Public Policy as a Functional Concept in the WTO: The Utility for Developing Nations as Illustrated by Saudi Arabia's Accession

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Abstract

The concept of public policy has potential to increase the effectiveness of the use of the WTO exceptions to the covered agreements by member states, while decreasing the likelihood of misuse, which will be of certain benefit to the trade organization as a whole.

This PhD study examines the use of public policy or "overriding principles" as it exists in three legal orders; the European Union, the Common Law of England and Wales, and the World Trade Organisation by conducting a comparative documentary analysis of the development and application of "overriding principles" in each legal order and the mechanisms used to monitor, control and encourage the evolution of the concept. The thesis argues that although different terms are used by each legal order, the function is similar, and therefore public policy can be successfully applied to the World Trade Organisation.

On the basis of the findings of the comparative analysis, the research aims to develop a functional concept of public policy that can be applied to the WTO to better achieve its goals as an international trade liberalising organisation, streamlining the accession process for new members, assisting developing countries to participate in the international market and maintaining a balance with the obligations to the organisation and lessening the potential for disputes to arise. A case study of the accession of the Kingdom of Saudi Arabia to the World Trade Organisation exemplifies the experience of developing nations and the potential for public policy to improve the balance of rights and obligations within this legal order.

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List of Abbreviations

AB	Appellate Body
ADR	Alternative Dispute Resolution Methods
CFI	Court of First Instance
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
CoR	Committee of the Regions
COREPER	Committee of Permanent Representatives
CRO	Committee on Rules of Origin
CTG	Council for Trade in Goods
CTS	Council for Trade in Services
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EASA	European Aviation Safety Agency
EC	European Community
EC Treaty	European Community Treaty
ECHA	European Chemicals Agency
ECHR	European Court of Human Rights
ECSC	European Coal and Steel Community
EEC	European Economic Community
EESC	European Economic and Social Committee
EFTA	European Free Trade Association
EIB	European Investment Bank
EMS	European Monetary System
EP	European Parliament
EPC	European Political Cooperation
ERA	European Railways Agency
EU	European Union
Euratom	European Atomic Energy Commission
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade

GCC	Gulf Cooperation Council
GNP	Gross National Product
HRA	Human Rights Act
IBRD	International Bank for Reconstruction and Development
ICCP	International Conformity Certification Programme
IMF	International Monetary Fund
ITO	International Trade Organisation
KSA	Kingdom of Saudi Arabia
MEP's	Members of the European Parliament
MEQR	Measures Having Equivalent Effect to Quantitative Restrictions
MFA	Multi-Fiber Arrangement
MFN	Most Favoured Nation
MTN	Multi-lateral Trade Negotiations
NGO's	Non-Governmental Organisations
SASO	Saudi Arabian Standards Organisation
SEA	Single European Act
SPS	Agreement on the Application of Sanitary and Phyto-Sanitary Measures
TBT	Agreement on Technical Barriers to Trade
TCRO	Technical Committee
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TMB	Textiles Monitoring Body
Total AMS	Total Aggregate Measurement of Support
TPRB	Trade Policy Review Board
TRIM	Agreement on Trade Related Investment Measures
TRIPS	Agreement on Trade Related Aspects of Intellectual Property Rights
UCC	Uniform Commercial Code
WTO	World Trade Organisation

Chapter 1- Introduction

This chapter contains a description of the nature of public policy, its importance and uses. This will be followed by an explanation of the research project, aims, objectives, methodology and methods, as well as the resources for the research and the structure of this thesis document.

1.1. Public Policy as a Legal Mechanism: Nature, Importance and Uses

Public policy is an area of the law where the rules or principles are not allowed to operate as they normally would. It is an exceptional area of the law, where certain issues are of such importance that they take precedence over ordinary law.

Although there is no commonly accepted definition of Public Policy, for the purposes of this thesis it is a set of express and tacit principles held that no person, entity or government official may legally enter into an act that is detrimental to the public. Public policy defines a community, not the policy of the public officers of a State.

The collective principles of public policy underpin actions taken by the government to protect public interest, public security, public morals, and public order. It is important to distinguish between legal and political public policy. These concepts overlap; however the political public policies are what the government develops to support the protection and maintenance of the welfare of its public, thus political public policy plays a key role in the creation and implementation of legislation in a state and thus

has the power to govern interactions.[1] Political Public policy is used by legal orders and governments as a tool to protect the interests of the public.

Within the constructs of the much debated Economic Theory of Legislation, Posner discussed the role of public interest theory and the relationships between governments and domestic interest groups.[2] While the anticipated goal of legislation and public policy is to protect the society as a whole, in reality; domestic interest groups can act to skew legislation in favour of its own demands, negatively affecting the general public. This is a delicate balance, as domestic interest groups can pressure and lobby the government to use public policy to protect their interests and promote their agendas. If new legislation is introduced it may be incorporated over time and inform the development of legal public policy.

Legal public policy is informed by foundational values and has characteristics that are independent of local use in a particular legal order that can be deployed across legal orders, thus playing a role in the comparative legal analysis forthcoming in this thesis. Legal public policy serves the public interest longer and its process of development is slower than political public policy, and is an attempt to stand by principles that define a community over generations. It is how a legal order views itself and wishes to be viewed internationally, rather than according to the political views of the time.

[1] West's Encyclopedia of American Law, Edition 2. (2008) The Gale Group, Inc.
[2] Posner, R. (2005) "Evolution of Economic Thinking about Legislation and Its Interpretation by Courts" Chapter 3. pp 53- 60. In The Theory and Practice of Legislation: Essays in Jurisprudence. Wintgens, L.; Thion, P.; Carly, M. Ashgate Publishing Ltd.

Legal Public Policy is flexible and adaptable to changing social norms, economic status, and moral and religious beliefs. It is based on common sense and supported by public opinion, what is the collective conscience of citizens of a state, applied to issues of public interest. It has advantages in its application and is a reflection of the judicial systems discretion and the mediation of judges. Features of public policy include the capacity to protect public interests by covering gaps in the legal systems unguarded by official legal statutes. Public policy is also quite broad, being able to accommodate the presence and needs of different cultures, traditions and orientations within a society.[3]

On a state-level, public policy can be found where it aims to oversee, shield and regulate issues of public morals, maintain public order and protect public security, as it is concerned with the interests within their borders.[4] On a supra-national level, public policy is also necessarily wide in scope, as legal systems encompass more than one state, with their individual differences. In this respect, public policy is characteristically adjustable and indefinite.[5] The applications of the public policies of the state and that of a supra-national legal order may conflict on occasion, as the national legal order may attempt to introduce measures that are not in the interests of the supranational legal order (this is the crux of the research project).

Public interest is a key concept for political public policy but is in itself is difficult to define, as it is in constant evolution; issues can dissipate or materialise rapidly. An issue of public interest can be identified by a democracy or motivated through

[3] Tinsley v. Milligan [1993] 3 W.L.R
[4] Re Sigsworth [1935] 1 Ch 89
[5] Rewe-Zentral AG v. Bundesmonopolverwatlung fur Branntwein (C120/78)

political lobby or activity. [6] There is disagreement on the nature of public interest and its identification is often problematic; governments have the task of maintaining an awareness of this to be able to handle and develop its programs and policies with such issues in mind, and be conscious of the potential misuse by interest groups.[7]

1.1.1. Public Policy in the World Trade Organisation

Currently in the World Trade Organisation, public policy is an area of its law that is determined by interpretations of the balance of obligations of member states and exceptions obtained from those obligations to the agreements. The WTO does not have an expressly nominated area of public policy as it exists in other legal orders.

The General Agreement on Tariffs and Trade provides a set of terms that, were there no exceptions in the WTO, could impact negatively on member states sovereignty.[8] Perdikis and Read state that:

> ”The GATT was drafted to provide rules for the conduct of trade for a small number of Member Countries – there were just 23 original signatories – and to proscribe the standard forms of protectionist behaviour. As such, the rules were not really designed to deal with a rising membership, the rapid growth in the volume of trade conducted under its rules and the increasing complexity of the trade issues subjected to GATT disciplines. The GATT rules were amended and extended periodically, notably during the Kennedy and Tokyo

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[6] Posner, R. (2005) “Evolution of Economic Thinking about Legislation and Its Interpretation by Courts” Chapter 3. pp 53- 60. In The Theory and Practice of Legislation: Essays in Jurisprudence. Wintgens, L.; Thion, P.; Carly, M. Ashgate Publishing Ltd.

[7] *Ibid*

[8] The General Agreement on Tariffs and Trade (GATT 1947) http://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm

> Rounds. The primary objective of these amendments was to close the legal loopholes relating to the use of a growing range of non-tariff barriers".[9]

Member states freedom to act within this is where public policy in the WTO has the most potential to be developed. The role of public policy has tremendous potential to serve the interests of both the legal order and its member states, in keeping with the continued expansion of the legal orders' membership base. Legal public policy could serve to guide the interpretation of the general exceptions in a way that protects national sovereignty and bring long term stability to the WTO.

If public policy existed in the WTO it should necessarily carry over across all agreements, and should be capable of suspending binding agreements if justifiable. A source of development of public policy should be found within judicial action, either in Panel or Appellate Body reports, and should have the potential to serve in other areas of WTO practice, such as the accession negotiations.

1.1.2. The Saudi Arabian Example

The experience of the Kingdom of Saudi Arabia in acceding to the World Trade Organisation serves as a model for other developing countries seeking to join the international organisation.

There are several developing countries currently applying for accession to the WTO such as Afghanistan, Algeria, Azerbaijan, Bosnia and Herzegovina, Comoros, Iran,

[9] Perdikis, N and Read, R. (2004), "The WTO and the Regulation of International Trade", p10.

Iraq, Kazakhstan, Lebanese Republic, Libya, Sudan, Syria and Uzbekistan.[10] As fledgling economies and mainly Muslim citizenship, these countries may benefit from the negotiations undertaken by Saudi Arabia, to protect their sovereign interests and internal public policies while entering the international market.

Within the context of the Saudi experience, Realist thinking will confirm assumptions that decision-making and public policy stance on issues is determined by a small group highly placed in the government that is fundamentally unaffected by the efforts and pressures of domestic or local interest groups; in a classic "black box fashion". While Saudi domestic groups may raise objections or advocate a change in policy, they have minimal influence on decisions of trade and public policy, which are made by the government. More recently, with the accession of Saudi Arabia to the World Trade Organisation, there has been a slight shift towards the country becoming more liberal. Joining the WTO entailed changes in Saudi public policy in terms of trade tariffs, regulations, quality standards, and operational procedures. Thus the international organisation has played a significant role in modifying the states behaviour and formulation of policy and its implementation.[11] In this there is a dynamic interplay between the liberal model of international relations and liberal states actions. Accession to international organisations such as the WTO necessitate a more liberal approach by the joining state as it demands an openness to foreign influences and this generates domestic legal policy changes over time.

[10] Slaughter, A. M. (1993) International Law and International Relations Theory: A Dual Agenda. 87 American Journal of International Law pp 205- 239.
[11] http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm

Due to the conservative nature of the state's government operations, there is limited scope for the principles of Liberalism to affect the direction and determination of public policy in Saudi Arabia. This is a source of tension, as in international organisations, liberal states favour other liberal states, and for Saudi Arabia, public policy could be crucial in protecting its conservative leanings.

1.1.3. Why Public Policy and Not Rules or Standards?

The previous section has discussed the substantive aspects of legal public policy at international and supranational levels. There is a formal aspect to public policy. If legal systems were to recognise a role for public policy they must find a way to express that role and the content of their public policy within that. If a legal order were to adopt the structural classification described by Kennedy in his article "Form and Substance" laws would have to necessarily be expressed as either "rules" or "standards". This has long been a topic for debate in legal circles, and disputes often centre on parties each advocating the use of one or the other.[12]

In coordinating actions through the law or language the legislator may choose different "forms" of the law, some being more or less precise, or allowing more flexibility for the judiciary in their applications. There are two modes that are used to arrive at a legal solution to a problem or question: the first is to use general, easily administrable, formal, clearly defined rules. The second is to use standards. Rules and

[12] Kennedy, D *Form and Substance in Private International Law Adjudication* 89 Harvard Law Review 1685 pp. 1975-1976

standards are distinct from one another; however they overlap and are similar in some respects.[13]

In his discussion of the debate for the uses of standards versus rules, Schlag describes legal directives as based on a formula of "if this, then that"; which means if there is an action undertaken, there is certain to be a consequence of a legal nature.[14] When a legal directive is issued, it can be viewed from several dimensions: its form realisability (the degree of its ruleness), its generality (how general it is) and its categorisation as a formality.[15] Directives may be general or specific, narrow or broad, subject to conditions or absolute, and they can be in the guise of a rule or a standard.[16]

Rules are clearly designed and specified to deter and prevent actions or behaviours that are identified as immoral or socially unacceptable. Sanctions and consequences are attached to such courses of conduct to discourage them, from criminalising an action to refusing to enforce contracts. However rules are not responsive to public policy concerns.

Rules can be either general or particular, and the same applies to standards, as they may also be general or particular. General rules serve the concept of form realisability

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[13] *Ibid*
[14] Schlag, P. Rules and Standards. (1985) 33 UCLA Law Review 379 the Regents of the University of California.
[15] Kennedy, D *Form and Substance in Private International Law Adjudication* 89 Harvard Law Review 1685 pp. 1975-1976
[16] Schlag, P. Rules and Standards. UCLA Law Review 33, 379 [1985] The Regents of the University of California.

by reducing the need for judicial law making due to fewer conflicts between lines of authority. Though general rules may be over or under-inclusive than particular rules, the clarity is beneficial, since if a legal question requires the application of multiple particular rules, this may lead to the problem of form realisability being undermined, as this has increased potential jurisdictional issues. An example is having different legal ages for different activities: allowing voting at 16, drinking at 18, marriage at 21, etc.; this causes potential conflict and uncertainty. Having a general rule of a legal majority of age 21 eliminates this, the rule is known, and all individuals will know when it is being applied.[17]

Von Ihering in *Spirit of Roman Law* used the term "Form Realisability" to describe the degree of "ruleness" in any legal directive. An example of this is using age as a formally realisable definition of legal capacity and setting it at a particular age to determine legal liability, and recording that in a directive that requires an official to respond to any relevant legal question by consulting the associated list of easily distinguishable facts, and intervening in a pre-determined manner. There is a drawback to using form realisability; it suffers from an innate lack of precision. Setting the legal majority at the age of 21 does not preclude that an individual will have achieved the capacity or maturity to judge or conduct themselves within the limits of the law; there will be individuals for whom this does not fit. But the reasoning stands that such a rule is more suitable to this issue than applying a standard to the facts of each case.[18]

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[17] Kennedy, D *Form and Substance in Private International Law Adjudication* 89 Harvard Law Review 1685 pp. 1975-1976
[18] *Ibid*

As the very nature of over or under-inclusiveness of a rule might punish innocent behaviour, it may also inadvertently permit or be unable to prohibit guilty behaviour. This is the penalty resulting when using a definite rule and moving away from arbitrariness and uncertainty that may occur if a standard is used.

The opposite of form realisability is what is known as a standard or principle. Examples of these are principles such as: good faith, due care, reasonableness, and fairness. When a judge comes to apply such principles, it is necessary to understand the situation fully in terms of the circumstances, the facts, and assess the purposes and social values that the standard embodies in order to come to a decision.[19]

Standards may also be general or particular. Applying a standard to a situation generates a particular rule narrower in scope than the original standard, due to its specificity to that situation for which it was applied. In certain cases, standards may be combined with particular rules, as involving a standard which is general will prevent any gaps in the reasoning from the particular rules being applied to the issue.[20] But to leave matters of public policy to be governed by standards is to lead to increased uncertainty. Standards such as reasonableness or due care attempt to tie social understanding on the basics of human conduct and have a scale element, more or less can be required at different times; it exhibits a temporal value.[21]

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[19] *Ibid*
[20] Kennedy, D *Form and Substance in Private International Law Adjudication* 89 Harvard Law Review 1685 pp. 1975-1976
[21] Schlag, P. Rules and Standards. UCLA Law Review 33, 379 [1985] The Regents of the University of California

Both rules and standards act to constrain official arbitrariness and the use of inappropriate criteria to make judicial decisions (i.e. corruption or political bias), which should have no part or influence on legal process. Rules and standards also provide an advantage to the state and its citizens, as they increase the likelihood that people will conduct themselves appropriately and in accordance to the certainty offered by the presence of such rules and standards. Rules and standards are also similar in that they can be wide in scope due to their attempt to cover as many legal issues that may potentially arise.[22]

Formalities are issued in order to ensure the adherence to a specified procedure, and are used in legal proceedings to provide clarity to an issue in question (e.g. if the parties have or have not followed the relevant formalities). If a dispute arises, the presence of formalities decreases the potential for a judge to enforce a non-existent contract on the basis of perjured evidence. Formalities serve to organise relationships and contracts. Formalities ensure clarity in communication between the involved parties (e.g. the requirement of an offer and acceptance). Formalities assume no preferences between alternative actions, and act by contradicting private intent. If formalities are not adhered to or observed, the sanction of nullity can be applied. Formalities have a deterrent effect; they make it more difficult to follow an *ad hoc* course of action.[23]

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[22] Kennedy, D *Form and Substance in Private International Law Adjudication* 89 Harvard Law Review
[23] *Ibid*

There is an argument for casting formalities as rules and this is based on two sets of assumptions, but this has been criticized as it may not take account of how real as opposed to hypothetical participants will act. The first concerns the impact of the demand for formal proficiency on real parties in the legal system. For rules to work parties must respond to the sanction of nullity threat by learning to operate the system, however the parties all have different levels of skill in the language, understanding, and technicalities involved and therefore different reactions to the threat of sanction. The law intervenes when private mechanisms for settling disputes fail- thus the judicial system should not legislate for tort cases or contracts.

A system of formally realiable rules would increase the disparity in bargaining power for those skilled in its use and in the workings of the legal system. The second assumption is on the practical possibilities of maintaining a highly formal regime. Legal scholarship from the time between the First and Second World Wars expended much effort into proving that legal directives looked as if they were form realisable and general but were actually imprecise. An example is the rule that a contract will be rescinded for mutual mistake going into the "substance" or "essence" of the transaction, but not through mistakes of "mere quality or accident", even though that may have been the reason for the transaction. This sort of legal directive leads to *sub rosa* balancing of the equities, and a critic of these assumptions can show what looks like a rule is in fact a covert standard and covert standards lead to more uncertainty. The more formally realisable the rule, the greater the potential in extreme cases for over and under-inclusion. There are other confusing issues: playing with facts, the invention of counter-rules, the manipulation of manifestations of intent, and others.

Each makes it more difficult to apply the rule rigidly in the next case; leading to more uncertainty than would be with an outright standard.[24]

Legal directives that aim to deter or prevent immoral and antisocial behaviours can be expressed with general or particular rules but the use of formalities for such a purpose is not as straightforward. Formalities can be cast as rules, but it is difficult to cast them as standards. It is possible for a judge to apply a standard in order to void a contract based on the parties failing to communicate appropriately. Williston advocated having a general rule to require a defined price and quantity in a contract or it would not be legally binding, however the Uniform Commercial Code (UCC) preferred not to void contracts due to indefiniteness if there was the intention of a contract and the potential to resolve the dispute, stating that a judge can ignore the parties will, and sanction the failure to observe formalities, using criteria that is not formally realisable (i.e. a standard).[25]

The imprecision and generality of using formalities necessitates the involvement of the parties and a decision made at the judge's discretion. This reduces the formal proficiency of the directives and the system, unlike if a rule would be applied. Using standards increase informality and cause uncertainty, whereas rules decrease

[24] Kennedy, D *Form and Substance in Private International Law Adjudication* 89 Harvard Law Review
[25] Schlag, P. Rules and Standards. UCLA Law Review 33, 379 [1985] The Regents of the University of California

informality and offer certainty, lending them to the achievement of formal proficiency.[26]

In terms of the argument being presented in this thesis, public policy can be seen to be neither a rule nor a standard and yet still to be capable of taking effect both as a rule and a standard. It is not a rule as it does not have always have sufficient form realisability to take on the required degree of ruleness. It needs to be general so that it can be applied in different circumstances to different issues right across the broad spectrum of policy considerations that might impact on a legal order. However it is not a standard as it may in certain circumstances manifest itself as a rule (e.g. the rule against perpetuities or the rule prohibiting illegal contracts). Public policy is necessarily general and has the capacity to override both rules and standards when necessary so as to be applicable to different circumstances to different issues right across the spectrum of policy considerations that might impact on a legal order, and to be adaptable to new situations as they arise.

Legal Public Policy has hybrid features of both rules and standards and stems from human desire for an ordered existence; it is based on a general interest in the common good, respect, fairness and duty to oneself and each other. The nature of public policy as compared to rules and standards is indefinable and has proved difficult to set parameters for; it manifests itself in situations where a rule or a standard will not

[26] Kennedy, D. *Form and Substance in Private International Law Adjudication* 89 Harvard Law Review

suffice. Public policy can originate from interactions between people, from traditions and culture, from international laws, or from religious belief.

Public policy exhibits unique features that lend it a particular character as a legal norm, most notable for its wide scope, flexible nature and potential to cover gaps left by other legal norms whether they are rules or standards. The nature and functionality of public policy of three legal orders will be discussed and explored in the thesis.

1.2. The Research Project

1.2.1. The Research Question

The PhD research is based on several interlinked questions, starting with the need to understand what public policy in EU law and Common law is set upon, and from this the desire to fashion an account of legal public policy that is not tied to a specific jurisdiction.

Once this is achieved, the research would continue on to understand what, if any, concept of public policy exists in WTO Law, and how common the concept of public policy is across the covered agreements. The research would then strive to find out if the concept of public policy in WTO law is similar to the functional concept of public policy derived from EU and Common Law.

Finally, the research would then move on to applications; how would an express concept of public policy influence the accession process? And can any effects of this be identified in the accession of Saudi Arabia to the WTO?

1.2.2. Aims and Objectives

The research aims to explore the nature and limits of "public policy" exceptions in the WTO legal order in light of the case study, an explanation conducted through the lens of a concept of public policy developed from examining different levels of legal systems.

The legal systems levels are Common Law in England and Wales (national law), which is the law of a sovereign state (unitary or federal), WTO Law, which is international law governing relations between sovereign states, and EU Law, which falls between international and federal law, having features of each.

The research also compares and contrasts the public policies in the legal systems, highlighting the contrasts between them to identify the implicit public policy contest from the WTO obligations. The research will develop recommendations as to the lessons that developing countries - that are Members of the WTO and those who are willing to join - might learn, in order to avoid the problems resulting from the ambiguity of the exceptions in WTO law.

This research will examine the concept of public policy exceptions from different standpoints; WTO law, EU law, and English Common Law in an attempt to draw out and make explicit the approach to public policy that is at present implicit in the general exceptions found in WTO law.

Detailed Aims and Objectives

1- To provide a concrete example of the process of, and impact of, accession and Membership of the WTO through a case study of the accession of Saudi Arabia with particular attention given to the novel constraints imposed by the WTO law and the negotiated and general exceptions applicable

2- To explore the nature and limits of public policy exceptions in the WTO legal order, in light of the case study, an explanation conducted through the lens of a concept of public policy developed from examining different levels of legal systems (WTO law, EU law, and Common Law of England and Wales)

3- To compare and contrast the public policies in the legal systems, highlighting the contrasts between them to identify the implicit public policy objectives behind the operation of the exceptions to the WTO obligations.

4- To formulate guidance for developing countries that are Members of the WTO and those considering joining the WTO as to how concepts of public policy affect the exceptions' provisions in the WTO law and as to how more detailed iteration of those concepts might assist the interpretation and application of those exceptions.

1.2.3. Methodology and Methods

1.2.3.1. Comparative Law Methodology

'Comparative law is the comparison of the different legal orders of the world'.[27]

Comparative methodology in law is fairly recent, developing out of a logical reasoning and the nature of human existence, and out of a need to resolve differences between the different laws of the world. Since it was first established in the early

[27] Zweigert, K and Kotz, H "*An Introduction to Comparative Law*" 3rd edition, Clarendon Press. Oxford p.2.

1900's, comparative law methods have become more advanced and accepted as fundamental and necessary to the continuing development of international legal orders.[28]

Comparative law offers the potential to delve into and understand at a fundamental level the 'form and formation' of legal orders which are constantly developing, and of laws that have not been established, and allows an insight into the similarities and differences between the legal orders.

According to *Lambert* it is crucial to allow comparative law methodology a wider presence in academic discourse, as if there were clarity in the general principles of law, international trade would be more prominent and effective, and greater in volume.[29]

In using comparative law in a macro sense, comparisons can be made as to the ways the different legal orders approach dispute resolution, techniques and procedures for legislation and interpretation of statutes. Comparisons can also be made as to the effectiveness of the ways conflicts are resolved in the legal orders. In the micro sense, comparative law can be used to analyse legal orders as to the rules that are enforced to resolve problems and conflict.[30]

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[28] *Ibid*
[29] Lambert '*Conception generale et definition de la scince du droit compare*' Proces-verbaux des seances et documents, Congres international de droit compare I (1905) 26
[30] *Ibid* p.5.

1.2.3.2. Research Design

In order to conduct the analysis of the concept of public policy, as it exists in each of the legal orders, its development and forms of utilisation, the comparative methodology and methods must be used.

This thesis combines elements of both macro and micro comparison of the legal orders, as the procedures for application of the rules must be studied to enable the understanding of why each legal order approaches conflict and dispute resolution as they do.

1.2.3.3. Using Comparative Law

Reitz put forward nine principles for comparative law scholarship, of which several are applicable in the context and for the purposes of this thesis. These principles cover the basic techniques that can be used to compare laws in different legal systems, and present guidelines to carry out such comparisons.[31] These principles are as follows:

1. Comparative law involves drawing explicit comparisons, and being made explicitly comparative could strengthen most non-comparative foreign law writing.[32]
2. The comparative method consists in focusing careful attention on the similarities and differences among the legal systems being compared, but in assessing the significance of differences the comparatist needs to take account of the possibility of functional equivalence.[33]

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[31] Reitz, J. *How to Do Comparative Law*. The American Journal of Comparative Law. Vol. 46, No. 4 (1998) pp.617-636.
[32] Reitz, J. *How to Do Comparative Law*. The American Journal of Comparative Law. Vol. 46, No. 4 (1998) p618
[33] Reitz, J. *How to Do Comparative Law*. The American Journal of Comparative Law. Vol. 46, No. 4 (1998) p620

3. The process of comparison is particularly suited to lead to conclusions about (a) distinctive characteristics of each individual legal system and/or (b) commonalities concerning how the law deals with the particular subject under study.[34]
4. One of the benefits of comparative analysis is its tendency to push the analysis to broader levels of abstraction through its investigation into functional equivalence.[35]
5. The comparative method has the potential to lead to even more interesting analysis by inviting the comparatist to give reasons for the similarities and differences among the legal systems or to analyse their significance for the cultures under study.[36]
6. In establishing what the law is in each jurisdiction under study, comparative law (and for that matter, studies of foreign law, as well) should (a) be concerned to describe the normal conceptual world of the lawyers, (b) take into consideration all the sources upon which a lawyer in that legal system might base her opinion as to what the law is, and (c) take into consideration the gap between the law on the books and law in action, as well as (d) important gaps in available knowledge about either the law on the books or the law in action.[37]
7. Comparative and foreign law scholarship both require strong linguistic skills and maybe even the skills of anthropological field study in order to collect information about foreign legal systems at first hand, but it is also reasonable for the comparative scholar without the necessary linguistic skill or in-country experience

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[34] Reitz, J. *How to Do Comparative Law*. The American Journal of Comparative Law. Vol. 46, No. 4 (1998) p624
[35] Reitz, J. *How to Do Comparative Law*. The American Journal of Comparative Law. Vol. 46, No. 4 (1998) p625
[36] Reitz, J. *How to Do Comparative Law*. The American Journal of Comparative Law. Vol. 46, No. 4 (1998) p626
[37] Reitz, J. *How to Do Comparative Law*. The American Journal of Comparative Law. Vol. 46, No. 4 (1998) p628

to rely on secondary literature in languages the comparatist can read, subject to the usual caution about using secondary literature.[38]

8. Comparative law scholarship should be organised in a way that emphasises explicit comparison.[39]
9. Comparative studies should be undertaken in a spirit of respect for the other.[40]

Especially relevant to the purposes of this thesis is the second principle described by Reitz; that careful consideration must be given to comparing the legal systems for their similarities and differences. An awareness of what is being compared must be maintained alongside that of the significance of the differences and the potential for the functional equivalence, that being the term to describe the situation when the part of the one legal system being compared has an equivalent in the other legal system that serves the same purpose, but different terms are used to name or describe it. Conducting a comparison for similarities and differences needs to deduce how different or how similar the legal systems are with respect to the issue under study. The degree of functional equivalence needs to be given due attention, and from it stems an assessment of how well the legal system functions as a whole.

By studying the whole legal system, its structure and workings, the comparison can be made as to whether a legal system can achieve matching results to the other legal systems being compared, even if the terms, rules and procedures used are different.

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[38] Reitz, J. *How to Do Comparative Law*. The American Journal of Comparative Law. Vol. 46, No. 4 (1998) p631
[39] Reitz, J. *How to Do Comparative Law*. The American Journal of Comparative Law. Vol. 46, No. 4 (Autumn 1998) p633
[40] Reitz, J. *How to Do Comparative Law*. The American Journal of Comparative Law. Vol. 46, No. 4 (Autumn 1998) p634

> "Either one legal system has the same legal rule or legal institution as another, or it has different rules or institutions which perform the same function, or it provides different results for a particular problem, or it does not seem to address that problem at all…."[41]

It is also imperative to maintain clarity on the framework or point for comparison until the comparison has been completed. The comparative analysis must be conducted carefully, and develop broad categorization to suit the terms being compared for their functional equivalence and assess these broader levels for similarities and differences.

Further to this, the significance of the similarities and differences between the legal systems must be analysed, and reasons given for this significance. Understanding the legal systems and the cultures and societies they come from and the historical, economic, political and social influences on them inform this.

Reitz goes on to describe the basic methods of comparison of laws, and details valuable rules and guidelines to doing so. At the outset, it must be determined what the law is in the legal systems under comparison, and how lawyers in each legal system view the legal problem or issue under study. Then it becomes crucial to find out what the sources of law in each legal system are (constitutions, treaties, statutes or even scholarly writings). This is useful as what may be regarded as official or formal law is not what is applied in reality, and the reasons for this gap in application of the

[41] *Ibid*

law provides the comparison with valuable insight into the legal reasoning at work in the different legal systems.[42]

In exploring the concept within the WTO, the research will utilise the comparative law approach across the EU and Common Law systems in order to develop a functional concept of public policy exceptions that might be applied to the general exceptions in the WTO legal order.[43]

1.2.3.4. The Development Process (How to Arrive at a Functional Concept)

In order to develop a fully functional concept of public policy, there are certain steps that need to be undertaken as part of the process of development. As discussed in the section on methodology, the comparative method will serve in this respect to compare the three legal systems selected. The initial step is to identify the problem with which we are concerned in this thesis: the absence of a clear concept of public policy within the WTO. The other two legal systems; the EU and Common Law have within their constructs a working concept of public policy, each with its own unique attributes, but a working concept nonetheless. This thesis is concerned with being able to derive from these a viable set of options that may be usefully adapted and applied to the WTO.

It is important to consider when applying the comparative method that the legal systems (WTO, EU and Common Law) are disparate legal orders and are

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[42] Reitz, J. *How to Do Comparative Law*. The American Journal of Comparative Law. (1998) Vol. 46

[43] Zweigert, K and Kotz, H "*An Introduction to Comparative Law*" 3rd edition, Clarendon Press. Oxford p.2

fundamentally different. The WTO is an international legal order, the EU is a regional economic integration organization that operates as both a supranational federal legal order and a municipal legal order; and Common Law is an abstraction, shared by a number of culturally related legal orders, of a Universalist concept of law that operates discretely in each sovereign state that recognises it.

With this in mind, the term (Public Policy) exists as a term in two of the systems and the research hypothesis is that it can usefully be applied to the WTO. Even though the term of public policy has different definitions in accordance with the different legal orders (see Chapters 2, 3, 4), it has the same functions which allow it to be successfully compared. Chapter 5 of the research will use the comparative law methodology therefore (allowing for each system's unique context and environment), establishing system neutral terms and concepts that will be used in the comparison.

A "doctrinal" (internal to each legal system) exposition of the key features of each system will be given, followed by a "functional" (external to each legal system) attempt to identify the tasks doctrinal law intends to perform. From this, an account of the special attributes of public policy in these legal systems will be derived. The research will apply the analytic framework and synthesis of the functional concept to the WTO to frame the general exceptions, and the understanding of their role in the WTO legal order. The research posits that the application of the term (Public Policy) will illuminate the relationships between different provisions in the covered agreements so as to simplify the comprehension of what is entailed in WTO law and what policy freedoms WTO law allows its Member States.

The research will articulate the results of the analysis from the standpoint of developing countries in seeking to exercise of their national policy imperatives whilst within the WTO, or seeking to preserve their public policy freedoms when acceding to the WTO.

The project will be conducted in accordance with ethical procedures set out by the NTU Graduate School's Code of Guidance on Ethical Research. However, this research will engage documentary sources of a nature that makes it unlikely that the project will need to be ethically reviewed.

1.2.4. Resources

The research will be based on documentary analysis of legal texts, cases, treaties, and statutes that form the laws governing the three legal orders. The research may also involve documentary analysis of scholarly works.

Relevant items of literature on the WTO will be used (including the process of accession to the WTO and the 'public policy' exceptions to the WTO obligations) and the concept of public policy under EU Law, English Common Law and in the context of International Law. Law treaties, statutes, cases, decisions are what constitute the law and commentaries, textbooks, and articles explain the law.

Treaties (international conventions binding as international law) specifically relevant are: The European Union Treaties; The Covered Agreements of the WTO; and general international legal sources such as the Treaty of Vienna 1969. Statutes are those of Nation States, specifically the Kingdom of Saudi Arabia and the United

Kingdom (primarily England and Wales). Cases are considered from each legal order of relevance – hence the reports of the WTO dispute settlement system, the European Court of Justice and the Courts of the English and Welsh legal system will be used. The commentary crosses disciplinary boundaries, and is served by specialist journals e.g. Journal of International Economic Law, European Law Review, and the publications of the WTO and other international bodies, e.g. the World Bank. Academic books of relevance include legally orientated books on the legal orders e.g. Bossche, 2008, and institutional, and juristic work e.g. Twining, 2002 and Zweigert & Kotz, 1998.

1.3. Thesis Structure

Chapter Two of the thesis will provide a description of the case study. Chapter Three put forward a description of the World Trade Organisation as a legal system. Chapter Four will contain a description of the European Union. Chapter Five will provide a description of the Common Law in England and Wales. Chapter Six will discuss the development of a functional concept of public policy within the WTO legal order as a result of the comparative analysis. Chapter Seven will seek to discuss the findings of the research, apply the functional concept to the WTO and examine the utility of the illustrative norm of public policy as related to the case study, and providing a conclusion to the research project.

Chapter 2- The World Trade Organisation

2.1. Constitution and History

The World Trade Organisation was established by the Marrakesh Declaration in April 1995 as manifested in the Marrakesh agreement signed in Morocco in completion of the Uruguay Round, which together with the covered agreements form the constitution of the WTO.[44] Under the umbrella of the WTO establishing agreements are the agreements and their associated annexes on goods, services, intellectual property, dispute settlement, trade policy review mechanism, and multi-lateral and pluri-lateral agreements, as well as schedules for commitments of member states.[45]

The WTO was established to administer and provide a common institutional framework for the conduct of relations between the member states in matters of trade relations within the covered agreements, facilitating the implementation, administration and operation and the objectives of the Marrakesh Agreement, the Multi-Lateral Trade Agreements and the Pluri-Lateral Trade Agreements.[46] The WTO provides a negotiation forum for member states for matters relating to their multi-lateral trade relations under the agreements and provides a framework for the implementation of the results of any such negotiations as decided by the Ministerial Conference. The WTO administers the Dispute Settlement Understanding (DSU) and the Trade Policy Review Mechanism (TPRM), and cooperates with other international organisations such as the International Monetary Fund (IMF) and the International

[44] Marrakesh Declaration of 15 April 1994, WTO website, last accessed in 20/04/2013 http://www.wto.org/english/docs_e/legal_e/marrakesh_decl_e.htm
[45] Agreements Establishing the WTO and associated annexes, WTO website, last accessed in 20/04/2013 http://www.wto.org/english/docs_e/legal_e/legal_e.htm
[46] Article II of Marrakesh Agreement

Bank for Reconstruction and Development (IBRD) to achieve coherence in global economic policy making. [47]

The basic tenets of the WTO trading system:

1) The system should be without discrimination; between member states, or between a state's own goods and foreign products, services or nationals
2) The system should be freer, dissolving barriers such as tariffs through negotiations
3) The system should be predictable; tariff and non-tariff barriers should not be changed randomly, and the market opening is binding
4) The system encourages competition and discourages export subsidies and product dumping below cost to influence market share
5) The system should be supportive and beneficial to developing countries, to allow flexibility and adjustment[48]

Although the tenets on which the WTO is based are altruistic in nature, the WTO constitution is considerably limited in its scope and function as it rests on the Marrakesh Declaration and the covered agreements.[49]

The origins of the WTO can be found in the Breton Woods Conference of 1944. This conference acknowledged a need for an international institution for trade. In 1945 the USA invited the Allies to enter negotiations for a multi-lateral agreement for a

[47] Article III of Marrakesh Agreement
[48] Principles of the Trading System, WTO website, last accessed 20/04/2013 http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm
[49] Jackson, J "The World Trading System: Law and Policy of International Economic Relations" 2nd edition, 1997 MIT Press pp. 47-55

reciprocal reduction on tariffs on trade in goods. This was proposed in 1946 as the International Trade Organisation (ITO), to complement the International Monetary Fund and the World Bank.[50]

Simultaneous negotiations in Geneva for the General Agreements on Tariffs and Trade (GATT) were progressing, and an agreement was reached in 1947. In October of that year, eight of the twenty-three countries negotiating the GATT signed the protocol of provisional application of the GATT.[51]

In early 1948 the negotiations for the ITO charter were concluded in Havana. The charter proposed the establishment of the ITO, and set out basic rules for trade and economic matters internationally conducted. This charter was never put into use, although repeatedly submitted to the US congress it was never approved; the argument being that it would interfere in domestic economic issues. In 1950 the charter was abandoned.[52]

Countries then turned to the other existing multi-lateral international trade institution; GATT 1947, to handle trade relations and associated disputes. The GATT would thus over the years transform into a *de facto* international organisation, and became the centre of international governmental cooperation on trade issues.

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[50] Bossche, P. "The Law and Policy of the World Trade Organization" 2nd edition, 2008, Cambridge University Press p.80
[51] The GATT Years: From Havana to Marrakesh, WTO website, last accessed 20/04/2013. http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm
[52] Bossche, P. "The Law and Policy of the World Trade Organization" 2nd edition, 2008, Cambridge University Press p. 78

Afterward, the negotiations reached its peak during the Uruguay Round in 1986, when the general view among GATT Members was that the system for the settlement of trade disputes needed to be reformed. At the conclusion of the Eighth Round of negotiations in Uruguay in 1994 the World Trade Organisation was established as a replacement and reformation of GATT.[53]

The GATT agreements and principles were adopted by the WTO, and the aim was to administer and expand these agreements and principles, and increase the membership gradually. The purpose of the organisation is to liberalise trade, ensure it flows regularly, smoothly and freely between member states, and ensure that no country has unfair trading advantages over others.[54] While the GATT originally began with a small membership base, as the WTO it has now evolved into a highly formalised modern organisation with large membership and a strict accession process.

2.1.1. Accession Process

Many countries seek to join the World Trade Organization (WTO) to take advantage of the perceived benefits available for its Members. However, joining the WTO is considered the culmination of what is called the Accession Process, which entails a balance of rights and duties (that a country must take on or reject) reached through negotiations, which will typically include:

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[53] Ibid. J.H. Jackson, "*Managing the Trading System"* pp. 134-135
[54] Matsushita, M; Schoenbaum, T and Mavroidis, P "The World Trade Organization" 2nd edition, 2006, Oxford University Press p.14

1. Compliance with all multilateral agreements is mandatory for all Member States; those agreements are known as the covered agreements under the Marrakesh agreement.[55]
2. Specific obligations under these covered agreements (i.e. bound tariff levels under Article II GATT, commitment under schedules to GATS). This is what typically makes up the bulk of the country's accession protocol. Certain parts of these obligations may be negotiable (i.e. a Member State must accept a bound tariff level but the bound tariff level can be negotiated)[56]
3. Particular obligations or exceptions agreed especially for that country as detailed in the protocol of accession (i.e. China's negotiation of the terms for distribution of media and film,[57] Saudi Arabia's negotiation for suspension of ART XI of GATT with respect to alcohol)[58]

In order to be eligible to apply to join the WTO, the applicant must be an independent state or customs territory and have full autonomy in the conduct of their external commercial relations as well as their internal trade policies[59].

Initially, a formal request to join the WTO must be submitted by the applicant country. The formal request is placed under consideration by the WTO General

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[55] There are also pluri-lateral agreements that are only binding to the countries who have signed up to them

[56] Saudi Arabia has agreed on its accession protocol to reduce all tariffs levied on imports. At the end of the ten year implementation period, its average bound tariff levels will decrease to 12.4% for agricultural products, and individual tariff rates for these products will range from 5% to 200%

[57] WT/DS363/R

[58] WT/ACC/SPEC/SAU/4/Rev.2

[59] ART XII of the Marrakesh Agreement Establishing the World Trade Organisation

Council and a Working Party is established, appointed by the General Council to examine and discuss the application and accession request on behalf of the WTO. Members of the Working Party represent various Member States, however in this capacity they, ideally, represent the interests of the WTO as an organization and not the interests of their respective country. [60] Members can ask to join Working Parties for several reasons; support for a particular applicant, demonstration of economic weight or interest in the particular accession application[61]. There is no typical format or size for a working party; it is variable in each instance.

The Chairman of the Working Party will invite representatives of the applicant to become observers of WTO processes, attending General Council meetings and meetings of the Accession Working Parties for other acceding Members, to allow the applicant to familiarise with the process and prepare for their own negotiations. When attending their Working Party meetings, the applicant is expected to participate equally with other Members of the Working Party, so as to reach mutual agreement on the terms of entry into the WTO.

The applicant country is required to submit a "memorandum" detailing all relevant aspects of its trade and legal regime to be circulated to all Members of the working Party.[62] The Working Party examines this thoroughly in open sessions in order to clarify the operation of the Applicant's foreign trade regime, and then the application

60 The WTO website "Accession: Explanation (How to Become a Member of the WTO" last accessed 20/04/2013 http://www.wto.org/english/thewto_e/acc_e/acces_e.htm In the case of Saudi Arabia the application was submitted 13 June 1993.

61 Paragraph 5, Note by the Secretariat on the Procedures for Negotiation ART XII

62 Saudi Arabia submitted its Memorandum in four different stages from 5 July 1994 and up to 21 May 1997

enters into the stage of extensive multi-lateral negotiations. These multi-lateral negotiations will form the basis for the development of the terms and conditions of entry for the applicant country. These will include a commitment to observe and uphold the WTO covered agreements once they accede, and an agreement to undertake a transitional process within which they will make modifications to existing legislation and structure that might be necessary to implement any commitments they agree to.[63]

The applicant country will simultaneously undertake "bilateral negotiations" with the other interested WTO Members with regard to access to each other's markets, goods and services. These meetings are arranged either through the Secretariat or by contacting the acceding country directly. They are conducted in the margins of the Working Party meetings, and not necessarily with a Working Party Member. The results of any and all of these negotiations are documented and later become part of the "accession package".[64]

This accession package will therefore include: a full report from the working party, any schedules of market access, and commitments with regards to services and goods which have been agreed to between the applicant country and the working party on behalf of the WTO, or between the applicant country and a particular member of the WTO. The Working Party does not have the power to reject an accession application,

[63] WT/ACC/1
[64] The WTO Website " Accession: Explanation (How to become a member of the WTO" last accessed 20/04/2013
http://www.wto.org/english/thewto_e/acc_e/acces_e.htm

but, if unsatisfied with the process of negotiation, the Working Party presents recommendations for further negotiations to the General Council.

This accession package is presented for approval to either the WTO General Council or Ministerial Conference. If the package is approved by a two-thirds majority of the WTO Member's positive vote, the decision to accept would then be issued in two documents: a General Council decision,[65] and the Accession Protocol.[66] The accession package may then be published as a "public document". The applicant country may then accept the approved accession package (subject to ratification by its national government body) and elect to sign the protocol of accession. The applicant country then becomes a Member State of the WTO. As a member state, this country must comply with the WTO agreements, which are considered international legal texts.

