mattoo among others. Aaditya Mattoo, 'National Treatment in the GATS : Corner-Stone or Pandora's Box?' (1997) 31 Journal of world trade 107, 121.

[378] WTO, *Canada — Certain Measures Affecting the Automotive Industry- Report of the Panel*, para 10.307.

[379] WTO, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services- Report of the Appellate Body*; 'Communication from Brazil to the Council for Trade in Services, MFN, National Treatment and like Circumstances' (Job 01/165, 2001) para 11. Markus Krajewski, 'Playing by the Rules of the Game?' (2005) 32 Legal issues of economic integration : law journal of the Europa Instituut and the Amsterdam Center for International Law, Universiteit van Amsterdam Legal Issues of Economic Integration 417.

[380] Francois, Wooton and Centre for Economic Policy Research (Great Britain) (n 370); Marchetti and Roy (n 348).

[381] Wolfrum and Feinäugle (n 329) 398–399.

countries, national treatment acknowledges inherent differences deriving from the foreign character of the service provided by a foreign country compared and it excludes these elements from the analysis. In other words, national treatment test distinguishes between inherent competitive disadvantages resulting from the objective difference existing between domestic and foreign services, on one side, and measures that create additional discriminatory effect. Only the latter is in violation of the national treatment principle.[382] That being said, given the broad scope of article XVII, the assessment of less favourable treatment encompasses both *de jure* and *de facto* discrimination. The former refers to formally different treatment, meaning measures that openly differentiate between domestic and foreign services. Yet, the existence of a different treatment does not automatically constitute a discriminatory measure since it may not create an additional burden, on the contrary it may in practice facilitate trade and supply of foreign services.[383] Therefore, it is necessary to ascertain that a measure alters or modifies the conditions of competition in detriment of foreign services.[384] By the same token, formally identical treatment may result in a *de facto* discrimination, which are inconsistent with national treatment commitments and need to be removed if challenged.[385]

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[382] ibid 411; *Argentina - Measures Relating to Trade in Goods and Services- Report of the Appellate Body*, para 6.104.

[383] A clear example of different treatment that facilitates trade concerns the measures adopted to overcome language barriers. If a national procedure allows documentation written in various languages, such as English, this may reduce domestic red tape. In this hypothetical case, a different treatment does not result in a discriminatory measure, rather the other way round. Aaditya Mattoo and Pierre Sauvé, 'Domestic Regulation and Service Trade Liberalization: Looking Ahead', *Domestic Regulation and Service Trade Liberalization* (World Bank and Oxford University Press 2013).

[384] The importance of conditions of competition has been reaffirmed also in WTO, *Korea — Taxes on Alcoholic Beverages - Report of the Appellate Body* (18 January 1999), paras 135-137. Wolfrum and Feinäugle (n 329) 413.

[385] The Understanding does not add much to the national treatment principle contained in the GATS, however it disciplines the case in which facilities are provided by lender of last resort. Paragraph C of the Understanding reads *"Under terms and conditions that accord national treatment, each Member shall grant to financial service suppliers of any other Member established in its territory access to payment and clearing systems operated by public entities, and to official funding and refinancing facilities available in the normal course of ordinary business. This paragraph is not intended to confer access to the Member's lender of last resort facilities."* Van den Bossche and Zdouc (n 275) 403.

2.2.4 Market Access – Article XVI of the GATS

Liberalization of trade is primarily encouraged by eliminating market access barriers. Yet, the GATS does not contain general prohibitions in relation to market access. The reasons are partially linked to WTO Members' will to preserve their right to regulate the services sector and, partially, to the "positive list approach", which creates obligations exclusively in the sectors listed in the Schedule of Specific Commitments.[386]

Coherently with this view, article XVI of the GATS, dedicated to market access, is inserted in Part III titled "specific commitments" and recites *"[with] respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule"*.[387] Therefore, obligations do not apply unconditionally but they are valid as long as a WTO member has undertaken relevant obligations in its Schedule of Commitments, exactly as it happens for national treatment.[388]

That being said, article XVI refers mainly to quantitative restrictions and paragraph 2 details a list of six different market access barriers that cannot be adopted or maintained. In general terms, members that undertake full market access commitments cannot adopt restrictive measures falling within the exhaustive list in article XVI(2) of the GATS.[389] The rationale is to lead WTO Members to refrain from adopting more

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[386] During GATS negotiations liberalisation of trade in services was shaped as a progressive and gradual achievement that explains why in article XIX of the GATS further liberalization is explicated to 'successive rounds'. Matsushita and others (n 318) 585; Cottier (n 275); Feketekuty (n 328).

[387] General Agreement on Trade in Services, art XVI.

[388] However, the wording of the provision has led the doctrine talk about hybrid approach, deriving from the mix of a negative definition of market access and positive substantive obligations promoting a progressive liberalization. Mona Haddad and Constantinos Stephanou, 'Financial Services and Preferential Trade Agreements : Lessons from Latin America.' [2010] World Bank 20. Wolfrum and Feinäugle (n 329) 369.

[389] The list in article XVI(2) included the following measures: (a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test; (b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test; (c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test; (d) limitations on

restrictive measures, once the level of market access has been set unless specific limitations apply.[390]

Concerning market access test, the adjudicative bodies would first verify whether the respondent has undertaken commitments with regard to the sector and the mode of supply at issue and whether the measure falls under the list of proscribed access barriers in article XVI(2). Finally, the contested treatment would be compared with the minimum market access level agreed in the Services Schedule.[391] However, a measure inconsistent with market access obligations can still be justified by specific limitations expressly listed in the Schedule of Commitments or by general exceptions under article XIV of the GATS or, again, by the prudential carve-out contained in the GATS Annex on Financial Services.[392]

Concerning the practical application of market access obligations, the literature is divided. First, a unanimous stance on what type of measures fall within the scope of article XVI does not exist. Scholars have questioned whether the scope of market access should be narrowed to only foreign services and service providers.[393] On the subject, Mavroidis, has supported the assumption that the scope of article XVI is limited to foreign services and foreign service suppliers. As a consequence, the provision cannot

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the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test; (e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and (f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment. Annex of General Agreement on Trade in Services on Financial Services, article XVI(2); Croome (n 294).

[390] *Guide to the GATS : An Overview of Issues for Further Liberalization of Trade in Services* (n 333).

[391] Although affirming that a clear and solid market access test exists, this *modus operandi* was used by the Panel in the Case US-Gambling. In particular, the Appellate Body explained that even if the six types of measures listed in article XVI:2 technically consist of quantitative or numerical restrictions, also *de facto* restrictions, meaning measures having the effect of or resulting in quantitative restrictions fall under the prohibited measures and have being removed *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services- Report of the Appellate Body*, paras 230-232. Zdouc (n 350).

[392] Wolfrum and Feinäugle (n 329) 388.

[393] Wei Wang, 'On the Relationship between Market Access and National Treatment under the GATS' (2012) 46 International Lawyer 1045.

indistinctive apply to all measures. To support this viewpoint, the scholar pointed out that the explicit reference to '*other Members'* in the text of the provision emphasises intra-State trade liberalisation and the lack of a specific mention to domestic services or service suppliers in the Schedule of Commitments leads to exclude domestic services and domestic suppliers from the scope of the provision.[394] From an opposite perspective, Delimatsis and Molinuevo, suggests a wide coverage of market access obligations, including also measures influencing domestic services and service providers. The underpinnings are manifold: first, the type of measures listed in article XVI:2 include measures indistinctively applicable, secondly, excluding domestic services from the scope of the provision would diminish the essence of the market access principle itself, reducing it to a simple list of restrictive measures whose substantive violations would be assessed only under national treatment test. Finally, since Schedules of Commitments do not explicitly apply to foreign services or service suppliers in an exclusive manner, also measures affecting domestic services should be covered.[395]

The second issue of disagreement concerns the interaction between market access and other GATS provisions, such as national treatment principle. As a premise, the distinction between market access and national treatment principle is not so straightforward. Indeed, an array of measures can simultaneously result in breach of both article XVI and article XVII.[396] However, while coincident commitments in both disciplines are not particularly problematic, misalignments in the level of commitments do count. To give an example, in the hypothetical case in which a member has fully committed in national treatment and remained unbound under market access how the overlap is assessed is crucial. Abu-Akeel has used investment protection law concepts to give an interpretation of these two complementary principles. In his view, market

[394] Petros C Mavroidis, 'Highway XVI Re-Visited : The Road from Non-Discrimination to Market Access in GATS' (2007) 6 World trade review World Trade Review 1, 9; Marchetti Juan and Mavroidis Petros C., *Walking the Tightrope between Domestic Policy and Globalization* (Mimeo 2006).

[395] P Delimatsis and M Molinuevo, 'Article XVI GATS (Market Access)' in W Wolfrum, PT Stoll and C Feinaugle (eds), *WTO-Trade in Services* (2008) 367–395, at 370.

[396] Joost Pauwelyn, 'Rien Ne va plus? Distinguishing Domestic Regulation Form Market Access in GATT and GATS' (2005) 4 World Trade Review 131.

access should be intended as pre-establishment measures and national treatment obligation seen as post-establishment measures. While it can theoretically be deemed true, the difference in the case of services is not as obvious as for goods. Especially for cross-border supply, where the establishment of commercial presence is not required, the application of article XVI or article XVII according to pre and post-establishment assumptions is hard to realise in practical terms.[397]

A different scholarship has intended market access as *lex specialis* to national treatment, which implies that all measures that fall within the scope of the former will be subject to its "special regime" regardless their discriminatory nature; whereas all discriminatory measures not addressed by market access will be covered by national treatment obligation.[398] A proposal concerning this approach was submitted to the Council for Trade in Services in the context of a technical review of GATS provisions.[399] This interpretation entails serious unbalances, such as the possibility for a member that is unbound under market access discipline to introduce discriminatory quantitative restrictions as they would be excluded by the national treatment coverage.[400]

In fact, the relationship between market access and national treatment is theoretically regulated by article XX(2) which disciplines prospective partial or full overlaps by stating "*measures inconsistent with both article XVI and XVII, should be in the column relating to Article XVI. In this case the inscription will be considered to*

[397] Aly K Abu-Akeel, 'The MFN as It Applies to Service Trade : New Problems for an Old Concept' (1999) 33 Journal of world trade : law, economics, public policy Journal of world trade 103, 126.

[398] Among the supporters of this view, see Petros C Mavroidis, 'Highway XVI Re-Visited : The Road from Non-Discrimination to Market Access in GATS' (2007) 6 World trade review 1. A different perspective is provided by Mattoo (n 98), and Delimatsis, 'Don't Gamble with GATS : The Interaction Between Articles VI, XVI, XVII and XVIII GATS in the Light of the "US-Gambling" Case' (n 57).Matsushita and others (n 318) 599–601.

[399] Council for Trade in Services, 'Special Session: Technical Review of GATS Provisions, Informal Note by the Secretariat' (2001) Job (01)/17, para 6.

[400] Wolfrum and Feinäugle (n 329) 418; Terry, Laurel S., 'But What Will the WTO Disciplines Apply To - Distinguishing among Market Access, National Treatment and Article VI(4) Measures When Applying the GATS to Legal Services' Professional Lawyer Symposium Issues; Marchetti and Mavroidis (n 394).

provide a condition or qualification to article XVII as well".[401] Under the Understanding market access-related obligations are added to signatories, however the level of commitment is very limited. Specifically, the Understanding introduces a standstill obligation concerning existing monopoly rights, a best-endeavour clause for government procurement and a declaratory provision on financial services purchased by public entities in Section B.[402]

2.2.5 Domestic Regulation – Article VI of the GATS

Trade in services is mostly affected by domestic regulatory measures rather than tariffs, since regulatory divergence translates into compliance costs for markets operators.[403] The potential adverse effects of regulatory systems were evident also during the negotiation of the GATS, when a specific provision was envisaged. However, article VI attains to minimise the costs of accessing services market without promoting harmonisation as such.[404] In other words, article VI does not constitute a substantial discipline but it simply prohibits regulatory measures that hamper trade in services, including those measures that do not have a discriminatory or market restrictive nature.[405] Structurally, Article VI is articulated into six paragraphs, of which paragraphs 4 and 5 detail substantive obligations, whereas the other discipline procedural aspects.[406]

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[401] Annex of General Agreement on Trade in Services on Financial Services, Article XX:2. Wolfrum, Stoll, Peter-Tobias and Feinäugle, Clemens (n 329) 373.

[402] De Meester (n 230) 125. Understanding on Commitments in Financial Services, section B.

[403] Market operators include foreign banks and financial product issuers. Aaditya Mattoo and Pierre Sauvé, *Domestic Regulation and Service Trade Liberalization* (World Bank and Oxford University Press 2013) 27.

[404] LIM Aik Hoe and Bart De Meester, 'Putting Principles into Practice with WTO Domestic Regulation Disciplines' [2014] International Trade Forum 36.

[405] Mattoo, Stern and Zanini (n 319) 70–72.

[406] The procedural nature of the regulatory measures is particularly important for cross-border financial operations and commercial presence in order for a service provider to operate in a foreign market, where authorisation or licence is usually required. Ernst-Ulrich Petersmann and James Harrison, *Reforming the World Trading System Legitimacy, Efficiency, and Democratic Governance* (Oxford University Press 2005).

Starting with the procedural provisions, the first paragraph ensures a fair regulation in sectors with specific commitments, prescribing that "*the measures affecting trade in services are administered in a reasonable, objective and impartial manner."*[407] This paragraph recalls important principles of the rule of law by prohibiting biased domestic regulation and calling for a reasonable, impartial and objective application. While the term "measure", in accordance with article XXVIII (a), has a wide general meaning encompassing any measure "*whether in the form of law, regulation, rule, procedure, decision, administrative action or any other form*", the scope of Article VI:1 is limited to measures with general character, namely law and regulation.[408]

Paragraph 2 establishes an impartial judicial review of administrative decisions. It is based on due process objective and applies to all sectors, conversely to paragraph 1 whose application is narrowed. Moving to paragraph 3, it spells out the administrative duty to inform applicants on their application status and on the final decision in a reasonable time.[409] In essence, this paragraph guarantees a fair authorisation procedure for service suppliers limited to sectors with specific commitments.[410] Finally, paragraph 6 accords adequate competence assessment for professionals, limited to specific professional services.[411]

With regard to the substantive provisions, paragraph 4 establishes that procedural requirements, technical standards and domestic licensing shall not constitute unnecessary barriers. In addition, the paragraph identifies transparency, objectivity and avoidance of unnecessary burdensome and restrictive measures as legitimising criteria for domestic regulation.[412] Besides, paragraph 5 recites *"In sectors in which a Member*

[407] General Agreement on Trade in Services, art VI:1.

[408] Administrative acts notably hold a very specific nature, Markus Krajewski, *National Regulation and Trade Liberalization in Services : The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* (Kluwer Law International 2003).

[409] General Agreement on Trade in Services, art VI:3.

[410] Wolfrum, and Feinäugle (n 329) 176; Panagiotis Delimatsis, 'Due Process and "Good" Regulation Embedded in the GATS - Disciplining Regulatory Behaviour in Services Through Article VI of the GATS' (2007) 10 Journal of international economic law Journal of International Economic Law 13.

[411] Specifically it applies to subsector A, sector 1 titled "business services".Krajewski (n 408) 15–20.

[412] To be noted that this provision does not address any measure, on the contrary it specifically applies to measures related to qualification requirements, procedure, technical standards and licensing

has undertaken specific commitments..the Member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which: (i) does not comply with the criteria outlined in subparagraphs 4(a), (b) or (c);and (ii) could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made". [413] In essence, this paragraph proscribes that members introduce licensing requirements that do not meet criteria listed in article VI(4) and, thus, nullify or impair specific commitments in manner that could not have been reasonably.[414] In this case, conformity can be verified by referring to international standards of relevant international organisations. On this matter, interpretative footnote 3 to article VI(5) specifies that the essential criterion for standards to be legitimately taken into consideration is being drafted by international organizations with an open membership.[415] In fact, under article VI (4) of the GATS, the Council of Trade in Services has been conferred the mandate to develop a multilateral discipline that guarantees that domestic regulation measures do constitute unnecessary barriers to trade.[416]

The interpretation of the substantive obligations has been addressed by the Working Party on Domestic Regulation (WPDR) and has been debated by academia as well. The first doubt concerns the application of Article VI(4) for future disciplines. While the majority in the WPDR seems to prefer a sector-driven application,[417] the literature supported a horizontal application of the provision based on the lack of an explicit

requirements. For a clearer distinction among these different measures consult the document drafted by the WTO secretariat titled "Working Party on Professional Services, the relevance of the disciplines of the agreements on technical barriers to trade and on import licensing procedure to article VI:4 GATS, WTO Secretariat, Working Party on Professional Services (S/WPPS/W/9, 1996) para 4.

[413] General Agreement on Trade in Services, art VI(5). Wolfrum and Feinäugle (n 329) 194–195.

[414] Marcus Klamert, *Services Liberalization in the EU and the WTO :concepts, Standards and Regulatory Approaches* (Cambridge University Press 2015) 36–39.

[415] The fundamental rationale behind the open membership is to guarantee that the standards considered as reference are the result of a choral endeavour produced by a wide and effective involving decisional process. General Agreement on Trade in Services, art VI:5(b).

[416] Van den Bossche and Zdouc (n 275) 533–534.

[417] 'Informal Note by the Chairman, Room Document' 18 April 2007.

reference to a restrictive scope, differently from other paragraphs, and given the placement within GATS part II concerning general obligations.[418]

A second concern relates to the covered measures, which is to say whether regulatory instruments other than the measures listed in article VI(4) are included. In essence, members of the WPDR have discussed whether voluntary standards or standards of non-governmental bodies with delegated powers should fall within the scope.[419] Needless to say that this scenario would raise concerns about legitimacy and transparency deficit, along with likely backlash from those WTO members excluded from the standards setting process.[420] Despite the undisputed international relevance of voluntary technical standards, a commonly shared view on whether including international standards in future disciplines has not been established yet.

Finally, the wording "*measures no more burdensome*" seems to imply a necessity test to prove that the measure contested is not more restrictive than necessary. However, the provision does not clarify what kind of test has to be applied, meaning whether the measure introduces an extra barrier that was not necessary or if it has to be proven that other less restrictive reasonable alternatives were available or, again, whether the link between the measure and legitimate objectives should be taken into consideration.[421] In

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[418] Mattoo and Sauvé (n 403); Joel P Trachtman, *Trade Law, Domestic Regulation and Development* (World Scientific 2015).

[419] Nevertheless, it is noteworthy to remark that standards-setting bodies do not belong to non-governmental bodies with delegated powers as clarified in 'Working Party on Domestic Regulation, Communication from Switzerland, Proposal for Disciplines on Technical Standards in Services' (S/WPDR/W/32, 2005); Elisabeth Türk, 'GATS Negotiations on Domestic Regulation, a Developing Country Perspective' in Alexander Kern Kern, ‚Andenæs, Mads Tønnesson, and Mads Andenas (eds), *The World Trade Organization and trade in services* (Martinus Nijhoff Publishers 2008).

[420] Aaditya Mattoo, 'Services in a Development Round Three Goals and Three Proposals' (2005) 39 Journal of World Trade 1223; Suparna Karmakar, 'Disciplining Domestic Regulations under GATS and Its Implications for Developing Countries: An Indian Case Study' (2007) 41 Journal of World Trade 127.

[421] The WPDR has looked at sectors regulated by the WTO regime and characterised by a high technicality, a relevant presence of international standards that serve in the adequacy test, such as food sector in which SPS and TBT measures are frequently adopted. For a comprehensive picture of the analysis of domestic regulation see Delimatsis, 'Due Process and "Good" Regulation Embedded in the GATS - Disciplining Regulatory Behaviour in Services Through Article VI of the GATS' (n 410); Joel Trachtman, 'Negotiations on Domestic Regulation and Trade in Services (GATS Article VI): A Legal

its case law, the approach used by the Appellate Body consisted of verifying a *prima facie* violation and then assessing the necessity of the measure. Basically, the measure has to nullify or impair a WTO member's right and the claimant bears the burden to prove the lack of necessity under article VI, whereas the respondent has to justify the measure allegedly inconsistent under the general exception provision conceived in article XIV.[422]

To a certain extent it can be affirmed that domestic regulation complement both non-discrimination principles (articles II and XVII), in relation to the non-discriminatory nature of the regulatory requirements, and market access (article XVI), for what concerns the quantitative restrictive effect that a domestic regulatory measures can have.[423] Theoretically, potential conflicts between market access and domestic regulation are solved by article XX(2), which regulate overlaps.[424] However, some authors[425] have raised questions on the mutual exclusivity between market access (article XVI) and domestic regulation (articles VI). On this matter, the Panel in US-Gambling case specified that different regimes entail different compliance tests.[426] Market access requires the removal of the restrictive measure unless justified under

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Analysis of Selected Current Issues.' in Ernst-Ulrich Petersmann and James Harrison (eds), *Reforming the world trading system legitimacy, efficiency, and democratic governance* (Oxford University Press 2005). For a synthesis of different proposals concerning the current system refer to Panagiotis Delimatsis, 'Towards a Horizontal Necessity Test for Services : Completing the GATS Article VI:4 Mandate' in Marion Panizzon, Nicole Pohl and Pierre Sauvé (eds), *GATS and the regulation of international trade in services GATS and the Regulation of International Trade in Services* (Cambridge University Press 2008).

[422] The necessity test has been largely applied in trade in the cases *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services- Report of the Appellate Body*; *Brazil — Measures Affecting Imports of Retreaded Tyres - Report of the Appellate Body* [2007] WTO/DS332/AB/R [225].

[423] Alexandre Kern, 'The GATS and Financial Services: The Role of Regulatory Transparency' (2007) 20 Cambridge Review of International Affairs 111.

[424] Laurel S Terry (n 400); Zdouc (n 350).

[425] Pauwelyn, 'Rien Ne va plus? Distinguishing Domestic Regulation Form Market Access in GATT and GATS' (n 117) 967.

[426] To be noticed that the issue was not appealed and consequently, it was not addressed by the Appellate Body but exclusively by the Panel. *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services- Report of the Panel* [6.307-6.308].

GATS exception clause, whereas in case of domestic regulation the validity of a measure is tested under article VI and only if it is found inconsistent it can be justified under the general exception provision. Coherently with the Panel's findings in the US-Gambling case, the Scheduling Guidelines for GATS Commitments affirm the discipline differentiation, clarifying that non-discriminatory measures do not fall within market access obligations but within domestic regulation instead.[427] While a measure that corresponds to those listed in article XVI:2 is obviously in violation of market access obligation and needs to be removed, it remains unclear whether a similar measure can be assessed under article VI even if it is found in violation of article XVI.[428] Despite the objective differences in the three disciplines, potential conflicts remain to be solved by adjudicative bodies since the GATS neither under
article XVII nor under VI cover the full spectrum.[429]

Although Under the Understanding a separate discipline is not remarked, a reference to reverse effects deriving from unnecessary trade restrictive measures is made. Indeed, Section B:10 titled 'non-discriminatory measures' introduces a best endeavour clause which reads "[*Each*] *Member shall endeavour to remove or to limit any significant adverse effects on financial service suppliers of any other Member..".* The provision proscribes measures that affect financial service suppliers by constraining the expansion of financial activities, altering the suppliers' ability to operate or generating 'reverse

[427] The WTO Council for Trade in Services, 'Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS)' (2001) S/L/92 para 11. In particular, see also the 'Informal Note by the Chairman of the Working Party on Professional Services "Discussion of Matters Relating to Articles XVI and XVII of the GATS in Connection with the Disciplines on Domestic Regulation in the Accountancy Sector"' (1998) Job No. 6496, in which mutual exclusivity was mentioned.

[428] De Meester (n 230) 180; Joel Trachtman, 'Lessons for the GATS from Existing WTO Rules on Domestic Regulation' in Aaditya Mattoo and Pierre Sauvé (eds), *Domestic Regulation and Service Trade Liberalization* (World Bank and Oxford University Press 2003).

[429] Basically, market access obligations concern committed sectors and prohibit all measures listed in article XVI. Similarly, national treatment refers to committed sectors, though it prohibits measures if discriminatory. Concerning domestic regulation, article VI covers measures in committed sectors, even if a specific discipline is not conceived, and they must not nullify or impair other WTO members' rights. Wolfrum and Feinäugle (n 329) 420.

discrimination'.[430] In principle, this best-endeavour commitment, , concerns both market access and domestic regulation measures as it covers entry barriers, on one side, and regulatory and procedural obstacle to trade, on the other.

2.2.5.1 Harmonisation Mechanisms

Given the proliferation of international regulatory standards and the growing standards reliance by market operators, private actors and public entities,[431] standards divergence can hamper trade.[432] With this regard, different mechanisms can be adopted to prevent reverse effects and achieve harmonisation or regulation convergence.[433] Taking into consideration the use of either domestic or foreign regulatory system, the presence or the absence of an agreement and the establishment of a surveillance system, the following analysis will distinguish among the following mechanisms: national treatment, mutual or unilateral recognition (also called equivalence) and passporting. It is noteworthy mentioning that reference to these different strategies are made also by

[430] Understanding on Commitments in Financial Services, section 10, para10 letters (a), (b), (c) and (d).

[431] The proliferation of international regulatory standards concerns especially highly technical sectors, such as financial sector or food sector. In the food sector, the recourse to TBT or SPS measures is very frequent and this kind of measures have been largely recognised as highly technical, signalling the specificity of the sector as well. Marielle D Masson-Matthee, *The Codex Alimentarius Commission and Its Standards* (TMC Asser Press 2007); Petros C Mavroidis, *The General Agreement on Tariffs and Trade : A Commentary* (Oxford University Press 2007).

[432] Divergent regulatory systems and different technical standards affect trade in services, raising questions on fair competition. The latter aspect is undoubtedly relevant; however, it will not be dealt in the present work. For general foundations on the EU competition policy and principles applied see, among other, Damien Geradin, Anne Layne-Farrar and Nicolas Petit, *EU competition law and economics* (Oxford University Press 2012); David Vaughan, *EU Competition Law : General Principles* (Richmond law & tax 2006); Mel Marquis and Roberto Cisotta, *Litigation and Arbitration in EU Competition Law* (2015); Laura Parret, *Side Effects of the Modernisation of EU Competition Law : Modernisation of EU Competition Law as a Challenge to the Enforcement System of EU Competition Law and EU Law in General* (Wolf Legal Publishers 2011).

[433] Joel Trachtman, 'Adressing Regulatory Divergence through International Standards: Financial Services' in Aaditya Mattoo and Pierre Sauvé (eds), *Domestic Regulation and Service Trade Liberalization* (World Bank and Oxford University Press 2003).

international standard-setting bodies, for example, in their guidelines or voluntary policy documents.[434]

2.2.5.2 National Treatment as a Harmonisation Mechanism

From a strict trade-oriented point of view, national treatment constitutes a non-discrimination principle rather than a mechanism aiming at achieving harmonisation. However, looking merely at the type of regulatory standards used as a reference system, national treatment can be seen as one of the three possible harmonisation alternatives, along with equivalence and passporting. Basically national treatment, as a harmonisation mechanism, extends domestic requirements to foreign services and foreign suppliers. Hence, from a pure standards-focused perspective, it exemplifies the case in which a domestic regulatory system is applied to foreign services and foreign service providers. Put differently, entities domiciled in or operating from a foreign country are recognised the same treatment as to domestic ones.

From a technical point of view, the domestic regulator does not analyse or assess the foreign regulatory system with comparative finalities, but it simply requires market operators to obtain licence, approval or authorisation by following the same procedure demanded for national businesses.[435]

The advantages of this mechanism are twofold. First, it does not imply high costs in terms of human and economic resources by the importing country since comparative analysis between domestic and foreign regulatory system is not conducted. Secondly, it assures direct and local oversight as all entities are subject to the same control by domestic authority. However, while this mechanism is exclusively centred on the importing country's regulatory system, cooperation agreements may be signed.[436]

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[434] To provide with an explanatory example, IOSCO has clarified the different modalities of cross-border regulation that allows harmonisation by distinguishing between national treatment (as a harmonisation mechanism), recognition and passporting in the field of securities. IOSCO, IOSCO Task Force on Cross-Border Regulation (FR23/2015, 2015).

[435] ibid 7–8.

[436] The most used template for cooperation agreements is the so called Memorandum of Understanding (MOU) which pursues enforcement cooperation or simply facilitate exchange of information.

Nevertheless, national treatment intended as a harmonisation mechanism does not come without flaws. For example, access or exchange of information for examination or inspection purposes can result difficult, and in certain cases even prevented without the cooperation of foreign regulator. Moreover, the application of domestic regulatory requirements to foreign services and foreign suppliers do not assure a level playing field to all market operators. Foreign operators may result de facto discriminated not having guaranteed same market access opportunities and fair competition by equal treatments.[437]

2.2.5.3 Unilateral or Multilateral Recognition

Recognition can be unilateral or mutual and it is a mechanism by which rules, regulations and administrative requirements applied in a foreign country for service sale or supply are recognised as satisfactory by the importing country. This mechanism, also known as "equivalence" allows market operators that meet country of origin requirements to sell or provide services in the importing country without imposing further regulation or supervision. In a nutshell, prior to an appropriate assessment, the import regulator concedes market access to foreign services by accepting foreign regulatory regime as its own.[438] As mentioned, the recognition can be both unilateral and bilateral, however the latter is generally preferred for reciprocity principle and for positive integration.[439]

What differentiates national treatment from recognition is essentially the assessment of the foreign regulatory system that does not occur in the first case, whereas it does in the second mechanism. In practical terms, recognition implies that the national regulator

[437] Concerning the difference between *de facto* and *the jure* discrimination that may arise during the application of national treatment refer to the homonymous section 3.1.3 and generally see Marchetti and Mavroidis (n 394); Zdouc (n 350).

[438] Nicolaïdis, Kalypso, 'Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law' in Thomas Cottier, Petros C Mavroidis and Patrick Blatter (eds), *Regulatory barriers and the principle of non-discrimination in world trade law* (University of Michigan Press 2000); James H Mathis, 'Mutual Recognition Agreements : Transatlantic Parties and the Limits to Non-Tariff Barrier Regionalism in the WTO' (1998) 32(5) Journal of world trade law 267–302.

[439] De Meester (n 230).

identifies foreign measures and sectoral requirements applied to specific services and services suppliers, then it analyses its own "outcomes" before comparing its model to the foreign legal framework that would be deemed recognised only if the same level protection is guaranteed. [440]

The benefits brought out are avoidance of duplicative regulation, regulatory arbitrage and, concurrently, enhancement of reliance on both domestic and foreign system which coexist together by creating the so called "substituted compliance".[441] Nevertheless, the recognition procedure entails a careful and comparative assessment in which regulatory goals are not forcedly coincident to those of the domestic system. In details, the assessment involved three steps. First, the domestic regulator analyses the foreign regime suggesting the measures to be introduced, secondly, the foreign regulator put in place the measures agreed upon, and, finally, the foreign businesses provide the host authority with compliance details with the foreign regime.[442] Given the complexity of the process, human and economic resources may result limited or the high technicality of this comparative exercise may require experts that are rarely involved in the regulatory activity. Moreover, even if internationally-agreed standards can constitute a valuable tool in the comparative analysis, as already argued in the first chapter, they are voluntary guidelines, not always unanimously recognised and often not sufficiently detailed.[443]

However, under the GATS regime Article VII(5), suggests that WTO members refer to international agreed standards as a base for mutual recognition, whenever

[440] Stefano Battini and Benedetto Cimino, 'Gli accordi di reciproco riconoscimento di norme tecniche' (2011).

[441] The term refers to the dual regulatory system, which allows entities to comply alternatively with the host market's requirements or the foreigner's ones. IOSCO (n 434) 14. For a practical application in the EU system refer to Raj Panasar and Philip Boeckman, *European Securities Law* (Oxford University Press 2014); Jonathan Herbst and Simon Lovegrove, *A Practitioner's Guide to MiFID II* (2015)

[442] It is not rare that in the assessment phase internationally-agreed standards serve as benchmark or as comparative factors to facilitate the analysis. ibid 17.

[443] For a criticisms on the process behind standards setting decision-making read Robert P Delonis, 'International Financial Standards and Codes : Mandatory Regulation without Representation' (2004) 36 New York University Journal of International Law and Politics 563.

appropriate.[444] Hence, according to this provision, international financial standards would constitute a supplementary means to pursue harmonisation and regulatory cooperation. Nevertheless, the wording of article VII does not establish a sound commitment upon members, so the idea of international financial standards as accessory legal means deemed linked more to the interpretation of the 'ordinary meaning' of relevant terms rather than being a relevant legal source.[445]

It is important to notice that while article VII refers to recognition of supervision procedures, paragraph 3(a) of the Annex recites "Member may recognise prudential measures of any other country in determining how the Member's measures related to financial services shall be applied".[446] The wording seems to suggest that the provision in the Annex contained an exception to the application of GATS article VII. Although the recognition may take the form of an arrangement between WTO members or be expressed unilaterally, under no condition it should impede multilateral trade liberalisation.[447]

2.2.5.4 Passporting

Passporting is a harmonisation mechanism based on a fully or partially new set of specific rules, usually included in an arrangement, applicable to all jurisdictions which are parties of the arrangement.[448] In the EU passporting regime, which is the only

[444] The word 'should' is used rather that 'shall' and the wording 'whenever appropriate' give WTO members large discretion and an incentive to adopt them as they do not constitute discriminatory measures as such, however, of course, a misuse can have distortive side-effects. Annex of General Agreement on Trade in Services on Financial Services, article VII. De Meester (n 230) 201–203.

[445] Panizzon (n 421) 273–325; G Marceau, 'Conflicts of Norms and Conflicts of Jurisdiction. The Relationship between the Dispute-Settlement Mechanisms of MEAs and Those of the WTO' (2001) 35 Journal of World Trade 1081. The following section will be dedicated to the WTO case law and it will be shown that a sound standard reliance has not been established yet, at least in the financial services sector; whereas the food sector presents a quite vast case law addressing compliance with international standards. On this matter refers following section 3.2.

[446] Annex of General Agreement on Trade in Services on Financial Services, art 3(a).

[447] De Meester (n 230) 163–164.

[448] According to the IOSCO report, passporting can be considered well established only in the banking sector. IOSCO (n 434) 32–33.

existing passporting system so far, the established central regulatory authority is responsible for promoting, implementing and monitoring the rules regulating this particular type of harmonisation.[449]

In comparison to the previously described mechanisms, pass-porting creates new set of rules that are evenly applied by all State parties to the agreement. This system is based on two assumptions, harmonised rules and mutual recognition of licence.[450] Any jurisdiction can issue an authorisation or licence provided that the agreed requirements are met without demanding for extra requisites.[451] As the name of the mechanism suggests, once the service provider gets the needed authorisation, its service can be supplied in all jurisdictions covered by the passporting arrangement on the basis of harmonised rules.[452] The objectives pursued are similar to the recognition mechanism, however the oversight relies on the central authority, which needs to coordinate with the national entities of the jurisdictions involved in the system.

[449] European Parliament and Council Directive 2000/12/EC [20 March 2000, OJ L126].

[450] EU Commission, Commission Staff Working Document - EU Equivalence Decisions in Financial Services Policy: An Assessment (2017).

[451] Few examples within the EU internal market are UCITS for cross-border marketing of funds in transferable securities, MiFID passporting concerning financial and investment services and prospectus passporting is related to the prospectus, as suggested by the name. Directive 2014/91/EU amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions 2014 [2014/91/EU]; Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU Text with EEA relevance 2014 2003 [2014/65/EU].

[452] It is noteworthy examining the difference between passporting and the EU third-country equivalence. Broadly speaking, passporting is not applicable to countries which are not part of the EU or the European Economic Area, whereas a similar mechanism called "equivalence" is. Technically, a third-country can ask for this treatment only when the EU legislation provided it. Unfortunately, it does not exist a one-fit all equivalence model, conversely, it is conceded by the EU Commission on case-by-case basis through specifically tailored EU secondary law. For a deep and detailed analysis consult EU briefing, EU-country in banking legislation. Directorate General for Internal Policies and Economic Governance Support Unit, 'Briefing - Third-Country Equivalence in EU Banking Legislation' (2017) 1–10.

2.2.6 The Prudential Carve-out

With regard to exceptions conceived in the WTO legal regime, there are two categories of policy that are left to members' discretion: first, measures related to macroeconomic policy management and, secondly, prudential measures.[453] The former group encompasses all "services supplied in the exercise of governmental authority", which technically are not 'services' according to the Annex and, therefore, do not fall within the coverage of the GATS.[454] In other words, this provision preserves the autonomy of central banks in policy making in pursuant to monetary and exchange rate goals.[455] While a measure targeting monetary objectives or central banks' activities cannot be challenged, measures adopted by a national monetary authority can still fall within the scope of the GATS provided that they negatively affect trade in financial services. Thus, the GATS exception looks at the sectors impaired by a specific measure independently from its nature (e.g. macro-prudential policy) or its origin (e.g. if it is promulgated by a central bank).[456]

The second exception embraces measures adopted for prudential reasons. Article XII titled "Restrictions to safeguard the Balance of Payment" accords a temporary waiver to WTO specific obligations, under strict procedural and substantive conditions, when a State faces serious balance-of-payment and external financial difficulties.[457] However, the prudential provision *par excellence* is spelt out in paragraph 2(a) of the

[453] The term "carve-out" in the present section refers to the label that has generally been given to prudential provisions and does not mean to define the function of the clause that, as it emerges from the analysed in the chapter remains undefined between exception and carve-out.

[454] Eric H Leroux, 'What Is A "service Supplied in the Exercise of Governmental Authority" under Article I(3)(b) and (c) of the General Agreement on Trade in Services?' (2006) 40 Journal of World Trade 348.

[455] Annex of General Agreement on Trade in Services on Financial Services, para 1(b)(i).

[456] De Meester (n 230) 101.

[457] Paragraph 1 and 2 contain the substantive criteria, whereas paragraphs 4 and 5 detail the procedural requirements, which impose upon Members a duty of notification to the General Council when such measures are adopted and duty of consultation with the Committee of Balance-of Payment Restriction. Thus, the article recognises the WTO the power to assess the seriousness of the economic situation and to ascertain compliance with the substantive requirements and the appropriateness of the national measures chosen, and, finally, to adopt non-binding recommendation if deemed necessary. Giovanna Adinolfi (n 341) 171; Yokoi-Arai, Mamiko (n 331) 626.

GATS Annex, which reads *"Notwithstanding any other provisions of the Agreement, a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Member's commitments or obligations under the Agreement"*.[458]

Paragraph 2(a), titled "domestic regulation", recognises States high discretion by waiving WTO members from their obligations when prudential measures are introduced to safeguard investors, depositors, policy holders or persons and international financial stability.[459] Although the term "prudential" is not clearly defined, the list of legitimate goals encompassed therein is commonly considered an illustrative and not an exclusive list.[460] In comparison to other legal documents, mainly bilateral treaties, containing a specific discipline for financial services moulded on GATS template, paragraph 2(a) results extremely vague on the meaning of prudential reasons, which is not even provided in the explanatory footnote.[461] Yet, the wide acknowledgement of sovereign prerogatives in regulating the financial sector, broadly intended, is counterbalanced by the "avoiding clause" that prevents the use of the label "prudential" as an excuse to

[458] The Prudential exception is limited neither by time-constraints or procedural requirements, as the balance of payments waiver. Matsushita and others (n 318) 630.

[459] The vague notion reflects the disagreement among States during the Uruguay Round negotiations. Wolfrum and Feinäugle (n 329) 634. For a detailed analysis on the negotiations history see Carlo Maria Cantore, '"Shelter from the Storm": Exploring the Scope of Application and Legal Function of the GATS Prudential Carve-Out' (2014) 48 Journal of world trade 1223, 1239–1246.

[460] An analysis of the Appellate Body's interpretation of "prudential measures" in the recent Argentina-financial services case is presented in the section 3.2.2.

[461] The comparison is drawn between the GATS prudential carve-out and some US bilateral investment treaties (BITs) or the US PTAs. Inu Barbee, Simon Lester, 'Financial Services in the TTIP : Making the Prudential Exception Work' (2014) 45 Georgetown Journal of International Law 953. To be noted that during negotiations Australia proposed for a further definition of the provision, but the initiative did not get substantial support. See Committee on Trade in Financial Services held on 13 April, 25 May, 13 July and 9 October 2000, Committee on Trade in Financial, WTO Doc. S/FIN/M/25-28 (2000).

circumvent WTO obligations.[462] Nevertheless, in practical terms, what kind of measures fall within the scope of paragraph 2(a) remains to be defined by the WTO adjudicative bodies.[463] Besides, how to assess the legitimacy of an alleged prudential measure is not specified either. In essence, the relationship between the measure adopted and the protected prudential goals has to be assessed in the dispute proceedings. Given that a nexus between the measure and the underlying rationale has to be ascertained,[464] the analysis can address different aspects, i.e. the means adopted to verifying that the measure is reasonably suitable to achieve the goal pursued, the effects produced in a way that excludes *de facto* protectionist measures from those allowed, and, finally, the intent behind the measure, practically identifying a measure as prudential where it preserves prudential objectives.[465] This interpretative issue is crucial to avoid that measures effectively trade restrictive or simply excessively burdensome elude the tests set out for other disciplines, such as domestic regulation (article VI) or market access obligations (article XVI) being erroneously justified under the prudential label.[466]

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[462] Barbee (n 461) 961. The repetition of the same prescription in the sentence "*[w]hether such a measure do not conform"* and in the opening notwithstanding formula, has generated ambiguities and warning on a potential duplicative effect, which may lead to interpret the second sentence as a further requirement rather than a general prohibition of abuse of rights, similarly to the one conceived in the chapeau of article XX.

[463] In the *travaux preparatoirs* five propositions for the definition of prudential measures were considered. Briefly, considering prudential measures only measures qualified national treatment provisions or referring to reasonable measures, alternatively introducing an illustrative list or including conditions of unqualified rights and finally detailing possibly permitted measures. For a comparative analysis between the proportionality exercise of the EU system and the same exercise carried out the WTO. GATT, doc. MNT.GNS/FIN/I (1990) para. 78.

[464] WTO, Doc. S/FIN/M/67' (2011).

[465] For the approaches mentioned, see respectively, De Meester (n 230); A von Bogdandy and Joseph Windsor, 'Annex on Financial Services' in Rüdiger Wolfrum, Stoll, Peter-Tobias and Feinäugle, Clemens (eds), *WTO:trade in services* (6th edn, Martinus Nijhoff Publishers 2008) 618; Sacha Wunsch and Aaditya Mattoo, 'Pre-Empting Protectionism In Services' 7 Journal of International Economic Law 765, 765; Joel P Trachtman, 'Trade in Financial Services under GATS, NAFTA and the EC : A Regulatory Jurisdiction Analysis' (1995) 341 Columbia journal of transnational law 37.

[466] It remains unclear whether prudential measures still have to abide by transparency and objectivity, the substantive requirements spelt out in article VI or if they are waived due to their prudential nature. Giovanna Adinolfi (n 341) 176–178. Similarly, Delimatsis and Sauvé underline the intentionally broad scope of the prudential carve-out (compared to the obligations related to the quality of services spelt-out in article VI) that entails a case-by-case balancing exercise conducted by the WTO adjudicative

From a functional point of view, while generally labelled as 'prudential carve-out', the nature of this provision remains unclear. The wording of Paragraph 2(a) starting with the *"Notwithstanding.."* has led a flourishing array of academic voices to suggest that the formulation is typical of exceptions.[467] Indeed, the supporters of the exception-type provision have underlined the similarities with article XX of the GATT or article XIV of the GATS which are exceptions *per excellence*.[468] First of all, "the notwithstanding formula", is typical of exception clauses, as already mentioned. In addition, the last sentence of Paragraph 2(a), that refrains WTO members from using prudential measures as disguised restrictions, reflects the chapeaux of article XX and it is identical to, i.e. *abuse of right* or *bona fide clause* in article XIV of the GATS.[469]

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bodies, where IMF or Basel standards can come in handy, according to the authors. Panagiotis Delimatsis and Pierre Sauvé, 'Financial Services Trade after the Crisis: Policy and Legal Conjectures' (2010) 13 Journal of International Economic Law 837, 851–853. Unfortunately, the Argentina case presented in the following section has not shed light on this very aspect.

[467] Joseph Windsor, 'The WTO Committee on Trade in Financial Services: The Exercise of Public Authority within an Informational Forum' [2010] The exercise of public authority by international institutions: advancing international institutional law 405, 1821; Armin von Bogdandy and Joseph Windsor, 'Annex on Financial Services', *WTO : trade in services* (2008) 634; Delimatsis and Sauvé (n 466) 851; Alexandre Kern, 'The GATS and Financial Services: Liberalisation and Regulation in Global Financial Markets' in Kern Alexander and Mads Andenas (eds), *The World Trade Organization and trade in services* (Martinus Nijhoff Publishers 2008) 585.

[468] The solid key similarity resides in the allocation of the burden of proof as pointed out in Anne van Aaken and Jurgen Kurtz, 'Prudence or Discrimination - Emergency Measures, the Global Financial Crisis and International Economic Law' (2009) 12(4) International Economic Law 859, 876; Juan A Marchetti, 'The GATS Prudential Carve-Out' in Panagiotis Delimatsis and Nils Herger (eds) (Kluwer Law International 2011) 285.

[469] Article XX of the GATT and article XIV of the GATS constitute the general exception provisions. Eric H Leroux, 'Trade in Financial Services under the World Trade Organization' (2002) 36 Journal of World Trade 413; Marchetti (n 468). For a complete dissertation supporting the opposite view, meaning the functional role of the prudential carve-out as a provision that excludes prudential measures form the scope of the Annex rather than an exception, consult Cantore (n 459) 1234. The author opposes to the majoritarian stance according to which the last sentence of the prudential carve-out can be compared to the chapeau of article XIV of the GATS given the similar "abuse of right" formulation. The main reason lies on the fact that article XIV of the GATS provides an extra requirement that has to be read in the context of the exception provision, whereas paragraph 2(a) of the Annex does not - as its last sentence applies without conditionality. For further opinion supporting the carve-out hypothesis based on the lack of a standard necessity test (typical of exception provisions instead) see Yokoi-Arai, Mamiko (n 331). Conversely, for a rebuttal stance, refer to Delimatsis and Sauvé that attribute the placement of the prudential carve-out to two complementary rationale during negotiation: the first one aiming at creating

Last but not least, similarly to exceptions, also prudential measures do not need to be scheduled.[470]

On the other side, an emerging stream of the literature disagrees with the previous interpretation and would rather categorise Paragraph 2(a) as a traditional carve-out based on two elements: the structure of the provision and the placement within the agreement. Concerning the former, the classic structure of exception-provisions presents a *chapeau,* provides with an exhaustive list of policies covered and refers to a necessity test to prove the adequacy of a measure. None of these elements is present in Paragraph 2(a) since it has no chapeau, the list of measures has been declared non exhaustive and, finally, it gives no reference to a necessity test.[471] With regard to the inclusion of Paragraph 2(a) under a specific discipline within the GATS context, the prudential carve-out is comprised in the provision titled "domestic regulation" so attributable to article VI of the GATS, rather article XIV devoted to general exception, instead.[472] According to this view, if contracting parties had conceived the limitation of GATS obligations as an exception, it would have been inserted within all other exceptions under article XIV rather than being included within domestic regulation discipline.[473] The reasons behind the placement of Paragraph 2(a) could be found in the historically

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a horizontally applicable framework envisaging also general exception, i.e. article XIV, and the second one more sector-specific, targeting trade in financial services, so the prudential carve-out, which was not place under the general discipline given its vertical applicability. Delimatsis and Sauvé (n 466) 849.