2.2. Institutions

The WTO is made up of various bodies, the total of which is seventy. Thirty-four of these bodies are considered "standing bodies"; the remainder are "*ad hoc*" bodies. These seventy bodies served to replace and develop the role of the GATT Secretariat in the regulation of the WTO.[67]

The WTO is structured in a functional hierarchy. The Executive branch of the WTO is comprised of the Secretariat and the General Council. The General Council is

[65] The decision on the accession of the Kingdom of Saudi Arabia to the WTO was made in 11 November 2005
[66] The Protocol on the Accession of Saudi Arabia to the WTO (WT/L/627)
[67] Bossche, P. "The Law and Policy of the World Trade Organization" 2nd edition, 2008, Cambridge University Press p.117

subordinate to the Ministerial Conference.[68] The General Council meets more frequently and carries the functions of the Ministerial Council when it is not in session. It is based at the WTO headquarters in Geneva. It is known that all Members are entitled to send representatives to the General Council at ambassador level, for its meetings, and the Council is composed of all those representatives who are in attendance. The General Council meets on average every two months in Geneva. A chair is elected to head the Council every year and manages the WTO daily activities and issues. The General Council is, in addition to undertaking the duties of the Ministerial Conference when it is not in session, also responsible for the WTO budget and financial regulations along with their accompanying matters. Most of the other WTO bodies report directly to the General Council.[69] The General Council also arranges meetings with international NGO's and other organizations for cooperation with the WTO. General Council meetings are not public, they are in fact restricted, but it is common for a statement to be issued to the media after the council has met.
It is important to state here that the WTO has no permanent executive body through which it communicates with the public.[70]

The WTO Secretariat is responsible for providing technical and professional support for the WTO bodies; it also has the responsibility to provide technical assistance to developing country Members States in particular. Also, it oversees and analyses world trade development, along with its role in advising governments of states which are

[68] The Organization, WTO Website, last accessed 20/04/2013, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm
[69] *Ibid*
[70] Article IV of Marrakesh Agreement Establishing the WTO

wishing to join the WTO. The WTO Secretariat is also responsible to provide the public and the media with information.[71]

The Director-General of the WTO is responsible for supervising the administrative functions. He has no decision making power because decisions are taken by the Member states through the Ministerial Conference or the General Council. The Director-General duties are in a more supervisory capacity than leadership. He supervises the WTO secretariat, which compose about 700 staff. The Director-General is appointed by the Members' nomination for a period of four years. Further down in the WTO hierarchy come the other specialised councils, committees and working parties, as well as various other bodies.[72]

As for the Legislative branch, this is headed by the Ministerial Conference. The Ministerial Conference is comprised of Members representatives and meets every two years, to enact necessary WTO functions. This Ministerial Conference is the WTO decision maker in issues of trade agreements. The Ministerial Conference has assorted other powers also such as adopting amendments, granting waivers, accession decisions, etc.[73] The Ministerial Conference does not meet often; in fact, it has only had eight sessions since 1995. The first meeting was in Singapore in December 1996, the second was in Geneva in May 1998, the third was held in Seattle in November/December 1999, the fourth meeting was in Doha in November 2001, the fifth placed in Cancun in September 2003, the sixth was in Hong Kong in December

[71] Article VI of Marrakesh Agreement Establishing the WTO
[72] About the WTO, WTO website, last accessed 15/04/2013 http://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm
[73] Marrakesh Agreement Establishing the WTO, WTO website, last accessed 15/04/2013 http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm

2005, and the seventh meeting was held four years later in Geneva in November 2009 and the most recent was also in Geneva in December 2011.[74] Decisions are made at these meetings by consensus and this is difficult in many cases, especially as these meetings include representatives of more than 150 different countries. The sessions of the Ministerial Conferences are highly publicised and covered by the media.[75]

The negotiation rounds of the WTO are central to the legislative endeavours of the organisation.[76] There have been eight rounds of negotiations, the most recent Doha Round is the Ninth, launched in Qatar in November 2001 as part of the Fourth Ministerial Conference and has yet to be concluded. Prior to that the rounds were in Geneva 1946 (7 months duration), in Annecy in 1949 (duration 5 months), in Torquay 1950 (duration 8 months), in Geneva 1956 (duration 5 months), the Dillon Round in 1960 (duration 11 months), the Kennedy Round in 1964 (duration 37 months), the Tokyo Round in 1973 (duration 74 months) and the Uruguay Round in 1986 (duration 87 months). The rounds are mandated by Ministers and typically cover a range of subjects and multi-lateral negotiations on tariff issues, amendments to existing agreements, work in existing committees. The rounds also give direction to the implementation of the WTO agreements.[77]

As of early 2013, The Doha Round is considered to be delayed in achieving its goals, missing the deadline of 2005, and the difficulty was in the disparity between the goals

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[74] The WTO website, the Ministerial Conferences, last accessed 15/04/2013 http://www.wto.org/english/thewto_e/minist_e/minist_e.htm
[75] *Ibid*
[76] The GATT years: from Havana to Marrakesh, WTO website, last accessed 15/04/2013 http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm
[77] The GATT Years: From Havana to Marrakesh, WTO website, last accessed 15/04/2013 http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm

of the developed (EU, USA, Japan) versus the developing countries (Brazil, China, India, South Korea and South Africa). The objective was to decrease barriers to international trade, however the divide on issues of tariffs, agricultural import rules and industry have stalled the negotiations significantly. Most recently, the WTO has elected to scale back its goals in order to achieve success in more gradual, smaller steps. [78]

[78] The Doha Round, WTO website, last accessed 15/04/2013 http://www.wto.org/english/tratop_e/dda_e/dda_e.htm

Table. 1 GATT and WTO Trade Rounds

Round	Start	Duration	Countries	Issues	Results
Geneva	April 1946	7 Months	23	Tariffs	Signing GATT
Annecy	April 1949	5 Months	13	Tariffs	Concessions
Torquay	September 1950	8 Months	38	Tariffs	Concessions
Geneva II	January 1956	5 Months	26	Tariffs	Reductions
Dillon	September 1960	11 Months	26	Tariffs	Concessions
Kennedy	May 1964	37 Months	62	Tariffs and Anti-Dumping	Concessions
Tokyo	September 1973	74 Months	102	Tariffs, Non-Tariff Measures, "Framework Agreements"	Reductions
Uruguay	September 1986	87 Months	123	Tariffs, Non-Tariff Measures, Rules, Services, Intellectual Property, Dispute Settlement, Textiles, Agriculture, Creation of WTO	Creation of WTO, Trade Negotiations, Reductions in Tariffs, Agricultural Subsidies, Access for Textiles and Clothing from Developing Countries
Doha	November 2001	On-going	141	Tariffs, Non-Tariff Measures, Agriculture, Labour Standards, Environment, Competition, Investment, Transparency, Patents	Not Yet Concluded

As for the judicial branch, this includes the Dispute Settlement Body (DSB) and the trade policy review body (TPRB).[79] The DSB and the TPRB, they are composed of representatives of all the WTO Members to monitor the implementation of the dispute resolution process and the Trade Policy Review Mechanism. These two bodies may have their own chairpersons and rules for procedure. The DSB meets monthly but may also hold special meetings as well if necessary. The TPRB also meets monthly. Below these bodies in the hierarchy, come the specialised councils; the Council for Trade in Goods (CTG), the Council for trade in services (CTS), the Council for TRIPS (Intellectual Property). The CTG oversees the multilateral trade agreements, the CTS oversees the GATS, while the Council for TRIPS oversees all functioning of trade related aspect of Intellectual Property Rights. WTO Members are represented in each of these specialised councils. In conducting the duties assigned to them, these specialised councils may make a recommendation to the Ministerial Conference or in its absence, the General Council, to adopt an amendment or an authoritative interpretation of a multilateral trade agreement.[80]

The panel process used in the WTO settlement of disputes is a structured process to achieve judicial effectiveness. Member states enter into consultations and attempt to resolve differences using the defined processes (see 2.3.Dispute Resolution). If initial consultations and the recommendations of the panels are not accepted, the dispute may be raised to the Appellate Body for review.[81]

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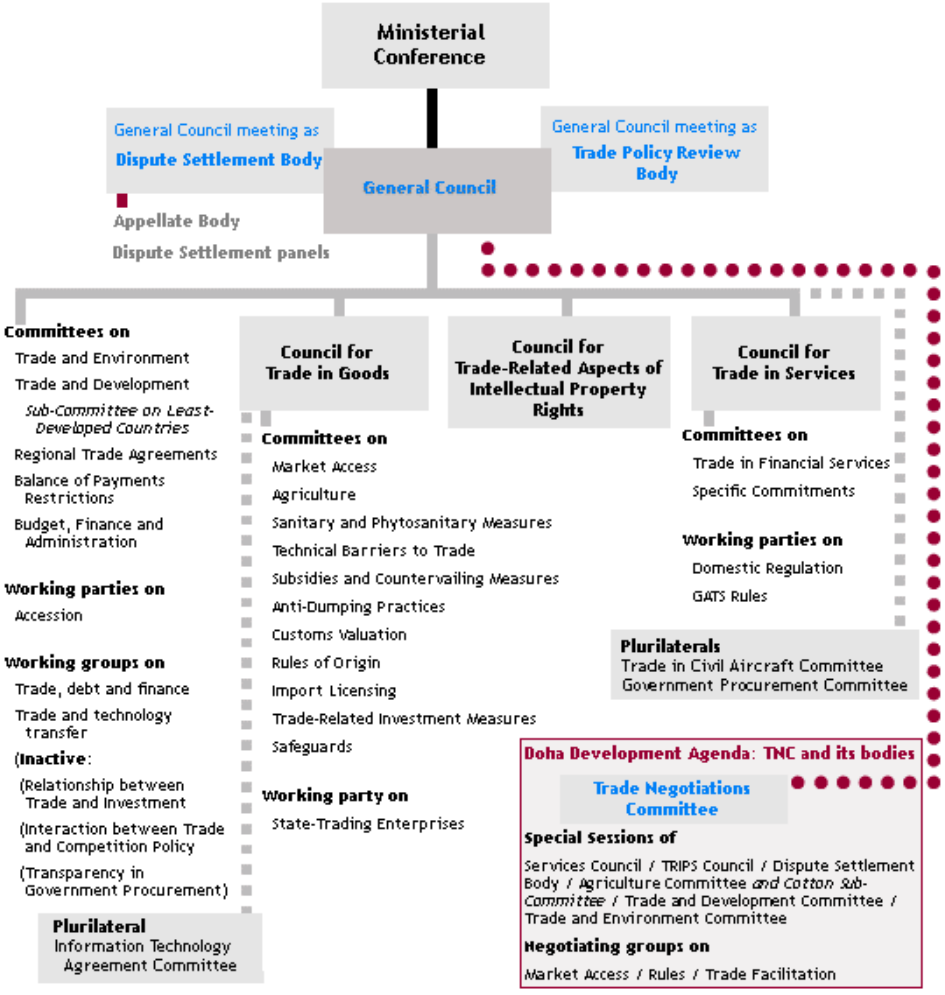
[79] Bossche, P. "The Law and Policy of the World Trade Organization" 2nd edition, 2008, Cambridge University Press pp.122-124
[80] Bossche, P. "The Law and Policy of the World Trade Organization" 2nd edition, 2008, Cambridge University Press pp.122-126
[81] The Panel Process, WTO website, last accessed 15/04/2013 http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp2_e.htm

The Appellate Body (AB) sits under the DSB and was established as a standing body consisting of seven persons with a rotation of four years. Since 1995 the Appellate Body under Article 17 of the DSU hears appeals on panel reports in dispute between Member States and can modify, reverse or uphold panel findings. The Appellate Body works according to the procedures set out in the DSU and the Working Procedures for Appellate Review. Appellate Body Reports must be accepted by all parties involved in the dispute.[82]

Figure 1. WTO Organisational Structure



[82] Dispute Settlement: Appellate Body, WTO website, last accessed 15/01/2013, http://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm

2.3. Dispute Resolution Process

As a result of the large number of trade relationships between the Member States of the WTO, differences in views between parties might exist, disputes may arise and need to be resolved. If a member state believes that its supposed benefits arising from the agreements are impaired, hindered or otherwise being nullified by the actions of another member state, either by failing to carry out obligations under the agreements, or applying measures that countermand the agreement objectives or other actions, that member state can initiate dispute resolution procedures within the WTO framework.[83]

The Dispute Settlement Body (DSB) is responsible for settling disputes,[84] arising between Members of the WTO in virtue of the Dispute Settlement Understanding (DSU), which contains rules and procedures in settling disputes. There is a constant option for parties to discuss and settle their dispute through consultation out of court or without the need for a tribunal. Resolving the dispute is more important than bringing parties to trial.[85]

The General Agreement on Tariffs and Trade (GATT 1947) contained two articles on dispute settlement: Article XXII (Consultation) and Article XXIII (Nullification or Impairment) considering rights for the party not receiving the benefits guaranteed to him under the GATT agreement, as a result of another party's conduct, and finding an acceptable solution to the parties through consultation. If consultations fail, a panel of 3 or 5 experts investigate the case and give a report, this is non-binding until all

[83] Article XXIII:1 (a) to (c) of GATT 1994
[84] Dispute Settlement, WTO website, last accessed 15/04/2013 http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#dsb
[85] Consultation, WTO website, last accessed 15/04/2013 http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s2p1_e.htm

parties accept its findings unanimously. This mechanism was criticised as weak due to the consensus requirement which could be misused to delay the application of the panel decisions; there was also a lack of clear objectives and procedures; a lack of time constraints.[86]

Accordingly, The WTO's Dispute Settlement Understanding displaced the GATT system as of January 1995 and was considered to be one of the most important results of the Uruguay Round negotiations. The Punta Del Este Declaration at commencement of the Uruguay Round says:

> "To assure prompt and effective resolution of disputes to the benefit of all contracting parties, negotiations shall aim to improve and strengthen the rules and procedures of the dispute settlement process, while recognizing the contribution that would be made by more effective and enforceable GATT rules and disciplines. Negotiations shall include the development of adequate arrangements for overseeing and monitoring of the procedures that would facilitate compliance with adopted recommendations".[87]

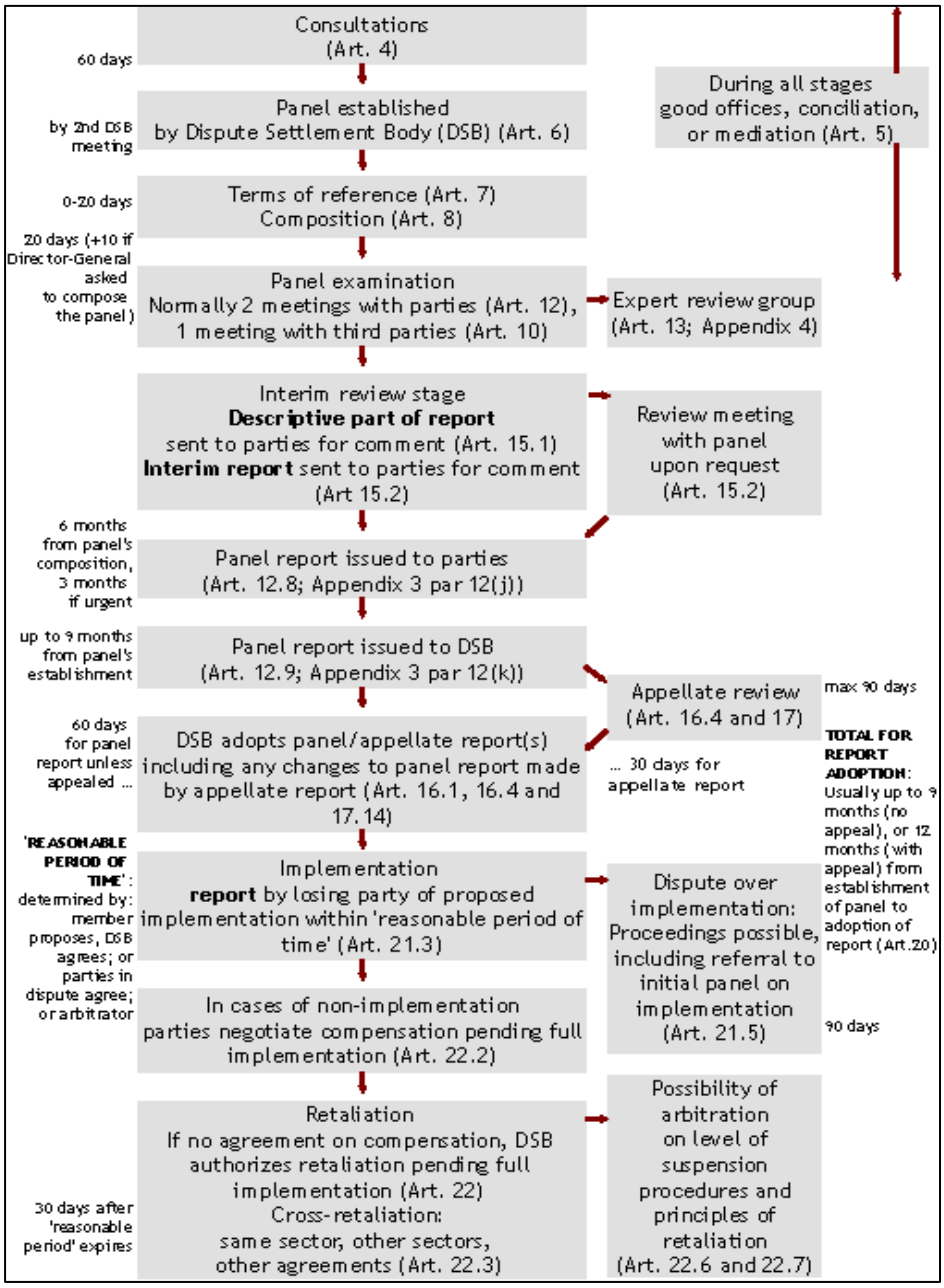
The DSU system under the WTO has many advantages such as the power of panel findings which cannot be blocked by respondents; the clear timetable with procedures and limited times, binding to the dispute parties, which led to a decrease in dispute duration. One of the most important features of the DSU system is the applicability of

[86] Read, R. (2005), "Trade Dispute Settlement Mechanisms: the WTO Dispute Settlement Understanding in the Wake of the GATT" p.15
[87] GATT (1986), Ministerial Declaration, Punta del Este, Geneva: GATT

its rules and procedures even in complex disputes (see figure 3).[88] The respondent has a 10-day limit to respond to the request for consultation submitted by the complainant, and a maximum of 30 days to enter into consultation and 60 days minimum to engage in the consultation. If a respondent does not meet one or more of these time limits, a complainant may request the establishment of a panel immediately. [89]

88 Understanding on Rules and Procedures Governing the Settlement of Disputes, WTO website, last accessed 15/04/2013
http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm
[89] The Process, WTO website, last accessed 15/04/2013
http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s1p1_e.htm

Figure 3. WTO Dispute Resolution Process



To establish a dispute panel if the consultation fails, a complainant must file a request within 60 days of the request for consultation, submitted in writing to the Chair of the Dispute Settlement Body (DSB). This is then circulated to all WTO Members to inform the respondent and interested third parties.

If a case contains more than one complainant or if several Members have similar complaints, article 9 (1) stipulates that a single panel could be established to study all these complaints, taking into account the rights of all concerned Members.[90] Third parties with a 'substantial interest' in the trade dispute have a right to introduce their submissions and be heard by the panel. The DSB must be notified within 10 days of the establishment of the panel. In cases of nullification or impairment of their benefits, the third parties could resort to the DSU.

The functions and procedures of the WTO dispute panels can be found in articles 7, 8 and 11 to 15 of the DSU. The main task of a panel is to assist the DSB in studying and assessing case facts of a trade dispute and their conformity with the WTO agreements. The panel is required to investigate the evidence and give recommendations to the DSB. Article 8 of the DSU explains the composition of the dispute panels: A panel usually consists of three to five members chosen by the WTO Secretariat. Panelists must have appropriate experience in the subject of the dispute. However they must not be citizens of a state known as a party to the dispute. [91]

According to panel procedures, set out in Appendix 3 of the DSU, a flexible timetable defines panel deliberations.[92] Most disputes cases take between 9 and 12 months from the panel establishment to the publication of its report.[93]

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[90] Article 9 (1) of the DSU
[91] Article 8 of the DSU
[92] Appendix 3 of the DSU
[93] WTO (2004). A Handbook on the WTO Dispute Settlement System, Cambridge University Press

The official WTO website clarifies dispute settlement panel procedures.[94] Before the first hearing, dispute parties present their case in writing to the panel. In the first hearing stage, the complaining country (or countries), the responding country, and those that have announced they have an interest in the dispute, make their case at the panel's first hearing. Next, the countries involved submit written rebuttals and present oral arguments at the panel's second meeting. Meanwhile, if one side raises scientific or other technical matters, the panel may consult experts or appoint an expert review group to prepare an advisory report. Then, the panel submits the descriptive (factual and argument) sections of its report to the two sides, giving them two weeks to comment but this report does not include findings and conclusions. Afterwards, the panel submits an interim report, including its findings and conclusion, to the two sides, giving them one week to ask for a review. The period of review must not exceed two weeks and during that time, the panel may hold additional meetings with the two sides. After that, a final report is submitted to the two sides and three weeks later, it is circulated to all WTO Members. If the panel decides that the disputed trade measure does break a WTO agreement or an obligation, it recommends that the measure be made to conform to WTO rules. The panel may suggest how this could be done. Finally, the report becomes the Dispute Settlement Body's ruling or recommendation within 60 days unless a consensus rejects it.[95]

Any of the dispute parties, except the third party, has the right to appeal the panels' final report within 60 days of its publication. In this situation, the panel does not

[94] Understanding the WTO, Settling Disputes. WTO website, last accessed 15/04/2013 http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm
[95] Understanding the WTO, Settling Disputes, A Unique Contribution, official WTO website last accessed 15/04/2013 http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm

present the final report to the DSB until the appeal stage is over. The Appellate Body has the right to modify or reverse the findings and recommendations of the panel report under its own rules. The appellant has a 10-day time limit, from the date of a publication of the panel's final report, to make his appeal which is required to be clear and based on a relevant legal argument. The Appellate Body works on resolving the dispute cases by reviewing whether or not the panel has correctly applied the provisions of the Covered Agreements and whether they have been interpreted correctly. And then it is submitted to the DSB for adoption.[96]

Once the final report of the Appellate Body is adopted by the DSB, its recommendations become binding on the dispute parties and a losing respondent is required to change its trading system in compliance with the WTO rules. Under Article 21 of the DSU (surveillance of implementation), losing respondents are required to inform the DSB, within 30 days from the adoption date of the final report, regarding their implementation of Panel or Appellate Body recommendations.[97]

An early dispute that involved a challenge to US domestic policy and was widely seen as a test for the efficacy and speed of the dispute settlement system when faced with a breach of WTO law was the *US-Gasoline* case.[98]

The US as a larger more developed country was a member with a great deal of power but was challenged by a weaker and less developed member (Venezuela) when Venezuela complained to the DSB against the United States on 23/1/1995 alleging

[96] Article (17) of the DSU
[97] Article (21) of the DSU
[98] *US- Gasoline* WT/DS2/AB/R

that a US gasoline regulation discriminated against gasoline imports in violation of GATT Articles I and III and Article 2 of the Agreement on Technical Barriers to Trade (TBT).[99] Brazil joined the case on 10/4/1995. In response to Venezuela's request, the DSB established a dispute panel at its meeting on 10/4/1995, and the panel was composed on 26/4/1995. The same panel was mandated to include Brazil's complaint on 31/5/1995. The panel completed its final report and it was circulated to the WTO Members on 29/1/1996. The US appealed on 21/2/1996. The Appellate Body published its report on 22/4/1996 and the DSB adopted it on 20/5/1996, one year and four months after the complaint was first lodged. Finally, the US announced implementation of the recommendations of the DSB as of 19/8/1997, at the end of the 15 months reasonable period of time. That the US amended its laws to comply with the ruling of the DSB proves the efficacy and speed of the system.[100]

It can be seen that the dispute settlement system under the WTO has many advantages if compared with the previous system of settling disputes under the GATT system. It can be argued that the existing mechanism has modified the imperfection of the GATT's dispute settlement provisions. The clarity and accuracy of its provision lead to speed in dealing with the disputes, all dispute parties are subject to procedures according to certain periods of times which must be respected. Moreover, the shift to negative consensus meant that binding rulings against respondents were made, and the blocking of unwelcome decisions by losing respondents was brought to an end.

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[99] *Ibid*
[100] *US- Gasoline* WT/DS2/AB/R (1996)

Furthermore, the procedure's transparency allows all WTO Members to be acquainted with the case developments to ensure the procedural equity, and it gives them the possibility to be involved in the dispute as a third party if needed,[101] such as what Brazil did, in the above mentioned case, by joining the *Gasoline* case which had complained by Venezuela against the US.[102]

The establishment of a permanent appellant body, which specializes in hearing a party's appeal against a dispute panel, clarifies the desire to achieve justice between the parties. Besides, the creation of particular rules that help to observe the implementation of the Panel or the Appellate Body's recommendations stresses the seriousness of the implementation and helps to respect the DSB's decisions. Also, the flexibility of the rules and the system's intention to resolve disputes which arise between parties more than giving judgments in cases, leads to resolving many cases through the consultation outside the court or the tribunal.[103] According to the World Trade Report (2007), 88% of the complainants, under the WTO, have mostly won their cases (counting the ones that went through to an adopted report and "decisive" ruling respectively) and more than one-third of completed cases have been mutually settled, some of them (about 10 percent of the total) without notifying details of a bilateral agreement to the membership as a whole.[104]

The dispute resolution system of the WTO, as described above, is unusually legalistic and effective for an international organisation. As we will see the legalistic

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[101] Lwasawa, Y. (2002) WTO Dispute Settlement as Judicial Supervision
[102] *US- Gasoline* WT/DS2/AB/R (1996)
[103] Understanding the WTO, Settling Disputes: A Unique Contribution. last accessed 15/04/2013 http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm
[104] World Trade Report (2007), WTO, pp. 273-274

appearance it offers to the WTO is one of its distinctive features as an international legal system. It is seen as a successful outcome of the formation of the WTO, and has marked an improvement on the GATT system.

The DSU has not escaped criticism. According to Read, "It has been accused of being biased against developing countries in that it favours the leading industrialized countries and that the EU and the United States, in particular, are seen as having created and using the DSU to achieve their own objectives by virtue of their international economic and political leverage, greater resources and retaliatory power".[105] However, a clear example of the non-biased implementation of the DSU towards industrialised countries is the *US-Tuna* case,[106] where Mexico complained against the United States in 1991 for its ban on imports of tuna products caught by Mexican fishing vessels in Mexico's waters and on the high seas. The case showed the circumstances under which a country could prohibit imports on the grounds that the product had been sourced in an environmentally harmful way. The United States was applying its domestic environmental standards to fishing activities, regarding the protection of dolphins taking place outside its territory, citing Articles XX (b) and XX (g). However, the American ban appeared to violate two essential rules of international law: (a) that all countries are entitled to fish freely on the high seas; and (b) without agreement to the contrary, one country cannot apply its standards to activities in other countries. At the time there were no international rules that dealt

[105] Read, R. Dispute Settlement, Compensation & Retaliation under the WTO, Ch45, 2005
[106] *US- Tuna (Mexico)* DS21/R- 39S/155

with this situation; two separate GATT panels which examined this case found decisively in favour of Mexico.[107]

Although the dispute settlement procedures under the WTO are now clearer, faster and more accurate than the previous system under the GATT, in certain situations, such as dumping and subsidies cases, trial duration could lead to the destruction of the economy in a developing nation; especially if the issue concerns the trade in raw materials where the economy of the developing country relies on them.[108] Furthermore, the high costs of resorting to the dispute settlement system and the lack of effective implementation of the provisions providing for special treatment in favour of developing countries badly affect the willingness of members that are developing countries to use the dispute settlement system.[109]

While discussing the useful changes that should be made to reform the current WTO dispute settlement system, Petersmann argues that "As most panel proceedings do not respect the time frames (6-9 months) prescribed in Articles 12 (8) and 12 (9) of the DSU, proposals for a faster start-up process were widely supported by granting a panel request at the first meeting of the DSB, speedier selection of panelists, shorter periods for the first submission by the complainant".[110] In addition, Davey considers that:

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[107] *Ibid*
[108] Ismail, F. (2005), A Development Perspective on the WTO July 2004 General Council Decision
[109] Sands, P, (2005). "Lawless World – America and the Making and Breaking of Global Rules", Penguin Group, pp 103-108
[110] Petersmann, E. (2003) "WTO Negotiators Meet Academics: The Negotiations on Improvements of the WTO Dispute Settlement System" Journal of International Economic Law (2003) 6 (1): 237-250

> "The WTO dispute settlement system needs to move to use of a standing panel body, similar to the Appellate Body, from which all panelists would be selected. And this would reduce the amount of time taken by the typical panel by two months; and provide more experienced panelists and, therefore, the likelihood of better decisions; and make procedural innovations, such as remand, much more practicable".[111]

According to Davey, many WTO members support the idea of making panel proceedings open to the public to achieve transparency and credibility and give panel procedures an advantage compared to national and international judicial practices, as long as the consultation stage, which comes before a panel's establishment, has a degree of privacy. Also, the procedures, which allow the admission and handling of amicus briefs by a panel/Appellate Body, are needed to be regulated under the acceptance of such admission in WTO jurisprudence.[112]

2.3.1. Appellate Process and Binding Effect

The final panel report is issued to all parties in the dispute, and later circulated to the general WTO Members. It then becomes an unrestricted document available to the public. The report is adopted by the Dispute Settlement Body (DSB) 60 days after date of circulation to Members unless either one of the parties decides to appeal, or the DSB decides not to adopt the report. If a panel report is appealed it is not discussed by the DSB until the appellate review proceedings and report, and the panel

111 Davey, W. (2006), "The WTO: Looking Forwards" Journal of International Economic Law (March 2006) 9 (1): 3-29.
112 Davey, W. (2005) The Sutherland Report on Dispute Settlement: A Comment

report are complete. All Members can comment on a panel report, and time is allowed for this.[113]

The period for conducting an examination by the panel should not exceed 6 months. If it cannot issue a report within this time it must inform the DSB in writing of the reasons for delay and with an estimate of when the report will be finished. This should not in any case exceed 9 months. However the panel process may exceed these limits if, for example, complexity of the case, need to consult experts, scheduling meetings, or translating the reports require extra time.[114] Occasionally the panel may be suspended for a maximum of 12 months at the request of the complainant.[115] If suspended for more than 12 months the authority of the panel lapses.

Appellate Review:

The Appellate Body has detailed working procedures as set out in the *Working Procedures for Appellate Review* pursuant to Article 17 of the DSU, which is Annex 2 of the WTO agreement. The working procedures of the Appellate Body contain the provisions which are referred to as "rules". Where a procedural decision is not covered by the working procedures the division hearing the appeal may adopt a more appropriate procedure for the purpose of the appeal.[116]

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[113] Dispute Settlement, WTO website, last accessed 15/04/2013 http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm

[114] *EC – Approval and Marketing of Biotech Products* WT/DS291/37, Communication from Chairman of the Panel,

[115] *EC- Butter* WT/DS72/R, Panel Report, para. 12, Communication from Chairman of the Panel, *India – Wines and Spirits* WT/DS380

[116] Appellate Body, WTO website, last accessed 15/04/2013 http://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm

Appellate review proceedings start with written notification to the DSB of a party's intention to appeal, and filing with the Appellate Body of a notice of appeal, pursuant to Article 20 (1) of the Working Procedures.[117] The notice of appeal must identify the grounds for appeal, such as errors in legal interpretation or findings as set out in Rule 20 (2) (d). This rule requires the appellant to provide notice of the alleged error that the appellant intends to appeal against so as to allow a proper defence, but not the reasons why it is seen as erroneous. However if the appellee fails to give sufficient notice of a claim of error, that claim cannot be considered by the Appellate Body.[118] All claims intended to be made on appeal should be expressly and exhaustively covered in the notice of appeal.[119] However the issue of the panel's jurisdiction is fundamental.[120] A party can appeal a panel report as soon as it has been circulated and has not been adopted by the DSB. In practice appeals are made shortly before the DSB meeting. The Appellate Body draws up time limits in accordance with those set out in the Working Procedures. Only if time limits result in manifest unfairness would they be modified under Rule 16 (2). A cross appeal under Rule 23 must be filed within 12 days of the first notice and meet the same requirements.

Under Rule 30 (1) a Member may withdraw their appeal at any stage, normally leading to termination of the appellate review.[121] Sometimes appeals are withdrawn so new ones can be submitted. Under this rule an appellant is allowed to attach

[117] Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010
[118] Appellate Body Report, *US – Upland Cotton* WT/DS267, para 206.
[119] Appellate Body Report, *US – Upland Cotton* WT/DS267, paras 494-5.
[120] Appellate Body Report, *US – Offset Act (Byrd Amendment)* WT/DS217, para 208.
[121] Appellate Body Report, *India – Autos* WT/DS146 and WT/DS175, para 18.

conditions to the withdrawal of its appeal, saving its right to file a replacement notice.[122]

The appellant must file a written submission within 7 days of the filing of the notice to appeal.[123] This must set out the exact grounds of appeal, the specific allegations of legal error, and legal arguments in support of the allegations.[124] If any parties have filed notice of another appeal, under Rule 23, they must file another appellant's submission.[125] Within 25 days of the notice of appeal any party wishing to respond may file an Appellees' submission setting out specific details and legal arguments.[126] Failure to submit submissions within the time limits may lead to dismissal of the appeal or other orders from the division, after listening to the views of the parties involved.[127]

Oral hearings are usually held between 35 and 45 days after the notice.[128] The purpose of such hearings is to present and argue their case, and clarify legal issues. After presentations from the Appellant and Appellee members of the division can ask detailed questions on the issues. Participants can make a concluding statement. Oral hearings are normally completed in one day but may take longer in complex cases.[129]

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[122] Appellate Body Report, *EC – Sardines* WT/DS231, para 141.
[123] Rule 639 of the *Working Procedures*
[124] Rule 21 (2) of the *Working Procedures*
[125] Rule 23 (1) and Rule 23 *bis* of the *Working Procedures*
[126] Rule 22 (1) and 23 (3) of the *Working Procedures*
[127] Rule 29 of the *Working Procedures*
[128] Rule 27 (1) of the *Working Procedures*
[129] *EC- Bananas* WT/DS27, and *EC – Hormones* WT/DS26.

At any time the division may request further evidence and specify the time allowed to present it.[130] Any such requests and responses are made available to all other parties involved, so they can respond.[131] There is an implicit authority, not expressly stated, that allows the Appellate Body to consult experts. Throughout all participants are not allowed *ex parte* communication with the Appellate Body.[132]

The rights of third parties are limited in panel proceedings, and normally they only attend a special session of the first meeting and receive the written submissions. Third participants i.e. third parties participating in the review, have broader rights if they have filed a written submission or intend to participate in the oral hearings where they can make a statement and respond to questions.

The division responsible for the appeal will exchange views with other members of the Appellate Body before concluding its report.[133] This puts into practice the principle of collegiality set out in the Working Procedures. This may take 2 or more days depending on its complexity. After the exchange of views and further deliberations the report is then drafted, translated, and circulated to members as an unrestricted document.

Within 30 days of circulation of the Appellate Body report the decisions are adopted by the DSB unless it decides by consensus not to adopt the reports. While the adopted Appellate Body report must be accepted unconditionally, members can without

[130] Rule 28 (1) of the *Working Procedures*
[131] Rule 28 (2) of the *Working Procedures* Appellate Body Report, *US – Section 211 Appropriations Act* WT/DS176/11 para 13
[132] Article 18.1 of the DSU and Rule 19 (1) of the *Working Procedures*
[133] Rule 4 of the *Working Procedures*

prejudice express their views on the contents of the report. Members often take advantage of this right – winners praising the decisions and losers being more critical. The views of members on the reports are recorded in minutes of the DSB meetings.

As a general rule proceedings should not exceed 60 days from when a party gives notice of its decision to appeal.[134] If the report cannot be completed within that time the Appellate Body must inform the DSB in writing, giving the reasons for delay and when it estimates the report will be ready. In no case should proceedings exceed 90 days,[135] and although there have been rare exceptions this is usually the case.[136] Reasons for delays include complexity of the appeal, overload of work, delay in translations, or death of an Appellate Body member.

2.4. Level of Legal Order

The WTO has identified itself as an international public law organisation in the Marrakech Declaration, in the nature of international public law. Its members are sovereign states (with the EU as a customs union being an exception).[137]

The Vienna Convention on the Interpretation of Treaties is used to interpret the covered agreements as they are considered to be international treaties.[138] An unusual

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[134] Article 17.5 of the DSU.
[135] *Ibid*
[136] There are 7 cases on this: *EC – Hormones* WT/DS26, *US – Lead and Bismuth II* WT/DS138, *EC – Asbestos* WT/DS135/AB/R, *Thailand – H-Beams* WT/DS122, *US – Upland Cotton* WT/DS267, *EC – Export Subsidies on Sugar* WT/DS265, *Mexico – Anti-Dumping Measures on Rice* WT/DS295.
[137] Pauwelyn, J. "The Role of Public International Law in WTO: How Far Can We Go?" The American Journal of International Law Vol. 95:535 2001 pp.535-540
[138] *US-Gambling* WT/DS/285/AB para.106 p.52; *US- Gasoline* WT/DS2/AB/R, *supra* note 52, at 17; *Japan- Taxes on Alcoholic Beverages* WT/DS8/AB/R, at 10 (Nov. 1, 1996)

aspect of the WTO is the fact that acceding members are obliged to sign and adhere to all the covered agreements as a complete package; it is not possible to select which agreements a member state will subscribe to. [139]

The WTO is not merely an organisation; it is a complete legal system with judicial, legislative and executive branches in operation. At the outset with the GATT 1947, the system was one of more diplomatic leanings, aiming to organise and moderate international trade and was not legalistic in nature. However at the end of the Uruguay Round with the establishment of the WTO as a formal organisation, this changed and became increasingly structured. The panel process was introduced (elaborated by the DSU as first instance trial courts followed by the appellate body culminating in a rule of law that can be applied). The legalistic nature of its dispute settlement process was introduced in the view of increasing the effectiveness and ability to implement decisions and hold members to their obligations.[140] (See section 2.1)

The WTO has features of a trade area, designed to encourage trade liberalisation as an international trade area however it cannot by any means be considered a nation state or federal system as there is no armed force or methods of sanctions or ability to enforce decisions (See Section 3.1.1). There is also limited legitimacy through service provision (there is no effort on the part of the WTO to promote education or police as the aims are not of this scope) but attempts to use international law to guide member states interactions in matters of trade and moderate these interactions.

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[139] Artcle 2.2 of Marrakesh Agreement Establishing the WTO
[140] Jackson, J. "The World Trading System: Law and Policy of International Economic Relations" 2nd edition, 1997 MIT Press pp. 47-55

Due to its breadth and not being limited by geographical or regional constraints there is a wide variety of cultures, languages, religions and policies among the member states, thus there is little cohesion among members and potential tension between member states desire to maintain sovereignty and the involvement of the organisation if it is to be effective and use public policy freedoms. Currently, member states are able to self-remedy, implementing measures that they see are necessary which may result in another member state raising a dispute claim.[141] The WTO does give the parties in dispute the right and opportunity to resolve matters through a consultation stage or outside of court during any of the trial stages; these choices are not typically available in other legal systems or sovereign state courts, especially if a common right is involved.[142] The decisions issued by the WTO's Panel/Appellate Body have sometimes taken a very long time to be accepted or to be implemented by the parties and it could be rejected by the consensus of the WTO's Members, while sovereign state's judgments have direct effects and its decisions are binding unless rejected by a higher court ruling.[143] The progress of the organization is dependent on this consensus; and decisions being made by the member states. The voting is most often of a positive or negative impact, rarely is there uniform or majority consensus on an issue being negotiated. There is also no concept of weighted majority. The reports of these panels and the Appellate Body are subject to review by the DSB, which also operates on the basis of consensus. Developing countries (the majority in the WTO)

[141] Matsushita, M; Schoenbaum, T and Mavroidis, P. "The World Trade Organization" 2nd edition, 2006, Oxford University Press p.89
[142] Consultation, WTO website, last accessed 15/04/2013 http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s2p1_e.htm
[143] Alvarez, J. (2005) "International Organisations as Law-makers", Oxford University Press, pp 463-472

do not participate in decision making and are usually excluded from negotiations which include small groups of developed countries.[144]

2.5. Sources of Substantive Law

The sources of law within the WTO are limited to the covered agreements and Ministerial Conference decisions. As a result of the Uruguay Round of Multilateral Trade Negotiations (MTN) during the period (1986-1993), twenty-four international agreements have been signed, including the Agreement of establishing the WTO, GATT 1994 on trade in the goods sector, GATS on trade in the services sector, and the TRIPS Agreement on the Protection of Intellectual Property Rights, in addition to seven memorandums of understanding. The aim of putting the agreements in one package is because they are all binding and related to each other, this means that any state wants to join the WTO must be fully committed to the Marrakesh Agreement and all the agreements therein.

There are two types of agreements in the WTO according to how mandatory the application of their provisions is, which are as follows[145]:

1. Multi-lateral Agreements

   There are fifteen agreements of this type including GATT 1994, GATS, and TRIPS. In addition, there are subsidiary agreements such as the Technical Barriers to Trade (TBT) Agreement. The provisions of such agreements are mandatory for all Member states of the WTO, whether they are developed, developing or least developed countries.

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[144] *Ibid*

[145] Bossche, P. (2008)"The Law and Policy of the World Trade Organization" 2nd Edition, Cambridge University Press pp 78-82

2. Pluri-lateral Agreements

   This type includes nine Agreements such as the Government Procurement Agreement. Such agreements are binding only to the Member states which have signed to it and not to all Member states of the WTO.

Under Article IX: 2 of the Marrakesh Agreement, the Ministerial Conference and the General Council have exclusive authority to adopt interpretations of the agreement and of all the multi-lateral trade agreements. This authority is exercised based on recommendations of the panels or councils overseeing the respective agreements, and the decision to adopt an interpretation is taken when a three-fourths majority is reached.[146] The DSU confirms this authority to the Ministerial Conference.[147] The results of disputes, panel reports and Appellate Body recommendations and decisions are not considered to be sources of law in the WTO. This is a source of tension within the WTO, as the Appellate Body is necessarily a law-making body but is not accorded this authority within the legal order.

General Agreement on Tariffs and Trade (GATT94)

This Agreement is considered to be one of the main Agreements of the WTO. It consists of GATT 47 in addition to the amendments that occurred during the rounds of negotiations previous to the Uruguay Round. All protocols of accessions, schedules of commitments, annexes and codes fall under this Agreement. GATT 94 relies on four basic rules:

[146] Article IX:2 of Marrakesh Agreement Establishing the WTO
[147] Article 2 Understanding on Rules and Procedures Governing the Settlement of Disputes

1. Liberalising international trade and allowing foreign products to access domestic markets by reducing tariffs and determining the bound rates
2. Protecting local products solely through the bound rates and eliminating Non-Tariff Barriers as stated in Article XI of the Agreement
3. Implementing the policy of non-discrimination between trading partners who are Members in the WTO by complying with the principle of Most Favoured Nation Treatment (MFN) as stated in Article I of the Agreement
4. Foreign products should be treated equally with the national products. The same should apply to foreign and domestic services. This principle called "national treatment" which means giving the same treatment to imports as one would give to the goods or services of one's own national goods or services.

Within GATT 94 there are several articles which are of relevance to this research project and these are:

Article I: General Most-Favoured-Nation Treatment This article ensures that any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded unconditionally to the like product originating in or destined for the territories of all other contracting parties.

Article II: Schedules of Concessions

This article describes the schedule of concessions and the regulations accordingly that each contracting party must accord the commerce of the other contracting parties' treatment no less favourable than that to another party. Contracting parties are not

allowed to impose undue charges not meeting those of the schedule. The article also details monitoring and control of monopolies on products, and methods of resolving issues around treatment of products among contracting parties.

Article III: National Treatment on Internal Taxation and Regulation

This article describes the stipulations regarding internal taxes, charges, laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products. The article also details that none of the products of any contracting party imported into the territory shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

Article XI: General Elimination of Quantitative Restrictions

This article details that no prohibitions or restrictions other than duties, taxes or other charges shall be instituted by any contracting party on the importation of products of any other contracting party or on the exportation of products to another contracting party, but stipulates that these do not include temporary restrictions that aim to relieve shortages or manage surplus or that are necessary for classification or grading purposes, or that are part of government restrictions on agricultural or fisheries or animal products. The article also stipulates that any contracting party applying restrictions must give public notice of the total quantity or value of products permitted for import during a specified future period.

Despite the premise of Article I on Most Favoured Nations, there are exceptions within GATT 94, of which the following articles are especially relevant to this research project. These are described briefly here and in more detail in section 2.6.

Article XIX: Emergency Action on Imports of Particular Products

This article details the actions that may be undertaken by a contracting party in the case of any product imported in increased quantities that may threaten serious injury to domestic producers of the same. The importing contracting party shall be free to suspend the relevant obligation in whole or in part or to withdraw or modify the concession as necessary to prevent or remedy such injury. The contracting party is obliged to notify the exporter in writing in advance and offer them an opportunity to consult.

Article XX: General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(*a*) necessary to protect public morals;

(*b*) necessary to protect human, animal or plant life or health;

(*c*) relating to the importations or exportations of gold or silver;

(*d*) necessary to secure compliance with laws or regulations not inconsistent with the provisions of this Agreement, including those on customs enforcement, enforcement

of monopolies, protection of patents, trademarks and copyrights, and prevention of deceptive practices;

(*e*) relating to the products of prison labour;

(*f*) imposed to protect national treasures of artistic, historic or archaeological value;

(*g*) relating to the conservation of exhaustible natural resources

(*h*) undertaken to meet obligations under any intergovernmental commodity agreement

(*i*) involving restrictions on exports of domestic materials necessary to ensure essential quantities to a domestic processing industry during periods when the domestic price is subject to governmental stabilization

(*j*) essential to the acquisition or distribution of products in general or local short supply

Article XXI: Security Exceptions

This article details the conditions under which contracting parties may be exempt from the obligations in the agreements: if information disclosure requested is contrary to their essential security interest as relates to fissionable materials, arms trafficking, ammunition and implements of war, taken in time of war or international relations emergency or that might prevent a contracting party from taking actions meeting their obligations under the United Nations Charter for the maintenance of international peace and security.

Agreement on Safeguards

This agreement relates to actions taken by a member state to protect a specific industry and aims to strengthen the existing agreement setting out clear criteria. It prohibits "grey area" measures and put in place a "sunset" clause on safeguard actions. The agreement is pursuant to the exceptions detailed in Article XIX of GATT 1994

The agreement sets out criteria for "serious injury" and the impact of imports. It should be applied only to the extent necessary. Safeguard measures should be applied regardless of source. There are time limits for all safeguard measures, and generally they should not exceed 4 years although they can be extended up to 8 years. There should be consultations on compensation and if these are not successful the affected members could withdraw equivalent concessions.[148] There are some different rules for developing countries. The WTO has attempted to use of safeguards to allow room for necessary public policy imperatives in the guise of the exceptions. [149]

Agreement on Application of Sanitary and Phyto-Sanitary Measures (SPS)

This Agreement aims to harmonise food safety and animal and plant health regulations – known as sanitary and phyto-sanitary measures – in such a way as to encourage members to base their measures on international standards and recommendations. These measures considered being significant and the WTO Members have intended to negotiate them in a separate agreement according to its

[148] Rodrik, D. "One Economics Many Recipes: Globalization, Institutions and Economic Growth" Princeton University Press 2007 pp. 230-231
[149] Rodrik, D. "The Globalization Paradox: Why Global Market, States, and Democracy Can't Coexist" Oxford University Press 2011 pp. 253-254

relation with aspects difficult to liberalise. Members can use higher standards of protection if there is scientific justification. However, Member states should not use these measures as tools to discriminate between members where similar conditions prevail. These measures described in this agreement are an elaboration and explanation of Article XX (b) of the GATT 1994.[150]

The agreement addresses procedures and criteria for risk assessments.[151] It is expected members accept the measures of other members as equivalent if they achieve the same level of health protection. There are provisions on control, inspection, and approval procedures.

As an example of the usage these measures, Japan has used its rights to ban the importation of US beef in 2003 after discovering that cows in one of Washington state's farms were infected with spongiform encephalopathy (BSE) which can affect humans.[152] Another good example of the SPS Agreement at work is the *EC – Hormones* case, as the SPS Agreement in this case took precedent over domestic opinion in the EU.[153]

Agreement on Technical Barriers to Trade

This agreement adds to the Agreement on Technical Barriers to Trade reached at the Tokyo Round. It is an elaboration of Article XX (b) and XX (g) when used in dispute situations. It aims to ensure technical negotiations and standards, testing, and

[150] Article (2) of the SPS Agreement
[151] Article (5) of the SPS Agreement
[152] Becker, G. "*Japan-US Beef Trade Issues*" CRS Report for Congress, RS22115 dated April 13,2005
[153] *EC- Hormones* WT/DS26

certification do not act as barriers to trade and encourages the use of international; standards. However it does allow for countries to establish protection for animal or plant life, health or environmental reasons.[154] In this the TBT agreement acts as a complement to the SPS agreement, operating where SPS does not (as SPS is considerably narrower and more concise in its applications). The TBT agreement covers processing and production methods. Conformity assessment is enlarged, and notification procedures are given in more detail. A code of good practice is included as an annex.

A clear example of the TBT agreement in its application is the *EC-Biotech* case between the US and EU as they were in dispute over genetically modified foods. [155] The case shows how the failure of the US to respect the political imperative of the EU led to the case stagnating due to non-enforcement even though the dispute was resolved successfully in favour of the EU. Pollack and Shaffer describe in detail the long-running disputes and trade difficulties surrounding genetically modified food and crops. [156]

Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping)

Dumping is the practice of importing a product at a lower price than that charged in the exporting country, where such imports cause injury to domestic industry. Article

[154] Article (2) of the TBT Agreement
[155] *EC-Biotech Products* WT/DS291
[156] Pollack, M and Shaffer, G. "When Cooperation Fails" Oxford University Press 2009

VI of GATT allows anti-dumping measures, and the current agreement provides more detail than the Agreement concluded in the Tokyo Round.

It provides greater clarity in defining what are considered dumped goods. It also clarifies the criteria for damaging domestic industry and states the importing country must establish a causal relationship between dumped imports and damage to domestic industry. It also provides clear procedures for investigations. It also provides that investigations where the margin of dumping is *de minimus* should be immediately dropped.

Agreement on Subsidies and Countervailing Measures (SCM)

This agreement is intended to build on Articles VI, XVI, XXIII and the earlier agreement negotiated in the Tokyo Round. It recognizes subsidies are important as an economic development issue for countries moving to market economies from planned economies and for other developing countries. It establishes three categories of subsidy. First are "prohibited" subsidies which depend on either export performance or the use of domestic over imported goods. They are subject to new dispute settlement procedures. The second category is "actionable" subsidies. This means no member should through use of subsidies cause adverse effects on another member such as, injury to domestic industry, restrictions to other benefits under the General Agreement or serious prejudice. The burden of proof in disputes is on the subsidising member. The third type of subsidy is non-actionable and could be specific or non-

specific, involving industrial research, precompetitive development, and regional assistance or environmental requirements.[157]

The agreement also sets out rules on countervailing measures on subsidised imports, and the initiation and procedures for such cases. It provides timescales for these cases, and states where the subsidy is *de minimus* or negligible the investigation should be immediately terminated. Least developed countries and those having per capita GNP of less than $1000 are exempt from disciplines on prohibited export subsidies, and there are other exemptions and extended time limits for developing countries. Civil aircraft are not subject to the agreement, as separate rules are to be drawn up.

The agreement had faced some issues due to the restrictions it imposes in its current form on the freedoms of member states to use their governmental imperatives in development or economic policy, therefore this particular area is in need of public policy intervention.[158] This will be assessed in more detail in Chapter 5.

Agreement on Agriculture

This sector is considered to be one of the most important economic sectors in developing and least developed countries. This agreement provides a framework for the long-term reform of agricultural trade and domestic policies with the aim of progressive reductions in support and protection to establish a fair and market orientated agricultural trading system. The rules governing this trade are strengthened

[157] Not renewed in 2000 as required by Article 31; this category has lapsed and Articles 8 and 9 are not in force

[158] World Trade Report 2006: Exploring the Links Between Subsidies, Trade and the WTO, WTO website, last accessed 20/04/2013, http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report06_e.pdf

to give improved predictability and stability for all Members. It aims to reduce trade distortions caused by rural domestic support policies. It allows actions, which may ease the burden of adjustment, and also allows flexibility implementation. It addresses specific concerns from net food importers and least developed countries.[159]

The agreement concerns four areas: agriculture itself; market access; domestic support, and export subsidies. As regards market access non-tariff border measures are to be replaced by tariffs that provide the same protection with the aim of reducing tariffs in the long-term. Timetables for reductions of subsidies were set out in the agreements. Developed countries are expected to reduce more and faster than developing countries. Least developed countries are not required to reduce tariffs. This package of tariffs provides for keeping current access opportunities and establishes a minimum tariff access quota which is to be expanded 5% over the implementation period. Special safeguard provisions allow extra duties to be applied where there may be a surge in imports. There is a trigger for such surges dependant on import penetration of the existing market.[160]

Domestic policies that have minimal impact on trade (green box policies), for example, general government services, are excluded from reduction commitments. Direct payments under production limiting programs, and certain other limited government assistance measures are also not included in the Total Aggregate Measurement of Support (Total AMS) commitments. Total AMS covers all product

[159] Introduction to the Agreement on Agriculture, WTO website, last accessed 15/04/2013
http://www.wto.org/english/tratop_e/agric_e/ag_intro01_intro_e.htm#introduction
[160] Article (5) of the Agreement of Agriculture

specific and non-product specific support and is to be reduced by 20% during implementation, 13.3% for developing countries, but no reduction is required for least developed countries.

Direct export subsidies are supposed to be reduced by 36% from the level in 1986-90, and the quantity of exports by 21% over the 6-year implementation period. For developing countries the reductions are two-thirds those for developed countries over 10 years. No reductions apply for least developed countries. The agreement allows some flexibility between years for reduction commitments and contains provisions to prevent avoidance of export subsidy commitments and criteria for food aid and export credits. The Peace clause under the Agreement on Agriculture means that certain actions under the Subsidies will not be applied to green box policies, domestic support, and export subsidies.[161] There is also an understanding that "due restraint" will be used for countervailing rights, and limits are set out for nullification and impairment actions. Peace provisions are to apply for 9 years. The agreement is part of a continuing process and calls for further negotiations in the fifth year, with an assessment of the first five years. It also sets up a committee to monitor implementation and follow up. This agreement is not of particular relevance to the scope or focus of this thesis, other than its potential impact on member states political interests.

Agreement on Textiles and Clothing

Trade in this sector was subject to bilateral quotas under the Multi-Fiber Arrangement (MFA). The aim of this agreement is to integrate this sector into the GATT. This

[161] Article (13) of the Agreement of Agriculture

means trade in these products will be governed by the general rules of GATT. Time limits for the stages of phasing out of MFA restrictions are given.[162] It also contains a transitional safeguard mechanism if a member's domestic industry was threatened.[163] The agreement contains provisions to deal with possible avoidance of commitments, and deal with disputes through a Dispute Settlement Body. A Textiles Monitoring Body (TMB) will oversee the implementation of commitments, and there are special provisions for countries who have not been MFA members since 1986, new entrants and suppliers, and least developed countries. This agreement, as with the previous on Agriculture, is also not of particular relevance to the thesis, but for its potential effects on member states political interests.