[470] The non-scheduling of exception has been confirmed also by the guideline concerning the mentioned subject. WTO Council for Trade in Services, 'Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS)' (n 427) para 13; WTO Council for Trade in Services, 'Background Note by the Secretariat on Financial Services' (1998) S/C/W/72.

[471] Cantore (n 459) 1232.

[472] In the Argentina case, the Appellate Body declared that the prudential waiver is not limited to solely domestic regulation measures, falling within the scope of article VI. As a result, any measure adopted for prudential reason can theoretically be considered within the scope of paragraph 2(a) of the Annex. *Argentina - Measures Relating to Trade in Goods and Services - Report of the Appellate Body*, paras 2.262, 2.272.

[473] Cantore has delved into the historical background and the dynamics during the negotiations and underlines that the original aim was not limiting States' regulatory freedom in order to avoid excessive and inadequate restrictive policies, but rather assuring that any kind of necessary measure for financial and economic stability was allowed, so "carving" the regulation of this sector out from the WTO discipline envisaged for domestic regulation. Cantore (n 459).

negotiations of the GATS, which aimed at creating a delicate balance between "progressive liberalization" and States' right to regulate, especially in a strategic sector such a financial services.[474]

However, the juxtaposition between exception and carve-out entails a substantive distinction rather than a simple taxonomic one. Indeed, an exception would still cover prudential measures in a broad sense and would assess whether a trade restrictive measure is effectively necessary and justified under prudential reasons. Conversely, carve-outs remove a certain type of measures from the scope of the obligation. This means that, in case of exceptions, prudential measures would still be subject to GATS obligations and a potential breach of GATS commitments could be anyway justified under Paragraph 2(a) of the Annex, but they would not be carve-out from the scope of the GATS, instead.[475]

The second even more relevant difference resides in the allocation of the burden of proof. In the case of an exception, the respondent bears the burden of justifying the inconsistent measure under the general exception provision.[476] Conversely, in the case of a prudential carve-out the burden of proof is reversed and lies on the complainant, given that Members are exempted from the application of certain provisions, since measures are practically carved-out from the discipline. This implies that in case of prudential carve-outs, an adjudicating body simply assesses whether the measure at issue has been adopted for prudential purposes. If the measure is found justified under prudential reasons the claims get consequently rejected, otherwise the measure has to

[474] Irwin, Mavroidis and Sykes (n 298) 680–721.

[475] Barbee (n 461).

[476] Any time the complainant makes a *prima facie* case, then the defendant has to prove that the restrictive or discriminatory policy, even if restrictive, falls within the exception previewed in the agreement. This two-step approach is confirmed also by the jurisprudence in the cases *European Communities - Measures Concerning Meat and Meat Products (Hormones)- Report of the Appellate Body* [1998] WTO/DS26/AB/R; *European Communities – Trade Description of Sardines Report of the Appellate Body* [2002] WTO/DS231/AB/R. For a more theoretical approach consult Michelle T Grando, *Evidence, Proof, and Fact-Finding in WTO Dispute Settlement* (Oxford University Press 2010) 154; Panagiotis Delimatsis and Nils Herger (eds), *Financial Regulation at the Crossroads: Implications for Supervision, Institutional Design and Trade* (Alphen aan den Rijn: Kluwer Law International 2011) 850.

be put in conformity with the WTO regime. Differently, when exceptions are invoked, the claimant has to show *prima facie* violation, meaning that has to demonstrate that the respondent has not complied with specific obligations, at that point the respondent has to justify the measure, otherwise contrary, under the exception provision by fulfilling the conditions provided for the exception itself.[477] Unfortunately, not even the most recent case *Argentina – Financial Services* has shed light on the disputed question of the nature of the provisions.[478] While the appeals did not directly address the carve-out vs exception debate, the wide interpretation of paragraph 2(a) of the Annex given by the Appellate Body, not limited to solely domestic regulation measures disciplined in article VI of the GATS, weakened one of the key underpinnings of the carve-out theory. Indeed, the supporters of the carve-out provision considered the placement of paragraph 2(a) of the Annex under domestic regulation discipline instead of under general exception discipline an argument in favour, since it would carve prudential measures out of the domestic regulation regime for financial services, otherwise it would have introduced a general exception to whatsoever measures. However, the Appellate Body's interpretation of the prudential provision did not limit the meaning of prudential measures to only measures falling within the domestic regulation discipline. Conversely, it appeared to potentially be invoked for any GATS commitment provided that conditions envisaged are fulfilled, so resulting more oriented towards a logic typical of exception-modelled provision.

To sum up, the reasons for the uncertainty in defining the nature of paragraph 2(a) is the result of delicate negotiations among parties holding different, if not conflicting, views on the matter. Not surprisingly disagreement touched various interpretative aspects, such as the question of whether including prudential policies in the dispute settlement mechanism, having only Canada, EU, US and Japan in favour during the negotiations.[479] The historical background helps explain also the existing differences

[477] Matsushita and others (n 318).

[478] For a thorough analysis refer to the next section on the WTO jurisprudence, *Argentina - Measures Relating to Trade in Goods and Services - Report of the Appellate Body*.

[479] On the still-open debate concerning the judiciability of prudential reasons, recently under spotlight concurrently with CETA and TTIP negotiations see Simon Johnson and Jeffrey J Schott, 'Financial

between domestic regulation discipline, which envisages the recourse to relevant international standards, in the adequacy test of a regulatory measure[480] and the prudential discipline that does not. As a result, the broad-worded definition of the term "prudential" along with the lack of substantial and procedural limitations, was intentionally chosen by contracting States to reconfirm their regulatory autonomy.[481] Especially in the financial sector, thus, States' sovereignty has remained essentially preserved.

2.3 THE USE OF INTERNATIONAL REGULATORY STANDARDS IN THE WTO CASE LAW

2.3.1 The WTO Dispute Settlement Mechanism

The WTO dispute settlement has widely been recognised as one of the most relevant achievements in the transition from the GATT to the WTO and one of the most innovative features within the context of international organisations.[482] Differently from the GATT, the new dispute resolution mechanism has clear procedural rules in substitution for the initial diplomatic-conciliatory process of the former trade organisation. Actually, in the early 1950s, the GATT dispute settlement mechanism shifted to a more legalistic system involving unbiased panels' reports, binding after the

Services in the Transatlantic Trade and Investment Partnership' (Peterson Institute for International Economics 2013) 1–11.

[480] Even if the Council for Trade in Services does not have specific binding powers, it is in charge of ensuring that the measure does not constitute an unnecessary burdensome barrier.

[481] See the statement by the Philippines in WTO Doc. S/FIN/M/27 (2000) para 19.

[482] The perception of the DSU as a remarkable fore step has been shared also from the inside. To mention few examples, Mike Moore, former WTO Director-General, has repeatedly described the DSU as the 'crown Jewel of the multilateral trading system' Mike Moore and World Trade Organization., *Doha and beyond the Future of the Multilateral Trading System* (Cambridge University Press 2012); Pascale Lamy, Chief of the Cabinet of the President of the European Commission from 1985 to 1994 and WTO Director-General in 2005-2013 has often recalled this concept also in press releases. WTO, 'WTO Press Release - WTO Disputes Reach 400 Mark' (2009); In addition, the vision of the DSU as an essential mechanism that enables the WTO to be effective has been expressed at the EU level in Roderick Harte, 'Briefing - Multilateralism in International Trade WTO Achievements and Challenges' (EPRS - European Parliamentary Research Service 2017).

unanimous vote of the the GATT Council. Despite a formalised and depoliticised new look, a not favourable Panel's decision could be easily blocked by the losing Party, which could use its veto in the GATT Council.[483] The elimination of this flaw along with the introduction of a second stage of the trial, i.e. the appeal, are the main changes since the establishment of the WTO system. In other words, the Understanding on Rules and Procedures Governing the Settlement of Dispute (DSU), which is part of the "single undertaking",[484] has created a more predictable, reliable, and legally binding dispute settlement mechanism that has revolutionised the multilateral trading system.[485]

At any time, a Member that perceives its right has been impaired of nullified can bring its claims before the Dispute Settlement Body (DSB).[486] The DSB is composed of WTO members, it meets about once a month and takes decision on consensus.[487] However, in three cases (i) the establishment of a panel (ii) the adoption of a panel's or the Appellate Body's reports, and (iii) the authorisation to suspensions of concessions, the 'reversed consensus' applies, meaning that the decision is automatically adopted unless WTO members otherwise by consensus.[488] In this way the report becomes automatically enforceable and cannot be halted by the losing Party. In essence, the dispute proceedings can be summarised in five key stages: (i) consultations, (ii) panel review, (iii) Appellate Body review, (iv) implementation of Panels' and the Appellate Body's reports, (v) compensation or retaliation. Bilateral or multilateral consultations constitute a preliminary phase of the process, in which the allegedly impaired party and

[483] All GATT Members sat at the Council and held an individual vote. In practice, the Panel's decisions were rarely adopted as the respondent has all interests in vetoing the adverse decision.

[484] "Single undertaking" is the term used for the WTO multilateral agreements intended as a comprehensive package that WTO members are required to accept in its entirety in order to avoid a cherry-picking approach.

[485] The general and wide reliance upon the WTO dispute settlement system is proven also by the outstanding number of disputes brought before the Dispute Settlement Body and the high compliance to decision rate. The list of the WTO disputes is available at the official website.

[486] Understanding on rules and procedures governing the settlement of disputes, art 2(1). Simon Nicholas Lester, Bryan Mercurio and Arwel Davies (eds), *World Trade Law : Texts, Materials and Commentary* (Hart 2012) 153.

[487] According to article 2.3 of the DSU, the DSB can meet ' [..] as often as necessary to carry out its functions'. Understanding on rules and procedures governing the settlement of disputes, art 2(3).

[488] Van den Bossche and Zdouc (n 275) 201–206.

the member accused of restrictive or unfair measures attempt to solve the issues by agreement. [489]

The adjudicative process starts with the establishment of a panel, in case of unfruitful mutually acceptable solution.[490] The request for a panel can be technically halted only in the DSB's first meeting in which the request is in agenda, since with the second voting the panel is automatically established unless the contrary is decided by consensus.[491] The parties should agree within twenty days about the composition of the panel, whether of three or five panellists, within a list of unbiased experts, academics or lawyers, suggested by the WTO Secretariat, and serving in their individual capacity, otherwise this task is carried out by the Director-General.[492] The panel review comprises factual and legal aspects limited to the scope of the dispute, which is spell out in the "panel's terms of reference", so technically limited to the claims identified in the "panel request" presented to the DSB.[493] The final report is adopted preferably by consensus or by majority and dissent opinions – if any – is integrated in the panel report as well.[494] According to article XII.9 of the DSU, the panel review should take six months and in any case no longer nine months before the panel report is automatically adopted by the DSB (unless it is unanimously decided the contrary) and circulated to all members.

[489] Michael J Trebilcock, Robert Howse and Antonia Eliason, *The Regulation of International Trade* (4th edn, Routledge, Taylor & Francis Group 2013) 183–188.

[490] Article 3.7 of the DSU indicates a clear preference for a solution achieved through negotiations.

[491] The compulsory nature of the dispute system is affirmed in article 6.1 of the DSU, which reads the panel "shall be established at the latest the meeting following that at which the request first appears". The automatic establishment of a panel at the latest during the second meeting after the request of panel in the DSB's agenda has led to talk of members' right to panel to underline the automatism of the process. Marceau and World Trade Organization. (n 304).

[492] The selection of panellists has a strong political component since the parties to the disputes are prone to point out those who are more likely to support their respective point of views. This is confirmed by the high percentage of panel composed by the Director-General. Van den Bossche and Zdouc (n 275) 216.

[493] Understanding on rules and procedures governing the settlement of disputes, art 8(2).

[494] It is usually drafted an interim report on which the parties to the dispute give comments, on these feedbacks the final report circulated to all WTO members. Picone and Ligustro (n 301) 134–136.

Once the official report is adopted by the DSB, the Parties to the dispute can conform to or appeal it,[495] within 60 days.[496] In the latter circumstance, the Appellate Body is called to re-examine exclusively the issues of law covered in the Panel's analysis and it can uphold, modify or reverse, partially or fully, the Panel conclusions.[497] Differently from Panels, the Appellate Body is not established *ad hoc* but it is a permanent organ composed of seven independent and impartial members which have stood out for their "*expertise in law, international trade and subject-matters of the covered agreements and broadly representative of membership n the WTO"* and they are elected for four years renewable once.[498] The Working Procedure for Appellate Review regulates the functioning of the Appellate Body and establish that the Members of the Appellate Body, simply called judges, are selected on rotation basis for every specific dispute and regardless of their nationality. The final report of the Appellate body is eventually adopted by the DSB and the Parties are recognised a reasonable period of time to implement any ruling and recommendation.[499] In practical terms, in case of violation of the WTO obligations, the respondent has to "bring the measure into conformity", meaning that the unlawful measure has to be withdrawn or modified. Article XXI call for a prompt compliance, however a reasonable period of time can be conceded by the DSB under the respondent's proposal, can be agreed by the parties, or can be set by arbitration.[500] When the reasonable period expires, if compliance is not achieved the offended State can ask for compensation, reached by agreement between the parties and then officialised by the DSB. It does not forcedly entail monetary reparation but it can be given in the form of additional trade benefits.[501] It should be

[495] Conformity to the Panel report implies that the unlawful measures has to be removed within an acceptable period of time. This is one of the greatest differences between the previous GATT institution dispute settlement and the current WTO's one. Matsushita and others (n 318) 111–114.

[496] Understanding on rules and procedures governing the settlement of disputes, art 16(4).

[497] ibid, art 17(13).

[498] ibid, art 17(3).

[499] The DSU indicates that the procedure should take up to 12 months in case of appeal starting from the establishment of the panel until the adoption of the report. ibid, art 20.

[500] Lester, Mercurio and Davies (n 486) 158.

[501] Understanding on rules and procedures governing the settlement of disputes, art 22.

noted that compensation is not retroactive, therefore it is meant to compensate the complaining State for the persisted presence of an unlawful measure. Another alternative is the suspension of concessions prior the DSB's authorisation to proceed.[502] It occurs when an agreed solution on compensation is not reached within 20 days and the ascertainment of an impairment or nullification of a benefit along with the determination of a suspension equivalent to the detriment suffered is established through arbitration. To restore the original balance, it is usually preferable to apply same sector retaliatory measures, however cross-sector measures may be adopted, exclusively if the former option is not possible.[503] Suspension of concessions are temporary authorised to bring the contested measures into compliance.

The scope of the WTO dispute settlement system is particularly broad and comprises the WTO agreement, the DSU and all multilateral agreements, including the GATT, the GATS and the TRIPS.[504] In principle, all measures that impair or nullify a benefit conceded by the covered agreements are subject to WTO jurisdiction. Those measures include violation of specific obligations, as well as non-violation complaints and the so called "situation complaints".[505] The last two are not so easy to detect. Indeed, non-violation complaints can be defined as *de facto* violation, meaning that the measure contested does not constitute a breach of the WTO regime *per se*, however it does create impairment or nullification of the claimant's benefits. Put it differently, the measure is technically consistent however it is effectively detrimental to the offended State.[506] In this circumstance, the burden of proof stays with the claimant, which has to evidence for its claims.[507] "Situation complaint" envisages a member to file a complaint in "any

[502] Matsushita and others (n 318).

[503] Lester, Mercurio and Davies (n 486) 161.

[504] These agreements are generally referred to as covered agreement. Peter van den Bossche, Denise Prévost and World Trade Organization. WTO, *Essentials of WTO Law* (Cambridge University Press 2016).

[505] Van den Bossche and Zdouc (n 275) 163.

[506] Non-violation and situation complaints mostly concern the GATT obligations, article 23(1) of the GATT and article 26 of the DSU. Lester, Mercurio and Davies (n 486) 180.

[507] *Japan - Measures Affecting Consumer Photographic Film and Paper - Report of the Panel* (1998) WTO/DS44/R [10.41].

other situation" that causes impairment or nullification. Similarly, the claimant bears the burden of proof, however, a measure belonging to this category has never been challenged so far. [508]

2.3.2 The Financial Sector: Interpretation and Application of the Prudential Carve-Out in the Argentina – Financial Services Case

The case *Argentina - Measures Relating to Trade in Goods and Services* (shorten title Argentina-Financial Services) is examined in the present chapter given its paramount importance being the financial services as such object of a WTO dispute, specifically under the GATS Annex on Financial Services (hereinafter the Annex).[509] Indeed, for the first time the so called "prudential carve-out", namely paragraph 2(a) of the Annex, has been challenged by one of the WTO members.[510]

The dispute concerned eight financial and taxation measures,[511] adopted in the attempt to combat tax evasion, which Argentina mostly imposed on services and service suppliers from jurisdictions that do not exchange information for the purposes of fiscal transparency, defined for this reason "non-cooperative jurisdictions".[512] The distinction between cooperative and non-cooperative jurisdiction was based on international

[508] Van den Bossche and Zdouc (n 275) 166–170; Lester, Mercurio and Davies (n 486) 183.

[509] *Argentina - Measures Relating to Trade in Goods and Services - Report of the Panel* [2016] WTO/DS453/R and *the Report of the Appellate Body, Argentina,* WTO/DS453/AB/R.

[510] In fact, China electronic payment case touched upon the financial services sector only indirectly, in relation to the requirements Chinese banks should meet when issuing payment cards. *China — Certain Measures Affecting Electronic Payment Services- Report of the Panel*, WTO/DS413/R. For a case note see Elisa Baroncini, 'China – Certain Measures Affecting Electronic Payment Services (WT/DS413/R)' Global Community 404.

[511] The measure challenged were withholding tax on payments of interest or remuneration (measure 1); presumption of unjustified increase in wealth (measure 2); transaction valuation based on transfer prices (measure 3); payment received rule for the allocation of expenditure (measure 4); requirements relating to reinsurance services (measure 5); requirements for access to the Argentine capital market (measure 6); requirements for the registration of branches (measure 7); and, foreign exchange authorization requirement (measure 8). Among those, exclusively measure (5) and (6) concerned financial service as such and were justified under para 2(a) of the Annex. *Argentina - Measures Relating to Trade in Goods and Services - Report of the Panel*, para 222.

[512] The distinction between "cooperative" and "non-cooperative" countries is established in the Regulations to the Income/Profit Tax Law, Decree n.589/2013.

standards and good practice drafted by the Global Forum on Transparency and Exchange Information for Tax Purposes and the Financial Task Force (FATF).[513]

According to Panama's claims, Argentine measures were inconsistent with Articles II (1), XI, XVI and XVII of the GATS and various articles of the GATT 1994, as well.[514] However, for the purposes of the present dissertation, only the provisions relevant for the regulation of trade in financial services will be examined. Specifically, the Panel's and the Appellate Body's findings will be grouped into (a) the analysis of "likeness" and the less favourable treatment, (b) the application of the prudential carve-out under paragraph 2(a) of the Annex.

2.3.2.1 The "Likeness" Test and the Less Favourable Treatment

The non-discrimination principle is a cornerstone of the WTO regime expressed through most-favoured nation obligation and national treatment. As seen in the previous section, the multilateral trade system assures that "like services" or "like service suppliers" are not discriminated face to domestic services or service suppliers and, concurrently, it guarantees they are given the most favourable treatment accorded to any other State. In

[513] The Global Forum was created in 2000 by the Organization of Economic Cooperation and Development (OECD) and the Financial Action Task Force (FATF) established in 1989 by the G7. The latter has adopted several guidelines of good practices fighting money laundering and terrorism (AML/CFT), which have been endorsed by 180 countries (at least formally) and acknowledged as key components of a sound financial system by the FSB. The AML/CFT standards, from a legal perspective, are voluntary recommendations. Concerning the institutional nature of the FATF, it is not an international organisation, since it has no legal personality, it has fix-term mandate, which is periodically reviewed, and a peer-review as compliance mechanism. While Argentina is a member of the FATF, where Panama is not. Panama, has been classified as high risk jurisdiction after the assessment of the International Cooperation Review Group. Recommendations are consultable at http://www.fatf-gafi.org/publications/fatfrecommendations and the mandate accessible at 2012-2020 (visited September 2017). For a detail explanation of the FAFT see James H Freis, 'The G-20 Emphasis on Promoting Integrity in Financial Markets' [2010] International monetary and financial law : the global crisis 104.

[514] Argentina invoked article XIV of the GATS, the general exception provision, to justify all measures excluded measures 5 and 6 for which the prudential carve-out was used as positive self-defence. Concerning the respondent's defence under the general exception clause, the Panel found that the arbitrary application of the measure produced unjustifiable discrimination within the meaning of the *chapeau* of Article XIV of the GATS and, therefore, could not be justified under this exception. *Argentina - Measures Relating to Trade in Goods and Services - Report of the Panel* para. 6.203.

order to ascertain compliance with national treatment and MFN principles, the analysis of "likeness" between services and service suppliers along with the assessment of a less favourable treatment are needed. The GATS does not provide with a clear procedure to assess likeness among services and service suppliers, the examination was based on previous WTO jurisprudence and particularly, on previous GATT case-law concerning like products test.[515] The proxies generally used to verify the likeness among two products, and possibly extended to services and service suppliers, are (i) physical characteristics, (ii) end-uses, (iii) consumer preferences and (iv) tariffs classification.[516] The test is carried out on case-by-case basis and the WTO adjudicative bodies are recognised discretion in pondering different factors' weight.[517] Alternatively, products or services can be assumed alike when the discrimination is exclusively hinged on origin, so the likeness can be presumed and the measure is checked only for less favourable treatment. With this regard, the analysis of less favourable treatment aims at assessing whether a contested measure alter market competitive conditions favouring domestic services (in the case of national treatment) or other countries' services (under the MFN principle).[518]

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[515] Some authors have criticised the transposition of the GATT analysis into the GATS likeness assessment, calling for a narrower and more specific test that considers the intangible nature of services compared to goods. Robert Howse, 'The World Trade Organization 20 Years On: Global Governance by Judiciary' (2016) 27 European journal of international law 9. Robert E Hudec, '"Like Product": The Differences in Meaning in GATT Articles I and III' in Cottier, Thomas and Mavroidis, Petros (eds), *Regulatory Barriers And The Principle Of Non-Discrimination In World Trade Law* (University of Michigan Press 2000).

[516] Notably, these criteria can be more easily assessed in the comparison among products rather than services, especially for the first one. However, the second and the third are considered in light of a potential modification of the competitive market conditions even if the concept of directly competitive or substitutable services are not always applicable. Finally, the fourth criterion is usually assessed recurring also to the CPC classification and looking at the modes of supply that the two services pertain to, tools that help identifying similarities. For a *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services - Report of the Appellate Body.*

[517] Discretion has been recognised as unavoidable already in *Japan – Taxes on Alcoholic Beverages - Report of the Appellate Body* [1996] WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R; for a overall picture of the balancing interests mechanism see Petros C Mavroidis, *The Regulation of International Trade: GATT* (MIT Press 2016).

[518] To be noted that the likeness test has been carried out for both the MFN and the national treatment principles, however the former is unconditionally applicable whereas the latter is linked to specific

Given these premises, on the merits the Panel found that the different treatment accorded to cooperative and non-cooperative jurisdictions was based exclusively on origin, so it presumed likeness among services and service suppliers at issue.[519] Subsequently, the Panel ascertained that the measures imposed to non-cooperatives jurisdictions produced a less favourable treatment compared to alike services and service suppliers of cooperative countries, therefore, in violation of Article II (1). Yet, in the Panel's view, these measure did not alter the conditions of competition by favouring Argentine market operators and, consequently, they could not be deemed inconsistent with Article XVII of the GATS.[520]

The Appellate Body modified the Panel's conclusion concerning discrimination claims since it found that the Panel erred in the assessment of "likeness analysis". In particular, the Appellate Body clarified that the "presumption of likeness" occurs when a measure makes a distinction between like services and service providers exclusively based on origin.[521] In the Appellate Body's view, while the Panel established the presumption of likeness "by reason of origin", it was unable to ground the distinction

commitments. Panagiotis Delimatsis and Bernard Hoekman, 'National Tax Regulation, International Standards and the GATS: Argentina—Financial Services' [2017] TILEC Discussion Paper 10–12.

[519] The conclusion drawn by the Panel originated from the impossibility to find consistency in the application of the rationale behind the Decree No 589/2013. Precisely, the domestic piece of legislation accorded the designation of cooperative jurisdictions, to countries (i) having concluded an agreement with Argentina in the context of exchange tax information or (ii) having agreed to negotiate such agreements. Part of the incoherence derived from the fact that originally Panama was listed among the non-cooperative jurisdictions but immediately after the recourse to the Panel Panama received the cooperative jurisdiction status even if lacking the requirements. As a consequence, the attribution to one of the two designations did not result supported by the established underpinnings. ibid 5–6.

[520] *Argentina - Measures Relating to Trade in Goods and Services - Report of the Appellate Body* [2016] WTO/DS453/AB/R para 6.203.

[521] The Appellate Body clarified the flaws of the Panel's analysis, at the same time it recognized that the presumption of likeness in the context of services presents further complexities compared to the market of goods (in light of the different modes of supply). Moreover, it specified that the analysis of likeness should involve also services suppliers and not only the services provided. In addition, the Appellate Body affirmed that only when the complainant succeeds in making a *prima facie* case based on origin, which is not rebutted by the respondent, the Panel can proceed with the analysis of 'less favourable treatment', without assessing competitiveness. In any case, the claimant always bears the burden of proof. *Argentina - Measures Relating to Trade in Goods and Services - Report of Appellate Body* para 6.36, 6.38, 6.39.

between cooperative and non-cooperative jurisdictions solely on "origin per se". The designation was, in fact, based on a regulatory framework (cooperative vs non-cooperative jurisdictions), which was intrinsically linked to such origin but not exclusively based on it. Hence, the Panel should have continued its analysis and distinguish between inherent competitive disadvantages, stemming from the foreign character of a service, which requires no justification, and conditions of competition, whose modification due to a contested measure can be challenged, instead.[522] In essence, the Appellate Body affirmed that the competitive relationship between alike services and service suppliers is a precondition for the assessment of less favourable treatment[523] and, by wrongly assuming the likeness between services and suppliers at issue, the Panel overlooked equally significant competitive factors.[524] Finally, the Appellate Body overturned the Panel's findings that services and service providers of non-cooperative countries were like those of cooperative countries.[525]

Concerning the less favourable treatment, the Appellate Body faulted the Panel for considering regulatory aspects as a separate step in the analysis, specifying that it would rather be part of the inquiry related to the conditions of competition. More precisely, despite having established that the distinction between cooperative and non-cooperative countries was not based on the access to tax information, the Panel analysed anyway regulatory aspects as to a justification for measures already found detrimental.[526] To a certain extent, the Panel's argumentations alluded to a potential capability of regulatory aspects to render measures that alter the competition conditions consistent with Articles II and XVII of the GATS. Precisely, the Appellate Body asserted that an erroneous legal standard was employed by the Panel, not traceable neither in the text of the provisions nor in the object and the purpose of the GATS. In the Appellate Body's view, where a

[522] *ibid,* para *6.104.*

[523] ibid, para 6.5.

[524] The modification of competition conditions as a test for less favourable treatment, was already established in China electronic payment case, *China — Certain Measures Affecting Electronic Payment Services- Report of the Panel,* WTO/DS413/R.

[525] *Argentina - Measures Relating to Trade in Goods and Services- Report of Appellate Body* para 6.154.

[526] Access to tax information was declared '*raison d'etre*' of the Decree 589/2013, the contested piece of legislation'. ibid, para 6.136-6.137.

measure is inconsistent with the non-discrimination provisions of the GATS regulatory aspects would be rather construed in the demonstration that conditions under GATS general exception are met rather than as justifications for violations article II or XVI.[527] As a result, the Appellate Body concluded that the Panel's findings on less favourable treatment lacked of appropriate legal bases and reversed the Panel's conclusions under articles II(1) and XVII of the GATS.[528]

To sum up, the analysis of likeness and less favourable treatment provided in the Argentina case adds further certainty on how the assessment has to be conducted. In particular, the Appellate Body established the standards for determining likeness and how a panel should proceed, under which conditions the presumption of likeness between financial services and service providers can be assumed and in what cases modifications of the conditions of competition become relevant for the examination. Furthermore, it specifies that regulatory aspects serve only in the establishment of an unfair competitive relationship and should not constitute an additional step of the analysis of less favourable.

2.3.2.2 Legal Interpretation of the Prudential Carve-Out

Argentina justified the contested measures under the prudential carve-out (PCO), which acknowledges States' right to adopt prudential policies. In the analysis of the prudential carve-out contained in para 2(a) of the Annex, the Panel differentiated between prudential measures and measures taken for prudential reasons giving national regulators a very broad discretion to decide what prudential reasons to pursue and what tool to use provided that a sound causal relationship is proved. In details, the Panel explained that a three-step test is required. The first step, referred to as the threshold or the preliminary question, verifies that a measure falls within the scope of paragraph 2(a) of the Annex and the second phase ascertains the existence of a genuine link between

[527] ibid para 6.115. For a stance in favour see Delimatsis, Panagiotis and Hoekman, Bernard (n 252).

[528] *Argentina - Measures Relating to Trade in Goods and Services - Report of Appellate Body*, para 6.147.

the measure and the prudential reasons behind its adoption. Once the prudential nature of the measure at issue has been established, the third step examines the consistency with the "avoidance clause", expressed in the second line of the paragraph, which prevents the use of the prudential carve-out as an excuse for eluding other WTO commitments.[529] In the Argentina case, given the lack of an etiologic link between the contested measures and the underlying prudential reasons, the Panel did not follow its examination till the third step and concluded that the measures could not be justified under paragraph 2(a) of the Annex.[530]

Panama appealed only the preliminary question and argued that the measures falling within the scope of the Paragraph 2(a) could have been only "domestic regulation" measures under article VI of the GATS, coherently with the title of the provision itself. Thus, according to Panama, the Panel erred in considering prudential carve-out as a potential justification for all type of inconsistency under the GATS.[531] While the Appellate Body, confirmed the three-step reasoning employed by Panel it limited its analysis to the preliminary threshold appealed. With regard to the scope of paragraph 2(a) the Appellate Body highlighted that no specific limitations are conceived in paragraph 1 titled "the scope and the purpose". Moreover, the ordinary interpretation of the term "domestic regulation" is particularly broad, embracing "*law, regulation, rule, procedure, decision, administrative action and any other form"* according to article XXVIII (a) of the GATS. Complementarily, the "notwithstanding formula" leads to a broad interpretation of the scope of the provision as if its coverage embraces any kind of inconsistency with the GATS obligations, accordingly with the Panel conclusions. Therefore, the Appellate Body disagreed with Panama's arguments and dismissed its claims.[532]

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[529] *Argentina - Measures Relating to Trade in Goods and Services - Report of the Panel* WTO/DS453/R, para 7.931.

[530] ibid, para 7.947.

[531] *Argentina - Measures Relating to Trade in Goods and Services - Report of the Panel*, para 6.248.

[532] ibid, para 6.262, 6.272. While the interpretative elements provided by the Appellate Body are not decisive in the carve-out vs exception debate, the wide interpretation of paragraph 2(a) - not limited to solely domestic regulation measures under article VI of the GATS - weaknesses one of the key underpinnings of the carve-out theory, meaning the placement of the provision under domestic

As already mentioned, the case is of particular relevance as it sheds light on the prudential exception under Paragraph 2(a). Although a three-step test was established, the interpretation provided only concerned the preliminary step of the analysis, meaning the scope of the provision, which is broadly intended and encompasses a wide array of measures, not limited to those belonging to domestic regulation, under article VI. Notwithstanding these clarifications, the nature of the provision namely whether it is a carve-out or an exception remains unsolved due to the limited appeal concerning the scope of para 2(a) of the Annex.[533]

Even more important is the question as to the compatibility between domestic regulation based on international standards and the WTO regime. While the present case confirms national governments freedom to regulate the financial services sector, it does not provide useful tools to draw the line between States' discretion and trade commitments lies or to understand whether international standards can help out in this analysis, leaving significant room for further interpretative disputes.[534] The question is undoubtedly crucial given the current international scenario characterised by cyclical economic crises, a positive trend to recur to prudential measures to guarantee national

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regulation discipline rather than under general exceptions, which would link the provision to domestic regulation measures exclusively. The Appellate Body's interpretation of the prudential provision does not seem to limit prudential measures to only domestic regulation, conversely, it appears to potentially waive from any GATS commitment, so resulting more oriented towards a logic typical of exception-modelled provision. Yet, it remains unclear what kind of adequacy test has to be carried out.

[533] The issue is central in the academic debate since the definition would has crucial procedural implications, such as the allocation of the burden of proof and the effective coverage of the paragraph. As deeply examined in the previous section, in the case of a prudential carve-out the burden of proof is beard by the claimant whereas exceptions should be justified by the respondent. While from the analysis of the wording this provision can be more likely labelled as an exception, similar wording and content are detected in bilateral agreements provisions, which result to be prudential carve-out instead. For a comparative study see Andrew D Mitchell, Jennifer Hawkins and Neha Mishra, 'Dear Prudence: Allowances Under International Trade and Investment Law for Prudential Regulation in the Financial Services Sector' (2016) 19 Journal of International Economic Law 787, 805–810.

[534] Andrew Cornford underlines the need to clarify whether the carve-out extends to macro‑prudential policies as well, such as capital flow measures, especially given the current discussion on trade liberalisation, systemic risks and national interests. Cornford Andrew, 'Coverage of Prudential Measures in the GATS: Some Conclusions of a WTO Appellate Body' (Paper presented at the UNCTAD Multi-year Expert Meeting on Trade, Services and Development, fourth session 18-20 May).

stability and a global need for legitimate standards to prevent crises and respond to their adverse consequences.[535] Unfortunately, in the Argentina case the interplay between trade obligations and international standards remains ambiguous since the Appellate Body did not address directly the broader question as to whether measures fighting tax evasion, corruption and money laundering based on international good practice or recommendations can legally be adopted against a country considered non-cooperative.[536] Taking a decisive and assertive stance results very difficult given the limited clarifications provided. Yet, some assessment criteria are undeniably necessary to understand the role of international standards in policy making. Decisive factors on which founding standard reliance may be States' general acceptance (proved by national implementation or conformity of national policies to international requirements), openness and effective participation into the decisional process,[537] or considering the standard-setters and excluding standards produced by entities other from international organisations *stricu sensu*. From the time being, it is hard to interpret international regulatory standards as a justification for trade restrictive policies. Nevertheless, future cases are very likely to be brought before the WTO DSB and the adjudicative bodies will have other chances to shed light on this debated subject. However, the common

[535] Over the last decade international effort in fighting tax evasion, corruption and money laundering have been remarked worldwide, as also acknowledged by the Appellate Body. To give few examples, the G20, the OECD Global Forum and the Financial Action Task Force (FATF), have strongly endeavoured to promote best practices and to define a common approach to prevent global financial risks. The international effort was remarked by the Appellate Body, *Argentina - Measures Relating to Trade in Goods and Services - Report of the Appellate Body,* para 6.189 – 6.191. Concurrently, numerous controversial issues, such as 'Panama papers', Google tax case and banks' misconduct in relation to the sale of unsafe financial products, have raised public concerns and governments' awareness of the need for higher accountability and transparency. Cohen and Sabel, 'Global Democracy' (n19) 765–766; Jan Wouters, *Global Governance and Democracy :a Multidisciplinary Analysis* (Edward Elgar Publishing 2015).

[536] By analogy, capital requirements adopted by the Basel Committee can be used as a benchmark to assess national measures' adequacy with or deviation from relevant international standards.

[537] For a comparative analysis of the approach adopted by the WTO adjudicative bodies in the SPS and the TBT discipline, Giovanna Adinolfi (n 341).

belief that the regulation of the financial sector remains within domestic domain could hardly be disputed.[538]

2.3.3 The Food Sector: Standard Reliance and Presumption of Conformity under the SPS Agreement

From the Argentina – Financial Services case, the questions concerning the recourse to international regulatory standards in WTO disputes, both as an interpretative tool for WTO provisions and as a justification for WTO-inconsistent measures remain unanswered. Moreover, being the Argentina- Financial Services case the first dispute in which the prudential carve-out was challenged, the WTO case law results limited and does not allow further analysis in the financial sector.

Yet, it is noteworthy mentioning that the WTO adjudicate bodies are not totally new to questions concerning the role of international standards in domestic policy-making, specifically in highly-technical sectors. Indeed, WTO panels and the Appellate Body have extensively dealt with the role of international standards in the food sector, particularly in the EC-Hormones case, the India-Agricultural products case, the US-Meat Products case and the Russian Federation-Pigs case under the SPS Agreement, and the EC-Sardines case and the US-COOL case under the TBT Agreement.[539]

The comparative analysis between the financial and the food sector originates from the objective similarities among the two systems: first, the high presence of international

[538] Treves, Tullio, 'Monetary Sovereignty Today' in Giovanoli, Mario (ed), *International monetary law : issues for the new millennium* (Oxford University Press 2000); Zimmermann, Claus D., 'The Concept of Monetary Sovereignty Revisited' (2013) 24 The European Journal of International Law 797.

[539] The disputes effectively brought before the WTO adjudicative bodies have been 45, under the SPS Agreement and 52 under the TBT Agreement. The present work examines only six of the total disputes having considered only disputes that address alleged violation of article 3 of the SPS Agreement and article 2 of the TBT agreement interpreted either by a panel or by the Appellate Body. For the sake of clarity, although in few disputes, such as the US-Poultry case (DS392), the EC-Biotech case (DS291, DS292, DS293) and the EC-Asbestos case (DS135) the respective claimants effectively challenged the provisions related to international standards, the disputes were settled through Parties' consultation without the recourse to the WTO adjudicative bodies. Therefore, these cases were excluded from the analysis. In addition, the panel's report on the Indonesia-Chicken case (DS484) at the moment of writing has not been circulated yet (expected date summer 2017) so it has not been examined.

regulatory standards in both sectors and, secondly, the similar institutional, structural and procedural characteristics of both the standard-setters and the standard drafting. To give an example, the Basel Committee, IAIS, IOSCO (for the financial sector) and the Codex Alimentarius Commission (for the food sector) share informality in the type of actors involved, in the drafting process and in the final outcome, which consists of soft nature guidelines or recommendations. Specifically, financial and food standard-setters convene a significant number of experts and representatives of national competent authorities, rarely diplomats or government representatives, which produce mostly codes of good practice or voluntary guidelines.[540] From an institutional point of view, the similarities are manifold: food and financial standard-setters are not international organisations as such, they are usually organised in highly specific committees in charge of standard-drafting that got approved by the executive organ through a light decisional procedure.

While acknowledging the similarities between the food and the financial sector, the differences between these two systems will be carefully weighted. First, despite an associable level of informality in the structure of these standard-setting bodies and in their procedure, the Codex Alimentarius Commission acts within the context of the UN specialised agencies and works jointly with FAO and the WHO in the UN Food Standards Programme. Differently, financial standard setters do not enjoy this level of "institutionalisation", as described in the first chapter. [541] Secondly, the WTO system envisages an open reference to international standards in both the SPS and TBT agreement, whilst it does not for the financial discipline.[542]

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[540] Frode Veggeland and Christel Elvestad, 'Equivalence and Mutual Recognition in Trade Arrangements Relevance for the WTO and the Codex Alimentarius Commission' [2004] Norwegian Agricultural Economics Research Institute Oslo - Report 15–28.

[541] The international Codex Alimentarius Commission was created in 1962 with a joint act by the Food and Agricultural Organisation (FAO) and the World Health Organisation (WHO). For a full development of the Codex Alimentarius see *The History of International Food Safety Standards and the Codex Alimentarius (1955-1995)* (2012); For a EU centred perspective on the Codex Alimentarius and its action consult Veggeland and Elvestad (n 540).

[542] With regard to the disciplines considered, for the SPS field the standards drafted by the Codex Alimentarius Commission, the international Office of Epizootics and the Secretariat of the International Plant Protection Convention (according to definition of international bodies contained in paragraph 3(a)

Indeed, the Agreement on Sanitary and Phytosanitary Measures (SPS), which disciplines the adoption of domestic measures pursuing human, animal, plan life and health, contains an open reference to international standards in article 3 and the presumption of conformity of those standards to the WTO system.[543] Specifically, the standards the SPS agreement refers to are those adopted by "relevant international bodies" including the Codex Alimentarius Commission, the International Office of Epizootics and the Secretariat of the international Plant Protection Convention.[544] The paragraphs relevant for our analysis read as follow:[545]

> *1. To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3.*
>
> *2. Sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994.*
>
> *3. Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5.(2) Notwithstanding the above, all measures which result in a level of sanitary or*

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and(c) of the Annex A of the SPS Agreement) are taken into account; for the TBT discipline the standards adopted by broadly defined international bodies (for example, but not limited to, the International Standardization Organization), and for the financial sector the guidelines set by the Basel Committee, IOSCO and IAIS (particularly, the Core Principles for Effective Banking Supervision and Basel II by the Basel Committee; Objectives and Principles for Securities Regulation by IOSCO; Insurance Core Principles by the IAIS.

[543] For a deep analysis on the SPS Agreement refer to Lukasz Gruszczynski (ed), 'The SPS Agreements within the WTO System', *Regulating health and environmental risks under WTO law : a critical analysis of the SPS agreement* (Oxford University Press 2012) 39–44.

[544] The definition of the relevant international bodies is provided in paragraph 3(a) and(c) of the SPS Annex A. For a overview of food safety regulation from a transnational perspective see Hüller, Thorsten and Maier, Matthias Leonhard, 'Fixing the Codex? : Global Food-Safety Governance under Review' in Joerges, Christian and Petersmann, Ernst-Ulrich (eds), *Constitutionalism, multilevel trade governance and international economic law* (Hart 2011).

[545] WTO, Agreement on the Application of Sanitary and Phytosanitary Measures (1994) art 3.1, 3.2 and 3.3.

> *phytosanitary protection different from that which would be achieved by measures based on international standards, guidelines or recommendations shall not be inconsistent with any other provision of this Agreement.*

The interpretation and the application of this provision will be presented below through the examination of the WTO jurisprudence.

2.3.3.1 The EC- Hormones Case (DS26)

The Case *European Communities – Measures Concerning Meat and Meat Products* (shorten the EC-hormones case),[546] has been considered a landmark case for manifold reasons. First, it brought questions on States' discretion in adopting food safety measures at the centre of the international discussion. In particular, it clarified whether States have full discretion or limited autonomy in regulating trade by pursuing human health, plant protection and sustainable environment.[547] Secondly, the Panel and the Appellate Body were interrogated on the appropriate scientific risk assessment, meaning what criteria, what methodology and what threshold should be used to establish a sound and well-pondered scientific process that allows to verify the appropriateness and the proportionality of a restrictive measures adopted for safety purposes.[548] Moreover, it addressed reliance upon international standards in both the definition of human safety policy and the risk assessment process as an analytical criterion. Implicitly, transparency and accountability of the relevant international standard setters, such as the *Codex Alimentarius,* are touched upon.[549] Finally, the dispute dealt with the standard review that adjudicative bodies should or could apply to national risk analysis and health

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[546] *European Communities - Measures Concerning Meat and Meat Products (Hormones) the Report of the Panel* WTO/DS26/R and *the Report of the Appellate Body* WTO/DS26/AB/R.

[547] Fisher Elizabeth, 'Beyond the Science/Democracy Dichotomy : The World Trade Organisation Sanitary and Phytosanitary Agreement and Administrative Constitutionalism' in Christian Joerges and Ernst-Ulrich Petersmann (eds), *Constitutionalism, multilevel trade governance and international economic law* (Hart 2011).

[548] David A Wirth, 'European Communities-Measures Concerning Meat and Meat Products WT/DS26/AB/R & WT/DS48/AB/R' (1998) 92 The American Journal of International Law 755, 755–759.

[549] Many have suggested democratic reforms in order to have a more transparent, legitimate and accountant system. Daniele Archibugi, Mathias Koenig-Archibugi and Raffaele Marchetti, *Global Democracy :normative and Empirical Perspectives* (Cambridge University Press 2012).

preserving policies. In other words, the case has shed light on whether and to what extent, the WTO adjudicative bodies can revise national authorities' risk assessment, namely whether they have the power to double approve a policy designed on risk analysis conducted by national technical bodies.[550] This activity indirectly entails the definition of the role of external experts within the multilateral adjudicative process.[551]

With regard to the factual background, in 1996 the United States and Canada filed a long-running case against the European Union (European Communities at the time) in reason of restrictive measures impeding market access to meat and meat products treated with certain types of hormones. The claimants complained about the alleged breach of articles 3 and 5 of the SPS Agreement.[552] The first provision spells out the interaction between SPS measures and international standards, whereas article 5 concerns risk assessment and the prohibition of disguised trade restrictions in pursuant to precautionary goals.[553] For the purposes of the present part, only article 3 of the SPS agreement will be examined given its relevance to better understand the role of the international standards in policy design.

In detail, both the Panel and the Appellate Body interpreted the three paragraphs of article 3, however in a slightly different way. To start with the first paragraph, article 3.1 of the SPS agreement declares that WTO members "*shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist"*.[554] Thus, the task of the Panel consisted of verifying the existence of

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[550] Tracey Epps, 'Recent Developments in WTO Jurisprudence: Has the Appellate Boy Resolved the Issue of an Appropriate Standard of Review in SPS Cases?' (2012) 62 The University of Toronto Law Journal 201, 208.