Other Agreements Related to Goods:

Agreement on Pre-shipment Inspection

Pre-shipment inspections are carried out, on behalf of governments, to safeguard national financial interest. This agreement establishes that GATT principles apply to pre-shipment inspections. Obligations under GATT include non-discrimination, transparency, protection of confidentiality, avoidance of unreasonable delay, use of specific price guidelines, and avoiding conflicts of interest. The agreement establishes independent review procedures.[164]

Agreement on Rules of Origin

This agreement aims to harmonise in the long term the Rules of Origin. This harmonisation program is to be finalised 3 years after the Uruguay Round, and is

[162] Article (2) of the Agreement on Textiles and Clothing
[163] Article (6) of the Agreement on Textiles and Clothing
[164] Article (2 & 3) of the Agreement on Pre-Shipment Inspection

based on making such rules objective, understandable, and predictable. The work is to be undertaken under a Committee on Rules of Origin (CRO) in the WTO and a Technical Committee (TCRO) based in Brussels. However due to the complexity of the work it was not finalized as planned and new deadlines were set in 2001. Until completion contracting parties have ensured rules of origin were positive and stated what conferred origin, rather than what did not.[165]

Agreement on Import Licensing Procedures

This is a revised agreement that strengthens existing disciplines, and increases transparency and predictability in this area. It sets out when automatic licensing procedures are assumed not to restrict trade, and recommends non-automatic procedures be limited to what is necessary. It gives a maximum of 60 days to consider applications.[166]

Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994

This agreement relates to customs valuations, and give administrators the right to ask for further information to determine values. It clarifies further provisions relating to developing countries, and sole agents, distributors, and concessions.

Agreement on Trade-Related Investment Measures (TRIMs)

This agreement relates to investment measures that distort and act as barriers to international trade. No contracting party should use TRIMs inconsistent with Article

[165] Article (4) of the Agreement on Rules of Origin
[166] Article (3) of the Agreement on Import Licensing Procedures

III (National Treatment) or XI (Prohibition of Quantitative Restrictions) of the GATT. TRIMs that are inconsistent with this are listed in an appendix.[167] All non-conforming TRIMs are subject to mandatory notification, and timescales are set out for their elimination.

General Agreement on Trade in Services (GATS)

The most important of the non-goods agreements, the purpose of this agreement is the removal of barriers to trade in services between different Members, and the liberalisation of markets both national and international. It contains three parts: first a Framework Agreement with the basic obligations of all members; second, national schedules for liberalisation; the third part contains annexes that address special situations of trade in services.

Part I defines the scope, that is, that it concerns services provided between different territories by suppliers, individuals, or other entities in those territories. Part II sets out general obligations. It is recognised a Most Favoured Nation (MFN) may not be able to extend its obligations to every service activity so it envisages exceptions, included as an annex. Provisions for economic integration are similar to Article XXIV of GATT, and there is provision for commitments on access to technology, distribution channels and information networks, and liberalisation of markets. Provisions spell out domestic regulations must be reasonable, objective, and impartial. There are obligations regarding recognition requirements for authorisation, licenses, or certificates. It encourages internationally agreed criteria and harmonisation. It also provides that restrictive business practices should be phased out, and monopolies not

[167] Article (2) of the TRIMs Agreement

abuse their position. There is provision for international transactions to be restricted in the event of balance of payment problems, subject to conditions. General and security exemptions are similar to Articles XX and XXI of GATT. It also aims to develop disciplines on trade distorting subsidies in services.

Part III contains provisions about market access and national treatment, according to national schedules. The intention is to open up markets by eliminating limits on number of service providers, total value of transactions, or operations, and numbers employed. Other restrictions such as type of entity, and amounts of foreign interest are also to be eliminated. Foreign and domestic providers should be treated the same, but there is provision for different treatment provided it does not favour domestic providers. Part IV establishes the basis for progressive liberalisation through negotiation and national schedules. Part V relates to consultation and dispute resolution and the setting up of a Council on Services.

The annexes concern the movement of labour, financial services, telecommunications, and air transport services. It was decided commitments in the financial sector would be implemented on a MFN basis and members can revise their schedules and MFN exemptions up to 6 months after the agreement enters into force.

Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

This agreement recognises that varying and different standards in this area have been a source of tension in international economic relations. It aims to create a multilateral framework by applying GATT principles and rules and those of other relevant agreements to intellectual property rights and trade in counterfeit goods.

Part I sets out general principles, especially that national commitments must not treat other parties differently. It also has a MFN clause so any advantage to nationals of another country must be extended to all other parties. Part II deals with the succession of intellectual property rights. Copyright is covered under the Berne Convention (Paris 1971) relating to artistic and literary work, and also moral rights. Computer programs are included as literary works. There are important additions in the area of rental rights relating to films, recordings, performance, and copying and bootlegging.

The agreement defines what types of signs can be protected as trademarks and service marks. Geographical indications as to origin of goods are covered, as are industrial designs. With regard to trademarks these should comply with the Paris Convention (1967) and there is additional protection of 20 years for all inventions. Exceptions are if they are prohibited for reason of public order or morality; diagnostic, therapeutic, and surgical methods; plants, animals, and biological processes. Plant varieties may however be protected. The agreement builds on the Washington Treaty in respect of integrated circuits, but with an additional protection for a minimum of 10 years and other strengthened conditions. Trade secrets, knowhow, and test data should also be protected against unfair commercial use. There is a provision for consultation in the case of anti-competitive practices in contractual licenses. Part III sets out obligations of governments to provide procedures and remedies that are effective. Civil and administrative procedures are also set out. A Council for Trade-Related Aspects of Intellectual Property Rights would monitor the agreement and compliance issues. Disputes can be settled under GATT procedures. There are different timescales for implementation for developed, and developing countries, and for different sectors e.g. pharmaceutical and agricultural chemicals.

2.6. Manifestation of Public Policy

Originally the GATT, and now the WTO is obliged to adjudicate upon the actions of some of its Member States. This is not a simple matter, as there is a natural reluctance by sovereign states to have their actions judged. For the WTO to overstep the mark it risks alienating Members pursuing valid public purposes in their domestic territories. Failure of the WTO to reach the mark risks alienating Members who honour their obligations under the covered agreements and rely upon the enforcement of the covered agreements for their economic success.

The WTO does not adjudicate on non-trade related issues and has no inherent general jurisdiction. Furthermore, the GATT 1994 and the other covered agreements recognise the existence of areas of action open to Members despite their trade impacts. Even complete bans of the importation of goods can be justified under the exceptions.[168] From this, it can be inferred that the freedom of Member States' action can be conceptualised as the area of "public policy" recognised by WTO law.

The case concerning the dispute between the US and Thailand in 1990 on the restriction and taxation of cigarette imports is an important one to consider in this respect. Citing the 1966 Tobacco Act, Thailand placed restrictions on the import of cigarettes and related tobacco materials, allowing only the sale of domestic tobacco products. The Thai government also imposed an excise tax, a business tax and a municipal tax.[169] The US disputed these restrictions, claiming inconsistencies with GATT Article XI: 1, refuting their justification by Article XI: 2(c), Article XX (b) and

[168] *US- Shrimp WT/DS58/AB/R*; *Brazil – Retreaded Tyres* WT/DS332/AB/R.
[169] *Thailand- Restrictions on Importation of and Internal Taxes on Cigarettes* WT/DS10/R- 37S/200

GATT Article III: 2. Thailand justified their measures restricting the imports under Article XX (b) as the measures were to prohibit chemicals and other additives contained in US cigarettes that they claimed made American cigarettes more harmful than Thai cigarettes.

The GATT Panel found the restrictions inconsistent with Article XI: 1 and unjustified under Article XI: 2 (c); it was further concluded that the import restrictions were not "necessary" within Article XX (b), however the internal taxes imposed were found to be consistent with Article III: 2. The panel made its recommendation that Thailand was obliged to comply with GATT 47 and that its defence was to be rejected; the health effect of all cigarettes is the same regardless of the country of origin. It was not to protect public health; it was meant to protect the monopoly. The panel maintained that it may be possible for Thailand to keep the governmental monopoly and restrict cigarette supply and still remain in accordance with the general agreement, by regulating the supply, pricing and retail availability and provided the same treatment is accorded to both domestic and imported cigarettes [170]

Thailand – Cigarettes brings into focus two issues. Firstly, Article XX (b) identifies a vital area of policy freedom for Member states. The legitimacy of Member State is bound to their ability to protect the health and life of their people (and animals and plants). Secondly, Member States may engage in false arguments; offering spurious excuses for actions. However the panels, the Appellate Body, and the WTO generally cannot insult Members by observing this fact. WTO jurisprudence must find a way to

[170] *Ibid* p. 22

discuss these issues in general terms, avoiding ascription of bad faith at all costs. The WTO attempts to balance the obligations of its agreements between the States with the need to maintain national sovereignty for them, thus the exceptions were agreed. However, the way in which the exceptions are drafted can allow for misuse or overuse, and this can negatively affect the principles of fair and liberal trade internationally.

An example of an area of legitimate Member action is that of the desire to protect the environment. In the twenty-first century threats to biodiversity and the global climate make the protection of environmental resources an area of internationally recognised valid public policy concern for Members both individually and collectively, such as in *US- Shrimp* case.[171]

Measures have been accepted under WTO law to protect turtle populations on the basis that they are an important part of the oceanic ecosystem. In 1996, the US prohibited the import of shrimp originating in countries that did not implement precautionary and regulatory measures to protect endangered species and ensuring the catch of sea turtles was equal to or less than that of the US.[172] The US justified this measure citing Article XX (b) and XX (g) and the WTO broad objective to protect and preserve the environment. It is important to mention here that shrimp trawling has been identified since the 1970's as a contributing factor to sea turtle mortality.

[171] *US- Shrimp WT/DS58/AB/R*
[172] *Ibid*

It was argued that the US measure prohibiting shrimp imports was in breach of the GATT Article XI, but that it should be exempted due to its environmental importance and permanence under XX (g). The Appellate Body ruled that the measures were justifiable in their desire to protect the environment and conserve exhaustible natural resources,[173] but the Appellate Body ruled against the US measure due to the discrimination between Member States as the US allowed Caribbean countries a longer period of time and offered financial and technical assistance to them in implementing the use of precautionary measures (such as Turtle Excluder Devices), but not allowing Asian countries (India, Malaysia, Pakistan and Thailand) the same advantages, thereby violating the terms of the chapeau of Art XX.

The issue in this case is certainly a crucial public policy debate; *US-Shrimp* is perhaps the most famous of all WTO disputes. The jurisprudence left unarticulated was a clear reason why the strained construction of XX (g) was valid; this was because international law and global opinion recognise the legitimacy of public policy action in the environmental sphere and the protection of the exhaustible natural resources (turtles are threatened with extinction) and the life and health of wildlife is a necessary measure, however the US action was found to be unlawful due to their discriminatory implementation. The Appellate Body ruling was therefore correct in this instance.

[173] Article XX (g) GATT

WTO law took a major step towards recognising an implicit concept of public policy in the *China–Audio-Visual* dispute.[174] China had implemented measures regulating the import and distribution of specific audio-visual materials such as books, newspapers, periodicals, electronic publication, as well as audio-visuals for home entertainments such as videocassettes, video compact discs, digital video discs, and sound recordings. The measures also included films for theatrical releases. China implemented this measure claiming it was justified as a measure taken for the protection of public morals, restricting trading rights, market access and distribution, reserving the right to do so for Chinese state-designated or wholly or partially owned enterprises.

This dispute concerned the terms of China's Accession Protocol. China pleaded reliance upon the terms of Article XX (a) GATT 1994 as an exception to its accession protocol. In 2007, the US requested consultations with China, and those failing filed a complaint with the WTO and a panel was assigned to review the disputed issues. The US claimed China was giving treatment less favourable to foreign individuals and enterprises than that offered to Chinese enterprises, and that this was inconsistent with China's obligations under the protocol of accession.

The WTO panel found that the measures limiting the distribution of such materials and prohibiting their import did not satisfy the requirements of GATT Article XX (a) and GATS Articles XVI (market access), XVII (national treatment) and GATT Article III: 4, and their accession protocol and working party report to allow Member

[174] *China- Publications and Audio-Visual Products* WT/DS363/17

States the right to trade. The Accession Protocol is relevant to point out here, as Article XX (a) naturally applies to the other Articles of GATT 1994. The reasoning of the Appellate Body focused on the construction of Article 5.1 of the Accession Protocol; the clear effect of the construction was to allow reliance upon Article XX (a) for a breach of the Protocol and not the GATT 1994.[175] The use of an exception in one treaty for the breach of another treaty is difficult to justify unless the treaties share a common core of understanding around the exception, unless the exception is of the nature of a public policy exception as it was argued in this case.

The Appellate Body ruled that China had not demonstrated the necessity for these measures to uphold and protect public morals, and had thus not established justification:

> "215. In our view, assuming *arguendo* that China can invoke Article XX (a) could be at odds with the objective of promoting security and predictability through dispute settlement, and may not assist in the resolution of this dispute, in particular because such an approach risks creating uncertainty with respect to China's implementation obligations. We note that the question of whether the introductory clause of paragraph 5.1 allows China to assert a defence under Article XX (a) is an issue of legal interpretation falling within the scope of Article 17.6 of the DSU. For these reasons, we have decided to examine this issue ourselves."[176]

This was in part because:

> "Use of the [*arguendo*] technique may detract from a clear enunciation of the relevant WTO law and create difficulties for implementation. Recourse to this technique may also be problematic for certain types of legal issues, for example, issues that go to the jurisdiction of a panel or preliminary questions on which the substance of a subsequent analysis depends. The purpose of WTO dispute settlement is to resolve disputes in a manner that preserves the rights and obligations of WTO Members and

[175] *China- Publications and Audio-Visual Products* WT/DS363/AB/R paras. 205-233
[176] *China- Publications and Audio-Visual Products* WT/DS363/AB/R para.215

> clarifies existing provisions of the covered agreements in accordance with the customary rules of interpretation of public international law"[177]

The Appellate Body wanted to generate a useful ruling for the dispute in hand and future disputes. The Appellate Body sensed an issue of importance in this dispute. It is not merely China's Protocol of Accession at issue in this case but also the ability of the jurisprudence to generalise in the absence of express words the availability of public policy freedom for Member States under WTO law.

2.7. Concepts of Public Policy

2.7.1. Exceptions as to Goods, Services and Dispute Resolution

General Exceptions under the GATT 1994

Article XX of the GATT 1994

Article XX allows for the protection of important policy objectives, such as the protection of public morals[178]. Paragraph (b) protects people, animal and plants. Paragraph (g)[179] relates to the conservation of exhaustible natural resources.[180]

Article XX is only relevant when a measure taken by a member is inconsistent with another GATT provision. Measures that satisfy the conditions of Article XX are allowed even if inconsistent with other provisions of the GATT 1994. Exceptions under Article XX are limited because the Article has an exhaustive list of exceptions; they are also conditional because it only provides justification when the otherwise

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[177] *China- Publications and Audio-Visual Products* WT/DS363/AB/R para.213
[178] Paragraphs (a) of Article XX of GATT
[179] Paragraphs (b) and (g) of Article XX of GATT
[180] A vital issue for many developing nations such as Saudi Arabia whose development and economy rely upon the extractive industries (see Case Study in Chapter 6)

illegal measures fall within the terms of Article XX. Article XX provides an exception or limitation to commitments under the GATT 1994, and allows members to pursue measures relating to wider societal values.

The Appellate Body has not adopted the approach of taking a narrow interpretation of Article XX, but instead has advocated a balance between the general rule and the exception,[181] and between trade liberalisation and societal values. The Panel in *US - Shrimp* ruled Article XX could not justify measures that undermine the WTO multilateral trading system.[182] On appeal the Appellate Body rejected this ruling.[183] Measures that require an exporting country to adopt or comply with policies prescribed by an importing country are measures that can potentially be justified by Article XX, and thus are not *a priori* excluded from its scope.

The Justification of Measures for Inclusion under Article XX

In *US-Gasoline* the appellate body explained that Article XX sets out a two-tier test for determining whether a measure, otherwise inconsistent with the GATT, can be justified. For such a measure to be justified it must meet both the requirements of one of the exceptions listed in paragraphs (a) to (j), and the requirements of the introductory clause, referred to as the "chapeau" of Article XX.[184] This was further clarified in terms of the order in which these two elements must be analysed[185]; first, the measure at issue, and second, the application of that measure[186].

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[181] *US – Gasoline* 16-17 WT/DS2/AB/R dated 29 April 1996.
[182] *Panel Report, US – Shrimp para. 7.44* WT/DS58/AB/R dated 12 October 1998
[183] *Ibid*., para.121
[184] *Appellate Body Report, US – Gasoline*, 20 WT/DS2/AB/R dated 29 April 1996
[185] *Appellate Body Report, US – Shrimp* WT/DS58/AB/R .
[186] *Brazil – Retreaded Tyres* WT/DS332/AB/R.

The provisions of Article XX have been the subject of consideration by Panels and the Appellate Body over the years. There follows a brief account of the construction of the terms in the WTO jurisprudence.

Article XX(a)

"(a) necessary to protect public morals;"

This Article was addressed in the *China-Audio-Visual* case [187] in the Appellate Body report Article XX (a) was applied to a breach of the protocol of accession of China. The dispute is considered a direct authority on the meaning of Article XX (a) as China's defence, which concerned reading materials and finished audio-visual products, was found by the Appellate Body to be in breach of their obligations under the Accession Protocol and because there was at least one other reasonably available alternative, China's measures were not "necessary" within the meaning of Article XX (a). China's recourse to Article XX (a) was not permissible with respect to the protocol obligations.[188]

Article XX (b)

"(b) necessary to protect human, animal or plant life or health;"[189]

This element is relatively easy to apply and there are minimal problems with interpretation.[190] If the measure falls within the scope of the paragraph then it must be determined if it is necessary to achieve the policy objective.

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[187] *China- Publications and Audio-Visual Products* WT/DS363/AB/R
[188] *Ibid*
[189] Article XX (b) of GATT
[190] *Brazil – Retreaded Tyres* WT/DS332/AB/R, since this dispute was decided the approach to "necessity" has been liberalised

Three WTO disputes illustrate the types of measures that can fall under this provision. *US-Gasoline* was relevant as it addressed a US law requiring certain gasoline products to be clean-burning and so reduce motor vehicle emissions and thereby safeguard the health of humans and animals who inhaled the polluted air. This law was found inconsistent with GATT Article III: 4 as it led to different treatment for foreign and domestic products. The panel found that the measure was a policy goal as described in Article XX (b). They also considered the specific aspect of the measure that was discriminatory and concluded the less favourable treatment of imported gasoline was not "necessary" in order to give effect to the policy objective[191].

In *EC-Asbestos* Canada initiated consultations with the EU taking issue with a French law prohibiting importation of a certain type of asbestos. Canada maintained that this law violated GATT Article III as it discriminated against Canadian asbestos and in favour of French substitutes.[192] The import ban on asbestos also violated GATT Articles XI and XIII as well as Articles 2, 3 and 5 of the SPS Agreement, and Article 2 of the TBT Agreement.

The Appellate Body found that the French measure was not inconsistent with the EC obligations under the WTO agreements. The Appellate Body was unable to examine the claims of inconsistency with the TBT agreement. The Appellate Body implemented the necessity test developed in the context of Article XX (d) in the *Korea-Beef* dispute,[193] and found that the health risks associated with the import of the good involved within Article III: 4 were necessary to be included in the

[191] *US-Gasoline* WT/DS2/AB/R paras 6.21-25.
[192] *EC-Asbestos* WT/DS135/AB/R, para 175
[193] *Korea- Various Measures on Beef* WT/DS161

examination of likeness and that Canada had not satisfied the burden of proof of the existence of "like products", and thus the Appellate Body found the French measure consistent with Article III: 4 of GATT. It found that Canada's argument that use of this asbestos regulated by safe handling was a "reasonably available alternative" had not been demonstrated and so the French measure was "necessary" under Article XX (b) to protect human life and health.

In *EC-Tariff Preferences* India requested consultations with the EC regarding the tariff preferences offered by the EC's Generalised System of Preferences Programme to developing countries.[194] This was requested under Article XXIII: 1 of GATT 1994.

India was concerned the tariff preferences offered under special arrangements to combat drug production and trafficking, protection of labour rights and the environment pose difficulties to Indian exports to the EC, and nullify or impair the benefits to India under the Most Favoured Nations provisions of Article I: 1 of GATT 1994 and paragraphs 2 (a), 3 (a), and 3 (c) of the Enabling Clause.

The panel upheld the Indian complaint and found that the tariff preferences offered were inconsistent with the MFN obligation in Article I: 1 as the EC failed to provide adequate justification of non-discrimination and that the measure was inconsistent with Article XX (b) as the measure was not necessary to protect human life and health in the EU. It was also found to not conform to the chapeau of Article XX.[195] The Agreement on Sanitary and Phyto-sanitary measures is closely linked to Article XX

[194] *EC-Tariff Preferences WT/DS246/AB/R*
[195] *EC-Asbestos* WT/DS135/AB/R, *paras 7.200-7.210*

(b) as an elaboration and extension. SPS will be examined in more detail further on in this chapter.

Article XX(c)

> *"(c) measures relating to importations and exportations of gold and silver"* [196]

Article XX (d)

> *"(d)necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices;"*[197]

This Article has potentially a very broad scope, and has been used in a number of disputes. There are three aspects of this provision. The measure should be designed to "secure compliance". Panels in relevant cases have interpreted this as compliance with obligations under certain laws, rather than the attainment of the objectives of those laws.[198] The second element, that the law is consistent with GATT rules, is fairly straightforward although an unclear issue is the extent of evidence that needs to be shown by the respondent. The third "necessity" element was interpreted in the *Korea-Beef* case where the Appellate Body developed the "weighing and balancing" test and considered the availability of alternative measures.[199]

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[196] Article XX(c) of GATT
[197] Article XX(d) of GATT
[198] *Mexico-Taxes on Soft Drinks*, para. 72 WT/DS308/AB/R
[199] *Korea-Beef* WT/DS161/AB/R and WT/DS169/AB/R

Article XX (e)

(e) "measures relating to the products of prison labour;".[200]

Article XX (f)

"(f) Measures "imposed for the protection of national treasures of artistic, historic or archaeological value;".[201]

Article XX (g)

"(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;"[202]

This paragraph focuses on the "conservation of exhaustible natural resources", but does not apply to environmental protection in general. Article XX (g) applications have undergone some expansion and become broader over the past decade, as it was previously concerned with oil and minerals but now is increasingly applied to other constructs such as clean air, water and the environmental aspects due to the growing international awareness of these issues. The scope of this provision has been examined in two important cases.

In *US-Gasoline* [203] the Appellate Body found that the measure was primarily aimed at the "conservation of exhaustible natural resources" and fell within the scope of Art. XX (g), but this nevertheless did not justify the measure under the chapeau of Article

[200] Article XX(e) of GATT
[201] Article XX(f) of GATT
[202] Article XX(g) of GATT
[203] *US – Gasoline*, WT/DS2/AB/R

XX because the discriminatory aspect of the measure constituted "unjustifiable discrimination" and a "disguised restriction on international trade".

As described previously, the *US-Shrimp* dispute concerned an import ban on shrimps collected by certain methods which negatively affected other wildlife (endangered sea turtles).[204] It was argued this was a violation of GATT Article XI. The Appellate Body found that one of the species specifically affected by the collection and fishing methods, sea turtles were an "exhaustible natural resource" and as such the measure was "reasonably related" to their conservation and justified under Article XX (g) however was not upheld as it was also found to be discriminatory under the chapeau of Article XX.

The potential public policy applications for this Article are evolving due to the shifts in international concerns for such exhaustible natural resources and their importance to sustainable economies and increased public awareness and interest.

Article XX (h)

> *(h) Measures "undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;".*[205]

Article XX (i)

> *(i) Measures "involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic*

[204] *US – Shrimp* WT/DS58/AB/R
[205] Article XX(h) of GATT

processing industry during periods when the domestic price of such materials is held below the world price as part of a government stabilization plan; Provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;".[206]

Article XX (j)

(j) Measures "essential to the acquisition or distribution of products in general or local short supply; Provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960."[207]

The Chapeau of Article XX of GATT 1994

"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:"[208]

The chapeau states the measures listed in the sub-paragraphs of Article XX are permitted as long as they can be justified under Article XX, and must not be applied in a manner that could be viewed as "arbitrary" or "unjustifiable" discrimination, or as a "disguised restriction on international trade". In *US-Shrimp* while finding the

[206] Article XX(i) of GATT
[207] Article XX(j) of GATT
[208] The Chapeau of Article XX of GATT

measures fell under Article XX (g), the Appellate Body also had to examine whether it also came under the chapeau. The Appellate Body found there to be both "unjustifiable discrimination" and "arbitrary discrimination" in this case.[209] Even though the US measure was serving a real environmental objective, the measure was found to be discriminatory between member states, and as such the measure did not qualify for the exception claimed. The chapeau is often the hinge on which disputes are resolved or ultimately judged. It is imperative to prove that the member state is not applying its measures as a way to discriminate in its trading relationships or restrict trade arbitrarily. This is similar to the previously described disputes of *US-Gasoline* and *Brazil-Re-treaded Tyres*.[210]

General Exceptions under GATS

For measures to be justified under Article XIV of GATS they must be examined first, to see whether the measure can be provisionally justified as one of the specific exceptions under paragraphs (a) to (e) of Article XIV, and second, whether the application of this measure meets the requirements of the chapeau of Article XIV.[211]

Specific Exceptions under Article XIV of the GATS

Paragraphs (a) to (e) of this article set out specific grounds of justification for measures otherwise inconsistent with the GATS such as: protection of public morals, maintenance of public order, protection of human, animal or plant life or health, the prevention of deceptive or fraudulent practices, the protection of the privacy of

[209] *US – Shrimp* WT/DS58/AB/R
[210] *US-Gasoline* WT/DS2/AB/R; *Brazil-Re-treaded Tyres* WT/DS332/AB/R
[211] Article XIV of GATS

individuals, the protection of safety, and the equitable or effective imposition or collection of taxes.

Article XIV (a)

"(a) necessary to protect public morals or to maintain public order;"[212]

A member invoking this article must establish that first, the policy objective pursued by the measure is the protection of public morals or the maintenance of public order, and that the measure is necessary to fulfil that objective. [213] The interpretation and application of the first element was dealt with by the Panel in the dispute of *US – Gambling* where it was found the measures at issue prohibiting the remote supply of gambling and betting services were found to be necessary for these policy objectives.[214]

Article XIV (b)

"(b) necessary to protect human, animal or plant life or health;"[215]

Paragraph (b) relates to measures necessary to protect human, animal or plant life and health. This paragraph contains a "necessity" requirement, and while there has been no case law, it is assumed Article XIV (a) and (c) of the GATS and case law on Article XX (b) and (d) of the GATT 1994 are relevant.

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[212] Article XIV (a) of GATS
[213] Public Order is a translation of the French legal term *Ordre Publique*, which is part of public policy (this will be explored further in Chapter 3).
[214] *US-Gambling* WT/DS285 dated 10 November 2004
[215] Article XIV (b) of GATS

Article XIV (c)

> *"(c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:*
>
> *(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;*
>
> *(ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;*
>
> *(iii) safety;"*[216]

This article provides the means to justify measures that are otherwise inconsistent with GATS. A measure should be assessed first for justification; if the measure is designed to secure compliance with national laws and regulations, and second, those laws and regulations must not be inconsistent with WTO regulations, and third, that the measure is necessary to secure compliance with national laws and regulations.

Interpretation and application of the first two elements (prevention and detection of fraudulent practices, and protection of the privacy of individuals' personal data and confidentiality) was discussed by the Panel and the Appellate Body in *US – Gambling*, who referred to case law on Article XX of the GATT 1994 due to the similarities between these two articles (XX and XIV).[217] The Appellate Body upheld the panel statement that the US acted inconsistently with Article XIV:1 and subparagraphs (a) and (c) of XIV:2 as it maintained limitations on market access not in its schedule of commitments to grant full market access to gambling and betting services. The Appellate Body also reversed the panel's finding and found the US did

[216] Article XIV (c) of GATS
[217] *US-Gambling* WT/DS285

in fact demonstrate that the federal statutes in question were "necessary" within Article XIV (a) but upheld the panel finding that the US did not demonstrate that the measures satisfied the chapeau of Article XIV.

Article XIV (d)

> *"(d) inconsistent with Article XVII, provided that the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members;"*[218]

Paragraph (d) allows members to adopt or enforce measures, which are inconsistent with the national treatment obligation of Article XVII, aimed at the imposition or collection of direct taxes on services.

Article XIV (e)

> *"(e) inconsistent with Article II, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound."*[219]

Paragraph (e) allows members to adopt or enforce measures inconsistent with the MFN obligations of Article II. Both paragraphs (d) and (e) are narrow in their scope.

The Chapeau of Article XIV of the GATS

> *"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on*

[218] Article XIV (d) of GATS
[219] Article XIV (e) of GATS

trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:"[220]

This sets out measures, which are required for the application of article XIV, the measure does not constitute "arbitrary or unjustifiable discrimination" between countries where the same conditions prevail, or "a disguised restriction" on trade. The language of this article is similar to the chapeau of Article XX of the GATT 1994 so the same case law applies.[221]

Security Exceptions

Article XXI of GATT has not played a significant role in dispute settlement to date. It has been used occasionally to justify trades restrictive measures to achieve national or international security and peace.[222]

Article XXI (a) and (b) of GATT 1994

Paragraph (a) allows Members to adopt or maintain certain measures necessary for the protection of essential security interests. Paragraph (b) allows for measures relating to fissionable materials, trade in arms or similar for military use, and measures taken in times of war or emergency in international relations. Article XXI does not have a chapeau. It gives Members a broad discretion regarding national security interests. To date this article has not been invoked in any case. The United States however has as a result of US–Cuban Liberty and Democratic Solidarity Act, also known as the US-

[220] The chapeau of Article XIV
[221] *US – Gambling* WT/DS285 10 November 2004
[222] Article XXI of GATT

Helms-Burton Act informed the WTO that this act does not fall under WTO law as the dispute involves security and diplomatic issues and is not a trade matter.[223]

Article XXI (c) of GATT 1994

This article allows Members to pursue their obligations under the UN Charter for peace and security. So Members may depart from GATT obligations if the UN Security Council imposes economic sanctions or other measures.[224]

Article XIV (bis) of GATS

This allows members to take measures in the interest of national or international security, otherwise inconsistent with GATS obligations. The language is nearly identical to Article XXI of the GATT 1994. Occasionally Members taking measures that affect trade in services as a means to achieve these interests can seek justification under this article. Article XIV (bis) provides for a notification requirement. To date it has not been invoked in dispute settlement proceedings.[225]

Economic Emergency Exceptions

Safeguard measures with respect to trade in goods are provided for in Article XIX of the GATT 1994, and the *Agreement on Safeguards*. They set out the rules on safeguard measures. *The Agreement on Safeguards* is part of Annex 1A to the WTO Agreement. It clarifies the provisions of Article XIX of the GATT 1994 and also provides for new rules. It sets out that substantive requirements must be met in order

[223] Article XXI (a) and (b) of GATT
[224] Article XXI (c) of GATT
[225] Article XIV bis of GATS

to apply safeguard measures, the national and international procedural requirements, and the characteristics and conditions relating to such measures.[226]

There are three requirements for the use of safeguard measures: first, an increased imports requirement, second, the serious injury requirement, and third, the causation requirement. There has been debate about absolute and relative increases in imports.[227] The serious injury requirement is much stricter than the standard of "material injury" in the Anti-Dumping Agreement and the SCM Agreement.

US–Lamb is a dispute that clarifies the interpretation of the provisions of the Safeguards agreement.[228] New Zealand and Australia filed complaints against safeguard measures in the form of tariff rate quotas enacted by the US on the imports of lamb meat. The complainants put forward that the US acted inconsistently with Articles I and II and XIX of GATT 1994 and Articles 2, 3, 4, 5, 8, 11 and 12 of the agreement on Safeguards. Upon reviewing the dispute, the Appellate Body found the US acted inconsistently with Article XIX: 1 (a) as it failed to demonstrate "unforeseen circumstances", and was inconsistent with Articles 2.1 and 4.1 (c) of Safeguards due to their inclusion of the growers and feeders of live animals in their definition of the industry, and had made that determination based on insufficient data, and was therefore also inconsistent with Articles 4.2. (a) as it did not demonstrate the "threat of serious injury" to the domestic industry. The US was also found to be inconsistent with Article 4.2 (b) due to the lack of a definitive causal link between the increased import of the product and the threat of serious injury.

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[226] Article XIX of GATT
[227] *Argentina – Footwear (EC)* WT/DS121/R dated 25 June 1999
[228] *US-Lamb* WT/DS177/AB/R & WT/DS178/AB/R dated 1 May 2001

The causation requirement places the burden of proof on the member states; they must be able to demonstrate a causal link between increased imports and serious injury or threat thereof, and an identification of any injury caused. There are also procedural requirements, which domestic authorities must meet regarding notification and consultation. Safeguard measures are usually customs duties or quantitative restrictions, but can take other forms. They are by nature, temporary and initially should not exceed four years, although there is provision for extension in certain cases. Safeguards should be applied without discrimination between supplying countries, and irrespective of source, so there is no selective application of such measures. There are however exceptions to this principle in Articles 5.2 (b) and 9.1 of the Agreement on Safeguards. Such measures should be commensurate with the extent of necessity. There can be compensation paid to exporting countries affected by such measures, and there are provisional safeguard measures for critical circumstances. Other safeguard measures occur under the Agreement on Agriculture, and under China's Accession Protocol.

Dani Rodrick proposes that Article XIX can be used to effect public policy in the WTO, as a means to modify the current trade regime.[229] Rodrick sees the WTO as overreaching while the GATT allowed member states to achieve the 'maximum amount of trade compatible with different nations doing their own thing' as it was designed to be minimally intrusive into domestic affairs. With the increasing "hyperglobalisation" that is the direction of the WTO, areas that were not previously included have emerged, such as intellectual property, subsidies and health and safety,

[229] Rodrik, D. "The Globalization Paradox: Why Global Market, States, and Democracy Can't Co-Exist" Oxford University Press 2011 pp. 253-254

as well as labour laws. But Rodrick states that globalisation must be limited by member states can still regulate their own internal affairs without intrusion by international rules or institutions. He suggests that WTO discussions should centre on the development of "policy space" to allow trade restrictions and suspension of obligation to the organisation for developmental and social safeguards, but that this should be with justification and demonstration that democratic procedure determined that any measure would be in the public interest, and that this should be transparent, accountable, inclusive and evidence-based. This would increase the stability and flexibility of the organisation.[230]

Regional Integration Exceptions

WTO law allows Members to take measures that pursue regional economic integration, even if they are WTO inconsistent. These exceptions are set out in Article XXIV of the GATT 1994 and Article V of the GATS.

Article XXIV of GATT

A measure has to be assessed first to determine if the measure is introduced upon formation of a customs union, free trade area, or interim agreement, and second, if the formation of these were made impossible if the introduction of the measure were not allowed.[231]

[230] *Ibid*
[231] Article XXIV of GATT

Article V of GATS

This article is the counterpart of Article XXIV of GATT for trade in services, and is entitled "Economic Integration". It provides legal coverage for measures, otherwise inconsistent with MFN obligations in Article II that pursue economic integration agreements.[232] It has a requirement regarding substantial sectoral coverage, non-discrimination, barriers to trade, economic integration agreements and developing country Members, procedural matters, and labour market integration agreements.[233]

Balance of Payment Exceptions

These are set out in Articles XII and XVIII (Section B) of the GATT 1994 and Article XII of the GATS. These exceptions allow Members to take measures otherwise GATT or GATS inconsistent to safeguard their finances and protect their balance of payments.

Economic Development Exceptions

Almost all WTO agreements favour developing countries and provide special treatment to help integration into the world economic system. These are also known as S&D treatment, which has six categories. There is infant industry protection under Article XVIII (7) of the GATT 1994, a generalised system of preferences exception, and an enabling clause for preferential tariff treatment.

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[232] *Canada – Autos* WT/DS139/R and WT/DS142/R dated 11 February 2000
[233] Article V of GATS

2.8. Characterisation of Public Policy

An Analysis of the Weaknesses of the WTO Legal Order

In her article on international law and international relations theory, Anne Marie Slaughter-Burley offers a theoretical underpinning that is valuable to the premise of this thesis.[234] If we were to consider the WTO from a realist perspective, the WTO membership would be seen as merely a collection of states seeking to secure their interests and compromising on agreements to gain benefits and advantages. If we were to consider the WTO from an institutional perspective, it would be as a crucial and independent institutional opportunity for the member states that continually creates new opportunities for the realisation of systemic benefits. If we were to consider the WTO from a liberal perspective, the member states would be part of an alliance of business groups driving globalisation efforts, coordinating lobbying powers and their influence on the global market.

It is important to note that some global and supranational movements such as the environmental efforts in *US-Shrimp* [235]and that of the drive to provide affordable drugs in the developing world as well as the amendments made to the WTO TRIPS Agreement have had significant impact on global trade practices.[236]

Within the WTO, the liberal nature of certain member states is an issue of concern to non-liberal states, as it may affect the ability of the organisation to protect them from

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[234] Slaughter, A. M. (1993) International Law and International Relations Theory: A Dual Agenda. 87 American Journal of International Law pp 205- 239.
[235] *US- Shrimp WT/DS58/AB/R*
[236] Kapstein, E.B.; Busby, J.W. (2013) Aids Drugs for All: Social Movements and Market Transformation. Cambridge University Press.

the liberal views and pressure by those states, even though non-liberal states now have a majority in the organisation. This research has identified weaknesses in the current structure of the WTO based on the absence of a working concept of public policy. As it stands, the WTO has only the exception provisions, which have been previously detailed in Section 2.7.1. These exceptions were created to protect the interests of the member states and their internal sovereignty. The exceptions have the potential to be utilised to override the obligations of a member state to adhere and apply the covered agreements if a concern should arise. There is a process, by which these exceptions can be invoked, but it is unclear as the exceptions in their current form do not have the strength of rules or the flexibility of public policy, and are overly generalised and vague.

The development of a set of rules is not feasible for an organisation such as the WTO, due to its multi-national nature. Rules are rigid and difficult to change, which would lead to a loss of confidence between the Member States and the organisation, and affect the stability and continued existence of the legal system. These weaknesses can potentially cause disputes between Member States.

In resolving disputes on exceptions, the panels and Appellate Body are called on to administer a ruling or judgment; however there is currently no actual process to conduct this. For example, if a Member State initiates a restriction on the import of certain goods for a specified reason, and the state on which the restriction was imposed protested, the organisation must try to find a way to balance the interests of the Member State with the agreements and obligations. The panels and Appellate

Body will closely examine the precisions of the covered agreement; it is called upon to "balance" the issue at question but not outside the implicit presence captured by the provisions of the agreements. The exceptions in the WTO are fixed and limited in their potential applications to settle disputes, and are often the source of lengthy debates and extended periods of dispute until a settlement can be reached.

In considering the inability of the Doha round of negotiations to produce results, the reason for this may be due to the increased number of non-liberal as opposed to liberal member states within the organisation, which poses difficulty in reaching consensus on crucial issues. In this, the smaller GATT organisation had an advantage; as its members were all liberal, democratic, constitutional states.[237] The difficulties of the Doha round may also be due on another level to the influence of developed countries as opposed to developing countries pushing their agendas during the negotiations. The member states policy imperatives and concerns to maintain their internal sovereignty necessitate a very careful balancing exercise to be undertaken by the WTO when attempting to settle disputes.

The DSU and the Marrakesh Agreement may also indicate a degree of ambivalence of trusting the potential for judicial development of WTO law. If multi-lateral negotiations cannot develop the body of law then judicial development becomes more important, hence the necessity for the WTO to develop and implement public policy. The benefit of the organisation developing its public policy will become evident in the

[237] Slaughter, A. M. (1993) International Law and International Relations Theory: A Dual Agenda. 87 American Journal of International Law pp 205- 239.

accession process of developing or least developed countries. As will be discussed in the case study (see Chapter 6), issues that were vital to the successful accession of Saudi Arabia were matters of public policy, even within Article XX (a) exceptions. A clearer expression and guarantee of the importance of sovereignty will serve to alleviate uncertainty on the part of acceding nations and guide protracted negotiations.

The next chapters will review the role of public policy in the EU and the Common Law of England and Wales.

Chapter 3- The European Union

3.1. Constitution and History

The European Union has radically changed over the course of its historical development. The current structure is based on the Treaty on the Functioning of the European Union ("the TFEU", which is a reiteration of the original 1958 Treaty of Rome) and the Treaty of the European Union ("the TEU", which is a reiteration of the 1993 Maastricht Treaty). The current operative versions of these treaties were introduced as part of the Lisbon Treaty of 2007.[238]

The European Union is given authority by its member states to enact legislation and adopt laws on its behalf via a principle of conferral, which is unique to the EU as a legal order.[239] The directives or laws have direct or indirect effects on national authorities of member states and take precedence over national law.[240]

The principle objectives of the European Union (EU) are to progressively integrate and promote internal economic and social progress and cohesion, through creating a border-free area and economic and monetary union, including a single currency. The external objective is to establish the EU's international identity through its Common Foreign and Security Policy (CFSP) and defense policy.[241]

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[238] The European Union website, last accessed 15/12/2012, http://europa.eu/about-eu/basic-information/index_en.htm

[239] European Commission website, Application of EU Law, last accessed 15/12/2012 http://ec.europa.eu/eu_law/introduction/treaty_en.htm

[240] *Ibid*

[241] Article I-3 of the Constitutional Treaty (Article 3 TEU)

The EU is a comparatively recently established legal order when considered in light of other legal systems such as English Common Law. The historical development and gradual adjustments to its structure and operative mechanisms offer a reflection of the WTO in its adherence to its principles and objectives. The EU was formed to establish an internal market and regulate the customs union and the free trade area of the European Economic Area (EEA). The EU has exclusive competence over the customs union and shared competence with its member states over the free trade area of the EEA. The EU acts for and in the place of the member states in any dealings with the WTO. The EU plays an important role in the international economic arena.

The following description of the historical development of the EU showcases clearly the development of the aims and objectives of this legal order and the incremental development towards the current versions of the TEU and TFEU.

3.1.1. Major Treaties and Delegated Legislation on Goods, Services and Dispute Resolution

In 1945, the Benelux Customs Union created an area where Belgium, the Netherlands and Luxembourg reduced barriers to trade amongst themselves. After World War II the first significant move towards European co-operation in the economic field was the establishing in 1951 of the European Coal and Steel Community (ECSC), which was an agreement between France, West Germany, Italy, and the three Benelux countries. This agreement was scheduled to last fifty years, and to expire in 2002. It set up four institutions: the High Authority, which was the executive, decision-making body; the Assembly, which contained representatives from the national parliaments; a

Council, which had a consultative and harmonising role; and a Court of Justice made up of nine judges. This was an important first step towards European integration.[242]

In 1952, the Treaty of Paris resulted in the creation of the European Coal and Steel Community (ECSC) to remove barriers to trade for coal, steel and iron ore. The signatories were Belgium, West Germany, France, the Netherlands, Italy and Luxembourg..[243]

1957 brought the Treaty of Rome and the creation of the European Economic Community (EEC) to establish a customs union and a common market, and the Euratom for European Atomic Energy Commission. The term EC was established to combine the three main treaties (ECSC, EEC and Euratom). The treaty had increasingly economic aims: to establish a single market and common customs tariffs, promote harmonious economic development, increase stability, abolish barriers to trade, progressively co-ordinate national social and economic policies, and promote closer relations between Member states. These developments foreshadowed later moves towards the EU.[244]

In 1965 an agreement was made known as the Luxembourg Accords. These had a considerable impact on the direction of Community development, and recognised the principle of "Intergovernmentalism" which recognised that individual Member States

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242 Craig, P and De Burca, G "EU Law (Text, cases, and Materials)" 4th edition, 2008, Oxford University Press p.190

243 European Union website, last accessed 15/12/2012, http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_ecsc_en.htm

244 Craig, P and De Burca, G "EU Law (Text, cases, and Materials)" 4th edition, 2008, Oxford University Press pp 190-192

may hold strongly different views, and the Council should endeavour to reach solutions acceptable to all parties.[245] Thus Members could in effect veto decisions, and this influenced future developments in the Council and the shape of future legislation. Concurrently the European Free Trade Area (EFTA) came into being. Its members were Norway, Sweden, Denmark, Austria, Switzerland, Portugal, and the UK, seven countries which for various reasons were unable or unwilling to join the EEC. Membership in the EFTA has dwindled as the UK, Denmark, Portugal, Austria and Sweden resigned their membership successively to join the EU (then the EEC). Only four countries are currently EFTA members: Lichtenstein, Finland, Norway and Iceland.[246]

Foreign policy also took shape during this period. Co-operation started in 1970 after the Davignon Report led to regular meetings of foreign ministers and a permanent political secretariat. A further report in 1973 consolidated this into what was called European Political Co-operation (EPC). United Kingdom, Ireland and Denmark joined in 1973.

In 1974 the European Council was formed to establish the practice of holding regular summits, although it was not recognised as a formal instrument until the SEA. These developments underlined the tension between "Supranationalism" (what is beyond the borders of member states and an issue of common importance such as ideas or values) and "Intergovernmentalism" (with the emphasis of the role of the member state on

[245] Bull, EC 3-1966, 9.
[246] Craig, P and De Burca, G "EU Law (Text, cases, and Materials)" 4th edition, 2008, Oxford University Press p.7

efforts of integration).[247] This tension in the EU is caused by the diverging interests of the member states and the legal order and amongst the member states themselves. During the 1960s and 70s the attainment of Treaty objectives was often delayed by the Commission having difficulty in securing the Council's agreement to its proposals. Reports such as the Tindemans Report 1974,[248] and the "Three Wise Men" recommended strengthening the supranational elements.[249] These reports resulted in changes being made to existing EU institutions, such as the creation of councils, the election of a European Parliament, the extension of the EEC's domains of intervention, and the creation of the European Monetary System (EMS) to resolve issues of monetary instability.[250]

In 1976 it was agreed that there should be direct elections to the European Parliament (EP), and the first elections took place in 1979.Although this was the first institution to have a direct mandate, it had a limited consultative role at the time. Further developments increased the community's financial independence and strengthened the EP's decision-making powers. There were also judicial developments. There was a broader reading of Article 308 EC (now Article 352 TFEU), which increased the Community sphere of competence. It influenced the Commission's single market strategy by a broad interpretation of Article 28 EC (now Article 34 TFEU) on the

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[247] *Theories of European Integration*, EU Facts, last accessed 11/06/2013 http://www.civitas.org.uk/eufacts/OS/OS16.html

[248] Bulletin of the European Communities, Supplement 1/76 "European Union" by Mr. Leo Tindemans 1975

[249] BULL. EC 11 – 1979, 1.5.2.

[250] *Building Europe through the Treaties*, EU website last accessed 10/06/2013 http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_introduction_en.htm

abolition of non-tariff barriers to the free movement of goods, and the principle of Community law overriding national law. [251]

In the early eighties, the Genscher-Colombo plan proposed, in that same year that Greece joined the EU, to minimize the veto power and increase European political cooperation.[252] This plan was initially unsuccessful and was followed by the Stuttgart European Council Declaration in 1983. In 1984 the Fontainebleau European Council meeting resulted in the creation of a committee to promote the image and identity to EU citizens and the world.[253] The 1985 European Council in Milan set up an intergovernmental conference and discussions in the working parties led to the signing of the Single European Act (SEA) in 1986, a new treaty which was the first major step toward the European common market.[254] Spain and Portugal also joined the EU in 1986.

The SEA was designed to encourage the construction of the internal unified market for goods, capital, services and labour. It was imperative to conclude a treaty on foreign and security policy and amend the EEC treaty due to the difficulty posed by the decision making process of the Council. The SEA changed the rules that govern European institutions and widened powers especially in the areas of research and development, the environment, and foreign policy. The EP powers were increased

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[251] *Rewe-Zentral AG v. Bundesmonopolverwaltung fur Branntwein* Case 120/78 (1979) ECR 649

[252] The History of European Cooperation in Education and Training p.99 http://ec.europa.eu/dgs/education_culture/publ/pdf/education/history_en.pdf

[253] Bulletin of the European Communities. June 1984, No 6. Luxembourg: Office for official publications of the European Communities

[254] The Single European Act, EU website, last accessed 18/12/2012 http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_singleact_en.htm

through a new legislative co-operation procedure,[255] thus giving it an increased role in decision-making. The EP was given new powers over the accession of new Members and the conclusion of agreements with associate states. The SEA also formally recognised the European Council and gave legality to the European Political Co-operation. The Court of First Instance was created to supplement the Court of Justice. The "Comitology" procedure where the Council delegates power to the Commission was included in Article 202 EC (now Article 291 TFEU).[256]

Major changes were in defining the internal market as an area without internal borders, allowing free movement of people, capital, goods, and services.[257] Qualified-majority voting was introduced in areas that previously required unanimity.[258] Other areas were added to the Community's remit, some of which had previously been asserted, but without any express basis in treaty. Social and industrial policy was aimed at encouraging improvements in the working environment, with regard to health and safety, and developing a dialogue between management and labour at a European level.[259] Another objective was to strengthen the scientific and technological basis of European industry so leading to greater international competiveness.[260] Although the environment was covered by earlier treaties, extra provisions to preserve, protect and improve the quality of the environment and contribute to human health, in addition to ensuring prudent and rational use of resources were added by the SEA.[261] As regards foreign policy, this provided for

[255] Article 252 EC which was repealed by the Treaty of Lisbon in 2009
[256] Article 202 EC (now Article 291 TFEU)
[257] Article 21 TFEU (ex 18 TEC)
[258] Article 95 EC (now Art 114 TFEU)
[259] Articles 118A and 118B EC.
[260] Article 150 TFEU (ex Article130F EC)
[261] Articles 130R, 130S, and 130T EC.

Members to consult with each other and jointly form and implement foreign policy.[262] The presidency of the Council was given power to initiate action, co-ordinate, and represent Members in their relations with other states.

In 1992, the Maastricht Treaty introduced important developments, and is now regarded as the birth of the European Union as it gave substance to the term "European Union". The treaty is also known as the Treaty of European Union (TEU) and there was considerable progress towards economic and monetary union including a timetable for reforms,[263] new areas of community policy,[264] and an increase in the power of the EP.

The TEU established the three-pillar structure of the EU. It originally contained seven titles. Title I included the basic aims of the TEU. Titles II, III, and IV contained amendments relating to the first pillar and the ECSC, EEC, and Euratom Treaties. Title V created the second tier dealing with the Common Foreign and Security Policy (CFSP). Title VI was about the third pillar of justice and home affairs, and Title VII contained final provisions.

The stated aims and objectives contain reference to solidarity between States, closeness to the citizen, respect for national identities and human rights, and safeguarding Community law, while respecting the principle of subsidiarity,[265] and

[262] Article 30 EC
[263] Articles 98-124
[264] Article 3 EC
[265] Article 5 TEU (ex Article 5 EC)

including balanced and sustainable economic and social progress.[266] The concept of European citizenship was also introduced.[267]

As regards the three-pillar structure the main objectives were co-operation in Foreign and Security policy, and Justice and Home Affairs. The first Community pillar was characterised by supranational decision-making with the Commission and CJEU playing central roles. However the new second and third pillars were more sensitive policy areas and so decision-making was more intergovernmental, with members retaining the primary reins of power with European institutions having a limited role. In the CFSP the European Council would define a common position, and the Council of Ministers could decide on "joint-action" by a qualified-majority. In the third pillar the role of adopting a joint position was given to the Council of Ministers with the Council having less of a role.

An important change was with regard to the EP through the "co-decision" procedure.[268] This increased the EP's power further in making legislation by allowing it to block new legislation, which it did not approve. It could also ask the Commission to introduce new legislation or block a new Commission. Further institutional change was included such as making the Court of Auditors equal to other institutions,[269] providing a European System of Central Banks,[270] a Parliamentary Ombudsman,[271] and a Committee of the Regions.[272] Maastricht established closer cooperation between

[266] Article 2 EC
[267] Articles 20-24 TFEU (ex Articles 17-21 TEC)
[268] Article 294 TFEU (ex Article 251 TEC)
[269] Article 13 TEU (ex Article 7 EC)
[270] Article 8 EC
[271] Article 195 EC
[272] Article 263 EC

the member states, and installed the unified currency that was to become effective by 1999.

In 1995, Sweden, Finland and Austria joined the 12 existing members. In 1997, the Treaty of Amsterdam aimed to consolidate rather than extend Community powers. This treaty made several changes to the first pillar. It renumbered all the articles, titles and sections of the TEU and EC Treaty. The Co-decision Process was extended and the EP was involved in appointing the Commission President further augmenting its power.[273] Added emphasis was placed on environmental concerns, which became an independent aim rather than an incidental to economic growth, and an environmental integration clause was added to Article 6 EC. Broader anti-discrimination provision was introduced giving the Community legislative competence in this area.[274] A major change was incorporating policies under the third pillar, such as free movement of people, visas, asylum, immigration, and judicial co-operation in civil matters,[275] into the first pillar. Closer co-operation between Member States was also encouraged.

Changes to the second pillar aimed at improving the presentation of the EU in international matters. The post of High Representative for EU was created to give identity to its CFSP. The EU increased its responsibility for peacekeeping and humanitarian work by closer links with the Western European Union. Clarification was given on common positions, joint actions, and common strategies. Provisions on voting were changed to make agreement easier between Members.[276] Matters such as police and judicial co-operation in criminal matters, which come under the third

[273] Article 214 (2) EC
[274] Article 13 EC
[275] Title IV Articles 61-69 EC
[276] Article 23 TEU

pillar, were enhanced through closer working between the agencies of Member States and Europol.

The Treaty of Amsterdam eroded some of the distinctions between the different pillars, in particular with regard to the third pillar where some areas were transferred to the Community pillar, leaving only criminal and police co-operation under the third pillar. Another result of the treaty was to encourage different degrees of co-operation between different groups of states.

The Treaty of Amsterdam did not address the EU's institutional structure; the size and make-up of the Commission, the weighting of votes in the Council, or the extension of qualified majority voting. A further Intergovernmental Conference was held leading to the Nice Treaty. Another development was the drawing up of a European Charter or Convention of Rights, which was a significant step forward with regard to human rights in the EU.

The Treaty of Nice in 2001 concerned the EU institutions, specifically the weighting of votes in the Council, changes in the allocation and numbers of seats in the EP due to new Members and reform of the Commission. The EP's powers were further extended. The powers of the Court of First Instance were significantly increased with wider jurisdiction. Stronger roles were given to the EP and the Commission in establishing better co-operation. One major reason for the Treaty of Nice was the enlargement of the Community bringing in the Eastern European states. Other protocols covered the Statute of the Court of Justice, the consequences of the expiry of the ECSC, and Article 67 EC on the free movement of people.

The main changes however were under the second pillar, CFSP. Most of these were under Article 17 TEU in relation to security and defence. Qualified majority voting was extended with regard to the appointment of special representatives and the conclusion of international agreements. Military and defence matters were covered by a new caveat aimed at enhanced co-operation.[277]

Shortly after the Treaty of Nice a further European Council meeting at Laeken identified four significant areas: the need for increased precision in the delimitation of competencies between the EU and the Member States in accordance with subsidiarity; the status of the Charter of Fundamental Rights; as well as the need for simplification of the Treaties for accessibility, and increased clarity for the role of national parliaments in the European architecture. A convention was set up which in 2002 presented a draft "Constitutional Treaty".[278] This draft attempted to give an outline of the constitutional architecture of the EU and provided a framework for the various working groups. It was divided into four parts: Part I dealt with the fundamental rights, competences, objectives and values of the EU; Part II dealt with the Chapter of Rights; Part III related to the policies and functions of the EU; and Part IV contained general and final provisions.

The Constitutional Treaty was unsuccessful and never came to pass; referendums were rejected by national governments such as the Netherlands and France when they sought a mandate to implement it nationally, so progress came to a halt. Many of the Constitutional Treaty's provisions were then carried over into the Lisbon Treaty with some minor amendments. For example, the Constitutional Treaty proposed a smaller

[277] Article 27a TEU
[278] CONV 369/02 Preliminary Draft Constitutional Treaty, Brussels, 28 Oct. 2002.

representation to form the European Commission, but this was altered in the Lisbon Treaty to have 27 representatives, one from each member state. Also, the Constitutional Treaty had separate posts for the High Representative and the External Affairs Commissioner but these were combined in the Lisbon Treaty to give the EU more presence and influence on the world stage.[279]

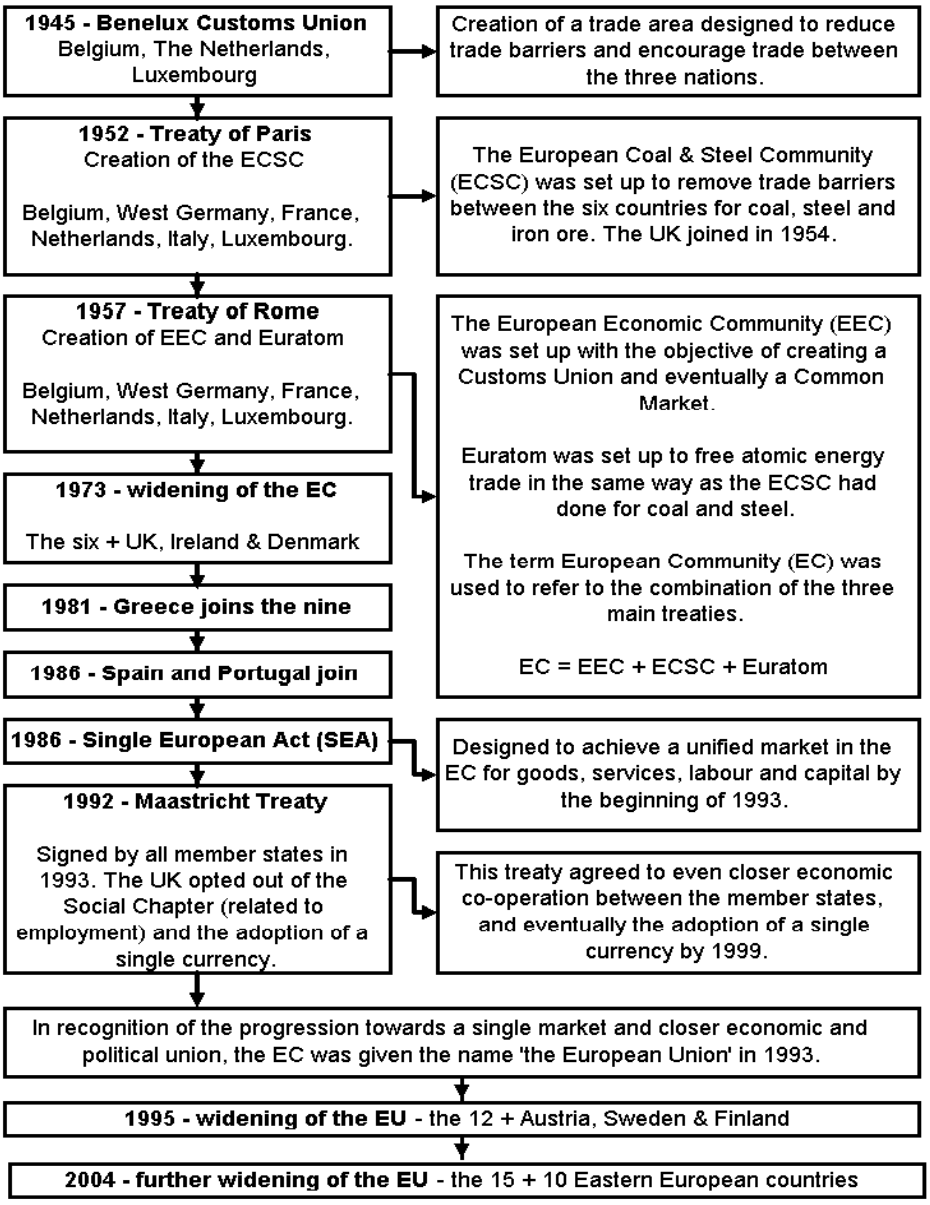
In 2004, 10 eastern European countries (Cyprus, Malta, Latvia, Lithuania, Poland, Slovakia, Slovenia, Hungary, Estonia and the Czech Republic) joined the EU.

The Treaty of Lisbon modified or reformed existing provisions in earlier treaties. It allowed the EU to become a legal entity. The treaty merged together the three pillars, and introduced a new rule of "double-majority" for decision-making, with a redistribution of the voting weights. It also confirmed co-decision between the EP and the Council of Ministers as the normal legislative procedure, and gave additional powers to the EC, EP and the CJEU in the areas of justice and home affairs. It confirmed the Presidency would be for a term of two and a half years, renewable once only. It enlarged democratic participation and the rights of citizens, and removed the vetoes in areas of climate change, energy security and emergency, and confirmed a High Representative for the EU in Foreign Affairs and Security Policy. Romania and Bulgaria joined the EU in 2007. The following figure (fig. 2) shows the history of the EU.[280]

[279] Craig, P and De Burca, G "EU Law (Text, cases, and Materials)" 4th edition, 2008, Oxford University Press pp. 22-24

[280] Historical development of the EU, UK Independence Party, Enfield & Haringey Branch, last accessed 18/12/2012 http://www.ukipenfield.co.uk/euguide.htm

Figure 2. History of the European Union



Currently, the EU internal market operates within the Common Customs Union of the EU Member States, and its foundations rest on TFEU Articles 28-32 (ex Articles 23-27 EC), which establish a Common Customs Tariff and eliminate customs duties and charges having a similar effect on goods moving between the EU Member States.[281]

[281] Article 28(1) TFEU (ex 23 EC)

Customs duties are prohibited on imports and exports between EU Member States. This also applies to customs duties of a fiscal nature and other charges having equivalent effects.[282]

This Common Customs' Union covers all trade in goods and involves the prohibition of any such duties and charges that might otherwise be levied on goods moving between Member States in the EU; whether those goods have originated in the EU or are goods from third party countries that have been lawfully imported into the EU and are freely circulating in Member States.[283] Products from third countries freely circulating in a Member State are identified as products that have complied with import formality and customs duties and charges that are payable and have been levied to that Member State.[284]

The Common Customs' Union establishes a Common Customs Tariff applicable to the trading relationships between the EU Member States and third party countries. Those trading relationships are the subject of bilateral negotiation by the EU (for and on behalf of its Member States) with those third party countries, (such negotiation being facilitated by the fact that the EU itself is a member of the WTO and represents all EU Member States within the context of their membership of the WTO). This common tariff is applied to all third party country goods at the point of import into the EU and to all goods at the point of their export from the EU to any third party country, and as such, the application of the EU common custom's tariff in respect of exports to or imports from member states of the WTO Member States must comply

[282] Article 30 TFEU (ex 25 EC)
[283] Article 28(2) TFEU (ex 23 EC)
[284] Article 29 TFEU (ex 24 EC)

with the Most Favoured Nation principles of the WTO. The duties applied by the Common Customs Tariff are proposed by the EU and fixed by the Council of the EU on a qualified majority vote.

To carry out the tasks of the Customs Union, the Commission has an obligation to be guided by: the desire to encourage trade between Member States and third party countries;[285] the development of competition conditions within the EU if they lead to the improvement of the capacity for competition;[286] Union requirements for the supply of raw material or semi-finished goods, taking care to avoid negative impact on competition between Member States for finished-goods;[287] and the need to prevent disturbances in Member State economies and maintain development of production and consumption expansion within the EU.[288]

3.1.2 Accession Process

There is a procedure that must be undertaken to apply for membership to the European Union. This procedure is complicated and lengthy, as applicants must justify certain membership conditions and requirements. These are termed "Copenhagen Criteria" and include demonstrating that the member state has a free market economy, stable democracy and a rule of law in its domain, and is agreeable and accepting of all EU legislatures, and the unified currency "The Euro". A country wishing to apply for membership submits an application to the Council, which in turn requests that the Commission review the applicants' eligibility. Candidate status is when a country is offered the prospective membership. If this response is positive, the

[285] Article 32(a) TFEU (ex 27 EC)
[286] Article 32(b) TFEU (ex 27 EC)
[287] Article 32 (c) TFEU (ex 27 EC)
[288] Article 32(d) TFEU (ex 27 EC)

Council will agree a mandate for negotiation, which are then opened subject-by-subject. This is when a country becomes an official candidate for membership. The EU provides support and advice for candidates during these lengthy procedures. Formal membership negotiations are when a candidate undertakes to put in place domestic reforms to meet EU criteria. When this is complete, the country is offered complete membership, provided all member states agree in complete unanimity. Croatia, Serbia, Montenegro, Iceland, Turkey, Macedonia are currently candidates to accede. Potential candidates include Bosnia Herzegovina, Kosovo and Albania.

3.2. Institutions

Article 13 TEU (ex. Article 7 EC) mentions five principal institutions that form the basis of the European Union, which have been set up to carry out the tasks of the Community. They are the Council, the Commission, the European Parliament, the Court of Justice, and the Court of Auditors.[289]

There are other important institutions, such as the European Economic and Social Committee, the Committee of the Regions, the European Investment Bank, the European Central Bank, the European Ombudsman, the European Data Protection Supervisor, the Publications Office, the European Personnel Selection Office, the European School of Administration and the European External Action Service.[290]

There are also various specialized agencies and decentralized bodies to undertake management, technical and scientific tasks. It should be appreciated in the EU many

[289] Article 13 TEU (ex. Article 7 EC)
[290] EU Institutions and other bodies, EU website, last accessed 15/12/2012 http://europa.eu/about-eu/institutions-bodies/index_en.htm

government functions are shared between institutions, and the EU does not therefore conform to a rigid separation of powers found in some domestic political systems. Furthermore the pattern of institutional competence has not remained static, but has developed over time as a result of organic development, changes in the balance of power, and treaty revisions.[291]

The executive branch of power in the EU is manifested in the European Commission and the European Council of Ministers. The EU Commission is responsible for safeguarding the EU Treaties. It is also responsible for initiating and proposing legislation and policy, in addition to overseeing the implementation of such policies. The Commission also acts as guardian of EU law, observing that each member state is correctly applying EU laws. In the event that a member state fails to do so, the Commission will send an official letter asking that the matter be rectified and can refer the matter further to the European Court of Justice.[292] The Commission is in effect the manager and executive authority of EU policies and international trade relations.

The Commission has responsibility for a wide range of areas affecting internal and external EU policy such as agriculture, competition, economic and financial affairs, education and culture, employment, social affairs and equal opportunities, enterprise and industry, environment, fisheries and maritime affairs, health and consumer protection, information and media, internal market and services, justice, freedom and

[291] Treaty Establishing a Constitution for Europe (2004) OJ C310/1
[292] European Commission, EU website, last accessed 15/12/2012 http://europa.eu/about-eu/institutions-bodies/european-commission/index_en.htm

security, regional policy, research, taxation and the joint customs union, and transport and energy.

The powers of the Commission are set out in Article 17.1 TEU (ex 211 EC).[293] The Commission is not characterised by any rigid doctrine of separation of powers, and it has important legislative, administrative, executive, and administrative powers. It plays a major role in initiating legislation, and although its proposals may have to be approved by the Council and Parliament it has an important role in initiating such legislation. The Commission also develops the overall legislative plan for each year. Finally the Commission develops general policy strategies, for example, the Commission's White Paper on the internal market,[294] which shaped the Single European Act. Administrative powers are usually in the form of supervising the implementation and administration of policies. The Commission has executive powers particularly in the areas of finance and external relations. Judicial powers are of two types. First, the Commission can bring actions against states when they breach Community laws,[295] although this is a last resort. Second, the Commission can act as investigator and initial judge of any treaty violations.

The Commission is the executive body and consists of twenty-seven Commissioners nominated by Member States and appointed for a five-year period. The Commissioners do not however represent their own states,[296] and should perform their duties independently.[297] They meet collectively as a College of Commissioners, under

[293] Article 17.1 TEU (ex 211 EC)
[294] COM (85) 310
[295] Article 226 EC
[296] Article 213 (1) EC
[297] Article 213 (2) EC

the guidance of its President. The President of the Commission was given increased powers,[298] and plays an important role in shaping overall policy, negotiating with the Council and Parliament, and determining the future direction of the EU.

The Council of Ministers is also part of the executive branch of power in the EU, acting on proposals from the Commission and is the EU's primary decision-making body. The Council defines political objectives and co-ordinates national policies. It can also resolve differences between Member States or other institutions. The Council is composed of ministers from Member States.[299] The Presidency of the Council is held by each Member State in turn for a period of six months. There are also permanent representatives who make up the Committee of Permanent Representatives (COREPER) and they are responsible for preparing work for the Committee, but they do not have decision-making powers, and act as an auxiliary of the Council. The Council also has a General Secretariat that provides general administrative support.

The Council, in being composed of ministers from Member States, tends to represent national interests. While the Commission proposes legislation the Council must examine and approve such proposals, and deal with the sometimes conflicting national interests of Member States.

The European Council has gradually evolved out of regular meetings of heads of government. The Presidency is rotated between Member States. The Council was to define the direction and priorities of the EU, and the President was given increased powers. It now plays a major role in setting the pace and shape of policy and

[298] Treaty of Nice, Article 217
[299] Article 203 EC

establishing the parameters for institutions. It can consider the overall state of the EU. One of its important functions is conflict resolution between Member States. This was one of the reasons for its evolution, and although only mentioned briefly in the TEU it is one of the most important decision-making bodies. Its conclusions form a framework for other institutions when looking at specific issues, and its relationships with these other bodies have developed over time.

The legislative branch of the European Union is considerably fragmented, as it consists of several bodies; the European Parliament, the Council, the Commission and also various regulatory agencies. The EP represents 500 million citizens of the EU. Its role is to pass legislation, and to subject to scrutiny and control the use of executive power by European institutions. Originally Members of the European Parliament (MEPs) were nominated by Member States, but they were directly elected to the Parliament after June 1979.[300]

The European Parliament has three types of powers. First, with regard to legislation, the Parliament can amend and adopt legislation proposed by the Commission. Over time the Parliament's position in the legislative process has become stronger, particularly as a result of the Single European Act,[301] making it a co-partner with the Council in enacting legislation. The Parliament and Council therefore share decision-making powers in several areas. Second, the Parliament has the power to approve the EU's annual budget.[302] Third, the Parliament can supervise the executive branch of the EU through its power to approve the President and members of the

[300] Dec 76/787 [1976] OJ L278/1. This Decision was amended by Art. 5 of the ToA
[301] Article 251 EC
[302] Article 272 EC

Commission,[303] and ultimately has the power to dismiss the Commission completely although this has never been used.[304] The EP also holds the right to monitor the Commission and other institutions by asking questions and establishing committees of inquiry.[305] European citizens have the right to petition the Parliament, and to expect MEPs to represent their interests and gives democratic legitimacy. There is an Ombudsman to investigate possible maladministration on behalf of EU citizens.

The CJEU, the Court of First Instance (CFI), and judicial panels such as the Court of Auditors form the judicial branch of the EU. The CFI was set up in 1988 following a Treaty amendment to the Single European Act.[306] Further to the Treaty of Nice amendment there is at least one judge from each Member State. The CFI sits in chambers of three or five judges, or occasionally a single judge.[307] A CFI decision can be appealed to the CJEU within two months.[308] The jurisdiction of the CFI is now determined by Article 256 TFEU (ex225 TEC).[309] Judicial panels were added and are governed by Article 257 TFEU (ex 225a TEC).[310] The reason for this was to lighten the workload of the CFI and CJEU, and was a significant structural reform.

The division of functions between the various bodies was amended by the Treaty of Nice and protocols and further rules were adopted.[311] The CJEU is the final arbiter on EU law. The judges are drawn from each Member State settle disputes over the

[303] Article 214 (2) EC
[304] Craig, P and De Burca, G "*EU Law (Text, cases, and Materials*)" 4th edition, 2008, Oxford University Press p.61
[305] Article 197 EC
[306] Council Dec. 88/591 (1988) OJ L319/1
[307] Council Dec.1999/291 [1999] OJ L114/52
[308] *Ibid*., Art. 56
[309] Article 256 TFEU (ex225 TEC)
[310] 257 TFEU (ex 225a TEC)
[311] Articles 221-225a EC.

interpretation and applicability of community law.[312] They have the power to overturn decisions that are found to be contrary to the Treaties establishing the EU. The judgments are binding on the Commission, national governments, organisations and individuals. It provides the judicial safeguards needed to ensure interpretation and implementation of the Treaties and EU activity. The CJEU covers challenges to community action by Member States,[313] actions between institutions,[314] and proceedings involving the compatibility of international agreements with EU Treaties.[315] As a result the CJEU has been active in developing community legal principles such as direct effect, supremacy, pre-emption, and state liability.

The principle of direct effect refers to the capacity of EU law to have direct effect in the legal orders of the EU member states.[316] This is then linked to the principle of supremacy, as the EU law becomes supreme in national legal orders and can overrule national municipal law.[317] The principle of pre-emption is also closely linked here, as if the EU legal order implements a law, member states cannot set laws thereafter that contravene EU law, as it pre-empts national law in the member states whenever there is a conflict. This means that in an area of shared competences, when the EU acts the member states lose their right to act and thus the shared competence has been pre-

[312] Article 220 EC
[313] Cases 281. 283-285, 287/85 *Germany v. Commission (Non-Community Workers)* (1987) ECR 3203; Case C-376/98 *Germany v. European Parliament and Council* (2000) ECR I-8419
[314] Case 22/70 *Commission v. Council* (ERTA) (1971) ECR 263.
[315] *Opinion 1/94 Competence of the Community to Conclude International Agreements Concerning Services and the Protection of Intellectual Property*, WTO (1994) ECR I-5267
[316] Craig, P and De Burca, G "EU Law (Text, cases, and Materials)" 4th edition, 2008, Oxford University Press p.180
[317] *Ibid* p.256

empted.[318] The principle of state liability is necessary for breaches of EU law, as the acceding states agree to uphold the treaties and any infringement causes the state to be liable to individuals within the context of each state's own national legal order.[319] These principles have defined the nature of the community and distinguished it from other international legal orders.[320]

The Court of Auditors consists of one national from each Member State. Its role is to oversee the finances of the community and ensure sound financial management. It provides the EP and the Council with a statement of assurance as to the reliability of the accounts. It also produces an annual report, which is adopted by most Members after the close of each financial year.[321] This court may also submit observations on specific questions, adopt special reports, or deliver opinions on specific legislative proposals.[322] As a result there may be at times, a strained relationship with the EP and the Council.

The European Economic and Social Committee (EESC) has been established to assist the Council and Commission.[323] It has a mandatory consultative role in the legislative process, as it advises the bodies on social and economic activity within the EU, either on its own initiative or at the request of other institutions.

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[318] *Ibid* p.84
[319] *Ibid* p.241
[320] Ziegler, K "International Law and EU Law: Between Asymmetric Constitutionalisation and Fragmentation" University of Oxford 61/2011
[321] Article 248 (4) EC
[322] Arts. 279, 280 (4) EC
[323] Article 7 (2) EC

The Committee of the Regions (CoR) also has a mandatory consultative role in the legislative process, as it was created to represent regional and local bodies [324] and to counter the idea of over-centralisation. It aims to protect local identities in the regions of the EU and to ensure local and regional interests are taken into account. The European Investment Bank (EIB) is the financing institution for the EU, which provides loans for capital investment to encourage economic growth. This institution is now being considered for expansion of its powers as a central bank within the context of the fiscal stability pact.[325] The European Ombudsman enables any victims of maladministration by any of the EU institutions to have recourse to the right of appeal against decisions, acting in its judicial role.[326]

There are several other agencies that serve a regulatory purpose and have specific legislative, executive and judicial capacities relevant to their areas such as the European Chemicals Agency (ECHA),[327] the European Railways Agency (ERA),[328] and the European Aviation Safety Agency (EASA).[329]

In examining the institutions of the EU, it is noticeable that the Community bears many of the hallmarks of a state in itself in terms of the presence of the three authorities (legislative, executive, and judicial) and the power that is granted to each authority, albeit one that has no responsibility for the delivery of public services,

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[324] Article 263 EC
[325] Article 309 TFEU (ex 267 TEC)
[326] Article 228 TFEU (ex 195 TEC)
[327] European Chemical Agency, last accessed 15/12/2012 http://echa.europa.eu/
[328] European Railways Agency, last accessed 15/12/2012 http://www.era.europa.eu/Pages/Home.aspx
[329] European Aviation Safety Agency, last accessed 15/12/2012 https://www.easa.europa.eu/home.php

maintenance of law and order or defence responsibilities (as the functions fall to be performed by the individual member states and and are not performed by EU bodies). However, in comparison with the WTO-as discussed earlier in Chapter 2 -the EU can be seen to be an effective supranational international body, whilst the WTO operates as a body to foster intergovernmental cooperation as the institutions within the WTO lack the legislative and judicial powers to act as a sovereign body. For instance, the legislative authority lacks the power to introduce new laws as needed outside the scope of the covered agreements and the judicial authorities (panels and Appellate Body (AB)) lack the power to develop the law as might be needed in new cases due to the limitations of the covered agreements. A detailed comparison of the three legal orders included in this study will be examined in Chapter 5.

3.3. Dispute Resolution Process

In the event of any unlawful derogation by member states, EU Law may be enforced against member states in one of three distinct ways:

Enforcement Actions by EU Commission

Article 17 (1) TEU (ex 211 EC) gives the commission the task of ensuring the proper application of Community law, and monitoring the compliance or non-compliance of Member States. Article 258 TFEU (ex 226 EC) establishes the general enforcement procedures for resolving disputes. Article 260 TFEU (ex 228 EC) allows the Commission to ask the CJEU to impose penalties.

Under Article 258 TFEU (ex 226 EC) the Commission can start proceedings in response to a complaint from a Member State, or on its own initiative. It can also

respond to complaints from citizens however its main role is as an 'objective' mechanism for ensuring state compliance with EU law.[330] It is notable here that there is no equivalent in WTO law to the Commission's jurisdiction stipulated under Article 258 TFEU (ex 226 EC). Neither is there within the WTO the ability to levy fines on a member state for breach of agreements as there is within the EU in Article 260 TFEU (ex 228 EC).

If a Member State is deemed by the Commission to have not fulfilled an obligation it had undertaken, the Commission will submit its reasoned opinion on the subject. Before reaching this, the Member State in question will be allowed to submit its own observations and notes on the matter. If the Commission presents its opinion and the Member State does not comply, the Commission then has the option to bring the non-compliance before the Court of Justice of the European Union.[331]

This is a procedure whereby the Commission will attempt to resolve the complaint using four stages: first, an initial pre-contentious stage; second, a formal notification; third, the commission will issue a reasoned opinion; fourth, if the previous measures do not resolve the matter, it is referred to the Court of Justice.

The Commission has certain discretion to bring proceedings under Article 258 TFEU (ex 226 EC). The Commission acts in the general interest, because 'Article 226 is not intended to protect that institutions own rights'.[332] Member States have had success

[330] 13th Annual Report (1986) OJ C303/8
[331] Article 258 TFEU (ex 226 EC)
[332] *Commission v. Greece* Case C-394/02 (2005) ECR I – 4713, para. 15-6.

arguing there are procedural constraints, such as time limits, and the CJEU ruled that excessive delay might be prejudicial.[333]

There are several types of breaches of Community law by Member States. Article 258 TFEU (ex 226 TEC) is very general in its description of this, and an unusual example of this was the case brought against Ireland in relation to the MOX Nuclear Recycling Plant in the UK. Ireland had complained about a breach of EU law by the UK in relation to the operation of the MOX Nuclear Recycling Plant; but it had made its complaint to a tribunal constituted under the International Convention of the Law of the Sea, rather than to the CJEU.

The Commission reasoned that Ireland's complaint to such a tribunal was itself a breach of EU law on the basis that community institutions had exclusive competence over issues of EU law and the CJEU upheld that reasoning. According to the CJEU, in a case of this nature: 'the autonomy of the community legal system may be adversely affected' [334] if non-EU institutions were able to exercise jurisdiction over issues of EU law. Member states can also be in breach of the obligation of cooperation under Article 4 (3) TEU (ex 10 EC) and, rather than complete failure to implement Community law, the complaint may be about inadequate implementation.[335] Breaches under Article 4 (3) TEU (ex 10 EC) may occur if a Member State fails to penalise those who infringe Community law in the same way as it penalises those who infringe National law, or where a Member State fails to prevent

[333] *Commission v. Netherlands* Case C-96/89 (1991) ECR I-2461, para.16.
[334] *Commission v. Ireland* Case C-459/03 (2006) ECR I-4635, para. 154.
[335] *Commission v. France* Case 167/73 (1974) ECR 359.

action by other parties, which is against community objectives.[336] Even if legislation is properly implemented, a breach may occur if administrative practice infringes EU law. In a case against Ireland in 2005 [337] the court ruled a finding of 'general and persistent breaches' could be made from a selected number of individual infringements of administrative practice.

Under Article 260 TFEU (ex 228 EC), a penalty payment can be imposed on a Member State, which has failed to comply with a court judgment. However there is no upper limit to the amount of penalty, the court is not bound to follow the proposal of the Commission, there is no mechanism to collect the payment if the Member State refuses to comply, and there is no power to seek an injunction or order specific action to be taken.

When complaint is brought before the CJEU and it finds the Member State at fault and in non-compliance with its obligations under the Treaties, the State is then required to take measures to comply with the CJEU judgment.[338] If the Commission does not deem the State to have complied with Court's judgment, the case may be brought before the Court - after that State has been given the opportunity to submit its observations – and a specific penalty payment may then be required to be paid by the State, the amount of which – whilst at the discretion of the Court – is recommended by the Commission applying a formula set out in a Commission Communication of December 2005.[339] This procedure does not prejudice the right of member states themselves, referred to in the next method of enforcement below, to make complaint

[336] *Commission v. France* Case C-265/95 (1997) ECR I-6959.
[337] *Commission v. Ireland* Case C-494/-01 (2005) ECR I-3331.
[338] Article 260(1) TFEU (ex 228 EC)
[339] SEC (2005) 1658

to the CJEU as to the actions of other member states under Article 259 TFEU (ex 227 TEC).[340]

The Commission may elect to bring the Member State to the Court, pursuant to Article 258 TFEU (ex 226 TEC), for failure to fulfill its obligations with regard to notifying measures as to the transposition into national law of a directive adopted as part of the EU legislative procedure and thereby may also specify a penalty payment amount for continuing default. If the Court finds an infringement has taken place, a penalty payment may be imposed. This should not exceed amount determined by the Commission, and will take effect on the date set by the Court.[341]

Criticisms of the enforcement procedures such as lack of effectiveness, lack of an adequate role for individual complainants, and the unresponsive attitude of the Commission have been gradually addressed.[342] The penalty payment procedure under Article 260 TFEU (ex 228 EC), and the procedures for pursuing general and persistent breaches, has made the procedures more effective. Furthermore, more regular and transparent administrative procedures at the Commission (for instance the publication of the guidelines used by the Commission in making recommendations as to the level of fines)[343] have been encouraged by pressure from the Ombudsman and the European Parliament.

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[340] Article 260(2) TFEU (ex 228 EC)
[341] Article 260(3) TFEU (ex 228 EC)
[342] Craig, P and De Burca, G "*EU Law (Text, cases, and Materials)*" 4th edition, 2008, Oxford University Press p.408
[343] *Ibid* fn. 11

Enforcement Action by Other Member States

Article 259 TFEU (ex 227 EC) provides a means for a Member State to initiate action against any other state it considers in breach of the Treaty. If a Member State considers another Member State to have not met an obligation specified in the Treaties, they may bring the matter to the CJEU. Before that, the Member State must bring the alleged infringement to the attention of the Commission. The Commission will allow each State to present his case both orally and in writing, after which the Commission will present its own reasoned opinion. This must be delivered within three months or the matter goes directly to the Court of Justice.[344] Article 259 TFEU (ex 227 EC) is seldom used because of the potential ill will it could cause between Member States and even where complaints originate with Member States they are generally pursued by the Commission under Article 258 TFEU (ex 226 EC).

It is important to note that within the WTO, a member state enacts measures to restrict or prohibit another member state that they see to be in breach of the agreements. The affected member state would then lodge a dispute and proceedings would be initiated. The WTO function in these circumstances is a balancing one, between moderating the measures that have been enacted and the obligations specified in the agreements. This is in contrast with the EU enforcement and punishment role, as the EU does not permit retaliatory action.

Enforcement by Private Persons

EU law is capable of direct effect on the legal systems of its member states and this may be enforced by natural or legal persons against member states in those states'

[344] Article 259 TFEU (ex 227 EC)

own courts as EU legislation is intended to create legal rights for those persons and the duties imposed by this legislation on the state are clear, precise and unconditional.[345] Not only is EU law considered supreme [346] (within the confines of the competences conferred on the EU by its member states)[347] in the legal systems of each member state but the courts of member states are obliged to ensure enforcement of EU law in a manner that is at least functionally equivalent to the manner national law is enforced and, furthermore, effective in fulfilling the aims and purposes of the EU law.[348]

The Court of Justice of the European Union has jurisdiction to give preliminary rulings on issues concerning the interpretation of the Treaties and the validity and interpretation of acts of the institutions, offices, bodies and agencies of the European Union. The preliminary reference procedure entails that a question of EU law may be raised in the court or tribunals of the Member State and those courts or tribunals may then request the CJEU to give a ruling on that question. National courts have a general discretion to refer such questions at any stage of a pending case, but the CJEU has reserved to itself the right to reject references where the determination of the issue is not necessary to the determination of the case, the case is hypothetical and does not involve a substantive dispute, the facts of the case have not been fully determined or

[345] *Francovich, Bonifaci & Ors v Italian State* Cases C-6/90 & C-9/90 [1991] ECR I-5357
[346] *Flaminio Costa v ENEL* Case 6/64 [1964] ECR 585
[347] The extent of such conferred competence, being a matter susceptible to distinct determination in each legal order, is determined in the UK by reference to the European Communities Act 1972 according to the decision of the House of Lords in Factortame (No. 2) [1991] 1 AC 603, 658.
[348] Harris "The EC REACH Regulation and Contractual Supply Obligations" J.B.L. 2010, 5, 394-419

the question of EU law is unclear.[349] Where no judicial remedy under the laws of that Member State is available (e.g. the court is the final appellate court in the Member State), the court or tribunal determining the case must refer any necessary question of EU law to the CJEU and the court has no discretion whether or not refer.[350] If the question raised regards a person or individual held in custody, the European Court must take action with a minimum delay.[351]

The preliminary ruling procedure is set out in Article 267 TFEU (ex 234 EC). Before the Nice Treaty only the CJEU could give such rulings. Article 225 (3) EC allows the Court for First Instance (CFI) to give such rulings in areas laid down by the Statute of the Court of Justice. The CFI may refer cases of principle to the CJEU, and the CJEU may exceptionally review decisions of the CFI. However, the CFI's power to give preliminary rulings has not so far been acted on and the CJEU currently hears all Article 267 TFEU (ex 234 EC) cases.

References may result in similar judgments about the EU legal order and the concept of direct effect and supremacy arose out of the preliminary reference procedure. The CJEU does not pass judgment on National laws, but only interprets the Treaties and secondary legislation made by the EU institutions pursuant to the Treaties. The relationship between national courts and the CJEU has been governed by the development of precedent, whereby the decisions of the CJEU are binding on the courts of Member States, which are entitled to interpret EU law to the extent the meaning of EU law satisfies the *Acte Clair* principle.

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[349] *Foglia v Novello* Case C-104/79 [1980] ECR 745; *Salonia* Case C-126/80 [1981] ECR 1563
[350] Article 267 TFEU (ex 234 EC), paragraph 3.
[351] Article 267 TFEU (ex 234 EC), paragraph 4.

The *Acte Clair* principle emerges when national courts are able to resolve cases independently when correct application of community law is obvious enough that there can be no reasonable doubt as to how the case should be resolved.[352]Member States retain regulatory independence only according to the sectoral delegation of responsibility to national courts; which is when the EU devolves applications and functions in the context of competition policy.[353] As regards precedent, previous rulings of the CJEU can be relied on even where the types of proceedings may be different, or the questions at issue are not identical. If the point of law has been already determined by the CJEU, it can be relied on by national courts in a later case. The CJEU has been even more forceful as regards previous decisions and the validity of Community legislation,[354] since it obliges member states (including their national courts) to apply previous decisions of the CJEU and to respect the CJEU's hegemony over the validity of legislation made by EU institutions. The development of CJEU precedent modifies the conception of horizontal and bi-lateral relations between the CJEU as a court of reference, and places the court in a superior position to National courts.

National courts may feel that the answer to an issue is so evident that no reference to the CJEU is needed. The conditions in which this is legitimate were considered in the *CILFIT* case.[355] This case recognises the 'give and take' between the CJEU and National courts and involves the CJEU accepting the *Acte Clair* doctrine thus limiting

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[352] Craig, P and De Burca, G "*EU Law (Text, cases, and Materials)*" 4th edition, 2008, Oxford University Press p.476
[353] Craig, P and De Burca, G "*EU Law (Text, cases, and Materials)*" 4th edition, 2008, Oxford University Press p.477
[354] *International Chemical Corporation v. Amministrazione delle Finanze dello Stato* Case 66/80 *(*1981) ECR 1191.
[355] *Srl CILFIT and Lanificio di Gavardo Sp A v. Ministry of Health* Case 283/81 (1982) ECR 3415

the discretion of National courts. It is rare that an *Acte Clair* is invoked; when there is no need to refer the matter to the CJEU as the matter is sufficiently clear to the national courts and can be reasonably accepted to be as such by other member states national courts as well. The Community has also made a conscious choice to devolve certain application and enforcement functions to national courts, as occurred with regard to competition policy. These developments mean national courts can deal with cases without the need for reference to the CJEU when there is community precedent, or the matter is so clear there is no need for reference, or where a more general responsibility has been delegated to them. The combined effect of these changes has been to make the relationship between the CJEU and national courts more vertical and multi-lateral than was originally conceived.

As mentioned above, the principle of direct effect is one that is unique to the EU legal system, resulting from the conferral of powers by the member states to the higher EU authority, where EU law takes precedent over national law. Indirect effect occurs in an occasion when national courts are obliged to review and develop an interpretation of the EU directives which were unimplemented or badly implemented. For example, in the *Von Colson* case the member state failed to correctly implement a directive and the CJEU held that national courts interpretations of national municipal law have – as far as possible - to comply with directives (even though directives are incapable of direct effect),[356] and later in *Marleasing*, the member state did not implement the directive completely.[357] In WTO law, only the principle of indirect effect exists in the guise of judicial review, as there are no directives and WTO law does not supersede

[356] *Von Colson and Kamann v Land Nordrhein-Westfalen* Case 14/83 [1984] ECR 1891 para28
[357] *Marleasing v La Comercial International de Alimentacion* Case C-106/89 [1990] ECR I-4135

member states national law. There is also no secondary legislation, as there are only recommendations which are binding but for which there is no enforcement mechanism. In the EU however, even recommendations and opinions are of considerable persuasive influence on national courts interpreting and applying EU law in the context of the national municipal order.

3.4. Level of Legal Order

The EU is a public international and municipal legal order that was established to regulate member states trade relations and political policies, to form a unified market. The EU absorbed in its capacities inward and assimilates within its remit its other legal obligations to other international entities such as the WTO. The EU arises out of public international law, with obligations that are not only constitutional imperatives resulting from the presence of the executive branch of the legal order but also as a result of the presence of the built-in legal enforcement capabilities. The legal order has the flexibility to adapt to suit the member state's needs as well as serve the principles of the legal order and ensure the continued success of the unified Community.[358] The EU's operation as a municipal legal order due to the direct effect principle is unlike the WTO, where there may be no effect or any indirect effect aside from judicial review within the context of the municipal legal order of each Member State.

As to the EU's status as a member of the WTO, the EU exerts total control over its member states alongside each states membership independently in the WTO. At the

[358] Basic Information on the European Union, EU website, last accessed 18/12/2012 http://europa.eu/about-eu/basic-information/index_en.htm

same time, the presence of the EU in the WTO serves its member states positively, as a major player on the international trade stage.

3.5. Sources of Substantive Law

The sources of substantive law within the EU are primarily the treaties signed and ratified by the member states, which is then enforced by the legal order. There is within the EU primary and secondary and supplementary legislation.[359] The primary legislation sources are the treaties: such as the TEU and the TFEU. These treaties specify and detail the competences distribution between the EU and the member states, and give the powers to the institutions within the EU and detail the legal framework that is used by the institutions to implement policies. The amendments to the treaties are also considered primary sources of EU legislation, as well as their associated annexes and protocols.

Secondary sources of law are the unilateral acts and agreements, which are divided into two categories; those in Article 288 TFEU (the regulations, directives, and decisions which are all binding) and opinions and recommendations which are non-binding) and others not listed in Article 288 which are "atypical" (communications and recommendations, as well as white and green papers for consultation).[360] Also considered to be secondary sources of EU law are international agreements signed by the EU and an outside organization or country that is not a member state, agreements between member states and inter-institutional agreements which are agreements

[359] Sources of European Union Law, EU website, last accessed 15/12/2012 http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/l14534_en.htm

[360] Article 288 TFEU

between EU institutions.[361] These secondary or atypical sources of law are non-binding. Supplementary EU law is the case law of the CJEU, international law and general law principles. Supplementary sources are used to cover gaps in primary and secondary law in the EU.[362]

The EU is a considerably richer legal order than the WTO as its objectives are wider and not limited to organizing trade. The EU governs more aspects of member states policies and its institutions are stronger in terms of the status of the judicial decisions and the weight accorded to them, as well as the volume of legislative sources available, when compared to the WTO, due to the continual evolution and modifications that occur.

3.6. Manifestation of Public Policy

The EU has two motivations for the use of public policy in its legal order. The first is to enable the EU legal system to formalise public policy concepts at a supranational level, which can then be used to constrain the exercise of sovereignty of Member States over their own municipal legal orders thereby preserving the effectiveness and supremacy of the EU's supranational legal order. The second is to enable the EU legal system to permit Member States sufficient latitude in the governance of their societies so as to preserve the coherence and stability of those societies subject to the demands of the EU legal order. In the EU, the concept of public policy has been formalised at the supranational level because of the aspiration of the EU legal order to respect the public interests of its Member States whilst at the same time protecting the rights of

[361] Sources of European Union Law, EU website, last accessed 15/12/2012 http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/l14534_en.htm
[362] *Ibid*

all EU Member States and preserving the survival and continuity of the EU legal order. [363]

The concept of public policy in the EU legal order has developed over time. Every instance that has required the use of public policy has served to inform the way public policy is currently seen in the EU. Public policy concepts manifest themselves in the EU in various forms at both the legislative and dispute stages.

The expressly permitted derogations in the context of the operation of the free trade area for goods and services (i.e. those that are similar to the WTO exceptions) are formed at the legislative stage. With respect to primary legislative sources of EU law, these express derogations are as follows: Art. 36 TFEU (ex Art. 30 EC) (free movement of goods), Art. 45(3)-(4) TFEU (ex-Art. 39 EC) (free movement of workers), Arts. 51(1) and 52(1) TFEU (ex-Arts. 45(1) and 46(1) EC) (freedom of establishment) and Art. 62 TFEU (ex-Art. 55 EC) (free movement of services), Art. 65 TFEU (ex-Art. 58 EC) (free movement of capital), Art. 21(1) TFEU (ex-Art. 18(1) EC).[364]

As regards the express derogations described in secondary sources of legislation relating to the operation of the free trade area for goods and services these include: Art. 3(1) of Regulation 492/2011 of the European Parliament and of the Council of April 5 2011 on the freedom of movement of workers within the EU [2001] OJ L141/1 (ex-Art. 3(1) of Regulation 1612/68 ([1968] OJ L257/475) on the "conditions

363 Borzel, T "How the European Union Interacts with its Member States" Reihe Politikwissenschaft/ Political Science Series 93, 2003

[364] Express Derogations of Public interest in EU Law http://publicinterest.info/eu-law/express-derogations last accessed 02/04/2013

of linguistic knowledge required by reason of the nature of the post to be filled" as well as Arts. 21-33 of Directive 2004/38/EC of the European Parliament and of the Council of April 29 2004 on the right of citizens of the Union and their family members to move and reside freely within the territories of the Member States, [2004] OJ L158/77 (the corrected version is [2004] OJ L 229/35), which refers to "restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health"- this replaced Directive 64/221/EEC ([1964] OJ Sp. Ed. L850/117).[365]

Then there are the wider public policy concepts such as the Rule of Reason[366] to facilitate legitimate objectives (such as public health, fairness of commercial transactions and consumer protection, protection of the environment, compliance with professional qualifications and protection of the work environment) [367] which are manifested at the dispute stage. The idea of the Rule of Reason aided the development of the concept of public policy in the EU to support the free movement of goods within the European internal market. This is a judge-made public interest justification, and is only used to justify restrictions on free movement resulting from measures that have been applied to achieve aims that are considered as being necessary for the state and the EU but which discriminate indirectly against goods passing between member states or negatively affecting their access to the market.

Without the application by the CJEU of the Rule of Reason, the provisions in Articles 34 and 35 TFEU (ex 28 and 29 EC), which prohibited quantitative

[365] *Ibid*
[366] *Cassis de Dijon* Case 120/78 [1979] ECR 649
[367] Judge-Made Public Interest Ground in EU Law http://publicinterest.info/eu-law/judge-made-public-interest-grounds last accessed 02/04/2013

restrictions on imports and exports between member states, would only be subject to the list of defined derogations in Article 36 TFEU (ex 30 TEC). The Rule of Reason has emerged to further broaden the scope of the public policy grounds that member states may use to implement quantitative restrictions on imports and exports under their own municipal legal orders where that is necessary to achieve a regulatory objective of that member state in so far as that public policy objective is regarded by the EU legal order as being a legitimate objective.