[551] Joost Pauwelyn, 'The Use of Experts in WTO Dispute Settlement' (2002) 51 The International and Comparative Law Quarterly 325.

[552] Ilaria Espa, 'EC – Hormones (Appellate Body Reports)' Oxford Reports on International Trade Law Decisions, available at http://opil.ouplaw.com/page/ITL/oxford-reports-on-international-trade-law-decisions (accessed August 2017)

[553] Michael Koebele, 'EC-Hormones Case', *Max Planck Encyclopedia of Public International Law* (2007) 1–6.

[554] WTO, Agreement on the Application of Sanitary and Phytosanitary Measures, art 3.1; *European Communities - Measures Concerning Meat and Meat Products (Hormones) - Panel of the Appellate Body,* paragraph 8.76.

international standards and assess the adherence of the contested measure to them. [555] Paragraph 2 recites "*measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994."* This provision reveals a presumption of conformity to the WTO regime in case a SPS measure adopted by a State comply with international standards.[556]

The interpretation of article 3.3 has been considered the most disputable of the case proven by the deep divergence between the Panel's and the Appellate Body's view. The provision reads "*Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5*".[557] In a nutshell, the provision allows members to adopt higher level of protection in comparison with the level provided by the relevant international standards, upon the condition of a scientifically justifiable risk assessment. Obviously, the paragraph attempts to avoid protectionist measures while assuring States' freedom to regulate. Indeed, the final sentence contains an avoidance clause formulated with the classic wording "notwithstanding", which prevents members from adopting measures inconsistent with the provisions of the SPS agreements. In the footnote of article 3.3 clarified that the level of protection should be appropriate, whose concept is explained in paragraph 5 of the Annex A of the SPS Agreement.[558] That being said, on the matters, the EU disputed various aspects of the Codex Alimentarius taken into consideration in

[555] Hüller, Thorsten and Maier, Matthias Leonhard (n 544).
[556] WTO, Agreement on the Application of Sanitary and Phytosanitary Measures, art 3.2.
[557] ibid, article 3.3.
[558] "Appropriate level of SPS protection" also referred to as the "acceptable level of risk". Annex A of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (1994) para Definitions.

the Panel's analysis. First the EU argued that the standards reflected levels of protection, so they were not measures as such. Secondly, from a procedural point of view, these standards were flawed because they had not been adopted by unanimity but by a sligh majority vote proving lack of choral acceptance.[559] In addition, the Codex Alimentarius had not been adopted by the time the EU introduced the regulation of hormones for meat products. Last but not least, the EU supported the non-binding nature of standards drafted within the context of the Codex Alimentarius Commission, underlining that the presumption of conformity with the SPS Agreement would alter the very nature of these standards.[560] The Panel replied that in its analysis, none of the abovementioned elements were relevant in the ascertainment of existing standards. Further, it practically equated the term "base on", used in article 3.1, to the term "conform to", in article 3.2, which refers to a stronger reliance upon international regulatory standards.[561] Thus, the Panel interpreted paragraph 1 and 2 of article 3 as general rules and paragraph 3 as an exception of the former. As a consequence, it allocated the burden of proof upon the respondent which had to demonstrate that the conditions under article 3.3 were met, being the party most favoured by the provision.[562]

Differently, the Appellate Body interpreted article 3.3 as an alternative scenario, rather than an exception of the previous two paragraphs and reversed the Panel's findings concerning the allocation of the burden of proof, which resulted upon the claimant, instead. On the merits, the Appellate Body first started with the hermeneutic analysis of the term "based on" in article 3.1. It rejected the Panel's interpretation that associated the expression "based on" with the notion "conform to" in article 3.2, interpreted as "comply with", since a measure based on international standards do not

[559] The five Codex Alimentarius' standards were adopted with a tiny majority, 33 votes in favour, 29 against, and 7 abstentions. *European Communities - Measures Concerning Meat and Meat Products (Hormones)- Report of the Panel*, para 8.67.
[560] ibid, para 8.68.
[561] The of relevant standards covering almost all hormones at issue with the exception of the MGA. So five over six hormones were covered. ibid, para 8.73-8.75.
[562] ibid, para 8.56.

forcedly conform to those standards.[563] According to the Appellate Body, the different wording has occurred intentionally and deliberately, this is why associating the two notions would result too simplistic and inaccurate. Moreover, the stronger interpretation of the term "base on" would transform voluntary guidelines in to effective norms by attributing them a binding nature.[564] For what concerns the relationship between articles 3.1, 3.2 and 3.3, the Appellate Body clarified that article 3.3 represents an alternative situation, compared to those depicted in the first two paragraphs of article 3, rather than being an exception. In other words, the Appellate Body conceived the three paragraphs as different levels of reliance upon international standards: from a partial reliance (art. 3.1), to full conformity (art. 3.2) to a deviance in pursuant to higher protection (art.3.3). While recalling States' essential right to establish their appropriate level of protection, the Appellate Body warned that it is not an absolute right. Although no minimal procedural requirement is imposed by article 3.3, national measures have to be justified by a sound scientific solid analysis.[565]

On the merits, the Panel concluded relevant international standards existed and the EU's measures were not based on them, so they could only be justified under article 3.3 and, *inter alia*, under article 5, for the scientific assessment.[566] In detail, the Panel affirmed that the EU failed to meet minimal procedural and substantial requirements under article 3.3[567] and it did not provide a solid risk assessment under article 5, since the measure did not pass any of the scientific examinations previewed. Thus a zero tolerance approach was deemed excessive compared to the results of the risk assessment and due to the acceptance of the same hormones in pig treatments and pig products.[568]

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[563] *European Communities - Measures Concerning Meat and Meat Products (Hormones)- Report of the Appellate Body,* para 163.
[564] ibid, para 165.
[565] ibid, para 189.
[566] *European Communities - Measures Concerning Meat and Meat Products (Hormones)- Report of the Panel,* para 8.89. Lukasz Gruszczynski, *Regulating Health and Environmental Risks under WTO Law : A Critical Analysis of the SPS Agreement* (Oxford University Press 2012) 73–81.
[567] *European Communities - Measures Concerning Meat and Meat Products (Hormones) - Report of the Panel*, para 8.159.
[568] Wirth (n 283) 757.

The Appellate Body confirmed the unlawfulness of the measures however following a different reasoning. Even if reversing the allocation of the burden of proof, from the respondent (in case of an exception) to the claimant (in a traditional situation of an alleged violation of a WTO provision), the Appellate Body eventually concluded that the EC's import bans were neither based on a scientific identifiable risk[569] nor justified under article 5 of the SPS.[570]

2.3.3.2 The India -Agricultural Products Case (DS430)

The Case *India-Measures Concerning the Importation of Certain Agricultural Products* (shorten title India-Agricultural Product)[571] is one of the most recent cases adjudicated by both the Panel and the Appellate Body in which the SPS Agreement have been challenged. It is relevant to see whether the Appellate Body consistently applied the approach adopted in its previous decision and whether it has further clarified the role of international standards in dispute settlement.

The dispute concerns Indian measures limiting or prohibiting importation of certain agricultural products from countries affected by the Notifiable Avian Influence (NAI). The US complained about alleged violation of numerous provisions of the SPS agreement, including article 3 that refers to international standards. India, on its side, built its defence mainly on article 3.2 of the SPS Agreement, claiming that the measures

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[569] *European Communities - Measures Concerning Meat and Meat Products (Hormones)- Report of the Appellate Body*, para 197.

[570] GA Walker, 'International Financial Instability and the Financial Stability Board' (2013) 47 International Lawyer 1, 251–320; Reinhard Quick and Andreas Bluthner, 'Has the Appellate Body Erred? - An Appraisal and Criticism of the Ruling in the WTO Hormones Case' (1999) 2 Journal of International Economic Law 603; Joost Pauwelyn, 'The WTO Agreement on Sanitary and Phytosanitary (SPS) Measures as Applied in the First Three SPS Disputes : EC - Hormones, Australia - Salmon and Japan - Varietals' [2005] Spencer Henson and John S. Wilson (eds.) WTO and technical barriers to trade 374.

[571] *India - Measures Concerning the Importation of Certain Agricultural Products-Report of the Panel* [2014] WTO/DS430/R.

were based on international standards, namely the OIE Terrestrial Code, and therefore they were presumed conform to SPS commitments.[572]

The Panel recalled the Appellate Body's report on the EC-Hormones case synthesising the three prospective situations depicted in article 3 of the SPS. Specifically, in article 3.2 a State fully conforms to international standards and, for this reason, its measures are deemed consistent with the SPS agreement. As prescribed in article 3.1, when only some elements of the international standards are taken into consideration in the policy-making activities, the measures do not benefit from the presumption of conformity, however the burden of proof lies on the complainant, which has to make a *prima facie* case. Finally, in article 3.3, a WTO member introduces higher level of protection compared to the level recommended in the international standards. In this case the conformity of national measures to SPS provisions have to be tested through an appropriate risk assessment, accordingly to article 5.1 and 5.2.[573]

Moreover, given the nuance in the two prescriptive terms "based on" and "conform to", the Panel clarified that the failure to meet the less rigorous threshold of article 3.1 automatically excludes consistency with the more demanding requirement in article 3.2.[574]

In the Panel's analysis, subsequently upheld by the Appellate Body, the measures at issues did not result to be "based on" or "conform to" the relevant international standards, therefore, they could not be deemed coherent with SPS provisions. Once established the existence of a relevant international standards, namely the OIE code, the Panel ascertained that only eight of the ten categories of the measures at stake were addressed by the standards.[575] For these eight categories, articles 3.1 and 3.2 applied, however a "fundamental departure" from the OIE code was found and, consequently,

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[572] *India - Measures Concerning the Importation of Certain Agricultural Products- Report of the Panel,* para 2.1-2.2.

[573] *India - Measures Concerning the Importation of Certain Agricultural Products- Report of the Appellate Body*, para 5.57, 5.58.

[574] ibid, paragraph 5.59.

[575] For the two categories left out neither article 3.1 nor 3.2 applied. ibid, paragraph 5.61.

the measures were found non conform to the SPS provisions.[576] In conclusion, the interpretation of article 3 of the SPS concerning the reliance upon international standards established in the EC-Hormones case was adopted also in the present case, marking a continuity in the WTO jurisprudence.

2.3.3.3 The United States – Meat Products Case (DS447)

The US-Measures Affecting the Importation of Animals, Meat and Other Animal products from Argentina case (shorten US-Meat Products case)[577] was settled by the Panel, since none of the findings was appealed by the available term, and the Panel's report was adopted straightforward by the DSB. On the merits, Argentina contested two US regulatory and administrative measures that affected import of animals, meats and animal products from specifically territories within the country that were not recognised free of foot-and-month disease.[578] Specifically, Argentina complained for an unjustified delay in the authorisation of import of local products for the misrecognition of Patagonia area as free of foot-and-mouth disease, so Argentina claimed that the measures were excessively trade-restrictive and not based on a scientific risk assessment in violation of multiple SPS provisions, including article 3 of the SPS agreement. The Panel followed the logical reasoning and the procedural methodology established in the previous cases. Thus, it first verified the existence of international relevant standards and, consequently, assessed the reliance of national measures upon these standards. The US measures were found neither "based on" nor "conform to" OIE terrestrial code (the relevant standards in the dispute) so that the Panel moved to examine whether the risk assessment was valid to justify higher lever of protection according to article 3.3 of the SPS.[579] By recalling this article, which does confer States an autonomous right to regulate, the Panel warned about the fact that discretion in not absolute and restrictive measures should be

[576] ibid, paragraph 5.71.

[577] *United States - Measures Affecting the Importation of Animal Products of Argentina - Report of the Panel*, para 7.248.

[578] The measures followed an outbreak that occurred in North Argentina.

[579] *United States - Measures Affecting the Importation of Animal Products of Argentina - Report of the Panel,* para 7.253.

supported by scientific risk assessment as clarified in article 5.[580] Given the inconsistency between the contested measures and both article 3.3 and article 5 of the SPS Agreement, the Panel concluded that the US regulation was illegitimate maintained and needed to be removed.[581]

2.3.3.4 The Russian Federation – Pigs Case (DS475)

The dispute *Russian Federation – Measures on the Importation of Live Pigs, Pork, and other Pig Products from the European Union* (shorten title Russian Federation-Pigs)[582] concerns two bans adopted by Russia affecting the import of pig, pork and pig products from the EU in reaction to the outbreaks of the Asian Swine Fever.[583]

The EU claimed that the measures were trade restrictive, not scientifically based and in violation of manifold SPS provisions, among others, article 3 on standards reliance and article 5 on scientific risk assessment.[584] According to Russia, the contested measures were not SPS measures. Alternatively, they were either conformed to international standards (under article 3.2 of the SPS) or based on regulatory standards (under article 3.1 of the SPS). In case the measures at issue were found not to fall within article 3 of the SPS, they could be considered provisional measures adopted consistently with article 5.7 of the SPS.[585]

On the merits, once clarified that the measures fell within the scope of the SPS agreement.[586] The Panel verified the existence of international relevant standards, then

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[580] ibid, paragraph 7.256.
[581] ibid, paragraph 8.1.
[582] *Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products-Report of the Panel,* para 6.
[583] Specifically, the measures at issue consist of a European-wide ban and a ban addressing products originated from Estonia, Latvia, Lithuania and Poland. Structurally, the Panel analysed the two bans separately (first the EU-wide ban and then the ban on the imports of products from Estonia, Latvia, Lithuania and Poland), however the same reasoning was adopted. ibid, para 6.4.
[584] ibid, paragraphs 6.6 and 6.7.
[585] In any event, Russia deemed them coherent with the principle of adaptation to regional conditions as prescribed in article 6, and under no circumstances, in Russia's view, the measures were discriminatory applied.
[586] ibid*,* para 6.8.

assessed whether the contested measures conform to them, so benefitting from the presumption of conformity, or, conversely, if they were based on international standards, which did not "exempt the complaint from showing a *prima facie case*".[587] Eventually, the Panel found that the measures were not conformed to international standards and, consequently, were inconsistent with both article 3.1 and 3.2.[588] With regard to article 3.3, while recognising the possibility for a State to depart from international standards a fundamental deviance from them corresponds to contradicting such standards.[589] In a nutshell, the Panel concluded that the measures were inconsistent with article 3.3 of the SPS, since Russia failed to provide for a sound scientific risk assessment, so the bans resulted being grounded on origin.[590] The Parties appealed some of the Panel's findings, however none of them were related to the application of article 3 of the SPS or to international standards interpretation.

2.3.4 The Food Sector: Standard Reliance and Presumption of Conformity under the TBT Agreement

The Agreement on Technical Barriers to Trade (TBT) regulates the adoption of technical regulation and standards that introduce procedure, administrative requirements and licensing, which allow that a service is traded and a service supplier operates into WTO members' domestic markets.[591] Article 2 of the TBT agreement, titled "*Preparation, Adoption and Application of Technical Regulation by Central Government Bodies*" resemble article 3 of the SPS. Despite a slightly different wording, these two articles have been often associated due to their almost identical content and the coincident rationale. Article 2 of the TBT spells out a prohibition to use technical regulations as a

[587] ibid, para 7.261, 7.858.
[588] ibid, para 7.524.
[589] ibid, para 7.261.
[590] ibid, para 7.860.
[591] Clearly, TBT rules do not exclusively discipline the food sector since they apply to labelling in general and specific technical requirements. For the sake of simplicity, the present work will refer to the food sector when considering the sphere of influence of TBT rules.

restrictive measure to trade.[592] In pursuing *"legitimate objectives"*, a State shall use relevant international standards, when they exist since standards compliance entails a presumption of conformity to the WTO regime, meaning that the national measures coherent with international standards do not presumably constitute obstacle to trade (para.5).[593] For this reason, the article encourages standards reliance through an active participation in the activities carried out by international standards-setting bodies.[594] The relevant paragraphs are reported below:[595]

> *2.4 Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.*
>
> *2.5 A Member preparing, adopting or applying a technical regulation which may have a significant effect on trade of other Members shall, upon the request of another Member, explain the justification for that technical regulation in terms of the provisions of paragraphs 2 to 4. Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade.*

The interpretation and the application of these provisions through the WTO jurisprudence will be analysed below.

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[592] Robert Howse, 'A New Device for Creating International Legal Normativity : The WTO Technical Barriers to Trade Agreement and "International Standards"' in Christian Joerges and Ernst-Ulrich Petersmann, (eds), *Constitutionalism, multilevel trade governance and international economic law* (Hart 2011).

[593] Mattoo, Stern and Zanini (n 319).

[594] The definition of international bodies or systems included in the explanatory note at paragraph 4 of the TBT Annex 1 specifies the open membership to all WTO members as the only essential requirement for standard-setters.

[595] Agreement on Technical Barriers to Trade (1994) art 2.4, 2.5 and 2.6.

2.3.4.1 The EC-Sardines Case (DS231)

The case *European Communities – Trade Description of Sardines* (EC-Sardines case shorten) is one of the few disputes in which the value of international standards in technical regulation design has been addressed directly.[596] In light of the similarities between article 3 of the SPS and article 2.4 of the TBT, the examination will take into account the approach established by the WTO adjudicative bodies in the SPS discipline to verify whether a similar reasoning has been applied also in the interpretation of the TBT provisions.

On the factual background, the dispute arose between Peru and the European Union (at the time European Communities) in relation to EU technical regulation that distinguished between two different types of Sardine, the first with the genus *pilchardus* and the second with the genus *sardinops sagax*, and recognising exclusively to the former the designation "Sardines". Peru, exporter of *sardinops* to Europe, claimed that the regulation was discriminatory, trade restrictive and in violation of the *Codex Alimentarius'* standards, which conversely accorded to a wider range of fish the designation of "Sardines".[597] Thus, Peru claimed violations of article 1.1 of the TBT Annex 1[598] and 2.1 of the TBT.

Procedurally, the Panel first addressed the question of whether the measures at issue corresponded to technical regulation, under TBT Annex 1.2, and, consequently, whether the TBT agreement was applicable, even if the measures were precedent to the entering into force of the TBT agreement. Then, the Panel examined of article 2.4 of the TBT considering adequacy of the measures in light of objectives underlying their adoption. Complementarily, the Panel further assessed whether the measures was more restrictive than necessary and finally clarified the allocation of the burden of proof.

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[596] *European Communities – Trade Description of Sardines-Report of the Panel* [2002] WTO/DS231/R.

[597] Henrik Horn and Joseph HH Weiler, 'European Communities – Trade Description of Sardines: Textualism and Its Discontent' (2005) 4 World Trade Review 248, 248.

[598] Agreement on Technical Barriers to Trade - Annex 1 (1994) art 1.1; Agreement on Technical Barriers to Trade, art 2.1.

On the merit, the Panel rejected the EU's claims according to which the contested measures were not TBT measures since related to the designation of a specific name "Sardines" and rather belonging to labelling requirements.[599] The Panel clarified that "*the measures lay down product characteristics that were clearly identified"* by the EU regulation and were substantially TBT measures.[600] The Appellate Body deepened the legal reasoning by following the criteria set in the EC-Asbestos case,[601] namely identifiable product, specific characteristics and the mandatory compliance to finally confirm the Panel's conclusions.[602]

The second EU claim concerned the inapplicability of article 2.4, due to the lack of consensus behind the adoption of the Codex Stan 94, considered the relevant standards in the dispute, and due to a different coverage between the international standards and the EU regulation.[603] As stated by the Panel and reconfirmed by the Appellate Body, consensus in standards adoption process is not an absolute requirement and *"documents not based on consensus are covered by the TBT agreement"*, as spelled out in the Explanatory Note of the TBT Annex 1 paragraph 2.[604] With regard to the coverage of the EU regulation and the Codex Stan 94, the Appellate Body affirmed that the Panel did not err in considering the latter as relevant international standards in the dispute. Actually, while the scope of the EU regulation covered exclusively the Sardine *pilchardus*, it did affect also trade of other types of Sardines, including the *Sardinopos Sagax,* which was the specie exported by Peru.[605] Thus, even if the international

[599] *European Communities – Trade Description of Sardines- Report of the Panel*, para 7, 28.
[600] *European Communities – Trade Description of Sardines- Report of the Appellate Body*, paras 7.88, 7.89.
[601] *European Communities — Measures Affecting Asbestos and Products Containing Asbestos- Report of the Appellate Body* [2001] WTO/DS135/AB/R.
[602] *European Communities – Trade Description of Sardines- Report of the Appellate Body*, para 176.
[603] The EU clarified that, in its opinion, the term 'standards' has to be intended as measures adopted by international standardized community, therefore, adopted by consensus. ibid, para 36.
[604] ibid, paragraph 74; Annex 1 of the Agreement on Technical Barriers to Trade, Terms and Definitions, para 2; Explanatory Note of Annex 1 of the Agreement on Technical Barriers to Trade (1994), para 2 concerning the term ' Technical Regulation'.
[605] *European Communities – Trade Description of Sardines- Report of the Appellate Body*, para 232.

standards had a wider scope, both documents effectively referred to the same product, namely preserved sardines, so their coverage was deemed coincident.[606]

Furthermore, according to the EU, the harmonisation obligation enshrined in article 2.4 of the TBT was limited to the preparation and the adoption of technical regulation, thus, differently from the SPS agreement, it did not encompass the maintenance phase. The EU stressed the presence of the word maintenance in the SPS provisions and the lack of it in the TBT agreement.[607] To support its claims, the EU added that the contested measures had been adopted before the entering into force of the TBT agreement in 1995, arguing that no obligation to adapt national measures to the TBT agreement occurred at the time.[608]

The Appellate Body upheld the Panel's findings and specified that maintenance cannot be excluded, since the obligation of harmonisation is a general one and it is not limited to the preparation and the adoption phases.[609] It then addressed the question of temporal scope of the provision. By following the reasoning in the EC-Hormones case, the Appellate Body established that as article 3 of the SPS applies to existing measures unless the provision reveals a contrary intention, so does article 2.4 of the TBT. Put differently, the Appellate Body cannot assume that the provision doesn't apply to the existing measures. If this was in the negotiators' intentions they would have spelt it out in the agreement.[610]

In addition, the EU underlined that the term "basis for" in article 2.4 cannot be interpreted as "conform to", coherently with the hermeneutical distinction made by the Appellate Body in the EC-Hormones case concerning article 3.2 and article 3.1 of the

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[606] ibid, paras 231-233.

[607] *European Communities – Trade Description of Sardines- Report of the Panel*, para 4.18 and then reiterated in the appeal; *Report of the Appellate Body*, paras 29-31. The EU's arguments are based on the the VCLT article 28 titled 'no-retroactivity of treaty'. Vienna Convention on the Law of Treaties (1969) art 28.

[608] *European Communities – Trade Description of Sardines-Report of the Panel,* para 4.19.

[609] The Appellate Body clarified that the lack of the term maintenance in the prohibition does not automatically exclude the applicability of the 2.4 also in the phase subsequent to the adoption. *European Communities – Trade Description of Sardines* (n 20), Appellate Body, paras 220-221.

[610] ibid, paras 207, 208.

SPS. [611] In relation to the interpretation of the term "the basis for", by transposing the legal reasoning followed in the EC-hormones case, the Panel clarified that the term "basis for" does not have the same meaning as to "conform to", however it refers to the concept of principal constituent.[612] Furthermore, by arguing *a contrario*, if the measures at issue and the regulatory standards contradict each other, the former cannot be deemed based on the latter.[613] Thus, the Panel examined the contradictory elements rather than the similarities. Specifically, the EU regulation prohibited the denomination "Sardines" to twenty species of fish other than Sardine *pilchardus,* whereas Codex Stan 94 allowed all them to be labelled as "sardines". As a result, the two texts showed a manifest contradiction, which excluded that the EU regulation was effectively based on relevant international standards. This conclusion was upheld by the Appellate Body[614] that re-examined also the Panel's interpretation of the second part of article 2.4 that allows WTO members to depart from international standards "*when such international standards or relevant parts would be ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued"*.[615] Thus, the Panel and the Appellate Body carefully examined the meaning of the terms ineffective, inappropriate and legitimate objectives included in the second part of article 2.4 of the TBT and contextualised the EU's legitimate objectives as market transparency, consumer protection and fair competition.[616] In addition, the Appellate Body advocated the Panel's conclusions which found the EU regulation mismatching the EU's legitimate goals. According to the Appellate Body the EU failed to prove that consumers effectively

[611] *European Communities – Trade Description of Sardines- Report of the Panel*, para 4.20.
[612] *European Communities – Trade Description of Sardines- Report of the Appellate Body*, para 242.
[613] ibid, para 249.
[614] ibid, paras 257-258.
[615] 'Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems'. Agreement on Technical Barriers to Trade, art 2.4.
[616] *European Communities – Trade Description of Sardines- Report of the Panel*, paras 7.122, 7.123.

identified with the name "sardine" exclusively the specie Sardine *pilchardus*.[617] To sum up, international standards were not ineffective or inappropriate means to EU objectives, therefore the EU's technical regulation should have been based on them.[618]

While reconfirming the Panel's general application of article 2.4 of the TBT, the Appellate Body reversed the conclusions concerning the allocation of proof. In essence, the Panel interpreted the second part of the article 2.4 of the TBT as a necessity test as for it implied the respondent's responsibility to prove that the international standards were inappropriate means to pursue objective national interests and that a different measure not based on the relevant standards was needed.[619] On the contrary, by reversing the Panel's arguments on the burden of proof, the Appellate Body applied the same approach established in the EC-Hormones case. As in the SPS agreement, also under the TBT Agreement departing from international standards is allowed only when the relevant standards are ineffective or inappropriate to achieve the objective set under article 2.4, therefore, no reason justifies a different treatment.[620] Eventually, the Appellate Body, established that the burden of proof lies on the claimant including for the second part of article of 2.4 of the TBT Agreement related to appropriateness and efficiency of international standards as means to pursue legitimate national goals.[621]

2.3.4.2 The US - COOL Case (DS384-386)

The United States-Certain Country of Origin (COOL) Requirements (shorter title The US-COOL case)[622] concerns country of origin labelling requirements applied to imports of beef and pork products. In 2009, Mexico and Canada complained that the US's technical requirements were unnecessary restrictive and excessive burdensome, thus,

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[617] *European Communities – Trade Description of Sardines- Report of the Appellate Body*, paras 127, 137.
[618] *European Communities – Trade Description of Sardines- Report of the Panel*, para 7.139.
[619] ibid, parag 7.140.
[620] *European Communities – Trade Description of Sardines- Report of the Appellate Body*, para 275.
[621] ibid, para 269.
[622] *United States – Certain Country of Origin Labelling (COOL) Requirements- Report of the Panel*, WTO/DS384/R; *Report of the Appellate Body,* WTO/DS384/AB/R.

were inconsistent with manifold WTO provisions, including article 2.4 of the TBT Agreement.[623] Since the Panel's findings related to the application of article 2.4 were not appealed by the Parties, only the Panel's analysis will be reported.

On the merits, by recalling the EC-Sardines case the Panel clarified that Mexico and Canada, the claimants, have to prove that the US measures were inconsistent with CODEX STAN 1-1985 "General Standards for the labelling of pre-packaged foods". In Mexico's view, CODEX STAN 1-1985 was an effective means to achieve US' objectives since it provided guidelines on how to inform consumers about product country of origin.[624] Differently, the US argued that its objective was to provide specific information to consumers, namely where the animals used to tradable products were born, raised and slaughtered. In fact, international standards resulted misleading since also animals that spent only a portion of their lives in the USA could have been labelled as US-origin similar to those that were born and raised exclusively in the US territory. Thus, the standards did not allow to differentiate from fully US-origin products to products whose treatments only partially took place in the USA.[625] In the US view, international standards were no appropriate to the goals attained. The Panel sided the US stance, since the CODEX STAN 1-1985 did not provide the exact and full information about where animals were born, raised and slaughter, but rather a general and approximate indication of the country of origin.[626]

As a consequence, the international standards taken as a reference were not deemed appropriate means to achieve the US legitimate objectives, so Mexico failed to prove that the US violated article 2.4 by departing from the international standards since they were ineffective to the US priorities.[627]

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[623] Specifically, the alleged violation concerned articles 2.1, 2.2, 2.4, 12.1 and 12.3 of the TBT; and articles III:4, X:3(a), XXIII:1(b) of the GATT. Exclusively claims under article 2 of the TBT have been examined. *United States – Certain Country of Origin Labelling (COOL) Requirements- Report of the Panel,* para 1.1.

[624] ibid, para 7.725.

[625] ibid, para 7.726.

[626] ibid, paras 7.729-7.731.

[627] ibid, para 7.735. the Panel's conclusions were recalled by the Appellate Body and the reasoning deepened relatively to the measures appealed.

To conclude, given the similar structure and the almost identical content of article 3 of the SPS and article 2.4 of the TBT, the approach established in the EC-Hormones case has been applied also in the EC-Sardines case addressing the provisions regulating the interaction with international standards. The take-home lesson that emerges from the analysis of the relevant case law is that international standards should be taken into consideration by States' in national policy-making. At least in the food sector, the presumption of conformity to the WTO regime has been repeatedly confirmed and any deviation from international standards has to be proven necessary in light of the inappropriateness of the standards at issue to achieve the legitimate national goals. By the same token, the burden of proof has been clarified to lie on the claimant in both the Sardines case and in the US-COOL case. Some authors have highlighted that State's regulatory autonomy may result constrained by the interpretation of article 2.4 TBT that encourages standards reliance and, in a way, allows for standards review by the WTO adjudicative bodies. However, in the food sector international standards have been used as a benchmark to ascertain the necessity and the appropriateness of a measure alleged inconsistent with WTO provisions rather than as further commitments in regulatory policy.[628]

2.4 CONCLUSION

WTO provisions influencing States' regulatory autonomy in the financial sector are substantially, the MFN obligation, the national treatment principle, market access commitments, the domestic regulation discipline and the prudential carve-out spelt out in the GATS, the GATS Annex on Financial Services and the Understanding on Commitments in the Financial Services. Overall, WTO commitments in financial services are prescriptive, meaning that they belong to hard law and are legally binding for WTO members.[629] Most commitments are sector-specific rather than horizontally

[628] *European Communities - Measures Concerning Meat and Meat Products (Hormones)- Report of the Appellate Body*, para 161. Mattoo and Sauvé (n 403) 58–59.

[629] All WTO members are bound by the GATS and its Annex, whereas the Understanding creates obligations only upon the contracting States which have committed to it.

applicable, accordingly to the GATS positive listing approach, with the exception of the MFN principle and substantive obligations under domestic regulation.[630]

However, the WTO trade discipline for the financial services sector can be influenced or even affected by international standards. In practical terms, by pursuing financial stability international standards can introduce capital or technical requirements, which can generate indirect adverse effects on market access and national treatment principle, and eventually resulting in trade restrictive measures. From the analysis of the interaction between international financial standards and the WTO obligations on trade in financial services, the capacity of the former to affect the WTO commitments results limited. Likewise, the recourse to regulatory standards in the WTO dispute settlement concerning the financial sector has never occurred.

In fact, the WTO commitments related to the financial sector have rarely been challenged. So far, the only dispute brought before the WTO Dispute Settlement Body has been the Argentina-Financial Services case, in which the interpretation and the application of the prudential carve-out has been partially addressed. While this case has brought important clarifications on the likeness analysis among services and among service suppliers, it has not shed enough light on the nature of paragraph 2(a) of the Annex. Indeed, it remains unclear if this provision is an exception or a carve-out, with all substantial and procedural consequences its definition entails, such as the allocation of the burden of proof. However, the WTO adjudicative bodies have clarified that a three-step test for prudential measures is required: first, a preliminary step to verify that a contested measure falls within the scope of paragraph 2(a). The second step consists of ascertaining the causal link between the measure and the prudential rationale behind it. Finally, it is necessary to exclude that the measure has been adopted to elude other WTO commitments, accordingly with the "avoidance clause". So, the broad interpretation of the term "prudential", which is not limited to prudential measures *per se* but encompasses all measures put in place for prudential reasons, confirms that in the

[630] Specifically, the term "non-discriminatory substantive requirements" refers to transparency, objectivity and non-excessive burdensome requirements, under article VI of the GATS.

financial sector WTO Members enjoy a wide discretion in trade policy design.[631] This implies that a measure without a prudential nature can still be considered covered by paragraph 2(a) of the Annex if adopted for prudential reasons. In this regard, the adjudicative bodies did not mention any reference to international regulatory standards, not even as benchmark in the adequacy test or as an interpretative tool for the definition of WTO obligations.

At this point the research turned into the more abundant WTO jurisprudence related to the food sector, where the presumption of conformity to the WTO system based on the standards reliance of domestic policies has been established. The examination considers whether and under what conditions the recourse to international regulatory standards is allowed in the food-related disputes. On the merits, panels and the Appellate Body have consistently interpreted article 3 of the SPS agreement in all disputes considered, identifying paragraphs 1, 2, and 3 as different degrees of standard reliance. Briefly, article 3.2 of the SPS agreement indicates a full adherence of a measure to international standards, which entails a presumption of conformity to the WTO regime as well. Instead, article 3.1 refers to a partial reliance, as only some elements of the relevant international standards have been adopted, so that national measures result "based on" international standards and conformity cannot be automatically presumed. The EC-Hormones case confirmed the different degrees of standard-reliance, expressed through the terms "based on", in article 3.1, and "conformed to", in article 3.2. This implies that only the latter benefits from the presumption of conformity to the WTO system, whereas the former circumstance requires that the complainant shows a *prima facie* case. In cases where a measure pursues a higher level of protection compared to the one recommended by international standards, the measure at issue has to be justified

[631]Some authors, Mamiko Yokoi-Aray among others, have underlined a constant States' reluctance in limiting their right to regulate, especially in sensitive sectors, such as the financial services one. However, countries have recently shown a more open approach towards regulatory standards, remarked among developing countries as well as in the US, traditionally contrary to any sort of constraint of its laisser-faire, with its acceptance to Basel Committee's standards. Mamiko Yokoi-Arai, 'GATS' Prudential Carve out in Financial Services and Its Relation with Prudential Regulation' (2008) 57 The International and Comparative Law Quarterly 613.

through solid and appropriate scientific assessments, according to article 3.3 and 5 of the SPS agreement.

From a procedural point of view, panels are required to first determine the existence of relevant international standards, secondly, to assess the level of harmonisation adopted by the respondent and, if the measures do not comply either with article 3.1 or with article 3.2, the level of departure from international standards needs to be adequate and not to violate other WTO provisions, accordingly with article 3.3. In essence, as clarified in India-Agricultural products, a certain leeway is guaranteed to national legislators provided that the measures at issue result proportionate to and based on a scientific risk assessment.[632] By the same token, a similar approach applies to food-related disputes covered by the TBT agreement, where international standards serve as a basis for national technical regulation unless they are inappropriate or inadequate means for the fulfilment of legitimate national objectives.[633]

In conclusion, the selected case law in the food sector has shown that international regulatory standards are taken into account in the analysis of the level of protection adopted by the State and to assess whether this level is appropriate to presume a compliance with the WTO agreements. As a result, they serve as a benchmark in the analysis of the measure adequacy. On the other side, it has to be noticed that in the cases examined the panels have always found the measures at issue falling within the circumstance regulated by article 3.3, consequently the dispute settlement has been centred on the scientific risk assessment, rather than on the threshold constituted by international standards. Yet, in a preliminary phase of dispute proceedings regulatory standards do seem to play a role, at least in the definition of the level of protection pursued by a national measure.

That being said, some important considerations have to be drawn before addressing the question *Can the approach established in the food sector be extended to the financial sector?* The comparative analysis originated from the existing similarities in the

[632] India - Measures Concerning the Importation of Certain Agricultural Products-Report of the Appellate Body, para 2.60-2.62.

[633] Agreement on Technical Barriers to Trade, art 2.4.

financial sector and in the food sector. First, in both sectors the proliferation of regulatory standards is remarkable and the activity of international standard-setting bodies - which are not international organizations *strictu sensu* - is intense. Secondly, regulatory standards are not legally binding. Yet, market operators and national authorities the more and more rely upon them.[634] As a result, the standards drafted in both sectors are formally identical regulatory tools with the same soft nature.

However, significant differences between the food sector and the financial services sector cannot be overlooked. First, it can be contested that trade in goods is substantially different from trade in services, which is intangible by definition and subject to a special regulation. In this sense, it is much easier to identify characteristics of a specific good rather than peculiarities of a specific service or service supplier, which is generally defined by the mode of supply and the sector the service belongs to.

Secondly, food sector and health-related measures can easily go through scientific assessment or scientific criteria whereas the financial sector cannot. The financial sector is undoubtedly *sui generis*. Prudential measures have always pertained to the concept of sovereignty and the idea that WTO panels or the Appellate Body could contest national legislators seems unrealistic and hard to accept, also in light of the prudential carve-out.

Third, the degree of institutionalisation of the food standards bodies and the financial standard-setters is different. For what concern the financial sector, as seen in the first chapter, the G20 and the FSB have a more political role in designing the global agenda and their membership results limited to a group of advanced and emerging economies (not very diversified or representative of the variety of the economies within

[634] To give two examples, the ISO requirements for the food sector are used by market operators sometimes in parallel to national legislation and international regulation, since in practice products very often need ISO certifications to be traded and sold. Similarly, in the banking sector, Basel Committee's standards serve as thresholds for banks' stress test and are generally recognised as indicator in the assessment of bank stability and soundness by international entities, such as credit rate agencies. For national implementation of regulatory standards see Basel Committee on Banking Supervision, A New Capital Adequacy Framework : Consultative Paper (1999); Mamiko Yokoi-Arai, 'Basel II in the National Sphere' (2005) EBRD Law in Transition. Harold Hongju Koh, 'Why Do Nations Obey International Law?' (1997) 106 The Yale law journal 2599.

the WTO), which has led some scholars to call them "clubs".[635] Similarly, IOSCO, IAIS and the Basel Committee, the more sector specific standard-setters, may show a formal open membership, though the effective participation into the decisional process result very limited. In particular, the Basel Committee gathers bank governors or heads of State of a limited number of developed countries and operates through closed-door procedures, so that the standards adopted result largely shaped by leading economies.[636] Besides, IAIS and IOSCO have formally a world wide participation, involving jurisdictions, technical authorities and international organisations, however the adoption procedure is carried out by organs that are usually non-plenary ones with a restrictive representation, which *de facto* leave many jurisdictions out.[637] On this point, the Codex Alimentarius Commission (CAC) shows important differences. It works within the UN context and presents a stronger institutional structure, based on a foundational Statute and Rules of Procedure.[638] The Statute establishes the CAC's mandate in article 1, which confers to this International entity the responsibility to protect consumers' health, to elaborate food safety standards and to coordinate international organisations involved in it. Moreover, article 2 of the Statute declares that the membership of the CAC is open

[635] Some authors have defined critically the Basel Committee negatively refer to it as a "central bankers' Club". For some reflections on the limited transparency and accountability Maziar Peihani, *Basel Committee on Banking Supervision. Part II: An Assessment of Governance and Legitimacy* (Brill 2016); Micheal S Barr and Geoffrey P Miller, 'Global Administrative Law: The View from Basel' (2006) 17 European Journal of International Law 15; Robert Howse, 'How to Begin to Think About the Democratic Deficit at the WTO' in S Griller (ed), *International Economic Governance and Non-Economic Concerns: New Challenges for the Inter- national Legal Order* (2003); Robert Howse and K Nicolaidis, 'Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?' (2003) 13 Governance 76.

[636] On the informality of the regulatory decision-making refer to David Zaring, 'Informal Procedure, Hard and Soft, in International Administration' (2005) 5 Chicago Journal of International Law 547; Robert O Keohane and Joseph S Nye, *Power and Interdependence :world Politics in Transition* (Little, Brown 1977); Anne-Marie Slaughter, 'Global Government Networks, Global Information Agencies, and Disaggregated Democracy' (2003) 24 Michigan Journal of International Law 1041.

[637] Daniel W Drezner, *All Politics Is Global* (Princeton University Press, 2008); Chris Brummer, 'Why Soft Law Dominates International Finance—and Not Trade' (2010) 13 Journal of International Economic Law 623.

[638] The Statutes of the CAC was adopted in 1961 by the 11th Session of the FAO Conference and in 1963 by the 16th Session of the World Health Assembly and then revised in 1966 and 2006. The first Rule of Procedure was adopted in 1963 was subsequently modified various times, the latest in 2006.

to all UN, FAO and WHO members, plus it guarantees access to other jurisdictions not affiliated to the former through a specific authorisation procedure.[639] In addition, the Rules of Procedure establishes that the Commission - the plenary organ - convenes at least once per year in public meetings, adopts decisions on a quorum basis (decided at each meeting), which cannot be less than 20% of the total membership and which counts for minimum one third of the members of the region that the recommendations under adoption are going to affect.[640] Even if the CAC is not an international organisation as such (since it does not have legal personality and independent organs that act autonomously), it appears institutionally more structured, with more specific tasks than the general responsibility for coordination and oversight, with an open membership and with more transparent and more inclusive decisional procedures.[641]

A fourth relevant difference concerns the open reference to standards reliance in the WTO agreements. As a premise, it has to be distinguished between standards that affect primary WTO law and standards used as a tool to assess the application of WTO obligations. In the first case, standards would result being an external source of law that States have to abide by and that can be used a justification for measures otherwise inconsistent with the WTO regime. Differently, in the second case standards are used as benchmarks, so States' discretion to rightfully deviate from the WTO system is reduced, however, without imposing further commitments on States' policy making. Put differently, standards would limit States' freedom to adopt whatsoever prudential measures by introducing criteria or requirements that narrow the meaning of the term "prudential" or the conditions under which a prudential waiver applies.[642]

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[639] Statutes of Codex Alimentarius Commission (version 2016), art 2-4.

[640] Rules of Procedure of the Codex Alimentarius Commission (adopted in 1963), rules V-VII.

[641] One of the reasons for these procedural differences may be related to the fact that the financial sector is product specific, so regulation in banking, insurance and securities are dealt separately by different standard setting bodies. Conversely in the food sector, everything related to food safety is handled in a more inclusive way, however specialisation occurs at internal subcommittee level. A more comprehensive approach may explain first a wide participation and secondly the higher formality in the procedure adopted in the food sector.

[642] Sydney J Key, 'Trade Liberalization and Prudential Regulation: The International Framework for Financial Services' (1999) 75 International Affairs 61.

While reference to international regulatory standards are allowed in the food sector, no mention is detectable in the financial sector. Specifically, the SPS agreement envisages reliance upon standards adopted by governmental bodies listed in article 3.4 of the SPS Agreement,[643] whilst the explanatory note 4 of the TBT Agreement specifies that the international bodies or systems are those with a membership opened to at least all WTO members. In essence, in both the TBT and the SPS regimes WTO members have accorded a limitation of their regulatory independence *vis-à-vis* standards reliance upon international standards, conceived legitimate insofar as they are the result of a collective endeavours deriving from a wide involving decisional process.[644] Therefore, the large engagement presumed in the standard-setting process and the consequent assumption of general acceptance, seemed to be underpinnings for the open reference to those standards within the WTO regime. On the contrary, the lack of an open participation in the standard-setting process in the financial sector, makes it hard to believe that an external source with a non-binding nature, a not inclusive drafting process and a limited State engagement will serve as a benchmark in the WTO dispute settlement, which is regulated by a compelling discipline, instead.[645]

To sum up, the level of standard reliance between the food sector and the financial sector seems different: while in the food sector a presumption of conformity has been established and coherently applied, the same presumption cannot be acknowledged in the financial sector. By the same token, the open reference to regulatory standards, in the SPS and in the TBT agreement, is not detectable in the WTO discipline regulating the financial sector, proving an aversion towards pre-defined constraints in the financial

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[643] As article 3.4 of the SPS Agreement reads *"The relevant international organizations and their subsidiary bodies, in particular the Codex Alimentarius Commission, the International Office of Epizootics, and the international and regional organizations operating within the framework of the International Plant Protection Convention"*.

[644] Donna Roberts and Laurian Unnevehr, 'Resolving Trade Disputes Arising from Trends in Food Safety Regulation : The Role of the Multilateral Governance Framework' (2005) 4 World trade review 469; for a general overview of the food satefy framework see Gruszczynski (n 566).

[645] However, some authors, such as Delimatsis and Sauvé conceive standards of the IMF's or Basel Committee's, as useful tools in the prudential adequacy test and in the reduction of the WTO adjudicative bodies' discretion. Delimatsis and Sauvé (n 466) 846–851.

sector by WTO members, which justifies a certain difference in the approach applied in the two sectors. Indeed, WTO agreements are the result of Parties' common intent, so the wording, the placement and the degree of commitments were intentionally chosen, according to the will to preserve full discretion or to accept constraints in States' right to regulate certain sectors. Therefore, standard reliance applied in the food sector cannot be extended to the financial services sector, also in the light of the little transparency and the limited States' participation in the standard-making process.[646] For the time being, neither State practice nor the WTO jurisprudence have provided enough evidence to prove that international standards limit States' freedom to regulate trade in financial services. Conversely, standards reliance appears to facilitate the ascertainment of an appropriate level of protection and the assessments of potential deviations from the WTO regime in the food sector.

With regard to the concerns about the nature of international financial standards, namely whether they "harden" by the interaction with the WTO, the present analysis does not lead to a positive answer. The nature of international financial standards does not result modified by the interaction with the WTO system, whose adjudicative bodies have not recurred to international financial standards in dispute settlement either for interpretative or as assessment device in the adequacy test. Nevertheless, the recent crises have proven a common need for guidance in the definition of both the term prudential and on the admissible measures.[647] Thus, it cannot be excluded that a

[646] During the meetings of the Council of Trade in Services, transparency, wide engagement and even participation in decision-making have been claimed as essential preconditions to standards reliance. In this regard, refer to Malaysia's intervention affirming that the voluntary nature of international standards precludes from the recourse to them in the WTO dispute settlement (including adequacy and necessity test) being the WTO discipline characterised by a compulsory nature instead. Council for Trade in Services, Special Session Report of the Meeting (S/CSS/M/13, 2002) paras 267-276.

[647] Yokoi-Arai, Mamiko (n 331); Bart De Meester, 'Testing European Prudential Conditions for Banking Mergers in the Light of Most Favoured Nation in the GATS' (2008) 11 Journal of international economic law Law 609; Delimatsis, 'Towards a Horizontal Necessity Test for Services : Completing the GATS Article VI:4 Mandate' (n 421); Luis Garicano and Rosa M Lastra, 'Towards a New Architecture for Financial Stability: Seven Principles' (2010) 13 Journal of International Economic Law 597; Charles Goodhart and Rosa M Lastra, 'The Boundary Problems in Financial Regulation' in James Barth, Chen Lin and Clas Wihlborg (eds) (Edward Elgar 2013).

restructuring of the actual international financial framework oriented towards a more transparent, inclusive and legitimate decisional process will take place. Consequently, if and when these regulatory standards become widely accepted and legitimately recognised the recourse to them by the WTO adjudicative bodies will be more likely.

CHAPTER III - PTAS AND INTERNATIONAL FINANCIAL STANDARDS: HARDENING SOFT LAW?

SUMMARY: *3.1 Introduction 3.2 Definition of PTAs and Historical Background.* 3.2.1 The Legal Basis for PTAs within the WTO Regime: Article XXIV of the GATT and Article V of the GATS. 3.2.2. Compatibility of PTAs with The WTO System: The Turkey-Textile Case. *3.3 Assessing the Inclusion of International Financial Standards into PTAs: The Intensive Qualitative Study of the EU PTAs*. 3.3.1 Methodological Premises and the Selection of the EU PTAs. 3.3.2 Previous Qualitative and Quantitative Studies on PTAs. 3.3.3 Methodology. 3.3.4 Findings. *3.4 Overlapping Jurisdiction between PTAs and the WTO System.* 3.4.1 Dispute Settlement Mechanisms in PTAs and the Choice of Forum Clauses. 3.4.2. Defining the Jurisdiction of the WTO Panels. 3.4.3 The Unavoidable Fundamental Right to the Panel in the Mexico-Soft Drinks Case. 3.5 *The Applicable Law in Disputes covered by both PTAs and the WTO Regime.* 3.5.1 General Rules of International Law Promoting Systemic Coherence. 3.5.2 Narrow and Open Approach towards Non-WTO Law. 3.5.3 The Use of Non-WTO Law for Interpretative Reasons. 3.5.4 The Use of Non-WTO Law as a Self-Standing Defence. 3.5.5 The Recourse to PTAs to Prove Defence under General Exceptions: the Brazil-Tyres Case. 3.5.6 Limited Reliance upon PTAs in the Peru-Agricultural Case. *3.6 Conclusion.*

3.1 INTRODUCTION

The present chapter is dedicated to the analysis of preferential trade agreements (hereinafter PTAs), defined as bilateral or plurilateral trade agreements promoting wide and deep economic liberalisation according to article XXIV GATT and article V GATS.[648] In essence, the research will examine a twofold aspect related to the impressive proliferation of PTAs as a complementary means to regulate trade relations, also in the financial services sector: first the chapter will deal with the interaction between international financial standards and PTAs in order to ascertain if and how the

[648] Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (3rd edn, Cambridge University Press 2013) 648; Michael J Trebilcock, Robert Howse and Antonia Eliason, *The Regulation of International Trade* (4th edn, Routledge, Taylor & Francis Group 2013) 83; Mitsuo Matsushita and others (eds), *The World Trade Organization: Law, Practice, and Policy* (Oxford University Press 2015) 105.

former is transposed in the latter. Secondly, the interplay between PTAs and the WTO regime will be investigated in order to clarify if and how PTAs commitments – possibly including reference to international financial standards - influence the WTO discipline in trade in financial services.

With these purposes in mind, the present chapter will open with a preliminary explanation of PTAs, which embraces a historical background and a clarification of the legal basis for the PTA within the WTO regime, namely article XXIV of the GATT and article V of the GATS, as well as the effective application of the two provisions in the paramount Turkey-Textile case.[649] The core part consists of an intensive qualitative analysis on the EU PTAs that aims at verifying whether and to what extent international financial standards are included in these new generation treaties and, consequently, whether their soft nature has hardened. Specifically, the empirical qualitative study will take into account the fifteen most recent EU PTAs in order to both define the recurrent features in the EU PTA template and to ascertain whether more inclusive obligations concerning the financial services sector have been reached in PTAs compared to the commitments undertaken in the WTO regime.

This intuition is based on a vast literature that acknowledges a newly defined trade regulation deriving from the fast-growing bilateral negotiations, which may not have a coincident and harmonious coverage with the pre-existing legal framework. This would translate into broader and deeper PTA commitments also in sectors not fully disciplined by the WTO system, such as the financial sector.[650] In this sense, potential misalignments between WTO and PTA commitments have been commonly referred to as WTO plus (WTO+), WTO extra (WTO-x) and WTO minus (WTO -) according to whether PTA provisions that constrain State's regulatory autonomy beyond the WTO

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[649] *Turkey — Restrictions on Imports of Textile and Clothing Products- Report of the Appellate Body* [1999] WTO/DS34/AB/R.

[650] Among a vast literature see Lorand Bartels and Federico Ortino, *Regional Trade Agreements and the WTO Legal System* (Oxford University Press 2010); Rohini Acharya, *Regional Trade Agreements and the Multilateral Trading System* (Cambridge University Press 2016); Jo-Ann Crawford, Roberto V Fiorentino, *The Changing Landscape of Regional Trade Agreements* (World Trade Organization 2005); for a depiction of the phenomenon in the Asian region, Carsten Fink and Martin Molinuevo, *East Asian Free Trade Agreements in Services : Roaring Tigers or Timid Pandas?* (The World Bank 2007).

level, whether PTAs create new obligations in sectors uncovered by the WTO regime or whether the level of engagement is lowered than the WTO one.[651]

From a methodological point of view, the qualitative analysis will be conducted by mapping structural and substantive features throughout the fifteen selected EU PTAs to allow an appraisal of a recurrent pattern (if any), an ascertainment of the presence or the absence of specific international standard-related commitments and an assessment of the level of engagement accorded. In essence, the mapping exercise will scrutinise the inclusion of international financial standards and the presence of a prudential carve-out all along the main disciplines in PTAs, which is to say the services chapter, the investment chapter, the domestic regulation and the transparency discipline along with the dispute settlement chapter when present. Eventually, the results will be synthetized under two axes: the inclusion of international financial standards into PTAs and their legal value, intended as legal enforceability. The four potential situations resulting from the combination of the values that the two axes can take are a) inclusion and legal value, b) inclusion and no legal value, c) exclusion but legal value d) exclusion and no legal value. However, only the first two cases a) and b) will be taking into consideration.[652] Indeed, the two analytical categories, inclusion and legal enforceability are intertwined and interdependent, so that only if international financial standards are included into PTAs through specific provisions the legal enforceability of these provisions can be assessed. Moreover, circumstances a) and b) are relevant for the present research since

[651] Bernard Hoekman and Petros C Mavroidis, 'WTO "à La Carte" or "menu Du Jour"? Assessing the Case for More Plurilateral Agreements' (2015) 26 European Journal of International Law 319; Henrik H Horn, Petros Mavroidis and André Sapir, 'Beyond the WTO ?An Anatomy of EU and US Preferential Trade Agreements' (2009) 7 *Bruegel blueprint series* 1; World Trade Forum, Assessing the World Trade Organization : Fit for Purpose? (World Trade Forum, 2017); Joost Pauwelyn and Alschner Wolfgang, 'Forget About the WTO: The Network of Relations between Preferential Trade Agreements (PTAs) and "Double PTAs"' (2014).

[652] The four cases are the result of the combination of the binary value that the two axes can take, namely "yes" for the presence "no" for the absence of the inclusion of international standards and the legal enforceability of these provisions. All elements mapped in the EU PTAs will allow us to attribute a positive value or a negative value on both axes and to summarise the results into four above-mentioned situations. Consequences and implications of the scenario corresponding to the present European trend in trade policy will be drawn at the end, in the section 3.3.4 titled "findings".

they may signal a modification in the soft nature of international financial standards. Specifically, case a) would prove a hardening of the voluntary nature of international financial standards and case b) would demonstrate an inclusion of soft law principles into legally binding instruments but with a wording rather declaratory than prescriptive. The conclusion drawn by the mapping analysis will answer the questions (i) whether international financial standards have been transposed into PTAs, (ii) whether their value is hortatory and political rather than legal and, consequently, (iii) whether the hardening of their soft nature has occurred.

The second part will examine the interplay between PTAs and the WTO system.[653] The wide coverage of PTAs that embraces trade-related aspects also in sector relatively "multilateralised" (such as the financial services sector), has raised concerns about potential overlaps in terms of jurisdiction and applicable law. Indeed, PTAs can regulate trade in financial services among two or more parties. Consequently, they can integrate the respective WTO discipline with complementary provisions or can introduce new obligations that not forcedly result compatible with the pre-existing WTO commitments. The last scenario is of particular relevance since it draws the attention on two problematic issues: first overlaps of jurisdiction, meaning which adjudicative body is competent to settle a dispute arising from incompatible PTA-WTO commitments, when the PTA conceives an alternative dispute settlement mechanism (DSM) to the WTO's one. The second question concerns substantive overlaps and refers to the applicable law in the WTO dispute settlement. In this regard, the research will verify whether and to what extent the WTO adjudicative bodies can recur to non-WTO law in dispute proceedings, considering both the use of PTAs for interpretative reasons and as a justification for measures inconsistent with the WTO regime. The relevance of these two questions originates from the hard nature of PTAs. Being treaties, PTA provisions result legally binding for contracting States as much as WTO provisions. As a result,

[653] ILC, Report of the Study Group of the International Law Commission, Fragmentation of the International Law: Difficulties Arising from the Diversification and Expansion of International Law (UN doc. A/CN.4/L.682, 13 April 2006).

States are compelled to ponder both WTO commitments and PTA obligations when designing their trade policy.

Therefore, the second part of the chapter will examine the relationship between these two sources of hard law.[654] The section dedicated to the overlaps of jurisdiction will give an overall picture of the possible PTA provisions regulating the interaction between fora and, then, it will focus on the specific provisions contained in the selected EU PTAs to ascertain whether the risk of jurisdictional overlaps effectively exists for the financial services sector. Besides, the relevant WTO jurisprudence will be presented, particularly the Mexico-Soft Drink case, where the Appellate Body established that the recourse to the panel is a fundamental and unavoidable WTO members' right.[655]

Subsequently, the study will delve into the applicable law in case of disputes arising from incompatibility between PTA and WTO obligations. In detail, the work will analyse whether and to what extent the WTO adjudicative bodies recur to PTAs in dispute settlement, both for interpretative reasons and as a self-standing justification. After a comparison of a narrow and an open approach towards non-WTO legal sources formulated in the literature, the dissertation will thoroughly examine the Brazil-tyres case[656] and the Peru-Agricultural Product case.[657] In the first dispute, the adjudicative bodies addressed the question as to whether non-WTO law can serve to prove

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[654] To be noted that the study on jurisdictional overlaps and on the use of non-WTO law in the WTO dispute settlement will be carried out independently from the results of the qualitative analysis, so even if the nature of the international financial standards has not been hardened by their inclusion into PTAs. The reason lies on the fact that the empirical analysis conducted captures the current EU trend in PTA negotiations and a negative result in terms of international financial standards inclusion and legal enforceability would not diminish the legal significance of the relationship between PTAs and the WTO regime. Indeed, a situation in which international financial standards are integrated in PTAs but with a declaratory value will not exclude per se the possibility of future legally binding standards-related provisions. In fact, this scenario may capture a transitional period characterised by a first attempt to include soft law principles into hard legal instruments without attributing them a coercive force, maybe because a consolidated state practice has not been established yet.

[655] *Mexico — Tax Measures on Soft Drinks and Other Beverages- Report of the Appelalte Body* [2006] WTO/DS308/AB/R.

[656] *Brazil — Measures Affecting Imports of Retreaded Tyres-Report of the Appellate Body* [2007] WTO/DS332/AB/R.

[657] *Peru — Additional Duty on Imports of Certain Agricultural Products- Report of the Appellate Body* [2015] WTO/DS457/AB/R.

justification under the WTO general exceptions, whereas in the second case the use of PTAs as a self-standing defence is considered. The analysis will show that a very narrow approach is adopted by the Appellate Body in the Peru-Agricultural Products case, which tends to "isolate" the WTO regime from external legal sources that cannot serve as a justification for measures otherwise inconsistent with the WTO discipline.

To sum up, the questions this final chapter attempts to answer are the following: *can PTAs be taken into consideration in the WTO dispute settlement when they rule on trade-related aspects disciplined by the WTO regime as well?* Specifically, *can PTAs be used as supplementary means of interpretation in the definition of the terms and the context of WTO provisions?* Alternatively, *can WTO-inconsistent measures be justified under PTAs if an effective reliance of the contested measure upon PTAs is ascertained?*

3.2 DEFINITION OF PTAS AND HISTORICAL BACKGROUND

A dramatic proliferation of preferential trade agreements (hereinafter PTAs) has marked the international scenario over recent years.[658] Bilateralism, dominant in the post-colonization period lost its unicity after the II World War, where multilateralism, on one side, and "regionalism", on the other, overspread in international trade relations, in a complementing sometimes competitive interaction.[659] The term PTAs generally refers to treaties concluded by a subset of States that accord to trade parties preferential

[658] On this widely discussed phenomenon see, *inter alia*, Richard E Baldwin and Patrick Low, *Multilateralizing Regionalism* (Cambridge University Press 2009); Joseph Weiler, *The EU, the WTO, and the NAFTA : Towards a Common Law of International Trade?* (Oxford University Press 2013); Thomas Cottier and Panagiotis Delimatsis, *The prospects of international trade regulation : from fragmentation to coherence* (Cambridge University Press 2011); Simon Lester and Mercurio Bryan, *Bilateral and Regional Trade Agreements : Commentary and Analysis* (Cambridge University Press 2007); Jean-Christophe Maur, 'Regionalism and Trade Facilitation : A Primer' (2008) 42 Journal of World Trade 979; David A Gantz, *Regional Trade Agreements : Law, Policy and Practice* (2009).

[659] Bilateralism has not disappeared after the establishment of the WTO, on the contrary it has been used as a parallel approach adding complexity to the international scenario. John Howard Jackson, *The World Trading System : Law and Policy of International Economic Relations* (MIT Press 1989); Steve Charnovitz, *The Path of World Trade Law in the 21st Century*, vol 37 (World Scientific 2015); Todd Allee, Manfred Elsig and Andrew Lugg, 'The Ties between the World Trade Organization and Preferential Trade Agreements: A Textual Analysis' (2017) 20 Journal of international economic law 333.

treatments in derogation of the WTO non-discrimination principle in order to attain wider and deeper trade liberalisation.[660] The exceptionality of the phenomenon does not simply concern the massive number of PTAs concluded over the last decades,[661] but also its reach in terms of the number of countries that recur to them and the coverage of these legal instruments. As many authors have pointed out, practically any country has signed at least one PTA, indistinctively from the geographical distribution, the degree of development and the economic model adopted as a system.[662] While at the beginning PTA negotiations were mostly driven by the European countries and the USA, nowadays Asian countries are also very active promoters.[663] Moreover, the recourse to this new generation treaty got intensified at the end of the 1990s and it has even grown after 2000. The breadth of the international proliferation of PTAs can be drawn by looking at the number of PTAs notified to the WTO per year, from three PTAs on average till 1995 to twenty-five PTAs afterwards.[664]

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[660] In the context of WTO, the legal bases for PTAs are article XXIV of the GATT and V of the GATS or they can be concluded under the so called enabling clause, which allows favourable treatment in the trade relations with developing countries. 'Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries' (No L/4903, 1979). Acharya (n 650) 2–6.

[661] The total number of PTAs is estimated around 600, whose almost 300 notified to the WTO, about the same number is estimated being already in force but not yet notified or being under negotiation at present. For the number of notified PTAs at the WTO consult the official database https://rtais.wto.org/ the overall estimation Andreas Dür and Manfred Elsig, *Trade Cooperation : The Purpose, Design and Effects of Preferential Trade Agreement World Trade Forum* (2015).

[662] Nowadays, practically all countries seem to be involved in PTA negotiations independently from the contrast developed-developing countries, north-south area, export-import driven economies. The only exception reported is Mongolia, which is negotiating a trade agreement with Japan and the Asia-Pacific Trade Agreement, Bartels and Ortino (n 650) 3. According to some authors, David Evans among others, even if not decisive regional proximity is still an important driver that push countries to aggregate. David Evans, 'Bilateral and Plurilateral PTAs - Commentary and Analysis' (2015) 2 Bilateral and regional trade agreements 53, 52. For a more economic-oriented perspective on the development of PTAs see Jagdish N Bhagwati, *Termites in the Trading System : How Preferential Agreements Undermine Free Trade* (Oxford University Press 2008) 11–14.

[663] Almost 11% of the PTA notified at the WTO have been negotiated by or with an Asian country. Europe remains in the lead with around 21% of the total PTA notified. Acharya (n 650) 7. For literature review of OECD regional and preferential consult Chantal Pohl Nielsen, *Regional and Preferential Trade Agreements : A Literature Review and Identification of Future Steps* (Fødevareøkonomiske Institut 2003).

[664] For a detailed analysis of the PTAs evolution over time see Acharya (n 650) 5–14.

With regard to the notions used in the literature, to refer to the same phenomenon different acronyms have been used, such as free trade agreements (FTAs), regional trade agreements (RTAs) and preferential trade agreements (PTAs). FTAs is largely more used (also in the context in the WTO), however it does not capture the variety of economic integration that this kind of treaties aims to create other than free trade area. In turn, the word RTAs, also used in the GATT, highlights the geographical proximity, which is a feature difficult to spot in modern mega regional agreements, such as NAFTA or TPP. Conversely, the term PTAs emphasises more favourable trade relations accorded to the contracting parties rather than the type of economic integration models or the geographical area the parties belong to. For this reason, the latter acronym is preferred in the present work.[665]

From a substantive point of view, even if originally concluded to gain economic advantages, PTAs have extended their coverage moving from purely trade-related aspects, namely tariffs and quota,[666] to societal values, such as environmental sustainability, human rights, financial stability, investment protection and so forth. In essence, no one is left out from this tick multi-layered legal framework characterised by different geometries and overlapping jurisdiction and coverage.[667]

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[665] Dür and Elsig (n 661) 3–5.

[666] When Second World War started, tariffs everywhere were high and trade had collapsed to 70% of it 1928 level Kym Anderson and Hege Norheim, *Is World Trade Becoming More Regionalized?* (University of Adelaide Centre for International Economic Studies, 1993). According some studies a balanced and advantageous level is reached if trade is duty-free and tariffs average less than 4% on trade non fully liberalise WTO, 'WTO Trade Report: Exploring the Links between Trade, Standards and WTO' (2005).

[667] As shown in the following section, PTAs frequently establish own dispute settlement mechanisms creating overlaps of jurisdiction in what has been defined as institutional fragmentation. ILC, Report of the Study Group of the International Law Commission, Fragmentation of the International Law: Difficulties Arising from the Diversification and Expansion of International Law (n 653). For a clarification of the multiple overlaps within the international system see G Marceau, 'Conflicts of Norms and Conflicts of Jurisdiction. The Relationship between the Dispute-Settlement Mechanisms of MEAs and Those of the WTO' (2001) 35 Journal of World Trade 1081; Joost Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?' (2001) 95 American Journal of International Law 535.

In particular, the changes in the PTA coverage have driven scholars' attention to a comparison between PTA obligations and commitments undertaken in the WTO framework, leading to talk about WTO plus, WTO extra and WTO minus.[668] Specifically, WTO plus (WTO+) embraces PTA obligations that discipline areas already regulated by the WTO regime, but they reconfirm or deepen the commitments undertaken in the multilateral trade system. A typical example would be PTA provisions that further lower tariffs agreed in the WTO context or the introduction of more constraining SPS commitments in PTAs.[669] In trade in financial services examples of WTO+ provisions can vary largely from a detailed definition of the term prudential to a specification of conditions under which a branch of a foreign bank can be established.[670] Besides, WTO extra provisions (WTO-X) refer to PTA commitments in areas that have not been covered by the WTO regime in a substantive manner, such as labour, environment, movement of capital and so forth.[671] To give a practical example in the financial sector, the introduction of specific requirements for bond issuers or capital requirements for banks pursuing national financial stability constitute WTO-X provisions. Conversely, the notion of WTO minus (WTO-) gathers all PTA provisions that set commitments below the WTO level. That being said, even if the number of WTO+ and WTO-X obligations included in PTAs is generally relevant, their formulation may result weak or rather political and, eventually, their innovative reach limited.[672]

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[668]Henrik H Horn, Petros Mavroidis and André Sapir, (n 651); Jaques Bourgeois, Kamala Dawar, Kamala and Simon J Evenett, 'A Comparative Analysis of Selected Provisions in Free Trade Agreements', (Study commissioned by DG Trade, Brussels: European Commission 2007). Actually, the same concepts have been used to assess the accession protocol of new WTO members, in comparison with the requirements in the WTO agreements and in relation to the accession protocols of the first WTO members.

[669] Horn, Mavroidis and Sapir (n 651) 21–22.

[670] In both cases the WTO regime partially disciplines these aspects, in para 2(a) of the Annex introduces the prudential carve-out in a very general wording.

[671] Bourgeois, Kamala and Evenett (n 668) 11–13.

[672] Pierre Latrille and Juan Lee Juneyoung, 'Services Rules In Regional Trade Agreements How Diverse And How Creative As Compared To The GATS Multilateral Rules?' (2012) WTO Staff Working Papers ERSD-2012-19.

Concerning the existing literature on PTAs, economists have extensively addressed the potential distortive effects deriving from the proliferation of PTAs in terms of disadvantages, allocation of resources and uneven distribution of benefits, labelled "trade diversion", which is opposed to the more desirable "trade creation" that entails positive spill over, instead.[673] Differently, political scientists have delved into the political, social and economic incentives that lead governments to prefer PTAs over multilateral negotiations.[674] Overall, legal theories have moderately researched the breadth of PTAs and their compatibility with other legal sources of international law as well as among themselves. However, most legal scholarships have focused on market access commitments since PTAs pursue economic integration that notably starts from the reduction of market access barriers.[675] A limited number of studies have adopted a

[673] This aspect will not be part of the present research. For a pure dissertation on trade diversion vs trade creation see, *inter alia*, Nicholls, 'Measuring Trade Creation and Trade Diversion in the Central American Common Market: A Hicksian Alternative' (1998) 26 World Development 323; E Fukase and W Martin, 'Economic Effects of Joining the ASEAN Free- Trade Area (AFTA) the Case of the Lao People's Democratic Republic' (1999) April 3; Kreinin, 'Effects of the EEC on Imports of Manufactures'' [1972] The Economic Journal 897. For a more comprehensive analysis of the economical impact of regional trade agreements refer to Charles Poor Kindleberger, *Economic response : comparative studies in trade, finance, and growth* (Harvard Univ Press 1979); RH Snape, 'History and Economics of GATT's Article XXIV' (2002) 3 Global trading system 286; Arvind Panagariya, 'Preferential Trade Liberalization: The Traditional Theory and New Developments' (2000) 38 Journal of Economic Literature 287. For a literature review on the economic effects dividing theoretical approaches and empirical studies consult Caroline L Freund, *The WTO and Reciprocal Preferential Trading Agreements* (Edward Elgar 2007).

[674] The analysis of the political aspects will not constitute part of the present dissertation. For a detailed study see Jacob Viner and Paul Oslington, *The Customs Union Issue* (Oxford University Press 2014) 69-71, 90-93. The author strengthens the political reasons behind entering an economic union, such as pleasing domestic electorate, pressure from interest groups, etc.. He also points out external dynamics, such as the "pressure for inclusion" that pushes to the conclusion of a customs union or a free trade area based on the idea that the more integrated a country is the more attractive it will look to advanced economies. On the same stance, Baldwin refers to the expanding membership of the European Union as "a domino theory of regionalism" in Richard E Baldwin, *The Causes of Regionalism* (CEPR 1997) 856. For a similar point of view in trade relations concerning the EEA, consult Ali M El-Agraa, *International Economic Integration* (1982) 126; Joos Stragier, 'The Competition Rules of the EEA Agreement and Their Implementation' (1993) 14 European Competition Law Review 30, 30. For an American perspective, see Haight, 'The Customs Union and Free-Trade Area Exceptions in GATT' (1972) 6 Journal of World Trade Law 392, 392.

[675] Economic integration in both goods and services has remarked a significant advance going beyond the WTO provisions. Overall, the services sector has register a higher level of commitment compared

comparative approach offering cross-country or cross-sector analyses. For these reasons, the following sector will deal with the legal basis for PTAs and will offer an intensive sector-oriented empirical study.

3.2.1 The Legal Basis for PTAs within the WTO Regime: Article XXIV of the GATT and Article V of the GATS

The cornerstone of the WTO system is the principle of non-discrimination, which prohibits more favourable treatment based on the country of origin or accorded to domestic market in case of like products, like services and like service suppliers.[676] However, PTAs have been contemplated already in the text of the GATT 1947 when negotiating parties expressly introduced article XXIV for trade in good and they were reconfirmed for trade in services in article V of the GATS, which allows preferential treatments in order to promote further economic integration.[677]

Nevertheless, no one could imagine that these provisions originally conceived as a minor exception of the non-discrimination principle would have become central in the international scenario allowing hundreds of PTAs co-existing with the multilateral trading system.[678]

In essence, article XXIV of the GATT titled "Territorial Application - Frontier Traffic - Customs Unions and Free Trade Area" and the mirrored provision article V of the GATS "Economic Integration" permit the creation of free trade areas (hereinafter

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to the GATS, remarking new commitments in sectors not disciplined by the WTO and in terms of depth of the obligations. That being said, clearly an accurate assessment has to be made case-by-case and factors like the type of trade partners involved, the level of development, the geographical areas, the number of contracting parties and the template used play a relevant role in the final outcome. Acharya (n 650) 10–11.

[676] Trebilcock, Howse and Eliason (n 648); Van den Bossche and Zdouc (n 275) 648.

[677] For a general reading, World Trade Organization and The Secretariat, *Regionalism and the World Trading System* (WTO 1995).

[678] For the PTAs notified to the WTO see http://rtais.wto.org (last access August 2017). Kreinin (n 673) 897–920

FTAs)[679] or customs unions (CUs).[680] Although these two mechanisms aim at enhancing trade liberalisation and fostering economic integration, the former consists of the elimination of internal import tariffs within the members of the FTA, whereas the latter additionally sets a common external policy for trade relations with non-members. In fact, different types of economic areas with different degrees of integration exist and they have been grouped into four categories: preferential agreements that reduce intra-group tariff barriers, FTAs that abolish intra-group trade barriers, a CU that distinguishes from a FTA for a common external policy and finally a common market which adds free movement of labour and capital compared to the CU.[681]

Since the overall purpose of the WTO is to avoid discrimination among its members through the well-known MFN principle and the national treatment commitments, the regional economic integration exceptions seem to follow an opposite rationale given that it enhances preferential trade relations among parties of a FTA or a CU.[682] In fact, article XXIV GATT and V GATS consist of conditional exemptions as they allow economic integration inasmuch as trade liberalisation is increased. However, potentially

[679] Traditionally the term 'free-trade area' was intended imperfect customs union because the lack of an external common tariffs made the use of rules of origin indispensable to distinguish between products originated or produced within the FTA, to which apply the preferential treatment, and the other outside it. Kenneth W Dam, 'Regional Economic Arrangements and the GATT : The Legacy of a Misconception' (1964) 30 U.chi.L Rev 615.

[680] Although the thesis is centred on trade on services, a comparison with the mirrored provision in the GATT will be offered to acknowledging similarities and differences in the two disciplines. With this regard, article V of the GATS refers more generally to economic integration whereas article XXIV of the GATT explicitly mentioned FTA and CU. Specifically, article XXIV(8)(a) of the GATT is dedicated to CU, whereas article XXIV(8)(b) of the GATT is related to FTA. Differently, article V of the GATS does not distinguish between the two. Rodolphe S Imhoof, *Le GATT et les zones de libre-echange* (Imprimerie Courvoisier 1979).

[681] Gabrielle Marceau, 'The Primacy of the WTO Dispute Settlement System' (2015) 23 QIL 1.

[682] LE Mossner, 'The WTO and Regional Trade: A Family Business? The WTO Compatibility of Regional Trade Agreements with Non-WTO-Members' (2014) 13 World Trade review 633; Andrew Mitchell, 'Legal Requirements for PTAs under the WTO' in Simon Lester Mercurio, Bryan (ed), *Bilateral and regional trade agreements : commentary and analysis* (Cambridge University Press 2007) 82.

adverse consequences for the WTO members left out are inherent in a FTA and a CU.[683] This risk was envisaged in article XXIV(4) that reads "*purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers*".[684]

Thus, non-discrimination principle and PTA-exception get reconciled thanks to a series of strict criteria that render legitimate a theoretically limited number of derogations. The creation of a FTA or a CU through a PTA is conditional upon specific requirements stated in article V paragraphs 1 and 2 of the GATS and in article XXIV paragraphs 5 and 8 of the GATT. Precisely, for services, the specific criteria that allow a PTA to depart from WTO obligations are (a) substantial sectoral coverage (b) elimination of existing discriminatory measures (c) prohibition of new or more discriminatory measures.[685] Moreover article V(4) of the GATS guarantees that a greater economic integration does not impair WTO members left out from the integration, so proscribes an increase in the overall level of barriers.[686]

Concerning goods, the relevant provision is article XXIV paragraphs 5(a) and 8(a). In details, paragraph 5(a) states "*the provisions of this agreement shall not prevent the formation of a FTA or CU ….[]provided that the duties and other regulations of*

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[683] Before the establishment of the WTO, already 107 RTAs were notified to the GATT under article XXIV. For a full list of all PTAs notified to the WTO and under what provision they have been registered, consult the WTO database www.rtais.wto.org

[684] General Agreement on Tariffs and Trade (1994) art 24(4).

[685] General Agreement on Trade in Services (1994) art 6(1). The footnote 1 of the GATS specifies that substantive coverage is understood in terms of number of sectors, volume of trade affected and modes of supply. In order to meet this condition, agreements should not provide for the a priori exclusion of any mode of supply. For a general analysis see Christopher Charles Findlay, Sherry M Stephenson and Francisco Javier Prieto, 'Services in Regional Trading Arrangements' in Patrick F.J. Macrory, Arthur, Arthur E. Appleton and Michael G. Plummer (eds), *The World Trade Organization: legal, economic and political analysis* (2005) 293–312.

[686] "*Any agreement referred to in paragraph 1 shall be designed to facilitate trade between the parties to the agreement and shall not in respect of any Member outside the agreement raise the overall level of barriers to trade in services within the respective sectors or subsectors compared to the level applicable prior to such an agreement*." General Agreement on Trade in Services, art 5(4); Markus Krajewski, 'Services Liberalization in Regional Trade Agreements : Lessons for GATS "Unfinished Business"?' in Lorand Bartels and Federico Ortino (eds), *Regional trade agreements and the WTO legal system* (Oxford University Press 2006) 176.

commerce applicable in the constituent territory shall not be higher".[687] Besides, paragraph 8 contains the so-called "internal condition" in subparagraph (a)(i) and the "external criterion" in subparagraph (a)(ii). The former prescribes that duties and other regulations of commerce are eliminated to substantially all trade to the parties and that the same level of duties is applied to other WTO members.[688] In turn, the external requirement bans a higher incident of duties and other regulations in the countries outside the FTA or the CU.[689]

The interpretation of those requirements have been disputed at length. The first issue regards the notion of "substantially all trade" in the GATT provision.[690] Doubts still persist in relation to how to interpret the concept of "all trade" and how to assess the substantial coverage of a PTA. The term can be interpreted in a broad sense, considering the overall trade of a country or narrowly taking into accounts all trade within a FTA or a CU.[691] From what concerns the PTA coverage, it is disputed whether a proportion or a threshold has to be met. From a qualitative perspective, coverage has to count all major sectors, whilst the mostly shared quantitative approach sets the threshold to 95%. However, even in the application of the latter perplexities on how to assess it, meaning whether to use the tariff line mechanism, a specific proportion or an aggregate value in trade involving more than two parties remain.[692] Similarly, difficulties arise also in the

[687] General Agreement on Trade in Services, art. (5)(a).
[688] ibid, Article 24(8)(a)(i),
[689] ibid, Article 24(8)(a)(ii).
[690] In trade in goods the assessment concerns both the internal and external requirement. Mathis James, 'WTO, Turkey – Restrictions on Imports of Textiles and Clothing Products' (1999) 27 Legal Issues of European Integration 103.
[691] Jürgen Huber, 'The Practice of GATT in Examining Regional Arrangement under Article XXIV' (1981) 19 Journal of Common Market Studies, Oxford 281; WTO Committee on Regional Trade Agreement, Coverage, Liberalization, Process and Transitional Provisions in RTAs: Background Survey by the Secretariat (WT/REG/W/46, 2002).
[692] The percentage was mentioned in Working Party Report on EFTA – Examination of the Stockholm Convention, where the agreement covered almost 90% of the overall trade, albeit leaving the agricultural sector out. Working Party Report on EFTA, 'Examination of the Stockholm Convention' (L/1235 - BISD 9S/70, 1960). Nevertheless, other questions remain open, such as if a major sector is left out, does it cover the notion of substantial coverage? Do FTA or CU members have to adopt the same measures to attain the common external tariff? Lester (n 682) 97.

impact analysis of duty incidence pre and post constitution of a FTA or a CU, paragraph 8(a)(i), and its overall assessment, paragraph 5(a).[693]

Although provisions in the GATS are more general than the GATT ones, the assessment does not result easier: first because services distinguish for their intangible nature, secondly because the word sector can be interpreted as sub-sectors, aggregate or disaggregate sectors and, third, associating a service to a place or a territory, especially in the case of cross-border services, is not that obvious.[694] In this sense, in 1996 a Committee on Regional Trade Agreement (CRTA)[695] was entrusted to verify compatibility of PTAs under article XXIV of the GATT, article V of the GATS and under the so called "enabling clause", which envisages the possibility to accord a more favourable treatment to developing countries and to permit preferential arrangements among developing countries in derogation of the MFN principle.[696] Despite the existence of CRTA, the mechanism has hardly been triggered, partially because good faith in intra-State relationships is presumed and partially because the compatibility check can be activated on consensus basis. In essence, while the WTO system can

[693] Scholars have wondered whether the discipline expressed into parenthesis in paragraph 8(a)(i) excludes those measures from the scope of the paragraph. An academic debate has dealt with the interpretation of bracketed norms in article 24(8)(a)(i) and the assessment of the overall incident according to paragraph 5. On the complexity of this exercise, see Nigel Nagarajan, 'Regionalism and WTO: New Rules for the Games?' (1998) 4 Directorate-General for Economic and Financial Affairs, Economic Paper n.128.

[694] A relevant footnote related to subparagraph (a) of article 24(8) adds that '*... agreements should not provide for the a priori exclusion of any mode of supply*'.

[695] On the tasks of the CRTA, check the Committee's mandate. WTO, Committee on Regional Trade Agreements (WT/L/127, 1996). The CRTA holds the compel to notify to the Council for Trade in Goods (CTG) for assessment under GATT, the Committee on Trade and Development (CTD) for PTA under the Enabling Clause and the Council for Trade in Services (CTS) if covered under GATS Article V. Matsushita and others (n 318) 560.

[696] Paragraph 2(2) of the decision 'The Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries' accords the possibility to conclude regional or global arrangements. WTO, Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (L/4903, Decision of 28 November 1979).

theoretically examine all PTAs, in practice compatibility of PTAs with the multilateral trade system has exceptionally been required by WTO members.[697]

3.2.2 Compatibility of PTAs with The WTO System: The Turkey-Textile Case

The case *Turkey — Restrictions on Imports of Textile and Clothing Products* (shorten title the Turkey-Textile case) is paramount for the interpretation and the application of the regional integration exception under article XXIV GATT, since the Appellate Body established that this article can be invoked as a defence to justify measures contrary to the GATT provided that (i) conditions expressed in article XXIV GATT are satisfied and (ii) the measure is necessary upon the creation of the FTA or the CU itself.[698] Although the case provides an interpretation of the regional integration exception under the GATT, the ruling can offer important guidance also for the application of the mirrored provision under the GATS.

On the factual background, the dispute was brought about by India after the introduction of quantitative restrictions by Turkey, according to which the measures were necessary to the completion of the Turkey-EC customs union and they were in line with both the 1963 Turkey-EEC Association agreement and the 1995 Decision setting out certain modalities for the final phase.[699] India claimed inconsistency with article XI of the GATT that prohibits quantitative restrictions, with article XIII of the GATT that proscribes the discriminatory application of quantitative restrictions and with article II of the Agreement on Textiles and Clothing. Conversely, Turkey justified the contested

[697] In five cases only one PTA has been formally recommended to be amended, on consensus rule, namely the 1994 customs union between the Czech Republic and the Slovak Republic, Working Party Report (GATT document L/7501, 1994). Petros C Mavroidis, 'Judicial Supremacy, Judicial Restraint and the Issue of Consistency of Preferential Trade Agreements with the WTO : The Apple in the Picture' [2002] The political economy of international trade law 583.

[698] Gabrielle Marceau and Cornelis Reiman, 'When and How Is a Regional Trade Agreement Compatible with the WTO?' (2001) 28 Legal issues of economic integration : law journal of the Europa Instituut and the Amsterdam Center for International Law 297.

[699] *Turkey — Restrictions on Imports of Textile and Clothing Products- Report of the Panel* [1999] WTO/DS34/R paras 3.41- 3.44.

violation under article XXIV(8)(a), calling for the compelled harmonization implied in the formation of a CU.[700]

As a preliminary step, the Panel examined its competence to assess the compatibility of PTA with the WTO system. Specifically, the Panel questioned its jurisdiction under paragraph 12 of the Understanding concerning claims under article XXIV of the GATT in consideration of the role of CRTA, which was originally established to ascertain an overall compatibility of PTAs with the WTO regime. Since the creation of a FTA or a CU entails the adoption of a set of measures, the consistency of an integrated-trade model to the WTO system has to be deemed in its entirety by taking into accounts legal, political and economic aspects. For these reasons the Panel firstly assessed whether to apply deference towards an organ with a broader mandate.[701] On the merits, the Panel concluded that generally all members are obliged to comply with WTO obligations even when creating a FTA or a CU. However, when a simultaneous compliance is precluded, the more general commitments expressed in both GATS and GATT shall be put aside in favour of a more specific prescriptions included in article XXIV GATT or in article V GATS.[702]

By rejecting the assumption that CRTA would have been in a more favourable position to assess the overall compatibility of a PTA in relation to the WTO system- in a obiter dictum-, the Appellate Body reaffirmed the full competence of the WTO adjudicative bodies to appraise the consistency of a FTA or a CU with the requirements prescribed under article XXIV of the GATT or V of the GATS.[703] With regard to the

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[700] ibid, para 3.26.

[701] ibid, paras 9.52-9.54. In the Panel's view a customs union (or a free-trade area) considered as a whole, would logically not be a 'measure' as such, but subject to be challenged under the DSU.

[702] ibid, para 9.208.

[703] *Turkey — Restrictions on Imports of Textile and Clothing Products- Report of the Appellate Body* WTO/DS34/AB/R para 60. The position is in line with a previous ruling in *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Product*s, where the adjudicative bodies reviewed the justification of balance-of-payments restrictions under Article 18(b) of the GATT 1994. *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products- Report of the Appellate Body* [1999] WT/DS90/AB/R paras. 89–109. In this regard, see William J Davey, 'Has the WTO Dispute Settlement System Exceeded Its Authority? : A Consideration of Deference Shown by the System to Member Government Decisions and Its Use of Issue-Avoidance Techniques' [2006]

burden of proof, it specified that since article XXIV of the GATT and article V of the GATS constitute an exception of the overarching non-discrimination principle the member that invokes the exception has to prove the fulfilment of the specific conditions enshrined in the article used as a defence. In general terms, if a PTA is challenged, first the claimant has to make a *prima facie* case and then the respondent bears the burden to prove that the requirements expressed under the exception have been met. In details, the strict compatibility test established by the Appellate Body entails three steps: (i) the measure has to be introduced upon the formation of the FTA or the CU,[704] (ii) the FTA or the CU shall meet all conditions required under subparagraphs 5(a) and 8(a) of article XXIV and, finally, (iii) the measure has to be strictly necessary to the creation of the FTA and the CU itself, which is to say that the FTA or the CU would be prevented if it were not allowed to introduce the measure at issue.[705]

The Appellate Body report has been criticised for the lack of guidelines on how to prove the compatibility with the conditions expressed under article XXIV, in the attempt, according to many,[706] to impose a coherent and responsiveness order among the abundant PTAs. Some others have highlighted the complexity of this compulsory test that does not distinguish between economic and legal assessments.[707] For the

Journal of International Economic Law 11, 104–105; Iwasawa, 'WTO Dispute Settlement as Judicial Supervision' (2002) 5 Journal of International Economic Law 287; Shabtai Rosenne, *The Law and Practice of the International Court, 1920-1996* -Jurisdiction (M Nijhoff, vol 2, 1997) 842.

[704] *Turkey — Restrictions on Imports of Textile and Clothing Products-Report of the Appellate Body*, para 52.

[705] ibid, paras 58-59.

[706] William J Davey, 'Dispute Settlement in the WTO and RTAs : A Comment' [2006] Regional trade agreements and the WTO legal system 343; Armin von Bogdandy and Tilman Makatsch, 'Collision, Co-Existence or Co-Operation? : Prospects for the Relationship between WTO Law and European Union Law' [2001] The EU and the WTO : legal and constitutional issues 131; Marise Cremona, 'Neutrality or Discrimination? : The WTO, the EU and External Trade' in Grainne De Burca and Joanne Scott (eds) (Hart 2002) 151.

[707] The Appellate Body recognised that an economic test is needed to assess the compatibility of FTAs or CUs with the GATT and GATS respective exception, *Turkey — Restrictions on Imports of Textile and Clothing Products- Report of the Appellate Body* para 55. For a tentative compatibility assessment see Marceau and Reiman (n 698) 315–320 For a comprehensive analysis that includes also an economic assessment consult Peter Hilpold, 'Regional Integration According to Article XXIV GATT - Between

purposes of our work, the present case clarifies the legal relationship between the WTO system and PTAs creating preferential treatments in derogation of non-discrimination principle: if a PTA is challenged its validity has to be proved in the context of article XXIV of the GATT or article V of the GATS.

3.3 ASSESSING THE INCLUSION OF FINANCIAL STANDARDS INTO PTAS: THE INTENSIVE QUALITATIVE STUDY ON THE EU PTAS

The EU is one of the most active actors in the negotiations of PTAs and has strengthened economic relationships with different trade partners ranging from Chile, to Singapore and Canada.[708] Since 1970, the year of the first PTA signed with Norway,[709] the EU has negotiated almost fifty PTAs most of them finalised, provisionally applied or already in force with over 100 countries.[710]

Legal scholarship has mainly focused on market access commitments since the WTO legal basis for PTAs (articles XXIV of the GATT and V of the GATS) allows preferential treatment insofar as they pursue economic integration, which notably starts from the reduction of market access barriers.[711] At the same time, a tiny number of

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Law and Politics' in von Bogdandy and Wolfrum (eds), *Max Planck Yearbook of United Nations Law*, vol 7 (Brill 2003).

[708] Lorand Bartels and Federico Ortino,'Constitutional Functions of the WTO and Regional Trade Agreements' in *Regional trade agreements and the WTO legal system* (Oxford University Press 2010).

[709] While the first EU PTA that entered into force was the EU-Switzerland and Liechtenstein PTA on 01/01/1973, the EU-Norwegian PTA was actually the first agreement negotiated in 1970 that entered into force just few months after the former mentioned. All EU PTAs are consultable at the Treaty Office Database of the European Union External Action http://ec.europa.eu/world/agreements. For the PTAs notified to the WTO see http://rtais.wto.org (last access August 2017).

[710] The list of the negotiated agreements divided per region is available at the EU official website under the section trade, policy:http://ec.europa.eu/trade/policy/countries-and-regions/agreements. Brief summaries of the state-of-art, the coverage and the key features of the EU PTAs along with the official texts are consultable at the Treaty Office Database of the European Union External Action, http://ec.europa.eu/world/agreements.

[711] Economic integration in both goods and services has been remarked as well as significant advances beyond the WTO provisions. Overall, the services sector has registered a higher level of commitment compared to the one undertaken under the GATS, signalling new commitments in sectors not disciplined by the WTO, also in terms of the depth of the obligations. That being said, clearly an accurate assessment has to be made on case-by-case basis, which considers the relevant factors, namely the type of trade

academic works have adopted a comparative approach offering cross-country or cross-sector analyses,[712] and even less studies have delved into one country's trade policy or into a specific sector providing an in depth depiction of the relevant variable.[713] While most researches have addressed the consequences of the new legal framework introduced by PTAs,[714] the EU's recursive pattern in trade policy in a single sector has been generally overlooked.[715]

Differently, the present study will focus on the EU's trade approach adopted in the financial services sector. Thus, after a clarification of the rationale used in the selection of the PTAs examined and an explanation of the methodology applied, the analysis will illustrate whether international financial standards have been included into modern PTAs and what degree of commitment they set for contracting parties in order to finally

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partners, the level of development, the geographical areas, the number of contracting parties and the template use. Acharya (n 650) 10–11.

[712] Horn, Mavroidis and Sapir (n 651).

[713] The negative listing approach adopted in some PTAs has resulted to be more ambitious in the sector coverage and in the commitments agreed, especially in relation to market access and national treatments under WTO compared to the disciplined regulated by a positive listing approach adopted in other PTAs. For a comprehensive analysis, see Rudolf Adlung and Hamid Mamdouh, 'How to Design Trade Agreements in Services : Top down or Bottom-Up?' [2014] Journal of World Trade 191.

[714] For a thorough study on PTA structure, the depth of commitments in relation to the WTO level see Pierre Latrille, 'Services Rules in Regional Trade Agreements: How Diverse and Creative Are They Compared to the Multilateral Rules' in Rohini Acharya (ed), *Regional trade agreements and the multilateral trading system* (Cambridge University Press 2016). For a US-EU comparative analysis see, for instance, Joel P Trachtman, 'Trade in Financial Services under GATS, NAFTA and the EC : A Regulatory Jurisdiction Analysis' (1995) 341 Columbia journal of transnational law 37; Adlung and Mamdouh (n 713); Horn, Mavroidis and Sapir (n 651). For a qualitative work on WTO+ and WTO-X provisions in the EU PTAs refer to Bourgeois, Dawar and Evenett (n 668). A detailed review of the published studies on the relationship between WTO and PTAs, including the methodology applied, the research question and the conclusive findings of the above mentioned analysis will be presented in the following section titled "methodological premises" 3.3.1.