The origins of the Rule of Reason can be found in the *Cassis* case. In this case, German authorities prohibited an importer from obtaining Cassis de Dijon (French liqueur) due to its alcohol content being low.[368] German law prevented the sale as liqueurs drinks with alcohol content between 15% and 25%, but the importer argued the German legal measure contravened Art.28 of the EC Treaty[369]; in that it was effectively a quantitative restriction on importation. The German authorities submitted that this measure was unrelated to country of origin and would apply to all domestic and imported products. Given that the measure was not directly discriminatory, the German authorities maintained that they were pursuing a legitimate consumer protection objective; that being to ensure the fairness to the consumer if competing goods sold under a common description, such as liqueurs, were required to have the same characteristics:[370]

> "…Those provisions were prompted, in particular, by the wish to protect the consumer against adverse effects on his health: a limitless authorization for all varieties of potable spirits, whatever their alcohol content, would be likely to lead to an increase in the consumption of alcohol as a whole and therefore to increase the specific dangers of alcoholism; the provisions are also intended to

[368] *Rewe-Zentral AG v Bundesmonopolverwaltung fur Branntwein* (C120/78)
[369] Art. 34 TFEU
[370] *Rewe-Zentral AG v Bundesmonopolverwaltung fur Branntwein* (C120/78) p.655

> protect the consumer against abuses and unfair practices during the manufacture and sale of spirits…"

The CJEU ruled that the measure was equivalent to a quota, having the practical effect of restricting imports, even if the measure did not directly target imported goods: [371]

> "…Prohibitions on imports shall not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States; the Court has ruled that there is a disguised restriction within the meaning of that provision…"

The CJEU also ruled that this type of measure escapes Article 28 (34 TFEU) only as long as the member state can establish not only the existence of a genuine public policy objective and a genuine risk to the achievement of that objective, but also that the objective is justifiable in the context of the operation of the EU internal market and that the regulatory measures taken are necessary to achieve that aim and proportionate to the risks arising:[372]

> "…The Government of the Federal Republic of Germany, intervening in the proceedings, put forward various arguments which, in its view, justify the application of provisions relating to the minimum alcohol content of alcoholic beverages, adducing considerations relating on the one hand to the protection of public health and on the other to the protection of the consumer against unfair commercial practices…"

Accordingly, even where a measure is considered necessary by a member state to protect its public interests, such as ensuring the fairness of consumer transactions, EU law requires the member state to go on to prove that: its public interests are legitimate in the context of EU public policy; that the absence of particular regulation at the national level would create a real risk to the achievement of that objective; and that

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[371] *Ibid* p.653
[372] *Ibid* p.662

the regulatory measure imposed by member states is necessary to alleviate that risk, and that the regulatory measure is proportionate to the risk.[373] If the member state can satisfy all these issues the regulatory measure will be permissible under EU law, but if the measure exceeds what is necessary and/or it is not proportional to the risk identified, it would not be permissible under EU law and would be condemned.[374]

In the *Cassis* case the CJEU accepted that the express derogations in the treaties (i.e. Article 36 ex 30 TEC) for such an issue as *Cassis* were insufficient because it gave no freedom for States to require that consumers are protected from confusion in the marketing of dissimilar products, i.e. the Cassis drink had lower alcohol content than its description as a liqueur might suggest to a German consumer wanting to drink a liqueur with more alcohol in it. Therefore the CJEU brought forward the Rule of Reason to supplement the Treaty provisions for those cases where the express derogations are insufficient.[375] However the CJEU decided that the ban introduced by the German state on the marketing of lower alcohol liqueurs was disproportionate to the identified risk (i.e. the risk that consumers might be misled) and could have been met simply by appropriate labeling. Accordingly the German regulation was declared unlawful.[376]

The WTO has had to tackle similar issues; the Thailand-Cigarettes Case[377] previously described is an example of restrictions on imports, allowing the sale of domestic

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[373] *Konsumentombudsmannen (KO) v. Gourmet International Products AB (GIP)* Case C-405/98
[374] *Ibid*
[375] *Rewe-Zentral AG v Bundesmonopolverwaltung fur Branntwein* (C120/78) p.657
[376] *Ibid* p.659
[377] [377] *Thailand- Restrictions on Importation of and Internal Taxes on Cigarettes* WT/DS10/R- 37S/200

tobacco products, justifying the measures under Article XX (b), but the panel found the measures to be inconsistent with Article XI: 1 and unjustified under Article XI: 2 (c), and that they restrictions were not necessary under Article XX (b).

The two cases described here (*Cassis* and *Thailand Cigarettes*) enacted similar measures to restrict the import of goods and failed due to the discrimination between imported and domestic items. It can be seen that although both use express derogations/exceptions, the EU supplements that use with the wider Rule of Reason concept to better balance the competing policy objectives of the conflicting national and international legal orders.

In the case of *Humblot*, France had imposed a system of taxation on car drivers in which the amount of the tax depended on the engine power.[378] The express purpose of this taxation was to encourage people to choose to drive cars with smaller engines, with the view that those who own larger cars would be able to afford a higher tax; although France stated it was to protect the environment from emissions from the cars with larger engines. However, the most contested (highest) tax band applied to certain imported cars, but not those produced in France. The CJEU ruled against this taxation scheme as unlawful, because it was indirectly discriminatory against imported cars. France then refined its taxation scheme to divide the band of highest taxation into several smaller bands, but this was again ruled unlawful by the CJEU because the band with the highest taxation, even when narrowed, included only cars that were imported. The CJEU ruled that any measures promoting smaller cars would be

[378] *Michel Humblot v Directeur des services fiscaux* (C-112/84)

unlawful and discriminatory if they indirectly discourage the purchase of imported cars.

An interesting case to compare with the Humblot case from the EU is the WTO is that of the dispute between the EC and Brazil over re-treaded tyres (as both cases are based on environmental protection claims).[379] In this case the EC complained against an import ban imposed by Brazil on re-treaded tyres and the imposing of fines on the importation, marketing, transportation, storage, of such tyres. Brazil based its ban on a projected health and environmental risk from the accumulated waste tyres; claiming that the waste would increase mosquito-borne diseases (i.e. dengue fever and malaria) and toxic emissions from fires. A WTO panel found that the ban was inconsistent with Art. X1:1, Art.III: 4, and the appellate body upheld this finding, stating that it considered the measure by Brazil unjustified and unnecessary as in Art. XX (b). The appellate body then found that the exemption of the Mercosur countries from the restriction was arbitrary discrimination under Article [380] XX (chapeau) of the GATT.

The application of the chapeau of Article XX in the *Brazil* case was similar to the use of Article 28 (now 34 TFEU) in the *Denmark* case, to resolve a dispute between Member States.

In the Denmark dispute, the Danish government imposed measures requiring beer and soft drinks to only be sold in reusable containers (i.e. glass), implementing a deposit-

[379] *Brazil- Retreaded Tyres* WT/DS332
[380] *Brazil- Retreaded Tyres* WT/DS332

and-return recycling scheme.[381] This scheme was to encourage recycling and was justified on grounds of environmental protection. The EU disputed these measures as it was much more difficult for an importer importing goods into Denmark to put such a scheme into place than for a Danish producer and the importers complained citing Art.226 (258 TFEU) in the CJEU, claiming the measure infringed Art.28 (34 TFEU). The CJEU ruled that although the measure was justifiable in terms of environmental protection under the rule of reason, Denmark would be allowed to implement the measure provided it was proportionate and non-discriminatory; they had to implement it in a way that did not violate the EU legal order. The CJEU ruled in favour of Denmark under the rule of reason, due to the authority given to the CJEU to develop and adapt the concept of public policy as needed. The method implemented by the EU in such cases is beneficial to a supranational legal order as it is able to weigh up the conflicting public policy interests at both the national and supranational level.

Continuing the development of the concept of public policy, the EU has introduced the narrower issue of *order public,* which is a more confined meaning for public policy in the context of EU law. The threshold test applied in the EU legal order for reliance by member states on a particular public policy derogation in the form of *order public* is that the issue has to be one that affects the fundamental interests of society. This was exemplified in *Bouchereau* on the free movement of persons.[382] In this case, a French national residing in the UK was convicted twice of illegal drug possession. UK courts had to decide whether to recommend deportation to the UK government on the grounds of public security and public policy. The UK court

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[381] *Commission of the European Communities v Kingdom of Denmark* (C 302/86) *[1988] E.C.R. 4607*
[382] *Regina v Pierre Bouchereau* (C 30/77)

referred to the CJEU for a preliminary ruling on the appropriateness of deportation on grounds of a threat to public security and public policy in accordance with Article 45 TFEU (ex. Article 39 EC).

The CJEU ruled that it would be considered a measure of State encroachment on the free movement of workers, and may only be justified by the public policy and public security exceptions formulated in Article 39 (3) of the EC Treaty[383] if *"there was a genuine and sufficiently serious threat affecting one of the fundamental interests of society"*.[384] This indicates that not all criminal behaviour justifies deportation under EU law. Breaching the law by infringing the social order, even seriously by such activity as drug possession is an insufficient ground to justify deportation on the narrow *order public* ground of public policy under EU law. As for being twice convicted for the same offence, the CJEU established that:

> *"The existence of previous criminal convictions is relevant only in so far as the circumstances which gave rise to them are evidence of personal conduct constituting a present threat to the requirements of public policy".*[385]

The CJEU explained that encroachment on the free movement of workers on grounds of public policy and public security is only justifiable if the person constitutes a continuing threat. While past convictions may be indicative of a person likely engage in future anti-social or criminal acts this is inconclusive. If there is no continuing threat, the past convictions are considered irrelevant. This case is key to establishing the need to satisfy the threshold of a continuing present threat to the fundamental

[383] Art. 45 TFEU
[384] Art. 45 TFEU (ex. Article 39 EC)
[385] *Regina v Pierre Bouchereau* (C 30/77)

interests of public security before domestic public policy grounds can be invoked to restrict the free movement of a worker.

Another good example of the use of the narrower concept of public policy in the form of Ordre public to resolve a dispute on the free movement of persons is that of *Adoui* and *Cornuaille*.[386] This was a case where French prostitutes had attempted to find work in Belgium and Belgium had placed a restriction on them doing so and tried to remove them, citing public morals and the illegality of prostitution in the country. It was held by the CJEU that they could not be expelled by Belgium because there did not exist with their presence a genuine threat of sufficiently serious manner that would affect the fundamental interests of society. If prostitution was illegal in Belgium then that would have been repressed, and this might have been applicable to all citizens of the EU, including those from Belgium and France. Since the measure was taken only against the French prostitutes and not those from Belgium, this was considered to be discriminatory. If the measures had been implemented across the board, then Belgium might have been able to rely on its domestic concept of public policy in order to derogate from EU law.[387]

These two cases (*Bochereau* and *Adoui, Cornuaille*) have similarities and were considered by the CJEU to not present a serious threat to the fundamental fabric of society, therefore in both instances, the resolution was in favour of the complainant. The threshold test was used for both instances, and we can infer that in certain situations, issues of public security, public policy and public morality in the EU can all be viewed from the perspective of their potential deleterious effect on society.

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[386] *Adoui and Cornaille v Belgium 115& 116/81 [1982] ECR 1665*
[387] *Ibid para. 7*

Conversely, in *Henn and Darby*,[388] the CJEU did not subject the measures used by the United Kingdom to the threshold test, as the UK was allowed to determine its margins of public morality within its territory, and it was allowed to impose a restriction on the import of pornographic magazines, as the restriction was also imposed on the production of such materials domestically. This was done using the public morality derogation under Article 36 TFEU.

With regard to the issue of free movement of persons, the WTO has no concept of public policy to rely on, it has only Mode 4 GATS, which is the same concept as it is related to the liberalization of trade and services, but this is very underdeveloped in the WTO.

In the WTO involving recycling and beverage packaging, Canadian policies were considered to be discriminating against importers of beer. Canada had upheld its interest in protecting the environment by imposing packaging and recycling measures in the form of different tax rates for bottled and canned beer; as bottles were reusable, and cans were not therefore taxed at a higher tariff. The US objected to Ontario's environmental tax, claiming discrimination, the Canadian government (Ontario) referred to GATT to settle the dispute (Pre-WTO). The WTO ruled in favour of the US, citing GATT.

It is important to consider the gradual development of the concept of public policy within the EU over time. As the EU is a relatively more recent legal system, established after the WTO, there are certainly some aspects in which the EU has

[388] *R v Henn and Darby* 34/79 [1979] ECR3975

learned from the experience of the WTO. In other respects, the system has been independently generated and this is, specifically, the case in relation to public policy. The EU has structured its own supranational concept of public policy and applied that to the making of decisions as to whether a public policy derogation has been established, the proportionality and necessity of the measures implemented, and whether they were justified or not, and discriminatory or otherwise.

3.7. Concepts of Public Policy

The European Union has established as part of its precepts an internal market. The aim of this market, which includes all the Members of the EU, is to encourage the sustainable development of the economy of these EU states and maintain the stability of prices, and promote the positive competition of the "social market economy". The market also aims to ensure the best possible employment rates, and social development. It also aims to promote environmental protection and progress in the fields of science and technology, as well as social justice, equality and communication.[389] Furthermore, the EU internal market also advocates for children's rights and is against all forms of discrimination. As well, the internal market aims to protect and safeguard what is described by TEU Article 3 (3) as the "rich cultural and linguistic diversity" of the EU Member States.

In order to enable the official conduct of its affairs, the EU has introduced the Principle of Conferral,[390] by which the Member state grants the EU competence and through which the EU can act to attain treaty objectives. This is not a blanket competence; this is limited and controlled by principles of proportionality and

[389] Article 3(3) of the TEU
[390] Article 5(1) TEU

subsidiarity. Other competences not granted to the EU remain with the Member States.[391] Within the confines of these competences, EU institutions apply principles of subsidiarity and proportionality described in a protocol agreed between the Member States and annexed to the TEU.[392] Subsidiarity refers to action that the Union undertakes if the Member State cannot sufficiently achieve the objective at any of its national levels. This especially the case when a treaty objective or action can better be achieved at Union level rather than Member State level.[393] With regard to proportionality, the EU action under competences granted must not exceed that which is needed to attain treaty objectives,[394] as also clearly defined in the Protocol on the application of principles of subsidiarity and proportionality.[395]

The EU and Member States share competences in specific areas and the internal market is one such area over which there are shared competences. The other principal areas are areas relating to: social policy as defined in the Treaties; social, economic and territorial cohesion; agriculture and fisheries; environment; consumer protection; transport; trans-European networks; energy; freedom, security and justice; and common safety concerns in public health matters.[396]

Within the EU legal system the distinct aspects of public policy manifest themselves differently in the context of the freedoms of movement of goods, services, establishment and workers. In the WTO the areas that resonate most closely are those

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[391] *Ibid*
[392] Protocol on the Application of the Principles of Subsidiarity and Proportionality [2004] OJ C 310/207.
[393] Article 5(3) TEU
[394] Article 5(4) TEU
[395] Supra, fn 4.
[396] Article 4(2) TFEU

related to goods and services. The next section will detail aspects of all freedoms in the EU (goods, services, workers and establishment) with case examples. The description of the areas of free movement of workers and establishment will be brief, and its relevance here is due to the cases nature of public policy being similar to the WTO. The thesis does not approach the issues of free movement of capital as this is interrelated with the issues of the single EU currency.

Free Movement of Goods

As described in 3.1.1, the EU internal market is based on the agreement that there shall be free movement of goods between the Member States. This includes a prohibition on the imposition of restrictions on imports or exports between Member States. Articles 34-37 TFEU (ex Arts 28-31 EC) aim to support this agreement by preventing Member States from restricting the flow of goods by measures such as bans, quotas, or measures having an equivalent effect to a ban or a quota. This has been broadly defined by the CJEU, in a description that has become known as the *Dassonville* formula, as being:

> "All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade".[397]

It was held in the *Cassis de Dijon* case[398] that Article 34 TFEU (ex 28 EC) could apply, subject to certain exceptions, when the same rule applies to both domestic goods and imports whenever the national regulation restricts, or might restrict, the free flow of goods between Member States, thereby satisfying the *Dassonville*

[397] *Procureur du Roi vs. Dassonville* Case 8/74 (1974) ECR 837, para 5.
[398] *Rewe-Zentrale AG v. Bundesmonopolverwaltung fur Brannwein* Case 120/78 (1979) ECR 649

formula. Discrimination is therefore a sufficient but not necessary condition to invoke Article 34 TFEU (ex 28 EC).

Article 34 TFEU (ex 28 EC) can apply where national rules favour domestic goods over imports. It can also apply to a national measure preventing import from one part to another of a Member State.[399] Import and export licenses are also contained within Article 34 TFEU (ex 28 EC).[400] This Article prohibits state actions that promote domestic products to the detriment of imports.[401] It also applies to price fixing where it is discriminatory. It recognizes that indistinctly applicable rules,[402] or measures that are not necessarily discriminatory, and "Measures Having Equivalent Effect" (MEQR) can nevertheless act as barriers to trade and free movement of goods.

The CJEU's decisions on the applicability of Article 34 TFEU (ex 28 EC) to trade rules, even where they do not discriminate has led to intense debate on the limits of EU law, and the law is continually evolving. Part of this debate centers on the relationship between negative and positive integration. In *Cassis de Dijon* the CJEU's approach led to negative and deregulatory integration, in that national rules are held not to apply. This contrasts with the proposed positive integration results from

[399] *Criminal Proceedings against Bluhme* Case 67/97 (1998) ECR I-8033
[400] *International Fruit Company vs. Produktschap voor Groenten en Fruit* (No.2) Cases 51-54/71 (1971) ECR 1107; *Commission vs. French Republic* Case 68/76 (1977) ECR 515; *Commission vs. Finland* Case C-54/05, 25 Mar. 2007.
[401] *Commission vs. Ireland* Case 249/81 (1982) ECR 4005; *Commission vs. United Kingdom* Case 207/83 (1985) ECR 1201; *Commission vs. Ireland* Case 45/87 (1988) ECR 4929.
[402] *Procureur du Roi vs. Dassonville* Case 8/74 (1974) ECR 837.

Community legislative measures. Article 28 can be used to police the tension between Community integration and national regulatory autonomy.[403]

There have been difficult decisions between market integration and the pursuit of other social goals. The CJEU has to decide if a mandatory requirement introduced by a nation state is a legitimate aim (in the context of the objectives of the internal market and the aims of the EU as a whole), whether a real risk to that legitimate aim has been established, whether the mandatory requirement is proportionate to that risk and if a less restricted measure would have been possible. It then has to go on to balance the various factors and decide, in consequence of such balance, whether or not the mandatory requirement is compatible with EU law. This balancing act, in the context of the *Cassis de Dijon* case has been characterized as the "Rule of Reason" and is only applicable where the mandatory regulation applies indiscriminately irrespective of whether the goods are domestic or imported.[404]

The *Cassis de Dijon* case also decided that a principle of mutual recognition had to apply to goods moving between Member States, so that where goods could lawfully be produced, sold and/or used in one Member State it could be presumed that they could be similarly produced, sold and/or used in any Member State subject to the rule of reason or the TFEU Article 36 derogation.[405]

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[403] Craig, P and De Burca, G "*EU Law (Text, cases, and Materials)*" 4th edition, 2008, Oxford University Press p.p. 666-667
[404] Craig, P and De Burca, G "*EU Law (Text, cases, and Materials)*" 4th edition, 2008, Oxford University Press p. 679
[405] *Ibid*

Where trade rules are found to be discriminatory, or otherwise to fall foul of the *Dassonville* formula they can be justified through Article 36 TFEU (ex 30 EC). This is usually interpreted very strictly. The grounds for such prohibition on the movement of goods can be justified by public morality, public policy, public security, the protection of health and life of humans, animals or plants; the protection of national treasures, or the protection of industrial and commercial property.[406]

As regards public morality there are two important cases. In *Henn and Darby*, the CJEU found that UK law restrained the manufacture and marketing of the goods concerned sufficiently to conclude there was no lawful trade in such goods in the UK.[407] However in *Conegate*, the CJEU reached the opposite conclusion. Public policy is a separate head of justification within Article 36 TFEU (ex 30 EC). The CJEU has not interpreted it too broadly. It has rejected arguments that 'public policy' includes consumer protection.[408]

A public policy justification must be made in its own terms, and cannot be used to advance a separate ground for defense. Relatively few cases contain detailed examination of the public policy argument, but the issue was considered in *Centre Leclerc,*[409] where the French government introduced minimum prices for the sale of fuel based on domestic refinery costs and sought to justify its action on the basis, inter alia, of public policy and public security using Article 36 TFEU (ex Art 30 EC). The French government claimed that without the rules on pricing, there would be civil

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[406] Article 36 TFEU (ex 30 EC)
[407] *Regina v Maurice Donald Henn and John Frederick Ernest Darby* Case 34/79 (1979) ECR 3795
[408] *Conegate Limited v HM Customs & Excise* Case 121/85 (1986) ECR 1007
[409] *Cullet vs. Centre Leclerc* Case 231/83 (1985) ECR 305.

unrest and violence, but this argument was rejected by the CJEU as it was not satisfied that the threat posed by such civil disturbance was one that the French state would be unable to control; and held that stated public policy and public security derogations had not been established.

The narrow interpretation of "public policy" and "public security" balancing the domestic regulatory interest of the Member State and the international internal market interest of the EU is neatly illustrated by this case and in particular by the Opinion of Mr. Advocate General Ver Loren van Themaat delivered to the CJEU on 23 October 1984. Mr. Ver Loren stated that if civil unrest and disturbances were to justify infringements on the free movement of goods then the consequences would be unacceptable. He went to discuss the threat of such a justification on the four fundamental freedoms of the treaty and the potential for private interest groups to replace the EU institutions in determining those freedoms and called on the authorities to place effective public policy and action plans to mitigate such potential disturbances. Although Mr. Ver Loren did not accept the French government's claim as a matter of principle, the CJEU accepted the potential claim under Article 36 but ruled it was rejected based on the facts of the case.

The EU freedoms must be protected from interest group pressure and the use of Article 36 must be carefully balanced to maintain the integrity of the EU principles of public policy as well as the benefit to the member state.[410]

[410] *Cullet vs. Centre Leclerc* Case 231/83 (1985) ECR 305

An example of public security invoked under Article 36 is the *Campus Oil case*,[411] where the Irish government required importers to buy 35% of their needs from state refinery at fixed prices. While Ireland claimed public security concerns, and the necessity to maintain the national refining capacity insuring a market for domestic refinery products, this was seen to be an MEQR under Article 34 TFEU (ex Art 28 EC), the CJEU found that the Irish government's claim was inadmissible under Article 36 and that there could be EU community rules to protect oil supplies. While the CJEU accepted the argument for public security in this case, the scope of the concept was revealed to be of limited application when in the balance against competing EU freedoms.

State monopolies within each Member state must be adjusted to allow for the requirements of the internal market. Member states are also obligated to ensure that any other measures introduced in this regard should not conflict with the requirements of the agreed to principles of the internal market.[412]

Another permitted derogation is the protection of health and life of humans, animals, or plants. The CJEU closely examines such claims to determine if protection of public health is the real purpose, or whether it is designed to protect domestic producers.[413] The CJEU may also have to decide if a public health claim is valid where there is no scientific consensus regarding the impact of particular substances, as in the *Sandoz*

[411] *Campus Oil Ltd v Minister for Industry and Energy* Case 72/83 [1984] ECR 2727
[412] Article 37 TFEU (ex 31 EC)
[413] *Commission v. United Kingdom* Case 124/81 (1983) ECR 203.

case,[414] and will be concerned to establish whether or not a real risk to public health has been established.[415]

In *Commission v France* case,[416] the CJEU found that France had hindered the marketing and sale of vitamin-enriched food imported from other member states into France without establishing any risk to public health; this was not accepted as a derogation under Article 36 TFEU (ex 30 TEC). The CJEU stated that France had not fulfilled its obligations to ensure the free movement of goods between member states and had not developed and implemented a simplified procedure to add a substance name to the authorized list of additives to foodstuffs that serve nutritional purposes marketed nationally which is required by law in France. In this case, the CJEU was able to distinguish between the French government's policies towards the marketing of nutritionally-enhanced foods as above and its views on the import, marketing and sale of energy drinks (such as Red Bull). The French government was able to argue that the high caffeine content and the addition of certain ingredients such as Taurine and Glucurunolactone posed a significant risk to public health, especially to vulnerable groups in the population such as pregnant women. This was accepted by the CJEU and France was allowed to control the import and marketing of such energy drinks as it deemed suitable to its populace.

These cases all serve to illustrate the EU's policy objectives with regard to goods and the careful consideration and balancing that the CJEU undergoes in solving disputes and applying public policy. While the derogations were limited and narrow

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[414] *Officier van Justite v. Sandoz BV* Case 174/82 (1983) ECR 2445
[415] Commission v France C-24/00 [2004] 3 CMLR 25.
[416] *Ibid*

previously, the development and introduction of the Rule of Reason has served successfully to enhance the broad concept of permissible public policy derogations in the EU for the benefit of both the coherence of the EU legal order and the legitimate policy objectives of EU member states.

Free Movement of Services

The EU obliges its Member States to facilitate the free movement of services within the internal market pursuant to the framework provided for at Chapter 3 of the TFEU and the obligations of Member States in this respect are subject to the familiar permitted EU "public policy, public security or public health" derogations.[417]

Services are defined as what is "normally provided for remuneration. These include activities of industrial or commercial character, or craftsmen and other professionals. However "services" for this purpose exclude services incidental to the freedom of movement of goods, capital, or persons, so as not to countermand the provisions particularly applicable to those freedoms[418] including in particular activities of an industrial or commercial character as well as the activities of craftsmen and "of the professions".[419] Persons providing services in one member state are entitled under the provisions in the treaties to provide those services in another member state "under the same conditions as are imposed by that State on its own nationals";[420] always provided that the regulatory competence of the EU has not been abolished by EU

[417] TFEU Article 62 incorporates into the scope of chapter 3 the derogations applied to the freedom of establishment by TFEU Article 52.
[418] Article 57 TFEU (ex 50 EC)
[419] TFEU Article 57 (ex Article 50 TEC)
[420] *Ibid*

harmonisation and such national restrictions are applied "without distinction on grounds of nationality or residence".[421]

In TFEU Article 59 (ex. Article 52 TEC) the EU Parliament and Council are empowered to issue directives "to achieve the liberalisation of a specific service" and enacted Directive 2006/123/EC[422] pursuant to that authority. Article 16 of Directive 2006/123/EC seeks to secure further harmonisation in the regulatory conditions restricting the free movement of services within the EU. Member States must respect the rights of individuals or entities to provide services in a different Member State than the one in which they are based. Free access and free exercise of the service activity must be assured, and the Member State must not force the service activity to comply with requirements that do not meet the principles of: non-discrimination, necessity, and proportionality; which principles are defined for the purpose of the Directive as follows:

> (a) non-discrimination: the requirement may be neither directly nor indirectly discriminatory with regard to nationality or, in the case of legal persons, with regard to the Member State in which they are established;
>
> (b) necessity: the requirement must be justified for reasons of public policy, public security, public health or the protection of the environment;
>
> (c) proportionality: the requirement must be suitable for attaining the objective pursued, and must not go beyond what is necessary to attain that objective [423].

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[421] TFEU Article 61 (ex Article 54 TEC)
[422] Directive 2006/123/EC of the European Parliament and Council of 12 December 2006 on Services in the Internal Market
[423] Article 16(1) of Directive 2006/123/EC

In *Arblade,*[424] the measures enacted were deemed incompatible to the freedom of services as it obliged the provider to implement safeguards regarding the keeping and retention of documents by the employer established in another Member State to safeguard public interest in addition to those put in place by the Member State. Article 56 TFEU precludes all restrictions that prohibit or adversely affect the activity of a service provider established in one member state and undertaking work in another. The CJEU ruled that there should be no impediments to the provision of services by a Member State and no discrimination between domestic providers and those from another member state undertaking to conduct work or provide a service. The CJEU based its judgment on the public policy that the measure enacted must be proportional and appropriate to secure the objective stated and not go beyond what is necessary to secure it. Post-*Arblade* it became imperative that the host member state make it clear the procedures and legal processes necessary to be fulfilled by the service provider.[425]

The Member State should not restrict the freedom for service provision in its state by imposing the following: to oblige the service provider to have an establishment, to oblige the service provider to obtain authorisation or membership in authorities or associations in the member state in which the service is provided. The Member State should also not impose a ban on the service provider setting up an office or location which is necessary to their service to be supplied, and also should not require the service provider to possess identification documentation specific to the service activity exercise. Finally, the Member State should not impose requirements on the service provider in terms of health and safety that may interfere with the appropriate use of the materials and equipment integral to service provision.

[424] Case 369/96 and Case 376/96
[425] Article 56 TFEU (ex Article 49 TEC)

When the service provider moves to the Member State to perform the service activity, the Member State is not prohibited from imposing non-discriminatory requirements as to their service provision where those requirements are necessarily and proportionately imposed for the permitted public policy, public security, public morals, public health and environmental protection derogations.[426] The Member State is also permitted to apply restrictions and rules on employment conditions.

Accordingly, the freedom to provide services across border and by temporary establishment is covered by Articles 56 to 62 TFEU (ex 49-55 EC). These provisions are similar to those for the freedom of individuals and companies to maintain and establish a permanent place of business in another Member state. The crucial features of establishment, as opposed to the provision of services, are the 'stable and continuous basis' on which economic activity is carried on, and the establishment of the professional base within the host state. To some extent the rules are horizontally applicable and can extend to restrictions imposed by public authorities to any similar restrictions imposed by private sector organisations [427].

The EU prohibits discriminatory restrictions on freedom to provide services whether imposed on a national of another Member state or on any person established in another Member State, other than that in which the services are being provided. Accordingly this concept may be extended to a national of a third country who is established in one EU Member State (i.e. the EU home state) and who provides services in another (i.e. the EU host state).[428]

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[426] Article 16(3) of Directive 2006/123/EC
[427] *Walrav and Koch* Case 36/74 (1974) ECR 1405
[428] Article 56 TFEU (ex 49 EC)

Issues such as transport and agriculture are specifically excluded from the general ambit of chapter 3 of the TFEU and Dir. 2006/123/EC. Since the regulatory environment for those services are increasingly becoming subject to measures of total harmonisation by which the regulatory competence of member states is largely eliminated those areas are not within the remit of my research and so are not considered here. It is appropriate to note here that the facilitation of world trade by the WTO does not extend to the achievement of measures of total harmonisation and, to that extent, the operation of the internal market in the EU can be seen to be entirely distinct from the operation of world trade under the auspices of the WTO.

Regardless of the issue of total harmonization, the EU has set out that the freedoms of service provision may only be restricted if the measures are necessary to protect the public interest (such as social protection of workers in the construction industry), is applied to one and all persons and territories in the member state in question, and as long as the public interest at issue is not protected by other safeguards and rules which the service provider is subject to in that member state. The EU also states that any measures or national rules applicable to service providers in other member states must be appropriate to achieve the objective and go no farther to meet that objective, and this also then applies to any control measures the member state enacts. If the member state restricts these freedoms based merely due to administrative concerns, this does not secure a justification for the derogation from community law rules.[429]

The application of the public policy concepts with regards to freedom of services requires careful consideration by the judicial authorities in the EU legal order, namely

[429] *Arblade* (n64) Cases C-369 and 376/96 [1999 ECR]

the CJEU in order to resolve disputes between member states efficiently and successfully. The cases described in this section showcase specific instances where the application of public policy has enabled the EU member states to continue to cooperate and exchange services to the benefit of all parties involved with minimum inconvenience and maximum clarity. Article 16 (1) of Directive 2006/123/EC clearly states the conditions under which a member state may be able to derogate from the provisions for free movement of services: the measures implemented must be non-discriminatory, and must be justified for reasons of public policy, public security, public health or environmental protection, and the measure must also be proportional to the objective being pursued by the member state, and not go beyond what is necessary to secure that.[430]

Freedom of Establishment

Freedom of Establishment in the EU is provided for by chapter 2 of the TFEU. Article 49 TFEU (ex 43 ECT) prohibits Member States from imposing restrictions on the freedom of establishment by nationals of Member State in another Member State within the framework of the chapter 2 provisions detailed in Articles 50-55 TFEU. This also applies to setting up agencies, branches, or subsidiaries.

There is an 'official authority' exception in Article 51 TFEU (ex 45 EC) which is extended by Article 62 TFEU (ex 55 EC) to cover services. It refers to activities connected with official power but the CJEU has interpreted the exception narrowly. There are also public policy, security, and health exceptions in Article 52 TFEU (ex 46 EC); which, as discussed, have been made applicable to services by Article 62

[430] Article 16 (1) of Directive 2006/123/EC

TFEU (ex 55 EC). The CJEU has developed a justificatory test for workers, services, and establishment similar to the *Cassis de Dijon* case in the context of free movement of goods.[431] The general principles of community law (including fundamental rights, proportionality, legal certainty, equality before the law and subsidiarity) and the principles of non-discrimination are part of the test for justifying public interest restrictions, as are the provisions of Directive 2004/38.[432]

In respect of goods, these open-ended exceptions are referred to as 'mandatory requirements', in the field of services, the terms 'imperative requirements' or the generic term 'objective justification' are often used.[433] These terms all signify the same function, conducted by the EU authorities (CJEU) which is to test measures implemented by member states for objectivity and justification for derogations from the treaty provisions.

Another issue is that Member states have argued that evasion of national regulation and control are easier where service providers were not permanently resident in the state where the service was provided. These concerns were reflected in the 2005 directive on recognition of professional qualifications,[434] which provides increased clarification of the conditions and requirements under which a professional from one member state may access the same profession in another member state, and the imperative that these conditions be proportionate and non-discriminatory to residents

[431] *Rewe-Zentrale AG v. Bundesmonopolverwaltung fur Brannwein* Case 120/78 (1979) ECR 649
[432] Directive 2004/38
[433] *Van Binsbergen v. Bestuur van de Bedrijfsvereniging vor de Metaalnijverheid* Case 33/74 (1974) ECR 1299
[434] Dir. 2005/36, Arts. 7-9, and recital 6

vs. non-nationals of the latter member state.[435] Other tests referred to in, and required by the *Van Binsbergen* case,[436] must be satisfied if restrictions on the freedom to provide services are to be compatible with Article 56 TFEU (ex 49 EC).[437] First, the restriction must be in pursuit of a legitimate public interest, which is compatible with Community aims, and in keeping with the scope of other exceptions to Treaty freedoms – in this context the CJEU has ruled that an economic aim is not a legitimate aim, but that maintaining the social security system in order to protect public health is legitimate.[438] Second, the restriction must be equally applicable to persons established within the state, and must be applied without discrimination. Third, the restriction must be proportionate to the legitimate rules in question. Fourth, the restrictive measure should also respect fundamental rights (human rights).[439]

Free Movement of Workers

There are several issues that arise regarding the free movement of workers, including: the scope of Article 45 TFEU (ex 39 EC); the meaning given to 'worker'; the rights of intermediate categories such as job seekers and former workers; the restrictions states may impose justifiably on workers and their families; and the derivative rights of family members under Community law. There is tension between the economic and social dimensions of the free movement of workers. The creation of EU citizenship has some influence on the development of the law on free movement of workers, and job seekers. The overlap between the categories of workers and citizens is reflected in

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[435] Directive 2005/36/EC
[436] *Johannes Henricus Maria Van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* Case 33-74 [1974]
[437] *Ibid*., 15
[438] *Finalarte Sociedade Construcao Civil v. Urlaubes-und- Lohnausgleichskasse der Bauvirtschaft* Case C-49/98 (2001) ECR I-7831
[439] *Carpenter v. Home Secretary* Case C-60/00 (2002) ECR I-6279

secondary legislation in Directive 2004/38/EC[440]. This includes workers, self-employed persons, their families, students, and other kinds of non-economically active nationals. There have been a significant number of cases challenging non-discriminatory national regulations, following a similar path to the case law regarding free movement of goods after *Dassonville*.[441]

Article 45 TFEU (ex 39 EC) provides for free movement of workers but is subject to the familiar limitations on grounds of public policy, public security, and public health.[442] The CJEU has emphasised the central importance of the principles of freedom of movement and non-discrimination on grounds of nationality, and has ruled it applies to any obstacles that impede free movement of workers.[443] This was extended in *Boukhalfa* where the CJEU ruled the employment relationship of a Member state national, even if performed in a non-member country, was still governed by the legislation of the Member State.[444]

Articles 27 to 33 of Directive 2004/38 govern restrictions on grounds of public policy, security or health. This Directive introduced three levels of protection against expulsion: first, general protection for all individuals as governed by EU law. Second, enhanced protection for individuals with the right of permanent residence in a

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[440] Directive 2004/38/EC of the European Parliament
and Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States

[441] *Procureur du Roi v Benoît and Gustave Dassonville* Case 8/74 (1974) ECR 837

[442] The same grounds of limitation are contained at Article 27 of Directive 2004/38/EC, which provides that: "Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends".

[443] *Walrave and Coch v. Association Union Cycliste International* Case 36/74 (1974) ECR 1405

[444] *Boukhalfa v. BRD* Case C-214/95 (1996) ECR I-2253

Member State and third, super-enhanced protection for minors and those who have resided for ten years in a host state. This simplified the requirements previously applied by Directive 64/221/EEC, which it repealed and replaced. Article 27 specifies all measures adopted on grounds of public policy or security should comply with the principal of proportionality, and be based only on the personal conduct of the individual concerned. The exceptions cannot be invoked for economic reasons. Past criminal convictions are not a basis for expulsion, unless there is a present threat.[445] Further case law stresses that general preventative measures should not be isolated from the particular facts of a case.[446] The CJEU has always made clear Member States retain discretion as regards the public policy exception, recognising that public policy may vary from one country to another.[447] Although in a series of cases it has required national concepts of public policy and public security to be applied only in the context of restrictions imposed by EU law. These restrictions require that measures adopted by reference to grounds of public policy or public security must: comply with the principle of proportionality; be based exclusively on the personal conduct of the individual concerned, which personal conduct "must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society".[448]

There is a significant body of case law about when a Member State may expel EU nationals or their family on public policy or security grounds. In *Van Duyn* the CJEU ruled a Member State need not criminalize and organisation in order to take restrictive

[445] *Bouchero* Case 30/77 (1977) ECR 1999
[446] *Calfa* Case C-348/96 (1999) ECR I-II
[447] *Van Duyn v. Home Office* Case 41/74 (1974) ECR 1337, para. 18
[448] Article 27(2) of Directive 2004/38/EC adopting the raion decidendi of CJEU judgment in Bouchereau Case 30/77 [1977] ECR 1999

action against non-nationals on grounds of public policy and security.[449] This was controversial because it appeared to discriminate against migrants for conduct, which did not give rise to restrictions against nationals.[450] However, later cases emphasised a need for some kind of comparability in the treatment of nationals and non-nationals.[451] *Rutili* took a similar view,[452] however in *Olazabal* it was ruled that it was not necessary for identical measures to be taken against nationals and non-nationals.[453]

Article 22 of Dir. 2004/38 reiterates that the right of residence can only be restricted if the same restrictions apply to their own nationals. Article 28 provides that Members must take account of individual situation before expulsion on public policy or security grounds. It gives enhanced protection in this respect for EU citizens and families. Article 29 tightens the provisions of the repealed Directive 64/221/EEC. Article 31 provides procedural safeguards and simplifies the earlier Directive 64/221. Article 31 (4) provides that while Members may exclude an individual from their territory, they may not prevent that individual submitting the defence in person, except if this may cause serious public policy or security difficulties. Article 32 deals with the duration of exclusion orders. Article 33 states exclusion orders may not be issued as a penalty unless the person constitutes a sufficiently serious threat, and 33 (2) provides that the threat must be reassessed after more than 2 years.

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[449] Case 41/74 [1974] ECR 1337.
[450] *Ibid*. 25
[451] *Adoui and Cornuaille* Cases 115 and 116/81 (1982) ECR 1665
[452] *Rutili* Case 36/75 (1975) ECR 1219
[453] *Ministre de l'Interieur v. Olazabal* Case C-10001 (2002) ECR I-10981

The cases in this section and decisions issued by the CJEU demonstrate the careful balancing undertaken using its authority to introduce laws and resolve disputes using public policy imperatives of the EU legal order to maintain, develop and ensure the sustainability of the system, and enhance the cooperation between the member states to the benefit of the internal market.

3.8. Characterisation of Public Policy

Within the European Union, the nominate concept of public policy is a narrow, defined area of the law. However when considering the functional operation of public policy, we can see the potential for public policy to be applied on a wider scope, having the capacity to override the law in specific contexts. The aim of using Public Policy is to achieve the EU goals of harmonization and maintain the Member States sovereignty while facilitating positive integration in the Union, and the success and sustainability of the internal market. As the EU is a considerably liberal legal order with liberal and democratic member states, the EU is able to use public policy with a degree of success (it is increasingly finding the expanded membership problematic).[454]

Public policy can be effected by the judicial authorities in the EU, namely the CJEU or the General Court System, when there is an issue of public interest. The EU has designed specific institutional restraints for the use of Public Policy; it may be utilized by the Executive or Legislative authorities through the unique "Principle of Conferral" where the member states grant the EU competences to act on their behalf to achieve treaty objectives better enacted at Union level rather than at State level.

[454] Slaughter, A. M. (1993) International Law and International Relations Theory: A Dual Agenda. 87 American Journal of International Law pp 205- 239.

The Principle of Conferral is mitigated by principles of subsidiarity and proportionality.[455]

The EU has also the unique Rule of Reason as an expander of Public Policy, used to manage the development and use of Public Policy and control the potential for a Member State to derogate from treaty provisions.[456]

The *Dassonville* Formula introduced in *Cassis Dijon* is also a means used by the EU to implement Public Policy and ensure that measures enacted by Member States are non-discriminatory to inter-community trade.[457]

If a measure is found to be discriminatory or does not fit the Dassonville formula, it can be justified using Article 36 TFEU (ex Art 30 EC) on the grounds of public security, public morality, public policy, the protection of health and life of humans, animals or plants, the protection of national treasures, or the protection of industrial or commercial property.[458] These are usually interpreted very strictly and balanced carefully to maintain the integrity of the EU principles of public policy and protect the EU freedoms.

Using these methods has served to facilitate the continual development of the concepts of public policy in the EU, and ensure the flexibility for its applications for the benefit of the legal orders' sustainability and functionality, while maintaining a

[455] European Commission website, Application of EU Law, last accessed 15/12/2012 http://ec.europa.eu/eu_law/introduction/treaty_en.htm
[456] *Rewe-Zentral AG v. Bundesmonopolverwaltung fur Branntwein* Case 120/78 (1979) ECR 649
[457] *Procureur du Roi vs. Dassonville* Case 8/74 (1974) ECR 837
[458] Article 36 TFEU (ex Art 30 EC)

balance with the rights of the sovereign member states Article 34 TFEU (ex Art. 28 EC).[459] It has been occasionally problematic, moderating the tension between market integration and achieving social objectives and national regulatory autonomy.

The CJEU plays a major role in deciding if the measures enacted by a member state should be allowed as a derogation and still be compatible with EU law; if it is a legitimate concern, if it is proportional to the risks if it were not enacted, and if there may have been other means to achieve their objectives.[460]

[459] Article 34 TFEU (ex. Art. 28 EC)
[460] *Rewe-Zentral AG v. Bundesmonopolverwaltung fur Branntwein* Case 120/78 (1979) ECR 649

Chapter 4- Public Policy in Common Law

4.1. Constitution and History

The origins of the Common Law system are from English feudal law, based on local customs, which were unwritten and transmitted orally. The aim of these codes was to prevent feuds and bloodshed by maintaining basic rights for the people and proposing compensation for injury. The rise of Christianity and the Norman Conquest in the early 11th century formalised this code into what is now known as Common Law.[461] Law was then centrally administered through a system of writs from the King's Court (*Curia Regis*). By the 13th century, the system evolved to grant Parliament the sole power to approve new writs, but this presented some difficulty, and resulted in many petitioning the King for justice in individual cases.[462]

An important development in the 13th Century was the signing of the *Magna Carta* or "The Charter of the Great Liberties of England" during the reign of King John of England. The version of 1297 is one of the cornerstones on which the Common Law uncodified constitution was based. The document proclaimed that the will of the King was not arbitrary but was bound to the law of the land, a principle that still exists. The document influenced the rule of constitutional law, and later was even used as a model in the colonies when developing their legal systems. The American constitution is one such a model; however their constitution became an official written document.[463]

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[461] Slapper, G and Kelly, D " The English Legal System" 8th edition, Routledge-Cavendish 2006
[462] Gearey, A and Morrison, W "Common Law Reasoning and Institutions" University of London 2012
[463] Magna Carta (1297) chapter 9 25 Edw 1 cc 1 9 29

King Henry II increased the centralisation of the justice administration and the speed and efficiency of the justice dispensed by the courts. Writs were enforced by the local sheriffs and non-compliance punished by imprisonment. Thus writs were the basis of the jurisdiction of the law.[464]

The term 'Common Law' describes the law that was applied by the Royal courts (and are now the national courts), developing through the use of precedent and the application of inferences made from the texts of individual judgments and often separate from parliamentary legislation and statutes, which became a major source of law after the mid-nineteenth century.

The United Kingdom does not have a written set of laws or a constitution that can be referred to in governing the country; the constitution is uncodified. Common Law decisions are taken by judges based on precedence (the body of precedent or *stare decisis*), or on a decision taken in a previously occurring case under similar conditions, derived from the principle that it is unjust to treat similar facts differently on different occasions. If there is no previous occurrence, the judge has the vested power or authority to make a decision and thus create precedence. Alongside, and in case of conflict overriding, this judicial source of law is the legislative role of Parliament. Since the seventeenth century the ultimate sovereignty of Parliament has been the central political and legal fact of the constitution. It is complex, due to the malleability that can be used- within reason- to revise the law and adapt to changes in the social, political and legal environment in the country. There is a danger however inherent in this flexibility; as parliament is the supreme legal authority in the

[464] Gearey, A and Morrison, W "Common Law Reasoning and Institutions" University of London 2012

Common Law country, but there is not a formal parliamentary procedure necessary to change the system or amend the constitution, it is subject to the political whims and leanings of the government. Over the course of the development of the Common Law system, parliament has passed statutes to limit parliamentary sovereignty.[465]

Other countries implemented a written set of laws in the form of a constitution, a document accorded a degree of sanctity which details the laws by which the state is governed, and sets out the distribution of power between the legislature, the executive (the King) and the judiciary. In the USA where there is a written constitution, the state's power is clearly delineated. The concept of the Rule of Law and the independence of the judiciary is a key concept in the Common Law system, where the law governs in all cases, and there can be no arbitrary decisions, and the entitlement to due process is ensured. If a representative of the government is seen to have acted arbitrarily or illegally, this can be tested in a court of law.[466]

Another key principle in the Common Law system is that of the "Separation of Powers" where each of the institutions of government maintain a check and balance on each other, and where each institution will remain independent, ensuring that no individual or body will have powers to span these institutions. This principle is designed to prevent abuse of power and encourage "good government". The balance is most often exhibited between the Crown and Parliament.[467]

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[465] Parliamentary Sovereignty, Parliament website, last accessed in 10/04/2013, http://www.parliament.uk/about/how/sovereignty/

[466] Pound, R "Common law and Legislation" Harvard Law Review [1908] Vol. 21 pp. 383-407

[467] Benwell, R and Gay, O " The Separation of Powers" House of Commons Library, dated 15/08/2011

There are two fundamental events that have affected the history and development of the Common Law system. The UK joined the European Economic Community in 1972 and as such EU law became a major influence on the Common Law system. In 1998 Parliament passed the Human Rights Act (HRA) and so the law of the European Convention on Human Rights was made part of Common Law. The HRA was derived from the European Convention on Human Rights 1950 (ECHR) and detailed citizens human rights and freedoms where there was no clarity beforehand. As such Common Law has now absorbed the principles of both the ECHR and EU law.[468]

4.2. Institutions

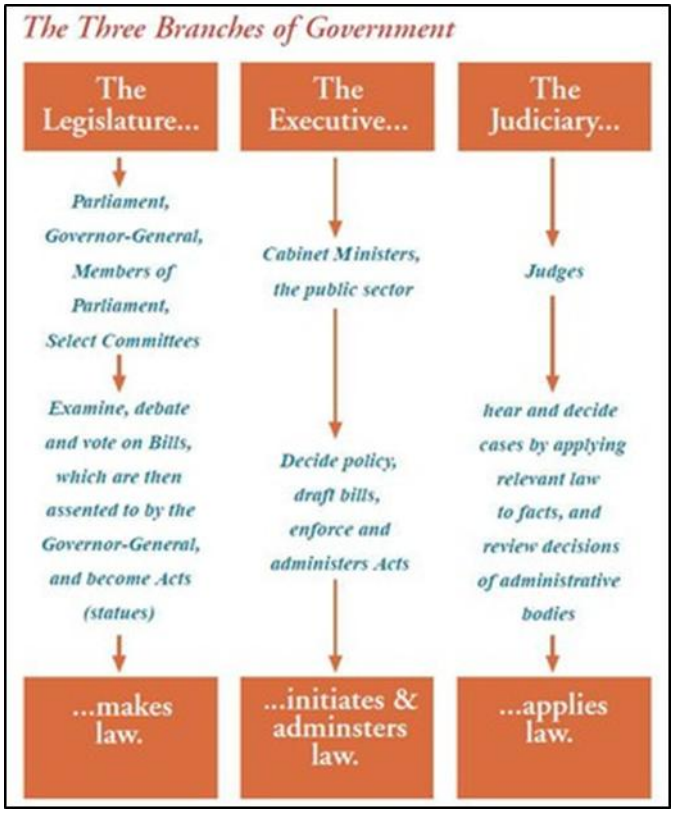
The institutional structure of the Common Law system is the result of various historical changes and disconnected reforms. There are three main branches of government in the Common Law system: the Legislature (Parliament), the Executive (the King and Cabinet) and the Judiciary (the Courts).