[715] The study sector concerns mainly sectors in which the EU has offensive interests (sectors in which the EU has an interest in establishing or extending its control over a partner's market), such as subsidies, state aid, competition and procurement. For a qualitative analysis on the EU's approach concerning state aid, see Leonardo Borlini and Claudio Dordi, 'Deepening International Systems of Subsidy Control: The (Different) Legal Regimes of Subsidies in the EU Bilateral Preferential Trade Agreements' (2017) 23 Columbia journal of European law 551; Dordi, Claudio, 'How Do PTAs Address "Competitive Neutrality" between State and Private Owned Enterprises?' (2016) 32 VNU Journal of Science 202.

answer the question as of whether the nature of international standards has hardened through the interaction with PTAs.

3.3.1 Methodological Premises and the Selection of the EU PTAs

By June 2017 more than fifty PTAs between the EU and at least one trade partner result finalised, signed or in force, of which almost two third have been negotiating after 2000.[716] Despite the outstanding abundance, only a selected number of the EU PTAs has been taken into consideration due to time and resource constraints as well as consistency with the research question. Indeed, the main focus remains verifying the inclusion of international financial standards within PTAs in the context of a possible future incorporation of those standards into the WTO legal framework, similarly to what happened with TRIPS.[717] Thus, the study attains to capture the current trend and considers the latest fourteen EU PTAs plus the EU-Chile PTA.

As a preliminary phase, all EU PTAs with a finalised texts have been listed and chronologically ordered from the more recent to the more dated.[718] The PTAs in an early stage or without a finalised text have been excluded from the analysis, with the exception of the Trade in Services Agreement (hereinafter TiSA). Despite the fact that the full text of TiSA has not been finalised and signed yet, the Annex on financial

[716] Thirty-seven EU PTAs out of fifty have been negotiated starting from 2000. Jo-Ann Crawford and Roberto V Fiorentino, *The Changing Landscape of Regional Trade Agreements* (WTO Publications 2005); Juan Marchetti and Martin Roy (eds), 'Services Liberalization in the WTO and in PTAs', *Opening markets for trade in services : countries and sectors in bilateral and WTO negotiations* (Cambridge University Press 2008), Roy and Marchetti identified a first wave of PTA proliferation coincident with the slowdown in multilateral negotiations at the Doha Round.

[717] TRIPS, adopted in 1995 in the context of the Uruguay Round, however it was inspired from and originated from international conventions on intellectual property rights, Antony Taubman, Hannu Wager and Jayashree Watal, *A Handbook on the WTO TRIPS Agreement* (Cambridge University Press ; 2012).

[718] The year taken as a reference is the year of signature of the text, so the year of the finalisation of the agreement, which allows us to chronologically order the EU PTAs according to the expression of Parties' mutual consent, regardless the length of each country's ratification procedure.

services is overall consolidated with only few provisions to grey.[719] The main reason for the inclusion of TiSA in this analysis resides in the relevance this treaty for the services sector, since it consists of a negotiating plurilateral agreement involving 23 WTO members, including the major players in trade in services (the EU, the US, Japan and Canada), which account for approximately 70% of the world trade in services.[720] Structurally, it is composed of 17 chapters called "Annexes", one of which entirely dedicated to the financial services sector. Moreover, the financial services text is overall stabilised with only few provisions to grey.[721]

	FTA	Full name	Country	Type of agreemen	Type of Partner	Sector	Status	Year of signature	Year of entry into force
1	TiSA	Trade in Services Agreement	Australia, Canada, Cile, Taiwan, Colombia, Costa Rica, UE, Hong Kong (Cina), Islanda, Israele, Giappone, Corea, Liechtenstein, Mauritius, Messico, Nuova Zelanda, Norvegia, Pakistan, Panama, Perù, Svizzera, Turchia e Stati Uniti	plurilateral	3	services	negotiated	2017	not yet
2	CETA	Comprehensive Economic and Trade Agreement	Canada	bilateral	3	services	finalised	2016	not yet
3	FTA	FTA	Vietnam	bilateral	3	services	finalised	2016	not yet
4	EPA	Economic Partnership agreement	SADC EPA	plurilateral	3	services	finalised	2016	not yet
7	EPCA	Enhanced Partnership and Cooperation Agreement	Kazakhstan	bilateral	3	services	finalised	2015	not yet
8	SSEPA	Stepping Stone Economic Partnership Agreement	Ghana	bilateral	3	cooperatior	finalised	2015	not yet
5	AA	Association Agreement	Georgia	bilateral	EU	services	in force	2014	2016
6	AA	Association Agreement	Moldova	bilateral	EU	services	in force	2014	2016
9	FTA	FTA	Singapore	bilateral	3	services	finalised	2014	not yet
10	FTA	Deep and Comprehensive FTA	Ukraine	bilateral	EU	services	in force	2014	2016
11	AA	Association Agreement	central america	plurilateral	3	services	finalised	2012	not yet
12	FTA	Trade Agreement	Columbia Peru	plurilateral	3	services	in force	2012	2016
13	FTA	FTA	South Korea	bilateral	3	services	in force	2010	2015
14	SAA	Stabilization and Association Agreement	Montenegro	bilateral	EU	services	in force	2007	2010
15	AA	Association Agreement	Chile	bilateral	3	services	in force	2002	2003

[719] Despite the temporary suspension of the negotiations, in November 2016 the parties joined the 21th negotiation round and the text was reported being almost entirely consolidated with the exclusion of very few provisions that have not been greyed yet. For a first-hand check on the stabilised text in the part dedicated to financial services see TiSA leaked version of 27 July 2016. Concerning the status of the text of the Annex on financial services and the importance of the TiSA within the international scenario refer to EU Commission, Report of the 21st TiSA Negotiation Round 2 (10 November 2016); and EU Commission, the Report of the 20th TiSA Negotiation Round 9 (25 September 2016). Moreover, as declared by the EU Parliament, the EU attempted to negotiate TiSA with the aim of "multilateralise" it in a second phase. For this further reason, TiSA could not be left out from the qualitative analysis. EU Parliament, 'European Parliament Resolution of 3 February 2016 Containing the European Parliament's Recommendations to the Commission on the Negotiations for the Trade in Services Agreement (TiSA)' (No P8_TA(2016)0041, 2016).

[720] EU Commission, 'Trade In Services Agreement (Tisa) - Factsheet' (Tradoc 154971, 2016); Elina Viilup, 'The Trade in Services Agreement (TISA): An End to Negotiations in Sight?' (No PE570448, 2015).

[721] In November 2016 the parties joined the 21th negotiation round and the text was reported being almost stabilised with the exclusion of very few disputed provisions. EU Commission, Report of the 21st TiSA Negotiation - Round 2 (10 November 2016) and the Report of the 20th TiSA Negotiation - Round 9 (25 September 2016). Above all, given the declared attempt, at least by the EU, to negotiate TiSA with the aim of "multilateralise" it in a second phase, this PTA could not be left out from the qualitative analysis. EU Parliament, Resolution of 3 February 2016 Containing the European Parliament's Recommendations to the Commission on the Negotiations for the Trade in Services Agreement (TiSA)' (No P8_TA(2016)0041, 2016).

Concerning the selection process, various criteria have been taken into accounts. First of all, as just explained, only stabilised PTAs have been considered, including the stabilised and initialled texts along with the provisionally applied PTAs.[722]

Secondly, among the EU trade partners, all PTAs concluded with countries that are not WTO members have been left out, given the research interest for a wide States' acceptance of financial standards in the prospect of a potential future inclusion in the multilateral trading system.[723] The third criterion applied relates to the coverage of the PTAs, which excludes all PTAs that do not deal with trade in services.[724] From the shortlisted agreements, the first fourteen EU PTAs were selected for the analysis, plus the EU-Chile PTA, which was deemed a benchmark for previously agreed treaties already in study of Bourgeois et al.[725]

As reported in the table, the selected EU PTAs are the following: EU-Canada Comprehensive Economic Trade Agreement (CETA), the EU-Vietnam FTA, the Economic Partnership with SADC EPA,[726] the EU-Kazakhstan PTA, the EU-Ghana Economic Partnership, the Association Agreement with Georgia, the Association Agreement with Moldova, the EU-Singapore FTA, EU-Ukraine FTA, the Association Agreement with Central America, the Trade Agreement with Colombia and Peru, the

[722] The PTAs in an early stage of negotiations or lacking of a mostly agreed text (such as the EU-Mercosur, EU-Japan, TTIP) have been excluded to the analysis. From the PTA selected almost all texts have been signed or entered into forced (some of them provisionally) with the only exception of TiSA, whose text on financial services has been stabilised. EU Commission, Overview of FTA And Other Trade Negotiations (2017).

[723] Baldwin was among the first scholars to have the intuition that PTAs would often be used to prepare the setting for future multilateral negotiations or advances. Richard Baldwin and Patrick Low (n 658).

[724] In order to assess the coverage of financial services, the work maps whether the EU PTA contained a chapter related to trade in services and if it did, the PTA was included in the analysis.

[725] Bourgeois, Dawar and Evenett (n 668) 208. The EU-Chile contains the highest concessions compared to the best EU GATS offer and the previous EU PTAs, which is to say that it was considered as a benchmark for the present research.

[726] The SADC EPA group stands for South African Development Community and comprises Botswana, Lesotho, Mozambique, Namibia, South Africa and Swaziland. Angola may opt to join the agreement in future.

EU-South Korea FTA, the Association Agreement with Montenegro and the Association Agreement with Chile.[727]

With reference to the countries selected for this analysis, as better explained in the following paragraphs, the EU has been chosen not only because it is one of the most active PTA negotiators but also because it has been recognised as the PTA drafter with the most open approach and inclusive coverage since PTAs are generally rich in WTO-X and WTO+.[728]

3.3.2 Previous Qualitative and Quantitative Studies on PTAs

The methodology applied in the mapping exercise conducted was built up from previous works on WTO+ and WTO-X provisions, including country-centred, cross-sectoral and comparative studies.

In particular, the starting point was Marchetti and Roy's cross-country and cross-sectoral quantitative research.[729] Briefly, the two authors selected 28 PTAs notified at the WTO and analysed both the number of sectors covered in the economic liberalisation promoted by PTAs (coverage) and the level of commitment accorded (depth). By comparing countries' GATS best offer in the Doha Round, on one side, and the same countries' PTA engagement, on the other, with in level of commitment at the WTO (used as benchmark), they concluded that PTAs were well far-reaching.[730] A similar conclusion was drawn by Trachtman in his comparative analysis of key multilateral trade principles in the WTO agreements, in the US PTAs and in the EU PTAs. Specifically, Trachtman looked at the single WTO obligations (inter alia market access,

[727] The use of the terms FTA, PTA or association agreement is linked to the official name on each treaty. If it is not specifically expressed, the term adopted will be the generic acronym PTA.

[728] The choice of the EU is based on Joel Trachtman, 'Trade in Financial Services under GATS, NAFTA and the EC : A Regulatory Jurisdiction Analysis' [2006] The international economic law revolution and the right to regulate 323, and Horn, Mavroidis and Sapir (n 651).

[729] The authors defined their analysis as an economic quantitative study Marchetti and Roy (n 716) 6.

[730] In synthesis, the authors compare the GATS offers in the ongoing Doha Round with the commitments in the services sector undertaken by the same countries in PTAs in order to see which one contain a deeper level of engagement considering the WTO level as a benchmark. They conclude that PTAs' reach is deeper and wider. ibid 31–35.

national treatment and the MFN principle) in both the US and in the EU PTAs and found that the European approach was more ambitious, thanks to the harmonisation imperative that drives the project of an EU's integrated market.[731] The wide coverage that characterises PTAs was recognised also by Adulung and Latrille, however it was attributed mainly to structural features of the agreements. In essence, Adulung focused on the positive listing approach or "bottom-up", typical of the GATS, and the negative listing also called "top-down" approach, frequent in PTAs, finding that the latter produced wider and more far-reaching obligations compared to the former.[732] Similarly, Latrille conducted a thorough analysis on both structural aspects and substantive provisions in a comparative perspective, considering the WTO regime and PTA approaches (including both EU and US PTAs).[733] The ultimate goal of his work was to systematise the PTA universe by identifying recurring similarities and differences in order to possibly group them according to common structural features. Thus, the study categorises PTAs following the dichotomy GATS model vs NAFTA template and it identifies a sort of recurrent pattern accordingly to the model chosen. In practical terms, the GATS model is characterised by positive listing, full coverage of the 4 modes of supply in the services chapter and horizontal application of the core disciplines. Differently the NAFTA template presents a negative listing, a coverage of three of the four modes of supply in the services chapter and the inclusion of the commercial presence provisions in the investment chapter, along with a sectoral application of the core commitments, meaning sector-specific market access and national treatment obligations in each stand-alone chapter.[734] While the study consists of a horizontal

[731] Trachtman underlines the stronger harmonisation pursued by the EU as a factor influencing the wide breadth of EU PTAs compared to the US ones. Particularly, harmonisation in this work has been construe as a sort of extended national treatment that along with the "institutional machinery", expressed through Cassis-de-Dijon ruling, were at the basis for the far-reaching European approach. Joel Trachtman, 'Trade in Financial Services under GATS, NAFTA and the EC : A Regulatory Jurisdiction Analysis' [2006] The international economic law revolution and the right to regulate 323, 120.

[732] Adlung and Mamdouh (n 713).

[733] Latrille (n 714).

[734] With regard to domestic regulation and transparency core obligations, if the general discipline applies horizontally the provisions automatically apply to all chapters in which the PTA is structured. Differently, if they do not apply horizontally, regulation and transparency obligations remain valid

application of structural characteristics that neutralises differences deriving from the degree of development or the geographical distribution of the trading partners, the analysis results rather quantitative with a cross-country and cross-sectoral approach and does not cover the financial sector, which is indeed excluded.[735]

Last but not least, Horn, Mavroidis and Sapir gather most of the findings presented by previous scholars, namely a wider coverage in PTAs, a different approach in the US and the EU templates along with the awareness of structural features behind different outcomes, and propose a more qualitative study. The research question investigates if the US or the EU tends to include more WTO+ or WTO-X commitments in their PTAs and examines the legal nature of the further commitments, in terms of legal enforceability.[736] Particularly, the concept of legal enforceability, meaning the likelihood to successfully bring a claim before an international adjudicative body in case of non-compliance by one of the parties, has been adopted also in the present analysis.[737] From their final remarks emerge that the EU includes more WTO+ and WTO-X in its PTAs than the US, however only a very restrictive number are legal enforceable, displaying significant legal inflation between the number of areas with further commitments and an effective engagement undertaken.[738]

Once established that the EU policy results far-reaching than the US one and, consequently, having decided to centre the analysis on the EU PTAs, the research of Bourgeois et al. concerning the EU's recurrent WTO-X commitments came in handy to identify the EU PTA template, first, and to include the EU-Chile PTA in our research,

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exclusively for the core disciplines, whilst sector-specific chapters may envisage specific regulatory and transparency commitments provided that the requirements are included in the chapter. In latter case, there is a sort of translation of general regulatory and domestic discipline into stand-alone chapters by the inclusion of specific sectoral commitments.

[735] By mapping the same structural features in all PTAs considered, irrespectively from the level of development and the regional area the trade partners belong to, the author captures the overall trend in PTA designing and neutralises the variance deriving from countries' differences. Latrille (n 714).

[736] The authors considered in this study 28 PTAs (14 EU and 14 US PTAs) and identified 52 area belonging to WTO+ or WTO-X. Horn, Mavroidis and Sapir (n 651).

[737] In particular, the observations made concerning the wording considered legal enforceable has been applied in the present analysis as well. ibid 16–19.

[738] ibid 7.

secondly. Specifically, in the final findings the authors reckoned the EU-Chile PTA as a benchmark for the previous PTA negotiations, since it contains the highest concessions in absolute terms compared to the EU best GATS offer in the Doha round and the EU PTAs signed before 2002.[739]

Besides, Borlini and Dordi's work on the EU state aid policy brought the awareness of different EU external actions according to the geographical proximity of the trade partners and the EU enlargement policy in the surrounding areas.[740] Hence, the EU trade policy results influenced by whether the commercial partner is a potential candidate for the EU enlargement, a regional neighbour or a strategic global player.[741] This explains why agreements, especially in a cooperative and economic framework, with potentially new EU members presented wider and deeper commitments than those agreed with other trading partners.[742]

To sum up, from the precedent studies on PTAs and the services sector, we took the following assumptions and applied the following methodological aspects:

The EU policy has proven to be more WTO+ and WTO-X inclusive, so if international financial standards have ever been included in PTAs they are expected to be found in the EU PTAs, however the wording may not allow an effective legal enforceability. For this reason, the present analysis will focus on the wording and on the examination of the effective commitment undertaken in the EU PTAs. In addition, being aware that the model chosen and the structural features adopted influence the final outcome, the present qualitative study will take into account the positive and negative listing approach, the template used and the modes of supply covered both in the services chapter as well in the investment chapter. For the interpretation of the results obtained

[739] Bourgeois considered five WTO-X areas, namely labour standards, environment protection, State aid, competition, government procurement and non-tariff barriers. Bourgeois, Dawar and Evenett (n 668) 208.

[740] With regard to the belief that PTAs and more generally bilateral agreements are used as a means to export specific policy or standards refer to Jean-Christophe Maur, 'Exporting Europe's Trade Policy' (2005) 28 World economy 1565.

[741] Borlini and Dordi (n 715) 3–4.

[742] ibid 6–8. For a general reference to the European Neighbourhood policy consult EU Commission, 'EU Commission a Strong European Neighbourhood Policy', (No COM(2007) 774, 2007).

from the mapping exercise, the degree of development of the trade partners and the type of country engaged in preferable treatments - in relation to the EU regional policy - will be considered as explanatory factors for potential differences reckoned among the EU PTAs selected for the analysis.

Finally, the UNCTAD mapping structure used for the International Investment Agreements (IIA) Hub has been taken as a starting point for the mapping exercise conducted in the present research. In practical terms, the binomial assessment system, that attributes the value 1 in case of the presence of the variable considered and 0 for lack of it, has been applied to systematise and facilitate both the comparison and the interpretation of the features of each PTA.[743]

3.3.3 Methodology

The present study aims at verifying if and how international financial standards are included in the fifteen EU PTAs selected. The analysis results both intensive and qualitative. It is intensive since the work focuses exclusively on the PTAs signed and concluded by the EU (counting 28 members as one country) and it considers only one sector, namely the financial services sector. At the same time the study is qualitative because it examines the level of commitment deriving from the provisions that include international financial standards. In other words, along with the presence of international financial standards, also the wording used to integrate them will be observed to ascertain Parties' intention to create legally binding relationship, referred to as "legal enforceability" in this study.

From a methodological perspective, the presence of provisions including international financial standards and carve-outs have been examined all along the core disciplines regulating financial services in each EU PTA, which is to say (i) the services chapter or the stand-alone financial services chapter (in case of NAFTA-modelled PTAs), (ii) the investment chapter, (iii) the domestic regulation discipline and (iv) the

[743] UNCTAD Wok Programme on International Investment Agreements, 'UNCTAD's IIA University Mapping Project - Guide' (2016).

transparency chapter. Concerning the four vertical disciplines taken into consideration, the mapping analysis has been conceived to capture both GATS-modelled PTAs and PTAs moulded on the NAFTA template. As acknowledged in the previous studies,[744] GATS-shaped PTAs show a positive listing approach, a services chapter (often including a financial services section) that covers all four modes of supply, a domestic regulation and a transparency discipline horizontally applied, meaning that general core provisions concerning transparency and regulation apply to all chapters. Differently, the NAFTA template envisages a negative listing approach, a services chapter that usually covers mode of supply 1, 2 and 4, an investment chapter that deals with mode of supply 3 (commercial presence), a stand-alone financial services chapter that prescribes a sector-specific discipline and for which domestic regulation and transparency provisions are sector-specific and not horizontally applicable. The purpose behind mapping all four chapters is to detect in what discipline international financial standards have been inserted.

With regard to the horizontal aspect examined all along the different EU PTAs, how the international financial standards are included in PTA provisions will be analysed. In practical terms, the examination will focus on the wording, the placement within the PTA and the kind of obligations that PTAs introduce in relation to States' policy design. In details, the wording will take accounts of the modals and the verbs used. Thus, the study will differentiate between "shall" and "should" and between prescription of conformity and blander cooperation efforts. Moreover, the analysis will look at explicit references to standard-setters (Basel Committee, IOSCO, IAIS) and open mentions to specific codes of conduct, voluntary guidelines and sectorial standards (e.g. IOSCO's Objectives and Principles for Securities Regulation, IAIS's Insurance Core Principles). In addition, the placement will be assessed, namely where the relevant provisions are inserted in the financial services part, if under the domestic regulation discipline or under the prudential carve-out. This exercise will be preliminary to the definition of the

[744] Trachtman,'Trade in Financial Services under GATS, NAFTA and the EC : A Regulatory Jurisdiction Analysis' (n 68); Adlung and Mamdouh (n 713); Marchetti and Roy (n 716); Latrille, Pierre (n 714).

commitment that international standard-related provisions introduce. At the end of the analysis concerning how international standards are included into PTAs we will be able to understand whether (i) international standards create new commitments upon States (ii) whether they serve as benchmark in States' policy design (similarly to the role of international SPS and TBT standards *vis-à-vis* SPS and TBT discipline in the WTO regime)[745] (iii) whether they become relevant in prudential policy-making or (iv) whether they constitute a justification for higher level of protection compared to the one conceived in PTAs.

Ultimately the legal value of the PTA international standard-related provisions will be ascertained. In this sense, it is noteworthy distinguishing between legally binding nature of a provision and its legal enforceability or judiciability. In this respect, the inclusion of soft law principles, such as international financial standards, into a hard law instrument would make those principles formally binding since the legal tool in which they have be integrated in is technically legally binding. Yet, legal enforceability is a different matter. This concept refers to the possibility to redress non-compliance or a violation of a provision before an international adjudicative body. As defined by Horn at al., legal enforceability is the likelihood that a provision is "successfully invoked by a complainant in a dispute settlement proceeding".[746] Put differently, even if soft law requirements are included in a treaty they cannot automatically be deemed legal enforceable if the content of the provision has a declaratory, programmatic or merely political value. With McMaffrey's words "*..the intent to create a legal relationship is distinct from the intent to create moral obligation or political commitment. Terminology such as 'should' and 'will' do not indicate such an intent*".[747] Therefore, for the present work, the mere presence of international financial standards or a reference to them included in a PTA, without substantive legal underpinnings, would not be considered

[745] For a deep analysis of the SPS and TBT disciplines within the WTO system refer to chapter 3. In the present study, the scenario (iii) refers to a situation in which national financial and prudential policies are required to be based to or even to conform to international financial standards in order to guarantee an acceptable and an adequate level of protection of the measures adopted.

[746] Horn, Mavroidis and Sapir (n 651) 16.

[747] Stephen C McCaffrey, *Understanding International Law* (Newark: Lexis Nexis 2006) 81.

legally binding. As a consequence, if the case occurs, the ascertained soft nature of international financial standards would not be reckoned "hardened" by their integration into PTAs.[748] For mapping purposes, wording like "parties shall cooperate", "dialogue shall be established", "parties shall strive to" or "each party shall make its best endeavour to" will not be considered as legally enforceable.[749]

Finally, the second horizontal element analysed is the presence of a prudential carve-out, on one side, and provisions that carve financial services out from dispute settlement, on the other. The former carve-out detects States' regulatory autonomy for prudential reasons, whilst the latter becomes relevant in the assessment of legal enforceability. Indeed, even if the wording of a provision confers effective enforceability, the presence of a carve-out from would prevent that certain provisions are invoked during adjudicative proceedings. However, if such a case occurs, it will be appropriately indicated in the analysis. The mapping of carve-outs from dispute settlement would allow us to detect any correlation between a specific wording (expectedly more prescriptive) and a carve-out, if this condition verifies.[750]

3.3.4 Findings

For the sake of clarity, the findings will first focus on the inclusion of international financial into PTAs. Specifically, the wording, the presence of a list of both standards and standard-setting bodies along with the issues covered in the relevant provisions will be analysed. Then the examination will move to the placement of these standard-related PTA provisions within the agreement and their legal enforceability in order to clarify the level of commitment they create upon States. In addition, the presence of a prudential carve-out will be verified and its placement within the PTAs' structure will be taken into

[748] The difference between the legal nature of the instrument that contained the provisions analysed and the substantive legal nature of the provision themselves is maintained. For a similar approach see Horn, Mavroidis and Sapir (n 651) 16–18.
[749] ibid 17.
[750] *The idea is to verify whether the presence of a carve-out allows the parties to stronger legal commitment.* Lester (n 682) 60–67.

account. Finally, some considerations on the influence of the factors spotted as relevant in the previous studies on PTAs, namely the countries' level of development or the type of trade partners will be provided. Eventually, the findings will acknowledge the breadth of the qualitative intensive study and will conclude with suggestions for further researches.

From the qualitative analysis emerges that 11 PTAs out of 15 include international financial standards or a reference to them.

Specifically, the PTAs that include international standard-related provisions are TiSA and the PTAs negotiated with Vietnam, Kazakhstan, Georgia, Moldova, Singapore, Ukraine, Central American Countries, Peru, South Korea, and Chile. Conversely, the four PTAs that do not present even a reference to international financial standards are CETA, SADC Countries,[751] Ghana and Montenegro. Taking into consideration the EU PTAs with at least a reference to international financial standards, some similarities need to be highlighted.

First of all, the wording. Basically all provisions seem very similar and follow the so-called "best-endeavour" formulation, which generally has a rather declaratory value. In particular, two templates emerge. The first, used in TiSA, in the EU-Central America PTA and in the EU-Chile PTA, is vaguer and recites "*Each Party shall make its best endeavour to ensure that internationally agreed standards for regulation and supervision in the financial services sector and for the fight against tax evasion and avoidance are implemented and applied in its territory.*[752] The second model contains the same opening but it details the international standard-setters and even lists the codes of conduct and the voluntary guidelines that States should take into consideration. For the sake of simplicity, this second template will be referred to as "Vietnam-model" and adds to the former opening the following sentence "*Such internationally agreed standards are, inter alia, the Basel Committee's Core Principle for Effective Banking*

[751] SADC stands for South African Development Community.

[752] In TiSA, an further sentence is added, compared to the EU-Central America PTA and reads " *Each Party shall consider the possibility of relying on other Parties' regulations when it finds that those offer an equivalent level of protection for the financial system and the stability and resilience of financial markets"*.

Supervision, the International Association of Insurance Supervisors' Insurance Core Principles, the International Organisation of Securities Commissions' Objectives and Principles of Securities Regulation, the OECD's Agreement on exchange of information on tax matters, the G20 Statement on Transparency and exchange of information for tax purposes and the Financial Action Task Force's Forty Recommendations on Money Laundering and Nine Special recommendations on Terrorist Financing".

The Vietnam model is used in 6 PTAs out of 11, namely the agreements negotiated with Vietnam, Georgia, Moldavia, Ukraine, Columbia and South Korea. Among these six PTAs the differences spotted are linked to the number of standard-setters openly mentioned and, consequently, the standards taken as reference. All non-exhaustive lists include Basle Committee, IOSCO, IAIS, OECD, G20 and FAFT. The agreements with Moldavia, Georgia and Ukraine explicitly envisage that parties take note of the ten Key Principle of Exchange Information of the G7. Besides, the EU-Columbia PTA is slightly different as the list of standards and standard-setting bodies result exhaustive instead, missing the word *inter alia* before the open reference to financial standards.

The standard-related provisions in the EU-Kazakhstan PTA and the EU-Singapore PTA do not fit the previous models. The former is literally a provision *sui generis*, since it generically encourages standard convergence for sound financial systems.[753] The provision in the EU-Singapore PTA does not have the general introductory opening, differently form the two previous models, and it goes straightforward to an exhaustive list of financial standards adopted by the Basel Committee, IAIS and IOSCO and by the OECD for transparency and information exchange standards.[754]

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[753] The provision in the EU- Kazakhstan PTA is inserted in the chapter titled "Cooperation in the area of banking, insurance and other financial services" composed of this single provision. We will speculate later that the reason may be found in the lack of centrality of the financial sector in the Kazakhstan's economy.

[754] The provision in the EU-Singapore PTA recites *"Each Party shall make its best endeavours to ensure that the Basle Committee's "Core Principles for Effective Banking Supervision", the standards and principles of the International Association of Insurance Supervisors and the International Organisation of Securities Commissions' "Objectives and Principles of Securities Regulation" and the internationally agreed Standard for transparency and exchange of information for tax purposes as spelled out in the 2008 OECD Model Tax Convention on Income and on Capital are implemented and applied in its territory"*.

The second similarity is the issues tackled by the 11 PTAs containing reference to international standards. Both the TiSA modelled and the Vietnam-modelled provisions address financial stability and tax evasion, with the exception of the EU-Chile PTA that covers money laundering instead of tax evasion. In addition, the Vietnam-modelled provisions are more detailed and aim to fight money laundering and financing terrorism as well. As already mentioned, only the Vietnam-modelled provisions present a non-exhaustive list with an open mention to the reference standards and the relevant international standard-setting bodies.

The third analytical element is the placement of the standard-related provisions. Most of the standard-related provisions have been inserted in the financial services chapter, being it a section under the chapter on trade in services or a stand-alone chapter if NAFTA-moulded PTAs. Specifically, the provisions have been inserted in the section titled "regulatory framework" linked to domestic regulation, in the PTAs with Moldova, Georgia, Ukraine, South Korea, Columbia, Central America and Chile.[755] Alternatively, the reference to international financial standards has been included under transparency discipline within the framework of financial services, as in the case of TiSA. In the EU-Vietnam PTA and the EU-Singapore PTA the reference to international standards has been found in the prudential carve-out.

Moving to the analysis of the legal enforceability, none of the provisions examined have been found legally enforceable since all provisions present the so called "best endeavours clause", a formulation with a rather hortatory and political value.[756] In this sense, in case of non-compliance with the international standard-related provisions a dispute can hardly been brought before an adjudicative body and even less likely the complainant would win it. As previously examined, the content of the provisions results

[755] In the case of GATS-modelled PTAs, the vast majority, the financial services sector is a subsection of the chapter dedicated to trade in services. Domestic regulation and transparency disciplines are generally horizontally applicable. Conversely, NAFTA-based PTAs, such as CETA, presents a stand-alone financial services chapter where domestic regulation and transparency provisions are sector specific and mirror the horizontally applicable ones.

[756] For a deep argumentation on the political or declaratory value of the "best-endeavour clause" see Horn, Mavroidis and Sapir (n 651).

in a simple exhortation to "*make the best endeavours to the extent possible to ensure the implementation of international financial standards*" without creating any substantive obligation.

FTA	Inclusion	Legal Enforceability	Wording	Standard setting Bodies	Standard setting Bodies	Issues tackled	List	exhaustive list	placement	formulation
TiSA	YES	NO	BE	NO	NO	TX,FS	NO	\	(FS)TR	TISA
CETA	NO	NO	\	\	\	\	\	\	\	
EU-Vietnam	YES	NO	BE	YES	SL,ISC,IAIS,OECD,G20,FATF	TAX,ML,TER	YES	NO	(FS)PCO	VIET
SADC Countries	NO	NO	\	\	\	\	\	\	\	\
Kazakhstan	YES	NO	RC	NO	NO	NO	NO	\	Coop	
Ghana	NO	NO	\	\	\	\	\	\	\	\
Georgia	YES	NO	BE	YES	BSL,ISC,IAIS,OECD,G20,G7	TAX,ML,TER	YES	NO	(FS)REG	VIET
Moldova	YES	NO	BE	YES	BSL,ISC,IAIS,OECD,G20,G7	TAX,ML,TER	YES	NO	(FS)REG	VIET
Singapore	YES	NO	BE	YES	BSL,ISC,IAIS,OECD	TAX	YES	YES	(FS)PCO	
Ukraine	YES	NO	BE	YES	BSL,ISC,IAIS,OECD,G20,G7	TAX,ML,TER	YES	NO	(FS)REG	VIET
Central America	YES	NO	BE	NO	NO	TAX,ML,TER	NO	\	(FS)REG	TISA
Columbia Peru	YES	NO	BE	YES	BSL,ISC,IAIS,OECD,G20,G7	TAX,ML,TER	YES	YES	(FS)REG	VIET
South Korea	YES	NO	BE	YES	BSL,ISC,IAIS,OECD,G20	TAX,ML,TER	YES	NO	(FS)REG -DR	VIET
Montenegro	NO	NO	\	\	\	\	\	\	\	\
Chile	YES	NO	BE	NO	\	ML	NO	\	(FS)REG -DR	TISA

LEGEND						
Wording	Best Endeavour (BE)	Regulatory Convergence (RC)	Ensure to the extent Possible (EP)			
Standard setting Bodi	Basel (BSL)	IOSCO (ISC)	IAIS	OECD	G20	G7
Issues Tackled	Taxation (TX)	Money Lundering (ML)	Terrorism(TER)		FS	
Placement - Section	Cooperation (Coop)	Prudencial Carve out (PCO)	General Regulation (REG)		Transparency (TR)	Horizontal provision (HP)
Type of Country	Developed (DEV)	Developping (DC)	Least Developed (LDC)			
EU Partners	European (EU)	Mediterranean (MED)	third country(3)			

The combination of the wording, the placement and the lack of legal enforceability will help us to formulate four situations where financial standards can effectively be used by States either in their policy-making or in the adequacy assessment of national measures. In other words, the commitment that international standard-related provisions can introduce are (i) new substantive commitments upon States, so that financial standards have to be taken into account in trade-policy design (ii) a benchmark in the choice of the level of protection to adopt (similarly to the role of international SPS and TBT standards *vis-à-vis* SPS and TBT disciplines in the WTO regime),[757] (iii) a benchmark in the prudential adequacy test or (iv) a justification for higher level of protection compared to the one conceived in PTAs.

Given the "best endeavour" formulation predominant in all international standard-related provisions, the scenario (i) can be excluded. It is hard to believe that new substantive commitments would be intended from sentences like "*party shall make its*

[757] The scenario (iii) refers to a situation in which national financial and prudential policies are required by PTAs to be based to or even to conform to international financial standards, similarly to what happens for the SPS and TBT disciplines.

best effort to the extent possible to ensure that". Case (ii) seems the more likely, in the sense that contracting parties are encouraged to take into account international standards when regulating the financial sector, at least under domestic regulation. Although this approach recalls the WTO discipline envisaged for SPS and TBT measures, the wording and the legal enforceability of the financial sector-PTA provisions result weaker compared to the analogous WTO provisions referring to food international standards. Indeed, PTA provisions do not create either an obligation to base national policies on international standards or a presumption of conformity to PTAs. So the PTA discipline in the financial sector results different from the SPS and the TBT agreements, where national measures conformed to international SPS and TBT standards are assumed conform to the WTO regime as well. Finally, for the EU-Vietnam PTA and the EU-Singapore PTA, where reference to international financial standards have been inserted in the prudential carve-out, a potential scenario (iii) that envisages the recourse to international standards in prudential adequacy test cannot be excluded. While international financial standards can be found useful in the adequacy analysis, the presence of an effective obligation upon Vietnam or Singapore to comply with this provision when adopting prudential measures remained questionable. Put differently, the exhortative value of the best-endeavour formulation would hardly limit States' right to regulate the financial sector recognised by the prudential carve-out.[758] Last but not least, the present analysis does not provide solid evidence to uphold the hypothesis conceived in the case (iv). Specifically, the use of international standards as a self-standing justification for national measures that pursue a higher level of protection than the one conceived in PTAs does not have valid ground. A similar role for international regulatory standards has not been recognised either in the SPS or TBT disciplines under the WTO framework. Indeed, even if the wording of SPS and TBT provisions is definitely stronger than the commitments shown in PTAs, since the terms used in the

[758] Reference to international standards may help adjudicative bodies to assess the reliance upon or the deviance of national measure from the level of stability/protection recognised by the international financial standards. Yet, the approach results different from what happens for SPS and TBT measures, where a presumption of conformity and an expectation to adherence, however indirect, is clearly stated in the SPS and TBT Agreements.

WTO agreements are "base on" and "conform to", the recourse to SPS and TBT international standards as self-standing justification for WTO-inconsistent measures has not been acknowledged yet. Therefore, it seems excessive and disputable to attribute such a power to PTA provisions designed with a light, vague and general wording, which lack of substantive commitments.

Among the EU PTAs that do not include any reference to international financial standards, few reflections have to be underlined with regard to CETA. Indeed, the PTA with Canada is of particular relevance since the EU and Canada can be considered being similar trade partners having similar economies and level of development. Given this premise, the absence of any reference to international financial standards, differently from PTAs with other trade partners, triggers questions on the reasons behind a different approach. The present study highlights three hypothetical explanations. First, since the EU and Canada share the same or a very similar level of protection in the financial sector - and consequently regulatory framework- the introduction of an open reference to international standards seemed unnecessary. A second hypothesis assumes that the trade partners preferred not to constrain their right to regulate in this specific sector. Yet, the approach adopted by the parties in investment protection, especially envisaging an *ad hoc* Investor-State dispute settlement mechanism (ISDS), may contrast the assumption based on general States' reluctance to limit their freedom to regulate, particularly in light of the significant limitations of sovereignty accorded in the investment chapter. Differently, an explanation based on trade partners' intent to maintain sovereign powers in the regulation of the financial sector in pursuant to financial stability or for prudential reasons cannot be excluded. A third hypothesis considers international financial standards as non-legitimate standards, which would explain why they are not mentioned in CETA provisions. However, this explanation would not reflect EU trade policy, since it has introduced standards-related provisions in PTAs with other trade partners. Furthermore, given the mere declaratory value ascertained in PTA standard-related provisions, an inclusion of an open reference to these regulatory standards in the CETA would not have limited States' right to regulate. So the reason could be better searched in the negotiating process of CETA (balance-offs, key sector, public pressure, sectorial

lobbying, etc). Nevertheless, the analysis has been conceived in a qualitative and intensive manner to investigate the EU approach towards international financial standards in PTAs, so the value of the hypotheses above formulated remains speculative. Moreover, Canada is the only trade partner with which the EU shares strong economic similarities, among those that did not include a standards-related provision in their PTAs, which makes a comparative analysis with other PTAs even harder. Even if considering Singapore similar to Canada as trade partner, the EU-Singapore PTA refers to international financial standards, which makes a generalisation of the EU approach towards developed countries difficult to conceived. Hence, to test with precision the validity of the hypotheses concerning the reason behind the absence of standards-related clause in CETA a different analysis is required: a further study that focuses exclusively on PTAs negotiated with trade partners that have a similar level of development, a similar economy and similar regulatory framework in order to ascertain differences in the treatment accorded by the EU to various trade partners pertaining to the same category. As already specified, the present analysis researches other priorities, so this very interesting question can constitute the subject for further studies in the field.

With regard to analysis of the prudential carve-out, as anticipated in the methodological premises, this type of provision can confirm States' right to regulate in pursuant to financial stability or can carve the financial sector out from the coverage of the PTA dispute settlement mechanism. Concerning the former, almost all PTAs contained a prudential carve-out with the exclusion of SADC, Kazakhstan and Ghana, whose substantive discipline in trade in services results very limited for the first developing community and practically inexistent for the last two countries.[759] Overall, all prudential carve-out provisions examined resemble to the prudential carve out contained in paragraph 2(a) of the GATS Annex on Financial Services. The PTA prudential carve-out provisions allow States to adopt or maintain prudential measures

[759] Particularly, although the EU-Ghana PTA contains a services chapter, it is composed of very few articles, vague in their wording with a mainly political and programmatic value. For this reason, even if it was mapped given it matched the selective criteria applied to the fifty EU PTAs, the results from the analysis are not particularly valuable for the purposes of this section.

for both (i) protection of investors, depositors, etc. and (ii) the integrity of the financial system. However the wording varies from one PTA to the other. For example, the opening changes considerably. The EU PTAs with Moldova, Ukraine, Georgia, Singapore and South Korea have a prudential carve-out that opens with the sentence "*Parties may maintain or adopt*" and contain the proscription of more burdensome and discriminatory measures. Although the EU-Vietnam PTA is very similar, it opens with the formula *"nothing in this Agreement shall prevent parties from maintaining or adopting measures for prudential reasons"* and refers to the international financial standards.[760] CETA presents a practically identical content but opens with "*this agreement does not prevent…"* and instead of proscribing measures that are more burdensome and discriminatory simply adds the adjective "reasonable" to prudential measures, without really explaining the meaning. The EU-Chile PTA begins with the formula "*nothing in this chapter shall prevent [..]"* and contains the *abuse de droit* clause, similarly to the prudential carve-out in the GATS Annex on Financial Services para 2(a). Finally, TiSA's prudential carve-out is identical to the one included in the GATS Annex on Financial Services para 2(a), analysed in the previous chapter.

In relation to the provision that carve financial sector out of the coverage of dispute settlement mechanism, only the EU-South Korea included it. In any case, for the purposes of the present analysis there was actually no need to map this element since it would have been relevant only if the standard-related provisions were found legally enforceable. In other words, the study was designed to capture a situation in which the provisions containing the reference to international financial standards were formally legal enforceable but they could not be invoked in dispute settlement proceedings being the discipline carve-out from the coverage of the dispute settlement mechanism itself.

From what concerns factors deemed relevant in previous studies on PTAs, the EU external policy does not seem to influence the integration of a declaratory reliance to international financial standards since both potential candidates for the EU enlargement

[760] Similarly, in the prudential carve-out provision of the EU-Singapore PTA, a list of international financial standards and standard-setters is included in relation to prudential measures. Yet, the wording of the PTA with Singapore differs from the one with Vietnam.

and global trade partners have undertaken WTO+ commitments. Neither the feature bilateral vs plurilateral agreement appears to have an impact on the presence of the reference to international financial standards, given that also EU plurilateral PTAs (scarce compared to the abundant bilateral PTAs negotiated) show international standard inclusive provisions, such as TiSA, the PTA with Columbia, Peru, Ecuador[761] and the EU-Central America PTA. Unfortunately, the variety among developing and developed countries is not enough wide to ponder the weight of this factor in the PTA structure and in the final outcome. Concerning the PTAs that do not contain international standard-related provisions, these PTAs are CETA, the EU-SADC PTA, the EU-Ghana PTA and the EU-Montenegro PTA. Leaving CETA aside, all other three PTAs have been concluded with developing and least developed countries, mainly focusing on trade in goods and lacking of a substantive discipline in trade in services. This leads us to hypothesise that financial services have not been dealt since it does not represent a relevant sector in the trade relationships with these countries. The EU-Kazakhstan PTA seems to strengthen this assumption. While showing a general reference to international standards in pursuant to sound financial systems, it lacks a general discipline on financial services and the single provision included shows a very weak wording.[762] Given that absence of trade partners with similar characteristics to Canada among the PTAs lacking of a reference to international financial standards, the attempt to find explanatory reasons would be utterly speculative.

To conclude, although the present analysis sheds light on the EU approach adopted in PTA negotiations, some limits have to be acknowledged. The first awareness concerns the breadth of the study that does not consider the evolution of the EU policy over time. Indeed, as stated in the methodological premises, being the study focused on

[761] Columbia and Peru negotiated the PTA and Ecuador joined in 2016 with a separate accession. *Protocol of Accession of Ecuador to the EU-Colombia/Peru Trade Agreement,* Official Journal L 356 of 24 December 2016.

[762] The structure of the entire PTA with Kazakhstan shows a clear orientation towards trade in goods rather than services. Moreover, the wording of the provision recalls to a general reliance in the desirable intent to strengthen cooperation but without really establishing substantive basis for it. Indeed, the EU-Kazakhstan PTA shows the weakest wording among the PTAs having a similar provision and this single article constitutes the whole discipline dedicated to banking cooperation.

fifteen PTAs, it captures the more recent EU trend without providing a complete historical evolution of the European trade relations. On the other side, this does not forcedly imply inconsistency with PTAs signed before 2002 (date of signature of the EU-Chile PTAs). Nevertheless, the focus on the more recent PTAs appears appropriate since the present research addresses a potential future integration of international financial standards in the WTO system.

The second partial limit to the research relates to the variety of trade policies considered. Further studies comparing the US model and maybe an Asian template- if any-[763] would enrich the research with a global perspective of State practice in relation to international financial standards and their potential "multilateralisation". By the same token, the more countries are mapped, the more accurate the impact assessment of each relevant factor will be. To give an example, widening the number of the PTAs examined can clarify whether the inclusion of international financial standards is more likely among developed countries (on the assumption that similar level of development and protection imply shared values and similar standards) or between developed and developing countries (in the attempt to export regulatory standards adopted by the former into the latter) or the lack of correlation among the two variables.

Similarly, an extended analysis to all fifty EU PTAs would provide a more comprehensive picture the EU trade policy and probably a sounder impact assessment this variable on the design of the EU PTAs themselves.[764] Unfortunately, time and resource constraints imposed a selection among the EU PTAs available and, in any case, resulted beyond the scope of the presence research. Hence, given the specific goals set the selection applied coherently with the research questions investigated.

[763] Ahn Dukgeun, 'Legal and Institutional Issues of Korea-EU FTA: New Model for Post-NAFTA FTAs?' (2010) Group D'Économie Mondial-Policy Brief 1, 1–37.

[764] The term EU regional policy refers to the different approach adopted with candidates to EU membership, with geographically far and closed located trade partners, and strategic global economies.EU Commission (n 94).

3.4 OVERLAPPING JURISDICTION BETWEEN PTAS AND THE WTO SYSTEM

The recent proliferation of bilateral and plurilateral agreements concluded outside the WTO system, PTAs *in primis*, has awakened international community's anxieties on possible fragmentation within international law. The issue has been addressed by the International Law Commission (ILC) Working Group in its Report on "the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law".[765] In essence, the ILC Working Group identified judicial fragmentation and substantial fragmentation. The former refers to the proliferation of institutional bodies and international tribunals, often established by specific regional or bilateral agreements that are in principle sub-sector specific.[766] This phenomenon has raised concerns about overlaps of jurisdiction that may lead to forum shopping, incoherent interpretation of norms of international law and potential lack of legal certainty, which would eventually jeopardise the unity of the international legal system in the long-run.[767] Differently, substantial fragmentation derives from the

[765] The work examines the differentiation of international law organising the five main topics of into specific studies 1) The function and scope of the *lex specialis* rule and the question of "self-contained regimes"; 2) the interpretation of treaties in the light of "any relevant rules of international law applicable in the relations between the parties" (article 31(3)(c) of the VCLT); 3) the application of successive treaties relating to the same subject matter (article 30 of the VCLT); 4) the modification of multilateral treaties between certain parties only (article 41 of the VCLT) and 5) hierarchy in international law: *jus cogens*, obligations *erga omnes*, Article 103 of the Charter of the United Nations, as conflict rules. ILC, Report of the Study Group of the International Law Commission, Fragmentation of the International Law: Difficulties Arising from the Diversification and Expansion of International Law, para. 21.

[766] Pascal Lamy, 'The Place of the WTO and Its Law in the International Legal Order' (2006) 17 European Journal of International Law 969, 977; Jonathan I Charney, 'The Impact on the International Legal System of the Growth of International Courts and Tribunals' (2011) 3 International law 361; Committee on Trade and Environment, 'Existing Forms of Cooperation and Information Exchange between UNEP/ MEAS and the WTO, Note by the Secretariat' (TN/TE/S/2/Rev.2, 2007).

[767] Plenary Session of the General Assembly of the United Nations, Speech by President of the International Court of Justice Schwebel on 26 October 1999, Plenary Session of the General Assembly of the United Nations, Speech by President of the International Court of Justice Guillaume on 26 October 2000. See also Van Damme, 'Systemic Integration of International Law: Views from the ILC, the WTO CTE, and UNESCO', ILC, *Fragmentation: Diversification and Expansion of International Law—CCIL 34th Annual Conference 2005* (CCIL 2006) 59.

proliferation of legal instruments, usually sector specific treaties with a wide scope that frequently covers international trade generally disciplined by the WTO system.[768] The increased number of substantive norms has led to a higher specialisation of international economic law.

With this regard, a conceptual distinction between overlaps of jurisdiction and applicable law has to be drawn in the WTO context. The former refers to the competence of a panel to adjudicate a dispute. The establishment of a panel's jurisdiction is preliminary to the analysis on the merits and it is crucial since they are not courts of general jurisdiction but ad hoc tribunals granted jurisdiction on claim-specific based.[769] Conversely, the concept of "applicable law" concerns the legal sources applicable to a dispute when examining the merits, including the analysis of the legal facts, the substantive obligations and the valid justifications for an incoherent measure.

Thus, the interplay between PTAs and the WTO regime becomes particularly important since the former often introduces dispute settlement mechanism alternative to the WTO's one, so a dispute can technically be brought before either fora. In addition, given the hard nature of PTAs and their very far-reaching scope, oriented toward the regulation of sectors non-completely discipline by the WTO, overlaps of jurisdictions between a PTA forum and the WTO adjudicative bodies can indeed occur. As a consequence, the establishment of the competent forum to settle a dispute among treaty parties that are concurrently WTO members deserves primary attention. In the following section, the study will attempt to answer the questions whether a WTO panel has to

[768] Generally on the subject matter see, *ex multis,* Bruno Simma, 'Self-Contained Regimes' (1985) 16 NYL Netherlands Yearbook of International Law 111; Pierre-Marie Dupuy, 'A Doctrinal Debate in the Globalisation Era: On the Fragmentation of International Law' (2007) 1 European journal of legal studies; Fiona Macmillan, 'International Economic Law and Public International Law : Strangers in the Night' (2004) 10 International Trade Law and Regulation 115, 118; Georges Abi-Saab, 'Fragmentation or Unification : Some Concluding Remarks' (1999) 31 New York University journal of international law and politics 919.

[769] For reference to the issue as to overlapping jurisdictions, Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press 2010); Vaughan Lowe, 'Overlapping Jurisdiction in International Tribunals' (1999) 20 The Australian yearbook of international law : annual survey of current problems of public and private international law with a digest of Australian practice 191. Marceau, 'The Primacy of the WTO Dispute Settlement System' (n 681).

decline its jurisdiction where (i) a more competent tribunal exists, (ii) where dispute proceedings had been triggered and (iii) where a dispute had already been settled by another tribunal.

3.4.1 PTA Dispute Settlement Mechanisms and the Choice of Forum

The multiplication of institutions and international adjudicative bodies established by, but not limited to, PTAs has raised questions on systemic coherence in international law.[770]

However, most of PTAs that conceive a dispute settlement mechanism also contain provisions regulating potential overlaps of jurisdiction, usually referred to as "choice of forum" clause.[771] Theoretically, five different situations may occur:[772] (i) the PTA does not address the issue, (ii) the PTA contains the so-called "fork-in-the-road" clause that leaves the claimant free to choose the forum where to bring its case, but once the proceeding has been initiated it cannot seek redress before another jurisdiction, (iii) the PTA conceives a "no-U-turn" clause meaning that the choice of a specific forum is regulated by specific conditions and implies a waiver to claimant's right to proceed before other fora[773] (iv) the PTA preserves the right of the claimant to seek redress before another adjudicative body till the judgement is rendered by the first jurisdiction

[770] In fact, a proliferation of institutions has been remarked also in investment protection discipline, especially in bilateral investment treaties (BITs) concerning Investor-State dispute settlement (ISDS). As a example see CETA, chapters IX and XXIX dedicated to DSM.

[771] Evans (n 662) 72–75.

[772] The classification adopted in the present study is taken by the UNCTAD IIA hub project. Although most of the categories included in the UNCTAD project refer to Bilateral Investment Treaties (BITs), the same categories have been applied in the selected and analysed PTAs.

[773] The "no-U-turn" clause is very similar to "the fork-in-the-road" clause, however the former conceives specific conditions under which recur to a specific forum, whilst the latter leaves the claimant free choice to address either fora but proscribing a consequent redress. Although the "no-U-turn" clauses may be more frequent in bilateral investment treatments (BITs), to give a practical example the wording of a provision of the 2009 Mexico-Singapore BIT is reported and it reads "A dispute investor may submit a claim to arbitration *only if* (a) the investor consents to arbitration (b) the investor *waives its right to initiate or continue before any administrative tribunal or court*". UNCTAD, Work Programme on International Investment Agreements (n 534).

addressed,[774] finally (v) the PTA includes a provision that set priority of a specific forum over others.[775]

From the intensive qualitative analysis on the EU PTAs emerges that practically all PTAs conceive a dispute settlement mechanism, in particular conciliation and arbitration panels.[776] Besides, the selected EU PTAs include a provision regulating the relation with the WTO system, which envisages the fork-in-the-road clause.[777] Despite a slightly different wording, overall the relevant provisions spell out that (i) the recourse to the dispute settlement provisions shall be without prejudice to any action in the WTO framework, including dispute settlement proceedings, (ii) a party shall not, for any particular measure, seek redress for a substantially equivalent obligation under both this Agreement and the WTO Agreement in both fora. In such case, once a dispute settlement proceeding has been initiated, the party shall not bring a claim seeking redress for the breach of the substantially equivalent obligation under the other Agreement to the other forum, unless the forum selected first fails for procedural or jurisdictional reasons to make findings on the claim seeking redress of that obligation.[778] In essence, parties are free to bring a dispute either before the WTO Dispute Settlement Body or before the PTA arbitration panel, but once initiated the dispute proceedings the parties cannot claim redress before the forum initially discarded. The EU PTAs usually add an

[774] The initiation of dispute proceedings does not prevent the claimant from seeking redress, differently from the previous two cases.

[775] An example of case forth concerns SPS and TBT disciplines, where many PTAs carve these disciplines out of the jurisdiction of the PTA dispute settlement mechanism, so in case a dispute arises the offended party shall recur to the WTO dispute settlement bodies. Thus, a primacy of the WTO forum over PTA dispute settlement mechanisms is established. To give an example the EU- South Korea PTA in article 5(11) *reads "Neither Party may have recourse to Chapter Fourteen (Dispute Settlement) for any matter arising under this Chapter."*

[776] Most PTAs encourage dispute resolution first through conciliation and if it is unsuccessful through arbitration panels.

[777] The EU PTAs with the following trade partners: Vietnam, Moldova, Singapore, Ukraine, Chile and South Korea.

[778] The text reported has been taken from the EU-Moldova PTA. It has not been clarified yet under what conditions a WTO panel "fails for procedural or jurisdictional reasons" in practical terms, meaning when a claimant is entitled to seek redress before a second forum. Indeed, scholars that conceived the WTO system as a *sui generis* regime may interpret a panel's refusal of its jurisdiction as a procedural fail, since the claimant does not see its claims redressed.

explanatory footnote or a paragraph in the provision that clarifies when dispute settlement proceedings are deemed initiated, usually with a party's request for the establishment of a panel under article 6 of the WTO DSU or with a party's request for an arbitration panel under the PTA dispute settlement discipline. In the EU-Chile PTA also a preference clause is included, since the text specifies that WTO obligations should be addressed by the WTO adjudicative bodies, claims under PTA obligations should be set up by the PTA dispute settlement mechanism and in the case of equivalent commitments in the PTA and the WTO regime the parties should recur to the WTO dispute settlement mechanism.[779] Finally, it closes up with the fork-in-the-road clause, so once the dispute proceedings has been initiated the parties cannot seek redress before the second forum.

As a result, overlaps of jurisdiction between PTA dispute settlement mechanisms and the WTO dispute settlement system deriving either from conflicting or incompatible substantive obligations can indeed occur. Thus, the question of the competent forum gets central in our analysis.

3.4.2 Defining the Jurisdiction of the WTO Panels

The term jurisdiction refers to the competence of a tribunal to adjudicate a dispute. By definition, a conflict of jurisdiction or competence occurs when a dispute can be taken before two institutions or two adjudicative bodies that are competent to rule on a case. As seen in the previous section, all EU PTAs analysed conceive a dispute settlement mechanism and a wide majority includes the fork-in-the-road clause in the relations with the WTO regime, meaning that the claimant can choose either of the two fora but once the proceedings are initiated the parties cannot seek redress in the other forum. Yet, the provision does not solve all questions about jurisdictional overlaps. Indeed, whether the forum addressed can suspend or decline its jurisdiction in favour on another jurisdiction

[779] EU-Chile PTA, article 189(4)(c), which reads "*Unless the Parties otherwise agree, when a Party seeks redress of a violation of an obligation under this Part of the Agreement which is equivalent in substance to an obligation under the WTO, it shall have recourse to the relevant rules and procedures of the WTO Agreement, which apply notwithstanding the provisions of this Agreement"*

remains unclear. The question assumes a particular relevance in situations where (i) an alternative competent forum is more appropriate, (ii) dispute proceedings have already been initiated and (iii) where the dispute has already been settled by an adjudicative body.[780]

On the subject, the doctrine is divided between those who believe that WTO panels should decline their jurisdiction when the parties to the dispute had previously agreed on waiving their right to recur to the WTO DSB and when an international tribunal had already been set up or has already ruled on the matter.[781] In particular Pauwelyn and Bartels, among the main proponents, favour interpretation the WTO adjudicative bodies' jurisdiction open to the interplay with external legal sources.[782] By perceiving the WTO regime as a part of the wider and more structured international legal system, Pauwelyn affirms that the WTO's action should explicate in a way that results aligned with rules of general international law and with which the interplay is constant. To

[780] Fawcett differentiated between a positive doctrine called *forum conveniens* defined as "a court taking jurisdiction since it is the appropriate forum or more appropriate that the alternative one" and a negative doctrine *forum non conveniens* that conceives the discretionary power of an adjudicative body to decline its jurisdiction. JJ Fawcett, 'Declining Jurisdiction in Private International Law : Reports to the XIV Congress of the International Academy of Comparative Law' (Clarendon Press, Oxford University Press 1995); see also T Sawaki, 'Battle of Lawsuits : Lis Pendens in International Relations' [1980] The Japanese annual of international law 17.

[781] In general terms some authors, Lowe among others, hve underlined the difficulties to apply concept as *forum non-conveniens*, meaning the power of an adjudicative body to refuse its jurisdiction, in the context of international law and especially in the case of overlaps of juridiction. The decisive factors considered in domestic jurisdictions are different from dispute proceedings at international law. As a consequence, elements such as expenses, availability of witnesses, and the place of residence of the parties have marginal if no relevance at all. Lowe (n 768) 12.

[782] Lorand Bartels, 'Applicable Law in WTO Dispute Settlement Proceedings' (2001) 353 Journal of world trade 499; Joost Pauwelyn, 'How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law?' (2003) 37 Journal of World Trade 997. It has to be noticed that while the two authors share the same viewpoint on the reliance of sources of law other than the WTO agreements in dispute settlement, Bartels recognises a limited jurisdiction of panels, which deviates partially from Pauwelyn's position. As Bartels states "*..The limitation on the disputes which can be brought under the dispute settlement provisions of the covered agreements, (according to Article 1.1 of the DSU), is a restriction on the jurisdiction of Panels and the Appellate Body. But this jurisdictional limitation has nothing to do with the law applicable to the disputes that are validly before a Panel or Appellate Body"*. Further "*..Panels and the Appellate Body are able to apply various sources of law in deciding the limited set of disputes which are within their jurisdiction*". Bartels 503.

support this view, he recalls article 3.2 of the DSU, which openly exhorts to the application of the covered agreement *"in accordance with customary rules of interpretation of public international law"*.[783] Further, the author claims that under specific circumstances, the Panel should decline its jurisdiction, namely when the parties to the dispute have signed an agreement to settle disputes out-of the court and when the dispute has already been ruled by another tribunal.[784] According to this stance multiple proceedings, especially in the last circumstance, would violate *res judicata* principle – considered by some scholars a general principle of international law – and it would constitute *abuse de droit*.[785] The former principle aims at avoiding multiplication of rulings on the same subject-matter by different adjudicative bodies, whose potentially contradictory results may cause systemic inconsistency and fragmentation.[786]

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[783] Article 3.2 DSU. The Author argues that the clear mention to rules of international law within the applicable law signals the will of the WTO member States to expressly accept the recourse to legal sources other than the WTO ones, otherwise the provision would have remained silence, since general rules are applicable also after the signature of an agreement unless the latter clearly depart from the rules already in force. Pauwelyn, 'How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law?' (n 782) 1001.

[784] According to the author it would be preferable to risk having non-WTO law misinterpreted by the Panel rather than ignoring when resolving dispute related to both the WTO regime and other sources of law. ibid 1105–1018. Among other scholars supporting panels' deference in favour of more specific international tribunals, see Henry Gao and CL Lim, 'Saving the WTO from the Risk of Irrelevance : The WTO Dispute Settlement Mechanism as a "Common Good" for RTA Disputes' [2010] Redesigning the World Trade Organization for the twenty-first century 389; Andrew D Mitchell and David Heaton, 'The Inherent Jurisdiction of WTO Tribunals : The Select Application of Public International Law Required by the Judicial Function' (2010) 313 Michigan journal of international law 559.

[785] *Res judicata* is a general principle of law where "a final judgement rendered by a court of competent jurisdiction on the merits is conclusive as to the right to the parties and constitutes an absolute bar for those parties from subsequent actions involving the same claim, demand or cause of action. Black's Law Dictionary, 6th edition (west publishing 1990) at 1305. However, many has contradicted the point by disputing the establishment of *res judicata* principle at international level. One of the main arguments opposed to Pauwelyn's thesis lies down on the variety of international tribunals, which consequently have different jurisdiction, different competences and often different dispute settlements mechanisms. The diversity shown at the international level makes it difficult to ascertain that the same claim, demand or cause of action have already been ruled on by another tribunal, since the legal basis considered, the obligations undertaken may vary agreement by agreement. Gabrielle Marceau and Anastasios Tomazos, 'Comments on Joost Pauwelyn's Paper: "How to Win a WTO Dispute Based on Non-WTO Law?"' in Stefan Griller (ed) (2008) 63.

[786] William J Davey and André Sapir, 'The Soft Drinks Case : The WTO and Regional Agreements' (2009) 8 World trade review World Trade Review 5, 14. Mitchell and Heaton wondered if an estoppel

Differently, the concept of *abuse de droit* refers to a morally vicious behaviour occurring when a party exercises its right only to cause harm, annoyance or injury to another. Generally, it assumed the lack of *bona fide* in the actions taken and it embraces abuse of the procedural rights, vexatious litigations and forum shopping.[787] From a practical perspective, for a WTO Panel to decline or suspend its jurisdiction would imply a preliminary analysis by the panel to verify that its jurisdiction has not been undermined by other treaties signed by the parties to the dispute.[788]

An opposing stream of the literature, with Trachtman at the forefront, contrasts the above described theory by blaming this open approach towards non-WTO law for being inconsistent with panels' established jurisdiction, which is limited to the covered agreements, as clearly stated in the DSU in article 1(1).[789] According to this view, by

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would be required to prevent already ruled cases by being brought in before another tribunal. Mitchell and Heaton (n 139).

[787] Abuse of procedural rights occurs where dispute proceedings have been initiated frivolously, in a groundless manner or to harass the defendant. Similarly, vexatious litigations is a legal action which is brought, regardless of its merits, solely to harass or subdue the other party, finally, forum shopping is a practice used by some litigants that choose the jurisdiction according to the likelihood to win the dispute. Marceau, 'Conflicts of Norms and Conflicts of Jurisdiction. The Relationship between the Dispute-Settlement Mechanisms of MEAs and Those of the WTO' (n 667) 1113.

[788] In details, Pauwelyn pointed out five situations in which the Panel should decline its jurisdiction: when (i) a bilateral agreement binds the parties not to involve the DSU, (ii) a treaty attributes exclusive jurisdiction to another tribunal for specific issues, (iii) a treaty imposes the choice of fora which is then exclusive, (iv) a treaty establish compulsory jurisdiction, however not exclusionary, (v) res judicata effect. However, the establishment of Panel jurisdiction requires a preliminary analysis of applicable law is similar. Pauwelyn, 'How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law?' (n 137) 1030; J Pauwelyn and LE Salles, 'Forum Shopping Before International Tribunals: (Real) Concerns, (Im)Possible Solutions' (2009) 42 Cornell International Law Journal 77.

[789] Article 1(1) of the DSU, the rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement rules and procedures of the agreements listed in Appendix 1 to this Understanding, hereinafter referred to as the 'covered agreements'. To frame it with Trachtman's words "[it] *would be absurd if rights and obligations arising from other international law would be applied by the DSB*", moreover "*..with so much specific reference to the covered agreements as the law applicable in WTO dispute resolution, it would be odd if the members intended non-WTO law to be applicable*". Joel P Trachtman, 'The Domain of WTO Dispute Resolution' (1999) 402 Harvard international law journal 333, at page 342. Among other authors, LD Guruswamy, 'Should UNCLOS or GATT/WTO Decide Trade and Environment Disputes?' (1998) 7 Minnesota Journal of Global Trade 287, 311; Charney (n 121) 219; Gabrielle Marceau, 'A Call for Coherence in International Law : Praises for the Prohibition against "Clinical Isolation" in WTO Dispute Settlement' (1999) 33 Journal of world trade : law, economics, public policy Journal of World Trade 87, 109–115.

refusing its jurisdiction the Panel would be compelled to consider relevant external sources of law, such as bilateral treaties, exceeding its competences already in a preliminary phase.[790] Similarly, Gabrielle Marceau criticises the position that conceives a sort of moral imperative upon panels to decline their jurisdiction, by warning that no WTO member can be deprived of its fundamental right to recur to the WTO dispute settlement mechanism.[791] In the event a conflict of jurisdiction occurs, the choice of which tribunal addresses stays with the complainant.[792] For a Panel to refrain from exercising its jurisdiction would diminish a WTO member's right to seek the redress however, it could exceptionally happen if the right to recur to the dispute settlement mechanism had clearly been relinquished by the parties as contemplated in the Mexico-soft drink case.[793] Moreover, Marceau contests that the principle of *res judicata* is applicable to international trade law.[794] According to her, a dispute adjudicated before two different fora will not have the same subject-matter since the legal proceedings and the applicable law will be different. Thus, the parties can be identical, the content of the

[790] Gabrielle Marceau and Julian Wyatt, 'Dispute Settlement Regimes Intermingled : Regional Trade Agreements and the WTO' (2010) 1 Journal of international dispute settlement 67, 70–71. It would be different if a legal institute similar to the exhaustion of domestic remedies typical in human right disputes was introduced in PTAs in order to establish a sort of prioritisation of dispute settlement mechanisms. Since this concept does not apply to trade law, the arguments supposing WTO Panels' limited jurisdiction should be dismissed. Marceau, 'Conflicts of Norms and Conflicts of Jurisdiction. The Relationship between the Dispute-Settlement Mechanisms of MEAs and Those of the WTO' (n 667) 1126.

[791] In the case US — Wool Shirts and Blouses the Appellate Body referred to the absolute right of WTO members to request the establishment of a Panel any time one of their rights is considered impaired or nullified. WT/DS33/AB/R, Appellate Body, 25 April 1997, para.13. Marceau and Tomazos (n 785) 61.

[792] Marceau, 'The Primacy of the WTO Dispute Settlement System' (n 35) 5–7; Gabrielle Marceau and Kwak Kyung, 'Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements' in Lorand Bartels and Federico Ortino (eds), *Regional trade agreements and the WTO legal system* (Oxford University Press 2010) 469–471. In the Peru-agricultural product case the Appellate Body reaffirmed it by saying "*Members enjoy discretion in deciding whether to bring a case, and are thus expected to be largely self-regulating in deciding whether any such action would be fruitful". Peru — Additional Duty on Imports of Certain Agricultural Products* (n 10), para 5.18.

[793] The Appellate Body declared "The DSU obliges the WTO panels to exercise their jurisdiction unless a legal impediment preclude them from ruling on the merits of the claim", *Mexico — Tax Measures on Soft Drinks and Other Beverages* (n 8), paras 48-54.

[794] In general terms also Lowe (n 678).

conflicting obligations similar but the subject-matter cannot be deemed the same.[795] Following this reasoning the principle of *res judicata* will never be applicable unless the same dispute is brought twice before the same adjudicative body since the applicable law will be always different according to the forum addressed. Marceau rejects also the abuse of right claims as a sufficient justification for a WTO Panel to suspend or decline its jurisdiction. In her opinion, a Panel would hardly refuse to proceed based on allegation of vexatious litigation or accusations of forum shopping.[796] Last but not least, the party that perceives that an abuse of right has occurred can still seek redress for the violation of the fork-in-the road clause under the PTA. In other words, if a party first brings a claim before a PTA dispute settlement mechanism and subsequently recurs to the WTO panel, the other party can initiate dispute proceedings before the first forum for violation of the fork-in-the-road provision and it will likely/reasonably win. Therefore, any party should carefully assess whether to bring a dispute before two different jurisdictions since the potential benefits acquired by a favourable ruling can be nullified by a second adverse ruling on the violation of the fork-in-the-road provision. In essence, Marceau rebuts Pauwelyn's arguments clarifying that an optimal situation that avoids duplicative effects of dispute resolution, however desirable, distinguishes from legitimate adoptable actions, such as members' right to access the WTO dispute settlement mechanism.[797] Thus, from her point of view, the approach suggested by

[795] According to Marceau, the fork-in-the-road clause is introduced to avoid multiple dispute settlement proceedings rather than establish the principle of *res judicata*. Marceau, 'Conflicts of Norms and Conflicts of Jurisdiction. The Relationship between the Dispute-Settlement Mechanisms of MEAs and Those of the WTO' (n 667) 1117, 1128.

[796] Even if it cannot constitute a sufficient reason for Panel's suspension or refusal of its jurisdiction, it can be used as argument to support allegation against good faith principle in the analysis of the merits. ibid 1126.

[797] In case two parties have agreed to settle dispute out-of-the court and one of those recurs to the dispute settlement mechanism, the recurring party will be responsible before the treaty dispute settlement mechanism for the violation of treaty provisions but it could not be deprived of its right to access the DSB. In addition, there are no basis to prove that a PTA dispute settlement mechanism can be assured better qualified to rule on a dispute rather than the WTO panels, and vice versa. Moreover, given the different legal basis considered, the WTO agreement in the case of a dispute brought before the DSB, and PTA in the case of an alleged violation of the agreement, the ruling rendered by the respective tribunals may not be substantively the same since "matters analysed", "applicable law" and the

Pauwelyn results flawed for two reasons. First it would diminish the effort to "multilateralize" dispute settlement stated in article 23 of the DSU, which at the same time limits the WTO adjudicative bodies' competences to disputes arising from "*violation of obligations or other nullification or impairment of benefits under the covered agreements*".[798] Secondly, the hypothetical primacy of PTA dispute settlement mechanisms over the WTO panels decided on case-by-case basis would contrast the WTO automatic jurisdictional mechanism itself.[799] Differently, in Pauwelyn's opinion, this approach would not diminish WTO members' rights, since the claims brought before the WTO panels will exclusively be based on the covered agreements. In his view, the Panel would simply be required to assess its competence to rule on a specific dispute if not addressed or settled by another adjudicative body.

3.4.3 The Unavoidable Right to the Panel in the Mexico – Soft Drinks Case

The Mexico - Tax Measures on Soft Drinks and Other Beverages case (shorten title Mexico-soft drink) is of a particular relevance since it addresses the question as to whether WTO panels can decline their jurisdiction. On the factual background, the dispute concerns modifications of competition in both the US and the Mexican sugar market linked to the NAFTA enforcement. In detail, the US sugar consumption could just partially be satisfied by the US production, however to incentivize the domestic industry national policies generated a higher price for imported sugar, which in the long-term resulted in a substitution of Mexican sugar with US sweeteners in the US market. Concurrently, the favoured access to Mexican market granted to the US sweetener producers by NAFTA seriously impaired Mexican sugar producers, so that the Mexican legislator introduced a tax on beverages containing sweeteners instead of cane sugar.

"mechanisms applied" can differ. Marceau and Tomazos (n 785) 61; Isabelle Van Damme, 'What Role Is There for Regional International Law in the Interpretation of the WTO Agreements?' *Treaty interpretation by the WTO Appellate Body* (Oxford university press 2009).

[798] Understanding on rules and procedures governing the settlement of disputes, art 23.

[799] Marceau and Tomazos (n 785) 59–60. Pauwelyn, 'How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law?' (n 782) 1000–1001.

The measure was not explicitly discriminatory on origin, as it affected both national and foreign products that used sweeteners, however given the area of competitive specialization of the two countries mostly US soft drinks were affected by this measure.[800]

As a preliminary step, Mexico claimed that the US did not act in good faith by bringing the case before the WTO DSB, which should have been referred to by NAFTA Panel, instead. Thus, it asked the WTO Panel to decline its jurisdiction.[801] On the conflict of jurisdiction the Appellate Body affirmed that "*it was express[ing] no view as to whether there may be other circumstances in which legal impediments could exist that would preclude a panel from ruling on the merits of the claims before it"*.[802] As stated in the excerpt, *res judicata* and simultaneous proceedings do not seem to be a sufficient justification for the panel to decline its jurisdiction.[803] However, is there any legal impediment that compels the Panel to refrain from exercising its jurisdiction? A waiver, intended as a mutual agreement that clearly and openly expresses parties' relinquishment of their WTO right to recur to a Panel, may be considered for this purpose, as then affirmed in the Peru-Agricultural Products case.[804] Nevertheless, some scholars have warned that a hypothetical acceptance of a bilateral waiver would weaken

[800] For the factual background, *Mexico — Tax Measures on Soft Drinks and Other Beverages-Report of the Panel* [2005] WTO/DS308/R, paras 4.77-4.97. For the analysis of sugar and sweeteners as like products, *Report of the Panel*, paras. 8.21–8.160. Paul Bratley, 'The Ups and Downs of Corn Sweeteners', *International Sweetener Colloquium Tucson* (2005).

[801] The Panel in the *Argentina-Poultry case* seemed to speculate that a not-yet-in-force Mercosur provision, which provided that once a party had brought a case under Mercosur, it could not bring a WTO case regarding the same subject matter (and vice versa), might constitute an impediment to a WTO Panel's exercise of jurisdiction. Since the new Mercosur provision was not yet in force, the Panel found that there was no such impediment to its exercise of jurisdiction. *Argentina — Definitive Anti-Dumping Duties on Poultry from Brazil-Report of the Panel* WT/DS241/R, para 7.38.

[802] *Mexico — Tax Measures on Soft Drinks and Other Beverages- Report of the Panel*, para 54.

[803] Davey and Sapir (n 651) 11.

[804] *Mexico — Tax Measures on Soft Drinks and Other Beverages- Report of the Appellate Body*, para 46. Moreover, in Peru-agricultural products case the Appellate Body specified that "*..While we do not exclude the possibility of articulating the relinquishment of the right to initiate WTO dispute settlement proceedings in a form other than a waiver embodied in a mutually agreed solution.. any such relinquishment must be made clear..". Peru — Additional Duty on Imports of Certain Agricultural Products-Report of the Appellate Body*, para 5.25.

the multilateral dispute resolution system and would deprive other members from their rights to participate as third party in a dispute.[805] In this regard, articles 3(2) and 19(1) of the DSU spell out "*dispute settlement proceeding, recommendations and rulings of the DSB can be interpreted in a way that diminishes the rights and obligations established under the covered agreements*". The Appellate Body supported this stance specifying that *"although panels enjoy some discretion in establishing their own working procedures, this discretion does not extend to modifying the substantive provisions of the DSU",* which guarantees all members access to WTO dispute proceeding.[806] This passage has been interpreted by some scholars as a confirmation that no agreement, nor even PTAs justified under articles XXIV of the GATT or V of the GATS, can be interpreted in a detrimental way vis-à-vis other WTO members if it deviates from core WTO principles.

To sum up, the Appellate Body acknowledged the recourse to the Panel as an unavoidable fundamental right by stating that *"the DSU obliges the WTO panels to exercise their jurisdiction unless a legal impediment precludes them from ruling on the merits of the claim*".[807] Moreover, the Appellate Body reaffirmed WTO members' discretion to recur to the Panel explaining that *"a Member may initiate a WTO dispute whenever it considers that any benefits accruing to [that] Member are being impaired by measures taken by another Member' implies that that Member is entitled to a ruling by a WTO panel".*[808] As a result, once the jurisdiction is validly established by a WTO

[805] In this regard, the conclusions of the ILC Working Group are noteworthy since specifies that when States enter into a treaty that may conflict with other treaties they should try to settle the relationship, though they cannot affect third-party rights in doing so. ILC, 'Conclusion of the Report of the Study Group of the International Law Commission, Fragmentation of the International Law: Difficulties Arising from the Diversification and Expansion of International Law' (*A/61/10*, 2006), para 30.

[806] *Mexico — Tax Measures on Soft Drinks and Other Beverages- Report of the Appellate Body*, para 46.

[807] *ibid, paras 48-54.*

[808] *ibid para 52.* The member is entitled, so the right to recourse is almost an absolute right that cannot be taken off either by the panel.

panel, the existence of parallel proceedings or tribunals entitled to have jurisdiction on the same dispute becomes irrelevant.[809]

3.5 THE APPLICABLE LAW IN DISPUTES COVERED BY BOTH PTAS AND THE WTO AGREEMENTS

Substantive fragmentation, meaning the proliferation of different legally binding instruments in the international scenario, has generated concerns about overlapping obligations.

Scholars have questioned about how to regulate situations in which two different treaties introduce conflicting obligations or cases in which the simultaneous application of treaty commitments results unfeasible. Above all, academic curiosity has addressed the issue of the applicable law, namely the legal sources applicable to a dispute when examining the factual and the legal facts, the substantive obligations and the valid justifications for an alleged inconsistent measure. While a stream of the literature believes that conflicts are rather apparent than real, given the horizontal structure of the international legal system, normative overlaps can indeed occur.[810] Particularly, in the international framework, where PTAs have increasingly regulated trade-related aspects, the question of compatibility between PTA obligations and the WTO regime appears legitimate.

In this regard, the present research takes into consideration the hypothetical case in which international financial standards are introduced into PTAs, essentially treaties, and how the latter interacts with the WTO discipline in trade in financial services. Specifically, the study examines situations in which a conflict of law occurs, meaning

[809] Alvarez Jimenez, 'The WTO AB Report on Mexico - Soft Drinks, and the Limits of the WTO Dispute Settlement System WTO - Report of the Appellate Body, 6 March 2006, Mexico - Tax Measures on Soft Drinks and Other Beverages, WT/DS308/AB/R' (2006) 33 Legal issues of economic integration : law journal of the Europa Instituut and the Amsterdam Center for International Law 319, 327.

[810] Giorgio Sacerdoti, 'WTO Law and the "Fragmentation" of International Law : Specificity, Integration, Conflicts' in Merit E Janow, Victoria Donaldson and Alan Yanovich (eds), *The WTO : Governance, dispute settlement and developing countries* (Juris Publishing, 2008).

when PTA provisions and WTO obligations are incompatible and their simultaneous application results unfeasible. [811]

Thus, the following section will attempt to answer the question: what role do PTAs play in the WTO dispute settlement? In essence, can panels recur to PTAs exclusively for interpretative reasons or can they serve as a self-standing defence to measures otherwise inconsistent with WTO law? [812]

3.5.1 General Rules of International Law Promoting Systemic Coherence

As generally recognised, public international law is not hierarchical organised.[813] Differently from national legal framework, at international level normative relationships between prescriptions can hardly be established.[814] Hence, all rules have the same value

[811] Philippe Sands, 'Sustainable Development: Treaty, Custom, and the Cross-Fertilization of the International Law' in Alan E Boyle and Freeston, David (eds), *International law and sustainable development: past achievements and future challenges* (Oxford University Press 1999) 88; J Pauwelyn, 'Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands' (2004) 25 Michigan Journal of International Law 903, 904. The doctrine does not hold a common stance on the adverse effects deriving from international fragmentation. Indeed, some scholars have been cautious on this regard emphasising that conflict is an integral part of the international legal system and a diversification in the disciplines covered or in the number of tribunals responsible for a correct application of the law would not forcedly impair the system as a whole. For example, J. Charney has reassured that "*a serious problem does not appear to exist*". Jonathan I Charney, 'Is International Law Threatened by Multiple International Tribunals?' (1999) 271 Recueil des cours 101, 351–355. For a more moderate appraisal of the potential negative consequences of that institutional and substantive fragmentation see Tullio Treves, 'Conflicts between the International Tribunal for the Law of the Sea and the International Court of Justice' (1999) 31 New York University journal of international law and politics 809; Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? : Postmodern Anxieties' (2002) 15 Leiden journal of international law 553, 553–579; Thomas Buergenthal, 'Proliferation of International Courts and Tribunals : Is It Good or Is It Bad?' (2001) 14 Leiden journal of international law 267, 273.

[812] See Gilbert Guillaume, 'The Future of International Judicial Institutions' (1995) 444 International and comparative law quarterly 848.

[813] Charles Rousseau, *De la compatibilité des normes juridiques contradictoires dans l'ordre international* (Pedone 1932) 150–151.

[814] As further disserted below, the principle *lex specialis derogat legi generali* is applied differently within a domestic system, where the legislative system is centralised, the normative relationships between the various sources of law are pre-determined and the maxim is applied "automatically" without case-by-case based interpretation, which happens instead at the international level. Anja Lindroos, 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis' (2005) 74 Nordic Journal of International Law 27.

(except from *jus cogens*)[815] independently from their origin, meaning regardless whether they belong to customary or treaty law since both derive from States' consent. Despite the lack of a vertical organizational principle, rules disciplining the coexistence of different legal tools and different regimes composing international law system do exist.[816]

Above all, the general principle of good faith together with the customary imperatives *pacta sunt servanda*[817] and *pacta tertiis nec nocent nec prosunt*[818] contribute to the presumption of a coherent and harmonious self-regulated system. In practice, starting from the assumption that States' obligations are cumulative, good faith is presumed during negotiations. In other words, since commitments have to be complied with simultaneously, a State that undertakes new obligations is compelled to bear in mind the already existing obligations in order to avoid opposing or conflicting commitments that cannot be abide by at the same time.[819]

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[815] The notion is still much debated but it generally refers to peremptory norms recognised as general imperatives by the international community for their fundamental importance. They are binding *erga omnes* and their prescriptive value cannot be overruled by other sources of international law. Primacy is spelt out in articles 53 and 64 of the VCLT. Academic discussion addresses the identification of these norms, embracing prohibition of genocide and slavery in general, among other. However, some scholars, Weil at the forefront, have warned about the side effects of attempting "costitutionalise" the international system, meaning the attempt to apply categories characteristic of national regime to the international legal framework. Prosper Weil, 'Towards Relative Normativity in International Law' (413AD) 77 American Journal of International Law 413, 413–422. For an analysis of the reasons behind this tendency see Ole Spiermann, '"Who Attempts Too Much Does Nothing Well": The 1920 Advisory Committee of Jurists and the Statute of the Permanent Court of International Justice' [2003] British year book of international law 187, 187–260.

[816] The reference is to rules of customary law that interpret the interaction among different legal instruments or sub-regimes, however without imposing normative relations among them. Many branches of international law have been recognised, such as international environmental law, international economic law, human rights, international private law and so on and so forth. Part of the questions the international community has delved into concerns the nature of those regimes as self-contained disciplines or simply specialised categories in which international law is declined, anyhow perceived as a *unicum.* ILC, 'Conclusion of the Report of the Study Group of the International Law Commission, Fragmentation of the International Law: Difficulties Arising from the Diversification and Expansion of International Law', (*A/61/10,* 2006).

[817] Article 26 of the VCLT.

[818] Article 34 of the VCLT.

[819] Marceau, 'Conflicts of Norms and Conflicts of Jurisdiction. The Relationship between the Dispute-Settlement Mechanisms of MEAs and Those of the WTO' (n 667) 1083–1084.

Similarly, the customary principles *pacta sunt servanda and pacta tertiis nec nocent nec prosunt* promote systemic legal coherence.[820] Indeed, the former prescribes the "sanctity of the treaty" binding contracting parties to legal and political compliance.[821] This imperative of public international law applies as long as persons and objects at the moment of the conclusion of the treaty remain unchanged (*clausula rebus sic stantibus)* and unless circumstances precluding wrongfulness occur.[822] By the same token, the principle *pacta tertiis nec nocent nec prosunt*, literally treaties do not create either obligations or rights for third states without their consent guarantees State's sovereignty in the commitments undertaken.[823]

In any event, one should still favour a harmonious interpretation of international legal prescriptions when a conflict occurs. The harmonious interpretation of norms is a generally acknowledged principle, according to which when two or more norms "*bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations"*.[824] This cornerstone principle regulates interactions within the international legal framework and contributes to a coherent interpretation and application of the different sources of international law. For this

[820] Martti Koskenniemi, *International Law* (New York University Press 1992).

[821] The principle, originally perceived as a moral imperative in ancient times, was then formalised and associated to law and good governance in the 16th century, concurrently with the publication of "Il Principe" by Macchiavelli, however a more solid theorisation of the concept within international relations was remarked started from early 18th century. For a comprehensive dissertation, comprising also the historical evolution of the principle refer to Hans Wehberg, 'Pacta Sunt Servanda' [1959] American journal of international law 775–786; in the Italian scholarship see, *inter alia*, Alberto Oddenino, *Pacta sunt servanda e buona fede nell'applicazione dei trattati internazionali : spunti ricostruttivi* (Giappichelli 2003). The principle is enshrined also in article 26 of the VCLT.

[822] For the circumstances preventing wrongfulness see Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001, chapter V articles from 20-25.

[823] See definition in Elizabeth A Martin and Jonathan Law, *A Dictionary of Law* (Oxford University Press 2009).

[824] 'Conclusion of the Report of the Study Group of the International Law Commission, Fragmentation of the International Law: Difficulties Arising from the Diversification and Expansion of International Law' (n 160) para. 1(4).

reason, presumption against conflicts is generally held by international adjudicative bodies in dispute settlement proceedings.[825]

Nevertheless, when this presumption cannot be drawn the principles of *lex specialis derogat generalis* and *lex posteriori derogat priori* can be applied.[826] The former establishes that in case of incompatibility between norms with same substantive coverage, the more specific norm prevails over the more general one, whereas the latter maxim gives primacy to the subsequent norm over the prior.[827] With regard to *lex specialis* principle, the ILC Working Group has extensively examined the preconditions to recur to it. First conflicting provisions have to cover the same subject-matter. With Fitzmaurice's words *"..lex specialis can only apply where both the specific and the general provision concerned deal with the same substantive matter.."*.[828] The second requirement pointed out is the existence of a conflict intended as the impossibility to simultaneously apply two or more valid norms without violating one of them.[829] Koskenniemi, the Chairman of the Study, conceived two possible applications of *lex specialis*: as an application of general law and as an exception of it. In the first case, the specific law does not conflict with the general one but simply details aspects that have

[825] See C Wilfred Jenks, *The Conflict of Law-Making Treaties.* (The British Year Book of International Law 1953) 427–429; Joost Pauwelyn, *Conflict of Norms in Public International Law : How WTO Law Relates to Other Rules of International Law* (Cambridge University Press 2008) 237–268; 'Report of the Study Group of the International Law Commission, Fragmentation of the International Law: Difficulties Arising from the Diversification and Expansion of International Law' (n 6) paras 25–28.

[826] Koskenniemi, 'Study on the Function and Scope of the Lex Specialis Rule and the Question of 'Self-Contained Regimes', *UN Doc. ILC (LVI)/SG/FIL/CRD.1 Add.1* (2004).

[827] ILC, Conclusion of the Report of the Study Group of the International Law Commission, Fragmentation of the International Law: Difficulties Arising from the Diversification and Expansion of International Law (n 765) paras 1-2. The rationale behind the *lex specialis* maxim is that special law tends to be more detailed and and more concrete. Moreover, according to the ILC working group the obligations under general law do not extinguish in the application of general law, on the contrary they remain valid and applicable, as affirmed by the ICJ in the Nicaragua vs USA case. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* International Court of Justice Judgment of 27 June 1986 (Merits), para 179.

[828] Fitzmaurice, 'Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points' (1951) 28 British Year Book of International Law 1, 236–239.

[829] For a similar type of pragmatic notion of conflict see Jan B Mus, 'Conflicts between Treaties in International Law' (1998) 45 Netherlands international law review 208, 209–222.

only abstractly regulated by the general law. To a certain extent, *lex specialis* principle serves as a rule of interpretation of the treaty, meant to promote a harmonious application of norms that are apparently in conflict. In the second case, a conflict does occur and a norm of specific law is conceived as a modification of general law, prevailing over the general prescription. In this circumstance, *lex specialis* works as a norm solving conflicts of law. [830]

Similarly, *lex posteriori* regulates situation of irreconcilable application of successive treaty prescriptions.[831] Article 30 of the VCLT titled "application of successive treaties" specifies that a previous treaty applies to the extent that it is compatible with the following one.[832] Besides, paragraph 4 of the same article disciplines situations in which the parties to two or more successive treaties are not coincident: for those which are party of both treaties *lex posteriori* applies in case of conflicts between provisions, for those which are party of exclusively one treaty will observe the prescriptions they have undertaken.[833] In addition, article 59 of the VCLT sets forth the primacy of subsequent treaties over previous ones, provided that they cover the same subject matter, in the case where the precedent treaty has been terminated or suspended by mutual consent expressed in the former or where both treaties cannot be applied at the same time.[834] That being said, a treaty can include cross-reference or a treaty clause that disciplines situation of overlaps or prospective incompatibility with other provisions.[835]

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[830]Koskenniemi, ILC (n 826) paras. 60-81.

[831] Ian Sinclair, *The Vienna Convention of the Law of Treaties* (Manchester University Press 1984) 94; Karl Wolfram, 'Conflicts Between Treaties', *IV Encyclopedia of Public International Law* (Elsevier 2000) 937–938.

[832] Vienna Convention on the Law of Treaties (1969) art 30.3.

[833] Marceau, 'Conflicts of Norms and Conflicts of Jurisdiction. The Relationship between the Dispute-Settlement Mechanisms of MEAs and Those of the WTO' (n 667) 1090.

[834] Vienna Convention on the Law of Treaties (1969) art 59.

[835] An example of a typical Treaty clause, is a provision that states " provisions of this Convention shall not affect the rights and obligations of any contracting party deriving from any existing international agreement.."

However, none of the maxims can rely on pre-determined relations so the analysis of the incompatible provisions has to be made on case-by-case basis by the competent adjudicative body.[836]

3.5.2 Open and Narrow Approach towards Non-WTO Law

Concerning the issue of the applicable law in a dispute, it is primarily necessary to define what a conflict of norms is. As all definitions, the concept of "conflict" can assume very narrow or quite broad meaning. A more narrow definition of the concept postulated by Jenks suggested that conflicts of norms refer limitedly to situations in which a simultaneous and harmonious application of two different provisions is impossible.[837] Quoting his own words *"a conflict in strict sense of direct incompatibility arises only where a party to the two treaties cannot simultaneously comply with its obligations under both treaties"*.[838] Thus, in order to ascertain this specific circumstance, which is not as frequent as one could think, according to Marceau, three conditions should be met: parties to the treaties and parties to the dispute should coincide, the subject matter should be identical and the obligations should be mutually exclusive.[839] As a result, under this strict definition, most of the situations recurring at international level would concern an imperfect alignment between commitments enshrined in two or more treaties that can be solved by a harmonious application of provisions without recurring to general rules of conflict of law.[840]

From a different stance, Pauwelyn, in his central piece on the use of non-WTO law in dispute settlement, adopted a broad definition of conflict that got to include also

[836] Lindroos (n 814) 40.

[837] Jenks (n 825) 401. This definition was subsequently embraced by other scholars, among others Karl, who in 1984 affirmed "*..There is a conflict when two (or more) treaty instruments contain obligations which cannot be complied with simultaneously"*. He also specifies *"..not every such a divergence constitutes a conflict"*. Karl Wolfram, (n 831) 425 and 468, see also Sinclair (n 831) 97.

[838] Jenks (n 825) 426. In line with this interpretation of legal conflict was also the Appellate Body in Guatemala- Cement Case, *Guatemala — Anti-Dumping Investigation Regarding Portland Cement from Mexico-Report of the Appellate Body* [1998] WT/DS60/AB/R, para 65.

[839] Marceau and Kwak Kyung (n 792.

[840] Sacerdoti (n 810).

diversities in the substantive rights granted by two or more treaties.[841] Similarly, Bartels considered as conflicts of norms also divergences deriving from rights and privileges accorded in a treaty, not exclusively based on obligations, which encompasses situations where a treaty permits a specific behaviour that is not envisages in another.[842] With reference to this interpretation, some criticisms have underlined the lack of differentiation between conflicting obligations, on one side, and the simple non-coincident scope or breadth of provisions belonging to different treaties, on the other, which fails to capture the "chaotic" status of the international system.[843] Notwithstanding the academic debate, situations of conflicting obligations not simultaneously applicable can arise and what law is applied seriously influences the final results in a ruling.