Parliament consists of its members and select committees, the House of Commons and House of Lords and their roles are to debate and examine the bills that are to become Acts of Parliament. As such, Parliament makes the law. The Executive branch of government consists of the King and the Cabinet Ministers, who consider policy and draft bills, and enforce and administer the Acts of Parliament. As such, the Executive branch initiates and administers the law. The Judiciary is a structured hierarchical court system, where there are levels of courts each with jurisdiction over a particular type of dispute. These courts are (in ascending order): The Magistrates Court, the County Court, the Crown Court, the High Court, the Court of Appeal, the

[468] Slapper, G and Kelly, D " The English Legal System" 10th edition, Routledge-Cavendish 2009/2010 pp.35-38

Supreme Court, the Judicial Committee of the Privy Council, and the European Court of Justice. The Judiciary branch effectively applies the law.[469]

Figure 4. Common Law Institutions

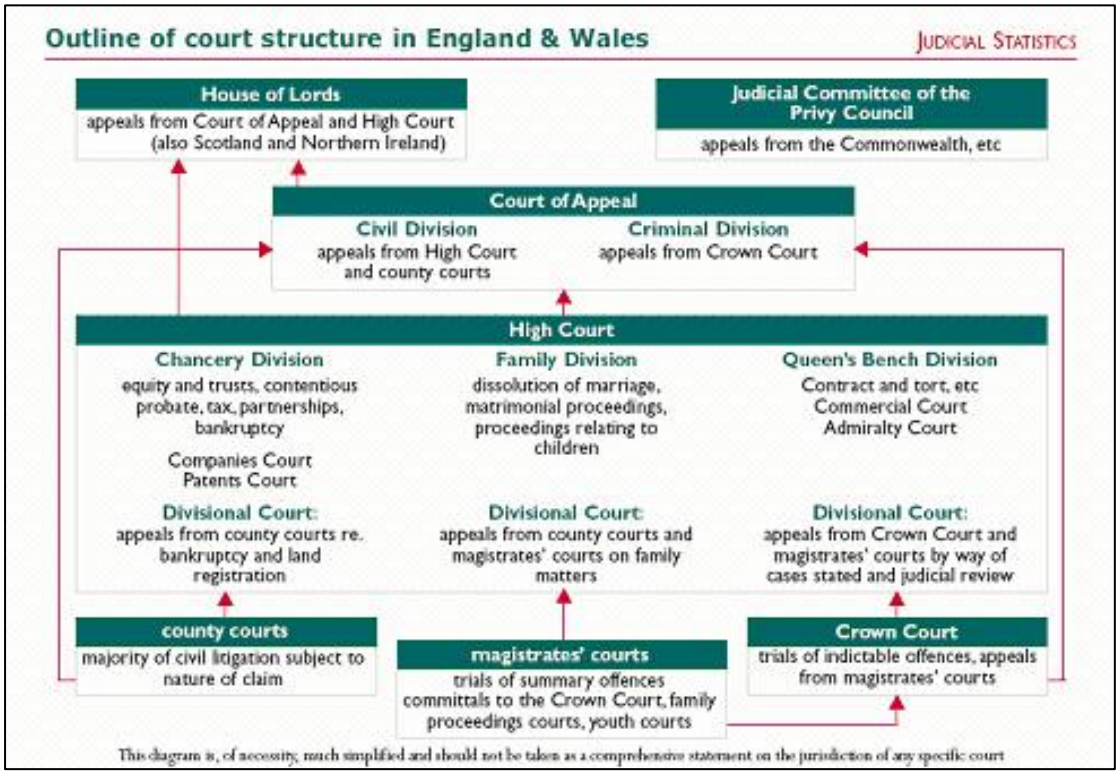


The Magistrates Court is the lowest in the hierarchy, involved in all criminal prosecutions including young offenders, family and domestic disputes, and tax enforcement. The County Courts cases are routine debt collection, and the jurisdiction is subject to financial and geographical limitations, which serve to distinguish County Courts from High Courts. If the amount of the claim is less than £50,000 it will be heard in the County Court. The Crown Court is the next level up in the hierarchy from the Magistrates Court to try more serious criminal issues, and has business and appellate jurisdiction as well. Jury trial is only available at this level for criminal

[469] Gearey, A and Morrison, W. "Common Law Reasoning and Institutions" University of London 2012

cases.[470] The High Court is a part of the Senior Courts of England and Wales,[471] and is divided into three sections: the Chancery (originally the Chancellor's Court), that handles trust, equity, mortgages, conveyancing, contested probate, and intellectual property, bankruptcy and appeals of Inland Revenue. Another section is the Queen's Bench, dealing with contract, tort and personal injury claims. The third section of the High Court is the Family Division, for divorce and ancillary matters and Children Act disputes. The Court of Appeal is split into two sections; civil and criminal, to which applications can be made for review of decisions made on cases.[472]

Figure 5. Court Structure in England and Wales



[470] Structure of the courts system, Judicial office website, last accessed 20/04/2013 http://www.judiciary.gov.uk/Resources/JCO/Images/Layout/courts_structure.pdf
[471] *Renaming of Supreme Courts of England and Wales and Northern Ireland*, Section 59 of the Constitutional Reform Act 2005
[472] Structure of the courts system, Judicial office website, last accessed 20/04/2013 http://www.judiciary.gov.uk/Resources/JCO/Images/Layout/courts_structure.pdf

The Supreme Court (replacing the House of Lords) is the highest court in the UK. The jurisdiction of this court relates to matters of public importance in civil and criminal cases in England, Wales and Northern Ireland. The Judicial Committee of the Privy Council is a Commonwealth Court, linked to the doctrine of precedent, and has played a role in maintaining the legal family of Common Law, but has had an increasingly limited role as the highest court in many Commonwealth countries.[473]

The European Courts; the CJEU and the ECHR have increasing jurisdiction in the UK due to the UK joining the European Union and signing the European Convention on Human Rights. The CJEU is involved in matters of actions against member states or EU institutions, opinions on international law or the European Treaty, tort cases and actions under judicial review (as has been noted in Chapter 3). The ECHR handles matters of enforcement of the Convention (the UK has been taken to court here for several issues that have resulted in necessary amendments to domestic law).[474]

4.3. Dispute Resolution Process

As Common Law countries use the principle of judicial precedent, the resolution of civil disputes in the Common Law system is governed by the courts and decided by judges (the judiciary) and are generally independent of the executive institutions of the government.[475]

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[473] The Supreme Court website, last accessed in 20/04/2013, http://www.supremecourt.gov.uk/about/the-supreme-court.html

[474] The Supreme Court and Europe, the Supreme Court website, last accessed 20/04/2013 http://www.supremecourt.gov.uk/about/the-supreme-court-and-europe.html

[475] The Dispute Resolution Commitment, Ministry of Justice website, last accessed 20/04/2013 http://www.justice.gov.uk/downloads/courts/mediation/drc-guidance-may2011.pdf

To commence court proceedings a series of steps (pre-action protocol) must be undertaken. Written notification must be provided to the respondent, describing the claim.[476] Litigation commences with the filing of a claim form at court. The respondent also files and the process continues, handled by the relevant court levels. The case is managed by a conference, where all relevant documentation is stored by the courts' service. Alternative Dispute Resolution Methods (ADR) are most often used in the pre-trial period as well as when proceedings start, and courts may stay proceedings to encourage progression of the ADR which include arbitration and mediation, expert determination or expert appraisal. With arbitration, there are two types: determinative (where a definitive binding decision is made) and non-determinative (where the parties reach a voluntary agreement and settlement after arbitration). [477]

The appeals process is not immediate; the grounds for appeal must be determined acceptable by the judge. Appeals then progress to the higher courts. Certain cases may appeal to the European Court of Justice as a court higher than the Supreme Court. Certain issues are handled by specialist committees or "tribunals" which are allocated specific jurisdiction by parliament for a specific instance.[478]

4.4. Levels of Legal Order

Common Law as a legal order is used in countries worldwide with ties or historical links to the British Commonwealth of Nations. Within the United Kingdom, Scotland

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[476] *Ibid*
[477] The Dispute Resolution Commitment, Ministry of Justice website, last accessed 20/04/2013 http://www.justice.gov.uk/downloads/courts/mediation/drc-guidance-may2011.pdf
[478] *Ibid*

has its own Common Law legal system, as does Northern Ireland. The Common Law of England and Wales is the focus in this research project. [479]

Common Law is a complex legal order, as although the historical origins and basic principles are one, each country has its own version of the Common Law, and will operate differently due to the differences in geography, culture, religions and societal norms in effect.

The highest law making body in England and Wales is the Parliament which sits in Westminster in London. Acts or Statutes are passed through Parliament, which then become laws.[480] Although the English legal system is not organised into set of codes, the law developed by judges using case law and interpreting statutes, and then coded into new Statutes issued by Parliament.[481]

Although England has its own independent legal system, as the UK (and accordingly England) has been part of the EU since 1973 and it is therefore also bound by EU law. The UK has also signed the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950,[482] which was incorporated into English law in the form of the Human Rights Act of 1998.[483]

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[479] Elliott, C and Quinn, F "English Legal System" 10th edition Pearson Longman 2009 Chapter 1
[480] Elliott, C and Quinn, F "English Legal System" 10th edition Pearson Longman 2009
[481] Cownie, F; Bradney, A and Burton, M " English Legal System in Context" Oxford University Press 2010
[482] European Court of Human Rights website, last accessed 20/04/2013 http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf
[483] Human Rights Act 1998 c.42, last accessed 20/04/2013 http://www.legislation.gov.uk/ukpga/1998/42/contents

The law in England and Wales is therefore composed of three elements: Common Law, Parliamentary legislation, and directly enforced EU law. All Common Law countries (or those belonging to the Commonwealth of Nations) have elements of common law and statutory law, however each country among them have aspects of the law that are unique to their internal structure and society.[484]

4.5. Sources of Substantive Law

The sources of the law in the Common Law system are outlined as: Firstly, the rules of the law in the legislation such as Acts of Parliament (primary legislation) and enactments of bodies upon which Parliament has conferred legislative power (delegated legislation). An example of delegated legislation is Parliament giving a minister power to make regulations, filling in the details of an Act and providing a framework for the legislation agreed by Parliament. Parliament also delegates power to the Queen in Council, conferring the ability to legislate by Order in Council, useful in emergencies when Parliament is not in session.[485]

The second source of law under the rules of law is judicial precedent; the decisions made by judges in the courts from their interpretations of the Common Law and statutes. Termed "Case Law", the decisions are issued by judges in the superior courts such as the Court of Appeal, the High Court, the Supreme Court and the Judicial Committee of the Privy Council. The third source of the law is that of the European

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[484] Slapper, G and Kelly, D " The English Legal System" 8th edition, Routledge-Cavendish 2006 Chapter 1
[485] *Ibid*

Union; as detailed previously the Common Law system has been greatly influenced by the enactment of Parliament of the "1972 Act".[486]

4.6. Manifestation of Public Policy

Common Law as a legal order uses both precedent and policy judgments that are conjectured from a combination of social science elements, business, economic factors and rulings from foreign courts. The Public Policy principles of the Common Law legal order are overarching and can be inferred from the results of the cases that will be described in this section.

An early precedent in which Common Law judges discussed the nature of public policy in Common law was *Richardson v Mellish*[487] this case remains influential to the present largely due to the articulation of the doctrine of judicial restraint. It is the nature of public policy to be applied by the courts; the extent and application is within their jurisdiction. Public policy is thus a product of Common Law just as the principles and rules it seeks to control.

As issues of public policy arise in litigation in an unsystematic fashion, the principle of judicial restraint is well regarded. Judges are cautious when invoking public policy; reluctant to threaten Parliament's supremacy. The judicial role was modified by the Human Rights Act 1998; this has been a source of tension and requires political balancing when the public policy issue is also a human rights issue, however unlike American Federal judges the UK judges cannot declare legislation unconstitutional.[488]

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[486] *Ibid*
[487] *Richardson v Mellish* (1824) 2 Bing 229
[488] *Ibid*

In *Richardson v. Mellish* a share of a ship was purchased by the respondent, chartered for four voyages and commanded by the complainant. The respondent proposed to exchange command of this ship for another ship, chartered for one voyage, to allow the respondent's nephew to command. It was agreed that should the respondent's nephew die at any time before the voyages were complete command would revert to the complainant. Also the destination of the second ship was changed, the exchange was approved by the company. The agreement entailed that complainant undertook to pay the respondent a fixed sum if the complainant refused to resign command (the complainant was ignorant of this).[489] The nephew died during the second voyage and the respondent refused to replace him with the complainant. The complainant sued the respondent for breach and was granted damages, but the respondent appealed, claiming the contract unenforceable.

The respondent alleged that the claimant's alleged agreement was illegal on public policy grounds as the East India Company is regarded as a government entity, and the sale of a public office of trust being illegal.[490] The Court of Appeal rejected the appeal and upheld the judgment dismissing the contention that the contract was void and illegal on public policy grounds with the appeal judges. The judges dismissed public policy as an argument in this case. Public policy was not deemed within the jurisdiction of the courts and was best left to be decided by the legislature. The contract would only be illegal if the actions were against a specific law or public policy.

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[489] *Richardson v Mellish* (1824) 2 Bing 229 para. 237 p.297
[490] *Ibid*

Burroughs, J. was not in favour of using the public policy argument, stating that it should only be used when all other points fail, remarking that public policy is "a very unruly horse which can lead anywhere". The East India Company while a public entity was not officially characterised as such by the legislature and engaged in private trade not subject to public policy.

From this we can infer that Public policy may override private contract law, the application of which is in the judges' hand. Public policy issues arise where activities are illegal under statute, but judges are reluctant to apply broader principles of public policy to artificially construct grounds for illegality unless confident of that fact.

A more recent case justifying the principle of judicial restraint in the application of public policy was *McLoughlan v O'Brian*.[491]

The case concerned liability for damages following negligent driving. The law awarded damages for physical injury to family members present at the accident but there was no authority on recovery of damages for psychological harm to family members not present at the scene of the accident. The case considered questions of foreseeability and psychiatric medicine, and debated whether the law in such issues of policy is clear on exempting from liability a respondent whose negligent act foreseeably the cause of the complainant's psychiatric illness if not where that line should be.

[491] *McLoughlin v O'Brian* [1983] 1 AC 410

In this case, the complainant's daughter was killed, and her husband and other children injured in a road accident caused by the respondents.[492] The complainant was not at the scene of the accident and learnt of her child's death several hours later, yet claimed to suffer mental/psychotic illness as a result of the accident and death of her child, and sued for damages. The respondents admitted negligence and liability for the death of the daughter and injuries suffered to those at the scene however disputed liability for consequent "nervous shock" suffered by the complainant. At the trial the judge found in favour of the respondents, this was upheld on appeal.

At its time, this was considered an unusual case, only the second ever to reach the House of Lords for consideration since *Bourhill v. Young* (1943) A.C. 92. The case questioned whether the mental/psychotic illness was foreseeable and whether a duty of care was owed to persons not present at the time of the accident.[493]

Originally the judge ruled in favour of the respondents stating the shock suffered was not reasonably foreseeable. The Court of Appeal returned the same judgement but held that although the shock was not reasonably foreseeable, the duty of care resulting was limited to the scene of the accident due to public policy considerations and if this were not limited it would "open the floodgates" to similar claims.[494]

The judges stated that when considering the claim for damages due to "nervous shock" this may not be limited to road accidents, and the specification for limiting the award of damages to those at the scene is a general rule, not a principle, thus

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[492] *Ibid*
[493] *McLoughlin v O'Brian* [1983] 1 AC 410
[494] *Ibid*

extending or widening the rule would require careful consideration. He pointed to four policy arguments against a wider extension of who might be able to recover damages from those not present at the scene of the accident. Firstly, such an extension would allow for claims to proliferate.[495] Secondly, it would be potentially unfair to respondents as damages would be out of proportion to the negligent conduct and an extra burden placed on insurers and those paying for such insurance. Thirdly, such an allowance would increase difficulties in collecting evidence and lengthen litigation. Fourthly, the scope of liability should only be made by the legislature after diligent research. There are tests of foreseeability and proximity, and there need only be circumstantial extension into public policy, and then existing law can be applied to allow the appeal.

The dismissal of the case in the appeal stage on public policy "floodgates" grounds was disputed, as some judges argued that public policy changes over time. It was also debated whether public policy can be "justiciable" i.e. determined by legal proceedings and it was then held that it is "justiciable" but should be used with close scrutiny. It was also accepted then that the nature and existence of public policy may not have been as yet established clearly in legal terms and that it may require the introduction of legal principles so fundamental they should be left to law-makers.[496]

This case showed that public policy can constrain the operation of Common Law concepts -here damage recovery in tort- so even though damages are reasonably

[495] *McLoughlin Appellant v O'Brian* [1983] 1 AC 410
[496] *Ibid*

foreseeable they are not recoverable; as allowing recovery to such a potentially wide group of claimants would be against public policy (i.e. open the floodgates). [497]

Public policy considerations change over time so they have a temporal element. Some public policy considerations are not justiciable and require intervention by the legislature as the policy considerations are opaque. Common Law thus operates on principles that can keep the law clear of policy problems, and if such problems arise leading to socially unacceptable results Parliament and the legislature can act.

Another old case on contract illegality gives an example of judicial restraint; when a contract was made to perform an illegal act breaking English law and was thus unenforceable in the English courts. The refusal to enforce said contract would be founded on public policy as the law could not enforce an agreement to break the law. This is an illustration of how public policy can effectively become a rule. However, the concept of illegality has been narrowly interpreted by the courts.

In *Holman et al v. Johnson* the complainant resided in France, and sold a quantity of tea which was then smuggled into England.[498] The verdict ruled in favour of the complainant. The argument was that the complainant knew of the intent to smuggle the tea was not therefore entitled to claim the price of the tea under English law. It was argued that as the tea was sold in France it could not be in violation of English law, so the sale was valid, and the complainant entitled to recover. The intention of the respondent in using the purchased goods was irrelevant to the seller (the

[497] *McLoughlin Appellant v O'Brian* [1983] 1 AC 410
[498] *Holmann v. Johnson* [1775], 98 Engl. Rep. 1120

complainant) and as the contract was enacted abroad, would be governed by the laws of that country (i.e. France).

The general public policy consideration that "*ex dolo malo non oritur action*" -out of fraud no action can arise- (i.e. courts are not to help someone found to base a case on an immoral or illegal act, if there is a transgression on a positive law). The judge argued that there was no illegal or immoral act on the part of the complainant: the tea was sold and the vendor's interest ended with the completion of the sale in France.[499] This case is a clear example of the principle that courts will not function in favour of someone whose action was illegal or immoral. The court system uses tests and methods to ascertain legality of actions brought to their attention; their function is to maintain a balance of order, distinguishing issues that fall under their jurisdiction and directing cases otherwise as needed.[500] Public policy can have a precise application operating like a narrow rule; the persons party to the illegal performance would not be able to enforce the contract but -as the transaction itself was not itself illegal- public policy will not deny remedy to someone who was not party to the illegal performance.

Common Law courts have exercised restraint in using public policy but they have also been willing to apply it outside of the central area of concern to the legal order. Where the performance of a contract entails illegality under foreign laws, the contract may be unenforceable in English courts. Public policy is not confined to considerations of parliamentary sovereignty or UK policy considerations, there is also an international dimension. Accordingly, the rule preventing the enforcement of an illegal contract equally applies when the illegality arises from a foreign law in force in the place of

[499] *Holmann v. Johnson* [1775], 98 Engl. Rep. 1120
[500] *Ibid*

contractual performance. The maintenance of legality is considered to be a policy objective of Common Law that is independent of the UK government or the UK legislature.

In the case of *Regazzoni Appelant; v K.C.Sethia* the issue concerned the sale of Indian jute being sold overseas. The respondents agreed to sell jute that both parties intended to ship from India to Genoa for resale to South Africa. Both parties were fully aware from the outset that exporting of jute from India to South Africa was prohibited by Indian law. The appellant filed an action for breach of contract by the respondent, who had reneged on the agreement. The respondent defended on the grounds that the contract was invalid because it was against Indian law and public policy. This defence was successful and the judgment appealed.[501]

The respondents argued that they were justified in reneging on the contract of sale, regardless of their awareness of the illegality of the export sale, and they supported repudiating of the contract referring to *Foster v. Driscoll* (1929) and claiming that *Foster v. Driscoll* was not rightly decided, and should be distinguished from their case. They also relied on the principle that English courts will not regard foreign laws of a "penal, revenue, or political character". [502]

It was clarified that this was not a case where a foreign state was attempting to enforce its laws, but instead was a matter of public policy: the "Comity of Nations" influenced the courts to refuse to enforce or award damages for breach of contract involving violation of a foreign law on foreign soil. Similar cases where public policy

[501] *Regazzoni Appelant; v K.C.Sethia* (1944)[1958] AC 301
[502] (1929) 1 K.B. 470; 45 T.L.R. 185.

is involved would be in cases of illegality, smuggling, or prostitution[503]. Public policy avoids issues where contracts offend the law, especially those of a foreign state, as public policy demands deference be given to international relations. *Ralli Brothers v. Compagnia Naviera Sota y Aznar* (1920)[504] is an example where the contract required an illegal act to be performed in Spain, and so was not enforceable. As such, the case of *Foster v. Driscoll* was deemed correctly judged, and the appeal dismissed.[505]

Public policy is evident here as courts find it against the principle of the Comity of Nations to rule on a contract involving an illegal act abroad. It is not a question of whether the contract can be enforced in English law, but of public policy in English law. The crucial fact is that both parties knew they were breaking Indian law but the case is not on enforcing Indian law in England. To make a judgement in this case it would involve taking sides between India and South Africa which would be against the aims of public policy and international comity. The judges concurred and dismissed the appeal.[506] To not recognise the issue in the case of *Foster v. Driscoll* and see the contract as enforceable would give the foreign government (India) cause for complaint against the English government, contrary to international comity, and this would offend the concept of public morality.[507]

Public policy concerns may arise from causes internal (illegality under English law) or external (illegality under foreign law) to the legal order, as illustrated by these two cases and so cannot be defined purely through the public policy of the state in which

[503] This restrictive attitude to illegality has continued and been extended to property rights in more recent times see: *Tinsley v Milligan* [1994] 1 A.C. 340
[504] (1920) 2 K.B. 287; sub nom. *Sota and Aznar v. Ralli Brothers*, 36 T.L.R. 456.
[505] *Foster v. Driscoll* (1929) 1 KB 470
[506] *Regazzoni Appelant; v K.C.Sethia* (1944)[1958] AC 301
[507] *Ibid*

Common Law operates. It is not limited to concerns arising within the policy of that state but subsists as a legal concept operating to uphold the normative force of legality.

Public policy is not unitary in nature and there are cases where they may conflict with each other. The courts are then forced to decide how to balance competing policy issues. The courts also have the power - and must be prepared to exercise it – and effect one public policy over another. However the interest of justice is always paramount when policy issues conflict.

The *Attorney-General Appellant v Times Newspaper Ltd* case concerned an article published on 24/09/1972 in the Sunday Times, on the Thalidomide tragedy (mothers who had taken this drug during pregnancy gave birth to babies with deformities). After publication the manufacturers of Thalidomide "Distillers" filed a complaint to the Attorney-General. A follow-up article was also sent to the Attorney-General. The case was sent to Divisional Court, who granted an injunction against publication of the second article on the grounds of contempt. The Court of Appeal discharged the injunction, the Attorney-General then appealed to the House of Lords. The judges' opinions on this were conflicted. [508]

Lord Reid allowed the appeal as the case questioned the nature of contempt of court, and argued that the law was based entirely on public policy where it continually balances conflicting interests. In this particular case there was a need to balance between freedom of speech (which should not be subject to undue limitations) and the

[508] *Attorney-General v. Times Newspapers Ltd.* [1974] A.C. 273

administration of justice (which should not be subject to prejudice). The Attorney-General relied on the statement by Buckley J. in Vine Products v. Green (1966) that: "It is contempt of this court for any newspaper to comment on pending legal proceedings in any way which is likely to prejudice the fair trial of the action".[509]

Lord Reid disagreed with the definition of contempt as it did not account for the potential to influence the litigant, and was not in accordance with public policy as it restricted fair comment on an issue of intense public interest which should be allowed. He distinguished public discussion from direct interference in terms of actions, words, or conduct that could affect the mind of the litigant. It was important to draw a line between fair criticism and injurious misrepresentation. He referred to a similar case on the same subject: Attorney-General v London Weekend Television (1973) where a TV programme on Thalidomide was broadcast. The judge then held there was no contempt because there was no "serious" risk of prejudice; the programme was ineffective. Lord Reid suggested the application of the *de minimis* principle (i.e. there is no contempt if the possibility of influence is remote) as a better justification for the decision in the *Attorney-General Appellant v Times Newspaper Ltd* case.[510]

Lord Diplock detailed that the administration of justice relies on 3 issues: that all citizens have unhindered access, that the courts should be free from bias and base their decisions and rulings on facts and evidence, and that the courts should be the final decision makers. Any contravention of these requirements is thus contrary to public policy and public interest and should be considered in contempt. Therefore

[509] *Vine Products v. Green* (1966) Ch. 484; (19650 3 All E.R. 58.
[510] *Attorney-General v. Times Newspapers Ltd.* [1974] A.C. 273

contempt is not merely prejudicing a fair trial, but also by exposing any party to publicity and prejudicial discussion that could prevent them from their right of access to the courts and justice. The law can only provide general guidelines in striking the correct balance and since the public had delegated decision-making in this area to the judicial representative it was in the public's interest that legal proceedings were allowed to progress without interference. Once those proceedings had concluded, public interest would shift to being informed and unhampered debate must be allowed making the freedom of public discussion the paramount interest at that time. The appeal was allowed because the proposed article was interfering with the ordinary course of justice.

The Thalidomide case highlighted the public policy at play and the need to balance the need to preserve the administration of justice and the need for freedom of expression and discussion. The crucial issue was whether the publishing company could be forced on public policy grounds to forgo its legal rights to protect the policy of fair justice and permissible if done fairly. The judges' opinion was that the publication was not in contempt, not against public policy and would not pollute the course of justice. Issues of public policy often arise as the result of such strong public feeling. It is a matter of public interest that freedom of discussion is maintained in a democratic society and the law of contempt is to safeguard the administration of justice.

Cases like *Regazzoni v Sethia*[511] show the Common Law courts recognising the laws of other States, and the normative power of international law, "the Comity of

[511] *Regazzoni Appelant; v K.C.Sethia* (1944)[1958] AC 301

Nations". Public policy is driven by considerations of public international law; so not only can foreign municipal law in the place of performance inform the concept of public policy under Common Law, the concept can also be informed by public international law.

However in the context of private international law, Public policy has however a more restricted application. When tackling questions of jurisdictional competence, applicable law and the enforcement of foreign judgments, the application of public policy considerations must consider that national policy norms may not be shared by the other legal orders. Common law in applying public policy in private international law disputes must consider the seriousness of the breach of policy norms in balancing competing policy objectives as the House of Lords made clear in the *Iraq v Kuwait Airways* case.[512]

In August 1990 the Iraqi government directed the respondent to fly ten aircraft from Kuwait to Iraq where the respondent used these aircraft as his own. In September 1990 Iraq passed Resolution 369 purporting to dissolve the complainant (Kuwait Airways) and transfer all assets including aircraft to the respondent (Iraqi Airways Co). In January 1991 the complainant issued a writ for return of the aircraft and consequential damages for the respondent's unlawful interference with the aircraft, or alternatively damages for the value of the aircraft.[513] Several aircraft had been destroyed the remaining had been sent to Iran, seized there, and returned to the complainant upon payment to Iran of US $20m.

[512] *Iraq v Kuwait Airways* case (2002)
[513] *Iraq v Kuwait Airways* case (2002)

It was judged in Commercial Court in favour of the complainant, but held the complainant was not entitled under Iraqi law to damages in respect of the aircraft destroyed or to recover any losses. The Court of Appeal dismissed the respondent's (Iraq Airways Co.) appeal against Mance J's decision, and only allowed in part the appeal by the complainant on the decision of Aiken J. [514] Lord Nicholls of Birkenhead dismissed both appeals. The actions took place in Iraq, and should be judged under Iraqi law. The court was obliged to apply the double actionability rule (i.e. by which tortious actions must be proved actionable both under the civil law of the country where they occurred and notionally – as if they occurred in England – under English law.

The question of Resolution 369 and English public policy was debated. Conflict of laws jurisprudence is concerned with cases with a foreign element. Foreign laws may differ from English law, but these differences are no reason to disregard foreign law. However Common law cannot be required to blindly adhere to foreign law; in an exceptional circumstance a provision of a foreign law would be disregarded where it would lead to a result alien to fundamentals of English law; contrary to public policy.[515]

Lord Nicholls cited Judge Cardozo in *Loucks v Standard Oil Co of New York* who states that the court will exclude a foreign decree only if it "would violate some fundamental principle of justice, some prevalent conception of good morals, or some deep-rooted tradition of the common weal".[516] Lord Nicholls cited, as a clear example

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[514] *Ibid*
[515] *Iraq v Kuwait Airways* case (2002)
[516] *Loucks v Standard Oil Co of New York* (1918) 120 NE 198,202.

of this rule, a 1941 Nazi Germany decree that deprived Jewish *émigrés* of their German nationality leading to confiscation of their property. In *Oppenheimer v Cattermole* Lord Cross of Chelsea commented that such a racially discriminatory and confiscatory law was a grave infringement of human rights and English courts should refuse to recognise it at all.[517] Lord Nicholls considered that the question becomes whether Resolution 369 is such a law, as it was made after the UN Security Council decided the annexation of Kuwait legally invalid. In March 1991 Iraq accepted these obligations and repealed RRC Resolution 369.[518]

The complainant argued the public policy exemption for foreign laws only related to infringements of human rights. However the Court of Appeal determined not to recognise Resolution 369 as a matter of public policy. Lord Nicholls noted with approval the statement of Lord Wilberforce in the case of *Blathwayt v Baron Cawley* (1976) that public policy should adapt over time[519] and of Lord Cross in the *Oppenheimer v Cattermole* case that the courts should recognise clearly established rules of international law. As to the latter Lord Nicholls commented that and with increasing interdependence internationally this need was ever more important.[520] Resolution 369 was clearly unacceptable in today's world and that the invasion of Kuwait was a gross violation of international law, and to enforce a law that supported this action would be a clear breach of English public policy, given international reaction.[521]

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[517] *Oppenheimer v Cattermole* (1976) AC 249, 277-278
[518] *Iraq v Kuwait Airways* case (2002)
[519] *Blathwayt v Baron Cawley* (1976) AC 397, 426.
[520] *Oppenheimer v Cattermole* (1976) AC 249, 277-278
[521] *Iraq v Kuwait Airways* case (2002)

In terms of the public policy aspects of this case, although it is procedure for English law to recognise the laws of other countries, public policy considerations ensure that if that law is especially discriminatory, or against human rights, or as in this case a serious breach of international law it should be ignored by the court. The majority of judges agreed that because of the serious nature of the breach of international laws by Iraq the public policy exemption should apply confirming that it is an overriding legal norm capable of overriding both English law and foreign applicable laws. The case also demonstrates the flexibility of the public policy concept, whereby the common law was content to apply the concept in support of international law and the temporal aspect of public policy, which changes over time to reflect the increasing cohesion of legal orders around international norms.

Radmacher v Granatino showcases the changes in English public policy brought about by social and legal shifts over time in society.[522] In this case the UK Supreme Court departed from a former determination of public policy by the House of Lords. *Radmacher v Granatino* debated principles that should be applied when a court in considering the financial arrangements following the breakdown of a marriage, has to decide what weight should be given to an agreement between the husband and wife made before the marriage (a 'pre-nuptial' agreement).

The two parties married in London in 1998. The husband was French and the wife German. A pre-nuptial agreement was signed before a notary in Germany three months before the marriage at the instigation of the wife, and she gained a further portion of her family's wealth as a result. Subject to German law, the agreement stated

[522] *Radmacher v Granatino* [2010] UKSC42

that no party was to benefit from the property of the other during or in event of the marriage being terminated. The husband, a banker, did not obtain independent advice on the agreement at the time. After 8 years of marriage the parties separated, and the husband applied to the high court for financial relief. The judge, taking into account the pre-nuptial agreement, granted the husband £5.5m (to be paid out annually in the sum of £100,000).

The wife appealed and was successful, as the Court of Appeal ruled that the prenuptial agreement should have been given decisive weight. The issue was how then the court would approach deciding the weight to be given to such agreements. The parties had entered into the agreement freely. At the time the agreement was signed, it was considered binding under German law, not in England, where the case was brought[523]. The husband appealed to the Supreme Court which observed that whilst in the past it was contrary to public policy for a married couple or were about to be married to make an agreement which provided for the contingency if they were to separate (as this might encourage them to do so) that was now no longer the case as UK society had changed its attitudes towards marriage and changing social views offered such agreements more weight. In light of this, the Supreme Court upheld the decision of the Court of Appeal as there were no factors making it unfair to hold the husband to the agreement, being financially capable and not in need of financial support, and was judged to not be entitled to a portion of his wife's wealth. The Supreme Court considered the guiding principle or test to be applied by the court when considering a pre-nuptial agreement should be fairness in the light of the actual

[523] *Ibid*

and foreseeable circumstances at the time and maintained its right to overrule agreements when necessary.

4.7. Concepts of Public Policy

Section 4.1 described the historical development of the Common Law legal order and the concepts of public policy within that. Winfield argued however that this development of public policy has occurred in an inherent, often "unconscious" fashion and has even been subject to the threat of elimination over the course of history, due to the strict interpretations and administration of justice by the courts.[524]

However what is Public Policy but the invocation of common sense and a test of reason to debate issues in terms of their ultimate benefit for the public and the populace? Public policy is according to Winfield, the "spirit" behind the laws. Statutes and customs are derived to complement public policy. Public policy is changeable, yet the legal process serves to control and check speculation. Legal process ensures that law is not contradictory, inconsistent or illogical. Public policy also favours the general good for the public over the good for the private individual.[525]

Many scholars have attempted to define the concept of public policy but none have succeeded, these studies and discourses have only served to narrow its applications and limit it to certain areas of the law. The increase in recorded case law and the proliferation of statutes have also played a role in defining the influences of the use of

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[524] Winfield, P "Public Policy in the English Common Law" Harvard Law Review, Vol. 42, No. 1 (Nov 1928) pp. 76-102
[525] *Ibid*

reasoned judgement and public policy in determining the outcomes of legal disputes.[526]

Public policy is modified over time, influenced by issues that affect the notions of public expediency, welfare and opinion that are constantly changing.[527] Issues of public policy at one time may change drastically in the next decades such as the way the introduction of the ECHR –particularly Articles 7 and 10- has affected public perceptions and due to altered acceptance and views of issues such as religion,[528] public service, morality,[529] same-sex marriage, pre-nuptial agreements, the growth of international law,[530] and so on.[531]

It is always a matter of concern that public policy, being so ambiguous, indefinable and complex to measure,[532] may be a hindrance to the accurate ascertainment of legal rights.[533] It apparent that public policy while having its devout adherents also faces some reluctance in its acceptance and caution in its use and application. It is a careful balance that is needed when judges are required to rule on an issue that affects the parties in dispute and also need to keep in consideration the interests of the community at large.[534] But it is also crucial to recognise the importance of the

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[526] E.G., Jessel, M. R., in *Besant v. Wood*, 12 Ch. D. 605, 620 (1879)
[527] *Radmacher v Granatino* [2010] UKSC 42
[528] Article 10 ECHR
[529] *McLoughlin Appellant v O'Brian* [1983] 1 AC 410
[530] *Kuwait Airways Corp v Iraqi Airways Co* [2002]
[531] Winfield, P "Public Policy in the English Common Law" Harvard Law Review, Vol. 42, No. 1 (Nov 1928) pp. 76-102
[532] *Richardson v Mellish* (1824) 2 Bing 229
[533] Winfield, P "Public Policy in the English Common Law" Harvard Law Review, Vol. 42, No. 1 (Nov 1928) pp. 76-102
[534] *Attorney-General v. Times Newspapers Ltd.* [1974] A.C. 273

flexibility of public policy and its potential to serve the constant development of the law.[535]

It is a distinctive feature of Common Law public policy; its flexibility and the ability to apply rules to uncontemplated situations, such as in *Re Sigsworth* where the Parliamentary Act was disregarded and its sovereignty was subordinated to judicial public policy.[536] In this case, Section 46 of the Administration of Estates Act 1925 was not applied, which gave the court authority to rule on who should be the recipient of an estate in certain circumstances as a matter of public policy. In this case, the son murdered his mother and committed suicide, and the court ruled that his descendants should not benefit from his crime, and granted the estate to the mother's family.

This showcased the importance and responsibility of the judicial authorities to exercise judicial restraint and that public policy has the capacity to override any other feature of the legal situation, even parliamentary sovereignty.[537]

There are other concepts active in the Common Law legal system that forms the context and at times the contrasting background for public policy. Non-state institutions such as the media or other professional bodies will often purport to be acting in the interests of the public. The term "public interest" is used in legislative purposes when a decision maker rules in view of the interests of the public.[538] It may

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[535] Winfield, P "Public Policy in the English Common Law" Harvard Law Review, Vol. 42, No. 1 (Nov 1928) pp. 76-102
[536] *Re Sigsworth*[1935] 1 Ch 89
[537] *Ibid*
[538] *Anderson v. Information Commissioner* [2011] NIQB 44

also be used when a member of the public or a particular pressure group brings forward a complaint in the interests of the public, such as environmental issues or trade unions.[539] The term public interest may also be used when judges invoke the term to justify a legal development and broaden the scope of public law in order to maintain jurisdiction over decision-makers.[540] The term "public interest" can be invoked by a public authority party to a dispute in the courts in preparation for the case if they claim that information disclosure is detrimental due to the public interest immunity effect. This poses a problem because Common Law behoves the requirement of justice and public interest immunity negatively impacts that.[541] Public interest may be invoked when a case is argued in reference to EU law or ECHR as states have an obligation toward the rights of the individual but this can be mitigated by the public interest justification when necessary, such as in circumstances relevant to public health or national security or crime prevention.[542] In the context of EU law the application and effect of public policy is constrained by the policies of the EU legal order as explained in Chapter 3.

4.8. Characterisation of Public Policy

In the context of English Common Law, public policy as a legal concept is the product of the Common Law in itself being a product of the decisions of the judiciary. Functionally, public policy operates in the Executive and Legislative arms of the state as it is informed by legislation[543], and must maintain respect for legality (in The UK

[539] D, Re an Application for Judicial Review [2003] NICA 14
[540] Re McBride's Application [1999] NI 299
[541] *R v. H* [2004] UKHL3
[542] The European Convention on Human Rights (ECHR)
[543] *Bourhill v. Young* (1943) A.C. 92

state, English Common Law, foreign laws and public international law) and awareness and sensitivity to societal norms.

Public policy in the Common Law legal system has the functionality and the capacity to operate with overriding effect on all legal norms other than those that form part of the central constitutional settlement in the UK (i.e. parliamentary sovereignty and the independence of the judiciary) but as a by-product of both parliamentary sovereignty and judicial independence it may also play a role in the balancing of their competing interests.

It has no apparent institutional restraints other than that derivative of parliamentary sovereignty, justice and those further products of parliamentary sovereignty such as EU law and human rights. In certain instances, discrete public policies may need to be balanced against each other, and as such the judiciary would be the ultimate arbiter of the policy objective in question, with the result that the policy interests of justice will generally be accorded more weight in that balancing exercise.[544]

Public policy in the Common Law system is neither a principle nor a rule; however in certain contexts it may generate rules. It is infinitely flexible in the context of particular decisions, and is of uncertain application, and therefore subject to considerable behavioural restraint in terms of precedent, clarity, judicial reluctance to invoke its use due to its broad scope[545]. Public policy in the technical sense (as used in this thesis) is defined by who can use it and where they can use it. It is an element

[544] *Attorney-General v. Times Newspapers Ltd.* [1974] A.C. 273
[545] Winfield, P "Public Policy in the English Common Law" Harvard Law Review, Vol. 42, No. 1 (Nov 1928) pp. 76-102

used by judges in decision making and nowhere else. Outside of this pragmatic definition (as described previously) the concepts are not possible to confine by definition[546].

To be useful, public policy must remain always partially developing. The changes public policy undergoes in its gradual and continual development is informed by policy considerations that arising from statutes in the law, justice, UK society and its views. Finally, Public policy in Common Law has a strong temporal aspect, as it reacts to societal changes, shifts in perspectives of the public and is impacted by changes in the international sphere as well[547]; the law of the place of performance of an obligation, considerations of international comity and considerations of public international law.[548]

[546] *Ibid*
[547] *Iraq v Kuwait Airways* case (2002)
[548] *Regazzoni Appelant; v K.C.Sethia* (1944)[1958] AC 301and *Iraq v Kuwait Airways* case (2002)

Chapter 5- Developing a Functional Concept for the WTO

In the previous chapters, there has been a description and discussion of each of the three legal orders, as to their structure, the major relevant treaties and constitutional elements, and how public policy exists and has been utilised in different forms within those legal orders.

This chapter seeks to formulate and examine the utility of, a fully developed functional concept for public policy for the WTO legal order. The chapter will do this by making an explicit comparison of the nature, operation and purpose of public policy concepts in the legal orders of the European Union, English Common Law and the World Trade Organisation. The purpose of the comparative analysis is to identify the public policy concepts within the EU and Common Law that are not part of the WTO's concept and which might be utilized in the WTO legal order.

5.1. Comparing the Legal Orders

As described in Chapter 1 in Methodology and Methods, six relevant principles of the nine described by Reitz have been selected as appropriate to apply in the conduct of this comparative law study.[549]

Reitz's principles described the appropriate approach to the conduct of comparative law study, as he detailed the importance of maintaining an awareness of the similarities and differences between the legal systems under study, and an

[549] Reitz, J. *How to Do Comparative Law*. The American Journal of Comparative Law. Vol. 46, No. 4 (Autumn 1998) pp.617-636

understanding of the significance of any differences and the functional equivalence with respect to the issue being studied- in this instance "public policy". From this, there can be an assumption made as to how well the legal system functions in comparison to others, even if at first glance, the structure, terms, procedures may appear very different.[550]

Reitz advocated the importance of maintaining a clear focus on the point of comparison throughout the study, with careful development of broad categorisation of the compared issues and constant awareness of the similarities and differences, the reasons for them and the background context at all times.[551]

Reitz' guidelines and rules for the conduct of comparative law study are valuable to the success of such an undertaking, helping to structure the research and develop the reasoning and the derivation of the results of the inquiry. He guides the researcher to determine the sources of the law in each legal system, and understand the viewpoints of the lawyers operating within them on the topic under study.[552]

Accordingly, this study and this chapter particularly, endeavours to identify the problem which is the focus of the comparative analysis (i.e. the absence of a clear concept of public policy in the World Trade Organisation as a legal order), considering public policy in each of the legal orders being compared, analysing how the problem is manifested and managed in each legal order, then explicitly comparing the functional similarities and differences between the legal orders, synthesising the

[550] *Ibid*
[551] *Ibid*
[552] *Ibid*

functional equivalence of the public policy concept across the legal orders. This will serve to develop a model of public policy for the WTO, which will be evaluated for its utility for the WTO legal order.

5.1.1. Comparing Sources of the Law and Public Policy

In Chapter 1 (see 1.1) the features of public policy were described and differentiated from rules and principles. Firstly, public policy has the ability to override and limit private agreements, rights, principles and even statutes in the law. [553] Secondly, public policy sources are universal; it can be derived from other legal orders, international bodies, from human morality and a sense of common decency and natural values. Thirdly, public policy has been typically constrained; used with caution and mediated by the judiciary, due to their concern with stringently applying the law and not allowing it to be misused, as they see themselves as guardians of legal order and of the right and just. Fourthly, the application of public policy is rules generative; leading to the creation and application of a rule (and this can be narrow or broad, depending on the issue being deliberated) such as when applied to family only,[554] illegal purpose only,[555] illegal purpose that is to be pleaded only.[556] Finally, public policy is changeable and flexible, adapting to shifts in societal values and perceptions over time. [557]

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[553] *Re Sigsworth* [1935] 1 Ch 89 and *Richardson v Mellish* [1824] 2 Bing 229

[554] *Houghton v Houghton* [1915] 2 Ch 178

[555] *Foster v. Driscoll* [1929] 1 KB 470

[556] *Tinsley v. Milligan* [1993] 3 W.L.R

[557] *Rewe-Zentralfinanz eGmbH v Landwirtschaftskammer* [1975] Case 4/75 ECR

As mentioned previously (see Chapter 1), legal public policy is the attempt to recognise factors fundamentally important to the community that are constant but changeable according to moral or ethical feeling shifts (such as on the issue of torture). The restraint of the power of jurisdiction of legal public policy may be done through judicial culture (as in the Common Law) or by developing principles of restraint (as seen in the EU jurisprudence). Public policy is not a policy based idea that tries to balance political forces representing public interest; it is an attempt to identify principles or values that cannot be dismissed by legal orders. In the context of the WTO this means it is an attempt to identify good faith reliance on the exceptions and legal permission to try and develop an articulation of how to approach this task by the Appellate Body.

In debating the form public policy should take in international legal orders we can derive guidance from the "liberal" analysis; the idea combines an interest in international forces influencing national governments and the forces of international business, religion, ethical or moral reform movements, and the ideals that motivate international NGOs are all possible sources of arguments as to the public policy credentials of domestic measures in the WTO.

While the international environmental movement and related issues in international law are justifiable as sources of argument about public policy and can influence the interpretation of the covered agreements generally and Article XX specifically, only trade liberalisation can be endorsed on its own grounds by the WTO. What the WTO must do is decide whether claims to good faith in pleading the exceptions are

justifiable and for this task an express discussion of public policy in the jurisprudence will prove valuable to the organisation and its members.

Public policy has a role in each of the three legal orders being compared. The purpose of the World Trade Organisation is to reduce and eliminate barriers to international trade- this is implemented by the obligations in the covered agreements. [558]But as member states demand regulatory flexibility to effectively maintain their national sovereignty, public policy should play a larger role than what it currently does. In the EU, public policy plays a similar role, however when considered in the context of the EU aims of encouraging positive integration and ensuring the sustainability and continual development of the nature of its norms through sensitivity to changes over time we find that public policy has been allowed greater flexibility and mobility than the WTO. In English Common Law public policy performs a more complicated role of managing the needs of societal change, covering gaps in the law, the preservation of the principles of justice and the balance and relationship between the executive, the legislature and the judiciary.[559]

Public Policy as a feature of the legal system exists in all three legal orders being compared, as detailed in previous chapters. The European Union and the Common Law of England and Wales have undertaken to develop the concept of Public Policy further and implement mechanisms to encourage the constant evolution to coordinate with changing societal views and values.

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[558] *EC-Biotech Products* WT/DS291
[559] *Radmacher v Granatino* [2010] UKSC 42

In Common Law, public policy has broad and shifting dimensions, and was historically influenced by the Christian religion, although to a much lesser extent in modern times. [560] Public policy includes the mitigation of threats to the integrity of the legal order (preventing the floodgates from being opened).[561] Public policy in Common Law includes principles such as no wrongdoer may benefit from their wrongdoing,[562] and the invalidity of agreements for criminal acts, however in Common Law there is no list of public policy or exceptions, thus the nominate term is very nearly the same as the functional concept within the legal order. Public policy is as such in a constant state of evolution, this has been ensured by the implementation of public policy on a needs basis, combined with the use of the case law to determine the outcomes of disputes.[563]

In the EU, public policy is identified as the four fundamental freedoms of the legal order, the derogations from the treaty provisions including *ordre public*, the Rule of Reason (for non-tariff barriers to goods), the Overriding Requirements (for non-tariff barriers to services) and the Objective Justification stipulations (for tariff barriers), as supplemented and controlled by using the principles of subsidiarity and proportionality and necessity. The EU has introduced the Rule of Reason to modify elements of Public Policy and ensure its applicability to issues being deliberated.[564] This has broadened the horizons for the achievement of the internal interests of the member states and their sovereignty to be protected within the legal order. The EU has a specific area of law termed "public policy" yet the functional role of public

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[560] *Ibid*
[561] *McLoughlin Appellant v O'Brian* [1983] 1 AC 410
[562] *Re Sigsworth* [1935] 1 Ch 89
[563] *Ibid*
[564] *Rewe-Zentral AG v Bundesmonopolverwaltung fur Branntwein* (C120/78)

policy type concerns actually has a broader working area that includes the Rule of Reason and the derogations. Thus in the EU the nominate concept is narrower than the functional concept, in reality the law allows more than what is designated public policy to overcome laws in certain instances.

In WTO law there is no designated term "public policy".[565] It is only the obligations and provisions which if met might suspend normal law, such as security or military considerations, safeguards, and the general exceptions. Functionally, these safeguards and exceptions have a functional equivalence to that of public policy in the other legal orders. The concept of public policy in the WTO remains narrowly construed and the exceptions are vague and ambiguous. [566]

There are structural similarities between the three legal orders being compared in this research study. In each legal order, there are three main branches of authority; the Legislative, the Executive and the Judicial. In the EU the Legislative authority is composed of the European Parliament, the Council of Ministers and the member states themselves or their representatives. In Common Law, the Legislative authority is the Parliament, and in the WTO the Legislative authority is manifested in the member states (through the agreements on which member states have signed).

The Executive authority in the EU is the European Commission and Council of Ministers, and in Common law this is the Government (or the Cabinet of Ministers).

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[565] Diebold, N "The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole" (2008), Journal of International Economic Law 11(1): 43-74

[566] *China- Publications and Audio-visual Products* WT/DS363/AB/R

In the WTO the Executive authority is the General Council and the Secretariat (see Table 2).

As for the Judicial authority, in the EU this is manifested in the Court of Justice of the European Union and the General Courts, and in Common Law this is the courts including the Supreme Court. In the WTO the Dispute Settlement Panels form the Judicial Authority along with the Appellate Body (see Table 2).

Table 2. Comparing the Legal Orders Authorities and Institutions

Institutions	**European Union**	**Common Law**	**World Trade Organisation**
Legislative	-European Parliament -Council of Ministers -Member States	-Parliament	-Member States
Executive	-European Commission -Council of Ministers	-Government (The Cabinet)	-General Council -The Secretariat
Judicial	-Court of Justice of the European Union -General Court	-Courts Supreme Court	-Dispute Settlement Panels -Appellate Body

As for the sources of law for the concepts of public policy in the legal orders, in the WTO public policy is derived from the covered agreements, the accession agreements and the exceptions contained within the covered agreements. In the EU public policy is derived from and the main treaties, the delegated legislation issued by the EU institutions and the jurisprudence of the CJEU. In Common Law, the higher court

decisions in England and Wales are the source of the law for the concepts of public policy. For example, in the EU, public morals are positioned as part of Article 36 TFEU and in the WTO as Article XX (a) GATTs and Article XIV (a) GATS. Public security is described in the EU in Article 36 TFEU and is present in the WTO as Article XIV (bis). Protection of Human, Animal and Plant Life and Health is described in the EU within Article 36 TFEU and in the WTO in Article XX (b) GATT and Article XIV (b) GATS. The Protection of National Treasures is found in the EU in Article 36 TFEU and in the WTO in Article XX (f) GATT. As for Natural Resources, this is found in Article XX (g) in the WTO, but is not found in Common Law or the EU (See Table 3).

Table 3. Sources of the Law for Public Policy (with Case Examples)

Legal Order / **Source of Law for Public Policy (with examples)**	**European Union**	**Common Law in England**	**World Trade Organisation**
Public Security	Art 36 TFEU *C-367/89 Richardt* *Case 72/83 Campus Oil*	No cases	Article XIV (a) GATS
Public Policy	Art 36 TFEU *7/78 R vs. Thompson* *231/83 Cullet vs. LeClerc*	*Attorney General v. Times Newspaper Ltd*	No cases
Public Morality	Art 36 TFEU *Case 34/79 R vs. Henn and Derby* *Case 121/85 Conegate* *C192/01 Denmark*	*Holman v Johnson* *Regazzoni v Sethia* *Foster v Driscoll*	Article XX (a) GATT *China Audio-visual* Article XIV (a) GATS *US-Gambling*
Protection of Health and Life of Humans, Animals and Plants	Art 36 TFEU *Commission vs. UK 40-82* *4/75 Rewe-Zentralfinanz*	*Bourhill v Young*	Article XX (b) GATT *Asbestos* *Brazil Tires* Article XIV (b)

	174/82 Sandoz		GATS *US-Gasoline* *Thai-Cigarette* *US-Tuna*
Protection of National Treasures Possessing Artistic, Historical or Archaeological Value	Art 36 TFEU *7/68 EEC vs. Italy*	No cases	Article XX (f) GATT No cases
Protection of Industrial or Commercial Property	Art 36 TFEU No cases	No cases	No Cases
Exhaustible natural resources	No cases	No cases	Article XX (g) GATT *US-Shrimp*
Customs Enforcement, Trademarks, Patents, Monopolies, Copyrights	No cases	No cases	Article XX(d) *Korea-Beef*

Although the legal orders serve similar purposes; i.e. to maintain order and achieve balance between the requirements of the legal order and the needs of the member states and its people (public interests), the methods they implement when invoking public policy are dependent on the institutions and authorities specific to that legal order, and the jurisdiction allowed to them. As such, the process by which Public Policy may be invoked or applied will vary according to the legal order and the authorities involved, even though the basic principles and the reasons for its use may be similar (see Table 3).