3.5.3 The Use of non-WTO Law for Interpretative Reasons

With regard to the question as to whether non-WTO law can serve in the WTO dispute settlement, panels' jurisdiction is recognised substantially limited, in the sense that claims brought before the DSB can exclusively lay down on the WTO multilateral

[841] The author openly declared that the definition provided by Jenks is too strict as it does not capture a relevant number of conflicting situations and overlapping circumstances, which occur at international level especially in sectors disciplined by a less stringent regulation, such as environmental rules vs WTO regime. Even if he specifies that conflicts are exceptional since States negotiate in good faith their obligations and harmonious application of different sources of law, this wide definition of conflict embraces situations that would not be included with a narrow one. Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?' (n 667) 551. The same definition stands behind the arguments presented in the subsequent paper Pauwelyn, 'How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law?' (n 782).

[842] Bartels supports his thesis by underlining that article 41 of the VCLT prohibits States to undertake obligation that are incoherent with the the "effective execution" purpose and the object of an existing treaty if a treaty or to ratify them, article 18 of the VCLT. Bartels (n 792). According to some other authors, conflict occurs exclusively if an incompatibility between obligations, and not privileges or rights or possibilities, exists. Marceau and Kwak Kyung (n 792).

[843] Marceau strongly criticises the assumption of Pawelyn's work, stressing that while he recognises that the conflicts of norms arise in exceptional cases, he overestimates the likelihood, the frequency and the number of cases that requires an analysis of the applicable law. Marceau and Tomazos (n 785) 56.

agreements.[844] Nevertheless, this compelling principle has not to be interpreted as precluding any use of non-WTO law whatsoever.[845] In fact, article 3(2) of the DSU envisages a harmonious interpretation of the WTO covered agreements with the existing legal framework, reading *"[the multilateral trading system] serves..to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law*".[846] Hence, inasmuch as a WTO term is unclear or ambiguous the recourse to external legal sources is allowed.[847]

Concerning the principles of law interpretation, the Vienna Convention Law of the Treaty (VCLT) offers important guidance for the interpretative exercise.[848] Articles 31 and 32 of the VCLT are particularly relevant and compose the section titled "the interpretation of treaties". Both articles aim at identifying parties' intention and spelt

[844] Pauwelyn and Bartens, among the strong supporters of a broad reliance upon non-WTO sources in dispute settlement recognise that "*..due to the limited substantive jurisdiction of the WTO panels, only legal claims under the WTO covered agreements may be examined*..", Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?' (n 667) 559. Thus, according to Pauwelyn, the legal basis for claims ruled by the WTO adjudicating bodies is conceptually different from Panel's jurisdiction, however intertwined. The former is limited to the covered agreements, whereas the latter can be established by taking into account the relevant non-WTO law. Yet, some doubts remain on the compliance with the customary principle *tertiis nec nocent nec prosunt* when a wide jurisdiction is conceived. Joel P Trachtman, 'Regulatory Jurisdiction and the WTO' (2007) 10 Journal of International Economic Law al Economic Law 631; Damme, 'What Role Is There for Regional International Law in the Interpretation of the WTO Agreements?' (n 152).

[845] Bartels (n 792); Mitchell and Heaton (n 139).

[846] Article 3.2 Understanding on rules and procedures governing the settlement of disputes (n 153).

[847] *In the* US-Gasoline case *the Appellate Body stated that the recourse to non-WTO was consented exclusively to clarify terms and provisions relevant in the dispute, affirming the* rationae materiae *of the DSU provision. United States – Standards for Reformulated and Conventional Gasoline - Report of the Appellate Body* [1996] WT/DS2/AB/R, paras 16-23. Isabelle Van Damme, 'WTO Treaty Interpretation Against the Background of Other International Law', Treaty interpretation by the WTO Appellate Body (Oxford university press 2009); Pamela Apaza Lanyi and Armin Steinbach, 'Promoting Coherence between PTAs and the WTO through Systemic Integration' (Forthcoming) December 1, 2016 Journal of International Economic Law; Marceau, 'Conflicts of Norms and Conflicts of Jurisdiction. The Relationship between the Dispute-Settlement Mechanisms of MEAs and Those of the WTO' (n 667) 17.

[848] *VCLT has being confirmed as part of customary law in the WTO jurisprudence. See, for instance, United States – Standards for Reformulated and Conventional Gasoline (n 200); Japan – Taxes on Alcoholic Beverages [1996] Appellate Body WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R.*

out a process of legal reasoning in which particular elements will have greater or less relevance depending on the nature of treaty provisions.[849]

In detail, paragraph 1 of article 31 prescribes that the ordinary meaning of treaty terms shall be interpreted in good faith and in light of the purpose and the object of the treaty.[850] This article prevents from a *contra legem* interpretation, meaning an interpretation of the treaty contrary to the treaty itself.[851] Article 31(2) specifies that the notion "context" embraces the text, the preamble and the annexes of a treaty, which can be used in the interpretative exercise.[852] Moreover, additional tools drafted in connection with treaty negotiations can serve to clarify the ordinary meaning.

Article 31(3) considers supplementary material external to the treaty as interpretative ancillary tools. The provision takes into consideration mainly actions subsequent to the conclusion of a treaty. Specifically, article 31(3) states that in treaty interpretation along with the context (a) subsequent agreement, (b) subsequent practice and (c) any relevant rules of international law applicable in the relations between the parties should be taken into account.[853] The term subsequent agreement in article

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[849] 'Conclusion of the Report of the Study Group of the International Law Commission, Fragmentation of the International Law: Difficulties Arising from the Diversification and Expansion of International Law' (n 160) para 18. Oil platform case para 41

[850] As noted by the ILC, jurists differ to some extent in their basic approach to the interpretation of treaties according to the weight which they give to the text of the treaty, the intentions of the parties, and the object and purpose of the treaty. See International Law Commission, 'Draft Articles on the Law of Treaties with commentaries', 2 Yearbook of the International Law Commission 218 (1966). In the WTO jurisprudence see, for instance Japan - Alcoholic Beverages, where the Appellate Body stated that "the proper interpretation of the Article is, first of all, a textual interpretation", Japan – Taxes on Alcoholic Beverages (n 201) para. G -article III(1); United States – Standards for Reformulated and Conventional Gasoline (n 200).

[851] Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?' (n 667) 573.

[852] Vienna Convention on the Law of Treaties (1969) art 31(2), The article recites "*The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty*".

[853] On the use of Article 31 of the VCLT for the purposes of integrating WTO law and other treaties, see Benn McGrady, *Trade and Public Health : The WTO, Tobacco, Alcohol, and Diet* (Cambridge University Press 2014); Pieter Jan Kuijper, 'Conflicting Rules and Clashing Courts the Case of Multilateral Environmental Agreements, Free Trade Agreements and the WTO' *ICTSD Issue Paper No.*

31(3)(a) generally refers to interpretative accords concluded after a treaty. The so-called subsequent agreement should be chronological subsequent to the conclusion of WTO multilateral treaties and should express the mutual consent among the parties that agree on a specific interpretation or application of the WTO law.[854] Differently, subsequent practice in article 31(3)(b) indicates a sequence of acts or facts that express an agreed interpretation of a treaty. The practice is concordant, common and consistent.[855] Subsequence practice is objectively more difficult to establish.[856] Finally, article 31(3)(c) affirms that any relevant rules of international law applicable in the relations between the parties can be used for interpretative reasons. This notion embraces a wide range of legal instruments.[857] Generally, the three characterising elements for a legal source to be considered are (i) being a relevant rule of international law, (ii) being applicable to the parties[858] and (iii) addressing the subject-matter at issue in the dispute.[859] The underlining rationale is detectable in the principle of systemic integration

10 (2010) 6–8; Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford university press 2009); Campbell C MacLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 The international and comparative law quarterly 279.

[854] *United States — Measures Affecting the Production and Sale of Clove Cigarettes* [2012] Appellate Body WT/DS406/AB/R, paras 241-275.

[855] Fitzmaurice and Merkouris (n 191) 223.

[856] However, in the US-Gambling case the Appellate body specified that subsequent practice is characterised by (i) common, consistent and discernible pattern of acts and (ii) it must imply an agreement on the interpretation of WTO agreements. *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services - Report of the Appellate Body* (n 324) paras 192-193. Coherently, the Panel in EU-IT Products, when verifying the establishment of a classification practice it is necessary to ascertain the existence of a "consistent, common and concordant" classification. *European Communities and its member States – Tariff Treatment of Certain Information Technology Products- Report of the Panel* [2010] WT/DS375/R, WT/DS376/R, WT/DS377/R para. 7.565.

[857] ILC study on 31(3)(c) some scholars have led back the notion to general principles of international law as intended in article 38(1)(b) and (c) of the ICJ Statute. Damme, 'WTO Treaty Interpretation Against the Background of Other International Law' (n 853) 367–372; Marceau, 'Conflicts of Norms and Conflicts of Jurisdiction. The Relationship between the Dispute-Settlement Mechanisms of MEAs and Those of the WTO' (n 667) 1087.

[858] For a thorough dissertation on the interpretation of the term "parties", being them the parties of the dispute or the parties to the covered agreements, consult Lindroos (n 814).

[859] See *Oil Platforms (Islamic Republic of Iran v United States of America)* [2003] ICJ Separate Opinion Judge Higgins (Merits), para 49.

that aims at promoting a coherent interpretation in the context of international law.[860] Finally, article 32 allows the recourse to supplementary means of interpretation when the terms of the treaty are ambiguous, obscure, absurd or unreasonable, including *travaux preparatoires*.[861] However, the lack of normative predefined relationship among the sources of international law implies a case-by-case application of the VCLT principles.

With regard to the WTO dispute settlement activity, in practice, while reliance upon elements of the treaty according to article 31(1) and 31(2) of the VCLT occurs frequently, the same cannot be said for reference to "any other relevant rules of international law" as spelt out in article 31(3)(c) VCLT. From the analysis of the WTO jurisprudence provided by Isabelle Van Damme, with the exception of the EC-Biotech products,[862] the relevant case law that shows a recourse to external legal sources for interpretive purposes has resulted limited.[863] The reasons may be found in the fact that article 31(3)(c) is more theoretical than practical, which is to say that not all disputes face ambiguities in the provisions at issue and most clarifications can be found directly in the treaty without need to consider external sources.[864]

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[860] 'Report of the Study Group of the International Law Commission, Fragmentation of the International Law: Difficulties Arising from the Diversification and Expansion of International Law' (n 6) para 423.

[861] Supplementary means refers to "*record of the negotiations preceding the conclusion of a treaty*" Jennings, Oppenheim and Watts (n 191) 1277.

[862] *European Communities — Measures Affecting the Approval and Marketing of Biotech Products* [2006] Panel WT/DS291/R, WT/DS292/R, WT/DS293/R, paras 7.67-7.70. In the EC-Biotech Products, according to Damme, the VCLT does not give discretion in the application of this principle, "if the conditions are met, the interpreter has no option other than to take account of international law". For a general analysis of the WTO adjudicative bodies' activity refer to Damme, *Treaty Interpretation by the WTO Appellate Body* (n 853) 360–368.

[863] An exemplificative case is Mexico –telecoms, where article 31(3)(c) was not found to be applicable in the case. However, the Panel specified that this does not exclude the application of other rules of international law that helps the interpretation of the context. *Mexico — Measures Affecting Telecommunications Services- Report of the Pnael* [2004] WTO/DS204/R para. 7.236. Damme (n 853) 362. For a general dissertation see also FPFeliciano, 'Panel Discussion: WTO Case Law in an International Context' in Merit E Janow, Victoria Donaldson and Alan Yanovich (eds), *The WTO : governance, dispute settlement and developing countries* (Juris Publishing, Inc 2008) 716.

[864] In some cases, the use of external resources has been justified under norms other than article 31(3)(c) of the VCLT. To give an example, in the US-Shrimp case, the Appellate Body was challenged on the meaning of "natural resources" contained in article XX(g) of GATT 1994. In essence, the Appellate

Furthermore, by acknowledging a systemic coherence, the Appellate Body has normally applied a strict notion of conflict, so that the recourse to general norms of conflict of law, such as *lex specialis*[865] and *lex posteriori*, has been occasional.[866] The limited application is linked to the peculiarity of the WTO system, which is characterised by a high degree of unity, promoted also by the single undertaking approach. As a result, treaty incompatibilities are primarily solved by a harmonious treaty interpretation and, only exceptionally by *lex specialis* maxim.[867]

From the WTO jurisprudence, the EC-Poultry case[868] confirms that the use of the non-WTO law is generally excluded unless the treaty provisions are unclear and the subject matter is coincident with the WTO subject matter contested in the dispute.[869] In the case at issue, Brazil complained about tariff quota on frozen chicken imposed by the EU (at the time the EC), which was inconsistent with the "Oilseed Agreement" signed by the parties and contrary to the EU's Schedule of Commitments. On the merits, the

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Body did not rely upon international legal instruments under the meaning of article 31(3)(c) but it rather justified the evolutionary interpretation conducted under the principle of effectiveness, to ascertain the subsequent practice. Specifically, the principle of effectiveness necessitates that the interpretation of a treaty provision is carried out in a manner that guarantees effect to all the provisions of the treaty, implying that no interpretation nullifies or overrides the effect of the provisions. *United States — Import Prohibition of Certain Shrimp and Shrimp Products- Report of the Appellate Body* [1998] WT/DS58/AB/R, para 130 and footnotes 110-113. For disputed cases refer to Damme, *Treaty Interpretation by the WTO Appellate Body* (n 853) 360–368.

[865] Lindroos (n 814) 57.

[866] A conflict arises when "in a dispute with the same parties, the treaties in question deal with the same subject matter and these provisions establish mutually exclusive obligations or rights". *Indonesia — Certain Measures Affecting the Automobile Industry Report of the Panel* (1998) WT/DS54/R para. 14.29; *Turkey — Restrictions on Imports of Textile and Clothing Products - Report of the Appellate Body*, para.9.94.

[867] Lindroos (n 814) 58; Marceau, 'Conflicts of Norms and Conflicts of Jurisdiction. The Relationship between the Dispute-Settlement Mechanisms of MEAs and Those of the WTO' (n 667) 1087–1090; Sacerdoti (n 810).

[868] *European Communities — Measures Affecting Importation of Certain Poultry Products- Report of the Appellate Body* [1998] WT/DS69/AB/R.

[869] Overall the use of non-WTO sources by panels and the Appellate Body is not disputed for interpretation purposes. Even Pauwelyn has remarks a positive trend in the use of non-WTO law also to fill procedural gaps when Panels recur to legal general principles of international law such as burden of proof and State responsibility. Pauwelyn, 'How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law?' (n 782) 997–998.

Appellate Body specified that the bilateral treaty was signed within the context of article XXVIII of the GATT 1947 and was doubtfully part of the covered agreements, whilst the EU Schedule was not. Thus, according to the Appellate Body, there was no need to apply norms of the VCLT and taking into account external sources that did not produce multilateral obligations for the parties of the dispute, such as the Oilseed agreement.[870] Conversely, Schedule LXXX constituted the legal basis for all complains and was, therefore, considered the relevant document to be interpreted.[871] A different approach, considered incoherent by some scholars, was remarked in the EC-Banana case, where the scope of the Lomé Convention was analysed. On this point, the Appellate Body clarified that it was obliged to take into account the Lomé Convention in order to understand the scope of the waiver and, in any case, was limited to a functional interpretation of the subject-matter at issue. Hence, the recourse to sources other than the WTO agreements result limited *"..[to] the extent necessary to interpret and apply WTO provision"*.[872]

3.5.4 The Use of Non-WTO Law as a Self-Standing Defence

More disputable is the question as to a PTA, and more generally non-WTO law, can constitute a defence for WTO violations. A relatively new stream of the literature has formulated a positive answer. Starting from the assumption that the WTO system was not created in a vacuum, the interpretation of the multilateral agreements cannot be carried out in a "clinical isolation" from the general international legal framework.[873] Pauwelyn, in the lead, has extensively delved into the issue, particularly in his paper

[870] *European Communities — Measures Affecting Importation of Certain Poultry Products Report of the Appellate Body*, para 79.

[871] ibid 81. See also the ruling of the chairman in the United States-margin of preferences, 9 August 1949, BISD II/11. By analogy with PTAs, the Panel limits its assessment to the verification of requirements under WTO articles dedicated to regional trade agreement without assessing neither the overall compatibility of the agreement nor implementing any provision of it. Marceau and Reiman (n 698).

[872] *European Communities — Regime for the Importation, Sale and Distribution of Bananas -Report of the Appellate Body* [1997] WTO/DS27/AB/R, para 162.

[873] Marceau, 'A Call for Coherence in International Law : Praises for the Prohibition against "Clinical Isolation" in WTO Dispute Settlement' (n 789).

"How to win a WTO dispute based on non-WTO law" concluding that the recourse to PTAs should be allowed, even desirable, when conflicting provisions occur.[874] Furthermore, Pauwelyn has echoed previous scholars' viewpoint, Hudec and Wold among others, who favoured the application of principles of general public law such as *lex specialis* and *lex posteriori* to solve potential overlaps.[875] Similarly, Bartels supportively affirmed that "*..in cases of conflict between multilateral environmental agreements (MEAs) and the WTO agreements, the MEAs should "trump" the WTO agreements because they constitute a lex specialis, even when they precede the relevant WTO agreements in time*".[876]

In particular, Pauwelyn has identified four situations in which the Panel should refrain form finding a WTO violation since PTAs constitute a substantive defence, when (i) treaties are incorporated or referred to in the WTO agreements, (ii) another treaty imposes or permits a measure inconsistent with the WTO regime, (iii) another treaty imposes or permits a measure inconsistent with the WTO regime provided that the treaty is violated, and finally when (iv) rulings under another treaty allows a countermeasure that is in breach of the WTO obligations.[877]

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[874] Pauwelyn firmly believes that obligations pertaining to specialised branches of international law, such as commitments related to agreements on environmental, on health protection or financial aspects should supersede WTO agreements on general trade. Pauwelyn, 'How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law?' (n 782) 1019; Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?' (n 667) 571–573.

[875] R. Hudec, "GATT Legal Restraints on the Use of Trade Measures against Foreign Environmental Practices" in J.Bhagwati and R. Hudec (ed.), *Fair Trade and Harmonization: Prerequisites for Free Trade?* (Cambridge, Massachusetts: MIT Press, 1996), 121. An explanatory excerpt from Wold's work stated "*environmental agreements are clearly more specific than GATT in terms of their subject matter. Under the principle of lex specialis, it is normally presumed that the more specific of two agreements is meant to control, even when the more general agreement happens to be later in time. In general, these principles would suggest that GATT should step aside whenever a GATT member government has signed an international environmental agreement authorising other signatories to impose trade restrictions against it."*. Chris Wold, 'Multilateral Environmental Agreements and the GATT Conflict and Resolution' (1996) 26 Environmental law 841, 28.

[876] Bartels (n 792) 500–501.

[877] Pauwelyn, 'How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law?' (n 782) 1028.

Examining each condition pointed out, in the circumstance (i) the author mentions TRIPS as an example of convention incorporated into the WTO regime and takes article 3 of the SPS and article 2 of the TBT agreement as explanatory cases for references to non-WTO sources within the WTO agreements, since these provisions contain an open reference to international standards.[878] Despite being paired, these two situations are in essence distinct and they have been dealt differently in the relevant case law. Concerning the TRIPS example, the incorporation of an initially external legal source into the multilateral system has effectively conferred the former the same value as the latter. Put differently, legal tools embedded into the WTO system become effectively part of the system itself, regardless of whether they were negotiated during multilateral negotiations or separately in other venues. That being said, external legal sources that are incorporated into the WTO system enjoy a presumption of consistency and in case of a substantive conflict, which appears rare, proportionality and balancing rights can apply.[879] Thus, it is not surprising that panels and the Appellate Body take accounts of TRIPS when settling a dispute, even if TRIPS obligations mirrored commitments enshrined in international conventions on intellectual property rights.[880]

Different considerations should be made with regard to SPS and TBT agreements. While an open reference to relevant international standards is explicitly included in article 3 of the SPS Agreement and 2 of the TBT Agreement, the WTO adjudicative bodies have recurred to them more as a benchmark rather than as substantive legal sources. The relevant standards have basically been used as a starting point to assess the deviance of a contested measure from the WTO system. [881]

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[878] TRIPS incorporates obligations and exceptions that can be found under various subject-related Conventions, such as the World Intellectual Property Organization (WIPO Convention). ibid 1021.

[879] Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press 2011) 192–205; David M. Beatty, *The Ultimate Rule of Law* (Oxford University Press 2004).

[880] TRIPS are part of the covered agreements so dispute arising from alleged breach can be brought before the DSU to the same extent than alleged violations of the GATT or the GATS.

[881] A comparison between SPS and TBT international standards can be contested since the former can hardly be deemed international treaties as the latter. For a detailed analysis of the WTO case law concerning reliance upon international standard under SPS and TBT agreements in previous case law refer to the previous chapter. See also Joel P Trachtman, 'Toward Open recognition?Standardization

Moving to case (ii) where another treaty imposes or permits a measure inconsistent with the WTO regime implies the Panel's interpretation and application of non-WTO sources. The criticisms highlighted to this approach are similar to those envisaged for a hypothetical deference of the Panel's jurisdiction, which is by the way intertwined with the applicable law issue. Specifically, the situation depicted by Pauwelyn entails a substantial analytical exercise by the Panel, which has to examine provisions incompatible with the WTO regime, interpret non-WTO legal sources and eventually apply general rules of public international law to ascertain the primacy of one of two regimes over the other.[882] In case a treaty supersedes the WTO regime, according to the principle of *lex specialis* and *lex posteriori*,[883] the Panel should accept the defence under non-WTO treaty and not finding a WTO violation, by applying treaty obligations instead of WTO provisions. Yet, in the situation (ii) if a PTA establishes subsequent obligations that modify the WTO commitments between the contracting parties, this expression of intent by the parties should be taken into account in dispute settlement deriving from conflicting PTA-WTO obligations, since both legal instruments derives their validity from States' consent.

Likewise, in the situation (iii) where the validity of a WTO inconsistent measure is allowed under a treaty and it is conditional upon the breach of the treaty itself, the Panel has first to verify that the violation of the treaty has occurred, secondly to ascertain that the measure has been validly adopted and, finally, to accept the non-WTO legal source

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and Regional Integration under Article XXIV of GATT' (2003) 6 Journal of International Economic Law 459.

[882] Pauwelyn recalls principles as inherent jurisdiction and *compétence de la compétence*, which are operational rules. Especially the latter is intended as incidental jurisdiction necessary to carry out the judicial functions without being related to the substantial judicial exercise. Pauwelyn, 'How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law?' (n 782).

[883] The supporters of this stance believe that PTAs tend to be more specific and sector-oriented than the general content of the WTO agreements, for this reason, in their opinion, once a conflict arises the application of *lex specialis* and *lex posteriori* more likely leads to ascertain the primacy of PTAs over the WTO regime. Pauwelyn and Salles (n 788); Bartels (n 792); Mitchell and Heaton (n 667); However, with a limitated number of case and under specific conditions see also Gao and Lim (n 639).

as a defence to WTO violations.[884] Leaving aside doubts on whether the Panel would be a legitimate tribunal to interpret and to verify the right application of non-WTO treaties, the massive analytical exercise seems to go way beyond the competence attributed to the WTO adjudicative bodies. One thing is examining the WTO provisions in light of relevant treaty commitments in order to ascertain that subsequent obligations have not modified the WTO undertakings in the relations between the treaty parties, which are concurrently WTO members as well. Another thing is interpreting a non-WTO treaty as a starting point of the analysis to verify first parties' compliance with the treaty itself, secondly the validity of a WTO-inconsistent measure adopted in response to a violation of the same treaty in order to eventually consider the treaty provision as a self-standing defence to the WTO violations. In other words, in the situation (iii) the panel is supposed to ascertain a violation of a treaty that would allow the adoption of a measure inconsistent with the WTO regime, before even conducting the analysis on the merits. In this very case, the Panel's action will exceed its competence by acting as a sort of general court in charge of assessing the right application of legal sources of international law. Needless to say that none of the WTO adjudicative bodies is a tribunal of general competences vested with the role to solve whatever dispute arises from incompatible obligations within the international legal framework. With Marceau's words "[..] *WTO is not a world government and its dispute settlement system even less*".[885]

Finally, in circumstance (iv) where rulings under another treaty authorise a countermeasure that is in breach of the WTO obligations, the panel should be take cognisance both of the ruling and the provision permitting trade sanctions.[886] As a premise, Marceau argues the compatibility of this approach with article 23 of the DSU that aims at avoiding unilateral redress by promoting a multilateral dispute settlement.

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[884] Pauwelyn, 'How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law?' (n 782) 1026.

[885] The International Court of Justice is the only court with a general jurisdiction. Cesare PR Romano, Cesare P.R., 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle' (1999) 31 New York University Journal of International Law & Politics 709, 710–713. According to Jimenez, the Mexico-soft drinks case has already paved the way for this conclusion. Alvarez Jimenez (n 664) 15.

[886] Pauwelyn, 'How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law?' (n 782) 1023.

Moreover, in line with a large part of the doctrine, she clarifies that a member always possesses the right to recur to the WTO dispute settlement mechanism any time it perceives impairment or nullification of its rights, so the State that adopts a countermeasure that is inconsistent with the WTO regime, risks being brought before the DSB.[887] Besides, as already established in Mexico-Soft Drink case, the right to initiate WTO action is a fundamental and unavoidable one, so a WTO panel can not refuse its jurisdiction based on the fact that a dispute has already been adjudicated or a proceedings have already been initiated. By the same token, it seems unlikely that a panel would exercise deference if a tribunal's ruling allows a WTO-inconsistent measure and even less realistically that the same panel accepts non-WTO sources as substantive defence.[888] As a consequence, before adopting a countermeasure that can be challenged before a WTO panel, a member should weigh the benefits deriving from the application of an inconsistent measure and the costs it may incur to if an adverse WTO ruling is rendered.[889] Some scholars have warned that a hypothetical acceptance of external ruling as self-standing justification would imply a sort of hierarchy among international adjudicative bodies and legal sources, which does not correspond to the systemic structure of the international legal regime. Therefore, the recourse to non-WTO sources is brought a step further than the simple use for a coherent interpretation of WTO agreements within the international legal framework the WTO regime is inserted, so denoting an excessively wide adjudicative role of WTO panels at international level.[890]

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[887] See, for instance, Robert Howse and Ruti Teitel, 'Beyond the Divide : The International Covenant on Economic, Social and Political Rights and the World Trade Organization' [2009] The World Trade Organization and human rights : interdisciplinary perspectives 39, 44; Margaret A Young, 'The Wto's Use of Relevant Rules of International Law: An Analysis of the Biotech Case' (2007) 56 The International and Comparative Law Quarterly 907, 907; Andrew Lang, *World Trade Law after Neoliberalism : Reimagining the Global Economic Order* (OUP Oxford 2014) 152–153.

[888] Pieter-Jan Kuijper, 'Does the World Trade Organization Prohibit Retorsions and Reprisals? : Legitimate "Contracting out" or "Clinical Isolation" again?' [2008] The WTO : governance, dispute settlement, and developing countries 695.

[889] Marceau and Wyatt (n 790) 73–75.

[890] Marceau and Tomazos (n 785) 56.

For these reasons, a vast majority of the literature, accounting with Trachtman, McGinnis and Marceau, shares a complete opposite view that conceives a limited reliance upon non-WTO legal accepted sources only for interpretative purposes. Moving from McGinnis, who holds an extreme stance that envisages the WTO as a self-contained regime,[891] the other authors express a more cautious opinion, yet contrary to construe PTAs as self-standing defence against WTO violations. The reasons highlighted are manifold.

The first reason is related to the limited and defined competences of WTO panels, spelled out in the DSU, particularly in articles 11 and 23, supported by the clear specification of "covered agreements" in numerous provisions of the DSU.[892] Conversely, a hypothetical defence based on PTA provisions entails the interpretation and the application of PTAs by the Panel, which would go beyond its mandate. Moreover, allowing the WTO panels to interpret any legal tools directly and indirectly related to trade and legally binding for the parties in the dispute would not guarantee a coherent application of non-WTO on the contrary it may lead to "*an interpretation of non-WTO treaties in complete isolation from the covered agreements*", as lamented by some scholars.[893]

Secondly, the WTO agreements have already previewed circumstances of exclusions. In practical terms, issues affecting trade have already been considered under general exceptions in article XX of the GATT and article XIV of the GATS.[894] As a

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[891] John O McGinnis, 'The Appropriate Hierarchy of Global Multilateralism and Customary International Law : The Example of the WTO' (2003) 441 Virginia journal of international law. 229, 36.

[892] In this regard, the provisions that contain an open reference to the covered agreements are article 7 paragraph 1 that reads the Panel has to *"examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute)",* and paragraph 2 that recites "*Panel shall address the relevant provisions in any covered agreements*". Article 11 titled "function of Panels" prescribes that "*the assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements*" and finally article 19(1) states *"[losing member] brings its measure into conformity with that [covered] agreements*" .

[893] Marceau and Tomazos (n 785) 72.

[894] Among others, environmental, health security issue, prudential reasons. R Housman and DM Goldberg, , 'Legal Principles in Resolving Conflicts Between Multilateral Environmental Agreements and the GATT/WTO' in Housman et al (ed), *The Use of Trade Measures in Select Multilateral*

consequence, many of the potential conflicting situations may fall under the exception provisions in the GATT or GATS, reducing the likelihood of real conflicts.[895] According to the authors, non-WTO sources may help to make the point when invoking general exceptions but they cannot serve as self-standing defence.

Third, acknowledging PTAs as justification against WTO violations would imply a substantive application of non-WTO law, a sort of direct effect of non-WTO sources that would unavoidably diminish or add rights to WTO members or to a part of them, inconsistently with both the customary principle *tertiis nec nocent nec prosunt* and the DSU article 3(2).[896] In conclusion, allowing non-WTO law as self-standing defence would inevitably affect, or even alter, the agreed multilateral commitments. Last but not least, the presumption of systematic coherence and good faith principle generally apply, so States remain responsible for any breach of treaties even if the violation is not ascertained in the WTO dispute proceedings. While a general recourse to non-WTO law any time a normative conflict arises has to be discourage, the applicable law in the WTO dispute proceedings has to be ascertained on case-by-case basis. Moreover, even if siding the arguments supported by Marceau that warn about the legitimacy and the competence of the WTO panels in the interpretation and application of PTAs in cases (iii) and (iv) since they exceed panels' mandate, a subsequent modification of WTO obligations cannot be overlooked. In other words, situations grouped under case (ii), where PTAs establish different obligations from the WTO commitments, the relevant

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Environmental Agreements (Centre for International Environmental Law 1995) 312; Richard H Steinberg, 'Trade-Environment Negotiations in the EU, NAFTA, and WTO : Regional Trajectories of Rule Development' (1997) 91 American Journal of International Law 231, 238.

[895] See Marceau, 'A Call for Coherence in International Law : Praises for the Prohibition against "Clinical Isolation" in WTO Dispute Settlement' (n 789) 72. Already Article XX of the GATT promotes sustainable development meaning coherence and greater co-ordination by conceiving a flexible application of the WTO provisions that takes into account also essential values for the international community, whose pursuance may conflict with trade commitments.

[896] The principle is enshrined in the VCLT from article 34 to 38. In the WTO context, Article 3(2) of the DSU states "*The Members recognize that DSM serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements*."

PTA provisions should be taken into account by the panel in the ascertainment of a violation of the WTO regime and retained valid justification for WTO-inconsistent measures inasmuch as they express States' intent to modify existing relations among the contracting parties. For what concerns case (i) any external legal sources incorporated in the WTO system gets to be part of the system itself, whilst concerning reference to external sources within the WTO agreements, namely SPS and TBT discipline, the reference to these sources has to be conducted within the limits prescribed in the provisions themselves. Hence, if a provision includes a best-endeavour clause when referring to external sources, these legal instruments cannot be considered as substantive obligations or positive defence, and the other way round. Thus, a mere reference vaguely worded would probably encourage to use international standards rather as a benchmark, exclusively.

3.5.5 The Recourse to PTAs to Prove Defence under WTO General Exceptions: The Brazil-Tyres Case

Among the WTO jurisdiction, The Brazil-Tyres case is an illustrative example of substantive fragmentation. The measure at issue was the Brazilian bans of imported retreated tyres, [897] adopted to avoid an increase in the number of waste tyres, already abundant in Brazil, which constituted a serious environmental concern, being the non-collected tyres the ideal habitat for mosquito-borne diseases, such as malaria or dengue fever.[898] The 1991 ban faced a strong backlash from the domestic industry that had mainly used cheaper imported tyres rather than the local used tyres, whose cost of collection and treatment was higher.[899] Despite the ban, tyres importation had grown consistently till 2000 when a second ban was adopted causing a dramatic drop in the EU

[897] Retreated tyres are reconditioned tyres that have a shorter life-duration, compared to new ones, but their price is reduced.

[898] As declared by Brazil, waste tyres dispersed around the country, is a very serious for Brazilian authorities that have struggled to eradicate. *Brazil — Measures Affecting Imports of Retreaded Tyres-Report of the Panel* [2007] WTO/DS332/R paras 7.24-7.28.

[899] Department of Foreign Trade and Ministry of Development of Brazil, Portaria No. 8 (May 13, 1991) (DECEX 8/1991)

exportation that got close to zero.[900] Brazilian regulation was challenged both before international tribunals in the context of MERCOSUR,[901] where the measure was found inconsistent with the regional treaty and before the WTO.[902] In 2005 The EU brought the dispute before the WTO claiming that the Brazilian ban was inconsistent with article XI of the GATT that interdicts quantitative restrictions and was contrary to article I and XIII of the GATT since MERCOSUR "preferential" treatment impaired EU's rights granted by the MFN principle.[903] Brazil construed its defence on article XX that justifies restrictive measures provided that necessary to protect human, animal, plant life or health.[904]

The Panel first analysed if the measures could be justified under general exception clause. In this regard, the Panel found that the measures fell within the scope of article XX of the GATT given their aim to manage and reduce waste in light of environmental and human health protection. However, the Panel judged that requirements under the chapeau of article XX of the GATT, which prevents arbitrary and unjustified measures had not been met since the bans, in a contradictory logic, prohibited retreated tyres for safety reasons but allowed used ones.[905] Secondly, the Panel examined the MERCOSUR exemption and reckoned that the measures were not arbitrary or unjustified, under the terms of the chapeau of article XX of the GATT since Brazil introduced the measures

[900] Secretariat of Foreign Trade and Ministry of Development of Brazil, Portaria No.8 (Sept. 25, 2000) (SECEX 8/2000). For a thorough study on competitive effects consequent to the Brazilian regulation see Morosini, 'MERCOSUR and the WTO retreated tires dispute', SIEL working paper 42/08.

[901] The 1991 Treaty of Asunción marked the establishment of MERCOSUR, with the founders Argentina, Brazil, Paraguay and Uruguay, and five associate members, namely Bolivia, Chile, Colombia, Ecuador and Peru. The MERCOSUR PTA was notified in March 1992.

[902] The original MERCOSUR dispute settlement mechanism was changed from Protocol of Brasilia for the Solution of the Controversies to Protocol of Olivos for the settlement of disputes in Mercosur (2004), which previewed the choice of forum, so allowing recourse either before MERCOSUR tribunals or to the WTO.

[903] *Brazil — Measures Affecting Imports of Retreaded Tyres - Report of the Panel*, para 3.1.

[904] ibid, para 3.3.

[905] Julia Ya Qin, 'Managing Conflicts between Rulings of the World Trade Organization and Regional Trade Tribunals : Reflections on the "Brazil-Tyres" Case' in Peter HF Bekker, Rudolf Dolzer and Michael Waibel (eds), *Making transnational law work in the global economy : essays in honour of Detlev Vagts* (Cambridge University Press 2010) 606.

in compliance with the ruling of the MERCOSUR tribunal.[906] Even if the Panel did not examine the compatibility of MERCOSUR custom union with the requirements expressed in article XXIV of the GATT, discrimination between MERCOSUR countries and other WTO members are not a priori unreasonable.[907] Yet, the measure was finally deemed in violation of WTO regime because the measures prohibited the importation of retreated tyres exclusively without limiting the trade of used tyres.

Conversely, the Appellate Body opposed to the analysis on the MERCOSUR exemption, clarifying that "arbitrariness" and "unjustifiability" of a measure should be assessed accordingly to the object and the purpose of the measure itself and not in consideration of a presumed compatibility with an international tribunal's ruling. In other words, to examine the requirements of the chapeau of article XX of the GATT the causal effect between the rationale and the measure adopted has to be analysed. In conclusion, the Appellate Body reversed the Panel findings and required Brazil to put the measures into conformity.[908] In essence, the recourse to external sources to justify a measure under the general exception provisions appears limited. In the Appellate Body's conclusions, the validity of a measure is not conditional upon non-WTO law or an international ruling, but rather on the adequacy of the measure *vis-à-vis* the WTO regime. Hence, the Appellate Body adopted a narrow approach towards external legal sources as applicable law in a dispute.

Some scholars have speculated that if Brazil had recalled principles of Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989), which was indirectly used by the WTO adjudicative bodies in

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[906] MERCOSUR exemption was not motivated by "capricious or unpredictable reasons", *Brazil — Measures Affecting Imports of Retreaded Tyres- Report of the Panel*, paras 7.273-7.274. See also the conclusion of the MERCOSUR ad hoc Arbitral Tribunal Award, Import Prohibition of Remoulded Tyres from Uruguay (Uruguay v. Brazil) [Jan. 9, 2002].

[907] The Panel did not found any incompatibility under MERCOSUR exemption, on the contrary the Panel's findings in a way legitimated Brazil's enforcement of the ban. Geert van Calster, 'The World Trade Organisation Panel Report on Brazil Tyres - Advanced Waste Management Theory Entering the Organisation?' (2007) 16 European environmental law review European Environmental Law Review 304.

[908] *Brazil — Measures Affecting Imports of Retreaded Tyres - Report of the Appellate Body*, para 227-228; Qin (n 905) 607–611.

their analysis, the measures would have more likely been proven WTO consistent thanks to the reliance on relevant international legal instruments accorded by article 31(3)(c) VCLT.[909] While the outcome in this hypothetical situation is difficult to forecast, undoubtedly the legal basis on which a party builds its defence has obviously tremendous influence on the final findings since, as described by Gardiner *"[..] Treaty interpretation is more of an art than an exact science"*.[910] Differently, some other scholars considered the Panel's deference to the MERCOSUR Arbitral tribunal very appropriate and a careful choice to avoid a contrast in jurisdiction.[911]

Nevertheless, the present case did not directly touch upon overlaps in jurisdiction nor did it concern effective substantive incompatibilities: the Appellate Body, indeed, described article 50(d) of the Montevideo Treaty as "*..serv[ing] a function similar to that of Article XX(b) of the GATT 1994*",[912] so the tension seems to derive mostly from

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[909] This stance is based on the presumption that by bringing another interpretation of the notion "waste" derived from Basel Convention on waste, the Panel would have been obliged to look at this relevant international instrument to define the meaning of the subject matter and the outcome may have been different. While Jurisprudence has shown that reliance on non-WTO law occurs for interpretative purposes, no more that speculations can be formulated concerning a potential justification of the restrictive measures under the Basel Convention. Jeff Waincymer, *WTO Litigation: Procedural Aspects of Formal Dispute Settlement* (Cameron May 2002) 537.

[910] Some scholars speculated that Brazil could alternatively have invoked article 50(d) of the Montevideo Treaty, which established the context of Mercosur, whose language is practically identical to article XX of the GATT, and justify the measure under the environmental and human protection on the Mercosur context. However, the results may not have been different, observing the ruling of the Mercosur tribunal since the Panel was more indulgent, finding only a partial incompatibility between the measure and the WTO regime. Richard K Gardiner, *Treaty Interpretation* (Oxford University Press 2008) 5–7.

[911] For a critical analysis of the two approaches taken by the Panel and the Appellate Body consult Pauwelyn, 'How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law?' (n 782). In favour of an interpretation that reconciles the divergence between PTAs and WTO refers to Julia Ya Qin that underlines the need for security and predictability of the WTO system through an interpretation that takes into account the systemic framework and aims at avoiding conflicts, Qin (n 905). For the general compatibility and search of harmonious interpretation see, *inter alia*, Sacerdoti (n 810); Damme, 'WTO Treaty Interpretation Against the Background of Other International Law' (n 853).

[912] *Brazil — Measures Affecting Imports of Retreaded Tyres- Report of the Appellate Body,* para 234. Appellate Body went further and affirmed that a second-guess Brazil's decision not to invoke Article 50(d) would not be appropriate. In any case, it has a function similar to the one of Article XX(b) of the GATT 1994. The Panel chose not to discuss Article 50(d) of the Treaty of Montevideo, so did the Appellate Body.

treaty interpretation.[913]

Yet, it would not be appropriate to talk about divergent treaty obligations, since the goals underneath and the means to pursue them, both in the WTO agreement and the MERCOSUR legal framework were in line. It would rather an exemplifying case about tension between trade liberalization and non-trade values, such environmental protection and human health, whose increasingly consideration has been proved by the proliferation of international standards.[914] However an equal relevance between the former and the latter has not been recognised by the Appellate Body, as criticised by some scholars.[915] Rebuttal opinions to the findings argue that article XX of the GATT accords room of manoeuvre to States to safeguard societal values parallel to liberalisation goals, though they have not been acknowledged in this case where a sort of WTO supremacy over PTAs appeared to be affirmed, instead.[916]

3.5.6 Limited Reliance upon PTAs in the Peru-Agricultural Products Case

The recent Peru-Agricultural Products case addresses both the question of compatibility between PTAs and the WTO obligations and the use of non-WTO law in dispute settlement.[917]

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[913] Nikolaos Lavranos, 'The Brazilian Tyres Case : Trade Supersedes Health' (2009) 1 Trade, law and development 231, 246.

[914] Jochem Wiers, *Trade and Environment in the EC and the WTO : A Legal Analysis* (Europa Law Publishing 2003) 178.

[915] For a study focused on the effective health risk see Fabio Morosini, 'The MERCOSUR and WTO Retreaded Tires Dispute: Rehabilitating Regulatory Competition in International Trade and Environmental Regulation' [2008] *Society of International Economic Law (SIEL) Inaugural Conference 2008*.

[916] Many authors outlined both external supremacy, namely WTO over PTAs and an internal primacy of the Appellate body over panels. Among others, Lavranos (n 913) 252–253.Chad P Bown and Joel P Trachtman, 'Brazil : Measures Affecting Imports of Retreaded Tyres : A Balancing Act' (2009) 8 World trade review 85, 85–135; N'Gunu N Tiny, 'Regionalism and the WTO : Mutual Accommodation at the Global Trading System' (2005) 11 International trade law & regulation International Trade Law and Regulation 126, 126–128; For a viewpoint in favour of the WTO primacy see Davey (n 706); Marceau, 'The Primacy of the WTO Dispute Settlement System' (n 792).

[917] *Peru — Additional Duty on Imports of Certain Agricultural Products-Report of the Panel* [2014] WTO/DS457/R, *Report of the Appellate Body* WTO/DS457/AB/R.

On the factual background, the dispute arose out of complaints brought by Guatemala against the Peruvian Price Range System (PRS), a mechanism conceived to minimize fluctuations in the international price for certain agricultural products, which technically imposed additional duties on specific imported agricultural products.[918] The complainant challenged the compatibility of the PRS with the WTO regime, specifically under article 4(2) of the Agreement on Agriculture and article II(1)(b) of the GATT,[919] whereas the respondent based part of its defence on the relevant bilateral Free Trade Agreement (FTA), which stated that "*Peru may maintain its PRS*", in Annex 2.3 paragraph 9.[920] However, both parties signed the FTA in December 2011, then the agreement was ratified exclusively by Guatemala in February 2014 (after the request for consultation received on 12th April 2013), whilst Peruvian ratification had been halted. Hence, at the time of the dispute the treaty was not in force.[921] In a nutshell, the claims addressed by the adjudicative bodies were threefold. A first preliminary question concerned the alleged lack of good faith in Guatemala's recourse to the WTO dispute settlement mechanism and two substantive issues on the nature of the measure and the compatibility with the WTO system.

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[918] It operated on the basis of a reference price, which reflected the average international price over the preceding two weeks, along with a range composed by a floor price and a ceiling price. In practical terms, the PRS imposes additional duties to the tariff when the reference price is below the floor-price level, it applies tariff reductions in case the reference price exceeds the ceiling price and leaves tariffs unaltered if the reference price is below the ceiling price and above the floor price. *Peru — Additional Duty on Imports of Certain Agricultural Products- Report of the Panel,* para 2.2.

[919] The Panel exercised judicial economy in relation to Guatemala's claims with regard to Article X(1) and X(3)(a) and did not rule on alternative claims under the Customs Valuation Agreement since the claims were conditional upon finding the PRS to be an ordinary customs duty. ibid paras 7.407 and 7.501.

[920] Tratado de Libre Comercio Guatemala-Perù (Guatemala-Peru Free Trade Agreement), signed 6 December 2011, paragraph 9 of Annex 2.3.

[921] Many scholars underline that the complaint, Guatemala, was the only party that ratified the FTA and the process took place after the dispute arose. The timeline has been considered as a further proof of Guatemala's consent to FTA commitments. Akhil Raina, 'The Day the Music Died: The Curious Case of Peru- Agricultural Products' (2016) 11 Global Trade and Customs Journal, 71; Joost Pauwelyn, 'Waiving WTO Rights in an FTA? Panel Report on Peru- Agricultural Products' available at the world trade law website http://worldtradelaw.typepad.com/ielpblog/2014/12.

With regard to good faith and the relinquishment of the right to have recourse to the DSU, Peru asserted that Guatemala had acted inconsistently with good faith principle as it had initiated legal proceedings despite having both accepted the Peruvian's PRS and waived its right to engage in dispute settlement procedure in the FTA. On the merits, the Appellate Body observed that although article 3(7) of the DSU confers a considerable discretion to a member in exercising its right to initiate WTO dispute settlement, this discretion is not unbounded.[922] As already stated in the EC-Banana case,[923] the Appellate Body reaffirmed that a relinquishment or a waiver of members' right to recur to the DSU to be effectively stipulated must be clearly stated in a mutually agreed solution that is consistent with the covered agreements.[924] In this sense, the Appellate Body concluded that the bilateral FTA at issue did not constitute a clear stipulation of the relinquishment of Guatemala's right to initiate WTO proceedings.[925] Furthermore, in the present case the FTA was not even in force between the parties, so Peru's arguments accusing Guatemala of the violation of the FTA, had not adduced sufficient evidence to show a breach of article 18 of the VCLT and of good faith obligation.[926] As a general assumption, a member that resorts to the DSB enjoys the

[922] Article 3(7) of the DSU reads "*Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute [..]*".