When considering the manifestation of public policy in the three legal orders we find that in the WTO what serves the purpose of public policy manifests in the resolution of disputes, from the panel rulings on actions of breach brought forward by member states. In the WTO the "overriding principles" or exceptions are invoked for example when a member state enacts a measure preventing a type of goods or service from importation from another member state. The affected state may request a consultation to resolve the issue and if this does not produce a satisfactory resolution a panel may

be assigned by the General Council. This panel produces a report and if either party disagrees the matter may be taken before the Dispute Settlement Body which then provides a final decree on the dispute.[567]

In Common Law, public policy manifests when courts seek to resolve disputes in civil and criminal proceedings brought by individuals against the state or by the state against individuals or in actions between individuals. An individual or entity may enact a measure or action which upon review in a court of law will become apparent to be in breach of public policy. [568] In such situations, the courts are the judicial authority enforcing public policy and which decree rulings on such cases. If the affected party is in disagreement with the court ruling, an appeal may be lodged to a higher court.

In the EU public policy manifests when the CJEU issues a decision on actions for breach brought against member states by the Commission or other member states. Public policy may also manifest in CJEU and national courts management of claims by individuals or entities against a member state for breach of EU law. It is also- and perhaps most significantly- made manifest by the CJEU in their interpretive declarations of EU law pursuant to the preliminary reference procedure.

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[567] The Panel Process, WTO website, last accessed 15/04/2013 http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp2_e.htm

[568] *Attorney-General v. London Weekend Television Ltd.* [1973] 1 W.R.L. 202; [1972] 3 All E.R. 1146, D.C.

5.1.2. Detailed Comparison

The study had previously identified the problem that is the focus of the comparative analysis (i.e. the absence of a clear concept of public policy in the World Trade Organisation as a legal order), as well as considering public policy in each of the legal orders being compared, and analysing how the problem is manifested and managed in each legal order.

This section will now explicitly compare the functional similarities and differences between the legal orders, synthesising the functional equivalence of the public policy concept across the legal orders. This will serve to develop a model of public policy for the WTO, which will then be evaluated for its utility for the WTO legal order.

5.1.2.1. Common Law in England and Wales

The sources of public policy in the Common Law legal order are the higher court decisions in England and Wales. The primary substantive (doctrinal) provisions in the law for public policy are a combination of the social, economic and business elements, as well as the rulings from foreign courts such as the CJEU. Public policy in Common Law is undefined and is a product of the system, similar to the rules and standards it seeks to control.

In the Common Law system there are various tests by which an issue can be weighed and assessed for the use of public policy and which operate in a similar way to the threshold test. Particular examples of such tests include the proximity and foreseeability tests, as in McLoughlin v O'Brian that is applied in connection with the

recoverability of damages for personal injury in tort.[569] Common Law also uses what is effectively a test of precise reflection to determine the legality contractual performance in the context of statutory prohibitions [570] to maintain the balance of order and distinguish illegal from legal contractual bargains.

Several concepts support and mitigate the use of public policy in the Common Law legal order, such as the principle of judicial restraint. Common Law judiciary is cautious when it comes to using public policy for concern of "opening the floodgates" and invokes it only when other points fail to resolve the issue in question preferring whenever possible to rule following judicial principle.[571] Common Law also gives due deference to the principle of "Comity of Nations" which is respect for international relations and foreign laws.[572]

When invoking public policy, the judiciary takes into serious consideration the balance between the interests of the public and the interest of maintaining legality, order and justice. In certain instances, more than one public policy may need to be considered and balanced against the other, and then the courts must decide to give priority of one policy over another and priority seems to operate in favour of the interests of justice.[573]

In balancing the use of public policy in the Common Law system, the judiciary most often will give the most weight to the interest of maintaining order and justice,

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[569] *McLoughlin v O'Brian* [1983] 1 AC 410
[570] *Holmann v. Johnson* [1775], 98 Engl. Rep. 1120
[571] *McLoughlin v O'Brian* [1983] 1 AC 410
[572] *Iraq v Kuwait Airways* case (2002)
[573] *Attorney-General v. Times Newspapers Ltd.* [1974] A.C. 273

followed by reverting to a known precedent of the issue, and then balance in light of the current views of the society and the public.[574]

The Common Law system exhibits the greatest flexibility and changeability of the three legal orders being compared. Its public policy is temporal in nature, affected to a great extent by the evolving perspectives, interest and opinions of society. Public policy in Common Law is also sensitive to political, social and environmental shifts, and the beliefs of the people, nationally or internationally. [575]

5.1.2.2. European Union

The sources of public policy in EU law are the main treaties, the delegated legislation issued by EU institutions and the jurisprudence of the CJEU. The main provisions of law for Public Policy in the EU can be found under Article 36 of the TFEU (ex Article 30 EC) for the free movement of goods. Article 36 TFEU specifies the derogations under which a breach of Article 34 (ex Article 28 EC) may be justified for measures that affect public policy, public security, public morality, the protection of health and life of humans, animals and plants, the protection of national treasures that possess artistic, historical and archaeological value, and the protection of industrial and commercial property.

Other primary sources of law for public policy in the EU is Article 45 (3)- (4) TFEU (ex. Article 39 EC) on the free movement of workers, Article 51 (1) and 52 (1) TFEU (ex. Articles 45 (1) and 46 (1) respectively) on the freedom of establishment, and

[574] *Ibid*
[575] *Radmacher v Granatino* [2010] UKSC 42

Article 62 TFEU (ex. Article 55 EC) on the free movement of services, Article 65 TFEU (ex. Article 58 EC) on the free movement of capital and Article 21 (1) TFEU (ex. Article 18 (1) EC).

The EU has introduced the Threshold Test to gauge the strength of the claim made in the view of public policy, where the criteria is that the issue in dispute must be one that affects the fundamental interests of society and poses a threat . This was specified in Article 39 (3) of the EC Treaty.

Other supplemental concepts that the EU uses to mitigate and manage the use of public policy are the Principle of Conferral, which is limited and controlled by the concepts of subsidiarity and proportionality. These principles have been agreed and set in a protocol annexed to the TEU.[576] The Rule of Reason (for non-tariff barriers to trade in goods), and the term "objective justification" (for tariff barriers to goods) is used by the EU to identify the open-ended exceptions and permitted derogations in the field of goods. In the area of services, the term: "imperative requirements" are used. These terms all signify a similar function, which is to test measures implemented for objectivity and justification and compatibility with EU law and the nature of the EU legal order.

In the European Union, when a member state implements a restriction on trade, it is for the CJEU to ascertain the facts of the issue and judge whether it is a matter of public policy and in doing so the CJEU makes an assessment as to whether or not the member state's legitimate constitutional and societal interests would be at serious risk

[576] European Commission website, Application of EU Law, last accessed 15/12/2012 http://ec.europa.eu/eu_law/introduction/treaty_en.htm

if this measure were not to be implemented; and whether it is justified according to the tests specified previously. The demand for public policy is also weighed and balanced in view of the obligations of the member states to the treaties of the EU, and the maintenance of the integrity of the internal market.

The most important factors taken into account by the CJEU when balancing the use of public policy with the treaty obligations are the aspects of the restriction on trade implemented, and whether the member state might have been able to achieve the effect using another method, followed by the size of the risk claimed by the member state to its policy imperatives. The CJEU will also assess for discrimination in the measures implemented. Priority is given to the overriding need to retain the legal integrity of the EU legal order.

Public policy in the EU exhibits a temporal nature, being affected by changes over time in the views and perspectives of society and the changing international legal norms and policies. The flexibility in the legal order serves to allow the gradual adjustment to meet these changes successfully. [577]

5.1.2.3. WTO

In the World Trade Organisation, the public policies "overriding principles" or "exceptions" are derived from the covered agreements, the accession protocols. The primary sources for public policy provisions in the WTO are the exceptions to the covered agreements which are listed under Article XX GATT (goods) and Article

[577] *Rewe-Zentral AG v. Bundesmonopolverwaltung fur Branntwein* [1979] Case 120/78 ECR 649

XIV GATS (services). These articles contain the chapeau, which serves to function as a controlling factor against arbitrary or unjustifiable discrimination. Article XXI GATT (security exceptions) and Article XIX GATT for Economic Emergency Exceptions (safeguard measures) and the Regional Integration Exceptions (Articles XXIV GATT and Article V of GATS) also form part of the primary sources for public policy provisions in the WTO.

In the WTO, the chapeau within Article XX listed functions in the same fashion as a form of the Threshold Test that is used by the legal order to establish the legitimacy and exert controlling influence on the potential for member states to abuse the exceptions or arbitrarily discriminate between other states in matters of trade. [578]

As stated in Chapter 2, the WTO is limited in its public policy constructs to those described above. The exceptions to the agreements are the only sources of public policy, and neither the panels nor the appellate body have the jurisdiction to add or modify these existing exceptions. There are no supplemental concepts that serve to bolster the strength of the exceptions or promote their flexibility, and this is the central focus of this research study.

When the WTO panels and appellate body adjudicate on a dispute that has been raised, they necessarily read and apply the covered agreements. In effect they must also consider the member states policy imperatives and those of the organisation against the interests of the promotion of trade liberalisation and mobility. The WTO

[578] The requirements of the chapeau have been the major limiting factor on member states seeking to rely upon the general exceptions: see *US- Gasoline* WT/DS2/AB/R, *US- Shrimp WT/DS58/AB/R*, *Brazil – Retreaded Tyres* WT/DS332/AB/R, *US- Gambling* WT/DS285

must necessarily confirm that no discrimination is being used in implementing trade restrictions.[579]

If the WTO was to judge the member states action strictly adhering to the exceptions and the obligations to the covered agreements, it risks alienating its members.[580] However if this is not the case, the risk is then negatively affecting the member states that have legitimate concerns and depend on the organisation to protect their economic viability.[581] The most important concern for the WTO is that the trade continues to flow unrestricted, followed by limiting the negative impact on the member states national sovereignty.

In the WTO legal order, the exceptions to the covered agreements which form the extent of the public policy concepts do not exhibit a temporal nature and do not adapt to changes over time in the nature and interests of the member states or the organisation.[582] They are designed to be of a more rigid and stringently interpreted nature. Changes may be made if there are amendments to the covered agreements, which is a lengthy process and not a feasible option. [583]

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[579] Rodrik, D "The Globalization Paradox: Why Global Market, States, and Democracy Can't Coexist" Oxford University Press 2011 pp. 253-254

[580] Pollack, M and Shaffer, G "*When Cooperation Fails*" Oxford University Press, 2009

[581] The "Rule of Law" aspect has been identified by Jackson, J in "*The World Trading System: Law and Policy of International Economic Relations*" 2nd edition, MIT Press, 1997 as a strength that attracts members.

[582] Subject to incorporating the general international norms present in *US- Shrimp WT/DS58/AB/R.* This avenue is open under the DSU as a means to update the application of the covered agreements.

[583] The prolonged process to amend an agreement such as TRIPS is an example of how a politically non-contentious formal change can be ardous and lengthy to complete in the WTO http://www.wto.org/english/tratop_e/trips_e/wtl641_e.htm accessed 26/06/2013

5.2. Developing a Functional Concept for the WTO

A "Concept" is an idea or an image or a set of propositions that form the basis for thought on a subject. The term "Functional" denotes an idea that is workable, can be used or is directed to a particular purpose. Therefore the term "Functional Concept" indicates the summary of a set of ideas and definitions for their use.

In this thesis, the development of a functional concept for public policy is a means to describe ways of implementing law that is outside the bounds of what is the normal legal order. Cases examined throughout the thesis thus far have showcased how public policy appears in different manifestations and how it operates. The legal orders vary in terming it "public policy" or "derogations" or "exceptions". In Common Law public policy is very broad, in the EU it is narrowly construed, and in the WTO is very ambiguous. From the assessment of the legal orders, and returning to Kennedy's structuralist view,[584] we have inferred that the WTO is very-rule like and inflexible, limited to the exceptions. Common Law is the most unlike the WTO, more standard like, with its flexibility and fluidity. The EU was initially rule-like, with its derogations from the treaties, but with the design and implementation of its supplementary concepts, is gradually evolving into a more standard like system.

Using comparative law and conducting the analysis in a functional manner (developing a functional concept) will serve to draw the relevant inferences and increase the benefits realised from this research.

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[584] Kennedy, D. "Form and Substance in Private International Law Adjudication" (1976) Harvard Law Review, 1685

5.2.1. The Benefits of a Developed Concept of Public Policy for the WTO

The WTO has not developed the basic construct of Public Policy sufficiently that it might serve the interests of the Organisation or its member states. The exceptions to the covered agreements as they stand are not fulfilling their potential to benefit the member states and the organisation. The ambiguity in the current delineation of the system of exceptions increases the potential for disputes to develop and makes it imperative for the WTO to expand its horizons and implement a more robust and clear framework for public policy. [585]

The benefit of developing a functional concept for the World Trade Organisation as a legal order and its member states (established or newly acceding), especially developing countries are multi-faceted.

If the World Trade Organisation were to utilise a developed concept of public policy, it would gain the ability to reflect on its own structure and learn from the other legal orders, and observe where the appropriate balance could be struck and allow for public policy to fill the gaps, which would encourage the constant development and refinement of the legislation and the application of the laws of the organisation. It is not merely a functional concept that the WTO would adopt, in effect it would become the legal order's idea of public policy and application.

A developed concept of public policy would be beneficial to the judicial arm of the WTO and the Appellate Body, when deciding cases they would have a clear criteria

[585] Rodrik, D "The Globalization Paradox: Why Global Market, States, and Democracy Can't Coexist" Oxford University Press 2011 pp. 253-254

based system to refer to, which would provide sharper and more rapid analysis of the disputes and more accurate resolutions.[586] A developed concept of public policy would increase the coherence of the panel decisions within and across the exceptions, and enhance the ability of the panels to balance appropriately the interests of the organisation with those of the member states, and enable panels to take account of shifts and changes in societal and technological needs.[587]

The use of a functional concept will add clarity to an otherwise complex area of the law; making it easier to understand the law of the WTO and limit the opportunities for misuse as occurs with the current exceptions. It will help decisions become more predictable as the people using it understand the law more deeply.

If the jurisprudence (reasoning of the Appellate Body, work of writers on the WTO, arguments of lawyers handling disputes) use the functional concept and find it beneficial, it will assist the legal order in becoming more rational and continue its development in a more balanced and even manner.

As the WTO is a global, multi-ethnic organisation, with a large group of member states with numerous languages, value sets and a multitude of economic levels and disparity, the functional concept must be developed with the member states in perspective in order to encourage them to recognise it and appreciate the reasoning behind it as it will serve their interests when negotiating for terms of their accession

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[586] *Appellate Body Report, US – Shrimp* WT/DS58/AB/R

[587] *Ibid.* The importance of some mechanisms is highlighted by *US-Shrimp* as the exception that proves the rule. The subject matter of the dispute fortunately allowed the incorporation of developments in public international law to act as a vehicle for updating the exception through application.

packages and conditions, protocols and the obligations and exceptions therein. This can be done by not limiting the member states to the general exception provisions stated within the agreements, introducing criteria that will clarify the entitlement of a member state to that exception on the grounds of public policy. The functional concept would make it clearer that there is no threat to national sovereignty from the WTO obligations.

5.2.2. The Required Attributes for a Functional Concept of Public Policy for the WTO

As the research study has stated that the sources of law which can be used to derive public policy are limited to the exceptions from the covered agreements and the accession protocols that the member states have negotiated, it would be beneficial for the WTO to include as a source of public policy international legal norms and societal concerns of its member states, and increase its awareness and sensitivity to current affairs of interest to the global community.[588]

The exceptions to the covered agreements in Article XX of GATT (goods) and Article XIV GATS (services), Article XXI GATT (security exceptions) and Article XIX GATT for Economic Emergency Exceptions (safeguard measures) and the Regional Integration Exceptions (Articles XXIV GATT and Article V of GATS) also form the primary substantive and doctrinal sources for public policy provisions in the WTO. Article XX contains a limiting mechanism in the form of the chapeau, which prohibits arbitrary or unjustifiable discrimination.

[588] The exception seen in *US-Shrimp* should effectively become the norm. Rodrick warns against the perils of hyper-globalisation that risks upsetting the foundations of democratic state action, but his remedy in terms of the WTO would be a tremendous increase in the applicability and use of the safeguards exception.

As for the supplementary concepts for the functional concept of public policy, the comparison has shown that the EU has introduced mechanisms that allow for the expansion of the overriding principles to protect the interests of the public and the member states within the legal order. The EU has structured the CJEU with the appropriate level of authority as a judicial body. Their capability to introduce law to protect public interests has proven its worth in the development of public policy within the legal order. This is also visible in the Common Law system, where the judicial arm has the authority to not only interpret but to develop laws on a case by case basis, invoking public policy on a needs assessment for the ruling to be issued .

The use of the Rule of Reason as an expander of the derogations from the treaties was a successful initiative that has allowed the EU member states and individuals to lobby to maintain their rights within the legal order. Similarly, the Threshold requirement ensured that measures enacted by a member state qualified for the invocation of public policy only when it was necessary.[589]

While the WTO has within its constructs tests to assess the legitimacy of a member states claim for an exception, however the organisation lacks the capacity to increase the reach of the exceptions because of its limitations to its provisions.[590] Of particular relevance are the prohibitions of interpretation or legal effect by the dispute resolution bodies (especially the Appellate Body, Article IX:2 Marrakesh Declaration and Article 3.2 DSU), also the application of the chapeau to Article XX has been a restrictive influence. A re-design of the threshold requirement and necessity test as in

[589] *Rewe-Zentrale AG v. Bundesmonopolverwaltung fur Brannwein* Case 120/78 (1979) ECR 649
[590] *US – Gasoline* 16-17 WT/DS2/AB/R dated 29 April 1996.

the EU model to become applicable to the WTO would meet this demand, and would offer the flexibility and adaptability characteristic of the Common Law system to WTO in support of the needs of particularly economically weaker member states. [591]

An important supplemental factor that has potential to shape and control public policy in the WTO is the re-configurement of the jurisdiction and authority allowed to the judicial arm, represented by the panels, the Appellate Body and the Dispute Settlement Body. If these authorities were given increased jurisdiction to issue decrees or judgments, such as within the EU and Common Law, it would increase the success of the settlement of disputes and limit the potential for new disputes to arise.[592]

The WTO should use the functional concept for public policy and its principles to determine the reasoning of disputes and balance the interests of the organisation and the maintenance of the flow of free trade between its member states against the internal interests of the member states in dispute. For the WTO, the most important factor that it needs to take into account when conducting this balancing exercise is the objectives of the organisation; the continued encouragement of trade liberalisation internationally, followed by the interests of the member states; their internal policy imperatives and the effect on their national economies.

The WTO must increase its adaptability and flexibility to the extent that is inherently characteristic of the Common Law system which allows for the modification and

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[591] *Korea-Beef* WT/DS161/AB/R and WT/DS169/AB/R and *Campus Oil Ltd v Minister for Industry and Energy* Case 72/83 [1984] ECR 2727
[592] Article IX:2 Marrakesh Declaration and Article 3.2 DSU

transformation of the concepts of public policy over time, in accordance with the changing public interests, societal values and needs. The WTO implementation of a developed concept of public policy as described will serve to support the gradual transmutation into a legal order with a more temporal nature, more sensitive to the shifts in perspectives of its member states and their citizens globally, which will encourage the sustainability of the organisation.

5.2.3. The Challenges to the Use of the Functional Concept in the WTO

The perceived challenges to introducing the functional concept in the World Trade Organisation centre around the willingness of the Organisation to accept recommendations of potential modifications and the resistance or reluctance to undertake to restructure due to the bureaucracy involved, or introduce amendments to the covered agreements and the exceptions for concern of increasing the flexibility to a degree where the Organisation may lose control due to its vast scope and internationally disparate membership.

Chapter 6- Case Study: Saudi Arabia as a Developing Country

6.1. Background on the Kingdom of Saudi Arabia

Saudi Arabia is one of the largest countries in the Middle East. Its central geographical location and renown for its tremendous oil reserves has placed it at the forefront of international politics. The last three decades have seen the country advance to become a robust economy based on the reformulation of its infrastructure and import of the latest modern technology and expertise, as well as the investment in the education and training of its people.[593]

Saudi Arabia boasts of the presence of Islam's holiest sites, and hosts millions of pilgrims annually, and the sources of law in the country are derived from the teachings of the Holy Quran, the "Sunnah" or teachings of the Prophet Mohammed (PBUH), the rulings of the judiciary by consensus and equivalency and measurement standards according to these teachings. This is termed "Sharia'a Law" and takes precedence in judicial rulings. Saudi Arabia also implements royal decrees, issued by the king and his council, but these are termed "regulations" and are not law as they are considered subordinate and supplementary to the Sharia'a law; and usually are concerned with areas of international trade, labour, commercial or corporate matters. The country also adheres to international laws, guidelines and standards.[594]

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[593] Library of Congress- Country study "Saudi Arabia" last accessed 15/4/2013 http://lcweb2.loc.gov/frd/cs/satoc.html Call number http://catalog.loc.gov/cgi-bin/Pwebrecon.cgi?v3=1&DB=local&CMD=010a+93028506&&CNT=10+records+per+page

[594] *Ibid*

The Kingdom of Saudi Arabia (KSA) maintains as its priority to protect the values of their Islamic society, as well as diversification, development of mineral resources, the improvement of the standards of living, education, healthcare and welfare. The country aims for balanced growth, and strives to strengthen the influence of the private sector to boost this effort. The country also strives for social and economic integration with the Gulf Cooperation Council (GCC).[595]

6.2. Accession to the WTO

Saudi Arabia began its application for membership to the General Agreement on Tariffs and Trade (GATT 1947) on the 13th of June 1993 and the working party was established on the 21st of July 1993 to examine the application of the Saudi Government.[596] Saudi Arabia submitted its initial memorandum on the 5th of July 1994, and subsequent supplementary documents to the memorandum were submitted on the 13th of May 1996, 11th of July 1996, 21st of May 1997.[597]

Before, during, and after the multi-lateral negotiations for the terms and conditions for the accession package (May 1996-October 2005), the working party met numerous times. In the intervening nine years of this process, there were apparently periods of high activity (1993-1996, 2003-2005), and others of subdued activity (1997-2002). During these meetings, members of the WTO and the working party submitted

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[595] Alamy, Fawaz, *'The Concept of Globalization in an understandable Language, the experience of KSA in the WTO"*, Al-Moayyad Publishing, 2006, p.261
[596] The WTO website "Accessions: Saudi Arabia" last accessed 15/04/2013 http://www.wto.org/english/thewto_e/acc_e/al_arabie_saoudite_e.htm
[597] *Ibid*

questions to Saudi Arabia as an applicant country for clarification, or requesting additional information.[598]

The WTO completed its package of documents presenting the Kingdom's terms of accession at the Working Party meeting on 28th October 2005. The WTO General Council successfully adopted Saudi Arabia's terms of accession on 11 November 2005; therefore Saudi Arabia officially became the 149th member of WTO since that date.[599]

6.2.1. Difficulties Faced During and After Accession

The process through which Saudi Arabia achieved membership in the WTO was a long and tedious journey, spanning thirteen years and entailing much discussion and meetings of the working party.

The delay and length of the accession process is due to multiple factors, first of which is the adaptations to usual internal government workings that needed to be implemented to reach the basic standards required to meet the international criteria. Secondly, the ambiguity of the accession process and complexity of the necessary requirements associated with this process.

Thirdly, the exceptions that are available as part of the covered agreements were limited and undefined, and therefore in order to maintain its national sovereignty and

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[598] The Report of the Working Party on the Accession of the Kingdom of Saudi Arabia to the WTO WT/ACC/SAU/61 Dated 1 November 2005

[599] *Ibid*

priorities, Saudi Arabia underwent lengthy negotiations to secure guarantees that their priorities would be unaffected by their joining the organisation. As a non-liberal state, there are several key factors that highly influence the policy stances of Saudi Arabia; among them the role of the Royal family as central government figures and decision-makers, the role of the Islamist faction and their conservative stances on various issues of social, cultural and economic relevance, and most importantly, the role of the oil business and the preservation of the economic autonomy of the beneficiaries and suppliers.

Issues periodically arise that are not included in the exceptions of the agreements which cause difficulties and pose a conundrum for the Saudi government, which is obliged to adhere to the WTO agreements and their stipulations while trying to balance their own national and political interests, as well as maintain internal stability.

Saudi Arabia has since requested technical assistance from the World Trade Organisation on several agreements such as GATS, TRIPS, Agreement on Government Procurement, Agreement on Import Licensing, Anti-Dumping, Safeguards and Subsidies, Trade Facilitation, TBT and SPS, and the RTA's. The required technical assistance would help ensure its effective participation in the multi-lateral trading system, in the form of national workshops or seminars. The country has also requested guidance on establishing a WTO Reference Centre and a cooperation

programme with a national university to meet the objectives of the University Programme of the ITTC.[600]

6.2.2. Saudi Arabia's Regulations on Trade and the WTO Agreements

With regard to trading rights in Saudi Arabia, there was a general requirement, for all but the smallest businesses, to obtain commercial registration. This is a routine procedure involving completing an application form, payment of a fee, and submission of documents. These requirements apply to both Saudi and non-Saudi businesses engaging in trading activity, although there was no need to register for those dealing in agricultural machinery.[601]

From the date of Accession "Importers of Record" are able to register without limits on equity or requirement to invest, and can obtain necessary import licenses. KSA also amended laws on licensing procedures to conform to WTO obligations. In KSA "Commercial Registration" is not the same as registration as a "Commercial Agent"; a commercial agent describes a business activity where a person acts as a distributor for a producer, usually foreign. A commercial agent therefore is involved in one type of business activity, whereas commercial registration is for those involved in any significant business activity.[602]

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[600] See Appendix C- Trade Policy Review Report by the Kingdom of Saudi Arabia WT/TPR/G/256 14 December 2011 p.23

[601] Alamy, Fawaz, *'The Concept of Globalization in an Understandable Language, the Experience of KSA in the WTO"*, Al-Moayyad Publishing, 2006

[602] *Ibid*

Following bilateral discussions the KSA's Schedule of Concessions and Commitments on Goods were documented in Part 1 of the Annex to the Protocol of Accession.[603] Secondary and tertiary boycotts were terminated under Saudi law[604]. Saudi Arabia did not apply tariff rate quotas and would not do so, unless permitted under Article XIX of the GATT 1994 and WTO Agreement on Safeguards. Under GCC customs laws there are tariff exceptions for imports by diplomats, military equipment and arms, philanthropic societies, returned goods after export, and personal effects.[605] There are minimal fees for port clearance, customs, or import and export licenses. In accordance with Article VIII: 3 of the GATT 1994 KSA did not impose large penalties for minor customs breaches. The Ports Authority maintains and operates the non-oil ports and terminals on a commercial basis. Oil ports and terminals are operated by the Petroleum Company Saudi Aramco. All ports and terminals remain the property of the government, however are operated by these private entities.[606]

Customs has reviewed and modernised its inspection system. The KSA Ministry of Commerce terminated the practice of charging for authentication, notarization, and consularisation of trade documents and fees imposed in connection with imports or exports would be in accordance with Article VIII of the GATT 1994.[607]

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603 The Protocol of the Accession of Saudi Arabia to the WTO WT/L/627 dated 11 November 2005

[604] Saudi Council of Ministers Decision No 5 of 13 June 1995

[605] Section VIII, Articles 98 to 105, Common Customs Law of the GCC states, adopted 27-29 November 1999 (implemented from 2002)

[606] The Report of the Working Party on the Accession of the Kingdom of Saudi Arabia to the WTO WT/ACC/SAU/61 Dated 1 November 2005

[607] The Saudi Ministry of Foreign Affairs website, last accessed 15/04/2013 http://www.mofa.gov.sa/m/ar/services/Pages/attestationdetails.aspx?svcid=60

The Import Licensing Law incorporated the provisions of the WTO Agreement on Import Licensing Procedures into Saudi law.[608] Measures previously in effect in the country submitted in the original documentation to the Working Party were then eliminated to conform to WTO requirements, and all measures remaining are listed in Annex E. Wheat imports no longer require permits or licenses.[609]

Most products are allowed into Saudi Arabia automatically, there are seventy-three items that require a license (non-automatic); such as explosives, veterinary medicines, pesticides, etc…and these are listed in Annex E. This is consistent with the WTO Agreement on Import Licensing.[610]

Import licenses should be issued normally within 30 days, including those for telecommunications equipment. Satellite receivers are listed in Annex F as banned imports. However within 3 years of accession KSA undertook to allow imports of these products subject to non-automatic license.

There are separate licensing regulations for horses to monitor the import of non-Arabian horses as the preservation of bloodlines. Imports of horses were not banned but did need a non-automatic license. Distillation equipment also requires licenses as these may be used to produce alcohol which is banned under Saudi Shari'a law. The list of products requiring import licenses is reviewed annually and the Council on

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608 Council of Ministers Decision No 84 0f 1.4.1421H (03/062000) and Decision No 88 of 6.4.1423H (16/06/2002)

609 The Report of the Working Party on the Accession of the Kingdom of Saudi Arabia to the WTO WT/ACC/SAU/61 Dated 1 November 2005

610 Saudi Arabia and the WTO, Samba Financial Group, February 2006, last accessed 15/04/2013 http://www.jeg.org.sa/data/modules/contents/uploads/infopdf/38.pdf

Trade in Goods is updated on any changes. There were no fees charged for import licenses, and there were procedures for appeal.

Quantitative import restrictions are listed in Annex F, with details on restricted, controlled, and banned products, including the justifications for their inclusion on this list. Several of these were queried by the Working Party including: long life pasteurised milk, dates, rice from the USA, poultry, offal, therapeutic medicines in animal feed, lentils from Australia, tyres. The KSA confirmed from its date of accession it would not ban, apply quotas, permits, or any other restrictions or changes that are inconsistent with WTO provisions, including Articles XI, XII, XIII, XIX, XX, and XXI of the GATT 1994.

Criticisms were made regarding the system for customs valuations that was in place at the time of accession. In particular certain aspects were inconsistent with Article VII of the GATT 1994, the Customs Valuation Agreement. These criticisms were addressed as the old customs regime had been superseded by the GCC Common Customs Law, which was ratified by the KSA in 2003[611]. Further deficiencies in the GCC Customs Law and Implementation have been remedied[612], and KSA undertook to fully implement Article VII of the GATT 1994 from the date of accession without any transitions.

Saudi Arabia only required certificates of origin for some preferential goods. Rules of origin were documented within the GCC framework, which would serve the KSA for

[611] Royal Decree No M/41 of 3.11.1423H (5 January 2003)
[612] Ministerial Decision No 1207 of 9.5.1425 (27 June 2004)

both preferential and non-preferential trade in goods. The KSA confirmed that it would fully comply with the WTO Agreement on Rules of Origin from the date of accession.

Other restrictions apply to goods imported to KSA through other GCC states, and on occasion such goods have been refused by KSA. It was also clarified that customs duties were apportioned according to the final destination of the goods within the GCC, and this arrangement is periodically reviewed. Goods in transit through Saudi Arabia receive duty free treatment under the common Customs Law of the GCC states. These laws are applied in full conformity with WTO agreements, especially Article V of the GATT 1994.

KSA does not charge any internal taxes, such as VAT or Excise tax on imported products. If any such taxes were considered they would be in compliance with Articles I and III of the GATT 1994. KSA does provide subsidies to both domestic and foreign owned companies, including loans of up to 50% of the cost of a project. The subsidy programmes would be maintained in conformity with the Agreement on Subsidies and Countervailing Measures, and that all necessary information would be provided.

From the date of accession KSA confirmed the International Conformity Certification Program had been phased out and requirements of the WTO Agreement on Pre-shipment Inspection would be met in full. Any pre-shipment inspection companies in KSA are obliged to meet the requirements of all relevant WTO Agreements. Fees and

charges would be consistent with Article VIII, and due process and transparency requirements would satisfy Article X of the GATT 1994.

With regard to particular agreements of the WTO, the KSA agreed not to apply any anti-dumping, countervailing duty, or safeguard measures to imports from WTO members until it had implemented appropriate laws in conformity with WTO Agreements on the Implementation of Article VI. It was confirmed such laws would fully conform to WTO provisions.

KSA had established and was implementing the Technical Barriers to Trade (TBT) regime. This was done by issuing and implementing the Saudi Arabian Standards Organisation (SASO) Technical Directive of July 2000 and amended on the 19 July 2005, which has the force of law. SASO is the only standardization body in Saudi Arabia and sets its own SASO standards. Standards are based on fulfilment of legitimate objectives as provided for in the TBT Agreement, such as protection of health, safety, national security, Islamic law, the environment, and prevention of deceptive practices. To make the Technical Directive more transparent details were placed on the ministry of Commerce and Industry website. From the date of accession KSA is compliant with all relevant provisions of the TBT Agreement, including the Code of Good Practice. Many Saudi standards use international and other widely accepted national standards as references. The International Conformity Certification programme (ICCP) has been replaced by the Conformity Certificate for the Goods Exported to the Kingdom of Saudi Arabia. This applies to all products, except those subject to sanitary and phyto-sanitary regulations. Certification is not required when

documentation establishes it conforms to Islamic religious requirements. The Conformity certificate would not be needed once KSA has established capabilities for random sampling and risk based compliance tests.

The SASO Technical Directive implemented the TBT Agreement, and KSA confirmed it would comply with all obligations under the WTO Agreement on Barriers to Trade.

Under terms of the agreement of Sanitary and Phyto-Sanitary Measures (SPS), measures have been implemented in Saudi law[613] entitled "Sanitary and Phyto-Sanitary Unified Procedures", following the guidelines of the Codex *Alimentarius* Commission, the World Organization for Animal Health, and the International Plant Protection Convention. Measures not covered by these bodies would be based on the provisions of the SPS Agreement. The SPS law also incorporated revisions of the "Agricultural Quarantine regulations" and "Statutory Instruments of Veterinary Quarantine". Further procedures and policies for veterinary and agricultural quarantine were being met under the auspices of the GCC, which as a customs union allowed goods from one country into the other. Any concerns about this would be met by applying Article 5 of the SPS Agreement in a consistent manner.

Concerns were expressed about bans due to disease outbreaks e.g. hand, foot and mouth, and regional bans e.g. Spanish olive oil. However KSA committed that its SPS standards system would fully comply with the relevant WTO Agreement.

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[613] Council of Ministers Decision No 85 of 1.4,1412H (4 July 2000) and Ministerial Decision No 943 0f 2.5.1424H (1 July 2003)

KSA would act to ensure Saudi law conformed to the WTO Trade Related Investment Measures (TRIMs) Agreement. There are no free zones or economic zones operating within Saudi Arabia, however if there were, they would comply with WTO provisions.

KSA has not to this date acceded to the Agreement on Government Procurement, as this is a pluri-lateral agreement, which is not a precondition of accession, and is in stages of revision within the WTO. However KSA agreed to start negotiations for membership of this agreement. KSA has no intention of entering the Agreement on Trade in Civil Aircraft. Upon accession it would apply a zero rate of tariff on imports of goods related to this agreement.[614]

It was noted that KSA banned the export of date seedlings, breeding horses, and subsidised wheat and flour, and the basis for the bans were set out in Annex I. The dates and horses were banned as they are considered local breeds and varieties that were pure and rare and necessary to maintain. Only subsidised wheat and flour were banned. KSA provided details of its agriculture sector, including tables on export support and export subsidies, and KSA commitments are contained in the Schedule of Concessions and commitments on Goods. Exports requiring licenses were listed in Annex J.[615]

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[614] WT/TPR/G/256 "*Trade Policy Review Reported by The Kingdom of Saudi Arabia*" 14 December 2011 p.11

[615] The Report of the Working Party on the Accession of the Kingdom of Saudi Arabia to the WTO WT/ACC/SAU/61 Dated 1 November 2005

Fees were charged for export licenses and traders were required to have commercial registration. It was requested prior approval requirements for the re-exportation of imported food to be removed, and it was agreed the export ban on scrap metal was to be removed before accession. KSA confirmed any export control requirements would be in effect by the date of accession in order to conform to WTO provisions. Un-tanned hides and skins were subject to export duties. KSA pointed out under Article XI of the GATT 1994 such duties were allowed. KSA dos not have, nor intends to have, any export subsidies.

6.3. Public Policy Imperatives

The Saudi government was concerned to maintain its national sovereignty and necessary control over aspects it deemed at its national priorities and in the best interests of its populace. The main justification for many of the negotiated exceptions is the fact that the country is the birthplace of the religion of Islam, and sees itself as its chief protector and champion. From this stems the belief system and the laws of the country, and the mechanisms of daily life.[616]

The religion of Islam is seen as a complete guide to the dealings between people, and provides a comprehensive regulatory framework for life, encompassing all matters from government, inheritance, financial dealings in trade, work and compensation, family and marital issues, education, lifestyle and health.

[616] Alamy, Fawaz, *'The Concept of Globalization in an Understandable Language, the Experience of KSA in the WTO"*, Al-Moayyad Publishing, 2006

The Saudi government prohibits the import of and trading in goods and services that are contradictory, defamatory or debilitating to Islamic principles, and thus the country's public policy is based on the religious principles.[617]

Other reasons for import restrictions are concerns for public health and welfare (such as in the case of prohibiting Sarin and nuclear waste imports) and public security (in the case of banning the import of toy pistols, police-siren noisemakers and radar-detectors). Satellite receivers are not allowed to be imported into the country without a license; these are on the list of non-automatic imports listed in Annex E. In the view of the government of KSA non-automatic licensing was needed to protect public morals. Similarly, the use of the internet is strictly monitored by the government through a filtering facility; also due to concern for the effects of free internet use on the values of Saudi society; public morals. The restrictions requested by Saudi Arabia on the import of horses stem from the desire and priority of the government to protect their breeding practices and the bloodlines.[618]

Using this as a basis for its public policy imperatives, the Kingdom of Saudi Arabia has negotiated for various exceptions to the covered agreements of the WTO during its accession process. These are described in detail in section 6.4 later on in this chapter.

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[617] *Ibid*

[618] The Report of the Working Party on the Accession of the Kingdom of Saudi Arabia to the WTO WT/ACC/SAU/61 Dated 1 November 2005

6.4. Exceptions Obtained

The exceptions Saudi Arabia has negotiated are listed in Annexes F and I in the package for the protocol of accession to the WTO (see Appendix A). Annex F lists the banned imports. Annex I lists the banned exports.

Saudi Arabia requested exceptions to ban certain goods and services from importation under Article XX (a) for reasons of concern for public morals. The goods banned include: live swine, or any by-products thereof. Dogs are also banned, other than those for the purposes of hunting and support of the visually impaired; however these must be accompanied with necessary paperwork, and permissions. Frog meat is a banned import as well as all foodstuffs containing animal blood in their manufacture, and mummified animals are prohibited items.[619]

Alcoholic beverages, wines and spirits in any proportion are prohibited, as well as any drink described as Zamzam (holy water). The Holy Quran is also a banned import. All machinery and equipment or paraphernalia related to gambling or games of chance are considered a banned import.[620]

Under Article XX (b) Saudi Arabia has banned the import of certain items as it deemed these measures necessary to protect human, animal or plant life. These items include all forms of narcotics and their materials. All animal or vegetable natural, raw and organic fertilisers, betel and its by-products, tobacco snuff, asbestos and its by-

[619] Article XX (a) exceptions in Annex F of the Working Party report on the Accession of the Kingdom of Saudi Arabia to the WTO WT/ACC/SAU/61 Dated 1 November 2005

[620] *Ibid*

products are all prohibited imports. Industrial and hazardous waste materials, or nuclear dust polluted materials are prohibited. Also, used or re-treaded tires, fireworks, damaged vehicles and right hand drive vehicles, and two, or three or four wheeled children's motorcycles or vehicles are included on the list of prohibited items under Article XX (b).[621]

Under Article XX (d) for purposes of ensuring compliance with laws on customs enforcement, enforcement of monopolies, the protection of patents, trademarks and copyrights, and preventing deceptive practice, Saudi Arabia has negotiated for an exception to prohibit the import of Saudi Arabian stamps, coupons for Hadi (sacrificial animals), and blank invoices for foreign companies abroad.[622]

Under Article XXI, Saudi Arabia has negotiated to ban the import of goro nut, greeting cards with electrical circuits, security car radar detecting equipment, satellite internet receivers, and apparatus emitting police car sounds or animal sounds in concern for matters of public security. Electric binoculars which emit infrared light, revolvers and pistols in the shape of mobile phones, pagers, lighters, pens or other pistols are prohibited from importation. Remote control aeroplanes and associated parts are also banned. Noise-making guns, pistols, or toy pistols similar in shape to

[621] Article XX(b) exceptions in Annex F of the Working Party report on the Accession of the Kingdom of Saudi Arabia to the WTO WT/ACC/SAU/61 Dated 1 November 2005

[622] Article XX(d) exceptions in Annex F of the Working Party report on the Accession of the Kingdom of Saudi Arabia to the WTO WT/ACC/SAU/61 Dated 1 November 2005

real pistols are prohibited. Finally, Kuwait and Iraq war leftover machinery or equipment have been included on the list of prohibited imports.[623]

With regard to the banned export items: Annex I contains a complete list of these including the justifications. Under Article XX (a) Zamzam water is prohibited from being exported out of the country. Under Article XX (b) Arabian purebred horses (female), racehorses (female), ponies (female), bovine animals (female), sheep and goats (female), camels (female) are banned exports. Date palm seedlings of various types are prohibited exports. Green fodder and hay are also included on this list.[624]

Under Article XX (d) scrap iron is prohibited as an export item. Under Article XX (f) for the protection of national treasures of artistic, archaeological or historical values antiques, archaeological and historic items have been banned from export out of the country. Under Article XX (j) for the purposes of ensuring equitable sharing of the international supply, acquisition or distribution of products of local short supply, Saudi Arabia has banned the export of wood from the country.[625]

With regard to services, Saudi Arabia has negotiated to maintain or implement measures restricting the operation of particular areas, such as that of the Saudization of employment, or the requirement to fill a quota of employees in all sectors with nationals in the first regard. Also in the property sector, the purchase and ownership

[623] Article XXI exceptions in Annex F of the Working Party report on the Accession of the Kingdom of Saudi Arabia to the WTO WT/ACC/SAU/61 Dated 1 November 2005
[624] Export exceptions in Annex I of the Working Party report on the Accession of the Kingdom of Saudi Arabia to the WTO WT/ACC/SAU/61 Dated 1 November 2005
[625] *Ibid*

of land or establishments is restricted to Saudi nationals, unless with express permissions for larger corporations or companies in operation in the country. The banking sector also implements restrictions on the presence and operation of foreign banks in the country, this has been relaxed somewhat in the past decade but the tight control remains in evidence.[626]

The regulations on labourers, workers and other employees is also restricted by government regulations, all foreigners under contract in the country must have a sponsor who is a national of the country and who is responsible for their conduct during their time there. Certain types of services and establishments are strictly prohibited to operate in Saudi Arabia such as cinema or film halls, gambling facilities, nightclubs or brothels.[627]

In terms of taxation on services, Saudi Arabia's government has negotiated to require only Zakat (Islamic annual tax on income) for nationals, and corporate taxes from foreign entities in operation in the country. The Saudi government also undertakes to provide subsidies specific to nationals of the country, in terms of land grants or public health care.

[626] The Report of the Working Party on the Accession of the Kingdom of Saudi Arabia to the WTO WT/ACC/SAU/61 Dated 1 November 2005
[627] *Ibid*

6.5. Theoretical Application of the Functional Concept

As discussed, Saudi Arabia's accession to the WTO was a lengthy process, affected by the ambiguity of the listed exceptions to the covered agreements. The country saw these exceptions as limited and unclear, and strived to ensure that its priorities would not be negatively affected by its accession to the organization.

Countries aspiring to accede see these limitations and ambiguity as a deterrent, and are concerned with the difficulty and inflexibility of the legal order in permitting renegotiation or altering their accession package once it is agreed. If the available exceptions do not apply to an issue of concern to the member state, this becomes a cause for dispute, and the volume of the disputes creates negative repute for the organisation and affects its efficiency and aims of trade liberalisation. The frequency of the disputes also puts the organisation at risk of failure, such as in the case of previous trade groups i.e. the ITO.

The functional concept developed aids both the world trade organisation and the member states to achieve a balance between the obligations of the legal order and the required exceptions or "overriding principles" that are imperative for the member state to maintain for purposes of its national sovereignty.

The application of the functional concept and the expanded utilisation of the principles of public policy will aid in clarifying the ambiguities, will allow increased flexibility in the negotiations and application of the exceptions. This will speed the accession process and encourage the addition of members to the legal order and the

expansion of the goals of international trade liberalisation and facilitation, lessening the potential for disputes, while ensuring the rights and national priorities of the member states.

Chapter 7- Discussion and Conclusions

7.1. Restatement of Research Aims and Objectives

The research aimed to explore the nature and limits of "public policy" exceptions in the WTO legal order, and draw out, develop and make explicit a concept of public policy by examining different levels of legal systems.

The research compared and contrasted the public policy used by the legal systems, to develop recommendations for the WTO and its member states (specifically developing countries) in order to avoid the problems resulting from the ambiguity of the current exceptions in WTO law.

The research objectives were:

1- To provide a concrete example of the process of, and impact of, accession and Membership of the WTO through a case study of the accession of Saudi Arabia with particular attention given to the novel constraints imposed by the WTO law and the negotiated and general exceptions applicable

2- To explore the nature and limits of public policy exceptions in the WTO legal order, in light of the case study, an explanation conducted through the lens of a concept of public policy developed from examining different levels of legal systems (WTO law, EU law, and Common law of England and Wales)

3- To compare and contrast the public policies in the legal systems, highlighting the contrasts between them to identify the implicit public policy derogations from the WTO obligations

4- To formulate guidance for developing countries that are Members of the WTO and those who are willing to join the WTO might learn to avoid the problems resulting from the ambiguity of the exceptions' provisions in the WTO law.

7.2. Summary of Key Results

The research and comparative study conducted an in-depth analysis and returned an increased understanding of the role of public policy in each of the legal orders studied, and clarified its potential for use in the WTO.

There are similarities in the basic structure of the three legal orders and in the purpose and functional equivalence of the public policy terms and manifestations used by each. However in the EU, public policy has been allowed more flexibility and mobility than in the WTO (in its early stages the EU was very-rule like with derogations from the treaties and is now evolving into a more standard-like legal order).[628] In Common Law public policy has very broad dimensions and performs a more complex role, managing the demands of social change, preserving principles of justice and balancing the relationship between the institutions of government (the most unlike the WTO, more-standard like, fluid and flexible). The WTO itself is rule like and inflexible, with its explicit exceptions to the covered agreements.

The study found that the sources of law used currently in the WTO to derive "overriding principles" are the exceptions to the covered agreements and the

[628] Kennedy, D. "Form and Substance in Private International Law Adjudication" (1976) Harvard Law Review, 1685

accession protocols. In comparison with the legal orders, the study found it would be beneficial for the organisation to include as a source of public policy international legal norms and fundamental concerns of its member states and to be alert to the ethical environment and any changes in that (as evidenced by NGO activities and international law developments). .

The study also found that in comparison with the legal orders, the WTO would benefit from introducing and enhancing the supplementary concepts to support the expansion of the overriding principles, such as the Rule of Reason and the Threshold requirement in the EU, and necessity tests, or tests of proximity and foreseeability in the Common Law system. This would be beneficial to the development of the organisations' public policy, especially with regards to developing countries with a weaker economic system.

7.3. Why I Think These Results Came About (Reasoning the Results)

The results of the study developed through detailed research and in-depth comparative analysis of the three legal orders selected. The gradual increase in the understanding of the structure and functions of the legal orders, as well as the nature and manifestations of public policy, served to crystallise the similarities and differences between them and derive potential useful points that could be applied successfully to the WTO to improve and enhance the current form of the overriding principles of public policy.

Understanding the reasoning and origins for the use of public policy in a legal sense and the availability of the research resources and the documentary texts perused in the

comparisons especially that of the case law, provided a rich background from which the results of the research were consistently clarified and compared.

7.4. Views on the Use of the Comparative Law Method

In using the comparative law method the research project was supported to a great extent by studying and reading the various instructional treatises on the applications and use of the method and its development. The use of the method provided a strong framework and methodology to the research study, helped to structure the project and enabled its conduct and management to become more feasible and lead to a concrete hypothesis and eventual derivation of the results.

Application of the abstract theories of comparative law was by no means a simple exercise, to understand and derive practical steps to conduct a comparative study was a steep learning curve but provided a rich research experience and opportunity to delve into the structure and functions of the compared legal orders with a clear intention and goal, supported by the confidence in the method and its guidance.

7.5. Strengths and Weaknesses of the Research Project

The research project was undertaken over the years 2009-2013, throughout which the conceptual framework and research proposal were modified periodically to reflect the changing understanding of the area of public policy under study. The researcher began the project with relatively minimal background knowledge of the field of public policy in international trade law, and this comparative law study was an exploratory learning experience and a steep learning curve.

A strength of this research project was the availability of information on the structure and operations of the three legal systems being researched, via the internet databases, online journals and organization websites, as well as the well-documented case law that were used by the researcher.