[923] *European Communities — Regime for the Importation, Sale and Distribution of Bananas - Report of the Appellate Body,* paras. 217, 228.

[924] The articulation of members' relinquishment of their WTO rights in FTAs should meet three requirements: should be clearly stipulated, should refer explicitly to the DSU, and the waiver should be limited to "specific disputes". B Natens and S Descheemaeker, 'Say It Loud, Say It Clear: Article 3.10 DSUs Clear Statement Test as a Legal Impediment to Validly Established Jurisdiction' (2015) 49 Journal of World Trade 873, 873–890.

[925] The Appellate Body remarked that the FTA presented various ambiguities concerning the maintenance of the PRS, which prevent the agreement from being a mutually accepted solution. The unclear aspects concerned the wording in Annex 2.3 para. 9, which states *"Peru may maintain*" instead of *"Peru shall maintain*", the presence of a fork-in-the-road clause in article 15(3), and the existence of a provision affirming the FTA primacy over WTO obligations in article 1(3)(2). *Peru — Additional Duty on Imports of Certain Agricultural Products - Report of the Appellate Body*, paras. 5.26-5.28.

[926] The Panel clarified that article 18 of the VCLT is a norm of public international law that prevents States from acting against the object and the purpose of treaties subject to acceptance, and its violation does not constitute *per se* evidence of lack of good faith. In the present case, the principle is invoked since the Guatemala's contradictory actions, which first ratified a treaty allowing Peru's PRS in the FTA

presumption of good faith, which excludes that the Panel "*can question a Member's exercise of judgement as to whether initiation of a dispute settlement procedure would be fruitful"*.[927] For these reasons, it was held that the claimant did not act contrary to its good faith obligations.[928] However, some scholars have highlighted that even if good faith and the relinquishment of the right to initiate dispute proceedings are different, the question of whether the latter is part of the applicable law in the dispute increases exponentially the attention on the interpretation and the application of the former.[929]

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and then challenged the same mechanism before a WTO panel, appeared in violation of the object and purpose of the FTA itself, from Peru's perspective. *Peru — Additional Duty on Imports of Certain Agricultural Products - Report of the Panel*, paras 7.91-7.92. On this point, some authors have underlined that the estoppel principle could have been applied to the dispute. Estoppel is defined in the Black's Law dictionary as "*the bar or impediment raised by the law, which precludes a man from alleging or from denying a certain fact or state of facts, in consequence of his previous allegation or denial or conduct or admission, or in consequence of a final adjudication of the matter in a court of law"*. In practical terms, Guatemala would not have the right to challenge the measure before the WTO DSB since it had previously accepted the PRS in the FTA. However, Natens warns about the difficulties to invoke this principle before a WTO panel as the defendant would have to first convince the panel about the applicability of estoppel and to show that the conditions for estoppel had occurred. Thus, it would result in more rather than less work for a defendant, also since article 3(10) assumes procedural good faith behind members' action. Akhil Raina, 'The Day the Music Died: The Curious Case of Peru-Agricultural Products', (2016) 11(2) *Global Trade and Customs Journal* 71–85. Natens B. and Descheemaeker S. (n 924). For a general explanation of the legal principle see Cottier, Thomas and Müller, Jörg P., 'Estoppel' in Wolfrum, R. (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, Vol 3, 2013).

[927] *Peru — Additional Duty on Imports of Certain Agricultural Products* (n 271) para. 7.74. However, Akhil found the reasoning vicious and wondered how a violation of good faith can be ascertained without conceiving a certain level of discretion in the assessment of fruitfulness by the panel. Akhil Raina (n 926) 74.

[928] Pauwelyn criticises that the approach adopted by both the Panel and the Appellate Body since in his view the core question has Guatemala waived its right to recur to the WTO dispute settlement mechanism? Was replaced by the more general one has Guatemala acted in good faith? Pauwelyn (n 921).

[929] Marion Panizzon, *Good Faith in the Jurisprudence of the WTO the Protection of Legitimate Expectations, Good Faith Interpretation, and Fair Dispute Resolution* (Hart 2006). On the importance of good faith see also Andrew D Mitchell, M Sornarajah and Tania Voon (eds), *Good Faith and International Economic Law* (Oxford Publishing 2015).

For what concerns the nature of the measure was found to be a variable import levy contrary to article 4(2) of the Agreement of Agriculture that requires a conversion of those measures into ordinary customs duties.[930]

Finally, the question of the role of non-WTO law in dispute settlement was addressed by the Appellate Body since Peru challenged the Panel's interpretation of article 4(2) of the Agreement on Agriculture which, in its view, did not take into consideration article 31 of the VCLT and articles 20 and 45 of the International Law Commission's Articles on State Responsibility (ILC). In details, Peru asserted that, in accordance with article 31(3) of the VCLT, the Panel should have interpreted the term "shall not maintain" in article 4(2) of the Agreement of Agriculture as meaning "may maintain" in light of the Peru-Guatemala FTA. Indeed, according to Peru, the FTA constituted a subsequent agreement, which modified WTO obligations exclusively in the relations between the treaty parties, pursuant to article 41 of the VCLT, and consequently allowed Peru to maintain the PRS. Furthermore, Peru argued that Guatemala's ratification represented a formal expression of consent, which precluded the Peruvian system from being considered wrongful, consistently with articles 20 and 45 of the ILC.[931] The Appellate Body observed that article 31 of the VCLT *"(...) aims at establishing the ordinary meaning of the treaty terms reflecting the common intention of the parties to the treaty and not just the intentions of some of the parties"* and it rejected Peru's position according to which *"(...) WTO provisions can be interpreted*

[930] Guatemala claimed that the PRS was a minimum import price within the meaning of footnote 1 of Article 4(2) of the Agreement of Agriculture, in violation with WTO obligations, rather than an ordinary customs duty, as argued by Peru. In the Panel assessment the PRS was found to be a 'variable import levy', meaning a border duty characterized by *"an inherent variability"* and specific features such as the lack of transparency and predictability. Such features differentiated this kind of measures from ordinary customs duties, whose nature was confirmed also by Appellate Body. Turning to the consistency with WTO obligations, variable import levies, were explicitly required to be converted into ordinary customs duties under Article 4(2) of the Agreement on Agriculture, thus the PRS was in violation of WTO obligations and, by the same token, was applied inconsistently with Article II(1)(b) of the GATT. *Peru — Additional Duty on Imports of Certain Agricultural Products -Report of the Appellate Body,* paras 7.291-7.292.

[931] *Peru — Additional Duty on Imports of Certain Agricultural Products- Report of the Appellate Body,* para 5.21.

differently, depending on the Members to which they apply and on their rights and obligations under an FTA to which they are parties".[932]

Moreover, the Appellate Body pointed out that the key issue in the dispute was the nature of the measure, meaning determining whether the PRS was a variable import levy, a minimum import price or an ordinary customs duty. Therefore, it considered neither the FTA nor articles 20 and 45 ILC as "relevant" rules of international law within the meaning of article 31(3)(c) of the VCLT, since these provisions did not concern the same subject matter as article 4(2) of the Agreement of Agriculture or article II(1)(b) of the GATT. Finally, the Appellate Body held that the FTA did not constitute a subsequent agreement regarding the interpretation of article 4(2) of the Agreement of Agriculture and that, in any case, the FTA had not produced legally binding effects upon the parties as it had not yet entered into force. In this regard, it further clarified that even assuming, *arguendo*, that the FTA had established modifications to the multilateral treaties, those modifications would not be subject to article 41 of the VCLT but rather to article XXIV of the GATT.[933]

This recent case offers important guidance on whether members can waive their WTO rights to recur to a WTO panel through treaties concluded outside the covered agreements and whether an FTA, as a treaty, can modify the interpretation or the application of the WTO agreements. As to the first question, the Appellate Body reaffirmed that the right to initiate legal proceedings is a fundamental principle from which the Panel cannot derogate.[934] The Appellate Body admitted the possibility for members to waive their right to have recourse to the DSB on condition that the relinquishment is clearly stated "*by means of a solution mutually acceptable to the parties that is consistent with the covered agreements*".[935] Yet, in the present dispute the

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[932] *ibid para. 5.106.*

[933] ibid para 5.111. According to the Appellate Body, the FTA should be read in light of the article XXIV that covers the creation of free-trade area or customs unions.

[934] *Mexico — Tax Measures on Soft Drinks and Other Beverages - Report of the Appellate Body*, paras. 5.26-5.28. On the primacy of the WTO settlement system see Marceau and Kwak Kyung (n 792) 465–523.

[935] *Peru — Additional Duty on Imports of Certain Agricultural Products - Report of the Appellate Body*, para. 5.25 and footnote 106.

FTA was ambiguous and Guatemala's consent was contingent upon Peru's ratification rather than being absolute.[936]

Concerning the question of whether a FTA can modify WTO obligations, the Appellate Body answered negatively. First, it clarified that, in an interpretative exercise, article 31 of the VCLT *"[...] could not be used to develop interpretation based on asserted agreements or asserted relevant rules of international law applicable in the relations between the parties to subvert the common intention of the treaty parties",* so the Appellate Body implicitly alluded to the need of a larger consent to modify WTO commitments.[937] Second, the Appellate Body expressly excluded *inter se* modifications of the WTO multilateral agreements from being subject to article 41 of VCLT since *"[...] specific provisions addressing amendments, waivers or exceptions for regional trade agreements, prevail over general provisions of VCLT".*[938] In other words, the Appellate Body appeared to "lock down" WTO agreements, precluding subsequent agreements from influencing the interpretation or the application of the former, in line with the stream of literature which supports a narrow interpretation. Indeed, as it clearly stated *"[...]the proper route for assessing whether a provision of the FTA may depart from certain WTO rules were the legal provisions specifically addressing regional trade agreements, namely article XXIV of the GATT".*[939]

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[936] According to Pauwelyn, Guatemala's intention to admit Peruvian PRS was openly expressed in the FTA substantial provisions and also proved by Guatemala's ratification. Moreover, the author encourages for the application of the theoretical distinction between procedural and substantial good faith. However irrelevant to address Peru's claims under Article 3(10) of the DSU, Guatemala's acceptance of substantive FTA provisions could have been weighed differently in the assessment of the wrongfulness of Peru's actions, based on Articles 20 and 45 of the ILC. For a critical analysis consult Joost Pauwelyn, 'Interplay between the WTO Treaty and Other International Legal Instruments and Tribunals: Evolution after 20 Years of WTO Jurisprudence' [2016] SSRN Journal SSRN Electronic Journal 1, 1–33.

[937] *Peru — Additional Duty on Imports of Certain Agricultural Products- Report of the Appellate Body* para. 5.94.

[938] ibid para 5.112.

[939] ibid para. 5.113.The validity of FTA obligations is conditional upon two requirements: first, the measure has to be introduced upon to the formation of free trade area and second, the measure has to be unavoidable to the realization of the free trade area itself. *Turkey — Restrictions on Imports of Textile and Clothing Products - Report of the Appellate Body*, paras 58-61.

Concerning the consent needed to modify commitments among parties, some authors, Lanyi in particular, have favoured a more open approach. Lanyi underlines a functional interpretation of WTO terms by the use of external legal sources. This stance does not appear too far from Appellate Body's position in the Peru-Agricultural Products case, whose excerpt recites "*while an interpretation of the treaty may in practice apply to the parties to a dispute among others, it must serve to establish the common intention of the parties to the treaty being interpreted"*.[940] According to her, the interpretative exercise per se does not automatically affects other members, so an extremely narrow approach that prevents the use of non-WTO law unless unanimously accepted by all WTO-members has to be rejected.[941] This criticised approach is based on the assumption that any recourse to alien WTO law would affect WTO members in a way that add or diminish their rights or obligations.[942] As a consequence, if exclusively unanimously recognised international sources of law apply in dispute settlement, an intricate paradox would emerge according to which the more the WTO membership expands the less likely the use of external sources will be.[943] Thus, from Lanyi's interpretation of the case, the Appellate Body did not rely on the Peru-Guatemala FTA because the consent of the parties was not clear and the treaty was not in force when the dispute arose, rather than for reasons related to its non-WTO nature.[944] Put differently,

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[940] *Peru — Additional Duty on Imports of Certain Agricultural Products - Report of the Appellate Body*, paras 5.108-5.109.

[941] This viewpoint distinguishes between an interpretation of the WTO agreement that avoids to diminish members' rights and obligations from the idea that non-WTO even for interpretative purpose does not produce effects for WTO members themselves. Lanyi and Steinbach (n 847) 7.

[942] Article 30(4)(a) of the VCLT envisages situations in which the parties of a second treaty partially coincide with the parties of a first treaty and the article does not prevent the application of the second treaty among the contracting parties based on the fact that the membership of the first one is wider. Likewise, preventing the application of a subsequent FTA that regulates relations among some of the WTO members based on the fact that the consent is not unanimous seems inconsistent with article 30(4)(a) of the contracting parties.

[943] The core assumption is that any interpretation affects all members of the WTO. Robert Howse, 'The Use and Abuse of Other Relevant Rules of International Law in Treaty Interpretation: Insights from WTO Trade/Environment Litigation' (2007) 2007/1 International Law and Justice Working Papers.

[944] As previous examples of "indirect integration of PTAs" through adjudication, basically PTAs used as factual evidence, see the US-antidumping and countervailing duties case, where it was clarified that the sources of international law referred to in article 31(3)(c)VCLT corresponds to article 38(1) of the

the Peru-Guatemala FTA did not clarify the ambiguity on the acceptance of the PRS, so it was not applied. The authors suggests that if it had constituted a clear expression of States' consent, both the FTA and ILC would have been taken into account. [945]

In conclusion, Lanyi affirms that nothing can exclude the use of non-WTO legal instruments simply on the fact that they do not bind all members. Yet, she distances from Pauwelyn's approach that conceives the non-WTO law as self-standing defence.[946] That being said, while Lanyi's analysis is mostly centred on the question as to whether exclusively unanimously agreed non-WTO source can be used in WTO dispute settlement mechanism, she seems to overlook the Appellate Body's stance on the PTAs-WTO interplay. Specifically, the Appellate Body clarified that the interaction between PTAs and the WTO regime has to be disciplined under articles XXIV of the GATT or V of the GATS, rather than under VCLT, and the reliance upon PTAs is exclusively limited to the interpretation of those provisions that result unclear or ambiguous.[947] Yet, this stance appears to diverge from the legal underpinnings of public international law, which is grounded on States' consent. In practical terms, linking the adequacy of a PTA to article XXIV of the GATT or V of the GATS and excluding article 41 of the VCLT as legal basis for this interaction, the Appellate Body conceived WTO norms as non-modifiable, even if an agreement among some WTO members has been achieved.

Statute of the ICJ, including customary law and general principles of law. *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* [2011].

[945] Lanyi and Steinbach (n 847) 9–10.

[946] According to Lanyi, Pauwlyn's approach has no confirmation in the WTO relevant case law. Indeed, ILC has to been referred to verify mostly procedural compliance rather than ascertain substantive violations. Moreover, it cannot be considered customary duty and does not waive States from their obligations. ibid, 15–16.

[947] *Peru — Additional Duty on Imports of Certain Agricultural Products- Report of the Appellate Body,* paras. 5.112-5.113. For a scholarship in line with the Appellate Body's findings see Davey's stance: "*Even if the AB's stance seems inconsistent with previous rulings, such as banana case, where the Lomè convention was effectively taken into consideration on the analysis, here the call for PTA reliance was not grounded on provision interpretation or clarification but with the attempts to justify a measure that is prohibited under the WTO regime.* Davey (n 706); Marceau, 'The Primacy of the WTO Dispute Settlement System' (n 792).

3.6 CONCLUSION

Given the significant proliferation of PTAs and the far-reaching coverage attributed to these new generation treaties, the present chapter has analysed whether and how international financial standards interact with PTAs. Specifically, in order to verify whether and to what extent international standards are included into PTAs, an intensive qualitative analysis has been conducted on fifteen selected EU PTAs, chosen from the most recent ones, with a finalised text and with a financial services discipline. The analysis has consisted of mapping provisions with a reference to international financial standards and the prudential carve-out all along the relevant chapters, namely (i) financial services – both within the services discipline or as a stand-alone chapter –, (ii) investment, (i) domestic regulation and (iv) transparency. At the same time, the examination has taken into consideration GATS-modelled vs NAFTA-moulded PTAs and the wording of the provisions containing standard reference in order to finally ascertain the legal enforceability of the relevant provisions. The results have shown a positive trend to include international standard-related provisions, however, with a mere declaratory value. Indeed, 11 out of 15 PTAs have introduced a standard reliance provision formulated as a "best-endeavour clause" (non-legally binding), mostly under the domestic regulation discipline rather than under the financial services chapter or within the context of a prudential carve-out (the latter exclusively in the EU-Singapore PTA and the EU-Vietnam PTA). Moreover, from the analysis has emerged that the relevant PTA provisions do not introduce new substantive obligations in the financial sector. Given the formulation and the placement of these provisions within the PTAs, it is hard to believe that international financial standards can be taken into account in States' policy-making. Though, they could be used in the assessment of domestic regulation measures but rather as a benchmark, meaning as a means to assess the level of protection adopted by a State compared to the international standards level, rather than as a justification for measures alleged inconsistent within the domestic regulation discipline. Likewise, they can even less likely be considered justifications for the adoption of prudential measures, given that the relevant PTA provisions are inserted under the domestic regulation or the transparency discipline. In any event, it has not

been possible to conceive international financial standards as SPS and TBT international standards, for which the presumption of conformity to the WTO system is envisaged, since the commitments detected in the PTAs are far less strong than the wording in SPS and TBT agreements. Indeed, while the SPS and the TBT relevant provisions within the WTO regime prescribe that a national measure is "based on" or "conform to" relevant international standards, similar PTA provisions simply encourage States to make their best endeavour to the extent possible to have international financial standards applied. Undoubtedly, the different wording reflects a different level of commitment and, consequently, different influence on States' policy design.

For what concerns the variables found crucial in the previous studies on PTAs, geographically proximity and the level of economic development of the EU's trade partners have not resulted being decisive factors in the inclusion of international financial standards. Overall, the study has captured the recent EU trend in policy making that shows a certain degree of openness towards international financial standards. Moreover, the inclusion of such a reference in TiSA, which involves 23 WTO members and accounts for almost 70% of the world trade in services, has made this result even more relevant in the perspective of a collective intent to better define prudential measures, yet the declaratory value of this TiSA provision does not widen trade commitments.

The second part of the chapter has focused on the interplay between PTAs and the WTO in the regulation of trade in financial services. As a preliminary step, the study has clarified the legal basis for PTAs within the WTO regime, i.e. articles XXIV of the GATT and V of the GATS. Moreover, the Turkey-Textile case has shed light on the criteria upon which a legitimate PTA can be established in derogation of the non-discrimination principle: (i) the measures have to be introduced upon the formation of the free trade area or the customs union, (ii) they have to meet the substantive conditions expressed in paragraphs 5(a) and 8(a) of article XXIV of the GATT – namely regulation and duties shall not be higher within the constituent territory, duties and regulation shall be eliminate to substantially all trade, and the external incidence shall not be higher –

finally, (iii) the measures have to be strictly necessary to the formation of the free trade area or the customs union itself.[948]

Subsequently, the analysis has differentiated between overlapping jurisdiction and applicable law, with a particular attention to conflicts concerning the WTO regime. The former concept refers to a situation in which two or more adjudicative bodies can settle a dispute arising between parties. On this point, the Mexico-Soft drink case has established the WTO members' unavoidable right to recur to the panel since the panel could not refrain from adjudicating a dispute only because an alternative dispute settlement mechanism is available. In essence, the WTO jurisprudence has dismissed the theory supported by Pauwelyn and Bartels, among other scholars, which presumes a deference of the panel when dispute proceedings have already been initiated before another adjudicative body or when a dispute has already been set up by another tribunal.

With regard to the applicable law, the issue arises when a conflict of norms occurs, meaning that two norms cannot be complied with simultaneously. In this situation, the adjudicative body before which the dispute is brought has to define the applicable law to the analysis of the facts, the validity of the claims and the assessment of the valid exceptions. Scholars have interrogated on whether and to what extent a recourse to non-WTO legal sources is possible in dispute settlement. Although the use of non-WTO law for interpretative reasons has not been contested, this recourse by the adjudicative bodies has not frequently occurred. The relevant WTO jurisprudence has clarified that the use of external sources is limited to situations where WTO terms are vague or ambiguous and, in any event, it should occur exclusively when it is essential to the interpretation and application of the WTO provisions at issue. Conversely, the question as to accepting non-WTO law as a positive self-defence for measures otherwise inconsistent with the WTO regime has been long debated. In the literature, an open approach has been identified, which is based on the application of *lex specialis* and *lex posteriori* principles *vis-à-vis* the WTO regime and allows sector-specific treaty provisions to serve as a

[948] Although the dispute examined the compatibility of PTAs under article XXIV of the GATT, similar conclusions can be drawn for the mirror provision in article V of the GATS.

justification for inconsistent measures.[949] While the conception of the WTO as a system operating together with other sources of international law is generally recognised, the permeability of the former to the latter is not. According to a narrow approach the application of non-WTO law in dispute settlement cannot be unconditional. If a recourse to PTAs in case of conflicting substantive obligations with the WTO can sound reasonable to verify prospective subsequent modifications of the WTO obligations – however extreme scholars such as Trachtman would not agree –, the idea of using PTAs as a justification for WTO-inconsistent measures adopted either in response to a breach of a PTA itself or in the implementation of a ruling implies an excessively analytical exercise by a WTO panel. This narrow stance criticises the open approach towards non-WTO law that would attribute wider competences to the Panel beyond its established jurisdiction, technically limited to the covered agreements. On this very last point supporters of the narrow approach have built their key argument. In addition, they have warned about the potential direct-effect that external legal sources would end up having if they were allowed to serve as a justification. By altering multilateral commitments, the recourse to non-WTO law would eventually diminish or add rights to all or some WTO members. Although disputable, the case law analysed seems more in line with the narrow approach. Particularly, in the Brazil-Tyres case the WTO Appellate Body has affirmed that the adequacy of a measure has to be assessed within the WTO discipline and should not be based on external legal sources or international tribunals' rulings. Likewise, the Peru-Agricultural Products case has shown a limited reliance upon external sources by "locking down" the WTO system from PTAs, whose compatibility remains to be ascertained under article XXIV of the GATT or article V of the GATS, rather than under article 41 of the VCLT. In other words, the legitimacy of subsequent modifications of multilateral commitments contained in PTAs have to be assessed under articles XXIV of the GATT or V of the GATS - the legal basis for PTAs - rather than under article 41 of the VCLT titled "agreements to modify multilateral treaties between

[949] Pauwelyn, 'How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law?' (n 782); Bartels (n 792).

certain of the parties only", which considers incompatibilities between different sources of public international law from a systemic perspective, instead.

To conclude, the soft nature of international financial standards does not result hardened by the interaction with PTAs. While a moderate *ouverture* towards regulatory standards has been remarked through the inclusion of a reference to these standards in the most recent EU PTAs, the value of these provisions is mainly declaratory. Even more important, the lack of legal enforceability of the PTA provisions, which represented one of the crucial elements in our definition of "hard" nature along with the formal "bindingness" of a legal instrument, does not allow us to ascertain an effective hardening of these regulatory standards. In addition, the recourse to international financial standards to justify domestic regulation measures or prudential policies results optional and, anyhow, limited to the use of these standards as a benchmark rather than as compulsory regulatory requirements. Besides, from the interplay between PTAs and WTO (especially in the hypothesis of a substantive translation of international financial standards into treaties) the WTO system has shown a limited permeability to external sources. Indeed, the WTO jurisprudence has proved little reliance upon non-WTO law for interpretative reasons and, in any case, limited to situations in which the provisions at issues were ambiguous and vague. By the same token, the WTO adjudicative bodies have shown reluctance to accept external legal sources as a positive justification for WTO-inconsistent measures, as established in both the Brazil-Tyres case and the Peru-Agricultural products case. In a nutshell, while the soft nature of international financial standards remains unchanged, these instruments seem to be gaining more consideration at the international level, at least for political and declaratory purposes.

CONCLUSION

In the aftermath of the latest global economic crises, the role of financial standards within the existing international legal framework has gained centrality in the academic debate as well as among national regulators. Public awareness of tight cross-border interconnections and of a real risk-contagion have awakened the dilemma of preserving systemic financial stability versus maintaining sovereign powers in the regulation of the financial services sector. Furthermore, international standard-setting bodies have started producing an ever-growing number of international regulatory instruments, having an impact at the national level and which, at the same time, increase the urgency of a coherent supranational legal framework.[950] In this regard, annual meetings that gather representatives of international standard-setters, such as BCSB, IOSCO, IAIS have been organized in the WTO context, with the purpose to *"take stock of the most recent international regulatory reforms and initiative in the financial sector and to discuss the potential implications for trade in financial services".*[951]

Starting from the renewed interest in international standards, the present thesis has entirely been dedicated to the analysis of the legal nature of international financial standards under a twofold perspective: firstly, as self-standing regulatory instruments within the international legal framework and, secondly, as regulatory tools interacting with both the WTO regime and PTAs.

In the attempt to categorise international financial standards as soft law or as hard law, the research has preliminarily gauged the relevant international standard-setters in the sector of financial services, in order to understand how the regulatory-making process works and what type of legal instruments it produces. As described, the G20 is an international forum, promoting international cooperation and sustainable growth,

[950] Alexander Kern, 'The World Trade organisation and financial stability: the need to resolve the tension between liberalisation and prudential regulation' (2002)5 ESRC Centre for Business Research Cambridge University 5, 45.

[951] WTO Committee on Trade in Financial Services, Report of the meeting held on 6 May 2014, (S/FIM/M/80) 1-2.

gathering to this purpose finance ministers, heads of States and bank governors. It provides guidelines for international financial stability by defining the economic and financial top-priorities that are subsequently published in the Leaders' Communique. The FSB acts both as the policy arm of the G20, and as a proper standard-setter. It brings together 36 different jurisdictions, international financial institutions and the ECB. However, the Steering Committee, i.e. its decisional body, essentially consists of central bankers, national banking authorities and financial regulators. Similarly, the BCBS is composed of the bank governors and the authorities of 27 countries, and it is responsible for macro-prudential policy and banking supervision. IOSCO, a private organization for the securities market, encompasses 120 market regulators and 80 market participants. IAIS is a voluntary membership-organisation of insurance supervisors, insurance regulators and of approximately 135 observers, which aims at providing a coherent supervision of the insurance industry. All financial standard-setters share some important features: a limited State-participation in the standard-drafting; the exercise of decisional powers by the "executive body", i.e. usually the Council that is less representative than the Assembly; and the informality of the actors engaged in the process, namely bank governors, national authorities and technical experts.

Subsequently, this research has presented a review of the existing literature on the international standard-setters presented. The main features of the international regulatory system emerging from the four theories that have been taken into account for this purpose, namely *Global Administrative Law, Network Theory, Informal International Law Making and International Public Authority;* are its informality and the transnational dimension. Specifically, informality characterises manifold aspects of the system: firstly, the standard-setters that are loosely-structured international bodies, rather than actual international organisations. Secondly, the actors involved in the decisional process are not States' representatives or diplomats, but rather national regulators, technical experts and sector supervisors. Furthermore, the process is not regulated by strictly procedural requirements but it is the result of a cooperative network whose outcomes consist of regulatory standards, codes of best practices and voluntary regulatory instruments. Likewise, the transnational dimension of the international

financial standards refers to both the supranational level at which standard-setters operate, as well as to the global issues tackled.

While the four theories mentioned above have largely investigated the functioning of the international standard-setters along with the similarities and the mutual influence of domestic systems, the place of international financial standards among the sources of public international law has been mostly overlooked. In this regard, the present thesis has examined whether these regulatory standards can be categorised as acts of international organisations, as international agreements *stricto sensu* or as principles of customary law in order to verify their potential 'hard law' nature. None of the hypothesis formulated has matched the peculiarities of international financial standards, which appear, thus, to constitute instruments of 'soft law'. Indeed, international standard-setters are not international organisations as such, since they lack a foundation treaty, independent organs and legal personality. All the financial standard-setters observed in the context of the present work were founded merely upon statements or memoranda, and their mandates explicitly defined them as international fora for State-cooperation, or mechanism for collective dialogue. Moreover, these regulatory bodies do not possess independent organs or legal personality under the theories of conferred or implicit powers, so they cannot be considered as actors of international law contributing to the regulation of the financial sector, but rather as international platforms which produce non-legally binding instruments of declaratory value.

Neither can international financial standards be considered as international agreements, given the informal character of the actors involved in the standard-setting, i.e. mainly national experts and supervisors rather than State representatives or diplomats. The former can hardly be considered negotiators with full powers. Moreover, the standard-drafting process follows neither the solemn, nor the simplified treaty-making procedure: no financial standard has been ratified and the signature certainly does not express States' consent to be bound.

Besides, international financial standards cannot be associated to principles of customary law as a sound State practice, called *diuturnitas,* along with the belief of the obligatory nature of the conduct referred to as *opinion juris* have not been established.

Hence, the examination has led us to conclude that international financial standards pertain to soft law.

Nevertheless, as skilfully affirmed by Boyle, interactions with hard law can effectively take place, through incidental legal interpretation or translation into treaties, altering the soft nature of these regulatory instruments.[952] For this reason, the study has moved to the interaction between international financial standards and the legally binding systems, i.e. the WTO system and PTAs, in order to ascertain whether the soft nature of these international regulatory standards has hardened by these interplays.[953]

Starting with the interactions with the WTO regime, the research has focused on the WTO substantive commitments in trade in financial services spelt out in the GATS, in the Annex on Financial Services and in the Understanding on Commitments in Financial Services. The MFN principle, the national treatment commitment, the market access obligations, the domestic regulation discipline and the prudential carve-out have been thoroughly examined, with the purpose of clarifying States' level of commitment. In details, the WTO principle of non-discrimination guarantees to foreign services and foreign service providers the same treatment accorded at the national level to alike services and alike service providers (under the national treatment obligation) and, concurrently, it assures the most favourable treatment accorded to any WTO country (according to the most-favoured nation principle). By the same token, market access commitments prevent member States from introducing new entry barriers (i.e tariffs, quotas, quantitative restrictions, etc.) and the domestic regulation discipline complementary proscribes the introduction of more burdensome technical requirements, licensing systems and administrative procedures, which may impair trade in services. Concerning the prudential clause, this provision is conceived to preserve State' right to regulate national market when pursuing financial stability. In the WTO context, the interpretation and the application of the prudential carve-out, enshrined in paragraph 2

[952] Alan E Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law' (1999) 48(4) The International and Comparative Law Quarterly 901, 902.

[953] To be noticed that international financial standards can influence or even negatively alter, however indirectly, trade in financial services inconsistently with the WTO obligations, for example the introduction of capital requirements may restrict free movement of capital flows.

of the Annex on financial services, has been addressed only in the Argentina-Financial Services case. Specifically, the Appellate Body has confirmed a broad meaning of the term "prudential", which encompasses a wide array of measures not exclusively limited to domestic regulation (disciplined under article VI of the GATS). This implies that a measure without a prudential nature can still be covered by paragraph 2(a) of the Annex if adopted for prudential reasons. On the contrary, the case has not shed light on the compatibility between national policies based on international standards and the WTO system, so the adjudicative bodies have not clarified if international standards can be used as a benchmark in the adequacy test or as an interpretative tool in the definition of the WTO obligations. Thus, the Argentina-Financial Services case has left significant room for future interpretative disputes.

Being the WTO jurisprudence on the financial sector limited, the work has delved into standards reliance in the food sector in order to verify whether the presumption of conformity to the WTO system, recognised in the SPS and TBT agreements, can be extended to the financial sector by analogy. The relevant case law has showed a coherent interpretation of article 3 of the SPS Agreement and article 2 of the TBT Agreement by the WTO adjudicative bodies, which confirms both the presumption of conformity to the WTO regime when a national measure conforms to international standards and the recourse to the relevant international standards as a benchmark in the adequacy test.[954]

In essence, in the six cases analysed in the present work, the WTO adjudicative bodies have identified different degrees of standard reliance in paragraphs 1, 2, and 3 of article 3 of the SPS Agreement: paragraph 2 indicates a full adherence of a measure to international standards and entails a presumption of conformity to WTO regime.

[954] For the SPS discipline, the case law considered was *European Communities - Measures Concerning Meat and Meat Products (Hormones)* WTO/DS26/AB/R; *India - Measures Concerning the Importation of Certain Agricultural Products* WTO/DS430/AB/R; *United States - Measures Affecting the Importation of Animal Products of Argentina* WTO/DS447/R; *Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products*, WTO/DS475/R. Conversely, for the TBT discipline the case law studied were *European Communities – Trade Description of Sardines* WTO/DS231/AB/R and *United States – Certain Country of Origin Labelling (COOL) Requirements* WTO/DS384/R, WTO/DS386/R.

Paragraph 1 refers to a partial reliance to international standards so that conformity to the WTO regime cannot be automatically presumed, and, finally, paragraph 3 envisages a deviation from international standards, which has to be justified with solid scientific evidence. By the same token, a similar approach has been applied to the food-related disputes covered by the TBT agreement, where international standards have served as basis for national technical regulation, unless they were inappropriate or inadequate means for the fulfilment of the legitimate national objectives.[955]

As a result, in the food sector, international regulatory standards have been used as a benchmark to assess, first, the adequacy of the national measure and, secondly, the conformity with the WTO agreements. A similar standards reliance has not been remarked in the financial sector. While the presumption of conformity in the food sector lays down the WTO agreements and it has been repeatedly confirmed by a sound WTO jurisprudence, the same cannot be affirmed for the financial sector. In fact, important differences in the WTO discipline applied in the two sectors have been remarked in the present study. Firstly, the food sector relates mainly to goods whereas the financial sector disciplines services, which are intangible by definition. Secondly, health-related measures can easily go through scientific assessment, whereas financial measures cannot. Third, the degree of institutionalisation of the food regulatory bodies compared to the financial standard-setters is very different. While the Codex Alimentarius Commission acts in the context of the UN, the financial standard-setters are characterised by a high level of informality that encompasses the process, the actors involved and the outcomes. Last but not least, the SPS and TBT agreements contain an open reference to standards reliance, whilst the WTO discipline in financial services does not. As seen in the second chapter, article 3 of the SPS Agreement and article 2 of the TBT Agreement include an explicit recourse to international standards in the assessment of allegedly inconsistent national measures. Differently, the WTO discipline in financial services conceives no reference to international standards, either as ancillary interpretative means, or as a benchmark in the prudential adequacy test. Therefore, the

[955] Agreement on Technical Barriers to Trade, art 2.4.

soft nature of international financial standards has not been hardened by the interaction with the WTO regime.

Finally, the work has carefully gauged the interaction between international financial standards and PTAs in order to verify a potential hardening of the former by the inclusion into the latter. Our intuition has stemmed from the recent proliferation of these new generation agreements that accord preferential treatment to trade partners in derogation of the WTO non-discrimination principle, coherently with articles XXIV of the GATT and V of the GATS. Even more important, a flourishing literature has acknowledged to PTAs a far-reaching coverage compared to the WTO agreements, also in sectors not fully disciplined by the WTO regime, such as the financial services. Thus, through the translation of international financial standards into PTAs, States may accord wider and deeper commitments than the obligations undertaken in the WTO framework, potentially 'hardening' the soft nature of these international regulatory instruments.

With this purpose in mind, the intensive qualitative analysis has taken into consideration not only the inclusion of soft law tools into hard law instruments, but also the legal enforceability of the PTA provisions related to international financial standards. Coherently with the definitions of "hard law" and "soft law" provided at the very beginning of this work, the concept of "hardening" soft law applied to the study goes beyond the formal "bindingness" of the legal instrument in which a provision is inserted, and embraces the normative significance produced by the provision as well. Consequently, the analysis that has been conducted on the fifteen selected EU PTAs has verified, firstly, whether a reference to or a translation of international financial standards in the PTA texts is detectable, and, secondly, the legal enforceability of the provisions themselves. The latter has been conceived as the intent of the parties to create legally binding relationship, which excludes provisions with a hortatory wording and a mere declaratory value.

Although the results have shown a positive trend to include an open reference to international regulatory standards in 11 PTAs out of 15, none of the PTA provisions is found legally enforceable. Furthermore, the analysis of the wording, the level of commitment and the place of the relevant provisions within the PTAs have confirmed

that none of the hypothetical cases of recourse to international financial standards envisaged in the present study has been found valid. Specifically, the analysis considered (i) whether PTA standards-related provisions create new substantive obligations that constraint States' right to regulate, (ii) whether the PTA provisions allow the use of international financial standards as a benchmark in the assessment of a different level of protection chosen by a national regulator – similarly to the WTO discipline of the TBT and SPS agreements –, (iii) whether they are assessing tools in the prudential adequacy test and, finally, (iv) if financial standards can justify measures that introduce higher level of protection compared to the level established by PTAs or by the WTO regime. Indeed, the provisions mapped have shown a mere hortatory wording, have been generally placed within the domestic regulation or the transparency discipline, and they have proved no other value than the political one. While a moderate *overture* towards international standards in the EU PTA has been remarked in the qualitative analysis conducted, the idea to associate SPS and TBT disciplines to the financial sector has to be rebutted in light of the mere declaratory value of the relevant PTA provisions mapped.

The research has subsequently investigated the interplay between PTAs and the WTO system, which has become relevant in the light of the wider scope of PTAs. These treaties have often come to regulate trade in financial services, potentially overlapping the WTO discipline in the same sector. This scenario brings up important legal issues related to the jurisdictional and substantive overlaps between PTAs and the WTO system. Concerning jurisdictional overlaps, namely when jurisdiction can be exercised simultaneously by two or more courts or adjudicative bodies, the WTO Mexico-Soft Drinks case has affirmed the compulsory jurisdiction of the WTO panel any time a dispute is brought before the Dispute Settlement Body (DSB). In essence, the Appellate Body has rejected the stance that limits the jurisdiction of the Panel when an alternative dispute settlement mechanism has been conceived in a treaty or has previously been

triggered by a WTO State. Hence, initiating legal proceedings has been recognised as a fundamental right of WTO member from which the Panel cannot refrain. [956]

For what concerns the applicable law, the WTO jurisprudence has showed a limited recourse to non-WTO law, almost exclusively for interpretative reasons rather than as a positive self-standing justification for measures otherwise inconsistent with the WTO regime. In details, the analysis has taken into consideration four situations of substantive conflicts, namely (i) when external law is incorporated into the WTO regime or the WTO agreements expressly envisage the recourse to non-WTO law, (ii) a case of incompatible substantive obligations, (iii) a situation when a WTO-inconsistent measure is allowed by a treaty conditional upon a violation of the treaty itself and a similar case (iv) where the WTO-inconsistent measure is authorised by a ruling. Generally, the recourse to international standards for interpretative purposes have been admitted by the WTO adjudicative bodies. Particularly, in the situation (i) where an externally formed legal source gets to be part of the WTO system through incorporation, a presumption of compatibility of the former with the WTO regime has to be assumed. Similarly, if the WTO agreements envisage an open recourse to non-WTO law, the reliance upon external legal sources is somehow "authorised", thus, allowed. On the contrary, in the case of conflicting obligations (ii) a one-fits-all solution cannot be found. According to the conclusion drawn by the examination of the existing literature on the merit, the WTO adjudicative bodies should take accounts of the existing external law, however on case-by-case basis, in order to ascertain that the existing WTO obligations have not been modified by subsequent obligations among the treaty parties. Differently, in situations where a WTO-inconsistent measure constitutes a countermeasure justified under a treaty (iii) or under a ruling (iv) the interpretative and analytical exercise that a WTO panel is called on to conduct seems to exceed its competences. Specifically, in the case (iii) a WTO Panel has to ascertain a violation of the treaty, as a preliminary step, then it has to verify the conformity of the WTO-inconsistent measure with the treaty that allows the countermeasure, and, finally, the panel has to refrain from declaring the measure at issue

[956] *Mexico — Tax Measures on Soft Drinks and Other Beverages- Report of the Appellate Body* [2006] WTO/DS308/R.

in violation of the WTO regime. Likewise, the situation (iv), where the WTO-inconsistent measure is justified by an external ruling, implies that a WTO panel exercises deference in its adjudicative exercise *vis-à-vis* an external tribunal. As a consequence, in both cases the use of external legal sources appears in contrast with the horizontal structure of the international legal system that lacks any sort of hierarchy among different legal sources and among international tribunals. Moreover, the interpretative activity of the panel seems to exceed its competences and it is in contradiction to the WTO jurisprudence, which has affirmed the Panel's compulsory jurisdiction, instead. Indeed, the WTO case law has revealed a limited permeability of the WTO system *vis-à-vis* external legal sources: in the Brazil-Tyres case external legal sources have unsuccessfully been invoked to prove the consistency of the contested measure under the WTO general exceptions. Similarly, in the Peru-Agricultural Products case, the Peru-Guatemala PTA has vainly been invoked to justify measures contrary to the WTO regime. In this regard, in the Peru-Agricultural Products the narrow approach towards the recourse to external legal sources applied by the Appellate Body seems to "locked down" the WTO system, so that prospective subsequent modifications of the WTO commitments have to be assessed under article XXIV of the GATT and article V of the GATS (which provide the legal basis for PTAs), rather than under article 41 of the VCLT (which regulates modifications of multilateral treaties).[957]

To sum up, the global dimension of the latest financial crises has awakened the need for a collective effort to establish common rules in the financial sector. In the light of this international scenario, international financial standards have been investigated to understand whether they represent the appropriate regulatory instruments and what is their legal value. The present research has shown that the ascertained soft nature of international financial standards has been hardened neither by the interaction with the WTO system, nor by the interplay with PTAs. As seen, the WTO jurisprudence has remained silent on the use of international financial standards both in the interpretation of WTO obligations concerning the financial sector and in the adequacy test of national

[957] *Peru — Additional Duty on Imports of Certain Agricultural Products-Report of the Appellate Body*, paras 5.112-5.113.

prudential policies. Likewise, the timid *overture* towards these regulatory standards, remarked by the presence of PTA provisions explicitly referring to international financial standards in the analysed EU PTAs, have not introduced any obligation to recur to these regulatory instruments, given the mere declaratory value of provisions mapped in the qualitative study. Moreover, the relevant case law on the interplay between the WTO system and PTAs has seemed to favour a depiction of the WTO regime "isolated" from external legal sources. Particularly the Peru-agricultural products case has affirmed that PTAs, which often come to regulate trade in financial services and in which legally enforceable standards-related provisions can be included, do not constitute subsequent modifications of WTO commitments, but rather exceptions of the non-discrimination principle, which has to be assessed under article XXIV GATT and V GATS. Last but not least, the criticised legitimacy shortfall and transparency deficit have raised concerns about the recourse to soft law by the WTO organs and especially by its adjudicative bodies, which are called to settle disputes in the financial sector, where the WTO legally binding discipline applies.

As emerged in the present work, international financial standards are soft law instruments that lack the minimum level of transparency and a sufficiently wide State participation to serve as the international reference framework in the regulation and surveillance of the financial services sector. The research has particularly spotted general concerns on the absence of developing countries in the standards-setting process. For example Basel II, drafted by the BCBS, provides macro-prudential criteria to avoid bankruptcy (such as the introduction of capital requirements to cover no-performing loans in the long term), which end up disfavouring developing countries by making loans to those countries more expensive compared to loans to developed countries.[958] In practice, international regulatory standards can produce unexpected negative effects over developing countries, which are unevenly left out from the

[958] At the moment the level of capital requirements has been fixed at 8%, accordingly to whom the money has been borrowed to, namely governments, developing countries, XX or again, accordingly to the length of the financial products (short loans are favoured rather then those products lasting over 1year). BCBS, Basel II: international convergence of capital measurement and capital standards: a revised framework, para 5.

decisional-process.[959] Moreover, the standards-setting process thoroughly examined in this thesis has highlighted relevant conflicts of interests, being the private sector technically the addressee of the regulatory instruments and the drafters at the same time. To give a meaningful example, IOSCO and IAIS gather representatives of sector associations and market participants in the standard-setting in order to assure that the standards formulated do not impair market operators. This informal structure exposes these international financial fora to a significant pressure from the financial industry lobby without having citizens' public interests counterbalanced.[960] The risk is to have international bodies taking care of the financial stability without sufficiently engaging governments, which supposedly attain to sustainable policies and societal values.

In addition, the action of financial standard-setters is confined to international cooperation and general supervising functions, rather than oversight and monitoring duties, which makes States' reliance upon vaguely-worded international standards even less likely. By the same token, the limited scope of international financial standards, which are mainly drafted in response to economic crises, does not foresee useful means to prevent future crisis.[961] Above all, transparency shortfall generates legitimacy concerns about the use of these regulatory standards at both the national and the WTO level. Thus, the recourse to international financial standards by the WTO Trade in Services Committee in the definition of financial terms and policies, or by the WTO panel as a benchmark in the prudential adequacy test remains a hypothesis far from reality.

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[959] Since capital requirements for banks is calculated on two main variables, the length of the loan and the risk of the investment, long-term loans to developing countries require higher capital to be held by banks, which create a relative advantage for developed countries since loans in their favour are cheaper. In the long-term, international financial standards may undermine the ability of the national banks of the developing countries to compete with international ones. Myriam Vander Stichele, 'Critical Issues in the Financial Industry' (2004) Somo Financial Sector Report 4, 138.

[960] Yung Chul Park, Kee Hong Bea, 'Financial liberalisation and integration in East Asia' in JJ Teunissen and M Teunissen (eds) *Financial stability and growth in emerging economies - The role of the financial sector* (The Hague, 2003) 185.

[961] Many have criticised the lack of the coverage of relevant substantive discipline such as capital inflows and outflows.

While this study cannot exclude future steps towards a convergence of prudential regulatory policies - similar to the collective endeavours remarked for fighting tax evasion, anti-money laundering and counterterrorism - for the moment being, State practice and the WTO jurisprudence provide no evidence that States' right to regulate has been constrained by international financial standards. However, if a restructuring of the international standard-setting system takes place, meaning a more transparent, accountable and participative decision-making process is set up, the recourse to these standards by the WTO Committee on Trade in Services in definition of financial-related commitments, on one side, and by the WTO adjudicative bodies in the dispute settlement proceedings, on the other, would be more likely.

Yet, no element has led to rebut States' traditional right to regulate, especially in the sector of financial services, where States' sovereign powers appear substantially untouched.

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