Another strength was the knowledge and expertise of the supervisory team that supported the researcher throughout the conduct of the project, especially in the area of EU and WTO law. The suggestions and constructive feedback offered on legal treatise to approach and analyse was invaluable to bolstering the researchers understanding and thus the robustness of the research framework and results. A strength that supported the researcher in the conduct of this project was the general requirements of qualitative research methods courses, instruction on the use of library databases and the management of long documents in word processing offered by the Graduate School at the Nottingham Law School that the student undertook as part of the research degree programme.

A weakness of the research project was the obstacles the researcher faced over the duration of the research degree programme, namely a chronic eye condition that posed a great deal of difficulty in reading lengthy legal texts and working on writing and editing a law degree thesis, while attempting to meet deadlines and scheduled submissions of parts of work for supervisory feedback. The researcher was obliged to request two extensions to the period of study for the degree to remedy these delays. The researcher, while sponsored by the Ministry of Higher Education of Saudi Arabia and the Ministry of Interior (his employer) to conduct full-time study in Nottingham,

England was faced with several instances of funding withdrawal and university disconnection due to miscommunication between the student, university bursary, the sponsor and the employer, which had a negative impact on the student's productivity.

7.6. Contribution to Knowledge

This research has added to comparative law scholarship on public policy, and advanced a novel interpretative approach to the general exceptions in the WTO legal order based upon the work on public policy. The thesis also described in detail the issues faced by the country of Saudi Arabia in acceding to the WTO, which had not been researched in much depth since its accession.

This research also shed light on an issue, which has presented difficulty to newly acceding countries to the WTO, as the public policy exceptions have been ambiguous, and this research developed a functional concept of public policy exceptions in comparing with the different legal orders. This research therefore covers a gap in existing knowledge, to give more certainty and uniformity to the exceptions delineated in the WTO legal order agreements.

The research project presents a complete picture of the topic of interest with specific attention to discussion and interpretation of the results of the research as is applicable to the developing countries within the WTO to form recommendations. The WTO can potentially use public policy to resolve issues being debated, especially those where there is a conflict between liberal as opposed to non-liberal member states, but must balance this carefully.

Although the WTO runs training sessions for Members newly joining, these are general in nature, and do not cater to each country's specificities. With the increase in awareness, some countries may decide not to submit an application to join the WTO, in order to maintain its control on import and export in all areas.

The research learns from the lessons and experience of the legal systems and develop recommendations for those developing countries which are either aspiring to join the WTO, or are existing WTO Members both to clarify the meaning of, and reduce the overuse of, 'public policy' WTO exceptions and increase the awareness of those Member countries of the WTO who are developing countries, of what they can use as an exception, or what can be used against them as a constraint from the moment they sign the accession protocol.

7.7. Recommendations for Use of the Findings (Applicability to the WTO and Member States)

The World Trade Organisation would benefit from the use of the findings of this research study in several ways: If it were to utilise the developed concept of public policy, the WTO would be able to reflect more clearly on its current structure and where it might be able to implement changes to improve on the legislation and applicability of the laws of the organisation; i.e. where public policy can fill the gaps.

The functional concept developed can be of use to the judiciary with a clear criteria based system and expansion of the sources of public policy to include international legal norms and societal concerns of the WTO member states and the global community. This will help the organisation to increase the reach of the exceptions.

The WTO might consider restructuring the authority and capacity given to the panels and Appellate Body to develop the law and introduce mechanisms to implement public policy on a needs basis.

Also, a re-design of the threshold and necessity tests as well as the chapeau would meet the demand for greater flexibility and sensitivity, and will support the goals of the organisation in liberalising trade successfully in the international sphere while maintaining its profile and ensuring the needs of its dynamic membership for national sovereignty.

7.8. Avenues for Further Research

The findings of the research described in this thesis may be complemented with further research on the application of the conceptual framework to the WTO and review of the current exceptions considering amendments or modifications that will ensure clarity and flexibility for the users.

Research may also be directed towards education, training and awareness of potential members to the WTO and those in the process of accession on how to best apply and invoke the exceptions and protect their interests within the trade organisation and global markets, while maintaining the goals of and obligations to the organisation itself and the preserving the ultimate aim of trade liberalisation.

7.9. Conclusion

The research study provided tremendous insight on the complex topic of implementing public policy. There are various lessons that the WTO could learn from the legal orders compared in this study such as the EU success with the criteria for the derogations applicability to a particular case (existing policy within the member states national government, necessity, and the absence of harmonising community law), and Common Law flexibility and authority to develop the law as needed.

The WTO in continuing the expansion and refinement of the currently existing exceptions will benefit as a legal order, provide more flexibility and clarity to the member states, and increase the confidence in the system and encourage non-members to apply for accession. The case study of Saudi Arabia as a developing country showed the importance of acceding countries and member states being able to use public policy as a fallback position, as a straightforward way to foresee the effects of the obligations they are committing too and the effect on their public policy imperatives (such as public morals, natural resource conservation and preservation of the antiquities in the holy cities). Ultimately such reforms will increase the success of the WTO endeavour to liberalise world Trade.

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Agreement on Rules of Origin

Agreement on Safeguards

Agreement on Subsidies and Countervailing Measures

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Agreement on Textiles and Clothing

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Appendices

Appendix A

WORLD TRADE ORGANIZATION

RESTRICTED

WT/ACC/SAU/61/Add.2

1 November 2005

(05-5142)

Working Party on the Accession of the Kingdom of Saudi Arabia

Original: English

REPORT OF THE WORKING PARTY ON THE ACCESSION OF THE KINGDOM OF SAUDI ARABIA

Addendum

Part II – Schedule of Specific Commitments in Services
List of Article II MFN Exemptions

As indicated in paragraph 316 of the Report of the Working Party on the Accession of Kingdom of Saudi Arabia (WT/ACC/SAU/61), the Schedule of Specific Commitments on Services resulting from the negotiations between the Kingdom of Saudi Arabia and WTO Members is annexed to the Protocol of Accession of the Kingdom of Saudi Arabia and is reproduced hereunder.

codes of supply: (1) Cross-border supply; (2) Consumption abroad; (3) Commercial presence; (4) Presence of natural persons.

Sector or Sub-sector	Limitation on market access	Limitations on national treatment	Additional commitments
I. HORIZONTAL COMMITMENTS			
All Sectors and Sub-Sectors of Services included in this Offer	(3) (i) Commercial presence for all services listed in this Schedule, other than business services (as listed below)[629] subject to incorporation under the Companies Act either as joint-stock companies or as limited liability companies.	(3) (i) Foreign service suppliers require approval from the Saudi Arabian General Investment Authority for establishing commercial presence in Saudi Arabia according to the Foreign Investment Law of April 2000 and Article 5:3 of the Regulation of the Foreign Investment Act.	All modes of supply: In all respects other than Zakat, taxation measures will be applied in conformity with Articles II and XVII and all other relevant provisions of the GATS.
	(ii) Commercial presence for business services (as listed below)[1] subject to formation of a company, and registration of such a company under the Professional Companies Law.	(ii) Non Saudi nationals may acquire the right to own real estate in Saudi Arabia by succession. Foreign establishments authorized to carry on their activities in the Kingdom under the Foreign Investment Law may own real estate in accordance with the	

[629] Professional Services (1A), as in document W/120.

codes of supply: (1) Cross-border supply; (2) Consumption abroad; (3) Commercial presence; (4) Presence of natural persons.

Sector or Sub-sector	Limitation on market access	Limitations on national treatment	Additional commitments
		present laws and regulations governing foreign ownership of real estate.	
		(iii) Non Saudi business entities and foreign natural persons are subject to income tax while Saudi entities and Saudi individuals are subject to Zakat. Future changes in Saudi tax code will not be less favourable to foreign service providers than the existing code.	
		(iv) Foreign service entities and foreign natural persons shall have access to subsidies available in the country. However some subsidies on certain services will be available to Saudis only.	
	(4) Unbound, except for measures	(4) Unbound, except as in the column	

codes of supply: (1) Cross-border supply; (2) Consumption abroad; (3) Commercial presence; (4) Presence of natural persons.

Sector or Sub-sector	Limitation on market access	Limitations on national treatment for limitation on market access	Additional commitments
	concerning the entry and temporary stay of natural persons in the following categories:		
	(i) Business Visitors A natural person who stays in Saudi Arabia, without acquiring remuneration from within Saudi Arabia and without engaging in making direct sales to the general public or supplying services, for the purposes of participating in business meetings, business contacts including negotiations for the sale of services and/or other similar activities including those to prepare for establishing a commercial presence in Saudi Arabia. Entry and stay shall be for a period of no more than 180 days, including multiple entries.		

codes of supply: (1) Cross-border supply; (2) Consumption abroad; (3) Commercial presence; (4) Presence of natural persons.

Sector or Sub-sector	Limitation on market access	Limitations on national treatment	Additional commitments
	(ii) Intra-corporate transferees (ICT) Intra-corporate transferees of managers, executives and specialists (as defined below), who have work experience for a period of at least three years in the same field prior to the date of application for entry into the Kingdom, to an affiliate in Saudi Arabia of a juridical person. Entry and stay of such managers, executives and specialists shall be subject to the following conditions: - Their number shall be limited to 25% of the total workforce of each service supplier. However, a minimum of three persons will be allowed. Alternatively to the above, the service supplier may have the following option, the number of managers, executives and		

codes of supply: (1) Cross-border supply; (2) Consumption abroad; (3) Commercial presence; (4) Presence of natural persons.

Sector or Sub-sector	Limitation on market access	Limitations on national treatment	Additional commitments
	specialists of each service supplier shall be limited to 15%; and the number of other foreign employees (i.e. other than managers, executives, or specialists) of each service supplier shall be limited to 10%, or vice versa. However, a minimum of two ICT will be allowed as compliant with the 15% threshold. - Their entry and stay shall be for a period of two years, renewable for similar periods. - Certain positions in a company may be reserved for Saudi nationals in all categories. These positions are recruitment and personnel, receptionists, cashiers, civil security guards, and transaction (government relations) follow up.		

Sector or Sub-sector	Limitation on market access	Limitations on national treatment	Additional commitments
	Definitions: Managers: Persons within an organization, who primarily direct the organization or a department or sub-division of the organization, supervise and control the work of other supervisory, professional or managerial employees, have the authority to hire or fire or recommend hiring, firing or other personnel action (such as promotion or leave authorisation) and exercise discretionary authority over day-to-day operation, does not include first-line supervisor unless the employees supervised are professional, nor does include employees who primarily perform tasks necessary for the provision of the service. Executives: Persons within an organization, who primarily direct the		

Sector or Sub-sector	Limitation on market access	Limitations on national treatment	Additional commitments
	management of the organization, establish the goals and policies of the organization, exercise wide latitude in decision-making and receive only general supervision or direction from higher-level executives, the board of directors or stockholders of the business. Executives would not directly perform tasks related to the actual provision of service or services of the organization. Specialists: Persons within an organization who possess knowledge at an advanced level of expertise and who possess proprietary knowledge of the organizations services, research, equipment, techniques or management. (iii) Contractual service suppliers Employees of contractual service suppliers, i.e. employees of juridical persons with no commercial		

codes of supply: (1) Cross-border supply; (2) Consumption abroad; (3) Commercial presence; (4) Presence of natural persons.

Sector or Sub-sector	Limitation on market access	Limitations on national treatment	Additional commitments
	presence in Saudi Arabia, who have obtained a service contract in Saudi Arabia requiring the presence of their employees in order to fulfil the contract. Entry and stay of such persons shall be for a period of no more than 180 days which would be renewable. Entry of such persons shall be allowed only for the following sub-sectors on business services: - Legal services (Part of CPC 861) - Architectural services (CPC 8671) - Urban planning and landscape architectural services (CPC 8674) - Engineering services (CPC 8672) - Integrated engineering services		

codes of supply: (1) Cross-border supply; (2) Consumption abroad; (3) Commercial presence; (4) Presence of natural persons.

Sector or Sub-sector	Limitation on market access	Limitations on national treatment	Additional commitments
	(CPC 8673) - Related scientific and technical consulting (CPC 8675) - Technical testing & analysis services (CPC 8676) - Translation services (CPC 87905) - Environmental services (all-sub sectors) (CPC 94010 + 94020 + 9403 + 9404 + 9405 + 9406 + 9409) - Services incidental to mining (CPC 883 + 5115) - Management consulting services (CPC 8650) - Services related to management consulting (CPC 8660) - Maintenance and repair of equipment (not including		

codes of supply: (1) Cross-border supply; (2) Consumption abroad; (3) Commercial presence; (4) Presence of natural persons.

Sector or Sub-sector	Limitation on market access	Limitations on national treatment	Additional commitments
	maritime vessels, aircraft or other transport equipment) (CPC 633 + 8861-8866) - Accounting, auditing & bookkeeping (CPC 8621 + 8622) - Medical & dental services (CPC 9312) - Inter-disciplinary Research and Development Services (CPC 85300) - Computer & related services (CPC 841-845 + 849) - Construction and related engineering services (CPC 511-518) - Travel Agency and Tour Operator services, excluding for Umra and Hajj (CPC 7471) - Restaurant Services, including catering services (except bars,		

codes of supply: (1) Cross-border supply; (2) Consumption abroad; (3) Commercial presence; (4) Presence of natural persons.

Sector or Sub-sector	Limitation on market access	Limitations on national treatment	Additional commitments
	nightclubs, etc.) (CPC 6421 + 6422 + 6423)		

codes of supply: (1) Cross-border supply; (2) Consumption abroad; (3) Commercial presence; (4) Presence of natural persons.

Sector or Sub-sector	Limitation on market access	Limitations on national treatment	Additional commitments
	(iv) Independent Professionals		
	Independent Professionals (i.e. natural persons) as part of a service contract with juridical person in Saudi Arabia for rendering professional services in which he/she possesses the necessary academic credentials and professional qualifications with three years experience in the same field. Their entry and stay shall be for a period of 180 days, which may be renewable. Entry of such persons shall be allowed only for the following: - Computer & related services (CPC 841-845 + 849) - Construction & related engineering services (CPC 512, 513, 516 + 517)		

codes of supply: (1) Cross-border supply; (2) Consumption abroad; (3) Commercial presence; (4) Presence of natural persons.

Sector or Sub-sector	Limitation on market access	Limitations on national treatment	Additional commitments
	- Accounting, auditing and bookkeeping services (CPC 8621 + 8622) - Taxation services (CPC 87905) - Architectural services (CPC 8671) - Pilot & Crews - Legal services (part of CPC 861) - Medical & dental services (CPC 9312) - Interdisciplinary Research and Development Services (CPC 85300) - Management consulting services (CPC 8650) - Building – cleaning services (CPC 874) For other education services (only Thai cooking and Thai language (as		

codes of supply: (1) Cross-border supply; (2) Consumption abroad; (3) Commercial presence; (4) Presence of natural persons.

Sector or Sub-sector	Limitation on market access	Limitations on national treatment	Additional commitments
	part of CPC 9290)), entry and stay shall be for a period of 90 days, which would be renewable for similar period.		
	(v) Installers and maintainers		
	Qualified specialists supplying installation or maintenance services. The supply of that service has to occur on a contractual basis between the builder of the machinery or equipment and the owner of that machinery or equipment, both of them being juridical persons. Temporary entry is granted for a period of stay of no more than 90 days which would be renewable.		

codes of supply: (1) Cross-border supply; (2) Consumption abroad; (3) Commercial presence; (4) Presence of natural persons.

Sector or Sub-sector	Limitation on market access	Limitations on national treatment	Additional commitments
II. SPECIFIC SECTOR COMMITMENTS			
1. BUSINESS SERVICES			
A. Professional Services			
a. Legal Services Consultancy on the law of jurisdiction where the services supplier is qualified as a lawyer and on international law (Part of CPC 861)	(1) None (2) None (3) Foreign equity limited to 75% (4) Unbound, except as indicated in the horizontal section	(1) None (2) None (3) Non-Saudi lawyers cannot appear in courts to plead cases (4) Unbound, except as indicated in the horizontal section	

codes of supply: (1) Cross-border supply; (2) Consumption abroad; (3) Commercial presence; (4) Presence of natural persons.

Sector or Sub-sector	Limitation on market access	Limitations on national treatment	Additional commitments
b. Accounting, auditing and bookkeeping services (CPC 8621 and 8622)	(1) None (2) None (3) Foreign equity limited to 75% (4) Unbound, except as indicated in the horizontal section	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	
c. Taxation services (CPC 8630)			
d. Architectural services (CPC 8671)			
e. Engineering services (CPC 8672)			
f. Integrated engineering services (CPC 8673)			
g. Urban planning and landscape architectural services (CPC 8674)			
h. Medical and dental services (CPC 9312)			
i. Veterinary services (CPC 93201)			

codes of supply: (1) Cross-border supply; (2) Consumption abroad; (3) Commercial presence; (4) Presence of natural persons.

Sector or Sub-sector	Limitation on market access	Limitations on national treatment	Additional commitments
B. Computer and Related Services a.-e. (CPC 841-45 and 849)	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	
C. Research and Development Services a.-c. (CPC 851, 852, 853)	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	

codes of supply: (1) Cross-border supply; (2) Consumption abroad; (3) Commercial presence; (4) Presence of natural persons.

Sector or Sub-sector	Limitation on market access	Limitations on national treatment	Additional commitments
E. Rental/Leasing Services without Operators			
a. Relating to ships (CPC 83103)	(1) None (2) None	(1) None (2) None	
b. Relating to aircraft (CPC 83104)	(3) None (4) Unbound, except as indicated in the horizontal section	(3) None (4) Unbound, except as indicated in the horizontal section	
c. Relating to other transport equipment (CPC 83101+83102+83105)			
d. Relating to other machinery and equipment (CPC 83106-83109)			
e. Leasing or rental services concerning household goods (CPC 832)			
F. Other Business Services			
a. Advertising services (CPC 8711)	(1) None	(1) None	
b. Market research services (CPC 86401)	(2) None (3) None	(2) None (3) None	
c. Management consulting services (CPC 8650)	(4) Unbound, except as indicated in the horizontal section	(4) Unbound, except as indicated in the horizontal section	
d. Services related to management consulting (CPC 8660)			
e. Technical testing and analysis			

codes of supply: (1) Cross-border supply; (2) Consumption abroad; (3) Commercial presence; (4) Presence of natural persons.

Sector or Sub-sector	Limitation on market access	Limitations on national treatment	Additional commitments
services (CPC 8676)			
f. Services incidental to agriculture, hunting and forestry (CPC 881)			
h. Services incidental to mining (CPC 883+5115)			
i. Services incidental to manufacturing (CPC 884 (except 88442)+885)			
j. Services incidental to energy distribution (CPC 887)			
m. Related to scientific and technical consulting services (CPC 8675)			
n. Maintenance and repair of equipment (not including maritime vessels, aircraft or other transport equipment) (CPC 633+8861-8866)			
p. Photographic services (CPC 8750)			
q. Packaging services (CPC 8760)			

codes of supply: (1) Cross-border supply; (2) Consumption abroad; (3) Commercial presence; (4) Presence of natural persons.

Sector or Sub-sector	Limitation on market access	Limitations on national treatment	Additional commitments
r. Printing and publishing services (CPC 88442)			
s. Convention services (CPC 87909)*			
t. Other (e.g. public relations services) - Translation services (CPC 87905) - Speciality design services (CPC 87907)			
2. COMMUNICATION SERVICES			
B. Courier services (CPC 7512)	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	- Foreign express delivery operators will have a treatment no less favourable than that accorded to the Postal Office for its activities in express delivery. - When Consultancy related to the provision of postal services (CPC 7511**) are privatized, they will also be opened for foreign service suppliers.

codes of supply: (1) Cross-border supply; (2) Consumption abroad; (3) Commercial presence; (4) Presence of natural persons.

Sector or Sub-sector	Limitation on market access	Limitations on national treatment	Additional commitments

C. Telecommunication services

General conditions for this sub-sector: The commitments taken by the Kingdom of Saudi Arabia are based on the scheduling principles provided by the following documents: Notes for scheduling Basic Telecom Services Commitments (S/GBT/W/2/Rev.1) and Market Access Limitations on Spectrum Availability (S/GBT/W/3).

This commitment is subject to the following general conditions:

- The Kingdom of Saudi Arabia undertakes commitments as contained in the basic telecommunications reference paper, included in Annex.
- Any telecom service supplied in Saudi Arabia on a commercial presence basis (Mode 3) must be supplied by a company registered in Saudi Arabia, the foreign equity of which shall be limited to the percentage levels mentioned below.
- This schedule on basic telecommunication does not include any broadcasting services[630].
- Cross-border supply is subject to commercial agreement with a legal entity/entities licensed or authorized by CITC in the Kingdom of Saudi Arabia.

[630] A broadcasting service is defined as a radio communication service in which the transmissions are intended for direct reception by the general public, including sound transmissions, or television transmissions. However, carrying a signal between broadcasting stations and transmitters is part of telecommunications services.

codes of supply: (1) Cross-border supply; (2) Consumption abroad; (3) Commercial presence; (4) Presence of natural persons.

Sector or Sub-sector	Limitation on market access	Limitations on national treatment	Additional commitments
1. Basic telecommunication services	(1) None as of the end of 2006 (2) None	(1) None (2) None	
- Public Fixed – facilities-based a. Voice telephone services f. Facsimile services i. Voice mail	(3) None, except services offered as public telecommunications services must be provided by a joint stock company. Foreign equity is limited to 49% upon accession, to go to 51% by the end of 2007 and 60% by the end of 2008	(3) None	
	(4) Unbound, except as indicated in the horizontal section	(4) Unbound, except as indicated in the horizontal section	
Public Fixed – non-facilities-based Private fixed – facilities-based or non-facilities based a. Voice telephone services f. Facsimile services i. Voice mail	(1) None as of the end of 2006 (2) None (3) None, except foreign equity shall be limited to 49% upon accession, to go to 51% by the end of 2006, and to 70% after 3 years from accession (4) Unbound, except as indicated in the horizontal section	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	

codes of supply: (1) Cross-border supply; (2) Consumption abroad; (3) Commercial presence; (4) Presence of natural persons.

Sector or Sub-sector	Limitation on market access	Limitations on national treatment	Additional commitments
2. <u>Public or Private – facilities-based or non-facilities-based</u> b. Packet-switched data transmission services c. Circuit-switched data transmission services d. Telex services e. Telegraph services g. Private leased circuit services - Value-added services h. Electronic mail j. On-line information and data base retrieval k. Electronic data interchange (EDI) l. Enhanced/value-added facsimile services, including store and forward, store and retrieve m. Code and protocol conversion n. On-line information and/or data processing (incl. transaction processing) o. Paging p. Internet services	(1) None (2) None (3) None, except foreign equity shall be limited to 49% upon accession, to go to 51% by the end of 2006, and to 70% after 3 years from accession (4) Unbound, except as indicated in the horizontal section	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	

codes of supply: (1) Cross-border supply; (2) Consumption abroad; (3) Commercial presence; (4) Presence of natural persons.

Sector or Sub-sector	Limitation on market access	Limitations on national treatment	Additional commitments
3. Others	(1) None	(1) None	
	(2) None	(2) None	
Mobile telephone services	(3) None, except that mobile voice services offered as a facilities-based public telecommunications service must be provided by a joint stock company. Foreign equity shall be limited to 49% upon accession, to go to 51% by the end of 2005 and 60% by the end 2008.	(3) None	
A.1. Public Mobile – facilities-based			
a. Voice			
f. Facsimile			
i. Voice mail			
	(4) Unbound, except as indicated in the horizontal section	(4) Unbound, except as indicated in the horizontal section	

codes of supply: (1) Cross-border supply; (2) Consumption abroad; (3) Commercial presence; (4) Presence of natural persons.

Sector or Sub-sector		Limitation on market access		Limitations on national treatment	Additional commitments
A.2. Private Mobile (facilities-based or non-facilities based) and Public Mobile non-facilities-based	(1)	None	(1)	None	
	(2)	None	(2)	None	
	(3)	None, except:	(3)	None	
a. Voice f. Facsimile i. Voice mail		- Foreign equity shall be limited to 49% upon accession, to go to 51% by end of 2005, and to 70% after 3 years from accession.			
Satellite services[631]: - VSAT - GMPCS		- The number of licenses for VSAT services may be limited to 5 until 1 January 2006. After that date, there will be no limit on the number of licenses.			
- Sale of satellite capacity to legal entities licensed or authorized by CITC to use such capacity in the Kingdom of Saudi Arabia.	(4)	Unbound, except as indicated in the horizontal section	(4)	Unbound, except as indicated in the horizontal section	

[631] The GMPCS and VSAT Satellite Operators shall be required until 1 January 2006 to pass traffic via STC network through transit and gateway exchanges, especially in the case of overseas communication from Saudi Arabia.

codes of supply: (1) Cross-border supply; (2) Consumption abroad; (3) Commercial presence; (4) Presence of natural persons.

Sector or Sub-sector	Limitation on market access	Limitations on national treatment	Additional commitments
D. Audiovisual Services			
1. References below to "home video entertainment" include, but are not limited to, video tapes and digitally encoded video.			
2. Nothing in this commitment shall require Saudi Arabia to provide a means of exhibition or transmission of audiovisual services not offered by the Saudi Government to the public generally.			
a. Motion picture and home video entertainment distribution services (CPC 96113) to other industries for public entertainment, television broadcasting, or sale or rental to others[632]	(1) None (2) None (3) Unbound (4) Unbound, except as indicated in the horizontal section	(1) None (2) None (3) Unbound (4) Unbound, except as indicated in the horizontal section	

[632] For purposes of clarity, this commitment relates only to the distribution, i.e., licensing of motion pictures of videotapes, and does not cover their television broadcast.

codes of supply: (1) Cross-border supply; (2) Consumption abroad; (3) Commercial presence; (4) Presence of natural persons.

Sector or Sub-sector	Limitation on market access	Limitations on national treatment	Additional commitments
b. Radio and television production and distribution services (licensing of radio and television programs whether live, on tape, on other recording medium or on digitally encoded video for subsequent broadcast, whether by terrestrial broadcasting, by satellite television, by cable, or by other similar medium, including DTH and DBS. These programs, and channels of programming, may be for entertainment, for promotion or plays that are normally produced in television studios. Also included are products such as sports coverage, weather forecasting, interviews, etc.)	(1) Unbound (2) None (3) Unbound (4) Unbound, except as indicated in the horizontal section	(1) Unbound (2) None (3) Unbound (4) Unbound, except as indicated in the horizontal section	

codes of supply: (1) Cross-border supply; (2) Consumption abroad; (3) Commercial presence; (4) Presence of natural persons.

Sector or Sub-sector	Limitation on market access	Limitations on national treatment	Additional commitments
3. CONSTRUCTION AND RELATED ENGINEERING SERVICES			
A. General construction work for buildings (CPC 512)	(1) Unbound* except for consultancy and advisory related services (2) None	(1) Unbound* except for consultancy and advisory related services (2) None	
B. General construction work for civil engineering (CPC 513)	(3) None (4) Unbound, except as indicated in the horizontal section	(3) None (4) Unbound, except as indicated in the horizontal section	
C. Installation and assembly work (CPC 516+514)			
D. Building completion and finishing work (CPC 517)			
E. Other (CPC 511, 515, 518)			
4. DISTRIBUTION SERVICES			

codes of supply: (1) Cross-border supply; (2) Consumption abroad; (3) Commercial presence; (4) Presence of natural persons.

Sector or Sub-sector	Limitation on market access	Limitations on national treatment	Additional commitments
B. Wholesale trade services (CPC 622, 6111, 6113, 6121)	(1) None (2) None (3) None, except:	(1) None (2) None (3) None	
C. Retailing services (CPC 631, 632, 6111, 6113, 6121 and 613) For purposes of this schedule wholesale and retail trade in country includes engaging private national individuals on a contract basis to sell products and services at retail for which compensation is received both for the sales effort and for sales support services that result in additional sales by other contracted distributors.	- Foreign equity limited to 51% upon accession and to 75% after 3 years from the date of accession. - Minimum foreign investment of Saudi Riyals 20 million by each service supplier. - Minimum size of outlets may be prescribed. - Minimum of 15% Saudi employees to be trained each year. (4) Unbound, except as indicated in the horizontal section	(4) Unbound, except as indicated in the horizontal section	

codes of supply: (1) Cross-border supply; (2) Consumption abroad; (3) Commercial presence; (4) Presence of natural persons.

Sector or Sub-sector	Limitation on market access	Limitations on national treatment	Additional commitments
D. Franchising (CPC 8929)	(1) Unbound (2) None (3) None, except: - Foreign equity limited to 51% upon accession and to 75% after 3 years from the date of accession. - Foreigner should be authorized in his own country to practice franchising or be a partner in an authorized company for a period no less than five years without interruption. (4) Unbound, except as indicated in the horizontal section	(1) Unbound (2) None (3) None (4) Unbound, except as indicated in the horizontal section	

5. EDUCATIONAL SERVICES

codes of supply: (1) Cross-border supply; (2) Consumption abroad; (3) Commercial presence; (4) Presence of natural persons.

Sector or Sub-sector	Limitation on market access	Limitations on national treatment	Additional commitments
A. Primary education services (CPC 921)	(1) None (2) None	(1) None (2) None	
B. Secondary education services (CPC 922)	(3) None (4) Unbound, except as indicated in the horizontal section	(3) None (4) Unbound, except as indicated in the horizontal section	
C. Higher education services (CPC 923)			
D. Adult education (CPC 924)			
E. Other (technical + Thai cooking and Thai language) (CPC 929)			

codes of supply: (1) Cross-border supply; (2) Consumption abroad; (3) Commercial presence; (4) Presence of natural persons.

Sector or Sub-sector	Limitation on market access	Limitations on national treatment	Additional commitments
6. ENVIRONMENTAL SERVICES			
A. Sewage services (CPC 94010)	(1) None (2) None	(1) None (2) None	
B. Refuse disposal services (CPC 94020)	(3) None (4) Unbound, except as indicated in the horizontal section	(3) None (4) Unbound, except as indicated in the horizontal section	
C. Sanitation and similar services (CPC 9403)			
D. Other			
- Cleaning services for exhaust gases (CPC 9404)			
- Nature and landscape protection services (CPC 9406)			
- Noise abatement services (CPC 9405)			
- Other environmental services (CPC 9409) (including environmental impact assessment)			

codes of supply: (1) Cross-border supply; (2) Consumption abroad; (3) Commercial presence; (4) Presence of natural persons.

Sector or Sub-sector	Limitation on market access	Limitations on national treatment	Additional commitments
7. FINANCIAL SERVICES			
A. Insurance and Insurance-Related Services			
(Market access allowed only for cooperative insurance services) Foreign insurance service providers operating through a Saudi Arabian agent are allowed to operate, including the ability to continue existing business operations without disruption, as well as to offer new products and servicing new clients, for a period of 3 years from the date of the Royal Decree No. 3120/MB dated 4/3/1426H (13 April 2005), and in accordance with that Decree.			
a. Protection and savings insurance[633] b. Non-life insurance (General insurance and health insurance) c. Reinsurance and retrocession d. Insurance Intermediation (Brokerage and Agency) e. Services auxiliary to insurance (consultancy, actuarial, risk assessment and claims settlement services)	(1) Unbound, except none for: (b) Insurance of risks relating to marine shipping and commercial aviation and space launching and freight (including satellites), with such insurance to cover any or all of the following: - the goods being transported, the vehicle transporting the goods and any liability arising there from. - Insurance of risks relating to goods in international transit. (c) Reinsurance and retrocession.	(1) Unbound, except none for: (b) Insurance of risks relating to marine shipping and commercial aviation and space launching and freight (including satellites), with such insurance to cover any or all of the following: - the goods being transported, the vehicle transporting the goods and any liability arising there from. - Insurance of risks relating to goods in international transit. (c) Reinsurance and retrocession.	

[633] As defined in Article 3, Part 3:1-3 of the Cooperative Insurance Companies Control Law Implementing Regulations, published 25 April 2004, including protection against longevity.

codes of supply: (1) Cross-border supply; (2) Consumption abroad; (3) Commercial presence; (4) Presence of natural persons.

Sector or Sub-sector	Limitation on market access	Limitations on national treatment	Additional commitments
	(d) Brokerage and Agency. (e) Services auxiliary to insurance consultancy, actuarial, risk assessment and claims settlement services.	(d) Brokerage and Agency. (e) Services auxiliary to insurance consultancy, actuarial, risk assessment and claims settlement services.	
	(2) None (3) For (a), (b), and (c) Commercial presence is permissible in the form of a locally incorporated cooperative insurance joint-stock company, or as an established direct branch of an international insurance company operating in Saudi Arabia as a cooperative insurance provider[634]. Non-Saudi participation in the joint-stock company in Saudi Arabia is permitted up to 60% from the date of accession. For (d) Commercial presence is	(2) None (3) None	

[634] For clarity's sake, branches of foreign insurance companies operating as cooperative insurance providers are not required to operate as joint-stock companies in Saudi Arabia.

codes of supply: (1) Cross-border supply; (2) Consumption abroad; (3) Commercial presence; (4) Presence of natural persons.

Sector or Sub-sector	Limitation on market access	Limitations on national treatment	Additional commitments
	permissible in the form of a locally incorporated joint-stock company or a limited liability company. Non-Saudi participation is permitted up to 60% from the date of accession. For (e) Commercial presence for claims services and risk assessment is permissible in the form of a locally incorporated joint-stock company or a limited liability company. Non-Saudi participation is permitted up to 60% from the date of accession. For actuarial and consultancy commercial presence is permitted as a natural person or a juristic entity.		
	(4) Unbound, except as indicated in the horizontal section	(4) Unbound, except as indicated in the horizontal section	
B. Banking and other financial services (excluding insurance)			
a. Acceptance of deposits and other repayable funds from the public	(1) Unbound, except for 'l.', 'k.' and, under 'i.', only for cash or portfolio	(1) Unbound, except as indicated in the M.A. column	

codes of supply: (1) Cross-border supply; (2) Consumption abroad; (3) Commercial presence; (4) Presence of natural persons.

Sector or Sub-sector	Limitation on market access	Limitations on national treatment	Additional commitments
b. Lending of all types, including consumer credit, mortgage credit, factoring and financing of commercial transaction c. Financial leasing d. All payment and money transmission services, including credit, charge and debit cards, travellers cheques and bankers drafts e. Guarantees and commitments f. Trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise, the following: - money market instruments (including cheques, bills, certificates of deposits); - foreign exchange; - derivative products including, but not limited to, futures and options; - exchange rate and interest rate instruments, including	management, all forms of collective investment, custodial, depository and trust services to be provided by institutions to institutional clients, including collective investment schemes, upon accession. (2) None, except unbound for pension fund management under 'i.' and all domestic settlement and clearing services provided exclusively by SAMA under 'j.'. This also limits national treatment. (3) None, except: - Commercial presence of banks is permissible in the form of a locally incorporated joint-stock company or as a branch of an international bank. - Non-Saudi participation in a joint-venture in Saudi Arabia is permitted up to 60% from the date of accession. - These financial services are to be	(2) None (3) None	When pension schemes supplementary to the public pension scheme are provided by Saudi Financial institutions, it will also be open for foreign service suppliers for mode (2) and (3) only.

codes of supply: (1) Cross-border supply; (2) Consumption abroad; (3) Commercial presence; (4) Presence of natural persons.

	Sector or Sub-sector	Limitation on market access	Limitations on national treatment	Additional commitments
	products such as swaps, forward rate agreements; - transferable securities; - other negotiable instruments and financial assets, including bullion.	provided by commercial banks except that asset management 'i.' and advisory services 'k.' may be provided by non-commercial banking financial institutions under the capital market law.		
g.	participation in issues of all kinds of securities, including underwriting and placement as agent (whether publicly or privately) and provision of services related to such issues	- Unbound for pension fund management under 'i.'. This also limits national treatment.		
h.	Money broking	- Unbound for all domestic settlement and clearing services provided exclusively by SAMA under 'j.'. This also limits national treatment.		
i.	Asset management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial, depository and trust services	(4) Unbound, except as indicated in the horizontal section	(4) Unbound, except as indicated in the horizontal section	
j.	Settlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments			
k.	Advisory and other auxiliary financial services on all the activities			

codes of supply: (1) Cross-border supply; (2) Consumption abroad; (3) Commercial presence; (4) Presence of natural persons.

Sector or Sub-sector	Limitation on market access	Limitations on national treatment	Additional commitments
listed in sub paragraphs 'a.' through 'l.', including credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy			
l. Provision and transfer of financial information, and financial data processing and related software.			
8. HEALTH RELATED AND OTHER SERVICES			
A. Hospital services (CPC 9311)	(1) Unbound* (2) None (3) None, except subject to formation of a company between a foreign hospital company and a licensed Saudi medical professional (4) Unbound, except as indicated in the horizontal section	(1) Unbound* (2) None (3) None (4) Unbound, except as indicated in the horizontal section	

codes of supply: (1) Cross-border supply; (2) Consumption abroad; (3) Commercial presence; (4) Presence of natural persons.

Sector or Sub-sector	Limitation on market access	Limitations on national treatment	Additional commitments
B. Other human health services (CPC 9319, except 93191)	(1) Unbound* (2) None (3) None, except subject to formation of a company between a foreign health company and a licensed Saudi medical professional (4) Unbound, except as indicated in the horizontal section	(1) Unbound* (2) None (3) None (4) Unbound, except as indicated in the horizontal section	

codes of supply: (1) Cross-border supply; (2) Consumption abroad; (3) Commercial presence; (4) Presence of natural persons.

Sector or Sub-sector	Limitation on market access	Limitations on national treatment	Additional commitments
9. TOURISM AND TRAVEL RELATED SERVICES			
A. Hotels and restaurants (including catering) (CPC 64110, 64120, 642 & 643) (Except bars, nightclubs, etc.)	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	
B. Travel agencies and tour operators services (CPC 7471) (excluding for Umra and Hajj)	(1) None (2) None (3) None, except economic needs test applied to travel agencies only, based on the ratio of total population to the number of travel agencies (4) Unbound, except as indicated in the horizontal section	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	
C. Tourist guides services (CPC 74720) (excluding for Umra and Hajj)	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	(1) None (2) None (3) None (4) Unbound, except as indicated in the horizontal section	

codes of supply: (1) Cross-border supply; (2) Consumption abroad; (3) Commercial presence; (4) Presence of natural persons.

Sector or Sub-sector	Limitation on market access	Limitations on national treatment	Additional commitments
10. RECREATIONAL CULTURAL AND SPORTING SERVICES			
B. News agency services (CPC 962)	(1) None (2) None (3) None	(1) None (2) None (3) None	
D. Recreational services (CPC 96491) (Only parks and public gardens services)	(4) Unbound, except as indicated in the horizontal section	(4) Unbound, except as indicated in the horizontal section	
11. TRANSPORT SERVICES			
A. Maritime Transport Services	(1) None	(1) None	The following services at the port are made available to international maritime transport suppliers on reasonable and non-discriminatory terms and conditions: - port and waterway operation services (excluding cargo handling) - pilotage and perthing services; - navigation aid services; - vessel salvage and re-floating services; - all other supporting services for water transport.
a. Passenger transportation (CPC 7211)	(2) None (3) None	(2) None (3) None	
b. Freight transportation (CPC 7212)	(4) Unbound, except as indicated in the horizontal section	(4) Unbound, except as indicated in the horizontal section	
c. Rental of vessels with crew (CPC 72130)			
d. Maintenance and repair of vessels			

codes of supply: (1) Cross-border supply; (2) Consumption abroad; (3) Commercial presence; (4) Presence of natural persons.

Sector or Sub-sector	Limitation on market access	Limitations on national treatment	Additional commitments
C. Air Transport Services	(1) None	(1) None	
d. Maintenance and repair of aircraft	(2) None	(2) None	
e. Supporting services for air transport (CPC 746)	(3) None	(3) None	
- Computer reservation system	(4) Unbound, except as indicated in the horizontal section	(4) Unbound, except as indicated in the horizontal section	
E. Rail Transport Services	(1) None	(1) None	
a. Passenger transportation (CPC 7111)	(2) None	(2) None	
b. Freight transportation (CPC 7112)	(3) Foreign investment in the form of Build, Operate and Transfer (BOT) arrangement	(3) None	
c. Pushing and towing services (CPC 7130)	(4) Unbound, except as indicated in the horizontal section	(4) Unbound, except as indicated in the horizontal section	
d. Maintenance and repair of rail transport equipment (CPC 8868)			
e. Supporting services for rail transport services (CPC 743)			

codes of supply: (1) Cross-border supply; (2) Consumption abroad; (3) Commercial presence; (4) Presence of natural persons.

Sector or Sub-sector	Limitation on market access	Limitations on national treatment	Additional commitments
G. Pipeline transport	(1) None	(1) None	
a. Transportation of fuels (CPC 7131)	(2) None	(2) None	
	(3) None	(3) None	
b. Transportation of other goods (CPC 7139)	(4) Unbound, except as indicated in the horizontal section	(4) Unbound, except as indicated in the horizontal section	
H. Services auxiliary to all modes of transport (limited to maritime, rail, and air transport services in accordance with the Annex on Air Transport Services)	(1) None	(1) None	The services related to CPC 749 are currently provided by the public sector. As far as market access to services included in CPC 749 become open under the Saudi legislation to private entities, national treatment will be granted.
	(2) None	(2) None	
	(3) None	(3) None	
	(4) Unbound, except as indicated in the horizontal section	(4) Unbound, except as indicated in the horizontal section	
a. Cargo handling services (CPC 741)			
b. Storage and warehouse services (CPC 742)			
c. Freight transport agency services (CPC 748)			

REFERENCE PAPER

Scope

The following are definitions and principles on the regulatory framework for the basic telecommunications services.

Definitions

Users mean service consumers and service suppliers.

Essential facilities mean facilities of a public telecommunications transport network or service that

(a) are exclusively or predominantly provided by a single or limited number of suppliers; and

(b) cannot feasibly be economically or technically substituted in order to provide a service.

A major supplier is a supplier which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of:

(a) control over essential facilities; or

(b) use of its position in the market.

1. Competitive safeguards

1.1 Prevention of anti-competitive practices in telecommunications

Appropriate measures shall be maintained for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices.

1.2 Safeguards

The anti-competitive practices referred to above shall include in particular:

(a) engaging in anti-competitive cross-subsidization;

(b) using information obtained from competitors with anti-competitive results; and

(c) not making available to other services suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services.

2. Interconnection

2.1 This section applies to linking with suppliers providing public telecommunications transport networks or services in order to allow the users of one supplier to communicate with users of another supplier and to access services provided by another supplier, where specific commitments are undertaken.

2.2 Interconnection to be ensured

Interconnection with a major supplier will be ensured at any technically feasible point in the network. Such interconnection is provided:

(a) Under non-discriminatory terms, conditions (including technical standards and specifications) and rates and of a quality no less favourable than that provided for its own like services or for like services of non-affiliated service suppliers or for its subsidiaries or other affiliates;

(b) In a timely fashion, on terms, conditions (including technical standards and specifications) and cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided; and

(c) Upon request, at points in addition to the network termination points offered to the majority of users, subject to charges that reflect the cost of construction of necessary additional facilities.

2.3 Public availability of the procedures for interconnection negotiations

The procedures applicable for interconnection to a major supplier will be made publicly available.

2.4 Transparency of interconnection arrangements

It is ensured that a major supplier will make publicly available either its interconnection agreements or a reference interconnection offer.

2.5 Interconnection: dispute settlement

A service supplier requesting interconnection with a major supplier will have recourse, either:

(a) At any time; or

(b) After a reasonable period of time which has been made publicly known to an independent domestic body, which may be a regulatory body as referred to in paragraph 5 below, to resolve disputes regarding appropriate terms, conditions and rates for interconnection within a reasonable period of time, to the extent that these have not been established previously.

3. Universal service

Any Member has the right to define the kind of universal service obligation it wishes to maintain. Such obligations will not be regarded as anti-competitive *per se*, provided they are administered in a transparent, non-discriminatory and competitively neutral manner and are not more burdensome than necessary for the kind of universal service defined by the Member.

4. Public availability of licensing criteria

Where a licence is required, the following will be made publicly available:

(a) all the licensing criteria and the period of time normally required to reach a decision concerning an application for a licence; and

(b) the terms and conditions of individual licences.

The reasons for the denial of a licence will be made known to the applicant upon request.

5. Independent regulators

The regulatory body is separate from, and not accountable to, any supplier of basic telecommunications services. The decisions of and the procedures used by regulators shall be impartial with respect to all market participants.

6. Allocation and use of scarce resources

Any procedures for the allocation and use of scarce resources, including frequencies, numbers and rights of way, will be carried out in an objective, timely, transparent and non-discriminatory manner. The current state of allocated frequency bands will be made publicly available, but detailed identification of frequencies allocated for specific government uses is not required.

List of Article II (MFN) Exemptions

Sector or sub-sector	Description of measure indicating its inconsistency with Article II	Countries to which the measure applies	Intended duration	Conditions creating the need for the exemption
Road Transport Services	Reciprocal preferential treatment for cross-border services	Egypt, Jordan	Indefinite	Existing bilateral agreements
Maritime Shipping and Road Transport Services	Preference for use of national shipping lines and road transport vehicles in bilateral trade	Egypt, Tunisia	Indefinite	Existing bilateral agreements
Road Transport Services	Reciprocal preferential treatment	Lebanon, Syria, Turkey	Indefinite	Existing bilateral agreements

Appendix B

WORLD TRADE ORGANIZATION

WT/L/627
11 November 2005
(05-5315)

ACCESSION OF THE KINGDOM OF SAUDI ARABIA

Decision of 11 November 2005

The General Council,

Having regard to paragraph 2 of Article XII and paragraph 1 of Article IX of the Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement"), and the Decision-Making Procedures under Articles IX and XII of the WTO Agreement agreed by the General Council (WT/L/93).

Conducting the functions of the Ministerial Conference in the interval between meetings pursuant to paragraph 2 of Article IV of the WTO Agreement,

Taking note of the application of the Kingdom of Saudi Arabia for accession to the WTO Agreement dated 21 December 1995,

Noting the results of the negotiations directed toward the establishment of the terms of accession of the Kingdom of Saudi Arabia to the WTO Agreement and having prepared a Protocol on the Accession of the Kingdom of Saudi Arabia,

Decides as follows:

1. The Kingdom of Saudi Arabia may accede to the WTO Agreement on the terms and conditions set out in the Protocol annexed to this Decision.

PROTOCOL ON THE ACCESSION OF THE KINGDOM OF SAUDI ARABIA

Preamble

The World Trade Organization (hereinafter referred to as the "WTO"), pursuant to the approval of the General Council of the WTO accorded under Article XII of the Marrakesh Agreement Establishing the World Trade Organization (hereinafter referred to as the "WTO Agreement"), and the Kingdom of Saudi Arabia,

Taking note of the Report of the Working Party on the Accession of the Kingdom of Saudi Arabia to the WTO Agreement reproduced in document WT/ACC/SAU/61, dated 1 November 2005 (hereinafter referred to as the "Working Party Report"),

Having regard to the results of the negotiations on the accession of the Kingdom of Saudi Arabia to the WTO Agreement,

Agree as follows:

PART I - GENERAL

1. Upon entry into force of this Protocol pursuant to paragraph 8, the Kingdom of Saudi Arabia accedes to the WTO Agreement pursuant to Article XII of that Agreement and thereby becomes a Member of the WTO.

2. The WTO Agreement to which the Kingdom of Saudi Arabia accedes shall be the WTO Agreement, including the Explanatory Notes to that Agreement, as rectified, amended or otherwise modified by such legal instruments as may have entered into force before the date of entry into force of this Protocol. This Protocol, which shall include the commitments referred to in paragraph 315 of the Working Party Report, shall be an integral part of the WTO Agreement.

3. Except as otherwise provided for in paragraph 315 of the Working Party Report, those obligations in the Multilateral Trade Agreements annexed to the WTO Agreement that are to be implemented over a period of time starting with the entry into force of that Agreement shall be implemented by the Kingdom of Saudi Arabia as if it had accepted that Agreement on the date of its entry into force.

4. The Kingdom of Saudi Arabia may maintain a measure inconsistent with paragraph 1 of Article II of the GATS provided that such a measure was recorded in the list of Article II Exemptions annexed to this Protocol and meets the conditions of the Annex to the GATS on Article II Exemptions.

PART II - SCHEDULES

5. The Schedules reproduced in Annex I to this Protocol shall become the Schedule of Concessions and Commitments annexed to the General Agreement on Tariffs and Trade 1994 (hereinafter referred to as the "GATT 1994") and the Schedule of Specific Commitments annexed to the General Agreement on Trade in Services (hereinafter referred to as "GATS") relating to the Kingdom of Saudi Arabia. The staging of the concessions and commitments listed in the Schedules shall be implemented as specified in the relevant parts of the respective Schedules.

6. For the purpose of the reference in paragraph 6(a) of Article II of the GATT 1994 to the date of that Agreement, the applicable date in respect of the Schedules of Concessions and Commitments annexed to this Protocol shall be the date of entry into force of this Protocol.

PART III - FINAL PROVISIONS

7. This Protocol shall be open for acceptance, by signature or otherwise, by the Kingdom of Saudi Arabia until 31 December 2005.

8. This Protocol shall enter into force on the thirtieth day following the day upon which it shall have been accepted by the Kingdom of Saudi Arabia.

9. This Protocol shall be deposited with the Director-General of the WTO. The Director-General of the WTO shall promptly furnish a certified copy of this Protocol and a notification of acceptance by the Kingdom of Saudi Arabia thereto pursuant to paragraph 9 to each Member of the WTO and to the Kingdom of Saudi Arabia.

This Protocol shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.

Done at Geneva this eleventh day of November, two thousand and five in a single copy in the English, French and Spanish languages, each text being authentic, except that a Schedule annexed hereto may specify that it is authentic in only one of these languages.

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ANNEX I

SCHEDULE CLVIII - THE KINGDOM OF SAUDI ARABIA

Authentic only in the English language.

(Circulated in document WT/ACC/SAU/61/Add.1)

SCHEDULE OF SPECIFIC COMMITMENTS ON SERVICES

LIST OF ARTICLE II EXEMPTIONS

Authentic only in the English language.

(Circulated in document WT/ACC/ SAU/61/Add.2)

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